Eminent Domain Compensation in Western States: A Critique of the Fair Market Value Model©

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Aging cafes disintegrating quietly on the old roads while travellers drive by on the new are a familiar part of the western landscape. Indeed there is a history of development in the west to be written from its eminent domain cases. They begin with the railroads and irrigation systems, continue through construction of the interstate highway system and urban renewal in the 1960s and 1970s, and today often concern environmental and historical preservation.

Both the United States Constitution and the constitutions of the states of the intermountain west and the Pacific Coast prohibit the state from taking property without paying just compensation. Thus, there are two basic issues in any eminent domain case. First, has governmental interference with property become extensive enough to constitute a taking that requires compensation? Second, how much and what kind of compensation ought to be paid? Much has been written on the first issue, but the second has received very little attention. This article is an attempt to remedy the gap with respect to eminent domain compensation in the western states.

The policy considerations underlying eminent domain compensation are complex. The public needs to be able to take property as cheaply as possible to serve valuable social ends. But if the public can take property too cheaply, it may take more than it needs. Moreover, it does not seem fair to let the government take advantage of its appropriative powers to gain an entrepreneurial edge over private competitors.[1] Nor is the relative competitive position of the government the only fairness consideration at stake here. Fairness to the individual seems to require that he or she not

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1. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63-64 (1964).

bear a disproportionate share of the cost of a public improvement, especially since the property transfer is involuntary. Fairness may also require that "distinct, investment-backed expectations"[2] be honored, although social justice may not look with equal favor on the expectations of the longstanding proprietor and the recent speculator upon the public improvements themselves.

The traditional textbook view is that these policy goals are best served by awarding the owner the fair market value of his property, in money. The textbook standard, however, does not measure the owner's loss very well when the state's activities have depressed market values, when the owner has special nonmarketable uses for the property, when the loss of the property is but a small part of the owner's personal or business losses, or when the taking leaves the owner with a truncated parcel whose usefulness to him has been compromised. On the other hand, the textbook standard may reward owners handsomely when the market has risen sharply, perhaps because of the improvement itself, or when the improvement greatly benefits the owner's remaining land. As a result, courts depart from the fair market value standard, often without announcing that they are doing so.

This article is a critical analysis of the fair market value standard of compensation as it has been applied in the western states. It argues that there are identifiable classes of cases in which courts in the west have ignored the standard. The article begins with the federal constitutional background, which sets minimum limits for state compensation practice. It then examines some elements of the traditional view that are common themes in compensation cases in the western states. The third section analyzes some unique compensation practices in individual states, as deviations from the fair market value model. The fourth section examines the problem of severance damages, paid to compensate for the reduced value of what remains to the owner in a partial takings case, as a departure from the fair market value standard. The conclusion recommends some statutory changes with the potential to regularize some of these departures from fair market value.

I. Federal Constitutional Background

The fifth amendment, applied to the states by means of the fourteenth amendment, prohibits takings of property without "just

2. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967).

compensation."[3] The federal limits are minimum standards only, as to both what constitutes a taking and what kind of compensation is required. Indeed, many western state constitutions require compensation for taking or damaging property.[4] Only the constitutions of Idaho, Nevada and Oregon parallel the fifth amendment's takings clause.[5]

The Supreme Court never has precisely defined "just compensation," nor has it held that a single standard of compensation such as the fair market value standard is constitutionally mandated.[6] Nevertheless, ever since the seminal case of *Boom Company v. Patterson*[7] the Court generally has treated the fair market value standard as a convenient objective measure of the property's worth—a reasonable point of departure if not a final destination.

Boom Company is not a federal constitutional case; it involved interpretation of a just compensation clause in a state constitution before the fifth amendment was held to apply to the states. Its approval of the fair market value standard, however, generally is regarded as indicating the direction of further federal constitutional considerations. The Company operated under a Minnesota state charter which granted it the right to condemn land to construct log storage areas called booms; the Minnesota constitution prohibited condemnation without just compensation.[8] The defendant owned three islands with nearly a mile of shoreline, perfectly suited for storing logs. In the condemnation proceedings, the jury valued the land at $300 if used for ordinary purposes, and at an additional $9058.33 if used as a boom. On plaintiff's motion for a new trial, the trial court allowed the defendant to elect a reduced verdict of $5500 which the defendant did.[9] The Company contended that the property should be valued for its ordinary pur-

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3. U.S. CONST. amend. V. The fifth amendment takings clause was applied to the state via the fourteenth amendment in Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 456-59 (1978) (governmental taking of private property is unconstitutional unless the private owner is compensated for the taking by payment of the fair market value of the property).

4. *See* ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 14; COLO. CONST. art. II, § 15; MONT. CONST. art. II, § 29; N.M. CONST. art. II, § 20; UTAH CONST. art. I, § 22; WASH. CONST. art. I, § 16; WYO. CONST. art. I, § 33; *see also* Chicago v. Taylor, 125 U.S. 161, 165 (1888) (Illinois state constitution prohibits taking or damaging property).

5. *See* IDAHO CONST. art. I, § 14; NEV. CONST. art. I, § 8; OR. CONST. art. I., § 18.

6. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950); J. GRELIN & D. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN § 3.1(B) (1982).

7. 98 U.S. 403 (1878).

8. *Id.* at 406.

9. *Id.* at 405.

poses only. Rejecting this contention, the Supreme Court held that the owner was entitled to receive fair market value for the property, "viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted," bearing in mind "the existing business or wants of the community or such as may be reasonably expected in the immediate future."[10] Those reasonably foreseeable uses included private use as a boom.

Because the fair market value standard is not constitutionally mandated, the Court over the years has felt free to recognize classes of cases in which market value does not necessarily prevail and to deviate from that standard. The Court seems to recognize that market value often does not fit very well with either the owner's loss or the condemnor's gain. The cases here are not always consistent and indicate very real difficulties in grappling with the fair market value standard.

For example, when the owner makes special use of the property, market value does not measure the owner's loss accurately. Therefore, the Supreme Court has mandated compensation for marketable special uses. In *Almota Farmers Elevator & Warehouse Co. v. United States*,[11] the Court awarded compensation for improvements under a leasehold agreement. The farmer defendants had operated a grain elevator since 1919 on land possessed under a succession of leases from a railroad. They had no right of renewal under the lease, but renewals had been standard and were reasonably expected to continue because it was in the railroad's interest to promote grain shipments.[12] When the United States condemned the land, the compensation issue was how to measure the value of the defendant's improvements: by loss of use under the unexpired term of the lease, or by the market value of the improvements under the expectation that the lease would be renewed.[13] In rejecting the government's theory that expectancy of renewal is not a compensable legal interest, the Court emphasized the role the improvements would play in enhancing value in the eyes of a willing buyer.[14]

The Court has not, however, gone so far as to require compensation for special uses that are nonmarketable. In *United States v.*

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10. *Id.* at 408.
11. 409 U.S. 470 (1973).
12. *Id.* at 475.
13. *Id.* at 472.
14. *Id.* at 474.

564.54 Acres of Land,[15] for example, the Court considered whether just compensation requires replacement value of the property. The Lutheran Church operated three summer camps used in part for summer programs for inner city children. The Church argued that market value recovery (found by the jury to be $740,000)[16] would fall far short of replacement costs (estimated at $5.8 million) because the camps were exempt from certain regulations under grandfather clauses.[17] The cost of substitute facilities was argued to be the appropriate measure of compensation because the property was devoted to a public use.[18] The Supreme Court held that no more than fair market value was required; market value represents a fairly objective measure of the owner's loss and need not "include the special value of property to the owner arising from its adaptability to his particular use."[19] The Court explicitly left open whether the cost of substitute facilities is an appropriate measure of compensation for public condemnees;[20] Justice White's concurrence suggested that fair market value should apply even to public condemnees.[21]

The Court also has not required compensation for uses that depend upon the government's exercise of its condemnatory powers, even when the uses themselves are marketable. In *Olson v. United States*,[22] for example, the United States sought to condemn a flowage easement to regulate lake levels under a treaty with Canada. The defendant contended that recovery should take into account the shoreline's special adaptability for use as a reservoir. The Court held that the owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken," but need not be compensated for features of his property which do not affect its market value.[23] While his land was physically adapted for use as a reservoir,[24] it was neither "a legal [nor a] practical pos-

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15. 441 U.S. 506 (1979).
16. *Id.* at 509.
17. *Id.* at 508.
18. *Id.* at 509.
19. *Id.* at 511-12.
20. *Id.* at 509 n.3, 516.
21. *Id.* at 518. The theory here is that the public entity will be required to replace the facilities. *See generally* Note, *The Cost of Substitute Facilities as a Measure of Just Compensation When There is a Private Condemnee*, 1975 DUKE L.J. 1133 (suggesting that cost of substitute facilities measure of compensation may be extended in the future to privately owned nonprofit facilities).
22. 292 U.S. 246 (1933).
23. *Id.* at 256-57.
24. *Id.* at 256.

sibility [that] he or some other person or persons—other than the expropriating authority—could have acquired the right to flood the lands necessary for the lawful raising of the lake."[25] Similarly, *United States ex rel. TVA v. Powelson*[26] reemphasized that fair market value may reflect uses of the land combined with other parcels, but only when there is a reasonable probability of the combination without use of the power of eminent domain.[27] The owner possessed a small hydroelectric power plant and land at four dam sites.[28] The lands had cost $277,821.56, and in addition the owner had invested $1,061,942.53 in their potential development.[29] The owner contended that their value should be set by considering their use as part of a complex, four-dam power project. The Supreme Court refused to consider that proposed use, in spite of the fact that the defendant had been granted the power of eminent domain by the state of North Carolina, because the owner was not entitled to compensation for benefits stemming from the privilege of the eminent domain power.[30] The Court likened the loss of the defendant's investment to noncompensable business losses.[31]

The Supreme Court also has refused to require compensation awards to take into account increments in value due to revocable governmental permits. In *United States v. Fuller*,[32] defendants operated a large ranch of over 1280 acres owned in fee simple absolute, 12,027 acres leased from Arizona and 31,461 acres held under Taylor Grazing Acts permits. The United States condemned 920 acres of the fee lands and argued that compensation should not include increases in value of land attributable to their use in conjunction with the Taylor Act lands. The Supreme Court agreed, noting that the government should not be required to pay compensation for benefits created by its own permits.[33] Justice Powell's dissent argued persuasively that the Court had departed from the fair market value approach, because a willing buyer would pay more for base lands with accessibility to Taylor Act lands.[34]

Distortions in the market such as those resulting from govern-

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25. *Id.* at 260.
26. 319 U.S. 266 (1943).
27. *Id.* at 276-78.
28. *Id.* at 268.
29. *Id.* at 269 & n.1.
30. *Id.* at 281.
31. *Id.* at 283.
32. 409 U.S. 488 (1973).
33. *Id.* at 492-93.
34. *Id.* at 498 (Powell, J., dissenting).

ment activities or private monopolies are another serious problem for the fair market value standard. The Court generally has declined to figure compensation awards on the basis of actual market values that reflect such dislocations. For example, the Court has held that the Constitution does not require awards to include speculation on inclusion of property in the project for which condemnation is sought, although they should include general market value increases within an area.[35] The Court has likened market value enhancement resulting from emergency wartime needs to speculation on government activities, and denied compensation for the increases in market value.[36]

Most recently, the Court did not reach the issue of whether a landlord's monopoly position should be taken into account in calculating compensation awards.[37] New York law required landlords to allow cable television installation and limited their payment demands to amounts fixed as reasonable by the State Commission on Cable Television. The issue argued before the Court was whether compensation was required for the minimal intrusion of the cable wiring.[38] The Court held that compensation was required for permanent physical occupation of property, no matter how minimal.[39] Before state regulation, landlords commonly had received five percent of the cable revenues but the Commission allowed only a nominal fee.[40] Declining to express a view about what compensation amount would be just, the Court remanded the issue of the proper compensation award to the state courts.[41]

When the owner suffers business losses as a result of condemnation, the fair market value standard may not reflect his full loss. The Supreme Court has insisted on compensation for business losses when the government becomes entrepreneur of the enterprise, but not when condemnation brings the business to an end. Indeed, in the first major compensation case to follow *Boom Company, Monongahela Navigation Co. v. United States*,[42] the court looked to the owner's loss as a measure of compensation when the

35. United States v. Miller, 317 U.S. 369, 377 (1943) (California Central Valley Reclamation Project).

36. United States v. Cors, 337 U.S. 325, 333-34 (1949).

37. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

38. *Id.* at 421.

39. *Id.* at 441.

40. *Id.* at 423.

41. *Id.* at 441.

42. 148 U.S. 312 (1892).

government acquired a business.[43] The company operated locks in the Monongahela River under charter from the state of Pennsylvania. The locks were a costly but major improvement to river navigation and were apparently quite profitable.[44] The United States took over and continued to operate the defendant's improvements; however, the United States statutes authorizing the condemnation explicitly excluded the corporation's franchise to collect tolls from the estimate of value.[45] The Supreme Court held that "just compensation" under the fifth amendment must return to the owner the "full and perfect equivalent" of the property he had lost.[46] Here, a critical element of the property's value to the owner was the franchise and the profits its use brought.[47] Thus, the condemnation award must include compensation for loss of the franchise. The Court, however, expressed no view about the compensation that would be required had the state taken the property but left the business alone.[48]

In *United States v. Mitchell*,[49] the Court returned to the question left open in *Monongahela Navigation* of whether the fifth amendment requires compensation for destruction of a business. Defendants' land was suitable for growing a very special kind of corn, but unfortunately also was needed for the military.[50] Compensation was granted for the value of the acreage but not for loss of the canning business. Following *Boom Co.*, the Court held that special uses of the property must be considered as they affect market value, but that the defendant was not entitled to compensation for business losses, absent statutory authorization.[51]

In *Kimball Laundry Co. v. United States*,[52] the Court faced the problem of compensation for a temporary takeover of a business by the government. The United States had condemned a laundry for military use for a limited period. The defendant's award included annual rent and damage beyond ordinary wear and tear.[53] No award was given for loss of trade routes or patrons,

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43. *Id.* at 342-43.
44. *Id.* at 318, 324.
45. *Id.* at 313.
46. *Id.* at 326.
47. *Id.* at 328.
48. *Id.* at 337.
49. 267 U.S. 341 (1925).
50. *Id.* at 343.
51. *Id.* at 344-45.
52. 338 U.S. 1 (1949).
53. *Id.* at 4.

made likely by the fact that the defendant had to suspend operations during the government's use.[54] The Supreme Court reversed, holding that compensation for going concern value was constitutionally mandated when the government had taken over the business.[55] Unlike management skill, business good will is transferable for a time, and would be taken into account by a potential purchaser of the enterprise.[56] The difficulty in this case, however, was that the government did not intend to operate the laundry in competition with the private sector; the defendant was not legally precluded from opening up "Kimball Laundry" elsewhere. Nonetheless, the Court held that in temporarily taking over the defendant's capital investment in facilities, the government had effectively precluded relocation and therefore was required to pay compensation.[57] The defendant, however, must prove the loss of going concern value[58] and may do so on the basis of records of past earnings, income and expenditure on good will.[59]

In *Kimball Laundry*, the compensation award included business losses despite the fact that the taking was only temporary. There is good reason to speculate that the Court will continue to apply the same general compensation standards to temporary and permanent takings. In *San Diego Gas & Electric Co. v. San Diego*,[60] the city had categorized as "open space" land acquired by the utility for use as a nuclear power plant.[61] The Court held that the state court's refusal to award compensation in this inverse condemnation suit was not a final judgment on the merits, and so did not reach the issue of whether compensation rather than invalidation of the regulation is the only permissible remedy for a regulatory taking. Had the issue been reached on the merits, however, five of the Justices in all likelihood would have required the state to compensate the owner fully for the duration of the regulatory taking.[62]

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54. *Id.* at 8.
55. *Id.* at 12.
56. *Id.* at 10.
57. *Id.* at 14.
58. *Id.* at 20.
59. *Id.* at 16-19.
60. 450 U.S. 621 (1981).
61. *Id.* at 624-25.
62. *Id.* at 633 (Rehnquist, J., concurring); *id.* at 658-59 (Brennan, J., dissenting). Several federal courts subsequently have agreed with this view. *See, e.g., In re* Air crash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982) (criticizing California's view that invalidation of the regulation will suffice as a remedy); Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043 (11th Cir. 1982) (inverse condemnation

Finally, the Court has held that compensation awards must take into account the impact of the taking on land remaining to the defendant, but may set off benefits received from the project. In *Bauman v. Ross*,[63] Congress had authorized the District of Columbia to adopt a uniform subdivision plan together with plans for a permanent system of highways.[64] In cases of partial takings, the act allowed benefits from the planned use of the taken parcel to be set off against both damages paid for the reduced value of the owner's remaining land and the recovery for the land taken itself.[65] The Court held that it would be unjust to the owner not to compensate him for the loss in value of his remaining land.[66] Correspondingly, it would be unjust to the public to interpret the fifth amendment to prohibit set offs, in effect giving the owner a windfall benefit of more than the value of what he has lost.[67]

This windfall is especially ironic in contrast to the plights of some of the condemnee's potential neighbors. The neighbor's land may diminish greatly in value as a result of the taking, for example, because it is less advantageously placed for attracting customers or because the entire condemned parcel is to be used industrially. Yet the neighbor will be entitled to no compensation if none of his actual parcel was taken. Nor need he be compensated for losses resulting from the uses of condemned parcels that were not originally his.[68]

In sum, the minimum limits set by federal constitutional holdings coalesce around the fair market value standard. Compensation must be full market value, for uses for which the land is reasonably adaptable and available, without relying on the use of governmental powers. Replacement cost is not required for special use or public use property unless the defendant is under a legal obligation to replace the facility, and perhaps not even then. Compensation awards need not allow benefits for increments of value resulting

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action to compel payment of just compensation for property seized or impaired is proper when an individual is deprived of his property without instituting formal condemnation proceedings to force the transfer of title); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) (city is not entitled to legislative immunity from damage arising from its zoning regulations that results in the "taking" of private property for public use without just compensation).

63. 167 U.S. 548 (1897).

64. *Id.* at 550-51.

65. *Id.* at 557.

66. *Id.* at 550-51.

67. *Id.* at 574-75.

68. Campbell v. United States, 266 U.S. 368, 371 (1924).

from inclusion of the land within the project, the government's pressing need or, most likely, other market dislocation. Compensation need not include consequential damages such as loss of profits or business good will unless the government actually takes over the business. It is likely, although not certain, that the same rules will be applied to compensation for regulatory takings.

II. THE TRADITIONAL FAIR MARKET VALUE APPROACH

Some textbook propositions about eminent domain compensation are common practice in the twelve western states treated in this article. The basic rule is that just compensation is the money equivalent of the market value of the property.[69] This value is what a willing buyer would pay a willing seller, in view of all uses for which the property is presently adapted or reasonably available.[70] The owner's plans for the property are relevant to valuation only insofar as they would bear on a willing purchaser's decision.[71] Sentimental value of the property is noncompensable; market value is thought of as an objective measure, reflecting what the owner actually transfers.[72] Beyond these basics, the western states vary in the extent to which they allow compensation awards to reflect other economic losses to the owner, including income or rent from the property, profits from business conducted on the property, loss of value to personalty, relocation expenses, loss of good

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69. UNIFORM EMINENT DOMAIN CODE §§ 1002-04, 13 U.L.A. 99-105 (1980); 3 P. NICHOLS, P. ROHAN, J. SACKMAN & R. VAN BRUNT, THE LAW OF EMINENT DOMAIN § 8.6(1) (rev. 3d ed. 1979); 4 P. NICHOLS, P. ROHAN, J. SACKMAN & R. VAN BRUNT § 12.1(4); 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 1 (2d ed. 1953). The following are recent reaffirmations of the fair market value standard: Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 150 (Alaska 1971); Mastick v. State, 118 Ariz. 366, 576 P.2d 1366, 1370 (Ariz. Ct. App. 1978); Goldstein v. Denver Urban Renewal Auth., 560 P.2d 80, 82-83 (Colo. 1977) (en banc); Canyon View Irrigation Co. v. Twin Falls Canal Co., 101 Idaho 604, 619 P.2d 122, 132 (1980), *cert. denied*, 451 U.S. 912 (1981); *In re* Creation of West Great Falls Flood Control & Drainage Dist. *ex rel.* Greenwood, 648 P.2d 297 (Mont. 1982); State *ex rel.* Dep't of Highways v. Olson, 76 Nev. 176, 351 P.2d 186, 191-92 (1960); Board of Comm'rs v. Vargas, 76 N.M. 369, 415 P.2d 57, 59 (1966); State *ex rel.* State Highway Comm'n v. Mayem, 19 Or. App. 234, 526 P.2d 1390, 1391 (1974); Redevelopment Agency v. Barratia, 526 P.2d 47, 48-49 (Utah 1974); State v. McDonald, 98 Wash. 2d 251, 656 P.2d 1043, 1047 (1983); Coronado Oil Co. v. Grieves, 642 P.2d 423, 433 (Wyo. 1982); CAL. CIV. PROC. CODE § 1263.310 (Deering 1981); MONT. CODE ANN. §§ 70-30-302(1), -313 (1983).

70. UNIFORM EMINENT DOMAIN CODE § 1004(a), 13 U.L.A. 104-05 (1980); 4 P. NICHOLS, P. ROHAN, J. SACKMAN & D. VAN BRUNT, *supra* note 69, § 12.2(1); 1 L. ORGEL, *supra* note 69, § 20.

71. 1 L. ORGEL, *supra* note 69, § 29.

72. 4 P. NICHOLS, P. ROHAN, J. SACKMAN & D. VAN BRUNT, *supra* note 69, §§ 12.2(1), (2).

will and loss of property specially adapted to the owner's use. The traditional view, however, is that present economic return from the property is the only one of these losses to be reflected in compensation awards, and then only as it bears on the market value of the property.[73] The standard rationale is that loss of the land must be distinguished from damages to the owner; lost profits, for example, are thought of as speculative and dependent more on the owner's efforts than on the value of the land.[74]

To determine the fair market value of property, three evidentiary measures commonly are proposed: (1) market data about comparable sales; (2) capitalization of income; and (3) replacement cost, less depreciation.[75] States in the west utilize all three of these measures. Only comparable sales data reflect actual market behavior; and for purposes of eminent domain compensation, some states view it as the preferred evidence of fair market value[76] despite the fact that real property is treated as unique for other legal purposes. The alternatives to comparable sales data are introduced within the market value framework, however artificial such treatment might be in a given case. Courts hypothesize what a buyer would pay for property yielding a specified income, given prevailing returns on investment in the larger financial market,[77] and attempt to imagine what a theoretical special use customer would pay for property, in light of what his own construction costs would be.[78]

Both traditional and contemporary commentators have criticized the fair market value standard.[79] In most eminent domain

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73. *Id.* § 12.3121; 1 L. ORGEL, *supra* note 69, § 155.

74. 4 P. NICHOLS, P. ROHAN, J. SACKMAN & D. VAN BRUNT, *supra* note 69, §§ 12.3121, 13.3(2); 1 L. ORGEL, *supra* note 69, § 162.

75. 4 P. NICHOLS, P. ROHAN, J. SACKMAN & D. VAN BRUNT, *supra* note 69, § 12.1(1).

76. Goldstein v. Denver Urban Renewal Auth., 560 P.2d 80, 82 (Colo. 1977) (en banc); State *ex rel.* Symms v. Collier, 93 Idaho 19, 454 P.2d 56, 59 (1969) (comparable sales data may rebut other estimates of value); State Highway Comm'n v. Tubbs, 147 Mont. 296, 411 P.2d 739, 742 (1966); State *ex rel.* State Highway Comm'n v. Martinez, 81 N.M. 442, 468 P.2d 413, 415 (1970); Southern Pac. Co. v. Arthur, 10 Utah 2d 306, 309-10, 352 P.2d 693, 695 (1960); Chase v. City of Tacoma, 23 Wash. App. 12, 594 P.2d 943, 944-45 (1979); State Highway Comm'n v. McNiff, 395 P.2d 29 (Wyo. 1964); CAL. EVID. CODE § 815 (Deering Supp. 1984). *But see* Ketchikan Cold Storage Co. v. State, 492 P.2d 143, 152 (Alaska 1971) (owner "entitled to put on his proof as to the various elements probative of property values as best he can").

77. 4 P. NICHOLS, P. ROHAN, J. SACKMAN & D. VAN BRUNT, *supra* note 69, § 12.3121; 1 L. ORGEL, *supra* note 69, § 175.

78. 4 P. NICHOLS, P. ROHAN, J. SACKMAN & D. VAN BRUNT, *supra* note 69, § 12.32(2); 1 L. ORGEL, *supra* note 69, § 40.

79. *See generally* Aloi & Goldberg, *A Reexamination of Value, Good Will and Busi-*

cases, the willing seller is a fiction; the owner may be unwilling to sell precisely because the property is worth more to him than to the hypothetical seller.[80] Moreover, western eminent domain law was formulated in a rural setting, where the chief loss from a taking was loss of the land. Today, the personal and business losses caused by state confiscation often are at least as important as the loss of land.[81] In urban renewal projects, and in rural areas of the west as well, dislocation may adversely affect the elderly, the economically marginal and others least able to withstand the noncompensated costs of displacement.[82] These losses, however, are not the only concern. Valuation in terms of the property's marketability at best use favors developmental interests rather than conservation.[83] Comparable sales data especially may reflect speculation or dilapidation resulting from the proposed project. Finally, resort to alternative measures such as income capitalization or reproduction costs may take place in situations in which any market for the property is entirely fictional. As a result, western courts have taken an increasingly realistic look at whether the market value standard properly measures just compensation.

III. The Fair Market Value Standard in the Western States

Western state courts have departed from the fair market value standard in a variety of ways. This section details characteristic western state court practices in twisting or abandoning the market value approach. The issue of severance damages is deferred until the next section.

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ness Losses in Eminent Domain, 53 Cornell L. Rev. 604 (1968); Bigham, *"Fair Market Value", "Just Compensation," and the Constitution: A Critical View*, 24 Vand. L. Rev. 63 (1970); Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Calif. L. Rev. 569 (1984); Denyer-Green, *The Case Against Market Value*, 11 Kingston L. Rev. 173 (1981); Slavitt, *Just Compensation—Updated*, 48 Conn. B.J. 241 (1974); Note, *Restoration Costs as an Alternative Measure of Severance Damage in Eminent Domain Proceedings*, 20 Hastings L.J. 800 (1969); Note, *The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 Hastings L.J. 675 (1969); Note, *Compensation for Moving Expenses of Personal Property in Eminent Domain Proceedings*, 20 Hastings L.J. 749 (1969); Comment, *Eminent Domain Valuation in an Age of Redevelopment*, 67 Yale L.J. 61 (1957).

80. 1 L. Orgel, *supra* note 69, § 37.

81. 4 P. Nichols, P. Rohan, J. Sackman & D. Van Brunt, *supra* note 69, § 12.3151(5).

82. 3 P. Nichols, P. Rohan, J. Sackman & D. Van Brunt, *supra* note 69, § 8.10.

83. Tomain, *Elimination of the Highest and Best Use Principle: Another Path Through the Middle Way*, 47 Fordham L. Rev. 307, 315 (1978).

A. Alaska

Alaskan courts are very generous both in finding that there has been a taking[84] and in compensating owners for losses caused by the taking, particularly business losses. Alaskan courts determine fair market value by considering all uses for which the property is suitable; the property's highest and best use, and any other uses, are considered to the extent that they might have value to potential purchasers.[85] Zoning changes which were reasonably probable at the time the land was taken may be considered in a determination of the land's highest and best use.[86] Usefulness of the property to the taker, however, is not to be included in fair market value; Alaska insists that the measure of compensation is the owner's loss, not the state's allegedly unjust enrichment. Thus, landowners whose home was condemned for highway construction did not receive compensation beyond the market value of the property, which was zoned residential, despite the state's extensive use of gravel and dirt fill from the land.[87]

To measure market value in light of available uses, Alaska allows the owner in any eminent domain case to submit evidence of comparable land values and sales data, net income from the property, and the reproduction costs of improvements.[88] By statute, Alaska precludes market value increases or decreases attributable to the very project for which the property is taken from influencing compensation awards.[89] Compensation awards, however, may be affected considerably by other state projects, such as the construction of nearby interconnecting roads.[90] Alaska also allows the landowner to recover the value of reasonable improvements made to the property before the taking, despite knowledge that condemna-

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84. For example, in Grant v. State, 560 P.2d 36 (Alaska 1977), the property owner settled an inverse condemnation suit for $22,000 for loss of an access to the Gastineau Channel because of the construction of a highway on land not taken from him. At the time of the settlement, highway department plans showed a culvert under the highway permitting small craft passage. When the culvert collapsed and was not replaced, the owner's successor in interest recovered on the theory that there had been a second taking. *Id.* at 39. *See also* Alsop v. State, 586 P.2d 1236, 1239 (Alaska 1978) (if prior settlement award was in reliance on unrestricted access, new access restrictions are a second taking; recovery is not extended to everyone in the vicinity regardless of prior understandings).

85. Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 150-52 (Alaska 1971); State v. 7.026 Acres, 466 P.2d 364, 366-67 (Alaska 1970).

86. Martens v. State, 554 P.2d 407, 409 (Alaska 1976).

87. Gackstetter v. State, 618 P.2d 564, 566 (Alaska 1980).

88. Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 150-51 (Alaska 1971).

89. ALASKA STAT. § 34.60.120(3) (1975).

90. State v. Alaska Continental Dev. Corp., 630 P.2d 977, 983 (Alaska 1980).

tion was proposed.[91]

One of the more unique features of Alaska compensation law is its liberal treatment of capitalization of income as indicative of market value. Alaska allows fair market value to be computed by capitalizing income, even when the income is projected merely from a reasonably probable use. Alaska thus has allowed a land developer's potential income from a projected subdivision, when capitalized, to serve as the basis of a compensation award.[92]

Alaskan courts also have allowed direct recovery for business losses caused by a taking, even when the losses were suffered by a lessee. In *State v. Hammer*,[93] the defendant's lessee began the search for a new home for "Kito's Kave" only after the state instituted condemnation proceedings. He was unable to relocate the bar for nine months; the state argued the interruption of business was noncompensable because it was personalty, because the damages were speculative and because only the land had been taken.[94] In rejecting all three theories, the court replied that Alaska requires compensation for personalty, that loss of profit damages are not considered too speculative in other legal areas and that a distinction between the land and the business is inconsistent with Alaska's view that the proper measure of compensation is "loss to the owner, as measured by an objective standard."[95] The court distinguished *United States v. Mitchell*[96] on the ground that the fifth amendment, unlike the Alaskan Constitution, does not require compensation for damaging.[97] Kito recovered both for the interruption of his business and for damages caused to the bar equipment by the move.[98]

Finally, in measuring loss to the owner, Alaska includes the value of taken personalty.[99] Personalty that is used merely on the land, however, and not taken or damaged, does not become part of a compensation award.[100]

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91. Babinec v. State, 512 P.2d 563, 572 (Alaska 1973).

92. Dash v. State, 491 P.2d 1069, 1071 (Alaska 1971); *see also* City of Anchorage v. Nesbett, 530 P.2d 1324, 1332-34 (Alaska 1975) (allowing capitalization of potential income from a proposed power line installation).

93. 550 P.2d 820 (Alaska 1976).

94. *Id.* at 823.

95. *Id.* at 824.

96. *See supra* notes 49-51 and accompanying text.

97. 550 P.2d at 824.

98. *Id.* at 826.

99. Stroh v. Alaska State Hous. Auth., 459 P.2d 480, 485 (Alaska 1969).

100. State v. Ness, 516 P.2d 1212, 1214 (Alaska 1973).

B. Arizona

Arizona compensates landowners for the fair market value of their property, considered in light of all uses that are likely to affect market value. Contiguous parcels may be valued for separate commercial uses, if at their highest and best use they would be marketed in that way.[101] Projected zoning changes may bear on highest and best use, even though deed restrictions will not expire for ten years.[102] The landowner's future plans for the property are relevant insofar as they bear on the property's availability for those uses, but not if the plans are highly speculative. Thus, a church was not permitted to introduce evidence of frustrated sanctuary plans because there was no reasonable probability that the plans would be brought to fruition within the foreseeable future.[103] Uses may be considered that require improvements to the land, but the fair market value must reflect the "mythical" buyer's knowledge of the likely costs of the improvements.[104] Fair market value also may reflect the reasonable value of improvements made in good faith despite knowledge of the impending public project.[105]

Sales data are the primary source for a determination of fair market value in Arizona. Capitalization of business income is available as an alternative measure if the property itself—not simply the business located on it—is income producing.[106] Rentals from a commercial lease also may be capitalized and used as a measure of market value, at least when distinguished from business income.[107]

In one case of special use property without a measurable market value, the Arizona courts agreed that replacement cost is the only just compensation basis: the compensation requirement "is designed to protect not only the landowner's proprietary interest, but also his economic interest."[108] A railroad had used access from

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101. County of Maricopa v. Paysnoe, 83 Ariz. 236, 319 P.2d 995, 997 (1957).

102. Moschetti v. City of Tucson, 9 Ariz. App. 108, 449 P.2d 945, 950 (1969).

103. City of Scottsdale v. Church of the Holy Cross Lutheran, 132 Ariz. 416, 646 P.2d 301, 305 (Ariz. Ct. App. 1982).

104. Mastick v. State, 118 Ariz. 366, 576 P.2d 1366, 1370 (Ariz. Ct. App. 1978).

105. State *ex rel.* Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593, 600 (1973) (en banc). Although the case is not entirely clear, it would appear that the compensation award should reflect the effect of the improvement on the property's market value, rather than the costs of the improvement. *See also* City of Yuma v. Arizona Water Co., 22 Ariz. App. 4, 522 P.2d 765, 769 (1974) (costs of improvements considered, but not necessarily conclusive).

106. City of Scottsdale v. Eller Outdoor Advertising Co., 119 Ariz. 86, 579 P.2d 590, 597 (Ariz. Ct. App. 1978) (billboard).

107. State v. Hollis, 93 Ariz. 200, 379 P.2d 750, 752-53 (1963) (en banc).

108. State *ex rel.* Herman v. Southern Pac. Co., 8 Ariz. App. 238, 445 P.2d 186, 188 (1968).

an adjoining public highway for track maintenance. When the access was closed, compensation was based on the cost of a new road.[109]

Unlike Alaska, Arizona is adamant in denying compensation for business losses such as loss of rental,[110] interruption of business,[111] costs of removal[112] or damage to fixtures during relocation.[113] Under an Arizona statute,[114] "going concern value" is compensable when a public utility is taken over by the state.[115]

Like many other states, Arizona distinguishes between losses resulting from new or rerouted freeways and losses resulting from improvement of the old. Courts have declined compensation, with apparent regret, when highways have been rerouted[116] and uniformly have denied compensation for other changes in traffic flow.[117] Arizona courts do, however, grant quite extensive damages for decline in fair market value (though not for business losses per se) when property becomes less commercially viable because direct access to an abutting highway is cut off,[118] impaired by a grade change,[119] made more circuitous[120] or even where the property becomes less visible.[121] It is hard to see why motel owners who lose trade because travellers must arrive by a frontage road suffer more "real economic injury"[122] than those bypassed when the freeway is moved entirely. On the other hand, highway relocation cannot be made prohibitively expensive by compensation awards and individuals must sometimes bear the costs of progress. The theory that abutting owners have a right to access thus has been a convenient,

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109. 445 P.2d at 189.

110. Mosher v. City of Phoenix, 39 Ariz. 470, 7 P.2d 622, 626-27 (1932).

111. State *ex rel.* La Prade v. Carrow, 57 Ariz. 429, 114 P.2d 891, 893 (1941).

112. State *ex rel.* Willey v. Chun, 91 Ariz. 317, 372 P.2d 324, 325-26 (1962).

113. 372 P.2d at 326.

114. ARIZ. REV. STAT. ANN. § 9-518(B) (1977).

115. City of Yuma v. Arizona Water Co., 22 Ariz. App. 4, 522 P.2d 765, 769 (1974); City of Tucson v. El Rio Water Co., 101 Ariz. 49, 415 P.2d 872, 874 (1966).

116. State *ex rel.* Sullivan v. Carrow, 57 Ariz. 434, 114 P.2d 896, 898 (1941).

117. Olson v. State, 12 Ariz. App. 105, 467 P.2d 945, 947-48 (1970) (median strip); Rutledge v. State, 100 Ariz. 174, 412 P.2d 467, 470-72 (1966) (access only via undeveloped streets); Rayburn v. State *ex rel.* Willey, 93 Ariz. 54, 378 P.2d 496, 498-99 (1963) (access only by one-way street).

118. State *ex rel.* Herman v. Hague, 10 Ariz. App. 404, 459 P.2d 321, 323 (1969).

119. State *ex rel.* Herman v. Mestas, 12 Ariz. App. 289, 469 P.2d 855, 863 (1970).

120. State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988, 991-92 (1960).

121. State *ex rel.* Herman v. Wilson, 103 Ariz. 194, 438 P.2d 760, 763 (1968). *But see* State *ex rel.* Herman v. Schaffer, 105 Ariz. 478, 467 P.2d 66, 74 (1970) (access circuity insufficient to warrant compensation).

122. State *ex rel.* Herman v. Hague, 10 Ariz. App. 404, 459 P.2d 321, 323 (1969).

if arbitrary, dividing line between when the state must pay and when it need not.

C. *California*

In 1975, California adopted a comprehensive statute regularizing eminent domain law.[123] The statute in the main codifies existing California practice, and has been interpreted in light of California's longstanding and extensive eminent domain litigation. It apparently settles some troublesome conflicts in prior California case law; for example, fair market value is to be figured independently of effects from the condemnation project and certain business losses explicitly are made compensable.

The statute provides that fair market value is the basic measure of compensation.[124] Fair market value is defined by the highest bargained price of a willing buyer and willing seller, with full knowledge of all reasonably available uses of the property.[125] Since the early case of *San Diego Land and Town Co. v. Neale*,[126] California courts have defined this scope of uses broadly. In *Neale*, the defendant owned part of a valley that was to be flooded by the plaintiff's reservoir. The defendant's property was not suitable as a dam site itself, and the issue was whether to admit evidence of its value "as a reservoir site."[127] The Company contended the evidence was inadmissible because the land could only be used as a reservoir in conjunction with Company land. In rejecting the Company's theory, the court distinguished between market value—what a willing buyer would pay—and value for a particular use.[128] Market value typically is to be determined by comparison with sales of similar property, but where there have been few comparable sales, market value is a hypothesis about what a potential buyer would pay in light of all uses for which the property is suitable. Since there was at least a minimal suggestion of a private market for dam sites, use as a reservoir might be considered by a prospective purchaser. Ownership was irrelevant; the market value of half a canyon will be the same whether the other half is owned by the condemnor, by the defendant, or by a third party. The court

123. CAL. CIV. PROC. CODE tit. 7 (Deering 1981).
124. *Id.* § 1263.310.
125. *Id.* § 1263.320(a).
126. 78 Cal. 63, 20 P. 372 (1888).
127. 20 P. at 374.
128. *Id.*

relied on *Boom Company*[129] to reach this result, but failed to note the crucial difference that in *Boom Company* the defendant owned a block of islands suitable in themselves for construction of a boom.[130]

California has continued to allow uses of the property in combination with other tracts to be considered in a determination of fair market value,[131] even when the combined uses are possible only with state permission.[132] All uses for which the property is "naturally adapted" are to be considered;[133] neither the owner's[134] nor the condemnor's[135] particular plans have any weight except to the extent that they suggest possible uses. Uses requiring a zoning change may be considered, if the change is reasonably probable.[136] One fairly recent case has even ignored permanent legal restrictions on use, allowing land in a city park to be valued as though the city were free to sell it on the open market.[137] Uses for which demand is slight or only potential may be considered, provided the land is "naturally adapted" to the use.[138] It is fair to say that in California case law "market value" has become an abstract hypothetical, constructed on the basis of the property's potential rather than the likelihood of actual sale.

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129. *See supra* notes 7-10 and accompanying text.

130. 20 P. at 375.

131. People v. Murray, 172 Cal. App. 2d 219, 342 P.2d 485, 491 (1959); City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 P. 228, 234-35 (1929).

132. People v. Silviera, 236 Cal. App. 2d 604, 46 Cal. Rptr. 260 (1965) (state consent to freeway access).

133. Meakin v. Steveland, Inc., 68 Cal. App. 3d 490, 137 Cal. Rptr. 359, 366 (1977); People v. City of Los Angeles, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797, 799-800 (1963); Joint Highway Dist. No. 9 v. Ocean Shore R.R., 128 Cal. App. 743, 18 P.2d 413, 417-18 (1933).

134. City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal. 3d 473, 546 P.2d 1380, 1390-91, 128 Cal. Rptr. 436, 440-47 (1976); San Bernardino County Flood Control Dist. v. Sweet, 255 Cal. App. 2d 889, 63 Cal. Rptr. 640, 646 (1967); People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15, 25 (1953); Central Pac. Ry. v. Feldman, 152 Cal. 303, 92 P. 849, 852 (1907).

135. City of Los Angeles v. Decker, 18 Cal. 3d 860, 558 P.2d 545, 548, 135 Cal. Rptr. 647, 650 (1977); People v. Lynbar, Inc., 253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967); People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15, 26 (1953); People v. Ocean Shore R.R., 181 P.2d 705, 727 (Cal. Ct. App. 1947), *aff'd on other grounds*, 32 Cal. 2d 406, 196 P.2d 570 (1948); Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681 (1891).

136. *See, e.g.*, City of Menlo Park v. Artino, 151 Cal. App. 2d 261, 311 P.2d 135, 138 (1957) (reasonable probability that zoning would be changed to allow construction of off-street parking plaza).

137. People v. City of Los Angeles, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797, 800-01 (1963).

138. *See, e.g.*, Joint Highway Dist. No. 9 v. Ocean Shore R.R., 128 Cal. App. 743, 18 P.2d 413, 417-19 (1933) (potential private demand for abandoned right of way as railroad or road); City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 P. 228, 235-36 (1929) (potential private demand for reservoir site).

Under California law, valuations of property taken in eminent domain may be based on sales of comparable property in the area.[139] Valuations also may encompass sales of the subject property.[140] All sales data, however, must be adjusted to exclude increases or decreases in value attributable to the condemnation project or the eminent domain proceeding at issue.[141] That means that the owner may not benefit from the condemnor's proposed use of the property, unless the property was marketable for that use before condemnation.[142] Nor may the state benefit from its precondemnation activities or the condemnation proceeding itself.[143]

California's complex date of valuation statute also is noteworthy here. The statute provides that property is to be valued as of the date the condemnor deposits the probable amount of compensation.[144] If judicial proceedings are brought, the property is valued as of the commencement of the trial, unless trial occurs more than a year after the condemnation.[145] In such a delayed case, the property is valued as of the date of trial, unless the delay was the owner's fault.[146] Thus, the defendant cannot speculate on the success of delaying tactics. Nor, under the valuation statute, should the state be able to delay the proceedings and thereby acquire property more cheaply.[147] This statute—unique in the western states—avoids problems due to changes in value during the condemnation process that have been handled on an equitable basis in some other states.[148]

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139. CAL. EVID. CODE § 816 (Deering 1966); County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680, 683 (1957).

140. CAL. EVID. CODE § 815 (Deering Supp. 1984) (but not if sale occurs after filing of lis pendens); *see* City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal. 3d 473, 546 P.2d 1380, 1384, 128 Cal. Rptr. 436, 440 (1976).

141. CAL. CIV. PROC. CODE § 1263.330(a), (b) (Deering 1981); *see* City of Los Angeles v. Decker, 18 Cal. 3d 860, 558 P.2d 545, 550, 135 Cal. Rptr. 647, 652 (1977); City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal. 3d 473, 546 P.2d 1380, 1384-85, 128 Cal. Rptr. 436, 440-41 (1976); Merced Irrigation Dist. v. Woolstenhulme, 4 Cal. 3d 478, 483 P.2d 1, 6-10, 93 Cal. Rptr. 833, 838-42 (1971).

142. CAL. CIV. PROC. CODE § 1263.330(a) (Deering 1981) (Law Revision Commission Comment).

143. *Id.* § 1263.330(b), (c); *see* Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 1349, 104 Cal. Rptr. 1, 5 (1972).

144. CAL. CIV. PROC. CODE § 1263.110(a) (Deering 1981).

145. *Id.* § 1263.120.

146. *Id.* § 1263.130.

147. *Id.* § 1263.330(b).

148. *See, e.g.*, Utah State Road Comm'n v. Friberg, No. 17275 (Utah filed Nov. 17, 1983) (although statute provides for valuation as of date of service of process, in protracted proceedings, when land has appreciated greatly in value, property should be valued as of date title transferred).

However, California does allow speculation on other state improvements to augment compensation awards. For example, defendants who purchased land at residential rates, intending to assemble a commercial package near one freeway offramp, were allowed to recover the value of commercially marketable property when their land turned out to be within the necessary right of way of an intersecting freeway.[149] Speculative increases in the general vicinity of the project may also be included in valuations, when the scope of the project is altered. Thus if the defendant's land originally is not slated to be part of the project, and its market value increases because of the project, later changes in the project will require compensation at the higher value.[150] These recoveries are defended by distinguishing general increases in market value in an area from speculation on the possibility that the property will be condemned for the public improvement in question.

In addition to comparable sales data, evidence of capitalized rental value is admissible in determinations of market value. Rental value must be distinguished from capitalization of income or profits, however, which apparently are admissible only in California[151] when the state takes over and continues to run an existing concern such as a utility.[152] From an early date, California insisted that evidence of income from agricultural land[153] was inadmissible. More recently, however, California has considered farm income as affecting market value. Thus, when a windbreak and part of a lemon orchard were confiscated, the court allowed evidence of the productivity of the lemon trees to be weighed in determining both the value of the taken trees and temporary severance damages for loss of productivity pending growth of a new windbreak.[154] California has also allowed capitalization of income to apply to mineral lands when no comparable sales data were available.[155]

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149. People v. Cramer, 14 Cal. App. 3d 513, 92 Cal. Rptr. 401, 405-06 (1971).

150. Merced Irrigation Dist. v. Woolstenhulme, 4 Cal. 3d 478, 483 P.2d 1, 11-12, 93 Cal. Rptr. 833, 843-44 (1971).

151. CAL. EVID. CODE §§ 817-819 (Deering 1966 & Supp. 1984); *see* Ventura County Flood Control Dist. v. Security First Nat'l Bank, 15 Cal. App. 3d 996, 93 Cal. Rptr. 653, 654 (1971); People v. Dunn, 46 Cal. 2d 639, 297 P.2d 964, 966 (1956).

152. South Bay Irrigation Dist. v. California-Am. Water Co., 61 Cal. App. 3d 944, 133 Cal. Rptr. 166, 190 (1976).

153. Stockton & Copperopolis R.R. v. Galgiani, 49 Cal. 139 (1874).

154. Ventura County Flood Control Dist. v. Security First Nat'l Bank, 115 Cal. App. 3d 996, 93 Cal. Rptr. 653, 655-56 (1971); *see also* City of Salinas v. Homer, 106 Cal. App. 3d 309, 165 Cal. Rptr. 65, 67 (1980) (approving *Ventura County*).

155. People *ex rel.* Dep't of Pub. Works v. Flintkote Co., 264 Cal. App. 2d 97, 70 Cal. Rptr. 27, 31 (1968).

Together with comparable sales data and capitalization of rental value, reproduction cost is the third factor admissible in California for a determination of market value.[156] The 1975 California statute provides that property is to be taken at its fair market value if there is a relevant market, and otherwise assessed by any "just and equitable" method.[157] This statute must be read against a background in which California courts have not treated reproduction costs entirely consistently. Initially, reproduction costs were admitted as relevant to the valuation of special use property:

> [W]hen it appears that property is improved so as to make it peculiarly adaptable for its highest available use and there may be said to be a market for the property for such use, the cost of reproduction of such improvements becomes a factor in the determination of market value . . . . This does not mean, however, that such cost of reproduction is the market value of the land, for other factors, including demand, enter into the ultimate determination of market value.[158]

In *Joint Highway Dist. No. 9 v. Ocean Shore R.R.*,[159] the state condemned an abandoned railroad line for a highway; the roadbed had been difficult to construct and provided the state with about 95% of the grading needed for the highway. The property was worth little as bare land, but the jury was allowed to consider the approximate $250,000 cost of roadbed construction as it might affect a potential purchaser.[160]

Very shortly, however, California courts limited the *Joint Highway* precedent. In *City of Los Angeles v. Klinker*,[161] the court denied reproduction costs for both a building specially constructed to bear the weight of newspaper presses and presses set into specifically designed foundations. Although it certainly was arguable that the property was designed for the newspaper's peculiar needs, the court held that these features of design could be considered only as they affected fair market value and refused to admit evidence of reproduction costs. The court distinguished *Joint Highway* by saying:

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156. CAL. EVID. CODE § 820 (Deering 1966).

157. CAL. CIV. PROC. CODE § 1263.320(b) (Deering 1981).

158. Joint Highway Dist. No. 9 v. Ocean Shore R.R., 128 Cal. App. 743, 18 P.2d 413, 419 (1933).

159. 128 Cal. App. 743, 18 P.2d 413 (1933).

160. 18 P.2d at 419.

161. 219 Cal. 198, 25 P.2d 826 (1933).

> Exceptions to this general rule [that reproduction costs are inadmissible] might be allowed where, under peculiar circumstances not here present, as by reason of the nature of the improvement itself, no other criterion would be appropriate for establishing the market value of the property other than the structural value or the reconstruction cost.[162]

Perhaps the cases are distinguishable because in *Joint Highway* the state was planning to use the value of the improvements, but the court does not say so. Several more recent California cases have continued to reject reproduction costs as an accurate measure of market value.[163]

On the other hand, there is a series of cases in which California has allowed reproduction costs into evidence. Some of those cases allow reproduction costs to be considered only as they bear on what a buyer would be willing to pay for the property.[164] Other cases have allowed costs of restoration as a direct measure of damages when they are less than the decline in market value.[165] For example, the owner of a lemon grove was allowed the costs of replanting a confiscated windbreak.[166] These cases might be explained as granting reproduction costs only when they result in a lesser recovery than market value depreciation. It also may have been significant that they all involved compensation for severance damages in partial takings.

A more recent case,[167] however, appears to be an unambiguous endorsement of reproduction costs. A railroad right of way, used also as a utility pipeline, was taken for a highway. Although railroad use could have continued, utility use and planned oil and coal slurry pipeline use were foreclosed. The defendant recovered

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162. 25 P.2d at 832; *see also* People v. Ocean Shore R.R., 32 Cal. 2d 406, 196 P.2d 570, 584 (1948) (viewing *Joint Highway* as measuring compensation by market value).

163. South Bay Irrigation Dist. v. California-Am. Water Co., 61 Cal. App. 3d 944, 133 Cal. Rptr. 166, 187-88 (1976) (capitalization of income as measure of compensation for a utility company taken over by irrigation district); City of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384, 82 Cal. Rptr. 1, 7 n.1 (1969) (error to allow testimony of reproduction cost of church).

164. People v. Hayward Bldg. Materials Co., 213 Cal. App. 2d 457, 28 Cal. Rptr. 782, 787 (1963); Steiger v. City of San Diego, 163 Cal. App. 2d 110, 329 P.2d 94, 99 (1958).

165. People *ex rel.* Dep't of Pub. Works v. Flintkote Co., 264 Cal. App. 2d 97, 70 Cal. Rptr. 27, 33 (1968); People *ex rel.* Dep't of Pub. Works v. Curtis, 255 Cal. App. 2d 378, 63 Cal. Rptr. 138, 142-43 (1967).

166. Ventura County Flood Control Dist. v. Security First Nat'l Bank, 15 Cal. App. 3d 996, 93 Cal. Rptr. 653, 655-67 (1971).

167. People *ex rel.* Dep't of Transp. v. Southern Pac. Transp. Co., 84 Cal. App. 3d 315, 148 Cal. Rptr. 535 (1978).

$183,636, the project cost of reproducing the "transportation corridor."[168] The compensation included the costs of replacing the taken land as well as the costs of reproducing improvements. The court emphasized that the California statute requires compensation to be determined by any just and equitable method when there is no market for the condemned parcel.[169]

Before the 1975 statute, California courts generally adhered to the view that business losses such as loss of good will or profits were noncompensable,[170] although they might bear on the property's suitability for a particular use.[171] Moving expenses and the cost of locating a new site were likewise noncompensable,[172] as were increased costs of use, unless they affected market value.[173]

The California eminent domain statute now provides that the owner of a business may receive compensation for provable loss of good will caused by any taking if the loss cannot reasonably be prevented by relocation or prudent management.[174] Prospective application of the provision has been held not to violate equal protection.[175] Relocation assistance[176] aside, other business losses such as lost profits remain noncompensable in California, except insofar as they affect theoretical market value.

Finally, California provides recovery for loss of access or for unreasonable circuity of access. Mere changes in traffic patterns

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168. 148 Cal. Rptr. at 538.

169. *Id.* at 541.

170. Cases holding that loss of business was not a taking included Hladek v. City of Merced, 69 Cal. App. 3d 585, 138 Cal. Rptr. 194 (1977); Peerless Stages, Inc. v. Santa Cruz Metropolitan Transit Dist., 67 Cal. App. 3d 343, 136 Cal. Rptr. 567 (1977) (no right to compensation for lost business due to competition); Hecton v. People, 58 Cal. App. 3d 653, 130 Cal. Rptr. 230 (1976); Parking Auth. v. Nicovich, 32 Cal. App. 3d 420, 108 Cal. Rptr. 137 (1973). There was, however, one well known eminent domain case in which the California lower court at least was tempted to compensate for business losses. *See* Community Redev. Agency v. Abrams, 41 Cal. App. 3d 608, 116 Cal. Rptr. 308 (1974), *rev'd*, 15 Cal. 3d 813, 543 P.2d 905, 126 Cal. Rptr. 473 (1975).

171. Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc., 77 Cal. App. 3d 742, 143 Cal. Rptr. 803, 812 (1978); People *ex rel.* Dep't of Pub. Works v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902, 909 (1966); People *ex rel.* Dep't of Pub. Works v. Alexander, 212 Cal. App. 2d 84, 27 Cal. Rptr. 720, 728-29 (1963); City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705, 708 (1915).

172. Parking Auth. of Sacramento v. Nicovich, 32 Cal. App. 3d 420, 108 Cal. Rptr. 137, 138 (1973); Town of Los Gatos v. Sund, 234 Cal. App. 2d 24, 44 Cal. Rptr. 181, 182-83 (1965).

173. People v. Lundy, 238 Cal. App. 2d 354, 47 Cal. Rptr. 694, 696 (1965).

174. CAL. CIV. PROC. CODE § 1263.510 (Deering 1981).

175. Carson Redev. Agency v. Wolf, 99 Cal. App. 3d 239, 160 Cal. Rptr. 213, 216-17 (1979).

176. *See* CAL. GOV'T CODE § 7262 (Deering 1982).

caused by median strips, traffic islands, one way streets,[177] or even road relocation[178] are noncompensable unless they impair easement of access, an ownership right. The test applied by the California courts is one of reasonableness.[179] Unlike some other states, California will allow a finding that access rights of nonabutting owners have been unreasonably impaired.[180] For a time, California courts appeared to hold that closure of access at one end of a street was compensable for all owners of frontage up to the next intersecting street.[181] The courts now will treat some cases in which a street becomes a cul de sac as cases of impaired access, depending on the extent of the interference.[182] There are also cases in which loss of visibility or view have been held compensable infringements of access rights.[183] These access cases often involve business losses such as the situation of a cafe that is no longer positioned to attract patronage. They are thus a likely forum for owners to seek to prove loss of business goodwill or changes in market values when the land is less commercially attractive.

D. Colorado

The touchstone for compensation awards in Colorado is what the property would bring in a "free marketplace."[184] Property is to be valued at the most advantageous use to which it reasonably may be applied.[185] Thus stated, the standard is relatively generous to owners, but in a number of ways Colorado courts have insisted on linking most advantageous use theoretically to marketability. For

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177. City of Berkeley v. von Adelung, 214 Cal. App. 2d 791, 29 Cal. Rptr. 802, 803 (1963); People *ex rel.* Dep't of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 523-24, 5 Cal. Rptr. 151, 155-56 (1960).

178. City of Stockton v. Marengo, 137 Cal. App. 760, 31 P.2d 467, 467-69 (1934); People v. Gianni, 130 Cal. App. 584, 20 P.2d 87, 89-90 (1933).

179. People v. Becker, 262 Cal. App. 2d 364, 69 Cal. Rptr. 110, 114-16 (1968) (change from state road access to freeway frontage not unreasonable); People v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902, 904, 909 (1966) (seven-mile route to defendant's packing shed unreasonably circuitous).

180. *But see* People v. Russell, 48 Cal. 2d 189, 309 P.2d 10, 14-15 (1957) (property owner's right of access did not extend beyond the next intersection at either end of the street on which the property abuts).

181. *See* Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818, 823 (1943).

182. Briedert v. Southern Pac. Co., 61 Cal. 2d 659, 394 P.2d 719, 722-24, 39 Cal. Rptr. 903, 906-08 (1964).

183. People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799, 803-04 (1943); Williams v. Los Angeles Ry., 150 Cal. 592, 89 P. 330, 332 (1907).

184. City of Aurora v. Webb, 41 Colo. App. 11, 585 P.2d 288, 291 (1978).

185. Goldstein v. Denver Urban Renewal Auth., 192 Colo. 422, 560 P.2d 80, 83 (1977) (en banc) (citation omitted).

example, property must be treated as a unit in determination of its most advantageous use; Colorado regards valuations as too speculative if they are based on carving up the property into separate lots or valuing separately the various improvements and other attributes of the property.[186] Likewise, zoning changes, if reasonably probable, may be taken into account in conjecturing the property's best use.[187] However, the court also must be allowed to consider the costs of taking advantage of the zoning change.[188]

This link to marketability is notable especially in Colorado's treatment of property with special features. Colorado will only allow improvements to be considered insofar as they affect market value,[189] and insists that costs of demolishing unwanted improvements must be taken into account as they affect an interested buyer.[190] Conversely, replacement costs of improvements may be considered in compensation awards only to the extent that they alter market value.[191] Restoration or relocation costs also are not required as compensation in Colorado. They are to be considered only as they bear on fair market value.[192] The need to replace fences or move fixtures may be considered, but only as the willing buyer would contemplate them in deciding what to pay for the property. Even if property is adapted to a unique use or is of unique historical value, evidence of replacement cost is inadmissible "absent a reasonable expectation that the building would be replaced."[193]

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186. City of Boulder v. Orchard Court Dev. Co., 527 P.2d 931, 933 (Colo. Ct. App. 1974); Board of County Comm'rs v. Vail Assocs., Ltd., 171 Colo. 381, 468 P.2d 842, 846 (1970) (en banc); Department of Highways v. Schulhoff, 167 Colo. 72, 445 P.2d 402, 404-05 (1968).

187. State Dep't of Highways v. Ogden, 638 P.2d 832, 833 (Colo. Ct. App. 1981); City of Aurora v. Webb, 41 Colo. App. 11, 585 P.2d 288, 291 (1978); Poudre School Dist. R-1 v. Stark, 35 Colo. App. 363, 536 P.2d 832, 834 (1975).

188. City of Aurora v. Webb, 41 Colo. App. 11, 585 P.2d 288, 291 (1978).

189. Board of County Comm'rs v. Loyd Hodge & Sons, Inc., 534 P.2d 638, 639 (Colo. Ct. App. 1975); City of Boulder v. Orchard Court Dev. Co., 527 P.2d 931, 933 (Colo. Ct. App. 1974).

190. Goldstein v. Denver Urban Renewal Auth., 192 Colo. 422, 560 P.2d 80, 83-84 (1977) (en banc).

191. City of Boulder v. Orchard Court Dev. Co., 527 P.2d 931, 933 (Colo. Ct. App. 1974).

192. Board of County Comm'rs v. Loyd Hodge & Sons, Inc., 534 P.2d 638, 639 (Colo. Ct. App. 1975); City and County of Denver v. Hinsey, 177 Colo. 178, 493 P.2d 348, 351 (1972); Dandrea v. Board of County Comm'rs, 144 Colo. 343, 356 P.2d 893, 896-97 (1960); *see also* Game & Fish Comm'n v. Farmers Irrigation Co., 162 Colo. 301, 426 P.2d 562, 565-66 (1967) (restoration costs available as a measure of damages for suit in tort).

193. Denver Urban Renewal Auth. v. Pogzeba, 38 Colo. App. 168, 558 P.2d 442, 443 (1976).

Comparable sales data are the basic evidence of market value,[194] with increases in the market attributable to the fact of condemnation factored out.[195] Nor may a landowner enhance the value of his own land by comparing it with sales prices of neighboring parcels which already reflect the impact of the proposed improvement.[196]

Colorado will allow into evidence factors other than comparable sales data. Capitalization of reasonable rate of return from rental is available as an alternative even when market data are available,[197] whether or not the property is rented at the market rate.[198] Despite this relative liberality, however, Colorado has not gone so far as to allow business losses per se to be compensated. Capitalization of rental must be carefully distinguished from the effort to recover lost rents themselves; lost rents are viewed as noncompensable business losses.[199] Evidence of the character and amount of business conducted on the land, as well as profits and losses, is admissible only to show possible use of the property, not to show fair market value.[200] Gross sales data are also rejected by the Colorado courts as too dependent on managerial skill and too speculative to serve as a measure of the value of the land.[201]

Colorado, however, has made income from the land itself into a major exception to the rule that business losses are noncompensable. Farm income from crops and livestock is regarded as income from the land itself, not from business conducted on the land.[202] Thus, where the defendant's business was ranching, evidence concerning the decreased carrying capacity of the land was admissible because "the income in question [is] derived from the use of the property itself."[203] Income from rental of the real property itself,

194. Goldstein v. Denver Urban Renewal Auth., 192 Colo. 422, 560 P.2d 80, 82 n.1 (1977) (en banc).

195. 560 P.2d at 83 (citation omitted).

196. Board of County Comm'rs v. Vail Assocs., Ltd., 171 Colo. 381, 468 P.2d 842, 847 (1970) (en banc).

197. Denver Urban Renewal Auth. v. Bergland-Cherne Co., 93 Colo. 562, 568 P.2d 478, 481 (1977) (en banc).

198. Montgomery Ward & Co. v. City of Sterling, 185 Colo. 238, 523 P.2d 465, 468 (1974).

199. Board of County Comm'rs v. Loyd Hodge & Sons, Inc., 534 P.2d 638, 640 (Colo. Ct. App. 1975).

200. City and County of Denver v. Hinsey, 177 Colo. 178, 493 P.2d 348, 351 (1972); City and County of Denver v. Tondall, 86 Colo. 372, 282 P. 191 (1929).

201. Denver Urban Renewal Auth. v. Cook, 186 Colo. 182, 526 P.2d 652, 653 (1974).

202. Board of County Comm'rs v. Delaney, 41 Colo. App. 548, 592 P.2d 1338, 1340 (1978); City and County of Denver v. Quick, 108 Colo. 111, 113 P.2d 999, 1001 (1941).

203. Board of County Comm'rs v. Delaney, 41 Colo. App. 548, 592 P.2d 1338, 1340

such as a trailer pad (but not the trailer), also is admissible.[204]

Under the Colorado constitution, recovery is available for damage to property without actual confiscation.[205] Damage in such cases must be tied to the loss of a specific property right; mere economic loss such as that caused by the noise from a nearby streetcar will not suffice.[206] Colorado courts initially held that impairment of access was noncompensable as long as the public entity was making normal street improvements, such as fixing the grade, for the public good.[207] Colorado courts struggled with this narrow reading of "damaged," finding impairment of access by a viaduct[208] and change from the original street grade[209] both "extraordinary" public uses and thus compensable. Colorado still insists, however, that access must be cut off almost completely for damages to be recoverable.[210] Access cases in Colorado thus are less likely to provide an opportunity for business losses to be compensated than in a state such as California, with a more expansive view of when access has been taken.

E. Idaho

In applying the fair market value standard, Idaho emphasizes the owner's loss, not the condemnor's gain.[211] For example, the

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(1978).

204. *See* Board of County Comm'rs v. HAD Enterprises, 35 Colo. App. 162, 533 P.2d 45, 51 (1974).

205. Mosher v. City of Boulder, 225 F. Supp. 32, 35 (D. Colo. 1964); City of Ft. Collins v. Wallace, 23 Colo. App. 452, 130 P. 69 (1913).

206. Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 P. 409, 413 (1913); Gilbert v. Greeley, S.L. & Pac. Ry., 13 Colo. 501, 22 P. 814 (1889).

207. City of Denver v. Bayer, 7 Colo. 113, 2 P. 6, 7 (1883).

208. City of Pueblo v. Strait, 20 Colo. 13, 36 P. 789, 792 (1894).

209. City of Denver v. Bonesteel, 30 Colo. 107, 69 P. 595 (1902).

210. Shaklee v. Board of County Comm'rs, 176 Colo. 559, 491 P.2d 1366 (1971) (replacing 1014 feet of frontage by two access points 600 feet apart considered a reasonable regulation); Hayutin v. Colorado Dep't of Highways, 175 Colo. 83, 485 P.2d 896, 899 (1971) (circuity of route caused by median held noncompensable), *cert. denied*, 404 U.S. 991 (1972); Thornton v. City of Colorado Springs, 173 Colo. 357, 478 P.2d 665, 668 (1970) (circuity of access resulting from median strip noncompensable); Troiano v. Colorado Dep't of Highways, 170 Colo. 484, 463 P.2d 448, 452-56 (1970) (impairment of view, appeal of motel resulting from freeway viaduct held noncompensable, disapproving People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943)); Radinsky v. City and County of Denver, 159 Colo. 134, 410 P.2d 644, 646-47 (1966) (nonabutting property owner not compensated for increased circuity of access resulting from construction of freeway exchange, where owner still had access and inconveniences shared by others in area); Gayton v. Department of Highways, 149 Colo. 72, 367 P.2d 899, 902 (1962) (inconvenience resulting from closure of alley where owner still had street access held noncompensable).

211. *See, e.g.*, Canyon View Irrigation Co. v. Twin Falls Canal Co., 101 Idaho 604, 619

measure of damages applied in an early case involving condemnation of an irrigation canal was the change in market value of the owner's property, not the condemnor's savings on construction costs as a result of the condemnation.[212] The condemnor's planned use may be considered, however, if it is indicative of the property's marketable highest and best use.[213] Unlike in California, the highest and best use of the property may be its use in conjunction with other parcels—for example, as a reservoir—as long as the joinder is reasonably likely.[214] Conversely, if the parcel taken is part of a larger tract, its value must reflect any enhancement of value such as recreational availability resulting from its potential use in conjunction with the larger parcel.[215] Idaho also has recently stipulated that both the probability and the possibility of rezoning should be considered in valuation, to the extent that they exert an effect on the current market value of the property.[216]

In keeping with its concern for the owner's loss, Idaho has decided several cases in which the owner's special use for the property was treated as the basis for fair market value. Idaho's treatment of these cases is markedly generous in light of the practice in other western states such as Colorado. In *State v. Dunclick, Inc.*,[217] a partial taking case, the portion condemned was used by defendants for storing and seasoning concrete products made elsewhere on the property.[218] The storage area was an integral part of the manufacturing process and no alternatives were available on the property. The court held that it was not error to instruct the jury to consider the going concern value of the manufacturing enterprise in estimating the value of the land with respect to the use for which it was peculiarly adapted.[219] In an earlier case,[220] Idaho allowed property used for a college campus, which had no alternative market value, to be valued for its special use. In a much cited de-

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P.2d 122, 132 (1980).

212. Portneuf-Marsh Valley Irrigating Co. v. Portneuf Irrigating Co., 19 Idaho 483, 114 P. 19 (1911).

213. Idaho Farm Dev. Co. v. Brackett, 36 Idaho 748, 213 P. 696, 698 (1923).

214. 213 P. at 698.

215. State *ex rel.* Symms v. City of Mountain Home, 94 Idaho 528, 493 P.2d 387, 389-90 (1972); City of Caldwell v. Roark, 92 Idaho 99, 437 P.2d 615 (1968).

216. Ada County Highway Dist. v. Magwire, 104 Idaho 656, 662 P.2d 237, 239-40 (1983).

217. 77 Idaho 45, 286 P.2d 1112 (1955).

218. 286 P.2d at 1114.

219. *Id.* at 1118.

220. Idaho W. Ry. v. Columbia Conference of Evangelical Lutheran Augustana Synod, 20 Idaho 568, 119 P. 60 (1911).

fense of special use valuation, the court explained:

> [T]he property built up for such purposes is ordinarily expensive, and becomes of great value for the specific work and purpose for which it is established. The fact that there is no market value for such property affords no justification whatever for the taking of property without payment of just compensation.[221]

In measuring market value, Idaho courts attempt to come as close as possible to what the property might presently bring, absent effects on the market of the proposed project. Comparable sales data are admissible evidence, as confirming an expert's evaluation of the property or as independent evidence of the property's value.[222] Generally, the purchase price originally paid by the owner is admissible, either as evidence of present value or to rebut other estimates of value.[223] In the discretion of the trial court, however, evidence of the original purchase price of the property may be rejected as too remote, if for example the property has increased massively in value because of its proximity to a freeway exchange.[224]

Idaho law at present seems somewhat confused about use of income capitalization as an alternative to comparable sales data for measuring market value. In an early case[225] involving condemnation of a farm, the Idaho court refused to consider evidence of actual income from the farm, on the theory that the income was too dependent on the owner's skills. It did allow, however, the average net income which a farm of the sort in question would produce under average conditions, to be considered as bearing on market value.[226] Later cases similarly allow indirect consideration of evidence of income. For example, in *State v. V-1 Oil Company*,[227] Idaho refused to allow evidence of past profits as dependent on business skills, but admitted evidence of the rental income, location and economic desirability of the parcel as bearing on market value.[228] In another case,[229] the court would not value a gravel

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221. 119 P. at 65.
222. State *ex rel.* Symms v. Collier, 93 Idaho 19, 454 P.2d 56, 60 (1969).
223. 454 P.2d at 60.
224. *Id.* at 59.
225. Idaho Farm Dev. Co. v. Brackett, 36 Idaho 748, 213 P. 696 (1923).
226. 213 P. at 699.
227. 94 Idaho 456, 490 P.2d 323 (1971).
228. 490 P.2d at 336.
229. State *ex rel.* Symms v. Nelson Sand and Gravel, Inc., 93 Idaho 574, 468 P.2d 306 (1970).

leasehold in terms of income projected from the amount of gravel remaining and the market value of gravel, even though it concluded there was no recognized market for gravel pits, but would allow expected future earnings to influence market value as they would a hypothetical purchaser.[230] Finally, a fairly recent case[231] allowed lost profits to bear on the market value of a leasehold, without noting the shift from income to profits.[232]

Because the Idaho constitution specifically mandates compensation for takings only,[233] Idaho courts have had some difficulty with cases involving loss of highway access. Owners cannot get compensation at all unless they can argue some property right was taken.[234] When compensation is available, Idaho insists on a separation between damages from the access termination itself and damages from traffic diversions associated more generally with the new project.[235] In a partial taking case,[236] however, Idaho appears once again to have allowed business losses to enter indirectly, for it allowed circuity of access caused by the taking to become a factor in assessing the market value of the remaining land.[237]

F. Montana

Montana eminent domain law is noteworthy for its treatment of mineral rich lands and for its willingness to allow replacement costs for special use property. At base, compensation in Montana rests on fair market value, measured in terms of the most valuable use for which the property is available.[238] "Available" is interpreted generously to mean "marketable";[239] uses that would appeal to a speculator count[240] unless they are purely conjectural.[241] Legal

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230. 468 P.2d at 314.

231. State *ex rel.* Moore v. Bastian, 97 Idaho 444, 546 P.2d 399 (1976). Profits arguably are one step more dependent on management skill than income.

232. 546 P.2d at 403.

233. IDAHO CONST. art. I, § 14.

234. Hughes v. State, 80 Idaho 286, 328 P.2d 397, 401 (1958).

235. State *ex rel.* Moore v. Bastian, 97 Idaho 444, 546 P.2d 399, 405 (1976); Mabe v. State, 86 Idaho 254, 385 P.2d 401, 405 (1963).

236. State *ex rel.* Symms v. Nelson Sand and Gravel, Inc., 93 Idaho 574, 468 P.2d 306 (1970).

237. 468 P.2d at 315.

238. State v. Hoblitt, 87 Mont. 403, 288 P. 181, 185 (1930).

239. State Highway Comm'n v. Woodcock, 147 Mont. 291, 411 P.2d 357, 358 (1965).

240. State Highway Comm'n v. Antonioli, 145 Mont. 411, 401 P.2d 563, 566 (1965); State v. Hoblitt, 87 Mont. 403, 288 P. 181, 185 (1930).

241. Montana State Highway Comm'n v. Jacobs, 150 Mont. 322, 435 P.2d 274, 277 (1967).

restrictions on property may result in a holding that it is not available for a proposed use; for example, property subject to flood zoning restrictions was found not usable for residential development.[242]

The distinction between uses that would appeal to a speculator, which may be considered, and merely speculative estimates of value, which may not, emerged in a series of Montana cases involving land with mineral wealth. The defendant may not guess about whether the land is of value for mining purposes.[243] He may, however, assume there is a speculative market for known reserves.[244] In such a case, the measure of compensation is the market value of the land with reserves, not the value of the reserves themselves.

When a market for comparable property does exist, Montana regards sales data as "the ultimate criterion" of just compensation.[245] It may be supplemented by evidence of the original purchase price, adjusted to date.[246] When capitalization of income gives a less conjectural measure of value than sales data, it may be used as a substitute.[247]

When property has a special use for which there is no ready market, Montana will allow reproduction cost to serve as an alternate measure of value. For example, replacement cost was used as the measure of compensation for a one-man cement plant, although the owner's estimate of what it would cost to replace his primitive facility was rejected as too speculative.[248] Replacement cost also was approved as the measure of compensation for a maggot ranch, conveniently located near a slaughterhouse.[249] Most recently, an owner was allowed to recover the loss in value of special confinement buildings of a hog farm, measured by the cost of the

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242. *In re* Creation of West Great Falls Flood Control and Drainage Dist. *ex rel.* Greenwood, 648 P.2d 297 (Mont. 1982).

243. State Highway Comm'n v. Metcalf, 160 Mont. 164, 500 P.2d 951, 955 (1972).

244. State Highway Comm'n v. Antonioli, 145 Mont. 411, 401 P.2d 563, 566 (1965).

245. State Highway Comm'n v. Tubbs, 147 Mont. 296, 411 P.2d 739, 742 (1966).

246. State Highway Comm'n v. Vaughan, 155 Mont. 277, 470 P.2d 967, 972 (1970).

247. State v. Olsen, 166 Mont. 139, 531 P.2d 1330, 1332 (1975); *see also* State *ex rel.* Highway Comm'n v. Keneally, 142 Mont. 256, 384 P.2d 770, 776 (1963) (capitalization of income is relevant to a decrease in market value, but does not allow for loss of business damages); State v. Heltborg, 140 Mont. 196, 369 P.2d 521, 523-25 (1962) (allowing testimony relating to capitalization of income); State v. Peterson, 134 Mont. 52, 328 P.2d 617, 623-24 (1958) (income evidence admissible but not conclusive of market value).

248. Alexander v. State Highway Comm'n, 147 Mont. 367, 412 P.2d 414, 415 (1966). *See generally* Comment, *The Montana Law of Valuation in Eminent Domain*, 34 MONT. L. REV. 90 (1973).

249. Department of Highways v. Schumacher, 180 Mont. 329, 590 P.2d 1110, 1115 (1979).

buildings less salvage value.[250] In this case, a frontage road constructed on the taken land threatened to cause such increased stress among the hogs that the confinement buildings had only salvage value.[251]

G. Nevada

Nevada's sparse eminent domain cases emphasize that justice requires compensation to be "real, substantial, full and ample."[252] Property must be valued in light of its highest best use,[253] and market value must include any factors that a reasonable businessman would consider in purchasing.[254] Those factors must include legal restrictions on the property, such as beachfront access encumbrances in the deed, insofar as they would affect a buyer's decision.[255] They also may include the availability of local bank loans for property development.[256] The highest and best use may encompass routine zoning changes[257] that would appeal to a willing buyer. The most striking contrast to the practice in some other states is Nevada's willingness to allow a single parcel of land to be valued on a lot-by-lot, dissected basis, if its best use is as a subdivision.[258]

Income capitalization may be used as evidence of market value, as long as an appropriate foundation is laid for the capitalization rate.[259] Notably, Nevada allows potential income to be used as a basis for capitalization. Potential income from the sale of subdivided lots, discounted to present value, has been held relevant to a determination of fair market value,[260] as has market rental even

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250. State *ex rel.* Dep't of Highways v. Howery, 664 P.2d 1387 (Mont. 1983).

251. *Id.* at 1390.

252. Sorenson v. State *ex rel.* Dep't of Highways, 92 Nev. 445, 552 P.2d 487, 488 (1976); Tacchino v. State *ex rel.* Dep't of Highways, 89 Nev. 150, 508 P.2d 1212, 1213 (1970).

253. Sorenson v. State *ex rel.* Dep't of Highways, 92 Nev. 445, 552 P.2d 487, 488 (1976).

254. State *ex rel.* Dep't of Highways v. Linnecke, 86 Nev. 257, 468 P.2d 8, 11 (1970); State *ex rel.* Dep't of Highways v. Shaddock, 75 Nev. 392, 344 P.2d 191, 194 (1959).

255. Skyland Water Co. v. Tahoe-Douglas Dist., 95 Nev. 289, 593 P.2d 1066, 1067 (1979).

256. Clark County School Dist. v. Mueller, 76 Nev. 11, 348 P.2d 164, 168 (1960).

257. Sorenson v. State *ex rel.* Dep't of Highways, 92 Nev. 445, 552 P.2d 487, 488 (1976).

258. Tacchino v. State *ex rel.* Dep't of Highways, 89 Nev. 150, 508 P.2d 1212, 1214 (1973).

259. Eikelberger v. State *ex rel.* Dep't of Highways, 83 Nev. 306, 429 P.2d 555, 557 (1967); State *ex rel.* Dep't of Highways v. Campbell, 80 Nev. 23, 388 P.2d 733 (1964).

260. Tacchino v. State *ex rel.* Dep't of Highways, 89 Nev. 150, 508 P.2d 1212, 1214 (1973).

though the property is currently leased for less than its rental value.[261] Thus, Nevada seems particularly liberal among the western states in treatment of income capitalization. Nevada does not appear to have faced the issues of special use property or business losses.

In the leading case[262] involving loss of access, moreover, Nevada appears to be sympathetic to compensation for business losses.[263] When direct access was replaced by circuitous access via a frontage road, the court held that such a substantial impairment constituted a taking of the owner's easement of access.[264] The court cited approvingly Arizona's approach to compensation for loss of access, which includes business losses, and noted that compensation should reflect the businessman's judgment.[265]

H. New Mexico

Apart from a series of cases concerning severance damages, New Mexico compensation law is relatively limited. Fair market value is to be determined by considering all probable uses for the property.[266] New Mexico agrees with Alaska that special value to the condemnor is not the measure of compensation, even when the condemnor takes something of value from the land, such as soil for roadfill.[267] The owner's planned use is considered as bearing on market value, if it is feasible, but one New Mexico holding[268] additionally allowed into evidence a design showing how the owner's use could be achieved compatibly with the taking.[269]

In determining market value, the jury may hear evidence of comparable sales, income capitalization and reproduction costs, apparently in all kinds of cases.[270] The original purchase price of the property, while not conclusive, is relevant.[271] The market value of a

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261. State *ex rel.* Dep't of Highways v. Shaddock, 75 Nev. 392, 344 P.2d 191, 194 (1959).
262. State *ex rel.* Dep't of Highways v. Linnecke, 86 Nev. 257, 468 P.2d 8 (1970).
263. 468 P.2d at 11.
264. *Id.* at 9, 11.
265. *Id.*
266. State *ex rel.* State Highway Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46, 49-50 (1966).
267. Board of County Comm'rs v. Vargas, 76 N.M. 369, 415 P.2d 57, 58-59 (1966).
268. State v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).
269. 539 P.2d at 615.
270. State Highway Comm'n v. Martinez, 81 N.M. 442, 468 P.2d 413, 414 (1970).
271. State *ex rel.* State Highway Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868, 870 (1969).

leasehold with improvements may extend beyond the term of the lease if renewal is likely.[272]

New Mexico has held that the condemnee may not recover damages for business losses caused by temporary inconvenience.[273] However, the owner may recover for loss of growing crops and other damage to land, such as the cost of restoring the surface to its former level.[274] Costs of relocating or selling improvements are generally not compensable, although they might bear on market value computations.[275] Nonetheless, New Mexico did award additional compensation for the cost of constructing flood control devices in a partial taking case,[276] apparently on the theory that the state has a duty to protect the landowner from the possibility of flooding caused by the new use of the condemned property.[277]

New Mexico holds that highway access is a property right, which may not be taken or damaged without compensation.[278] In general, compensation is not owed for temporary impairments,[279] however, or for reasonable inconvenience caused by increased travel distances.[280]

I. Oregon

Oregon consistently is one of the most stringent states in awarding compensation. Oregon does base compensation on fair market value, determined by the owner's loss, not the condemnor's gain.[281] Property is to be valued by considering uses for which it is reasonably available, including rehabilitation.[282] Particular needs that the state has for property may be considered if the property is

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272. 456 P.2d at 873.

273. State v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611, 616 (1975).

274. Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938, 944 (1961).

275. Board of Trustees v. B.J. Serv., Inc., 75 N.M. 459, 406 P.2d 171 (1965).

276. State *ex rel.* State Highway Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

277. 417 P.2d at 434.

278. State *ex rel.* State Highway Comm'n v. Chavez, 77 N.M. 104, 419 P.2d 759, 760 (1966).

279. Hill v. State Highway Comm'n, 85 N.M. 689, 516 P.2d 199, 201 (1973).

280. State *ex rel.* State Highway Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984, 986-87 (1969); State *ex rel.* State Highway Comm'n v. Mauney, 76 N.M. 36, 411 P.2d 1009, 1011-12 (1966).

281. State *ex rel.* State Highway Comm'n v. Mayem, 19 Or. App. 234, 526 P.2d 1390, 1391 (1974); Santiam Lumber Co. v. Conhaim, 218 Or. 220, 344 P.2d 247, 249 (1959); State *ex rel.* State Highway Comm'n v. Arnold, 218 Or. 43, 341 P.2d 1089, 1092-93, *modified*, 343 P.2d 1113 (1959); Oregon R. & Nav. Co. v. Taffe, 67 Or. 102, 134 P. 1024, 1028 (1913).

282. City of Portland v. Nudelman, 45 Or. App. 425, 608 P.2d 1190, 1197 (1980).

marketable for that use to others as well.[283] The defendant's planned uses may be considered,[284] even if they require a zoning change,[285] as long as they are not too speculative.[286]

Sales data are the basic evidence of fair market value. Oregon allows market data to be supplemented in a number of ways, but often insists that supplementation may occur only when market data are unavailable. Sales data may be supplemented by evidence of the purchase price, if the purchase was not too long ago to be a helpful indicator of value.[287] Capitalization of rentals is a permissible measure of market value, but capitalization of profits is not.[288] As in Colorado, evidence of farm income may be used as a basis for capitalization, but only if it is income already received from the particular farm being valued.[289] The rental basis for capitalization must not be speculative.[290] In estimating the market value of a lease, business profits may not be considered unless no other valuation methods are available.[291] Minerals are valued by taking the fair market value of the aggregate.[292]

In valuing special use property, Oregon insists that replacement cost may be considered only if market transaction data is

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283. State *ex rel.* State Highway Comm'n v. Arnold, 218 Or. 43, 341 P.2d 1089, 1093, *modified*, 343 P.2d 1113 (1959) (cinder cone marketable for gravel to others than state).

284. State v. Assembly of God, Pentecostal, 230 Or. 167, 368 P.2d 937, 940-41 (1962) (not error to allow testimony about church's landscaping plans). *But cf.* State *ex rel.* State Highway Comm'n v. Morehouse Holding Co., 225 Or. 62, 357 P.2d 266, 269 (1960) (failure to give instruction to jury not to consider any intentions or plans held not reversible error).

285. Unified Sewerage Agency v. Duyck, 33 Or. App. 375, 576 P.2d 816, 819 (1978); State *ex rel.* State Highway Comm'n v. Compton, 9 Or. App. 264, 490 P.2d 743, 746-47 (1971), *rev'd on other grounds*, 265 Or. 339, 507 P.2d 13 (1973); State *ex rel.* State Highway Comm'n v. Oswalt, 1 Or. App. 449, 463 P.2d 602, 604 (1970).

286. State *ex rel.* State Highway Comm'n v. Compton, 265 Or. 339, 507 P.2d 13, 16 (1973); State *ex rel.* State Highway Comm'n v. Anderson, 234 Or. 328, 381 P.2d 707 (1963).

287. State *ex rel.* State Highway Comm'n v. Empire Bldg. Material Co., 17 Or. App. 616, 523 P.2d 584, 587 (1974).

288. *Compare* City of Medford v. Bessonnette, 255 Or. 53, 463 P.2d 865, 869 (1970) (evidence of loss of rental income due to decreased parking space), *with* State v. Cerruti, 188 Or. 103, 214 P.2d 346, 351 (1950) (evidence of capitalization of profits not admitted for agricultural land).

289. State v. Cerruti, 188 Or. 103, 214 P.2d 346, 350 (1950) (citing City & County of Denver v. Quick, 108 Colo. 111, 113 P.2d 999, 1001 (1941)); *cf.* Idaho Farm Dev. Co. v. Brackett, 36 Idaho 748, 213 P. 696, 699 (1923) (allowing evidence of average income for farm).

290. State *ex rel.* State Highway Comm'n v. Compton, 265 Or. 339, 507 P.2d 13, 16 (1973).

291. City of Portland v. Postill, 123 Or. 579, 263 P. 896, 900 (1928) (evidence of business profits held to be error).

292. State *ex rel.* State Highway Comm'n v. Arnold, 218 Or. 43, 341 P.2d 1089, 1104 (land was not a "natural warehouse"), *modified*, 343 P.2d 1113 (1959).

"impossible" to obtain.[293] Oregon has suggested that the cost of substitute facilities is required as compensation only when the condemnee is under a legal duty to replace the property.[294] Thus, an owner of special use property will be less favorably treated in Oregon than in states like Idaho, especially if the property is marketable for any purpose whatsoever.

In Oregon, moving expenses and other consequential damages are noncompensable.[295] Compensation is not available for personalty made less useful by the taking, such as a restaurant's cooking equipment.[296] Nor is it available for personalty damaged by the taking, such as cattle injured in a move made necessary by the taking.[297] As elsewhere, however compensation is granted for fixtures.[298]

Oregon's constitution provides for compensation for takings only.[299] Early Oregon decisions held that even complete termination of access was not compensable[300] unless the severance occurred because the street had been appropriated for a private use such as a street railroad.[301] Oregon now holds that recovery is available for deprivation of all reasonable access,[302] and severance damages also may be available if part of the land is appropriated.[303] Oregon maintains strict standards about what constitutes

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293. State *ex rel.* Bd. of Higher Educ. v. First Methodist Church, 6 Or. App. 492, 488 P.2d 835, 836 (1971) (where church youth center adjoined college campus there was no similar facility for valuation).

294. 488 P.2d at 837.

295. State *ex rel.* State Highway Comm'n v. Superbilt Mfg. Co., 204 Or. 393, 281 P.2d 707, 723 (1955). Indeed, through removing its fixtures and seeking moving expenses, Superbilt found its former factory valued as a warehouse for the purpose of determining market value.

296. State *ex rel.* State Highway Comm'n v. Demarest, 263 Or. 590, 503 P.2d 682, 689 (1972).

297. State Dep't of Transp. v. Glenn, 288 Or. 17, 602 P.2d 253, 255 (1979).

298. State *ex rel.* State Highway Comm'n v. Empire Bldg. Material Co., 17 Or. App. 616, 523 P.2d 584, 591 (1974).

299. OR. CONST. art. I, § 18.

300. Wilson v. City of Portland, 132 Or. 509, 285 P. 1030 (1930); Barrett v. Union Bridge Co., 117 Or. 220, 243 P. 93, 93-94 (1926); Brand v. Multnomah County, 38 Or. 79, 60 P. 390, 392 (1900).

301. Kurtz v. Southern Pac. Co., 80 Or. 213, 155 P. 367, 369 (1916); Sandstrom v. Oregon-Washington R. & Nav. Co., 75 Or. 159, 146 P. 803, 804-05 (1915).

302. Douglas County v. Briggs, 34 Or. App. 409, 578 P.2d 1261 (1978), *aff'd*, 286 Or. 151, 593 P.2d 1115 (1979); Ail v. City of Portland, 136 Or. 654, 299 P. 306, 310 (1931); Cooke v. City of Portland, 136 Or. 233, 298 P. 900, 901 (1931).

303. State *ex rel.* State Highway Comm'n v. Burk, 200 Or. 211, 265 P.2d 783, 795 (1954).

deprivation of access, however; a recent case[304] held that the owner of duplexes was not deprived of access because the front of the property could be reached, in spite of the fact that the driveway to garages in the back was completely closed and no other land remained on which to build a substitute.[305]

J. Utah

The measure of the defendant's loss in Utah is fair market value in money, determined by considering highest and best use in light of all uses for which the property is reasonably available. These may include uses requiring zoning changes[306] and uses made possible by zoning changes in anticipation of the improvement.[307] Unlike Nevada, Utah will not allow the property owner to speculate on the possibility of subdividing a parcel.[308] Utah also has suggested that the uses considered together in determining value must be compatible,[309] but at least one case appears to have given recovery for noncompatible uses.[310]

Comparable sales data are basic evidence of fair market value,[311] but are supplemented in the many Utah cases involving property for which no real market exists. Utah admits evidence of the purchase price if it is not too remote,[312] and appears to be

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304. Boese v. City of Salem, 40 Or. App. 381, 595 P.2d 822 (1979).

305. 595 P.2d at 823. It is fair to say that Oregon generally is stringent in determining when a taking has occurred. Zoning is not a taking unless the owner is precluded from all economically feasible use. Fifth Avenue Corp. v. Washington County, 282 Or. 591, 581 P.2d 50, 63 (1978). Precondemnation activities will amount to a taking if rights to use have been effectively snuffed out, for example, for ten years. Lincoln Loan Co. v. State Highway Comm'n, 274 Or. 49, 545 P.2d 105, 109 (1976). For shorter term deprivations, the condemnee may recover only the value of the use of the land. City of Silverton v. Porter, 28 Or. App. 415, 559 P.2d 1297, 1300 (1977).

306. State *ex rel.* Road Comm'n v. Jacobs, 16 Utah 2d 167, 170-71, 397 P.2d 463, 465 (1964) (citing 4 P. NICHOLS, P. ROHAN, J. SACKMAN & R. VAN BRUNT, *supra* note 69, § 12.322(1)).

307. State *ex rel.* Road Comm'n v. Wood, 22 Utah 2d 317, 321, 452 P.2d 872, 874 (1969).

308. State *ex rel.* Engineering Comm'n v. Tedesco, 4 Utah 2d 248, 251, 291 P.2d 1028, 1029-30 (1956).

309. State *ex rel.* Road Comm'n v. Noble, 6 Utah 2d 40, 42, 305 P.2d 495, 497 (1957).

310. Southern Pac. Co. v. Arthur, 10 Utah 2d 306, 311-12, 352 P.2d 693, 696-97 (1960). The defendant was compensated for the gravel taken and recovered severance damages in addition because his lambs could not cross the pit resulting from extraction of the gravel. *Id.* at 312, 352 P.2d at 697.

311. *Id.* at 309, 352 P.2d at 695; State *ex rel.* Road Comm'n v. Noble, 6 Utah 2d 40, 44, 305 P.2d 495, 498 (1957).

312. State *ex rel.* State Road Comm'n v. Hopkins, 29 Utah 2d 131, 132, 506 P.2d 57, 58 (1973).

fairly lenient in allowing "opinion evidence of what the property would probably sell for" when the area is too remote for there to be a ready market.[313] The value of mineral deposits is to be measured by considering the fair market value of the aggregate.[314] Capitalizations of rentals[315] or income[316] are admissible as alternative measures. When the property is not put to its best use, however, Utah will not measure compensation by what the property could earn if put to its best use, although evidence of highest and best use still may bear on market value.[317] In Utah, capitalization of profits generally is regarded as too speculative to be a measure of compensation unless the business is taken over.[318]

Nonetheless, where property—such as industrially valuable water runoff—has a specially adapted use but no ready market, Utah has allowed its "inherent value" to be measured by admitting evidence of the profitability of uses to which it is put.[319] If the property is unique and its use requires special conditions, Utah has allowed replacement cost to be an appropriate method of valuation, even though the defendant is under no duty to replace the property.[320]

Under the taking or damaged clause of its constitution, Utah grants damages for loss of access.[321] It appears to be relatively generous in compensating for inconvenience, allowing recovery of increased costs of operation when a parcel is severed.[322]

K. Washington

As elsewhere, compensation in Washington is based on the fair

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313. Southern Pac. Co. v. Arthur, 10 Utah 2d 306, 309, 352 P.2d 693, 695 (1960).

314. State *ex rel.* Road Comm'n v. Noble, 6 Utah 2d 40, 42, 305 P.2d 495, 496 (1957).

315. State *ex rel.* Road Comm'n v. Ouzounian, 26 Utah 2d 442, 445, 491 P.2d 1093, 1095 (1971); Ogden L. & I. Ry. v. Jones, 51 Utah 62, 67-68, 168 P. 548, 550-51 (1917); Hempstead v. Salt Lake City, 32 Utah 261, 273, 90 P. 397, 401 (1907).

316. Salt Lake County v. Kazura, 22 Utah 2d 313, 315-16, 452 P.2d 869, 870-71 (1969); State *ex rel.* Road Comm'n v. Bingham Gas & Oil Co., 21 Utah 2d 66, 440 P.2d 260 (1956).

317. Redevelopment Agency v. Barrutia, 526 P.2d 47, 49 (Utah 1974).

318. State *ex rel.* Road Comm'n v. Ouzounian, 26 Utah 2d 442, 445, 491 P.2d 1093, 1095 (1971).

319. Salt Lake City Corp. v. Utah Wool Pulling Co., 566 P.2d 1240, 1243 (Utah 1977); Sigurd City v. State, 105 Utah 278, 289-90, 142 P.2d 154, 159 (1943).

320. Salt Lake City Corp. v. Utah Wool Pulling Co., 566 P.2d 1240, 1244 (Utah 1977) (disapproving State *ex rel.* Bd. of Higher Educ. v. First Methodist Church of Ashland, 6 Or. App. 492, 488 P.2d 835 (1971)).

321. UTAH CONST. art. I, § 22; *see* Hempstead v. Salt Lake City, 32 Utah 261, 267, 90 P. 397, 399 (1907); Kimball v. Salt Lake City, 32 Utah 253, 260, 90 P. 395, 397 (1907).

322. State *ex rel.* Road Comm'n v. Larkin, 27 Utah 2d 295, 298-99, 495 P.2d 817, 819-20 (1972).

market value standard.[323] The defendant must be paid in money; he should not be required to take a promise about the condemnor's use of his right[324] or to accept alternative facilities.[325] Fair market value is to be measured by considering all uses for which the property is reasonably available, including those involving likely zoning changes.[326] Zoning changes made likely by the project itself, however, may not be considered.[327] Potential uses may be considered, but not highly speculative ones such as subdivision,[328] "plotting value" of the land in combination with other lots,[329] or value of the land used in combination with state lands.[330] The special use value of the land to the condemnor may be taken into account if the land is reasonably adapted to it and the use affects its market value.[331]

Washington is quite liberal in its rules regarding proof of fair market value. Comparable sales data are admissible, as is evidence of the purchase price.[332] If condemned property was within the scope of the project from the time of the government's commitment, its market value must not reflect inclusion in the project.[333] Capitalization of rentals[334] and income[335] are available as alternative evidence. Washington courts attempt to tread a fine line between insisting that evidence of business profits is admissible only to determine available uses on the theory that profits depend on

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323. State v. McDonald, 98 Wash. 2d 521, 656 P.2d 1043, 1047 (1983) (en banc).

324. State *ex rel.* Polson Logging Co. v. Superior Court, 11 Wash. 2d 545, 119 P.2d 694, 706 (1941).

325. State v. McDonald, 98 Wash. 2d 521, 656 P.2d 1043, 1049 (1983) (en banc).

326. State v. Sherrill, 13 Wash. App. 250, 543 P.2d 598, 605 (1975); State v. Motor Freight Terminals, Inc., 57 Wash. 2d 442, 357 P.2d 861, 863 (1960).

327. State v. Kruger, 77 Wash. 2d 105, 459 P.2d 648 (1969).

328. State v. Swarva, 86 Wash. 2d 29, 541 P.2d 982, 984 (1975); City of Medina v. Cook, 69 Wash. 2d 574, 418 P.2d 1020, 1022-23 (1966); *cf.* Chase v. City of Tacoma, 23 Wash. App. 12, 594 P.2d 942, 944-45 (1979) (developed versus undeveloped land).

329. State v. Washington Horse Breeders Ass'n., 64 Wash. 2d 756, 394 P.2d 218, 220 (1964).

330. State v. Corvallis Sand & Gravel Co., 69 Wash. 2d 24, 416 P.2d 675, 678-79 (1966); Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 104 P. 267, 269 (1909).

331. Ham, Yearsley & Ryrie v. Northern Pac. Ry., 107 Wash. 378, 181 P. 898, 901 (1919) (citing Boom Co. v. Patterson, 98 U.S. 403 (1878)).

332. Chase v. City of Tacoma, 23 Wash. App. 12, 594 P.2d 942, 944 (1979).

333. Lange v. State, 86 Wash. 587, 547 P.2d 282, 286 (1976) (en banc) (citing United States v. Miller, 317 U.S. 369 (1942)).

334. State v. Hobart, 5 Wash. App. 469, 487 P.2d 635, 637-38 (1971); Seattle & M.R. Co. v. Roeder, 30 Wash. 244, 70 P. 498, 501 (1902).

335. State v. Obie Outdoor Advertising, Inc., 9 Wash. App. 943, 516 P.2d 233, 236-37 (1973); City of Renton v. Scott Pac. Terminal, Inc., 9 Wash. App. 364, 512 P.2d 1137, 1141 (1973).

managerial ability,[336] and admitting that income from the property may also be largely due to skill.[337] Evidence of the amount and value of mineral resources is admitted as the best measure of the value of mineral lands, although the defendant may not base his estimate of value on a multiplication of units and price.[338] The owner's sentimental attachment to the land and unwillingness to sell are not to be considered;[339] loss of view and similar amenities are relevant only as they affect fair market value.[340] Replacement cost less depreciation may be considered "whenever the structures are well adapted to the land on which they stand,"[341] regardless of whether market data are available.[342] Loss of personalty, however, is not compensable in Washington.[343]

L. Wyoming

Wyoming's scanty eminent domain cases indicate adherence to a relatively traditional fair market value approach. They include a longstanding holding that fair market value is to be determined on the basis of all uses for which land may be adapted, excluding remote and speculative uses.[344] Comparable sales are the best evidence of market value; even data of sales to the condemning authority are admissible, if the sales were voluntary.[345] When there have been no recent sales of similar property, expert testimony may extrapolate fair market value from aggregate values of sales of other neighboring property.[346] Where the plaintiff is denied use of his land, as by flooding, market rental rates may be used as a valid

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336. City of Renton v. Scott Pac. Terminal, Inc., 9 Wash. App. 364, 512 P.2d 1137, 1141 (1973); City of Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 P. 199, 204 (1910).

337. State v. Obie Outdoor Advertising, Inc., 9 Wash. App. 943, 516 P.2d 233, 236-37 (1973); City of Renton v. Scott Pac. Terminal, Inc., 9 Wash. App. 364, 512 P.2d 1137, 1141 (1973).

338. State v. Hobart, 5 Wash. App. 469, 487 P.2d 635, 638 (1971); State v. Rowley, 74 Wash. 2d 328, 444 P.2d 695, 696-97 (1968); State v. Larson, 54 Wash. 2d 86, 338 P.2d 135, 136 (1959); Seattle & M.R. Co. v. Roeder, 30 Wash. 244, 70 P. 498, 504 (1902).

339. Port Townsend Co. v. Barbare, 46 Wash. 275, 89 P. 710, 710-11 (1907).

340. Housing Auth. of Seattle v. Brown, 68 Wash. 2d 485, 413 P.2d 635 (1966) (loss of view).

341. State v. Wilson, 6 Wash. App. 443, 493 P.2d 1252, 1257 (1972).

342. City of Renton v. Scott Pac. Terminal, Inc., 9 Wash. App. 364, 512 P.2d 1137, 1141-42 (1973); State v. Wilson, 6 Wash. App. 443, 493 P.2d 1252, 1257 (1972).

343. *See* State v. Evans, 96 Wash. 2d 119, 634 P.2d 845, 846 (1981), *opinion changed*, 97 Wash. 2d 724, 649 P.2d 633 (1982).

344. Edwards v. City of Cheyenne, 19 Wyo. 110, 114 P. 677, 688 (1911).

345. City of Cheyenne v. Frangos, 487 P.2d 804, 805-06 (Wyo. 1971).

346. State Highway Comm'n v. McNiff, 395 P.2d 29 (Wyo. 1964).

indicator of damages.[347]

Consequential damages directly attributable to a project such as damages from construction, are compensable in Wyoming.[348] Other consequential losses to the owner, however, are not. Business losses are noncompensable.[349] Personal inconvenience, annoyance, fear, and discomfort are not compensable unless they reduce what a buyer would be willing to pay for the property.[350] When new highway construction changes traffic patterns, resulting business losses are noncompensable as long as preexisting access rights are not cut off.[351]

IV. Severance Damages

Condemnations in which the state takes only a portion of the defendant's property often place the most severe strains on the market value model of compensation. The owner may be left with a truncated parcel that does not serve his needs, or any other needs, very well. On the other hand, the owner may continue to hold a piece of land made vastly more valuable by the improvement, such as land adjoining a freeway exit. Three issues in the analysis of partial takings are particularly relevant to the market value issue. First is the problem of deciding when the owner's holdings form part of an integrated whole, so that the condemnation should be treated as a partial taking rather than a taking of one parcel held by an owner of other parcels. Second is the selection of methods for valuing the part taken and damages to be paid for the remainder. Third is whether to allow benefits from the public project for which the property was taken to offset the condemnation award. At each of these points in the analysis, courts in the western states appear to stretch the market value model beyond recognition.

A. Partial Takings

The traditional rule for determining when a piece of land should be viewed as part of a whole for eminent domain purposes

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347. Wheatland Irrigation Dist. v. McGuire, 562 P.2d 287, 300 (Wyo. 1977).

348. Wyoming Highway Dep't v. Napolitano, 578 P.2d 1342, 1346-47 (Wyo. 1978).

349. State Highway Comm'n v. Peters, 416 P.2d 390, 396 (Wyo. 1966); Sheridan Drive-In Theatre, Inc. v. State, 384 P.2d 597, 599 (Wyo. 1963).

350. Coronado Oil Co. v. Grieves, 642 P.2d 423, 438-39 (Wyo. 1982); State Highway Comm'n v. Scrivner, 641 P.2d 735, 738-39 (Wyo. 1982).

351. State Highway Comm'n v. Scrivner, 641 P.2d 735, 738-39 (Wyo. 1982).

is the "larger parcel" test. Under this test, the condemnation is not a partial taking unless the part taken and the part remaining are: 1) contiguous, 2) under the same ownership, and 3) put to the same use.[352] Thus, a defendant who leased tidelands for lumber storage and shipping for its planing mill was denied severance damages for loss of the tidelands because the mill was on the other side of a public highway.[353] The larger parcel test stems from insistence that compensation is due only for "the property" taken by the state; insistence on contiguity, for example, forecloses compensation for extensive economic loss when the property is not a physical unit.

More recently, however, courts have moved away from the larger parcel test, toward treating unity of use as the determinative factor.[354] California employs a functional test: common contractual arrangements are sufficient for unity of ownership[355] and relatively permanent interconnected use may outweigh physical separation.[356] For example, the owners were awarded severance damages for loss of a parcel several blocks away, which they had purchased to meet parking requirements for their medical building.[357] Oregon likewise allows severance damages when the property has been used as a unit or adapted for integral use.[358] This emphasis on unity of use grants compensation to owners based on investment decisions and economic expectations, rather than physical damage to property or outright deprivation of rights. Alaska has gone even

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352. 4 P. NICHOLS, P. ROHAN, J. SACKMAN & D. VAN BRUNT, *supra* note 69, § 14.3; Sinnet, *Offsetting Special Benefits and the Larger Parcel in Eminent Domain*, 1 GONZ. L. REV. 77, 83-84 (1966).

353. City of Oakland v. Pacific Coast Lumber & Mill Co., 151 Cal. 392, 153 P. 705, 707 (1915).

354. *See, e.g.*, State v. McDonald, 98 Wash. 2d 521, 656 P.2d 1043, 1047-48 (1983) (en banc) (where parcels are separated physically, unity of use is an important factor in establishing contiguity for "large parcel" text); State Highway Comm'n v. Renfro, 161 Mont. 251, 505 P.2d 403, 407 (1973) (three noncontiguous ranch parcels cut apart by new highway); State *ex rel.* Symms v. Nelson Sand and Gravel, Inc., 93 Idaho 574, 468 P.2d 306, 311-312 (1970) (unity of title subordinate to unity of use; not necessary that owner have the same type of property interest in entire parcel).

355. People *ex rel.* Dep't of Pub. Works v. Nyrin, 256 Cal. App. 2d 288, 63 Cal. Rptr. 905, 911 (1967).

356. City of Los Angeles v. Wolfe, 6 Cal. 3d 326, 491 P.2d 813, 815-20, 99 Cal. Rptr. 21, 23-28 (1971). The recent California eminent domain statute does not define "larger parcel," apparently to allow further judicial development of this approach. CAL. CIV. PROC. CODE § 1263.410 (Deering 1981) (Law Revision Commission Comment).

357. City of Los Angeles v. Wolfe, 6 Cal. 3d 326, 491 P.2d 813, 815-20, 99 Cal. Rptr. 21, 23-28 (1971).

358. Oregon R. & Nav. Co. v. Taffe, 67 Or. 102, 134 P. 1024, 1028 (1913).

further and rejects the larger parcel test altogether, insisting only that there be sufficient damage to the remainder to warrant compensation, regardless of whether the part taken be physically contiguous or even used for the same purpose as the remainder.[359] Under Alaska's test, any economic damage to remaining holdings resulting from a taking is potentially compensable.

Vestiges of the larger parcel test can be seen in the Utah rule that to recover severance damages, the defendant must show physical injury to the land itself from the improvement, such as blocked light, restricted size or shape, impaired access, smoke or noise.[360] Emphasis on the physical relation between the part taken and the part remaining also can be seen in the rule that severance damages may not be awarded for harms caused by portions of the public improvement not physically located on the parcel taken. The recent California eminent domain statute rejected this rule despite a number of cases going the other way.[361] Of the western states, New Mexico is the only one that apparently still insists on the larger parcel test. Even in New Mexico, however, the owner's other holdings may augment a damage award to the extent that they affect the market value of the parcel taken.[362]

B. Measuring Damages in Partial Takings

The rule for measuring damages in a partial taking is another point at which owners' economic losses seep into compensation awards. There are two major proposals here. The first is the "before and after" rule,[363] that in a partial taking compensation should be the difference between the fair market value of the entire parcel before the taking and the remainder afterwards. This rule most directly tracks the owner's marketable loss,[364] but has been criticized extensively. Under this rule, the owner will receive no compensation if the public improvement increases the market value of the remainder beyond the entire parcel's original value—the situation when freeway construction leaves owners of

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359. Babinec v. State, 512 P.2d 563, 567 (Alaska 1973).

360. *See* State Road Comm'n v. Rohan, 26 Utah 2d 202, 487 P.2d 857 (1971); Southern Pac. Co. v. Arthur, 10 Utah 2d 306, 311, 352 P.2d 693, 696-97 (1960); State v. Ward, 112 Utah 452, 459, 189 P.2d 113, 117 (1948).

361. CAL. CIV. PROC. CODE § 1263.420(b) (Deering 1981) (Law Revision Commission Comment).

362. State *ex rel.* State Highway Comm'n v. Gray, 81 N.M. 399, 467 P.2d 725, 729 (1970).

363. 1 L. ORGEL, *supra* note 69, § 64.

364. *Id.*

unimproved ranchland with hundreds of feet of off-ramp frontage. Despite the fact that they have lost land, condemnees will be treated no differently than their neighbors, who have lost nothing and gained similarly. Critics of the rule thus argue that it allows the state to take rights for nothing.[365] Their contention is irrefutable on the assumption that compensation must be in money. But the owner does receive something in return for the condemnation: the public improvement, which by assumption benefits him in a case in which the before and after rule yields no compensation. It is simply that his benefit is shared with others, who have not paid for it in the same way.

The second proposal for measuring damages in a partial taking is the value plus damages approach.[366] The value of the land taken is calculated and decline in the market value of the remainder is then added onto the compensation award as "severance damages." There is always a sense in which severance damage awards overcompensate the owner: the damages are not paid for rights actually taken. In this sense, the recipient of severance damages is treated differently than his neighbor, who may have lost as much or more from the public improvement but has not had the good fortune to have had rights actually condemned. The standard justification for this difference is that rights of the owner *were* appropriated, but compensation for these losses already has been awarded. In perhaps the height of generosity, however, the Uniform Eminent Domain Code recommends that compensation be the *larger* of the before and after differential or the value plus damages measure.[367]

Some version of the value plus damages approach is the law in all of the western states, except possibly New Mexico,[368] which has

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365. *See, e.g.*, Denyer-Green, *Agricultural Compensation: The Injustice of Market Value in Severance Cases*, 1980 J. PLANNING & ENVTL. L. 505, 506 (measure of compensation in partial takings cases should be price owner would pay for the portion taken).

366. 1 L. ORGEL, *supra* note 69, § 64.

367. UNIFORM EMINENT DOMAIN CODE § 1002(b), 13 U.L.A. 99-100 (1980).

368. ALASKA STAT. § 9.55.310(a)(2)-.310(a)(3) (1983); ARIZ. REV. STAT. ANN. § 12-1122(A)(2) to -1122(A)(3) (1982); CAL. CIV. PROC. CODE § 1263.410(a) (Deering 1981); COLO. REV. STAT. § 38-1-114 (1973); IDAHO CODE § 7-711 (Supp. 1984); NEV. REV. STAT. § 37.110 (1979); N.M. STAT. ANN. § 42A-1-26 (1981); UTAH CODE ANN. § 78-34-10 (1953); WASH. REV. CODE ANN. § 8.04.080 (1961); WYO. STAT. § 1-26-203 (1977); *see* State *ex rel.* Dep't of Highways v. Lahman, 172 Mont. 480, 565 P.2d 303, 306 (1977); State *ex rel.* State Highway Comm'n v. Hooper, 259 Or. 555, 488 P.2d 421, 423-24 (1971). A recent Washington case, however, erroneously equated value plus damages with the before and after rule. *See* State v. McDonald, 98 Wash. 2d 521, 656 P.2d 1043, 1047 (1983) (en banc). Washington also is the only state in the west that allows benefits resulting from the project to be offset against the

expressed adherence to the before and after rule, albeit somewhat modified since "early territorial days."[369] The extent to which the value plus damages rule actually does inflate compensation awards depends in part on how each portion of the award is calculated. Consider first the award for the parcel actually taken. Partial takings cases frequently involve segments of land that would not be sold separately, such as strips of frontage. Some courts attempt when possible to arrive at a separate assessment of the market value of the condemned portion;[370] others require computing the value of the entire parcel and compensating on a proportional basis for the part taken;[371] still others will award the owner the greater of these two measures.[372] Compensation on a proportional basis gives the owner a windfall when the parcel taken is the least valuable segment of his land. Compensation on separate valuation is most likely to give the owner a windfall when he gets top value for the parcel taken (say, frontage) and then is left with a parcel of newly augmented value (say, new frontage on a better road).[373] Recognition of this possibility has led Oregon sensibly to refuse to consider frontage value of the land taken when the defendant receives new frontage.[374]

Decline in the fair market value of the remainder then is added onto the award for the parcel taken. Theoretically, these severance damages should not encompass losses already calculated into the market value of the land already taken, or otherwise noncompensable losses such as loss of profits. In a number of severance damage cases, however, loss to the remainder has included business losses.[375]

If severance damages compensate the owner for injury to land,

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damage award for the part taken. *See infra* notes 391-92 and accompanying text.

369. City of Tucumcari v. Magnolia Petroleum Co., 57 N.M. 392, 259 P.2d 351, 355 (1953). The measure of damages in a 1978 amendment, however, obviates advantages of the before and after rule. *See* N.M. STAT. ANN. § 42A-1-26 (1981).

370. *See, e.g.*, City of Scottsdale v. Church of Holy Cross Lutheran, 132 Ariz. 416, 646 P.2d 301, 306 (1982); People *ex rel.* Dep't of Pub. Works v. Corporation of Pres. of Church of Jesus Christ of Latter-Day Saints, 13 Cal. App. 3d 371, 91 Cal. Rptr. 532, 537 (1970); People *ex rel.* Dep't of Pub. Works v. Silviera, 236 Cal. App. 2d 604, 46 Cal. Rptr. 260, 269-70 (1965); City of Orofino v. Swayne, 95 Idaho 125, 504 P.2d 398, 401-02 (1972).

371. *See, e.g.*, Montana Power Co. v. Wolfe, 169 Mont. 234, 545 P.2d 674, 677 (1976).

372. *See, e.g.*, Babinec v. State, 512 P.2d 563, 568-69 (Alaska 1973).

373. *See* 1 L. ORGEL, *supra* note 69, § 64.

374. State *ex rel.* State Highway Comm'n v. Freeman, 11 Or. App. 513, 504 P.2d 133, 136 (1972); State *ex rel.* State Highway Comm'n v. Hooper, 259 Or. 555, 488 P.2d 421, 427-28 (1971).

375. *See, e.g.*, State *ex rel.* Dep't of Highways v. Howery, 664 P.2d 1387, 1390-91 (Mont. 1983).

not for rights taken outright, the appropriate analogy might be to nuisance, rather than to forced sale. Several western states have adopted methods of limiting severance damages along lines suggested by the nuisance analogy. For example, a significant group of Arizona cases treats cost to cure as the measure of severance damages.[376] When an Arizona condemnee's building is damaged, he receives the cost of restoring it to its predamaged condition;[377] when his access is destroyed by a ditch, he will recover the cost of a bridge;[378] and when parking in front of his commercial building is taken, he will recover the cost of a driveway to the back.[379]

California likewise holds that cost to cure may be the appropriate measure of severance damages.[380] In addition, California has suggested that there is a duty to mitigate[381] and that in determining the decline in fair market value for severance damages, the trier of fact may take into account available mitigation opportunities such as the purchase of substitute land.[382] California also will compensate owners for good faith efforts to mitigate severance damages. For example, owners who attempted to discover the cause of a landslide triggered by state road construction were compensated for their efforts.[383] Expenses are compensable only if they are incurred in the effort to avoid compensable losses, however; attempts to limit business losses, for example, are non-compensable.[384]

Several western states, however, emphatically reject linking severance damages to ameliorative efforts. Idaho will not require

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376. If nuisance is the appropriate analogy to severance damages, this approach to compensation is not in conflict with Justice Brennan's insistence in *San Diego Gas* that every taking requires compensation. *See supra* notes 60-62 and accompanying text. On the issue of regulatory takings, however, Arizona also has held in an inverse condemnation suit that there is no taking where an injury to property is capable of reasonable rectification. The measure of damages is the restoration cost. City of Tucson v. Transamerica Title Ins. Co.., 26 Ariz. App. 42, 545 P.2d 1004, 1006 (1976).

377. Mosher v. City of Phoenix, 39 Ariz. 470, 7 P.2d 622, 627 (1932).

378. Pima County v. DeConcini, 79 Ariz. 154, 285 P.2d 609, 611 (1955).

379. Haney v. City of Tucson, 13 Ariz. App. 296, 475 P.2d 955 (1970).

380. CAL. CIV. PROC. CODE § 1263.420 (Deering 1981) (Law Revision Commission Comment).

381. Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 141, 42 Cal. Rptr. 89, 101 (1965) (en banc) (dicta).

382. City of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384, 420-22, 82 Cal. Rptr. 1, 25-26 (1969).

383. Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 141, 42 Cal. Rptr. 89, 101 (1965) (en banc).

384. Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc., 77 Cal. App. 3d 742, 764-65, 143 Cal. Rptr. 803, 815-16 (1978).

the defendant to look for or accept substitute facilities in lieu of severance damages.[385] Oregon admits costs of adjustment to make the severed property usable—e.g., the cost of a new cattle fence for a ranch—only as they bear on the market value of the remainder.[386] Colorado holds that there is no duty to mitigate damages and that the state may not claim the benefit of the defendant's mitigation efforts. For example, when the state condemned part of a truck terminal, the defendant recovered $165,000 severance damages because the remaining property no longer was usable as a terminal. Ten days later, the defendant bought substitute property for $260,000; it sold part of the property for $105,000 and used the remainder to reconstruct the terminal. Nonetheless, the court refused to allow the purchase to bear on severance damage recovery.[387]

Utah holds an interesting intermediate position here. In Utah, when improvements must be moved because they lie in the path of a state right of way, the state is entitled to show restoration costs. The theory is that restoration costs would be taken into account by a willing buyer and if they are less than the decline in market value, the state will have to pay a smaller claim.[388] For quite some time, Utah courts also held that the owner has a duty to mitigate severance damages by seeking available alternatives, such as replacement pasture.[389] Utah recently has overruled that view, however, and now holds that there is no duty to mitigate severance damages.[390]

C. Setoffs

A final issue through which recovery in partial takings cases

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385. State *ex rel.* Rich v. Dunclick, 77 Idaho 45, 286 P.2d 1112, 1115-16 (1955) (availability of new warehouse site not sufficient to require modification of compensation award).

386. *In re* Lebanon-Shea Hill Section, 135 Or. 430, 296 P. 65, 67 (1935). When a freeway severs agricultural land, Oregon does allow the state to provide a crossing in lieu of severance damages. OR. REV. STAT. § 374.085 (1983).

387. Department of Highways v. Intermountain Terminal Co., 164 Colo. 354, 435 P.2d 391, 392-93 (1968) (en banc); *see also* Western Slope Gas Co. v. Lake Eldora Corp., 32 Colo. App. 293, 512 P.2d 641, 643 (1973) (measure of damages to residue is diminution in fair market value, not cost of restoring land burdened by easement to its original condition).

388. State *ex rel.* Road Comm'n v. Fox, 30 Utah 2d 194, 195-96, 515 P.2d 450, 451-52 (1973).

389. State v. Cooperative Sec. Corp. of the Church of Jesus Christ of Latter-Day Saints, 122 Utah 134, 140, 247 P.2d 269, 272 (1952); Provo River Water Users Ass'n v. Carlson, 103 Utah 93, 103, 133 P.2d 777, 781 (1943).

390. Utah Dep't of Transp. v. Rayco Corp., 599 P.2d 481, 490 (Utah 1979); State *ex rel.* Road Comm'n v. Howes, 20 Utah 2d 246, 436 P.2d 803 (1968).

can be adjusted to reflect actual losses more accurately is the availability of setoffs to recovery. In only one western state, however—Washington—are benefits to be set off against the portion of the compensation award earmarked for the land actually taken.[391] Thus, in all of the other western states, the defendant may be compensated for his appropriated rights, and receive as well major benefits for his remaining land, simply by disclaiming any effort to recoup severance damages.[392]

Moreover, most western states severely restrict the benefits that may be offset against compensation awards. Lines are difficult to draw here, but the typical effort is to distinguish benefits that are peculiar to the land in question from benefits that are more generally shared. Montana's rule that only benefits entirely limited to the property in question are to be set off appears to be the most favorable to the landowner. In one Montana case,[393] even a depot, stockyards, grain elevator and side tracks built on taken land were not set off because they benefitted the adjoining neighborhood. Otherwise, Montana argues, the condemnee would be forced to accept in kind benefits instead of the money equivalent of market value.[394] Several other states approach Montana in their insistence that only benefits "unique" or "special" to the land in question be set off.[395]

California's treatment of the general/special distinction is confused, to say the least. California's statute was drafted to allow judge-made law to continue to develop in this area.[396] In the case law, special benefits are defined as those that "result from the mere construction of the improvement, and are peculiar to the land in question."[397] Direct connection was thought necessary to avoid setting off speculative benefits; uniqueness was thought important to avoid imposing on the defendant whose land happens to

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391. WASH. REV. CODE ANN. § 8.04.080 (1961).

392. *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Silviera, 236 Cal. App. 3d 604, 46 Cal. Rptr. 260, 271 (1965); City of Orofino v. Swayne, 95 Idaho 125, 504 P.2d 398, 401-02 (1972).

393. Gallatin Valley Elec. Ry. v. Neible, 57 Mont. 27, 186 P. 689 (1919).

394. 186 P. at 690-93.

395. *See, e.g.*, City of Lakewood v. DeRoos, 631 P.2d 1140, 1142-43 (Colo. Ct. App. 1981); State *ex rel.* Rich v. Fonburg, 80 Idaho 269, 328 P.2d 60, 65 (1958) (abutting highway not special benefit); Salt Lake & U.R. Co. v. Butterfield, 46 Utah 431, 433, 150 P. 931, 932 (1915).

396. CAL. CIV. PROC. CODE § 1263.430 (Deering 1981) (Law Revision Commission Comment).

397. Beveridge v. Lewis, 137 Cal. 619, 70 P. 1083, 1085-86 (1902); *see also* Los Angeles County v. Marblehead Land Co., 95 Cal. App. 602, 273 P. 131, 137 (1928).

have been taken at a cost (reduced recovery) not borne by others who can sell their property on the open market.[398] The standard has caused difficulty, however, because uniqueness and direct connection to the improvement do not always coincide; for example, all property owners abutting an improved street share a direct benefit. California has allowed benefits to be set off when increased traffic flow made possible by a street improvement enhanced frontage value,[399] where freeway construction enhanced visibility and access,[400] and where a water improvement project decreased flooding on the defendant's land.[401] California also has refused to offset benefits resulting from a nearby freeway off-ramp,[402] changes in course of a highway,[403] drainage through the owner's land[404] or increased demand for the defendant's product caused by the improvement.[405]

Other states in the west are more willing to allow benefits to be set off against severance damages. In Arizona, Nevada and Wyoming, benefits can be offset if they make the property suitable for better uses.[406] In keeping with its view that compensation awards extend to incidental damages, Alaska insists on a setoff for incidental benefits as well.[407] Oregon has construed the category of special benefits to include any addition to convenience brought about by the improvement, whether shared by others or not, but this construction occurred in a case involving direct freeway access for the land in question so perhaps is not generalizable.[408] And,

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398. Los Angeles County v. Marblehead Land Co., 95 Cal. App. 602, 273 P. 131, 137 (1928).

399. City of Hayward v. Unger, 194 Cal. App. 2d 516, 15 Cal. Rptr. 301 (1961).

400. People *ex rel.* Dep't of Pub. Works v. Giumarra Farms, Inc., 22 Cal. App. 3d 98, 99 Cal. Rptr. 272, 275-76 (1972); People *ex rel.* Dep't of Pub. Works v. Home Trust Inv. Co., 8 Cal. App. 3d 1022, 87 Cal. Rptr. 722, 725 (1970); People *ex rel.* Dep't of Pub. Works v. Edgar, 219 Cal. App. 2d 381, 32 Cal. Rptr. 892, 894 (1963).

401. Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co., 268 Cal. App. 2d 199, 73 Cal. Rptr. 733, 736 (1968).

402. Pierpont Inn, Inc. v. State, 70 Cal. 2d 282, 449 P.2d 737, 746, 74 Cal. Rptr. 521, 530 (1969).

403. People v. McReynolds, 31 Cal. App. 2d 219, 87 P.2d 734, 736-37 (1939).

404. Podesta v. Linden Irrigation Dist., 141 Cal. App. 2d 38, 296 P.2d 401, 411 (1956).

405. People *ex rel.* Dep't of Pub. Works v. Simon Newman Co., 37 Cal. App. 3d 398, 112 Cal. Rptr. 298, 305 (1974) (gravel).

406. Defnet Land & Inv. Co. v. State *ex rel.* Herman, 14 Ariz. App. 96, 480 P.2d 1013, 1015 (1971); State Highway Comm'n v. Rollins, 471 P.2d 324, 331 (Wyo. 1970); State *ex rel.* Dep't of Highways v. Haapanen, 84 Nev. 722, 448 P.2d 703, 705 (1968).

407. State v. Hammer, 550 P.2d 820, 828 (Alaska 1976).

408. State *ex rel.* State Highway Comm'n v. Bailey, 212 Or. 261, 319 P.2d 906, 920 (1957).

finally, New Mexico explicitly allows both general and special benefits to be offset against compensation awards.[409]

V. Conclusion

Thus, it is apparent that courts in the western states have departed from the market value model of compensation in a number of ways. Sometimes these departures amount to settled state common law doctrine. Sometimes they occur on a case-by-case basis, as apparent adjustments to the inequity of traditional compensation doctrine. These case-by-case adjustments seem especially likely when evidentiary rules allow juries to hear a wide range of estimates of the property's value: from sales in the local real estate market, to the speculative market for known mineral reserves, to the costs of replacing a building adapted to the owner's special needs. If fairness in the sense that individuals should not bear a disproportionate share of the burden of a public improvement is an important policy consideration, however, it is desirable for some of these departures to be regularized by statute.

One approach to reform that has been suggested recently is to realign compensation practices to further a single important goal, such as economic efficiency. There are a number of reasons why current compensation practices are inefficient in the sense that they encourage allocations of resources that fall short of optimality. For example, pegging compensation at current market rates disregards benefits that cannot be marketed commercially and thus ignores an incentive that could keep government from taking over highly valued special use property.[410] Similarly, it ignores the relocation costs associated with a taking. Market rate compensation may also encourage owners to overinvest in land at risk of being taken, if they are assured they will receive the full value of their investment when the taking comes to pass.[411] Thus, it has been suggested that a measure of compensation which more accurately reflects the full social costs of a taking would be what the owner would be willing to pay to avoid the taking.[412]

Even if the serious difficulties with regard to willingness to

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409. Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682, 685 (1953).

410. *See* Blume & Rubinfeld, *supra* note 79, at 619.

411. *Id.* at 618. However, to the extent that those investments are not incorporated in a market value model that relies on comparable sales data, and to the extent that compensation practices ignore factors such as replacement costs or relocation expenses, the owner's overinvestment will not be protected.

412. *Id.* at 620.

pay as an approximation of value are left to one side,[413] full scale reform of eminent domain practices to promote efficiency would alter the values that shape our current compensation practice in undesirable ways. In particular, it would place on the same footing all reasons owners might have for being willing to pay a great deal to avoid a taking: from speculation on the market to longstanding special use to sentimental attachment. Owners who have made similar investments in property but who have very different subjective desires to keep the property will be treated very differently, even when their subjective desires are not reflected in actual improvements to the property. The public will be placed in the position of having to pay individuals for their attachments to land with resulting increases in the costs of public improvements.

Compensation also could be realigned to pay the owner a reasonable return on his original investment in the property. "Reasonable return" might be measured by the rate of return allowed investors in public utilities over the appropriate time period since the date of original purchase. Theoretically, this would treat investment in property as analogous to other forms of investment in public goods, an approach that is congenial with analogizing property ownership to a trust relationship. But this approach ignores another important characteristic of property investment: property need not be left dormant and the owner may have been receiving a return on his investment all along.

An alternative measure of reasonable return is to give the owner his original investment, augmented by average increases in land values in the surrounding area. This approach reflects the fact that people invest in property both to earn a present return and to take advantage of its growth potential. But like other efforts to give the individual a reasonable return on investment, it fails to reward speculative investments that would have done better than the reasonable return benchmark. It also will encourage the government to take more property than it needs by taking advantage of situations in which return to the owner would fall below current

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413. Even its proponents admit that willingness to pay is administratively difficult to measure. *Id.* But the difficulties are deeper. In eminent domain compensation, where the individual has a unique resource needed by the government—in effect, a monopoly—he will have the incentive to overrepresent what he is willing to pay to avoid the taking. Moreover, willingness to pay may be as much a reflection of ability to pay as it is of the social costs of the taking. *See, e.g.*, Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFFAIRS 3 (1975); Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

market values. Conversely, the approach protects owners who have made poor investments by assuring them at least a reasonable return. Compensation policy would then place on the public the burden of protecting the owner who has not invested well.

Perhaps we would do better simply to recognize that eminent domain compensation serves a number of different values: the need of the public to acquire property, the concern that the government not take more than it needs, the protection of investment decisions, and the equitable sharing among individuals of the costs of improvements that benefit us all. A reexamination of some of the ways in which the case law has bent the notion of "market value" can suggest some relatively minimal statutory reforms that further one or several of these goals without jeopardizing the others.

First, speculative gain could be limited by restricting the notion of highest and best use to exclude uses requiring legal changes such as changes in zoning regulations. Property owners do not have the right to expect that even reasonably likely zoning changes will actually come to pass. Speculative gain also could be curtailed by refusing to consider uses of the property in combination with other parcels (not themselves part of the parcel being taken) or use of the property on a subdivided unit basis. Speculation on "project enhancement value"—i.e., increases in value owing to the proposed project for which the land is taken—also could be factored out of compensation awards.[414] On the other side, owners could be protected against decreases in property values that reflect the proposed project, to the extent that these decreases are not avoidable by the owner's own management of the property.

A separate set of reforms could treat comparable sales data and the evidence available as alternatives to it. Sales data are at least objective indicators of the property market in the area. The alternatives that utilize yield from the property—capitalization of rents or potential rents, capitalization of income (particularly when the property is farmed) and capitalization of profits—all to one extent or another reflect the skills of the present owner. On the one hand, it could be argued that the owner will lose disproportionately if he is not allowed to bring into evidence all of these factors, and that he should not incur these losses in an involuntary trans-

414. *See, e.g.*, UNIFORM EMINENT DOMAIN CODE § 1005(a), 13 U.L.A. 105 (1980). Perhaps because there is little demand for common compensation practices among states, the Uniform Code has not been enacted by any state in the ten years since its approval by the National Conference of Commissioners on Uniform State Laws. *See* UNIFORM STATE LAWS, 13 U.L.A. 1 (1980 & Supp. 1984).

fer. On the other hand, these are not losses that he would be able to recoup in a voluntary transfer. The compromise in some states—that these measures may be introduced into evidence when comparable sales data are unavailable—is convenient but treats owners differently depending on a happenstance entirely unrelated to the taken property. But when there have been no recent local sales—a relatively common situation in sparsely settled areas of the west—some alternative to comparable sales data must be utilized. Any practice here will be an adjustment among competing values. The solution that treats owners most equitably, while not imposing costs on the state beyond the land itself, is to allow into evidence capitalizations of rentals and income dependent on the land, whether or not comparable sales data also are available, but not to allow capitalizations of either profit or income from a business merely located on the land.

Replacement costs are the other traditional alternative to market value. They are likely to be reflective of the owner's earlier treatment of the property and thus would involve the state in paying the owner even for investments in developing the property that turned out to have been economically unwise, given the local property market. Replacement costs, therefore, should not be available generally as an alternative measure to comparable sales data. It does not follow, however, that special use property should be ignored entirely. In situations in which the property has not been a source of private financial gain but has been used for purposes such as a school, library, or church, the state might decide to bear the extra burden of replacement costs. This would be a decision to protect certain socially valuable uses of property against the costs imposed by a government taking, not a decision to pay the owner the market value of his land.

Business and personal losses also are an area in which current compensation practices warrant rethinking. The federal relocation assistance program,[415] which insulates both businesses and individuals against the worst effects of dislocation, is a good starting point. The program mandates payment of actual reasonable moving expenses, or if lower, actual direct personal property losses from discontinuing a business. Displaced persons under the act also may receive reasonable expenses in searching for a replace-

415. PUB. L. No. 91-646, 84 Stat. 1895 (1971); *see* Norfolk Redev. Hous. Auth. v. Chesapeake & Potomac Telephone Co., 104 S.Ct. 304 (1983).

ment business or farm.[416] Homeowners may receive reasonable costs of a replacement dwelling and compensation for increased financing costs;[417] tenants can get a four-year cushion against increased rents caused by the need to relocate.[418] The program is a reasonable accommodation between recreating the landowner's pretaking economic situation, at least for a while, and imposing on the state the costs of buying out the landowner's entire investment. Yet it has not been fully adopted in the western states.[419] Compensating owners for loss of good will, to the extent it cannot be prevented reasonably by relocation or good management, will further insulate the involuntary loser of property against what may be very heavy costs. Compensating for lost good will, however, represents a public decision to protect businesses against a particular type of change—that imposed by the public need for land—when businesses are not protected against many other types of change.

Finally, severance damages are particularly in need of reform. The general refusal to adopt the before and after rule and the unwillingness to set benefits off against the award for the part taken are part of the view that the owner must be paid money compensation for any land actually taken. Although these rules sometimes result in large economic gains for owners whose land over all is more valuable after the taking than before, at least they can be given a traditional property rights defense. The failure to analogize damages to the remainder to nuisance cannot be given this defense. The remaining land is not taken, although it, or more likely the owner's activities on it, may be injured economically. Tort doctrines, such as the duty to mitigate, should be applied to awards for damages to the remainder.

Eminent domain compensation illustrates the persistence of

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416. 42 U.S.C. § 4622(a)(1)-(3) (1982).

417. *Id.* § 4623.

418. *Id.* § 4624.

419. Alaska, Colorado, Montana and Nevada have adopted the program for federal projects only. ALASKA STAT. § 34.60.010 (1975); COLO. REV. STAT. § 24-56-103(2) (1973); MONT. CODE ANN. § 70-31-102(4) (1983); NEV. REV. STAT. § 408.443 (1979). Arizona, Idaho, New Mexico and Utah permit some additional compensation for state condemnation projects. ARIZ. REV. STAT. ANN. §§ 11-961 to -974 (1977); IDAHO CODE §§ 40-2901 to -2913 (1977); N.M. STAT. ANN. §§ 42-3-1 to -15 (1978) (as long as federal funding continues to be available); UTAH CODE ANN. §§ 57-12-1 to -13 (1953) (direct financial assistance including recording fees, property taxes, mortgage prepayment penalties and compensation for improvements at market value). California, Oregon, Washington and Wyoming mandate the federal standards for all public works projects. CAL. GOV'T CODE §§ 7260 to 7276 (Deering 1982); OR. REV. STAT. § 281.060 (1983); WASH. REV. CODE ANN. § 8.26.040 (Supp. 1983-84); WYO. STAT. ANN. §§ 16-7-101 to -121 (1977).

common law accommodation of competing values. Leaving such choices to the common law, however, can mask real inequities.