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John F. Sullivan

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COMMENTS

THE MONTANA LAW OF VALUATION IN EMINENT DOMAIN

John F. Sullivan

During the last decade, and primarily because of the interstate highway program, the amount of litigation concerning valuation in eminent domain has increased tremendously in Montana. Though Montana's law of valuation is still in the formative stage, there is a sizeable body of case law in need of classification, explanation, and critique.

The purpose of this comment on the Montana law of valuation in eminent domain is to present the practicing attorney with a comprehensive survey of what that law is, and, concerning the income method of valuation and opinion testimony of value, to critique decisions of the Montana court and offer suggestions for reform. This comment is limited almost exclusively to Montana law. Also, only the valuation of real property taken or damaged in condemnation will be considered. Generally, the following four topics will be considered: what the standard of valuation is; how this standard is applied to property taken or damaged in condemnation; permissible evidence of value; and who has the burden of proof.

THE STANDARD OF VALUATION IN EMINENT DOMAIN

EMINENT DOMAIN AND JUST COMPENSATION

REVISED CODES OF MONTANA, § 93-9901 (1947) [hereinafter cited as R.C.M. 1947] defines eminent domain as "the right¹ of the state to take private property² for public use." The right of eminent domain is inherent in the sovereign state. It does not depend for its existence on any constitutional or statutory grant.³ The right is, however, subject to an important constitutional restriction, one which is the subject of this comment.

Montana's Constitution provides that: "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner."⁴ This constitutional restriction on

¹Eminent domain is, in the author's opinion, more accurately described as a power rather than a right. See, EMINENT DOMAIN, *A Research Report Prepared by the University of Montana School of Law for the Montana State Highway Commission*, 32-33 (1967). However, the term "right" will be used in the text of this comment for the sake of consistency.

²The statute is erroneous, for in some cases public property may also be taken for a public use. See, EMINENT DOMAIN, *A Research Report Prepared by the University of Montana School of Law for the Montana State Highway Commission*, 33-34 (1967).

³State v. Aitchison, 96 Mont. 335, 341, 30 P.2d 805 (1934).

⁴MONT. CONST. art. III, § 14. Montana's new constitution, in article II, § 29, provides that: "Private property shall not be taken or damaged for public use without just

the right of eminent domain is simply a condition precedent of the payment of just compensation to the owner for that which is to be taken or damaged by the condemnor.

Just compensation, as the name implies, is an equitable standard, measured by the traditionally flexible principles of equity. Accordingly, "Its measure varies with the facts,"⁵ and "no one formula or method of measurement universally applies to all cases."⁶ Just compensation is a relative measure.

Though ultimately a question of the unique facts of each case, a formula has been developed by which courts and juries may, with some theoretical degree of accuracy and consistency, give concrete meaning to the amorphous standard of just compensation. While courts must not, as a matter of constitutional law, adhere inflexibly to a general formula for the assessment of just compensation, a general formula has evolved.

Market Value—The Usual Standard

There are three standards by which just compensation could be measured. These are: value to the taker, value to the owner, and market value. Of these, market value is the usual standard for measuring just compensation. Value to the owner and value to the taker are probably rejected as standards since they are subjective and would result in awards of compensation that would economically prohibit public improvements.⁷

Montana uses the usual market value standard. R.C.M. 1947, § 93-9913, which is a statutory implementation of the constitutional requirement of just compensation,⁸ provides that: "For the purpose of

compensation to the full extent of the loss having been first made to or paid into court for the owner." So far as the standard of compensation is concerned the new provision is identical to that in the present constitution, except for the addition of the phrase "to the full extent of the loss." The only official comment of the Constitutional Convention on the meaning of this added phrase is to the effect that it was not intended to make any substantive change in the valuation standard. The phrase was inserted to simply remind the Montana court to continue to recognize that the landowner's compensation should be just. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, pp. 5636-5637 (1972).

⁵Alexander v. State Highway Comm'n, 147 Mont. 367, 372, 411 P.2d 414 (1966).

⁶State Highway Comm'n v. Tubbs, 147 Mont. 296, 301, 411 P.2d 739 (1966).

⁷There are, however, some cases in which value to the owner or value to the taker may properly be considered in arriving at just compensation. For example, where property is presently adaptable to the public use for which it is being taken or damaged, and this adaptability contributes to the property's market value, the value of the property to the taker should be considered. Here there is no real deviation from the usual market value standard since in such a case value to the taker constitutes an element of the property's market value. Likewise, where property is of a kind which has no readily ascertainable market value (churches, hospitals, and the like, which are rarely sold), the value of the property to the owner should be given consideration as a means by which the usual standard, market value, may be ascertained. 4 NICHOLS, EMINENT DOMAIN, § 12.1 [5] (3d ed. 1971); State Highway Comm'n v. Tubbs, *supra* note 6 at 303.

⁸State Highway Comm'n v. Vaughan, 155 Mont. 277, 281, 470 P.2d 967 (1970).

assessing compensation . . . its *actual value* . . . shall be the measure of compensation for all property to be actually taken, and the basis of depreciation in value of property not actually taken, but injuriously affected." (Emphasis supplied.) The "actual value" mentioned in this statute usually means "market value."⁹

Market value is "the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy."¹⁰ Therefore, in ascertaining the amount which the owner is entitled to receive, "the court is bound to take into consideration every element of value which would be taken into consideration if the plaintiff were negotiating a sale with the defendants as a willing purchaser and the defendants were willing sellers."¹¹

THE TIME OF VALUATION

Since the market value of property fluctuates, a time must be set at which the market value of the property is to be determined. All jurisdictions agree that the time of valuation is when the property is taken or damaged, "but there is a great diversity of opinion as to just when that point in time occurs."¹² In Montana, property is by statute deemed to have been taken or damaged at the date of the service of summons in the condemnation action.¹³

An important corollary to the "date of service" rule is the general rule that only evidence of things which affect the market value of the property prior to the date of service is relevant to prove the amount of just compensation to the owner. There are, however, two important exceptions to this rule. The first exception concerns the case of the after-discovered gold mine, the situation where a condition which would affect the value of the property existed at the time of service, but was not discovered until later. As yet the Montana supreme court has not had an opportunity to recognize this exception.¹⁴

⁹*Id.* at 282; State Highway Comm'n v. Jacobs, 150 Mont. 322, 326, 435 P.2d 274 (1967); State Highway Comm'n v. Tubbs, *supra* note 6 at 301; State Highway Comm'n v. Woodcock, 147 Mont. 291, 294, 411 P.2d 357 (1966); State Highway Comm'n v. Peterson, 134 Mont. 52, 70, 328 P.2d 617 (1958); State v. Lee, 103 Mont. 482, 485, 63 P.2d 135 (1936); State v. Hoblitt, 87 Mont. 403, 413, 288 P. 181 (1930).

¹⁰State Highway Comm'n v. Jacobs, *supra* note 9 at 326; State Highway Comm'n v. Woodcock, *supra* note 9 at 294; State Highway Comm'n v. Tubbs, *supra* note 6 at 301; State Highway Comm'n v. Milanovich, 142 Mont. 410, 419, 384 P.2d 752 (1963); State Highway Comm'n v. Peterson, *supra* note 9 at 70; State v. Lee, *supra* note 9 at 485; and State v. Hoblitt, *supra* note 9 at 413.

¹¹Yellowstone Park R.R. Co. v. Bridger Coal Co., 34 Mont. 545, 556, 87 P. 963 (1906).

¹²4 NICHOLS, EMINENT DOMAIN, § 12.23 (3d ed. 1971).

¹³R.C.M. 1947, § 93-9913.

¹⁴If and when the court has cause to recognize this exception, it should do so. There are two reasons for this: (1) jurisdictions which have considered this exception recognize it; and (2) logic and equity support recognition of the exception. The argument from logic may have particular significance in Montana, since this is a jurisdiction which measures just compensation by a statutory actual value standard. In 4 NICHOLS, EMINENT DOMAIN, § 12.231 (3d ed. 1971) the argument from logic is set forth as follows:

In jurisdictions where "actual value" is the object sought, it has been held that such knowledge may be considered. The thing to be ascer-

The second exception concerns the case where significant events which occur because of the taking or damaging are not anticipated at the date of service. The issue here is whether evidence of actual results of a taking or damaging are admissible, when the results occurred after the date of service. In *State Highway Comm'n v. Biastoch Meats, Inc.*,¹⁵ the landowner was allowed to introduce evidence that a partial taking of his land for construction of an interstate highway had eliminated an old water channel and diked up a new channel. The net result, in the owner's opinion, was that his land had been converted into a flood basin. The usual "date of service" rule was noted, but it was nevertheless held that actual results of a taking or damaging, even though subsequent to the date of service, are proper. The court quoted *Nichols* with approval:

[I]t was formerly considered that the jury was bound to shut its eyes to everything which had actually occurred after the taking, and it was held that evidence could be admitted only as to the character of the structure that would probably be erected, its probable effect on the remaining land. . . . The modern and more enlightened rule is that it is competent to show the mode in which the work was actually constructed, the actual effect of its construction and operation upon the remaining land. . . .¹⁶

One can have no quarrel with this rule, since it clearly promotes the ultimate goal of the valuation process, the just and accurate compensation of the landowner for value actually lost. This rule is, however, subject to a qualification stated in *Montana Railroad Co. v. Freeser*.¹⁷ In this case it was said that, though the actual results of a taking or damaging could be shown, "If the improvements are improperly or negligently constructed, no additional damages should be given for this reason."¹⁸ Actual effect evidence may be used only insofar as the improvements have been properly constructed in the manner proposed by the condemner.¹⁹ This qualification made sense in *Freeser*, where the landowner was attempting to recover for prospective damages because of improper construction. The court correctly held that if and

tained, runs the argument, is not market value, but actual value. Market value is taken as the criterion of compensation, based on the proposition that it is the true measure of actual value—the only practical test. But in a case where discoveries made after the date as of which valuation is normally made demonstrate that the actual intrinsic value of the land at that date was greater than its market value, in other words, when it appears that market value is not a criterion of actual value, these discoveries should be taken into consideration.

The more appealing and direct argument from equity is stated as follows in JAHR, *EMINENT DOMAIN*, § 77 (1st ed. 1953):

[T]he valuation of property taken by eminent domain is governed by equitable principles. It would therefore constitute an injustice to the owner to exclude from the consideration by the jury of a material element that enhances the value of the property acquired.

¹⁵*State Highway Comm'n v. Biastoch Meats, Inc.*, 145 Mont. 261, 400 P.2d 274 (1965).

¹⁶*Id.* at 271.

¹⁷*Montana Railroad Co. v. Freeser*, 29 Mont. 210, 74 P. 407 (1903).

¹⁸*Id.* at 214.

¹⁹*Id.*

when damage occurred because of improper construction or maintenance, the owner could maintain a subsequent action.²⁰ However, when the damage from the actual results of construction is presently ascertainable, the *Freaser* rule results in an undesirable multiplicity of actions. In such a case it ought not matter whether the improvements are properly or improperly constructed.

JUST COMPENSATION FOR TAKING OR DAMAGING PRIVATE PROPERTY

JUST COMPENSATION FOR TAKING PRIVATE PROPERTY

For private property taken for a public use the owner must be awarded just compensation.²¹ This means that the owner must be awarded the actual or market value of the property at the time of service of the summons.²² At times it may be a difficult question whether there has been a taking of private property; however, the Montana court has not had to decide this question in any of its potentially numerous fact situations.

JUST COMPENSATION FOR DAMAGING PRIVATE PROPERTY

When private property is damaged for a public use, the Montana constitution requires that the owner receive just compensation.²³ The law of just compensation when private property is damaged is vastly more complex than that which governs a taking. A proper summary of Montana law on the subject requires a consideration of the following topics: damage without a taking, damage to the remainder of that which is taken, how damages are measured, noncompensable damages, and deduction of benefits.

A. *Damage Without A Taking*

Under Montana's constitutional "taken or damaged" provision it is evident that "it is not necessary that there be any physical invasion [or taking] of an individual's property for public use to entitle him to compensation."²⁴ All that is required is that the owner's property be deemed to have suffered "damage."

The obvious problem, therefore, is determining what constitutes compensable damage, damage in the constitutional sense. The problem is not an easy one in terms of either law or fact: like so much of the law of valuation in eminent domain, "damage" is an elastic, relative concept.

²⁰*Id.* at 216.

²¹MONT. CONST. art. III, § 14.

²²R.C.M. 1947, §§ 93-9912 (1) and 93-9913. Also, where land is taken for a railroad, R.C.M. 1947, § 93-9912 (4) provides that the landowner must also be awarded "the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad."

²³MONT. CONST. art. III, § 14.

²⁴*Root v. Butte, Anaconda & Pacific Ry. Co.*, 20 Mont. 354, 358, 51 P. 155 (1897).

It is elementary that damage, to be compensable, must be damage to property. Damage does not include the owner's annoyance or personal inconvenience nor "mere infringement of the owner's personal pleasure or enjoyment."²⁵

In some jurisdictions the rule is that damage includes only those injuries that would have been actionable at common law if inflicted without statutory authority.²⁶ While damage certainly ought to include that for which there was common law liability, compensation should not be limited by common law restrictions, since "many of the injuries from public improvements which cause the greatest hardship to individuals would not be actionable at common law."²⁷ For example, at common law compensation was not required for much of the damage resulting from a change in grade of a street. "It was considered that, public improvements being for the good of the body politic, and always being in contemplation, the individual purchased his . . . property charged with knowledge that changes might be made as required by public necessity and convenience."²⁸ In *Less v. City of Butte*,²⁹ the Montana court properly held that the constitutional provision requiring just compensation for damage "abrogated this harsh rule,"³⁰ and "overturns the doctrine that one owning . . . property must continually live in dread of the changing whims of successive boards of aldermen."³¹ Clearly, the rule in Montana is that damage is not restricted to that which was actionable at common law. Though there are no Montana cases, that which was actionable at common law should be held to be compensable damage.

Beyond common law liability courts have suggested two definitions of compensable damage. First, damage might include any decrease in the market value of property. Such a generous provision for injured Montana landowners has, however, been rejected.³² Our court has said: "[T]he constitution does not authorize a remedy for every diminution in the value of property which is caused by public improvement."³³ The alternative and Montana rule is that, in the absence of common law liability, damages must be "special" in order to be compensable.³⁴

²⁵*Less v. City of Butte*, 28 Mont. 27, 33, 72 P. 140 (1903).

²⁶2A NICHOLS, EMINENT DOMAIN, § 6.441[2] (3d ed. 1970).

²⁷*Id.*

²⁸*Less v. City of Butte*, *supra* note 25 at 31.

²⁹*Less v. City of Butte*, *supra* note 25.

³⁰*Id.* at 31.

³¹*Id.* at 32.

³²*Id.* at 33. While the Montana court has never clearly articulated a reason for rejecting this definition, one gets the feeling, from reading *State ex rel. Johnson v. Board of Commissioners of Deer Lodge County*, 19 Mont. 582, 42 P. 147 (1897), that the court considers such a definition prohibitive of public improvement, too expensive a burden for the condemnor to bear.

³³*Less v. City of Butte*, *supra* note 25 at 33.

³⁴*State ex rel. Johnson v. Board of County Commissioners of Deer Lodge County*, *supra* note 32 at 584.

Special damage may be generally defined as that which is "in excess of that sustained by the community at large,"³⁵ and "not common to the public in general."³⁶ These definitions are best explained by dividing special damages into two classes: (1) special damage in fact, and (2) special damage by virtue of invasion of a private right of the property owner.

The criteria for the first category, special damage in fact, is that the property suffer some peculiar and direct physical injury cognizable to the senses.³⁷ For example, in *Root v. Butte, Anaconda & Pacific Ry. Co.*,³⁸ a railroad was authorized by a city ordinance to be constructed and operated along a city street in Anaconda. The plaintiff-landowner contended that the operation of the railroad forty-six feet from his lodging house had depreciated its market value. Specifically, he complained of noise from the passing of trains, shaking of the windows of his house, ringing of bells, and the sounding of whistles. The court held that this kind of damage was special if "in excess of that sustained by the community at large."³⁹

The standard for the second category, special damage by virtue of invasion of a private right of the property owner, is that there be disturbed some property right which the owner holds in connection with or appurtenant to his property and which is not shared in common with the public in general. For example, in *Less* it was said that an owner whose property abuts a public street has appurtenant easements in the public street for the purpose of giving to the property light, air, and access.⁴⁰ Unreasonable interference with these easements appurtenant only to the abutting property, as by a change of grade or erection of a structure in the highway, requires just compensation to the owner.⁴¹

To complete this brief survey of special damage, a word must be said about the invasion of a public right absent some peculiar and direct physical injury cognizable to the senses. In this situation landowners undoubtedly suffer varying degrees of injury. It seems at first logical to conclude that those who suffer damage "in excess of that sustained by the community at large" have suffered special, compensable damage. But one must remember that additionally the damage suffered must be "not common to the public in general." And when a public right is invaded, all members of the public suffer a damage of the same character and nature. Though it may appear that an owner suffers special damage because invasion of the public right causes him more hardship than others, the damage is in fact not special because the

³⁵*Root v. Butte, Anaconda & Pacific Ry. Co.*, *supra* note 24 at 358.

³⁶*Id.* at 359.

³⁷2A NICHOLS, EMINENT DOMAIN, § 6.4431 (3d ed. 1970).

³⁸*Root v. Butte, Anaconda & Pacific Ry. Co.*, *supra* note 24.

³⁹*Id.* at 358.

⁴⁰*Less v. City of Butte*, *supra* note 25 at 32.

⁴¹*Id.*

right which is invaded, and from which the injury flows, is shared by all members of the public.⁴² For example, in *State ex rel. Johnson v. Board of Commissioners of Deer Lodge County*,⁴³ a landowner sued for damages on account of the vacating of a public road by the board of county commissioners. In holding that no recovery was allowed, the court said:

All who use the road suffer in the same manner. While one may be more largely injured than others, he yet sustains damages of the same character and nature which all who use the road—the public generally—suffer. While the road exists he has the right to the easement. But this right is not different from that enjoyed by the public generally. His right, then, is such as is enjoyed by the public. His damages are those shared by the public, and no other. It is well settled that in such a case recovery cannot be had by a citizen.⁴⁴

Thus, damages without a taking are compensable only in two instances: (1) where the damage would have been actionable at common law if inflicted without statutory authority; and (2) where the damage is special, that is, where there is a peculiar and direct physical invasion cognizable to the senses or where there is an invasion of a private right which the landowner holds in connection with his property.

B. *Damage To The Remainder Of That Which Is Taken*

R.C.M. 1947, § 93-9912 (2) provides:

If the property sought to be appropriated constitutes only a part of a larger parcel, [the owner must be awarded as part of his just compensation] the depreciation in value which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.

The first problem raised by this statutory provision is determining what constitutes a "part of a larger parcel." This is an important determination in many eminent domain cases, since the statute clearly limits the award of damages to the larger parcel. The landowner will not be compensated for injury caused by the public improvement to parcels of land other than or independent of that from which land is actually taken.⁴⁵

There are generally three tests for determining whether a parcel of land constitutes a remainder of that which is taken: (1) unity of ownership of the two parcels; (2) contiguity of the two parcels; and (3) unity of use of the two parcels.⁴⁶ Unity of ownership means that one person, entity, or group of persons or entities owns that which is taken and that which is claimed to be its remainder. Contiguity means

⁴²*State ex rel. Johnson v. Board of County Commissioners of Deer Lodge County*, *supra* note 32.

⁴³*Id.*

⁴⁴*Id.* at 584.

⁴⁵Unless, of course, the injury constitutes a damage without a taking, discussed above.

⁴⁶*State Highway Comm'n v. Robertson & Blossom*, 151 Mont. 205, 219, 441 P.2d 181 (1968).

physical togetherness, "not separated by distance nor by other tracts of land."⁴⁷ If the land is a physically single unit, it matters not that it is divided into separate parcels by mere imaginary lines not located on the land but created by law and simply reflected on a map.⁴⁸ Unity of use means that the two parcels are "used jointly by the owner in a single enterprise [so that] . . . the whole . . . is depreciated in value by the proposed improvement."⁴⁹ The parcels must be "so inseparably connected in the use to which they are applied that injury to or destruction of one must necessarily and permanently injure the other."⁵⁰ A claim of unity of use may be based on a prospective, future use, if such a use is reasonably probable and "not a dream concocted or contrived with the purposeful intent of obtaining a larger settlement from the [condemnor]."⁵¹ Whether there is unity of use is a question of fact.⁵²

Of the three criteria, unity of use is the most important, since it is the basis of an exception to the previously stated general rule. In *State v. Hoblitt*,⁵³ the Montana court said that even though two tracts are non-contiguous by virtue of separation by a highway, watercourse, or railroad; if there is unity of use they will be held but a single parcel.⁵⁴ Unity of use may in some cases overcome the absence of contiguity. But this exception applies only where the alleged remainder is not "separated by too great a distance from the land condemned and taken."⁵⁵ Also, the converse—contiguity without unity of use—is not an exception to the general rule. Where a single parcel is not used as a single entity by the owner, the parts will be held independent even though contiguous, and no compensation for damages to the remainder will be allowed.⁵⁶

Once it has been established that there is a remainder to what is taken, the problem becomes one of determining the damage to the remainder which are recognized as compensable. R.C.M. 1947, § 93-9912 (2) provides that the owner must be awarded the "depreciation in value [of the remainder] . . . by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff." The statute provides for two kinds of damage, namely, severance and consequential damage. A severance damage award compensates for the value lost because the taking makes the parcel of land smaller or different in shape. Compensation for severance damage represents recognition of the fact that

⁴⁷*State Highway Comm'n v. Milanovich*, *supra* note 10 at 416.

⁴⁸*Id.*

⁴⁹*State v. Hoblitt*, *supra* note 9 at 408.

⁵⁰*State v. Bradshaw Land Co.*, 99 Mont. 95, 107, 43 P.2d 674 (1935).

⁵¹*State Highway Comm'n v. Milanovich*, *supra* note 10 at 417.

⁵²*Id.*

⁵³*State v. Hoblitt*, *supra* note 9.

⁵⁴*Id.* at 408.

⁵⁵*State Highway Comm'n v. Milanovich*, *supra* note 10 at 416; *State v. Bradshaw Land Co.*, *supra* note 50 at 105-107.

⁵⁶*State Highway Comm'n v. Milanovich*, *supra* note 10 at 415-418.

land has inherent value as being part of a larger tract. Imagine, for instance, the severance damage which would result from taking a single hole of an eighteen-hole golf course.

An award of consequential damages compensates for value lost because of the construction and operation of a public improvement. As a general rule:

[A]ny element of damage which results in a diminution of value of the remainder area is a factor which must be considered. The different elements of damage to remaining land recoverable when part of a tract is taken are as numerous as the possible forms of injury.⁵⁷

There is no requirement that the damages be special or actionable at common law, as was the case with damages without a taking. Moreover, as the statute provides, the measure of damages is the "depreciation in value"; consequently, damages are not to be itemized with a monetary award for each element. Rather, they are to be considered only insofar as they decrease the value of the remainder.⁵⁸

Generally, the only limitation placed on the consideration of elements of severance and consequential damages is that they be caused by the public improvement for which land is taken and they be capable and being reasonably ascertained. "[R]ecoverable damages must be the natural and proximate consequence of the taking; they must be direct and certain, actual, reasonable and readily ascertainable, not remote, speculative or contingent."⁵⁹ Damage is not compensable if it is "remote, obscure, undefinable, problematical, or the like."⁶⁰ Some examples are helpful to illustrate the meaning of these limitations. In *State v. Bradshaw Land Co.*,⁶¹ part of a cattle ranch was taken for construction of a highway. The landowner, over objection, introduced evidence on the necessity of fencing the highway,

[A]nd that, after fencing, with the ends of the land open, range cattle would stray on the highway, and that these cattle upon smelling the water, presumably in Locate Creek, and being alarmed by motorcars upon the highway, would break through the fences and thereby make it necessary for defendant, in the winter-time in particular and during other seasons, to employ additional help to repair the fences and remove trespassing livestock.⁶²

As might be suspected, evidence of this kind of consequential damage was held "too remote, speculative and conjectural to be received."⁶³ In *State Highway Comm'n v. Antonioli*,⁶⁴ part of a mining claim had

⁵⁷4A NICHOLS, EMINENT DOMAIN, § 14.24 (3d ed. 1971); *Lewis & Clark County v. Nett*, 81 Mont. 261, 266, 263 P. 418 (1928).

⁵⁸*Lewis & Clark County v. Nett*, *supra* note 57 at 267.

⁵⁹*Id.* at 265.

⁶⁰*State Highway Comm'n v. Antonioli*, 145 Mont. 411, 420, 401 P.2d 563 (1965).

⁶¹*State v. Bradshaw Land Co.*, *supra* note 50.

⁶²*Id.* at 110.

⁶³*Id.*

⁶⁴*State Highway Comm'n v. Antonioli*, *supra* note 60.

been taken for construction of a highway. Without showing that the claim contained ore worth mining, the landowner introduced evidence that

[T]he taking of the part for the highway so cramped the remainder that there would not be room for a generating plant, dry house, powder magazine, mine building, loading ramps, storage, dump space, etc. In addition, testimony was received to the effect that if the claim were mined directly under the Interstate [highway] the operation would have to cease within 100 feet of the surface lest the roadbed cave in.⁶⁵

In response to this claim of severance damage the court noted that

The truth is that the mine is unopened now, . . . [has not been worked for 65 years], and has no surface structure presently other than an old concrete hoist foundation. All of the surface facilities referred to are not currently in existence and there is no proof that any of them will ever be required. For this reason such evidence of damage may not be received as it is speculative and conjectural.⁶⁶

Finally, there are some elements of damage which the law considers to be noncompensable. These will be discussed in detail later.

C. *How Damages Are Measured*

Generally the owner of land damaged with or without a taking is entitled to receive as compensation the decrease in the market value of the land.⁶⁷ However, where the damage may be corrected or cured, the cost of cure is the measure of damages if this cost is less than the decrease in the market value of the property.⁶⁸

If land is damaged without a taking and the decrease in its market value is the proper measure of damages, this decrease is computed by applying a before and after rule. Just compensation equals the difference between "the value of the land prior to the injury and its value after the injury."⁶⁹

On the other hand, if land is damaged because of a taking and the decrease in its market value is the proper measure of damages, the decrease may be computed in one of two ways. First, the value of the land taken may be added to the difference in the value of the remainder area before and after the taking. *Nichols* expresses this rule in formula forms as follows:

Value of land taken + (value of remainder area before taking — value of remainder area after taking) = just compensation.⁷⁰

The second method is a modified version of the before and after rule

⁶⁵*Id.* at 418.

⁶⁶*Id.*

⁶⁷*Lewis & Clark County v. Nett, supra* note 57 at 266; *Eby v. City of Lewistown*, 55 Mont. 113, 126, 173 P. 1163 (1918).

⁶⁸*Eby v. City of Lewistown, supra* note 67 at 126; *Wright v. City of Butte*, 64 Mont. 362, 369, 210 P. 78 (1922).

⁶⁹*Watson v. Colusa-Parrot M. & S. Co.*, 31 Mont. 513, 518, 79 P. 14 (1905); *Sweeney v. Montana Central Ry. Co.*, 25 Mont. 543, 552, 65 P. 912 (1901).

⁷⁰4A NICHOLS, EMINENT DOMAIN, § 14.23 (3d ed. 1971).

mentioned above in connection with damages without a taking. Under this rule damages are intermingled with the award for the value of the land taken, with the total award computed by determining the difference between the value of the entire tract before the taking and the value of the remainder after the taking. In formula form *Nichols* represents this rule as follows:

Value of entire parcel before taking — value of remainder area
after taking = just compensation.⁷²

Prior to 1971 it would have been difficult to determine accurately which of these two methods was to be used in Montana. Some of the early decisions contain language which would support an argument for the before and after rule.⁷² More recent decisions, however, enunciate damage measurement rules which are nearly identical to the first formula set forth above. In *Lewis and Clark County v. Nett*,⁷³ the court said: "The measure of damages . . . is the fair market value of the land sought to be condemned with the depreciation of such value of the land from which the strip is to be taken. . . ."⁷⁴ The court was even more explicit in *State Highway Comm'n v. Jacobs*,⁷⁵ where it said: "The compensation due . . . is the value of what was taken . . . plus any depreciation in value of the property not actually taken but injuriously affected."⁷⁶

Any lingering doubts about the vitality of the before and after rule in Montana were quieted by *State Highway Comm'n v. Emery*.⁷⁷ In this case the trial court had instructed the jury to find separately: (1) the value of the land taken; and (2) the damages to the remainder. Clearly, this instruction on the form of the verdict required a computation of damages to the remainder in accordance with the first formula set forth above. On appeal the trial court's instruction was sustained on the authority of *Nett*, and, more importantly, by the court's opinion that R.C.M. 1947, § 93-9912 "specifically requires (1) the taking to be assessed and (2) loss to the remaining land from the taking to be assessed."⁷⁸ By negative inference the rule of *Emery* is that R.C.M.

⁷²*Id.*

⁷³*Montana Railway Co. v. Warren*, 6 Mont. 275, 277-278, 12 P. 641 (1887), *aff'd*, 137 U.S. 348 (1890).

⁷⁴*Lewis & Clark County v. Nett*, *supra* note 57.

⁷⁵*Id.* at 266.

⁷⁶*State Highway Comm'n v. Jacobs*, 150 Mont. 322, 435 P.2d 274 (1967).

⁷⁷*Id.* at 326.

⁷⁸*State Highway Comm'n v. Emery*, 156 Mont. 507, 481 P.2d 686 (1971).

⁷⁹*Id.* at 512. *See, State Highway Comm'n v. Manry*, 143 Mont. 382, 386, 390 P.2d 97 (1964); *State Highway Comm'n v. City Service Co.*, 142 Mont. 559, 562, 385 P.2d 604 (1963); and *State Highway Comm'n v. Heltborg*, 140 Mont. 196, 204, 369 P.2d 521 (1962). The portion of R.C.M. 1947, § 93-9912 which the court relied on in *Emery* provides that there shall be ascertained:

1. The value of the property sought to be appropriated and all improvements thereon pertaining to the realty

2. If the property sought to be appropriated constitutes only a part of a larger parcel, the depreciation in value which will accrue to the portion not sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.

1947, § 93-9912 prohibits use of the before and after rule to compute damages in the case of a partial taking.

The principal merit of the before and after rule is that it is the easiest of the compensation measuring rules to apply. For this reason, it is the favorite of the commentators.⁷⁹ In spite of these considerations there are a number of reasons why in Montana the split-verdict formula is the preferable one.

The practical argument in favor of the split-verdict formula is that, though theoretically more difficult to apply, the split-verdict has been used in numerous recent cases without any apparent difficulties. Moreover, either formula should yield the same result.

Two equitable arguments may be made for the split-verdict formula. First, it may have tax advantages for the landowner, in that

[I]f there is no severance of damages the whole award will be treated as the purchase price of the land condemned, with the resulting increase in profit; whereas if there is a severance the damage to the residue may be treated as a reduction in the cost basis of the remaining land.⁸⁰

Second, the split-verdict formula provides a safeguard against jury awards which are contrary to the evidence. In two instances in Montana⁸¹ use of this formula has resulted in overturning jury verdicts in excess of the compensation requested by the landowners. In both cases the verdicts were within the range of total compensation requested, but above that requested for the land taken⁸² or the damages to the remainder.⁸³ Neither of these would have been detected if the before and after rule had been applied, since under this rule the jury is required to award a single sum as compensation for both the land taken and damages to the remainder.

Finally, the before and after rule encounters insurmountable problems under Montana's rule for the deduction of benefits from the award of compensation (discussed in detail later). In Montana benefits may be deducted only from damages to the remainder. This is no problem under the split-verdict formula, with its requisite separate amount for damage to the remainder. However, under the before and after rule's single sum award benefits could not properly be deducted without first computing separately the damages to the remainder. When this is accomplished the basic argument in favor of before and after—convenience and ease of application—disappears. Of course, this problem only arises in cases where there are benefits to deduct. But it would be absurd, and

⁷⁹4A NICHOLS, EMINENT DOMAIN, § 14.232[1] (3d ed. 1971); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 51 (2d ed. 1953).

⁸⁰1 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 50, n. 18 (2d ed. 1953).

⁸¹Emery, *supra* note 77; State Highway Comm'n v. Barnes, 151 Mont. 300, 443 P.2d 16 (1968).

⁸²State Highway Comm'n v. Barnes, *supra* note 81.

⁸³State Highway Comm'n v. Emery, *supra* note 77.

doubly confusing, to use the split-verdict formula in this case and before and after where no benefits are involved. This is especially true when the split-verdict formula is apparently satisfactory, may have tax advantages to the landowner, and prevents excessive and unjust jury awards.

D. Noncompensable Damages

There are some damages that the law does not recognize as compensable. Though the landowner will receive just compensation, he will not necessarily be fully indemnified for all of the injuries which a condemnation has caused.

Some items of damage are noncompensable because just compensation is defined in terms of the market value of that which is taken or damaged. Thus, a landowner may not be compensated for mental anguish caused by condemnation.⁸⁴ Also, when land is taken by condemnation the title to personalty on the land taken is not affected. Thus, the owner may remove it.⁸⁵ Most courts hold that since the condemnor is required to pay only for that which is taken or damaged, it is not constitutionally required to pay for the costs of removing personalty.⁸⁶ In Montana the question whether removal costs of personalty is constitutionally compensable has not yet been decided. However, from 1957 to 1961, and from 1967 to 1969, R.C.M. 1947, § 93-9913 provided for payment by the condemnor of removal costs for personalty.⁸⁷

Some noncompensable damages are based on a court's finding that no right of the landowner has been taken or damaged. For example, a landowner whose property abuts a public thoroughfare receives no compensation for the decrease in the market value of his property caused by a relocation⁸⁸ or discontinuance⁸⁹ of the thoroughfare. This rule

⁸⁴State Highway Comm'n v. Danielsen, 146 Mont. 539, 545, 409 P.2d 443 (1965).

⁸⁵4A NICHOLS, EMINENT DOMAIN, § 14.2471[2] (3d ed. 1971).

⁸⁶*Id.*

⁸⁷For instances of judicial interpretation of these provisions, see, State Highway Comm'n v. City Service Co., *supra* note 78 at 564-565; and State Highway Comm'n v. Manry, *supra* note 78 at 387. Much of the hardship of the rule forbidding recovery of removal costs has been mitigated by federal legislation. For example, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646, 84 Stat. 1894) contains numerous provisions designed to ease the landowner's burden in relocating. The philosophy of this Act is stated in § 201: "[P]ersons displaced . . . [should] not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." Among other things, § 202 provides for payment to the landowner of the costs of removing personalty. The Act only applies where displacement results from federal or federally assisted programs, but as a practical matter this provides fairly adequate coverage in Montana where most of the present displacement is due to the federally assisted interstate highway program.

⁸⁸State Highway Comm'n v. Peterson, *supra* note 9 at 67-68.

⁸⁹State v. Hoblitt, *supra* note 9 at 411. There is language in *Root v. Butte, Anaconda & Pacific Ry. Co.*, *supra* note 24 at 360, which appears contrary to the position stated in *Hoblitt*. However, since *Hoblitt* postdates *Root*, *Root* must be held overruled on this point. See also, State ex rel. Johnson v. Board of County Commissioners of Deer Lodge County, *supra* note 32; and State v. Bradshaw Land Co., *supra* note 50.

applies in Montana regardless of whether or not a taking accompanies the relocation or discontinuance.⁹⁰ The reason for this rule has been stated by the Montana court as follows:

The owner of land abutting on a highway established by the public has no property or other vested right in the continuance of it as a highway at public expense, and, at least in the absence of deprivation of ingress and egress, cannot claim damages for its mere discontinuance, although such discontinuance diverts traffic from his door and diminishes his trade and thus depreciates the value of his land.⁹¹

This unwillingness to find a right or protected interest in a given traffic flow has been justified on two practical grounds. First,

Our . . . highways are built and maintained to meet public necessity and convenience in travel, and not for the enhancement of property of occasional land owners along the route. Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right against the judgment of those public officials whose duty it is to build and maintain these highways.⁹²

Second, to allow compensation for diversion of traffic would economically prohibit valuable and necessary public improvements. If such compensation were allowed, imagine its amount in those instances where a controlled-access highway bypasses an entire community, an event which is most common in Montana.

Similar to the cases in which damage is held noncompensable because no vested right is invaded are those in which some right of a landowner is held noncompensably subordinate to a public right. In this situation the court holds the invasion of the landowner's right to be merely police power regulation rather than compensable confiscation under eminent domain. In the case of highways, for example:

[T]he use of highways and streets may be limited, controlled and regulated by the public authority in the exercise of the police power, whenever, and to the extent necessary to provide for and promote the safety, peace, health, morals and general welfare to the people, and is subject [without compensation] to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement, and to provide for their safety while using it.⁹³

Restrictions on the right of access are a good Montana example of the application of the doctrine of noncompensation for injury due to police power regulation. It has been held that "the right of access . . . is subject to the public's primary right to regulate traffic and travel on the street and is the right of *reasonable* ingress and egress from the abutting highway."⁹⁴ A median strip, or traffic divider, has been held

⁹⁰*Cf.*, *State Highway Comm'n v. Peterson*, *supra* note 9, *with* *In re Appropriation for Highway Purposes*, 13 Ohio App.2d 125, 234 N.E.2d 514 (1968).

⁹¹*State v. Hoblitt*, *supra* note 9 at 411.

⁹²4A NICHOLS, *EMINENT DOMAIN*, § 14.244[4] (3d ed. 1971).

⁹³*State Highway Comm'n v. Keneally*, 142 Mont. 256, 267, 384 P.2d 770 (1963); *Kipp v. Davis-Daly Copper Co.*, 41 Mont. 509, 516-525, 110 P. 237 (1910).

⁹⁴*State Highway Comm'n v. Keneally*, *supra* note 93 at 265.

not to be an unreasonable restriction on the right of access.⁹⁵ Damages to property caused by installation of a median are, therefore, not compensable.⁹⁶ Moreover, "the right of access does not embrace all points on the common boundary on the entire length of the highway."⁹⁷ Thus, the landowner "may not insist on the maintenance and construction of the road in such a way as to afford him direct access to his property at all adjacent points."⁹⁸

In some cases damages are held noncompensable because of arbitrary statutory prescriptions. Under R.C.M. 1947, § 93-9921 court costs in a condemnation action are allowed only at the discretion of the trial court.⁹⁹ Since court costs include only those items recognized by statute,¹⁰⁰ attorney's fees¹⁰¹ and special expert witness fees¹⁰² are in all cases excluded.¹⁰³ Likewise, since R.C.M. 1947, § 93-9913 provides that a taking or damaging is deemed to occur at the time of the service of summons in the condemnation action, damage caused by acts preliminary

⁹⁵State Highway Comm'n v. McGaffick, 144 Mont. 76, 79, 394 P.2d 174 (1964); see also, State Highway Comm'n v. Keneally, *supra* note 93 at 265.

⁹⁶State Highway Comm'n v. McGaffick, *supra* note 95 at 79. In some instances an interference with access may be held reasonable or unreasonable as a matter of law, but the question is usually one of fact for the jury. State Highway Comm'n v. Keneally, *supra* note 93 at 265; State Highway Comm'n v. Manry, *supra* note 78 at 385.

⁹⁷State Highway Comm'n v. Keneally, *supra* note 93 at 267.

⁹⁸*Id.*

⁹⁹State v. Bradshaw Land Co., *supra* note 50 at 113.

¹⁰⁰See, R.C.M. 1947, §§ 93-8601 through 93-8631; Montana Ore Purchasing Co. v. Boston Mining Co., 27 Mont. 288, 323, 70 P. 1114 (1902); and Tomten v. Thomas, 125 Mont. 159, 162, 232 P.2d 723 (1951).

¹⁰¹Tomten v. Thomas, *supra* note 100 at 162-168.

¹⁰²State Highway Comm'n v. Heltborg, *supra* note 78 at 204-205.

¹⁰³The rule that attorney's and appraiser's fees are not recoverable in a condemnation action is partially abrogated by the new constitution. Article II, § 29 of this document provides: "In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails." The convention intended that "necessary expenses of litigation" include "all costs including appraiser's fees, attorney fees and court costs." PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, p. 5632 (1972). This provision was incorporated in the new constitution "to give substance to the citizen's effort to challenge the compensation figure of the condemnor"; to "produce a climate in which the condemnor's offer for compensation will more adequately reflect the compensation to which the property owner is entitled"; and to "redress the imbalance between the vast resources brought to bear by the state and those available to the individual property owner in contested cases." PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, p. 5632 (1972).

There are two problems with this provision. First, the convention delegates clearly intended that the landowner was the prevailing party if he received an award in excess of that offered by the condemnor. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, pp. 5638-5640 (1972). In so doing the delegates overlooked a very important fact: one cannot realistically tell who prevails unless he looks at what is demanded by both parties. One who is awarded one dollar more than the condemnor's offer will certainly not feel triumphant and prevailing when he had demanded several hundred (or thousand) dollars more than he was offered. The assertion by the convention delegates that this will in fact be the case is absurd and ridiculous.

In the author's opinion a much more realistic notion of prevailing is to treat it as relative to the amount which the award exceeds the condemnor's offer and approaches or equals the landowner's demand. The author suggests the following formulas; one who is awarded in excess of fifty per cent of the difference between the condemnor's offer and landowner's demand plus the amount of the condemnor's offer prevails fully; but one who receives less than this amount prevails only to the extent of double the percentage which the amount of his recovery, less the condemnor's offer, bears to the difference between the landowner's demand and the condemnor's offer. Thus, if a condemnor offered \$10,000 and the landowner demanded \$20,000, the landowner

to the condemnation are not compensable.¹⁰⁴ The hardship which this rule may cause is well illustrated by *Bakken v. State Highway Comm'n.*¹⁰⁵ In this case the landowner sued to recover depreciation in the market value of his realty caused by a public announcement, five years previous, to the effect that his land was included within the boundaries of a proposed highway. The owner, a home building contractor, was unable, since the time of the public announcement, to market his realty for home building. To Bakken's plea of injustice the Montana court huffed: "[L]and is not damaged by reason of preliminary procedure looking to its appropriation to a public use."¹⁰⁶ The court was wrong on the facts, but right on the law. Under R.C.M. 1947, § 93-9913 the owner's right to compensation does not accrue until summons is served.

Finally, a judgment of noncompensability is sometimes based on simple justice. For example, where a public improvement, which enhances the value of property, results in a special levy against a condemned landowner, the landowner will not be compensated for the special assessment.¹⁰⁷ To hold that the special assessment is compensable damage would be unjustified special treatment to one lucky enough to have been condemned for the improvement, for it would allow him to escape paying for benefits for which others are required to pay.¹⁰⁸

As pointed out above, just compensation is not necessarily full indemnity for all losses suffered by the landowner. Simple justice, practical considerations, the nature of the right taken or damaged, arbitrary statutory rules, and the market value standard are all factors which limit full indemnity recovery. In some cases the limitation is justified, but in others it seems unwarranted and excessive.

To those distressed by some of these limitations on full indemnity there is one mitigating factor to consider, and this is the jury. Though as a matter of law just compensation may not always provide a realistic measure of damages, the jury may provide a means by which this standard can be made to bend. What the laws deem noncompensable

would prevail fully if he was awarded more than \$15,000. If the landowner was awarded only \$14,000, he would prevail only to the extent of eighty per cent. In this latter example the landowner would be awarded only eighty per cent of his necessary expenses of litigation.

The second problem with the new provision is its potential for abuse in compensating attorneys and appraisers. It does not seem right that an award to the landowner that exceeds the condemnor's offer by a mere dollar ought to be sufficient for granting full attorneys' and appraisers' fees. But because our new founding fathers interpret "prevails" in an absolute sense, this is a very real possibility. Perhaps legislation or a constitutional amendment is in order to correct this obvious potential for abuse.

¹⁰⁴*Bakken v. State Highway Comm'n*, 142 Mont. 166, 169, 382 P.2d 550 (1963).

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 169; see also, *State Highway Comm'n v. Robertson & Blossom*, *supra* note 46 at 220-222.

¹⁰⁷*State Highway Comm'n v. Donovan*, 152 Mont. 282, 287-288, 448 P.2d 671 (1968).

¹⁰⁸*Id.* at 288.

may, as a practical matter, be compensable. As Orgel has put it: "The fact that the property owners are usually not only willing but anxious to have their properties condemned testifies to the widespread belief that awards in condemnation proceedings are liberal."¹⁰⁹

E. Deduction of Benefits

In certain cases the condemnor may show benefits which accrue to the landowner because of the public improvement which causes him damage. If the jury agrees, these benefits may be deducted from the landowner's award of just compensation.

R.C.M. 1947, § 93-9912 provides that in assessing just compensation it must be determined

[H]ow much the portion not sought to be condemned . . . will be benefited, if at all, by the construction of the improvements proposed by the plaintiff, and if the benefits shall be equal to the amount assessed [for damages to the remainder] . . . , the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefits shall be less than the amount assessed [for damages to the remainder] . . . , the former shall be deducted from the latter, and the remainder shall be the only amount allowed in addition to the value.

Although this statute does not mention deduction of benefits where there is a damage without a taking, such a deduction has been allowed.¹¹⁰ Also, since the statute provides that benefits may be deducted only from damages, the question of such a deduction arises only in a partial taking case or one in which damage is inflicted without a taking. Benefits may not under this statute be deducted from compensation for that which is taken.¹¹¹

Like damages, benefits, to be deductible, must be permanent,¹¹² caused by the public improvement which caused the damage,¹¹³ reasonably certain,¹¹⁴ and must increase the market value of the land.¹¹⁵ Also, in the case of a partial taking the remainder itself must be benefited; benefits to independent parcels of the owner's land may not be considered.¹¹⁶

Finally, there is in Montana an important judicially imposed restriction on benefits: to be deductible they must be special.¹¹⁷ A special benefit is: (1) a physical improvement of the property which cannot

¹⁰⁹2 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 247 (2d ed. 1953).

¹¹⁰Eby v. City of Lewistown, *supra* note 67 at 127-128.

¹¹¹An excellent critique of the rule that benefits may not be deducted from compensation for land taken is contained in EMINENT DOMAIN, *A Research Report Prepared by the University of Montana School of Law for the Montana State Highway Commission*, at 182-185 (1967).

¹¹²3 NICHOLS, EMINENT DOMAIN, § 8.62[2] (3d ed. 1965).

¹¹³*Id.*

¹¹⁴*Id.* at § 8.6201.

¹¹⁵*Id.*

¹¹⁶*Id.* at § 8.62[2].

¹¹⁷State v. Bradshaw Land Co., *supra* note 50 at 110; Gallatin Valley Elec. Ry. v. Neible, 57 Mont. 27, 34, 186 P. 689 (1919).

be altered to the property's detriment without compensation; or (2) a conferral on the property of some right or privilege which cannot be destroyed or impaired without compensation.¹¹⁸ An example of the first kind of special benefit is where a highway is constructed in such a fashion that the condemnor becomes obliged to provide the land with necessary drainage.¹¹⁹ An example of the second class of special benefit is where a street is constructed so that the abutting property acquires easements of light, air, and access.¹²⁰ The reader will note that the characteristics of special benefits are very similar to those of special damages inflicted without a taking, discussed above.

PERMISSIBLE EVIDENCE OF VALUE

A number of factors merit consideration by the fact-finder in attempting to arrive at an award of just compensation. In an appropriate case these might include the following: a view of the affected property by the fact-finder, usually the jury; the use, condition, and location of the property; the income, if any, produced by the property; the value of improvements, if any, which are affected; sales of and offers for the sale of the property affected or similar property; and the opinions of competent witnesses.

THE JURY VIEW

When realty is the subject matter of a condemnation action, a view by the jury of the property affected is often essential to their understanding of the case and the intelligent assessment of just compensation. To this end, R.C.M. 1947, § 93-5102 provides that:

When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation . . . it may order them to be conducted, in a body, under the charge of an officer, and one person representing each party, to the place, which shall be shown to them by the person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial and such person shall not speak to the jury upon any matters connected with the subject of the action, but may point out to the jury the property in litigation. . . .

In addition to the important procedural requirements for the conduct of the view, set forth in the statute itself, a number of important rules about a jury view have been judicially imposed. First, as the statute indicates, whether a view by the jury will be permitted is within the discretion of the trial court.¹²¹ Second, the view should be taken at a point in the trial when "it is known what are the various items of damages to be considered in the light of the trial court's rulings on

¹¹⁸Gallatin Valley Elec. Ry. v. Neible, *supra* note 117 at 34-35.

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹Clark v. Worrall, 146 Mont. 374, 378-379, 406 P.2d 822 (1965); Puetz v. Carloon, 139 Mont. 373, 382, 364 P.2d 742 (1961); and Maloney v. King, 30 Mont. 158, 172, 76 P. 4 (1904).

the admission and rejection of offered testimony."¹²² This lessens the danger of having the jury's attention directed to elements of damage or portions of the property not properly within their consideration.¹²³ Finally, the evidential effect of the jury view is twofold in Montana: (1) it enables the jury to understand the case; and (2) it aids the jury in determining the truth or falsity of the other evidence presented.¹²⁴ In other words, the view is both real and demonstrative evidence. Consequently, in determining what is just compensation the jury may properly take into account the result of their observation of the affected property.¹²⁵

USE, CONDITION, AND LOCATION OF THE PROPERTY

Since just compensation is measured by market value, evidence may be introduced concerning the uses to which the property is adapted, its location and condition, the character of the neighborhood, and all things surrounding the property.¹²⁶ All of these are factors which a willing purchaser would consider in ascertaining the property's market value.¹²⁷

Of these factors, use is the most significant, for the owner is not restricted to showing the market value for the use to which the land is presently put. The standard of value is the market value of the land based on the highest and best use for which it is available.¹²⁸

Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Its capability of being made . . . available [for a prospective and more valuable use] gives it a market value which can be readily estimated.¹²⁹

What is the highest and best use of land is a question of fact.¹³⁰ Moreover, though highest and best use usually means a single use, if two or more uses are compatible and the owner is deprived of all of them, the owner is entitled to compensation for the loss in market value which the land has by virtue of its adaptability for several uses.¹³¹

¹²²State v. Bradshaw Land Co., *supra* note 50 at 111.

¹²³*Id.*

¹²⁴Ferris v. McNally, 45 Mont. 20, 31, 121 P. 889 (1912); State v. Bradshaw Land Co., *supra* note 50 at 111; State v. Lee, *supra* note 9 at 486.

¹²⁵White v. Barling, 36 Mont. 413, 417, 93 P. 348 (1908); Murray v. Heinze, 17 Mont. 353, 357, 42 P. 1057 (1895); and Ormund v. Granite Mountain Mining Co., 11 Mont. 303, 309, 28 P. 289 (1891).

¹²⁶State Highway Comm'n v. Peterson, *supra* note 9 at 70-71.

¹²⁷*Id.*

¹²⁸State Highway Comm'n v. Vaughan, *supra* note 8 at 282; State Highway Comm'n v. Jacobs, *supra* note 9 at 326; State Highway Comm'n v. Woodcock, *supra* note 9 at 294; State Highway Comm'n v. Wheeler, 148 Mont. 246, 255, 419 P.2d 492 (1966); State Highway Comm'n v. Peterson, *supra* note 9 at 71; State v. Bradshaw Land Co., *supra* note 50 at 109; State v. Hoblitt, *supra* note 9 at 413; Sweeney v. Montana Central Ry. Co., *supra* note 69 at 561; Northern Pac. & Mont. Ry. Co. v. Forbis, 15 Mont. 452, 455, 39 P. 571 (1895); and Montana Railway Co. v. Warren, *supra* note 72 at 284.

¹²⁹Montana Railway Co. v. Warren, *supra* note 72 at 280.

¹³⁰State Highway Comm'n v. Vaughan, *supra* note 8 at 282, 285.

¹³¹Northern Pac. & Mont. Ry. Co. v. Forbis, *supra* note 128 at 457-458.

The single limitation on proof of a prospective use is that the land must be adaptable or available for the prospective use. Since the market value at the date of summons controls, "the land must be shown to have been marketable at that time for the purpose stated . . . ; the showing must be that the use is one to which the land may reasonably be applied . . . , such as would probably affect a purchaser. . . ." ¹³² Speculative, remote, conjectural, and problematical uses may not be considered, ¹³³ nor uses which are dreams "concocted or contrived with the purpose of obtaining a larger settlement." ¹³⁴

INCOME PRODUCED BY THE PROPERTY

Income produced by the use to which the affected property is presently applied may in some cases be used as a means of arriving at an estimate of the property's market value. ¹³⁵ Usually net income is capitalized to present the fact-finder with an estimate of market value in terms of income. When capitalization of income is used, the property's market value is said to be the sum which will, in accordance with the prevailing local rate of earning for property of a given location and character, produce annually a sum equivalent to the net annual income of the affected property. ¹³⁶

An income approach to valuation is usually allowed only when the property's income is attributable to the property itself, and not to the owner's skill. ¹³⁷ The reason for this limitation is that in a condemnation action the standard of just compensation is the market value of that which is taken or damaged. Property, and not the owner's skill, is all that is taken or damaged in condemnation.

An income approach is usually allowed in the case of rental property, since, "[W]hen property is leased, the rent is derived almost entirely from the property." ¹³⁸

On the other hand, an income approach to the value of commercial business property is impermissible. *Nichols* forcefully explains the rationale for this exclusion as follows:

¹³²State v. Hoblitt, *supra* note 9 at 413; State Highway Comm'n v. Vaughan, *supra* note 8 at 282; and State Highway Comm'n v. Woodcock, *supra* note 9 at 294.

¹³³State Highway Comm'n v. Antonioli, *supra* note 60 at 417; State v. Bradshaw Land Co., *supra* note 50 at 109; and State v. Hoblitt, *supra* note 9 at 414.

¹³⁴State Highway Comm'n v. Woodcock, *supra* note 9 at 295; State Highway Comm'n v. Milanovich, *supra* note 10 at 417.

¹³⁵The use of income evidence is related to the determination of what is the highest and best use of the property. As stated in 5 NICHOLS, EMINENT DOMAIN, § 19.1 (3d ed. 1969):

If the owner relies upon his actual income from the property as furnishing a fair test of its value, he tacitly admits that the use to which the property is devoted is the most advantageous use to which it could be put If, on the other hand, the condemnor seeks to bring out the actual income from the property, it should be first obliged to offer evidence that the use to which the land was actually put was one of the uses to which the land was best adopted

¹³⁶5 NICHOLS, EMINENT DOMAIN, § 19.23 (3d ed. 1969).

¹³⁷*Id.* at § 19.1[1].

¹³⁸*Id.* at § 19.2.

If the owner of property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes no test of the value of the property. It is, accordingly, well settled that evidence of the profits of a business conducted upon the land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive. The profits of a business are too uncertain and depend on too many contingencies safely to be accepted as any evidence of the usable value of the property upon which business is carried on. . . .

It has been said that it is the land which is appropriated [or damaged], and not the business conducted thereon. While it is proper to show, as bearing on the value of the property, that it [is] peculiarly adapted for a particular business, the success of an enterprise does not depend upon its location alone, but rather upon the skill and ability of the proprietor, and the manner in which he conducts his business.¹³⁹

Whether agricultural land can be valued by an income approach is an issue on which the courts are about evenly divided. Though to a lesser degree, the same elements that preclude the income approach for commercial business property enter into the result when the owner uses his land for agricultural or ranching purposes. On the other hand, "the actual return is in such case some evidence of the value of the land."¹⁴⁰

The general law on the use of the income approach has been set forth for the purpose of contrast. When compared with other jurisdictions, Montana's case law on this subject may be considered only an erroneous oddity.

The Montana court's difficulty with the income approach began with the following anomalous statement in *State Highway Comm'n v. Peterson*:

Questions relative to revenue produced from the property taken is undoubtedly admissible for the purpose of arriving at the market value of the property. Where sales are in process of being made, income could become an important factor in arriving at market value. In all cases where a seller is ready and willing to sell, and a purchaser is ready and willing to buy, and involving sales of hotels, bars, cafes, garages, farms, service stations, stores and the like, a purchaser naturally wants to know something about gross income, gross expenses and net profit before buying. Therefore, in condemnation proceedings, such evidence is admissible for the purpose of arriving at the market value for such is a circumstance, but not a conclusive circumstance, to be shown on an issue of value. In many cases involving the taking of agricultural lands, evidence of revenue is considered for the purpose of arriving at market value.¹⁴¹

Insofar as *Peterson* allows an income approach to show the value of rental or agricultural property, there can be no harsh complaint. However, insofar as *Peterson* allows this approach for commercial business prop-

¹³⁹*Id.* at § 19.3[1].

¹⁴⁰*Id.* at § 19.3[2].

¹⁴¹*State Highway Comm'n v. Peterson*, *supra* note 9 at 63-64; and *see*, *State Highway Comm'n v. Heltborg*, *supra* note 78 at 201.

erty, to that extent the law of Montana is unique, and, in the author's opinion, erroneous. The long quotation set forth from *Nichols* adequately explains why the income approach should be prohibited in the case of commercial business property.

For a time it appeared that the court had corrected the position taken in *Peterson*. In *State Highway Comm'n v. Bare*,¹⁴² the court quoted with approval from the 1962 Report of the Committee on Condemnation and Condemnation Procedure of the Section of Local Government Law of the American Bar Association:

[T]he "income method" may be used to determine market value, where appropriate. . . . However, the majority of courts restrict this type of testimony. This stems in part from the principle that business profits are considered too speculative to be considered in determining value, and partly because courts view comparable sales as a more¹⁴³ objective test. Rental property, however, is an exception to this rule.

Within two years of *Bare*, however, the *Peterson* rule was reaffirmed twice.¹⁴⁴ It appears that in spite of what was said in *Bare*, the *Peterson* rule is the present Montana law on the use of the income approach to valuation.

In the author's opinion the *Peterson* rule is a most unsatisfactory one, since it allows the use of an income approach to value certain kinds of commercial business properties. This method in such a case is highly speculative, since it measures not only the market value of property, which is the sole consideration in computing just compensation, but also the value of business skill and good will, which are not taken or damaged by condemnation.

VALUE OF IMPROVEMENTS

Where improvements affixed to the property are taken or damaged, their value may be shown as an element of the value of realty taken or damaged, if they enhance the realty's value.¹⁴⁵

The value of improvements may be shown in the same manner as the value of other property. Where, however, an income approach is impermissible and the improvement is of a kind seldom sold, so that its true market price is difficult to determine, the Montana court has permitted improvements to be valued by computing reproduction cost less depreciation.¹⁴⁶

¹⁴²141 Mont. 288, 377 P.2d 357 (1962); and see, *State Highway Comm'n v. Smith & Jesson*, 141 Mont. 302, 377 P.2d 352 (1962).

¹⁴³*State Highway Comm'n v. Bare*, *supra* note 139 at 300.

¹⁴⁴*State Highway Comm'n v. Crow*, 142 Mont. 270, 273-275, 384 P.2d 273 (1963) (trailer court rental); *State Highway Comm'n v. McGaffick*, *supra* note 95 at 80 (gas station).

¹⁴⁵*State Highway Comm'n v. Peterson*, *supra* note 9 at 64.

¹⁴⁶*State Highway Comm'n v. Tubbs*, *supra* note 6 at 302-303. While not expressed in the Montana decision, 5 NICHOLS, EMINENT DOMAIN, § 20.2[1] (3d ed. 1969) explains the reason for restricting the use of reproduction cost as a method for valuing improvements:

This rule stems from a recognition of the fact that reproduction cost

Reproduction cost may be computed in two ways. First, a unit cost is determined (for example, so many dollars per square foot), and this unit cost is then simply multiplied by the number of units contained in the improvement. Second, an estimate of materials and construction costs may be made. While there are no Montana decisions on this point, the second method should be preferred since it requires a more specific itemization of the expenses on which the estimate is based.¹⁴⁷

In computing the proper deduction for depreciation in Montana both structural depreciation resulting from physical deterioration and functional depreciation due to obsolescence and loss of adaptability may be considered.¹⁴⁸

SALES AND OFFERS

A. Sales

Evidence of sales to prove the market value of the property affected may be divided into two categories: sales of the property affected and sales of similar property (a comparable sale).

Though there is no Montana law on the subject, a sale of the property affected should be allowed as evidence when it was made voluntarily and in good faith; covers substantially the same property as that which is affected; and, since the time of the sale to the date of service of the summons, neither the market nor conditions have fluctuated markedly.¹⁴⁹

There are two problems with the admission of comparable sales. First, some jurisdictions reject such evidence on the ground that it introduces a multitude of collateral issues which serve only to confuse the jury and direct their attention away from the central issue—determining the value of the property affected.¹⁵⁰ This contention is met with the fact that only *comparable* sales may be used, and with the conclusion, with which the author agrees, that evidence of sales of comparable property is the most convenient, direct, and reliable measurement of the market value of the affected property.¹⁵¹ The Montana

evidence almost invariably tends to inflate valuation. This is so because the reproduction cost of a structure sets an absolute ceiling on the market price of that structure, a ceiling which may not be, and frequently is not, even approached in actual market negotiation. When this inherently inflationary attribute of reproduction cost evidence is considered in light of the misleading exactitude which such evidence almost invariably imports to a jury unsophisticated in the niceties of economics, the justification for placing substantial safeguards upon its admission is apparent.

¹⁴⁷NICHOLS, EMINENT DOMAIN, § 20.2[3] (3d ed. 1969).

¹⁴⁸State Highway Comm'n v. Tubbs, *supra* note 6 at 303.

¹⁴⁹NICHOLS, EMINENT DOMAIN, § 21.2 (3d ed. 1969).

¹⁵⁰*Id.* at § 21.3[1].

¹⁵¹*Id.*

court has adopted the preferable view, holding on a number of occasions that: "One of the most reliable tests . . . on the question of fair market value . . . is that of comparable sales."¹⁵²

The second problem concerning comparable sales evidence concerns its method of introduction. The easiest way to introduce such evidence is merely to have one who knows of the prices paid relate them directly. Though there are technical hearsay and best evidence objections to this method, a majority of jurisdictions, including Montana, have made exceptions to the best evidence and hearsay rules in such cases. "The various reasons given for admitting the comparable sales and prices paid is that with proper safeguards the testimony should be consistently reliable and much more time conserving than if all the parties [to the sales] had to be called."¹⁵³

To be used to determine the market value of the affected property, the sale of other property must first be shown to be comparable. To decide what constitutes a sufficient comparability there is no set formula. The decision varies with the facts of each case.¹⁵⁴ The factors that should be given consideration by the trial court in determining whether a sale is of sufficient comparability to aid the jury are: location,¹⁵⁵ condition,¹⁵⁶ size, shape, and use¹⁵⁷ of the property; the time of sale;¹⁵⁸ and the nature of the sale,¹⁵⁹ that is, whether it was forced or made in a free and open market between a willing seller and a willing buyer.

A question which has arisen but has not yet been decided in Montana is whether evidence of a negotiated comparable sale of land subject to condemnation by the plaintiff-condemnor may be used to arrive at the value of the land condemned.¹⁶⁰ A majority of jurisdictions exclude such evidence on the ground that it involves a forced, involuntary

¹⁵²State Highway Comm'n v. Tubbs, *supra* note 6 at 303; State Highway Comm'n v. Greenfield, 145 Mont. 164, 170, 399 P.2d 989 (1965); State Highway Comm'n v. Voyich, 142 Mont. 355, 362, 384 P.2d 765 (1963); State Highway Comm'n v. Bare, *supra* note 142 at 300.

¹⁵³State Highway Comm'n v. Greenfield, *supra* note 152 at 167.

¹⁵⁴The decision also varies according to how the evidence of comparable sales is being used. In *State Highway Comm'n v. Jacobs*, *supra* note 9 at 328 the Montana court said:

When a price paid for another piece of property is offered as evidence of the value of property sought to be condemned a strong similarity between the two parcels must be shown to exist However, when the value of another piece of property is testified to . . . for the purpose of showing the basis for an expert's knowledge of the market and his opinion of value, the requirement of similarity is not so strict

¹⁵⁵State Highway Comm'n v. Greenfield, *supra* note 152 at 167.

¹⁵⁶State Highway Comm'n v. Churchwell, 146 Mont. 52, 60-61, 403 P.2d 751 (1965).

¹⁵⁷*Id.*

¹⁵⁸State Highway Comm'n v. Jacobs, *supra* note 9 at 328; State Highway Comm'n v. Greenfield, *supra* note 152 at 170; State Highway Comm'n v. Voyich, *supra* note 152 at 362; State Highway Comm'n v. Bare, *supra* note 142 at 300.

¹⁵⁹State Highway Comm'n v. Jacobs, *supra* note 9 at 328.

¹⁶⁰This issue was raised in *State Highway Comm'n v. Voyich*, *supra* note 152, but the court reserved judgment for lack of a proper objection.

sale, and so is not evidence of market value—based on a willing-buyer/willing-seller concept.¹⁶¹ However, some jurisdictions treat the question simply as one of proof; that is, such evidence is admissible if it is first shown that the price paid in the negotiated purchase was not influenced by the threat of condemnation and fear of litigation.¹⁶²

B. Offers

Offers to sell or purchase the affected property or comparable property, no matter by whom or to whom made, are not admissible to determine the market value of the affected property.¹⁶³ Two reasons have been given for this exclusion: (1) it constitutes hearsay; and (2) it raises too many collateral issues to justify an exception to the hearsay rule.¹⁶⁴ Offers are easy to fabricate. Often they are based on inadequate knowledge, made under circumstances not involving potentially binding responsibility. While the problem is basically one of proof that the offer was made in good faith and with the intent to purchase or sell once accepted, these facts would be difficult to verify objectively in the typical informal offer situation.

OPINIONS

Of all the evidence that may be used to ascertain the value of property in a condemnation action, opinion evidence is the most important. Opinion evidence has been the subject of more discussion by the Montana supreme court than any other kind of valuation evidence. This is simply a reflection of the fact that, as a practical matter, opinion evidence is the means by which market value is most often shown. This is in spite of the fact that opinion evidence is advisory only. The jury may give to opinions the weight they deem proper or may reject them altogether if they find them unsound.¹⁶⁵

As is the case with all opinion testimony, "it is in the discretion of the trial judge to determine who are competent to give opinions on value."¹⁶⁶ What standards, then, are to guide the trial judge in making this determination? The question at present is an extremely difficult one, since recent Montana decisions on this point have been woefully inconsistent.

The decisions are all agreed on the fundamental rule of qualifi-

¹⁶¹State Highway Comm'n v. Voyich, *supra* note 152 at 361-362.

¹⁶²5 NICHOLS, EMINENT DOMAIN, § 21.33 (3d ed. 1969).

¹⁶³Helena Power Transmission Co. v. McLean, 38 Mont. 388, 392, 99 P. 1061 (1909); Yellowstone Park R.R. Co. v. Bridger Coal Co., *supra* note 11 at 557-559.

¹⁶⁴*Id.*

¹⁶⁵State Highway Comm'n v. Vaughan, *supra* note 8 at 287.

¹⁶⁶State Highway Comm'n v. Wilcox, 155 Mont. 176, 181, 468 P.2d 749 (1970); State Highway Comm'n v. Barnes, *supra* note 81 at 305; Alexander v. State Highway Comm'n, 142 Mont. 93, 110, 381 P.2d 280 (1963); State Highway Comm'n v. Keneally, *supra* note 93 at 262; and State Highway Comm'n v. Peterson, *supra* note 9 at 63.

cation for an opinion witness¹⁶⁷ and his opinion. The witness must have and use "some peculiar means of forming an intelligent and correct judgment as to the value of the property in question beyond what is presumed to be possessed by men generally."¹⁶⁸ This same standard was expressed more informally (but also more accurately considering its application) as requiring a mere showing that the witness "knew more than the ordinary person on the street about the subject in question."¹⁶⁹

All of the decisions translate the "some peculiar means" standard into at least this basic requirement: the witness must know the real property in question, be familiar with the uses to which it is or may be put, and base his estimate of value on this knowledge.¹⁷⁰ An opinion of value was held improper where the witness valued a cement mixing plant on the basis of what the plant ought to have been rather than what it in fact was.¹⁷¹ Likewise, an opinion as to the value of a mineral deposit was held improper where there was not presented as a foundation "evidence of any core drilling, surface or subsurface sampling, geological reconnaissance, geophysical exploration, geochemical analyses, or smelter reports of former production."¹⁷² For the witness and his opinion to be competent, the witness must be familiar with those real attributes which give value to the affected property, and, furthermore, his opinion must be based on his evaluation of these attributes.

Beyond the rudimentary requirement of familiarity with the affected property, it is difficult to say what is required for the competency of the witness and his opinion. It seems reasonable to require something

¹⁶⁷The term "opinion witness" is used instead of the more conventional "expert" and "non-expert," since the author believes the term "opinion witness" describes most accurately the witness who may express an opinion of market value. In some instances the Montana court refers to this witness as "not . . . a technical expert" (State Highway Comm'n v. Peterson, *supra* note 9 at 63) and in other instances as "an expert" (State Highway Comm'n v. Jacobs, *supra* note 9 at 327). There is a technical distinction between an expert and a non-expert. An expert is "A witness who has special training, education or experience in a particular science, profession or calling" State Highway Comm'n v. Donovan, *supra* note 107 at 288. However, the Montana court has not observed this distinction in condemnation actions, and has applied the same standard of qualification to both technical experts and non-experts. The only practical difference the distinction between expert and non-expert makes is in a case where all of the witnesses are experts. Here the jury instruction as to how to judge their opinion will be the standard expert witness instruction rather than that which is used exclusively in condemnation cases to determine whether a witness is qualified to render an opinion as to value. State Highway Comm'n v. Donovan, *supra* note 107 at 288-290.

¹⁶⁸State Highway Comm'n v. Peterson, *supra* note 9 at 63; State Highway Comm'n v. Wilcox, *supra* note 166 at 181; State Highway Comm'n v. Barnes, *supra* note 81 at 305; Alexander v. State Highway Comm'n, *supra* note 166 at 110; and State Highway Comm'n v. Keneally, *supra* note 93 at 262.

¹⁶⁹State Highway Comm'n v. Jacobs, *supra* note 9 at 327.

¹⁷⁰City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 396-397, 480 P.2d 826 (1971); State Highway Comm'n v. Wilcox, *supra* note 166 at 180-181; State Highway Comm'n v. Barnes, *supra* note 81 at 305; Alexander v. State Highway Comm'n, *supra* note 166 at 110; State Highway Comm'n v. Keneally, *supra* note 93 at 262; State Highway Comm'n v. Peterson, *supra* note 9 at 63; and Montana Railway Co. v. Warren, *supra* note 72 at 283.

¹⁷¹Alexander v. State Highway Comm'n, *supra* note 166 at 97-104.

¹⁷²State Highway Comm'n v. Antonioli, *supra* note 60 at 416.

more of an opinion witness, but to say that this is the law in Montana would be an incompetent opinion on the author's part, resting on sheer speculation and conjecture. The problem with stating the Montana law is that the court has been less than meticulous in setting it forth. Since the rules of law cannot be stated in one-two-three-order, the best method of analysis is a case-by-case consideration of four recent Montana decisions.

The first case is *State Highway Comm'n v. Barnes*.¹⁷³ In this case the opinion testimony of a number of witnesses was rejected on the ground that it was based on mere "personal opinion" or "experience."¹⁷⁴ There was no question but that the witnesses were familiar with the affected property and the uses to which it could be put. But the court required something more than mere familiarity to meet the "some peculiar means" standard; the opinion testimony had to be based on "an accepted method of arriving at value."¹⁷⁵ The three accepted methods, discussed above, are use of comparable sales, capitalization of net income, and computation of reproduction cost of improvements less depreciation. The opinion witness would probably not, under *Barnes*, have been required to consciously apply these technical appraisal techniques. However, to be acceptable, the basis for the opinion would have to be translatable into an appropriate one or more of these accepted appraisal techniques. The distinction is that, though the witness need not possess the expert's background knowledge, he must, under the *Barnes* interpretation of the "some peculiar means" standard, testify *like an expert*—using, perhaps unknowingly, the expert's techniques.

Two years later the court retreated from *Barnes* in *State Highway Comm'n v. Wilcox*.¹⁷⁶ *Wilcox* held that an opinion based on four admittedly non-comparable sales and rendered by one who simply knew the affected property and its uses was an opinion by one who had used the requisite "some peculiar means."¹⁷⁷

The crowning blow to *Barnes* came one year later in *City of Three Forks v. State Highway Comm'n*.¹⁷⁸ The court held that a witness who knew the affected property and its potential uses was competent to render an opinion as to its value.¹⁷⁹ It appeared also that the witness' opinion need only be based on knowledge of the property and its potential uses. No longer was the witness required to arrive at his opinion in a fashion that could be deemed an "accepted method of

¹⁷³*State Highway Comm'n v. Barnes*, *supra* note 81.

¹⁷⁴*State Highway Comm'n v. Barnes*, *supra* note 81 at 305-307.

¹⁷⁵*Id.* at 306.

¹⁷⁶*State Highway Comm'n v. Wilcox*, *supra* note 166.

¹⁷⁷*Id.* at 178-181.

¹⁷⁸*City of Three Forks v. State Highway Comm'n*, *supra* note 170.

¹⁷⁹*Id.* at 396-397.

arriving at value." *Barnes* was dead. *Wilcox* was appropriately cited¹⁸⁰ for this new and more lax rule on the requirements of market value opinions.¹⁸¹

One year later the court started what may signal the beginning of the redemption of *Barnes*. The pendulum came close to a full swing (again) in *State Highway Comm'n v. Metcalf*.¹⁸² A witness was allowed to testify to the value of a gypsum deposit when he had never seen the deposit, knew nothing of gypsum, had never studied the economic aspects of the gypsum market, had no knowledge of the quality standards applicable to the chemical compound to make it commercially marketable, and had never investigated any gypsum deposits.¹⁸³ In holding that the witness lacked the requisite "peculiar means" the court emphasized the fact that the witness had no means by which to determine the value of gypsum, since he knew nothing about the values of gypsum in the market or in place.¹⁸⁴ This is a higher standard than that applied in *Wilcox* and *City of Three Forks*, which required mere familiarity with the land and its potential uses. Under these cases, knowledge of market value was imputed by simple familiarity. But under *Metcalf*, the court required something more than mere familiarity. Though the decision is not as clear as *Barnes*, the court seemed to require some knowledge of the worth of the property in the market, knowledge that can be obtained only by applying an accepted appraisal technique like comparable sales, income, or reproduction cost of improvements less depreciation. This, of course, is the rule of *Barnes*. While the author does not believe that *Metcalf* necessarily marks a complete return to *Barnes*, it is a step in this direction. To see whether *Barnes* is to be fully reinstated we must await future decisions.

To the general rule of opinion testimony, whatever it now is, there was, and may still be, one exception. This exception concerns the opinion of the landowner himself. In *Alexander v. State Highway Comm'n*,¹⁸⁵ the court announced its rule governing a landowner's opinion :

[A]n owner, upon prima facie proof of ownership, shall be qualified to estimate in a reasonable way the value of his property for the use to which he has been putting it. Such owner is not qualified by virtue of ownership alone to testify as to its value for other purposes unless he possess, as any other witness as to value, "some peculiar means of forming an intelligent and correct judgment as to the value of the property in question beyond what is presumed to be possessed by men generally."¹⁸⁶

¹⁸⁰*Id.* at 397.

¹⁸¹In all fairness to the court it must be noted that the test used in *City of Three Forks* has its origin in the very famous old Montana case of *Montana Railway Co. v. Warren*, *supra* note 72. In *Warren* it was said, at 283, that "Witnesses who know the property, and are familiar with the uses to which it may be put, can give their opinions as to the market value."

¹⁸²..... Mont., 500 P.2d 951 (1972).

¹⁸³*Id.* at 954.

¹⁸⁴*Id.* at 955.

¹⁸⁵*Alexander v. State Highway Comm'n*, *supra* note 166.

¹⁸⁶*Id.* at 110.

This "reasonable way" standard is an equitable one,¹⁸⁷ and appears to be directed at the amount of the owner's estimate in light of the facts of the case, rather than at the knowledge on which the opinion is based.¹⁸⁸ "Reasonable" has been defined as "not incredible,"¹⁸⁹ and "being in agreement with right thinking or right judgment; not conflicting with reason: not absurd: not ridiculous: not extreme: not excessive: possessing good sound judgment: well balanced: sensible."¹⁹⁰ The vagueness of the definition indicates the elasticity and subjectivity of the standard. A landowner may, without any basis whatsoever, render an opinion of value for the use to which he is putting his land. The opinion is objectionable only if excessive in amount in light of other facts and testimony.

The problem with the landowner exception is whether it is still the law in Montana. Probably it is, but two decisions subsequent to *Alexander* cast a shadow of doubt on the vitality of the exception. In *Barnes* and *Wilcox* the court measured landowners' opinions as to the value of their land for the use to which they were putting it by the more strict standard of "some peculiar means."¹⁹¹

In neither case did the court express a conscious intent to overrule *Alexander*. In fact, in *Barnes* the court said it was following *Alexander*.¹⁹² Also, in the later case of *City of Three Forks* the court alluded to a special rule concerning the property owner's value opinion.¹⁹³ This leads the author to the tentative conclusion that *Alexander* is still the law. One may only speculate about what the court had in mind in *Barnes* and *Wilcox*. As with the treatment of other opinion testimony on market value, the court was not too meticulous in applying or discarding prior precedent.

Montana's law of opinion testimony on market value in condemnation cases needs substantive revision. For reasons unarticulated in their decisions, the court has carved out an exception to the general rule of R.C.M. 1947, § 93-401-27(9) that only experts are competent to render opinion evidence. To express an opinion of market value in a condemnation case one "need not be a technical expert."¹⁹⁴ And under *City of Three Forks*, one need have no basis for his opinion other than familiarity with the land and its potential uses. Landowners may be allowed to express opinions under even more lax standards.

The only plausible reasons for permitting non-experts to give opinions of market value are that they are competent to do so or experts are

¹⁸⁷*Id.* at 109.

¹⁸⁸*Alexander v. State Highway Comm'n*, *supra* note 5 at 369-371.

¹⁸⁹*State Highway Comm'n v. Keneally*, *supra* note 93 at 261.

¹⁹⁰*Alexander v. State Highway Comm'n*, *supra* note 166 at 109.

¹⁹¹*State Highway Comm'n v. Barnes*, *supra* note 81 at 304-306; *State Highway Comm'n v. Wilcox*, *supra* note 166 at 180-181.

¹⁹²*State Highway Comm'n v. Barnes*, *supra* note 81 at 305.

¹⁹³*City of Three Forks v. State Highway Comm'n*, *supra* note 170 at 396.

¹⁹⁴*State Highway Comm'n v. Peterson*, *supra* note 9 at 63.

scarce. Neither of these has validity today. Not only is the appraisal of real property a growing profession, it has also become a highly specialized art, which requires knowledge and experience in the application of technical appraisal methods.¹⁹⁵ The appraisal of realty is a matter for experts and experts are available. The time has come to abolish the rule allowing non-expert opinions of market value in condemnation cases.

To this end the author makes two proposals for legislation. First, no one should be allowed to give opinion evidence of market value unless he is an expert appraiser. If in the future real estate appraisers are licensed by the state, perhaps licensure should be made a condition to showing the requisite expertise. Second, as a check on the ethics and competency of expert appraisers there should be established in an appropriate state agency an Appraisal Review Committee composed of real estate appraisers. In any case in which one valuation expert testifies against another, the experts involved should be required to submit to the Committee a written report stating the nature of the case and their estimates of value. Where the divergence of opinion is minor no further steps should be necessary. Where the divergence is significant, the Committee should require a full appraisal report from each expert. These reports should be subjected to careful analysis. If necessary, the expert may be required to appear personally before the Committee. If unethical conduct or incompetence is discovered, appropriate disciplinary sanctions should be invoked.

An Appraisal Review Committee is not a novel suggestion. The procedures outlined above are identical to those presently used successfully by the American Institute of Real Estate Appraisers.

Hopefully, adoption of these proposals would have a salutary effect on the quality of the opinions of market value rendered in condemnation cases in Montana.

¹⁹⁵This is witnessed by the growing number of professional appraisal societies. These societies include the American Institute of Real Estate Appraisers, the American Society of Appraisers, the American Right of Way Association, the American Society of Farm Managers and Rural Appraisers, and the Society of Real Estate Appraisers.

That the appraisal of the value of realty requires special knowledge and experience, consider, for example, that to achieve the professional designation M.A.I. granted by the American Institute of Real Estate Appraisers one must meet the following basic requirements:

1. Graduation from an accredited four-year high school (Rule 1.110);
2. Two years full-time experience in the real estate vocation followed by at least five years of experience in appraising or supervising the appraisal of interests in real property (Rule 1.230);
3. Submission of three satisfactory demonstration appraisal reports (Rule 1.240), in sufficient detail to enable the Admissions Committee to pass on the reasonableness of the value estimate and the appraiser's grasp and practical application of fundamental appraisal processes (Rule 1.312); and
4. Satisfactory completion of at least two written examinations covering such topics as highest and best use estimates, reproduction cost estimates, depreciation theories and methods, methods of capitalizing net income, market data interpretation, the nature of real property interests, and how to plan an appraisal (Rules 1.160, 1.250, and 1.401).

BURDEN OF PROOF

Though in civil actions the burden of proof is normally on the plaintiff, this is not the usual rule in a condemnation action. In Montana the landowner—whether plaintiff or defendant—must bear the burden of proving just compensation in excess of that offered by the condemnor.¹⁹⁶

CONCLUSION

For the most part, Montana's law of valuation in eminent domain is the same as that of most other jurisdictions. There are, however, at least two areas of Montana's valuation law in need of reform. First, though most jurisdictions forbid it, in Montana, in some cases, an income approach may be used to value commercial business property. For the reasons set forth previously, the author is of the opinion that in this respect the Montana law on the income approach is unsatisfactory. This should be judicially corrected in an appropriate future decision. Second, while most courts allow landowners and non-experts to render opinions of market value in condemnation cases,¹⁹⁷ the Montana court has recently indicated a willingness to allow such witnesses to render opinions under comparatively lax standards. In the author's opinion the appraisal of the value of real property is today a matter for experts. Only experts ought to be allowed to render opinions of market value in condemnation cases. As a check on the ethics and competency of these experts, their appraisals given in condemnation cases should be subjected to review by a committee of appraisers established within an appropriate state agency. Since this reform contemplates granting additional powers and duties to an executive state agency, it requires legislative action.

¹⁹⁶State Highway Comm'n v. Barnes, *supra* note 81 at 309; State Highway Comm'n v. Churchwell, 146 Mont. 52, 62-63, 403 P.2d 751 (1965); State Highway Comm'n v. Barovich, 142 Mont. 191, 193, 382 P.2d 917 (1963); State Highway Comm'n v. Peterson, *supra* note 9 at 73-75.

¹⁹⁷*See*, NICHOLS, EMINENT DOMAIN, §§ 18.4-18.42 (3d ed. 1969).