CASE NOTE

PROPERTY LAW—Strong Armed at Arm's Length: The Role of Comparable Easements in Condemnation Proceedings under Wyoming's Amended Eminent Domain Laws; *Barlow Ranch, LP v. Greencore Pipeline Co.*, 2013 WY 34, 301 P.3d 75 (Wyo. 2013)

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INTRODUCTION

In the early twentieth century, commenting on the governmental power to take private property on the burgeoning western frontier, United States Supreme Court Justice Oliver Wendell Holmes, Jr. wrote that "there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation."[1] The drafters of the Wyoming Constitution required landowners make such concessions when they included a provision granting a category of private entities the right to take private property for certain purposes, so long as just compensation is provided.[2] Eminent domain, as this power is known, was historically extended to private companies in an effort to encourage development of the state's agricultural and mineral resources, and to foster economic progress.[3] This provision remains unchanged to this day, though the question of determining "just compensation" for condemned property lingers.

In 2007, the Wyoming Legislature amended the state's eminent domain laws to allow courts faced with the question of compensation for an easement to consider the prices paid for other easements that were comparable in size, type, and location so long as they were the result of arm's length transactions.[4] In *Barlow Ranch, LP v. Greencore Pipeline Co.*, the Wyoming Supreme Court held

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[1] Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (holding a Utah statute that allowed a private mining operation to condemn a right-of-way for an aerial bucket line over private property was constitutional under the Fifth and Fourteenth amendments).

[2] WYO. CONST. art. 1, §§ 32, 33; ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE 67 (1993).

[3] KEITER & NEWCOMB, *supra* note 2, at 67.

[4] WYO. STAT. ANN. § 1-26-704(a)(iii)(B)-(C) (2013).

that comparable easements are admissible to determine the fair market value of a partial taking for a pipeline under certain circumstances.[5]

While the court reached the proper conclusion in *Greencore*, the court expanded the definition of "arm's length transactions" in a way that will lead to chilled condemnation negotiations, an overall decrease in prices offered to landowners for private takings, and an increase in condemnation litigation.[6] This Case Note first discusses the unusual nature of "private takings" in federal and Wyoming law and then provides a summary of the holding and reasoning in *Greencore*.[7] The practical implications of the 2007 amendments and the *Greencore* decision will be discussed, followed by recommendations on how to account for these consequences.[8]

BACKGROUND

Eminent Domain and Private Takings

The power to take private property for public use has been called "essential to the life of the state."[9] The power of eminent domain is inherent to any sovereign, including the United States and individual states therein.[10] The taking of private property by a public entity, or a private entity with the delegated authority, is often viewed as necessary for the proper performance of governmental functions.[11] The Fifth Amendment of the United States Constitution explicitly recognizes this power, while simultaneously limiting it in two ways. First, private property may only be taken for public use.[12] Second, private property may never be taken without providing just compensation in return.[13]

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[5] 2013 WY 34, ¶ 50, 301 P.3d 75, 91 (Wyo. 2013).

[6] *See infra* notes 140–170 and accompanying text.

[7] *See infra* notes 9–120 and accompanying text.

[8] *See infra* notes 121–196 and accompanying text.

[9] State of Ga. v. City of Chattanooga, 264 U.S. 472, 480 (1924).

[10] *Id.* at 480; Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (holding that when private property is taken for public use by a state court or Legislature without providing just compensation, it is a violation of the U.S. Constitution Fourteenth Amendment right to due process of law, thereby requiring states to comply with the Fifth Amendment just compensation requirement); Matthew P. Harrington, "*Public Use*" *and the Original Understanding of the So-Called* "*Takings*" *Clause*, 53 HASTINGS L.J. 1245, 1250 (2002) (discussing the origins and nature of eminent domain).

[11] *City of Chattanooga*, 264 U.S. at 480; *see* United States v. Jones, 109 U.S. 513, 518 (1883) (holding that the right of eminent domain is inherent in any sovereign and exists without Constitutional recognition); Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) (stating the right to take private property for public uses appertains to independent government).

[12] U.S. CONST. amend. V (The Takings Clause states: ". . . nor shall private property be taken for public use, without just compensation.").

[13] *Id.*

The United States Supreme Court interpreted the term "public use" broadly, allowing government to take property for a wide range of purposes, including roads, railroads, bridges, pipelines and, most recently, for economic development.[14] In *Kelo v. City of New London,* the Court considered whether a city's condemnation of private property in order to convey it for the purposes of revitalizing a distressed economy satisfied "public use."[15] The Court held that it did, stating that the public use requirement is broad, and includes takings of private property that will be used directly by the public as well as those that will provide economic benefits to the public generally.[16] The Court has also held that state governments may delegate to private entities the power to take private property.[17] It is generally accepted that a taking by such an entity is done for a public purpose.[18]

Takings by private companies, or "private takings," are common in the Mountain West, where states explicitly grant the power to private entities by constitutional provisions or statutes.[19] One purpose of extending this power is

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[14] Kelo v. City of New London, Conn., 545 U.S. 469, 478–79 (2005) (holding that the city's exercise of eminent domain power to promote economic development plan was a "public use" and was therefore constitutional under the Fifth Amendment); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 493 (2006).

[15] 545 U.S. at 472.

[16] *Id.* at 480.

[17] Clark v. Nash, 198 U.S. 361, 364 (1905) (holding that a private individual has the right to condemn a right of way across neighbor's property for the enlargement of an irrigation ditch when the statute granting that right asserts the use to be public); Cline v. Kan. Gas & Elec. Co., 260 F.2d 271, 273 (10th Cir. 1958) ("[T]he Legislature may delegate [the right to appropriate private property] to another, provided that the property is to be devoted to public use, that there is public necessity that it be taken for such use, and that provision is made for the payment of just compensation."). State governments may also limit the power of eminent domain by defining public use more narrowly, either through statute or judicial decisions. *Kelo*, 545 U.S. at 489 (emphasizing that the *Kelo* decision does not preclude "any State from placing further restrictions on its exercise of the takings power" either through statutory or judicial measures); Cohen, *supra* note 14, at 511–12.

[18] Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984) (refusing to engage in debate over the "wisdom of takings" so long as the purpose of the Legislature is legitimate and not irrational); Berman v. Parker, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the Legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the Legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs.") (citation omitted); *see* Luxton v. N. River Bridge Co., 153 U.S. 525, 529 (1894) (holding that Congress may delegate the power of eminent domain by statute to a private company authorized to take private property for the purpose of building a bridge); Cohen, *supra*, note 14, at 511–12; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77 (1986).

[19] *See, e.g.*, COLO. CONST. art. II, § 14 ("Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes."); ARIZ. CONST. art. II, § 17 ("Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands

to promote development of coal, oil, gas, and other natural resources.[20] States, in the infancy of statehood, were eager to grow local economies through the development of mining, oil and gas development, forestry, and other industries.[21] The United States Supreme Court found these purposes satisfy the public use requirement of the Fifth Amendment.[22] As one scholar wrote of the American West, the "hardships of life in arid lands and mountain fastnesses, the nature of the resource base, vast distances, and, above all, men's impatience to force the pace of economic development all seemed to overwhelm the remaining bulwarks of legal-constitutional structure."[23] Because the power of eminent domain in the hands of selected private entities served to foster expansion and utilization of the region's resources and promote economic growth in these fledgling states, it is generally accepted that the public purpose requirement is satisfied.[24]

As a result, in many states, private companies may initiate a condemnation proceeding against a landowner without involving state government.[25] Because the power of eminent domain is granted by law, courts generally do not question

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of others for mining, agricultural, domestic, or sanitary purposes."); IDAHO CONST. art. I, § 14 (Private property may be taken for public use for just compensation which is defined as " use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants."); Harry N. Scheiber, *Property Law, Expropriation and Resource Allocation by Government: The United States 1789–1910*, 33 J. ECON. HIST. 232, 244 (1973); *see* Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L REV. 651, 652 (2008).

[20] KEITER & NEWCOMB, *supra* note 2, at 67; Klass, *supra* note 19, at 652.

[21] *See* SAM WESTERN, PUSHED OFF THE MOUNTAIN, SOLD DOWN THE RIVER: WYOMING'S SEARCH FOR ITS SOUL, 10 (2002) (arguing that Wyoming, even before it was a state, "bet on cattle, oil, coal and gas to bring the state abundance").

[22] *See Clark*, 198 U.S. at 364 (stating that under some "peculiar condition of the soil or climate, or other peculiarity of the state," the power of eminent domain in the hands of private entities may rise to a public use); Klass, *supra* note 19, at 652; KEITER & NEWCOMB, *supra* note 2, at 67; Scheiber, *supra* note 19, at 244.

[23] Scheiber, *supra* note 19, at 244.

[24] *Id.* at 249, n.57 (emphasizing the strategic importance of eminent domain in the hands of private entities, the absence of which would have probably led to the foundering of such enterprises).

[25] *See, e.g.*, WYO. STAT. ANN. § 126-814 (2013) (a "utility or [any petroleum or other pipeline] company has the right of eminent domain and may condemn the easement required by the utility or company); COLO. REV. STAT. ANN. § 38-2-101 (2013) ("If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipeline, bridge, ferry, tunnel, telegraph line, railroad line, electric line, electric plant, telephone line, or telephone plant is unable to agree with the owner for the purchase of any real estate or right-of-way or easement or other right necessary or required for the purpose of any such corporation for transacting its business or for any lawful purpose connected with the operations of the company, the corporation may acquire title to such real estate or right-of-way or easement or other right in the manner provided by law for the condemnation of real estate or right-of-way.").

whether the use is for a public purpose.[26] The question then, is not whether the taking can occur, but how much an individual must be compensated.[27]

Determining Just Compensation

Regardless of who is taking, just compensation is always required.[28] The Takings Clause "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[29] Determining just compensation is not an easy task. The United States Supreme Court has not established a rigid formula for determining just compensation.[30] Noting that the "just" requirement "derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law," the Court pointed to fair market value as the primary standard by which to determine compensation.[31] Fair market value is the value that a willing but unobligated buyer would pay in cash to a willing but unobligated seller at the time of the taking.[32]

Fair market value is itself not an easy figure to determine, and the method has been criticized as not arriving at just compensation.[33] For example, fair market value fails to take into consideration subjective values an owner may have in his property.[34] It also does not generally account for activity on the property prior

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[26] *See* Laura A. Hanley, *Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, but by How Much*, 37 HOUS. L. REV. 125, 158–159 (2000) (arguing that, because there is really no question as to whether or not a private condemnor can take the property, what determines who wins and loses is a question of compensation only); *see supra* notes 17–18, 22 and accompanying text.

[27] Hanley, *supra* note 26, at 137.

[28] U.S. CONST. amend. V.

[29] Armstrong v. United States, 364 U.S. 40, 49 (1960); *see* McGrath v. R.I. Ret. Bd. *ex rel.* Mayer, 906 F. Supp. 749, 769 (D.R.I. 1995) *aff'd sub nom.* McGrath v. R.I. Ret. Bd., 88 F.3d 12 (1st Cir. 1996).

[30] United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

[31] United States v. Fuller, 409 U.S. 488, 490 (1973) (citation omitted).

[32] Kirby Forest Indus., Inc. v. United States., 467 U.S. 1, 10 (1984).

[33] *See infra* notes 34–36 and accompanying text.

[34] Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) (suggesting that fair market value is not full compensation, for "market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property"); Steven J. Eagle, *Protecting Property from Unjust Deprivation Beyond Takings: Substantive Due Process, Equal Protection, and State Legislation*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 507, 515 (Thomas E. Roberts ed., 2002); Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 721 (2008) (discussing the role subjective attachment has in an individual's valuation of their property). *But see* Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 649 (2013) (arguing that fair market value provides at least partial compensation for a significant amount of condemnee's subjective value).

to condemnation, the cost of relocation, or destruction of a given business's good will.[35] Furthermore, fair market value does not consider consequential damages, which may arise at some distant point in the future, or any subjective or emotional damages.[36] Emotional damages may include what have been termed "dignitary harms," including feelings of outrage, resentment, and insult as a result of condemnation.[37] For these reasons, fair market value is regarded by some as an inadequate means of determining just compensation.[38]

Determining fair market value in the context of a partial taking, which is often what is obtained for the purposes of natural resource extraction, is even more complicated.[39] In the case of a partial taking, such as an easement to lay a pipeline, the condemnor does not take the entire parcel. Instead, the right to use the property is taken, while the owner retains title.[40] The method used by most jurisdictions to determine the value of an easement is the "before and after" approach.[41] Under this approach, compensation is the difference between the fair market value of the property before the taking occurred and after, or the "before and after" value.[42] This approach is discussed in greater detail in the following section.[43]

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[35] Marisa Fegan, *Just Compensation Standards and Eminent Domain Injustices: An Under-examined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 288 (2007); Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 HAMLINE J. PUB. L. & POL'Y 181, 192 (1993).

[36] Consequential damages are "losses that do not flow directly and immediately from an injurious act but that result indirectly from the act." Black's Law Dictionary 445–46 (9th ed. 2009); Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990) ("It is a well settled principle of Fifth Amendment taking law, however, that the measure of just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking."); Fegan, *supra* note 35, at 288.

[37] Nadler & Diamond, *supra* note 34, at 721.

[38] *See supra* notes 34–36 and accompanying text.

[39] 4A NICHOLS ON EMINENT DOMAIN, Ch. 14, § 14.01[2] (Julius L. Sackman, 3rd ed.) (noting that, while conceptually determining compensation for a partial taking is straightforward, application of the principles can be complex).

[40] Albert N. Allen, *The Appraisal of Easements*, RIGHT OF WAY MAGAZINE, Nov./Dec. 2001 at 41; Edward McKirdy, *Partial Takings*, EMINENT DOMAIN AND LAND VALUATION LITIGATION, SF54 ALI-ABA 215, 217 (ALI-ABA Course of Study Materials, Jan. 9, 1992).

[41] NICHOLS, *supra* note 39, § 14.01[2]; Alan T. Ackerman & Noah Eliezer Yanich, *Just Compensation and the Framers' Intent: A Constitutional Approach to Road Construction Damages in Partial Taking Cases*, 77 U. DET. MERCY L. REV. 241, 246 (2000); Leslie Pickering Francis, *Eminent Domain Compensation in Western States: A Critique of the Fair Market Value Model*, 1984 UTAH L. REV. 429, 472–73; McKirdy, *supra* note 40, at 217.

[42] NICHOLS, *supra* note 39, § 14.01[2].

[43] *See infra* notes 48–58 and accompanying text.

Eminent Domain in Wyoming

When the Wyoming Constitution was ratified in 1889, it included two sections regarding the state's power of eminent domain. Article I, Section 32 provides:

> Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.[44]

Article 1, Section 33 supplements Section 32, stating: "Private property shall not be taken or damaged for public or private use without just compensation."[45] In Wyoming, like many western states, the power of eminent domain was extended to private entities for the purpose of promoting settlement and the development of the state's resources.[46] These two sections, along with the Wyoming Supreme Court's interpretations and some other limited statutes, governed condemnation proceedings in Wyoming for almost one hundred years.[47]

During this time, Wyoming courts used the "before and after" valuation method to determine the price of partial takings for pipeline easements.[48] In *Continental Pipe Line Co. v. Irwin Livestock Co.*, the Wyoming Supreme Court held, in the instance of a partial taking, "just compensation is the difference between the fair market value of the entire parcel before the taking and that after

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[44] WYO. CONST. art. I, § 32. In *Coronado Oil Co. v. Grieves*, the Wyoming Supreme Court held that "mining" includes oil and gas development. 603 P.2d 406, 412 (Wyo. 1979). While this case note does not address the "public use" requirement of the Fifth Amendment of the U.S. Constitution, it is important to note that the Wyoming Supreme Court has held that a taking must be in the "public interest." Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 57 (Wyo. 1913). The court has also held that, though article 32 ostensibly gave private entities the power of eminent domain for private use, "it was evidently adopted upon the theory that the public would be sufficiently benefited by the taking for such a purpose to warrant the taking." *Id. See supra* note 18 and accompanying text for more information regarding the public use requirement of the Takings Clause.

[45] WYO. CONST. art. I, § 33.

[46] KEITER & NEWCOMB, *supra* note 2, at 67.

[47] There were a number of statutes passed prior to the Wyoming Eminent Domain Act that address takings in limited circumstances, such as a taking involving public building and school sites and public utility plants and facilities (WYO. STAT. ANN. §§ 1-26-101 through -110 (repealed 1981)); railroads (WYO. STAT. ANN. §§ 1-26-201 through -210 (repealed 1981)); roads, ditches and flumes, pipe, electric transmission, telephone and telegraph lines (WYO. STAT. ANN. §§ 1-26-301 through -303 (repealed 1981)); ways of necessity for certain purposes (WYO. STAT. ANN. §§ 1-26-401 through -405 (repealed 1981)). These were all repealed in 1981 when the Legislature passed the more comprehensive Wyoming Eminent Domain Act.

[48] RANDALL T. COX, EASEMENTS, ACCESS & EMINENT DOMAIN: A REVIEW OF WYOMING LAW, 144–45, (2nd ed. 2001); *see supra* notes 40–41 and accompanying text.

the taking."[49] In *Coronado Oil Co. v. Grieves*, a case in which an oil company sought an easement on a private road, the court held the trial court erred by allowing opinions of just compensation which were not tied to a "before and after" valuation of the property, but were instead based on speculation and conjecture.[50]

Many landowners were frustrated with the "before and after" method of valuation. They believed it was inadequate and unfair.[51] It was difficult for landowners to show that partial takings, such as laying a pipeline, caused a significant diminution in property values.[52] However, landowners could show affronts of other kinds: surveyors would enter their property without permission, landmen would make low offers and threaten litigation, and projects would divide lands and impair views.[53] Juries recognized these damages and would award substantial verdicts for the landowners, only to have them overturned.[54] On appeal, the Wyoming Supreme Court would apply the "before and after" method of valuation, arriving at a lower price.[55]

This left landowners, who believed rights of property ownership to be sacrosanct, feeling disrespected and disappointed.[56] The increasing use of eminent domain by private companies, and the accelerating market values of land, made landowners even more frustrated with the "before and after" method of valuation.[57] In 1981, the Wyoming Legislature responded to these concerns by passing the Wyoming Eminent Domain Act.[58] Unsurprisingly, much of the Act addresses methods and procedures for determining just compensation.[59]

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[49] 625 P.2d 214, 216 (Wyo. 1981); *superseded by statute*, WYO. STAT. ANN. § 1-26-704 (2007), *as recognized in* Barlow Ranch, LP v. Greencore Pipeline Co., 2013 WY 34, ¶ 36, 301 P.3d 75, 87 (Wyo. 2013) (concluding that the Legislature's 2007 amendments "implicitly abrogated early contrary decisions in the law of eminent domain").

[50] *Coronado*, 642 P.2d at 433.

[51] Cox, *supra* note 48, at 144–45; *see* Saige Albert, *Barlow Pipeline Case Settled in Wyo Supreme Court*, WYOMING LIVESTOCK ROUNDUP (March 30, 2013), http://www.wylr.net/component/content/article/252-government/state/4079-barlow-pipeline-case-settled-in-wyo-supreme-court (last visited Nov. 2013).

[52] *See* Cox, *supra* note 48, at 144–45.

[53] *Id.* at 144.

[54] *Id.*

[55] *See, e.g.*, *Coronado*, 642 P.2d at 443–44 (reversing and remanding for a new trial after finding an award to a landowner, which exceeded the amount he claimed, was based on evidence that did not comply with the "before and after" rule); Cox, *supra* note 48, at 144.

[56] Cox, *supra* note 48, at 248.

[57] Rodney Lang, Comment, *Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure*, 18 LAND AND WATER L. REV. 739, 739 (1983).

[58] WYO. STAT. ANN. §§ 1-26-501 through -817 (2013).

[59] *See id.*

The Act states that the measure of compensation for a taking of any property is its fair market value.[60] In the case of a partial taking, the measure of compensation is the "greater of the value of the property rights taken, or the amount by which the fair market value of the property immediately before the taking exceeds the fair market value of the remainder immediately after the taking."[61] This section substantially changed the method for determining the amount of compensation required for a partial taking. Prior to the passage of the Act, the only method of valuation of a partial taking was the "before and after" test.[62] The Act maintained this traditional method of valuating partial takings and introduced a new method: "the value of the property rights taken."[63]

The statute later defines "fair market value" as the "price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy" if there is a relevant market.[64] If there is no relevant market, fair market value may be determined by "any method of valuation that is just and equitable."[65] In *L.U. Sheep Co. v. Board of County Commissioners of the County of Hot Springs*, the Wyoming Supreme Court determined the effect of this section was to "permit the landowner to establish the appropriate amount of just compensation for a partial taking by any rational method so long as he is able to introduce competent evidence to that end."[66] This allowed the landowner to prove the value of his property rights taken instead of using the "before and after" value.[67] These amendments, the court found, "implicitly abrogated earlier contrary decisions in the law of eminent domain" that restricted valuation to the "before and after" method.[68]

For nearly twenty years, the Act remained unchanged. In 2007, the Legislature enacted a handful of amendments, including one that made significant additions to the methods a court might use to determine fair market value.[69] The Act now instructs a court to use "generally accepted appraisal techniques," which may include the "values paid for transactions of comparable type, size and location by other public or private entities in arms [sic] length transactions for comparable

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[60] *Id.* § 1-26-702.

[61] *Id.* (emphasis added).

[62] Continental Pipeline Co. v. Irwin Livestock Co., 625 P.2d 214, 216 (Wyo. 1981); *see supra* notes 49–51 and accompanying text.

[63] WYO. STAT. ANN. § 1-26-702(b) (2013). The term "value" in this section is somewhat ambiguous. The *Greencore* court held that "value" in this context means "fair market value." Barlow Ranch, LP v. Greencore Pipeline Co., 2013 WY 34, ¶ 25, 301 P.3d 75, 85 (Wyo. 2013).

[64] WYO. STAT. ANN. § 1-26-704(a)(i) (2013).

[65] *Id.* § 1-26-704(a)(ii).

[66] 790 P.2d 663, 672 (Wyo. 1990).

[67] *Id.*

[68] *Id.* at 669.

[69] *See* WYO. STAT. ANN. § 1-26-704 (2013).

transactions on the same or similar property."[70] It may also include the "price paid for other comparable easements or leases of comparable type, size and location on the same or similar property."[71]

As the legislators recognized during debate on these amendments, there are instances when landowners are paid substantial prices for easements.[72] It has been noted that such offers are, in fact, typical.[73] Condemnors often offer more than the fair market value in an attempt to avoid delay, maintain positive relationships, and to "satisfy the intuitive feelings of landowners that they really have lost something."[74] The amendments to the Act, the purpose of which were to provide landowners the ability to present evidence of what other landowners have been offered for similar easements, are at the heart of the *Greencore* decision.[75]

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[70] *Id.* § 1-26-704(a)(iii); the full text of the section reads:

> (iii) The determination of fair market value shall use generally accepted appraisal techniques and may include:
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> (A) The value determined by appraisal of the property performed by a certified appraiser;
>
> (B) The price paid for other comparable easements or leases of comparable type, size and location on the same or similar property;
>
> (C) Values paid for transactions of comparable type, size and location by other public or private entities in arms length transactions for comparable transactions on the same or similar property.

Id.

[71] *Id.* § 1-26-704(a)(iii)(B).

[72] Debate on House Bill 0124, 59th Leg. Gen. Sess., January 24, 2007, afternoon session, http://legisweb.state.wy.us/2007/audio/AudioMenu/AudioMenu.aspx (Representative Thomas E. Lubnau said during debate: "In my experience up in my home county negotiating road easements and pipeline easements for land owners and oil companies, there are occasions where premium deals work out.").

[73] Cox, *supra* note 48, at 145.

[74] *Id.*; *see* Matt Micheli & Mike Smith, *The More Things Change, The More Things Stay the Same: A Practitioner's Guide to Recent Changes to Wyoming's Eminent Domain Act*, 8 WYO. L. REV. 1, 15 (2008); Allen, *supra* note 40, at 44–45 (explaining that "condemnors, especially private companies, have been willing to pay extra to landowners in order to move the project along quickly, encourage good landowner relations, and avoid costs associated with litigation").

[75] Debate on House Bill 0124, *supra* note 72. Representative Kermit C. Brown stated:

> I'd ask your favorable consideration for [the amendments regarding comparable easements and transactions] so that the one poor landowner that ends up in court isn't standing there on an island or out on a limb all by himself, without the ability to make a showing about why he's holding out, why the price that he is advocating for is reasonable. He knows some things that he can't tell the court. The court can't take them into consideration. That would be the purpose of this amendment.

Id. While the statements of individual legislators cannot be assumed to be the sentiment of an entire legislative body, the amendments were debated and passed despite some expressed concerns, as the *Greencore* court noted. Barlow Ranch, LP v. Greencore Pipeline Co., 2013 WY 34, ¶ 45, 301 P.3d 75, 89–90 (Wyo. 2013) (citing Kennedy Oil v. Dept. of Revenue, 2008 WY 154, ¶¶ 21–22, 205 P.3d 999, 1006 (Wyo. 2008)).

PRINCIPAL CASE

Background

Greencore Pipeline Company began negotiations in the mid-2000s with over sixty Wyoming landowners, including Barlow Ranch, seeking easements across their property in order to construct, operate, and maintain a pipeline.[76] Once completed, the pipeline will transport carbon dioxide from processing plants in Fremont County, where it is created as a waste product at gas plants, to southeastern Montana, where it will be injected into oil wells for enhanced oil recovery.[77] While Greencore reached agreements with sixty-three of the landowners for purchase of easements, it was unsuccessful in negotiations with Barlow.[78] Consequently, Greencore deposited with the district court the amount of its final purchase offer to Barlow and filed a condemnation action.[79]

After Greencore filed its complaint, the parties stipulated that Greencore could obtain the easements by condemnation. However, they left the question of compensation unresolved.[80] Based on evidence Greencore presented showing what it paid for a similarly situated easement nearby, the district court found the Barlow's easement was worth $43,034.[81] Both parties appealed.[82] The Wyoming Supreme Court considered multiple issues on appeal, one of which is relevant to this Case Note: whether comparable easements are proper evidence to establish the value of a partial taking of real property for a pipeline easement under the Eminent Domain Act.[83]

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[76] *Greencore*, ¶¶ 6–7, 301 P.3d at 80.

[77] Brief for the Appellant at 4, Barlow Ranch, LP v. Greencore Pipeline Co., 2013 WY 34, 301 P.3d 75 (2013), (S-12-0038); Findings of Fact and Conclusions of Law, Barlow Ranch, LP v. Greencore Pipeline Co., No. 31771 at 1–2 (Wyo. Dist. Dec. 28, 2011).

[78] *Greencore*, ¶ 7, 301 P.3d at 80. Greencore was also unsuccessful in reaching an agreement with Joseph C. Maycock, Brown-Kennedy Ranch, or Mitchel M. Maycock and Dixie Lea Maycock, who brought the action as Trustees of the Mitchel M. Maycock Revocable Trust and Trustees of the Dixie Lea Maycock Revocable Trust. *Id.* However, because these parties did not appeal the district court ruling, the following analysis focuses solely on Barlow Ranch.

[79] *Id.* at ¶ 8, 301 P.3d at 80–81. The actual amount Greencore deposited was $136,323.83, the combined total of its final purchase offers to Barlow, the Maycocks and the Brown-Kennedy Ranch. *Id.* Wyoming statutes require a condemnor to deposit with the court an amount equal to the condemnor's last offer of settlement prior to the action at the time of commencing an eminent domain action. WYO. STAT. ANN. § 1-26-513 (2013).

[80] *Greencore*, ¶ 8–9, 301 P.3d at 80–81. The pipeline easement to which the parties agreed was 860.679 rods, or about 4,734 feet in length, with a construction easement 100 feet wide and a permanent easement 50 feet wide. Findings of Fact, *supra* note 77, at 2.

[81] *Greencore*, ¶ 12, 301 P.3d at 81–82.

[82] *Id.* at ¶ 13, 301 P.3d at 82.

[83] *Id.* at ¶ 5, 301 P.3d at 80. The full list of issues the court addressed were:

(1) Did the district court err by concluding comparable easements were proper evidence to establish the value of a partial taking of real property for a pipeline easement?

Admissibility of Comparable Easements

Greencore asked the Wyoming Supreme Court to address whether comparable easements are admissible under the Wyoming Eminent Domain Act to establish the value of a partial taking of real property for a pipeline easement.[84] After an analysis of the applicable sections of the Act, read *in pari materia*, the court found that a trial court may admit and consider evidence of comparable easements when determining the value of the easement.[85] The court found that the language "comparable easements" clearly indicated the Legislature intended the section to apply to partial takings of easements.[86] Accordingly, the court upheld the district court ruling that the Act permits the district court to consider comparable easements in determining just compensation of a partial taking.[87]

The court then turned its attention to the type of easement and transaction that could be admitted under the amended statutes.[88] Barlow contended the district court judge erred in refusing to admit twelve easements of comparable type, size and location, which Barlow offered as evidence of fair market value as defined by the Act.[89] Using these easements, Barlow's appraiser calculated the fair market value of the pipeline easement at twenty-five dollars per rod with an additional annual payment of three dollars per rod, adjusted annually for inflation.[90]

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(2) Did the district court err when it ruled the easements offered by Barlow as comparables were not the result of arms' length transactions?

(3) Did the district court err in concluding the pipeline easements offered by Barlow were not comparable to the Greencore easement pursuant to [WYO. STAT. ANN. § 1-26-704(a)(iii)(B)-(C)]?

(4) Did the district court err in concluding annual payments for a condemned easement are not permissible under Wyoming law?

(5) Did the district court err when it refused to rule that Greencore was entitled to abandon its pipeline in place when its need for it terminates?

Id.

[84] *Id.* at ¶ 15, 301 P.3d at 82–83.

[85] *Id.* at ¶¶ 18–54, 301 P.3d at 84–93. *In pari materia* is a canon of statutory interpretation which requires that statutes that relate to the same subject or have the same general purpose are to be considered and construed in harmony. *See, e.g.*, Sorensen v. State Farm Auto. Ins. Co., 2010 WY 101, ¶ 13, 234 P.3d 1233, 1237 (Wyo. 2010); *In re* Loberg, 2004 WY 48, ¶ 5, 88 P.3d 1045, 1048 (Wyo. 2004).

[86] WYO. STAT. ANN. § 1-26-704(a)(iii)(B) (2013).

[87] *See Greencore*, ¶ 50, 301 P.3d at 91.

[88] *Id.* at ¶ 51, 301 P.3d at 91.

[89] *Id.* at ¶ 51, 301 P.3d at 90–91.

[90] A rod is a measurement of length equal to 5½ yards or 16½ feet. The Consumer Price Index, which was used by the court to track inflation, is the "measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services." U.S. Department of Labor, Bureau of Labor Statistics, http://www.bls.gov/cpi/cpifaq.htm#Question_1.

Greencore challenged this appraisal, arguing that the only measure of damages in a condemnation action for the partial taking of property is the difference between "before and after" values of the property taken.[91] Greencore further contended "that evidence of prices paid for comparable easements was not admissible to show fair market value in the context of partial takings."[92] Greencore filed an affidavit from its own appraiser, who believed the fair market value for a fee simple interest in the property sought for the pipeline would be $325 per acre.[93] This value would have led to a lower value for the easement overall than the values that Barlow's appraiser introduced.[94]

In response to these arguments, the district court held that evidence of the values of other easements was permissible, but only if the other easements were comparable and the result of arm's length transactions.[95] Ultimately, the district court found that the easements Barlow submitted were neither comparable nor the result of arm's length transactions.[96] The court based its holding on the fact that Barlow's easements were for pipelines that had to cross onto Barlow's property to connect to other pipelines and compressor facilities and because some of them were "negotiated in an effort to placate Barlow so future dealings would go more smoothly."[97] As a result, there was "insufficient evidence to establish that both sides were under no obligation to obtain the easements, or that the motivations and pressures there were the same as the motivations here."[98] The district court judge instead relied on the evidence Greencore submitted, concluding that the value of the Barlow easement was fifty dollars per rod, for a total of $43,034.[99]

In reviewing this decision, the Wyoming Supreme Court first addressed the district court's dismissal of Barlow's evidence and whether these easements were the result of arm's length transactions.[100] The court determined that the

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[91] *Greencore*, ¶ 11, 301 P.3d at 81.

[92] *Id.*

[93] *Id.*

[94] *See id.* It is impossible to say what compensation would be under Barlow's appraisal. Because annual payments are part of the valuation, compensation depends on the lifetime of the pipeline. It seems safe to assume, however, that Barlow would not have filed an appeal if there were not a substantial difference between what he introduced as fair market value and what the trial court awarded.

[95] *Id.* at ¶ 12, 301 P.3d at 81–82.

[96] *Id.*

[97] Findings of Fact, *supra* note 77, at 5.

[98] *Id.* at 6.

[99] *Greencore*, ¶ 12, 301 P.3d at 81–82; These easements showed that, for the pipeline in question, it had paid sixty-three other landowners, including a landowner just west of Barlow, between forty-nine and fifty-five dollars per rod, with an average of fifty dollars per rod. *Id.* at ¶ 83, 301 P.3d at 100. The values paid for these other easements were lump sum values and did not include annual payments. *Id.*

[100] *Id.* at ¶ 55, 301 P.3d at 93.

Act "incorporates the principle that fair market value and comparable sales must be based upon arms' length transactions between willing buyers and willing sellers."[101] A transaction is not arm's length if there is "compulsion either on the part of the seller who is obliged to act or on the part of the purchaser, who for personal reasons or necessities, is compelled to pay a higher price than an ordinary purchaser would be willing to pay."[102] Furthermore, an arm's length transaction is presumed unless there is evidence showing anything contrary.[103]

After noting that prices paid during condemnation proceedings or under actual threat of condemnation are not arm's length transactions and are therefore inadmissible in court as comparable easements, the court concluded that this does not exclude any and all transactions made by an entity with the power of condemnation.[104] The court held the values were admissible so long as the transaction was fair and met all other standards of comparability.[105] In sum, so long as a transaction is not made during a condemnation proceeding, or under the threat of condemnation, the value of the transaction may be admitted as evidence of fair market value.[106]

Applying this reasoning, the court rejected the district court's conclusion that the easements Barlow offered as evidence were not a result of arm's length transactions.[107] In ruling they were inadmissible, the district court relied on a rule established in *Coronado Oil Co. v. Grieves*: a sale is not arm's length when the easement is placed in a required location.[108] In *Coronado*, an oil company sought an easement on a private road, which was the only means of access to a drilling site.[109] Because the only options for the oil company were to either pay the landowner's demand or condemn the property right of way for the road, the *Coronado* court held the transaction was not arm's length nor was the price indicative of fair market value.[110]

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[101] *Id.* at ¶ 56, 301 P.3d at 94; *see supra* note 70 and accompanying text; WYO. STAT. ANN. § 1-26-704 (2013).

[102] *Id.* at ¶ 57, 301 P.3d at 94 (quoting 5 NICHOLS ON EMINENT DOMAIN, Ch. CT21, § 21.02[5] (Matthew Bender, 3rd ed.)).

[103] *Id.*

[104] *Id.* at ¶ 58, 301 P.3d at 94.

[105] *Id.* The court provided no guidance to lower courts regarding what constitutes a "fair" transaction. *Id.*

[106] *Id.*

[107] *Id.* at ¶ 74, 301 P.3d at 98.

[108] *See* Coronado Oil Co. v. Grieves, 642 P.2d 423, 439–40 (Wyo. 1982).

[109] *Id.* at 440.

[110] *Greencore,* ¶ 60, 301 P.3d at 95.

However, this rule was created prior to the adoption the Act, and because it was seemingly contrary to its purpose, the *Greencore* court overruled it.[111] While a condemnor may identify an easement across a landowner's property as a necessary part of a larger pre-determined system, the court held that this does not mean that the location is "required."[112] The court continued:

> We do not believe the Legislature intended that a proposed easement be rejected as an appropriate comparable [easement] simply because it is part of a larger project or the location chosen by the company was the most expeditious, shortest or most cost effective. If that were true, the project developer would possess nearly unlimited power to determine the location was "required" and most mineral development easements would be excluded as comparables, in direct contradiction of the statutory directive to use comparable easements to establish fair market value.[113]

The court concluded that the "rule requires actual condemnation or threat of condemnation to bar use as a comparable sale."[114]

Secondly, the court concluded that the district court erred in finding the transactions were not arm's length because there was no evidence Barlow had been placated.[115] While the record reflected a desire by the company representatives to "maintain an amicable relationship with landowners," the Court found no evidence showing that company representatives paid Barlow a "premium" to avoid condemnation or to appease him.[116] The proposition that the existence of an ongoing relationship between buyer and seller negates the arm's length nature of the transaction runs contrary to the purpose of the Act, the court held, which specifically permits consideration of easements on the same or similar property.[117]

On remand, the court instructed the district court to "analyze the proffered easements to determine whether they are comparable under the appropriate standards."[118] These standards include considering whether the transactions

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[111] *Id.* at ¶ 61, 301 P.3d at 95. In order to give effect to the legislature's intent to "use the market for comparable easements as a tool to determine fair market value in pipeline condemnation cases" the court "reject[ed] *Coronado's* statement that a transaction is not arms' [sic] length simply because the project developer "requires" the easement be placed in a certain location." *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at ¶ 64, 301 P.3d at 96.

[115] *Id.* at ¶ 74, 301 P.3d at 98.

[116] *Id.*

[117] *Id.*; WYO. STAT. ANN. § 1-26-704(a)(iii)(B)-(C) (2013).

[118] *Greencore*, ¶ 103, 301 P.3d at 105.

were arm's length under the court's interpretation.[119] In other words, so long as they were not made under the threat of condemnation or during condemnation proceedings, the district court may consider the easements as evidence of fair market value.[120]

ANALYSIS

While the *Greencore* court correctly held that comparable easements are admissible in determining fair market value under Wyoming law, the reasoning used was incomplete and partially incorrect.[121] In holding that arm's length transactions may include those transactions in which one party is vested with the power of eminent domain, so long as they are not determined under the threat of condemnation or during condemnation proceedings, the court established a rule that will ultimately harm landowners.[122] The 2007 amendments, coupled with the *Greencore* decision, will create in private condemnors an incentive to threaten condemnation at the beginning of negotiations, will discourage condemnors from making substantial offers to landowners, and will increase condemnation litigation.[123]

The Question of Comparability

The *Greencore* court correctly held that consideration of comparable easements is a permissible method of determining fair market value for a partial taking under the Wyoming Eminent Domain Act.[124] The amendments made to the Act in 2007 explicitly permit a court to consider comparable easements and transactions to determine the fair market value of a partial or complete taking.[125] The plain language of the statute, paired with the legislative history and intent, shows that the Legislature intended to permit comparable easements in determining just compensation for a partial taking.[126]

However, as previous cases illustrate, determining just compensation, even with statutory guidance, is a difficult and controversial task.[127] The 2007 amendments only complicated the process further.[128] The Legislature provided no

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[119] *See id.*

[120] *Id.* at ¶ 64, 301 P.3d at 96.

[121] *See infra* notes 124–139 and accompanying text.

[122] *See infra* notes 136–196 and accompanying text.

[123] *See infra* notes 166–90 and accompanying text.

[124] *See infra* notes 125–126 and accompanying text.

[125] *See* WYO. STAT. ANN. § 1-26-704 (2013).

[126] *See supra* notes 84–87 and accompanying text.

[127] *See supra* notes 60–75 and accompanying text; *see, e.g.*, L.U. Sheep Co. v. Bd. Of Cnty. Comm'rs, 790 P.2d 663 (Wyo. 1990); Continental Pipeline Co. v. Irwin Livestock Co., 625 P.2d 214, 216 (Wyo. 1981); Coronado Oil Co. v. Grieves, 603 P.2d 406 (Wyo. 1979).

[128] *See* WYO. STAT. ANN. § 1-26-704(a)(iii)(B)-(C).

guidance as to what constitutes a comparable easement, other than to require it be similar in size, type, and location and that the transaction be "arm's length."[129] The Legislature did not include a definition of the phrase "arm's length transaction" in the 2007 amendments, leaving the task to the court.[130]

Though the Wyoming Supreme Court had not explicitly defined "arm's length transaction" prior to the *Greencore* decision, the term appears elsewhere in Wyoming statutes.[131] Taxation and revenue laws provide this explanation:

> 'Bona fide arm's-length sale' means a transaction in cash or terms equivalent to cash for specified property rights after reasonable exposure in a competitive market between a willing, well informed and prudent buyer and seller with adverse economic interests and assuming neither party is acting under undue compulsion or duress[.][132]

Unsurprisingly, the *Greencore* court adopted a similar definition, holding that a transaction is *not* arm's length if there is "compulsion on the seller who is obliged to act or on the part of the purchaser, who for personal reasons or necessities, is compelled to pay a higher price than an ordinary purchaser would be willing to pay."[133] The court recognized a well-settled principle that "prices paid in condemnation actions or under actual threat of condemnation are not proper comparable sales because they are not arms' [sic] length transactions."[134] The court nevertheless held that the mere fact that one party was vested with the power of eminent domain does not mean the transaction was inherently unfair or necessarily precluded as evidence of a comparable sale.[135] Instead, the district court may consider transactions in which a party is vested with eminent domain, so long as the other statutory requirements are satisfied.[136]

The question then becomes, under what circumstances is a transaction, in which one party is vested with the power of eminent domain, *not* reached under the threat of condemnation? On remand, the *Greencore* court directed the district

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[129] *Id.*

[130] *See id.*

[131] *See Greencore*, ¶ 57, 301 P.3d at 95 (citing no judicial authority for the definition of "arm's length transaction"). The author, after an extensive search, was unable to locate any Wyoming Supreme Court cases that set forth a definition.

[132] WYO. STAT. ANN. § 39-14-501 (2013). This law was originally passed in 1999. 1999 Wyo. Sess. Laws 59.

[133] *Greencore*, ¶ 57, 301 P.3d at 95; *see supra* notes 102–03 and accompanying text.

[134] *Greencore*, ¶ 64, 301 P.3d at 96 (citing City of Cheyenne v. Frangos, 487 P.2d 804, 805–06 (Wyo. 1971); Colorado Interstate Gas Co. v. Uinta Dev. Co., 364 P.2d 655, 659 (Wyo. 1961).

[135] *Greencore*, ¶ 64, 301 P.3d at 96.

[136] *Id.* at ¶ 103, 301 P.3d at 105; WYO. STAT. ANN. § 1-26-704 (2013).

court to determine whether the easements offered by Barlow were comparable under the standards set forth in the decision.[137] In making this determination, the district court must consider whether the transaction is arm's length as the court defined the term.[138] If any of the values for Barlow's easements were reached under the threat of condemnation or during a condemnation proceeding, they would be inadmissible.[139] The question for the trial court will be to determine the meaning of "threat of condemnation."

The Effects of the Amendments and the Greencore *Decision*

While the court found the legislative intent in passing the 2007 amendments was to "encourage private negotiations and agreements," this is unlikely to be the outcome of the *Greencore* decision.[140] Instead, the decision will create in private condemnors an incentive to threaten condemnation at the beginning of negotiations.[141] Furthermore, offers made to landowners as part of negotiations will decrease.[142] Finally, the decision will increase litigation of takings.[143]

There are many reasons a pipeline company may pay a landowner a substantial price beyond the fair market value for an easement, including economic necessity, opportunity costs, the desire to avoid litigation, or to maintain a positive working relationship with landowners.[144] Prior to *Greencore*, private condemnors paid these sums without anticipating they would eventually be used in court to determine just compensation for a subsequent condemned easement.[145] Following the *Greencore* decision, however, these transactions may be admissible so long as they were not reached under the threat of condemnation.[146]

One of the most compelling arguments against using comparable easements acquired by an entity with the power of eminent domain to determine fair market value is because the buyer is under the threat of condemnation.[147] In such a case, the

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[137] *Greencore*, ¶ 53, 301 P.3d at 92 (noting that "each proposed easement transaction should have been evaluated [by the trial court] to determine whether it was appropriate evidence of fair market value").

[138] The *Greencore* court also instructed the trial court to consider whether the comparable easements were similar in size, type and location as required by the statute. *Greencore*, ¶ 84, 301 P.3d at 101.

[139] *Id.* at ¶ 64, 301 P.3d at 96.

[140] *Id.*

[141] *See infra* notes 147–160 and accompanying text.

[142] *See infra* notes 161–165 and accompanying text.

[143] *See infra* notes 166–170 and accompanying text.

[144] *See* Micheli & Smith, *supra* note 74, at 15.

[145] *See* Debate on House Bill 0124, *supra* note 72; Micheli & Smith, *supra* note 74, at 15.

[146] *Greencore*, ¶ 64, 301 P.3d at 96.

[147] Allen, *supra* note 40, at 45.

landowner has no choice but to convey the easement to the entity.[148] It is difficult to imagine a scenario in which a landowner approached by a representative for a company vested with the power of eminent domain would not feel threatened or compelled to sell. Simply knowing that the company is vested with the right would seemingly be enough to render the transaction *not* arm's length, and in Wyoming, a condemnor is required to inform a landowner of this power.[149]

Under Wyoming law, a condemnor must notify the landowner that it is vested with the power of eminent domain at the beginning of a negotiation proceeding.[150] The Act states that a condemnor must use "reasonable and diligent efforts" to acquire a piece of property and "negotiate in good faith."[151] Good faith negotiations must include providing the landowner with "[a] written notice that . . . *formal legal proceedings* may be initiated if negotiations fail."[152] From the beginning of negotiations, if the condemnor follows procedure required by law, the landowner is aware that he is dealing with one who has the legal authority to take his property, regardless of the landowner's desires or demands.[153]

If the trial court determines that this notice constitutes a threat of condemnation, then many, if not most, of the comparable easements that landowners offer at trial in the future will not be admissible as evidence of fair market value. Such a result would seriously frustrate the Legislature's intent to ensure rewards reached in a condemnation proceeding reflect prices agreed upon outside of the courtroom. If, on the other hand, this notice is insufficient to render an arm's length transaction "under the threat of condemnation," this will likely prompt condemnors to explicitly warn a landowner at the beginning of negotiations that he is being threatened with condemnation.[154]

Out of fear that these high values may be introduced during a later, and perhaps unrelated, condemnation proceeding, condemnors may include a threat of condemnation with any offer, in addition to the notice required by statute.[155]

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[148] *Id.*; *see* Laura A. Hanley, *Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, but by How Much*, 37 HOUS. L. REV. 125, 159 (2000) (arguing that, because there is really no question as to whether or not a private condemnor can take the property, what determines who wins and loses is a question of compensation only).

[149] WYO. STAT. ANN. § 1-26-509(a)-(b) (2013).

[150] *Id.*

[151] *Id.*

[152] *Id.* § 1-26-509(c)(iii)(F) (emphasis added).

[153] *See id.* § 1-26-509(a)-(b)-(c)(iii)(F).

[154] *See infra* notes 155–160 and accompanying text.

[155] Dave Ditto, *New Developments in Wyoming: Compensation for Easements in Eminent Domain Cases*, (May 2013), http://wyia.org/wp-content/uploads/2013/05/dave-ditto.pdf (discussing "steps to avoid pitfalls" following the *Barlow* decision with the Wyoming Infrastructure Authority in Cheyenne, Wyoming on behalf of Associated Legal Group).

Under such circumstances, the transaction would not be arm's length according to the *Greencore* holding and would be inadmissible under Wyoming law.[156] This frustrates the legislative intent of the statute in two ways. First, it prevents admission of the very transactions the Legislature meant to be used during condemnation proceedings to determine compensation—those that are paid for easements of comparable size, type and location.[157] Second, such threats will turn existing amicable relations between landowners and condemnors into adversarial ones. This will discourage negotiations between the parties, in direct contradiction of legislative intent.[158]

Arguably, such a threat would not constitute good faith negotiations as required by state statute.[159] The Act states that the condemnor must make "reasonable and diligent efforts to acquire property by good faith negotiation."[160] However, there is nothing to preclude the use of reasonable and diligent efforts on the part of the condemnor from occurring under the umbrella of a threat. Such foreboding may make the transaction uncomfortable, but would not necessarily render it unreasonable or not diligent.

The second negative consequence of the *Greencore* decision will be a decrease in the price of easement offers to landowners during negotiation proceedings. During debate on the 2007 amendments, this concern was raised.[161] One legislator expressed concern that the practical effect of the amendments admitting comparable easements and transactions would be that "none of the companies will negotiate with a landowner because if you cut a deal or a premium deal and that becomes discoverable, then that is the price."[162] This phenomenon was also foreseen in an article written in response to the 2007 amendments, in which the authors argued:

> Allowing these other agreements into a condemnation valuation hearing will ultimately result in a loss to landowners, especially landowners who are willing to work with condemnors. In the past, condemnors, especially private companies, have been willing to pay extra to landowners in order to move the project along quickly, encourage good landowner relations, and avoid

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[156] Barlow Ranch, LP v. Greencore Pipeline Co., 2013 WY 34, ¶ 64, 301 P.3d, 75, 96 (Wyo. 2013).

[157] WYO. STAT. ANN. § 1-26-704(a)(iii)(B)-(C) (2013).

[158] *Greencore*, ¶ 64, 301 P.3d at 96 (interpreting the purpose of the act be to "encourage private negotiations and agreements").

[159] WYO. STAT. ANN. § 1-26-509 (2013).

[160] *Id.*

[161] Debate on House Bill 0124, *supra* note 72.

[162] *Id.*

> costs associated with litigation. If a company feels like those agreements will be allowed into court and used to value property taken in a condemnation action, it no longer has the ability to reward cooperative landowners.[163]

The solution to this problem is to "not pay anyone a premium to settle and cooperate."[164]

Additionally, in a presentation to the Wyoming Infrastructure Authority, a Wyoming attorney explicitly advised practitioners: "Do not set a new industry standard by making higher payments, annual payments, or [consumer price index] adjustments."[165] During negotiations, landowners will likely find they are not made the same kind of offers as they were before *Greencore*. As a result, they may feel compelled to engage in condemnation proceedings more frequently, thinking that this will be their way to compensation they see as just. When landowners do find themselves in court, and are permitted to introduce evidence of values paid for comparable easements, they may find the prices paid for those easements have decreased.

Finally, the *Greencore* decision will likely lead to an increase in condemnation litigation. Condemnors will be hesitant to make substantial offers to landowners during negotiations for fear such transactions will be used to determine compensation in a later transaction.[166] For example, a landowner who knows that his neighbor received a price for an easement (not reached under the threat of condemnation or during a condemnation proceeding) that was substantially more than what he has been offered (because the neighbor was especially agreeable or because the condemnor was under pressure to get the project up and running) has little incentive to accept the condemnor's proposed price. Further, the condemnor has little incentive to match landowner's demands for fear that the next neighbor will use these values in court.[167] As a result, landowners may find themselves in courtrooms more frequently.

On the other hand, the *Greencore* decision may instead encourage companies to make offers reflective of what would be presented at trial, thereby avoiding trial altogether. If a company knows that transactions from previous negotiations, either its own or another company's, will be introduced during proceedings, perhaps it will make an offer that is similar to those transactions. If the company

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[163] *See* Micheli & Smith, *supra* note 74, at 21.

[164] *Id.*

[165] Ditto, *supra* note 155.

[166] Micheli & Smith, *supra* note 74, at 22 (discussing how allowing comparable easements will decrease incentive for condemnors to make offers to landowners, which will, in turn, encourage litigation).

[167] *Id.*

believes this will be the likely outcome if the case goes to trial, in an effort to save time and money, perhaps the company will just make that offer initially.

However, such a result is unlikely. Making a substantial offer would increase the overall payment standard by providing landowners with transactions that can be used during later condemnation proceedings to prove fair market value.[168] Practitioners have been explicitly warned against doing this.[169] By either matching or exceeding offers made in previous arm's length transactions, companies are perpetuating the use of these transactions to show fair market value, even though the values in these previous transactions may be inflated beyond the value of the property taken.[170] The *Greencore* decision does not encourage negotiations. It stifles them, thereby creating an incentive in landowners to seek relief in the courts.

And The Question Lingers: What is Just Compensation?

As the law exists now, landowners will likely suffer harm including reduced settlement offers, negotiations entered into under the threat of condemnation, fewer comparable easements of substantial value to present during condemnation proceedings, and an increase in condemnation litigation.[171] There are a number of ways the Legislature could prevent this harm, including by amending the Wyoming Eminent Domain Act or the Wyoming Constitution.

First, the Legislature could amend the Wyoming Eminent Domain Act to remove the requirement that only arm's length transactions for comparable easements be admitted to determine compensation. This will likely permit a court to look to any transaction, thereby expanding the pool of transactions from which a landowner may pull to prove the value of his property taken.[172] Furthermore, condemnors would no longer have an incentive to threaten condemnation during negotiations, because the transaction would be admissible regardless of whether it was made under the threat of condemnation.

However, this change would fail to address another likely outcome of the *Greencore* decision: an overall reduction in the prices offered to landowners from condemnors during negotiations.[173] In fact, it may exacerbate the problem

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[168] *See supra* notes 155–60 and accompanying text.

[169] Ditto, *supra* note 155.

[170] *Id.*

[171] *See supra* notes 143–67 and accompanying text.

[172] The argument has been made that agreements on values of easements reached during negotiations are settlement agreements and are therefore inadmissible in court under rules of evidence. If the Legislature were to remove the "arm's length transaction" requirement, this argument may be raised with more fervor in the future. Micheli & Smith, *supra* note 74, at 21–22.

[173] *See supra* notes 161–65 and accompanying text.

further. With the arm's length requirement, the company can render a transaction inadmissible by threatening condemnation. Without it, all transactions are admissible to prove fair market value. Because of this, condemnors will have even less incentive to negotiate with landowners. If they do continue to make substantial offers, it is almost certain that those values will be used against them in future condemnation proceedings.

Secondly, Wyoming could statutorily require that land be valued above and beyond fair market value, either because of the nature of the land or because of the purpose for which it was taken. For example, in Indiana, agricultural land must be compensated at 125 percent fair market value and residential land must be compensated at 150 percent of fair market value.[174] In contrast, a Rhode Island statute requires that a landowner whose property is taken for the purpose of economic development be compensated at least equal to 150 percent of fair market value.[175] A number of states have enacted similar statutes, requiring that compensation exceed fair market value by a certain percentage.[176] The Wyoming Legislature could do the same, requiring a private condemnor to pay a landowner 150 percent of the "before and after" value the property taken for the purpose of oil and gas development.[177]

Finally, the Legislature could revoke the power of eminent domain from the oil and gas industry.[178] This option is obviously politically charged and perhaps unwise, but worth consideration nevertheless.[179] The drafters of the Wyoming

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[174] IND. CODE. § 32-24-4.5-8 (2013).

[175] R.I. GEN. LAWS § 42-64.12-8(a) (2013).

[176] MO. ANN. STAT. §§ 523.001, 523.039 (2013) (compensation for a primary residence must be equal to 125 percent of the property's fair market value unless it has been "owned within the same family for fifty or more years." Then it must be equal to 150 percent of the property's fair market value); CONN. GEN. STAT. ANN. § 8-129(a)(2) (2012) (redevelopment agencies must compensate owners 125 percent of the property's fair market value).

[177] *See supra* notes 48–50 and accompanying text.

[178] This would likely require a constitutional amendment, which is not an easy task to accomplish: an amendment must be passed by two-thirds of all the members of each of the two houses, and then approved by the state electorate. WYO. CONST. art. XX, § 1.

[179] Klass, *supra* note 19, at 688 (noting that, because the development of coal, oil, gas and other mineral resources in many Western states is still so important, efforts to eliminate or significantly limit authority for natural resources takings will likely meet strong resistance); *see* Dustin Bleizeffer, *Property Power Struggle*, CASPER STAR-TRIBUNE (Jan. 1, 2007), http://trib.com/news/state-and-regional/property-power-struggle/article_3536c579-15d1-5962-8c9f-188604f48075.html (last visited November 2013) (reporting on the controversy surrounding the 2007 Wyoming Eminent Domain Act amendments, noting that the desire to preserve the Act comes from the "very entities that work the hardest at lobbying state legislators: the oil and gas industry, utilities, municipalities and the state itself. They say tinkering with eminent domain laws would not only upset decades of case law on the subject, but would strangle the state's ability to grow its economy and maintain vital infrastructure such as highway systems and the power grid.").

Constitution granted private entities the power of eminent domain for a public purpose: to promote settlement and encourage the development of the state's natural resources in the early days of statehood.[180] However, Wyoming is no longer in its infancy and the resource extraction industry, especially the oil and gas industry, is anything but floundering.[181] With the words of Justice Holmes in mind, it is questionable whether such exceptional times now exist that concessions need be required of landowners so that the "foundations of public welfare" might be laid.[182]

In recent years, oil and gas activities have accounted for forty-three percent of Wyoming's gross state product and thirty-two percent of the state's total economic output.[183] The industry also contributes significantly to employment in the state.[184] Oil and gas activities account for twenty percent of the labor force and generate nearly four billion dollars in labor earnings annually.[185] The oil and gas industry is a "vital and significant economic driver" of the state economy.[186] The power of eminent domain was extended to the oil and gas industry in an effort to foster economic development.[187] However, the industry at this point appears well developed.[188]

If the Wyoming Eminent Domain Act and its amendments are any indication, the Legislature is more concerned with providing landowners just compensation for takings by private entities than it is with fostering economic development in the oil and gas sector.[189] Allowing landowners to rely on the market to determine the value of an easement on their property by removing eminent domain from

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[180] KEITER & NEWCOMB, *supra* note 2, at 67; *see* Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir, and Irrigation Co., 131 P. 43, 56 (Wyo. 1913) (discussing the importance of the WYO. CONST. art. 32 and 33 which grant private companies the power of eminent domain in an effort to irrigate in the arid west).

[181] The Wyoming Constitution was ratified in 1889.

[182] Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906); *see supra* note 1 and accompanying text.

[183] Holly Wise Bender, et. al., *Wyoming Oil and Gas Economic Impact Study*, vii (2008), *available at* http://www.westernenergyalliance.org/sites/default/files/Wyoming%20Oil%20and%20Gas%20Economic%20Impact%20Study%20-%202008.PDF%3B.pdf; *see* Brian Jeffries, *Oil, Natural Gas, Pipelines and Wyoming State Revenue*, WYOMING INFRASTRUCTURE AUTHORITY, *available at* http://wyopipeline.com/wp-content/uploads/2012/09/2011-Gas-Fair-Presentation-Jeffries.pdf (2011) (illustrating that sixty-percent of the annual Wyoming revenue comes from minerals, forty-nine percent of which is attributable to oil and gas activities).

[184] Bender, *supra* note 183, at vii.

[185] *Id.*

[186] *Id.*

[187] *See supra* notes 44–47 and accompanying text.

[188] *See supra* notes 184–86 and accompanying text.

[189] *See supra* notes 51–75 and accompanying text.

the equation may be the most productive means of doing so.[190] This would allow landowners and companies to negotiate a price for an easement without the threat of condemnation lingering in the background. Landowners would be able to demand a price that would compensate them for what they feel they are losing.[191]

However, there is the valid concern that landowners would hold out, refusing to sell unless offered an exorbitant price.[192] This may be a good reason to continue to extend the power of eminent domain to the oil and gas industry. Without it, oil and gas companies might find the costs of negotiating with landowners too prohibitive to carry on operations in Wyoming.[193] In light of this consideration, perhaps the oil and gas industry must still retain the power to condemn in order to remain a significant contributor to the state economy.[194] Even if this were not the case, overcoming the political opposition to such a substantial change in the law is likely to prove difficult, if not impossible.[195] As a result, the Legislature should likely focus its attention instead on amending the Wyoming Eminent Domain Act in a way that would strike a balance between landowner concerns and industry interests.[196]

CONCLUSION

The Wyoming Legislature amended the state's eminent domain laws to permit the admission of comparable easements and transactions to determine fair market value of condemned easements in an attempt to allow landowners to show what other landowners had been paid for similar easements.[197] Recognizing this intent, the Wyoming Supreme Court expanded the definition of arm's length transactions to include those that involved a party with the power of eminent domain so long as the transaction was not made under the threat of

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[190] Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 JOURNAL OF POLITICAL ECONOMY 473, 473 (1976) (arguing that land assembly is not necessarily a more efficient institution than the free market for consolidating many contiguous but separately owned parcels into a single ownership unit when one considers the litigation costs of buyer and seller); *see* William L. Anderson, *The Economic Case Against Eminent Domain*, 53 IDEAS ON LIBERTY 16, 19 (pointing out that a forced sale forces the landowner to bear an economic burden when he does not receive the price he demands, causing the landowner and the community to suffer an economic loss).

[191] *See supra* notes 51–75 and accompanying text.

[192] *See* Anderson, *supra* note 190, at 18; Micheli & Smith, *supra* note 74, at 15 (noting that speculators buy up easement rights with the intention of forcing pipeline, transmission lines and railroads use negotiated settlement values that have been paid in limited circumstances as a floor for negotiations for a specific projects).

[193] *See* Anderson, *supra* note 190, at 18.

[194] *See id.*; Klass, *supra* note 19, at 688.

[195] *See supra* note 179 and accompanying text.

[196] *See supra* notes 172–77 and accompanying text; WYO. STAT. ANN. §§ 1-26-501 through -817.

[197] *See supra* notes 84–120 and accompanying text.

condemnation or during a condemnation proceeding.[198] However, rather than encouraging private negotiations and agreements that lead to just compensation for landowners, the amendments and *Greencore* decision are likely to chill condemnation negotiations, decrease prices offered to landowners for private takings, and increase condemnation litigation.[199] A correction to these problems will require Legislative action in the form of changes to the Wyoming Eminent Domain Act, or perhaps, the Wyoming Constitution.[200]

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[198] *See supra* notes 100–06 and accompanying text.

[199] *See supra* notes 143–67 and accompanying text.

[200] *See supra* notes 178–90 and accompanying text.