

# Idaho Eminent Domain Overview

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## I. Background: Requirements to Condemn under Idaho's Eminent Domain Laws

The right to acquire property through the exercise of the powers of eminent domain is governed by the Idaho Constitution, Article I, Section 14 and Idaho statute, Idaho Code §§ 7-701, *et seq.*

Idaho's Constitution provides that “[p]rivate property may be taken for public use, but not until a just compensation to be ascertained in the manner prescribed by law, shall be paid therefor.” IDAHO CONST., art. I, § 14.

### A. Idaho Has Four Threshold Requirements for the Exercise of the Powers of Eminent Domain

Idaho's eminent domain laws require that four threshold requirements be satisfied before private property can be taken for public purposes. Idaho Code §§ 7-701, 7-704, 7-705, 7-707. *See also* IDAHO CONST., art. I, § 14 (“Private property may be taken for public use, but not until a just compensation to be ascertained in the manner prescribed by law, shall be paid therefor.”).<sup>1</sup> The threshold requirements are:

1. **Public Use:** Private property can only be taken for a “public use” authorized by law. IDAHO CONST., art. I, § 14; Idaho Code §§ 7-701, 7-704(1), 7-705.
2. **Necessity:** The property taken must be “necessary” for the authorized public use. Idaho Code § 7-704(2). For private condemnors, the necessity requirement is one of reasonable necessity and not absolute necessity. *Erickson v. Amoth*, 112 Idaho 1122, 1124, 739 P.2d 421, 423 (Ct. App. 1987).
3. **Greatest Public Good/Least Private Injury:** The property taken “must be located in the manner which will be most compatible with the greatest public good and the least private injury . . .” Idaho Code § 7-705.
4. **Good Faith Negotiations:** The entity seeking to condemn private property must seek “in good faith, to purchase the lands so sought

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<sup>1</sup> For electric transmission lines with a capacity of more than 230 KV, there is a fifth requirement involving a public hearing. Idaho Code § 7-704(4).

to be taken, or settle with the owner for the damages which might result to his property from the taking thereof . . . .” Idaho Code § 7-707(7).

**B. Public Use: Who May Condemn Property/Public Uses for Which Power of Eminent Domain May be Exercised**

In Idaho, the right of eminent domain inheres in the sovereign and “may be exercised in behalf of such uses as to the sovereign seems proper.” *Bassett v. Swenson*, 51 Idaho 256, 262, 5 P.2d 722, 725 (1931). Thus, the question of *who* may exercise the right of eminent domain depends in large part upon the *purposes* for which the property is being taken. *See, e.g.*, Idaho Code § 7-707(1) (providing that a “corporation, association, commission or person in charge of the public use for which the property is sought” may initiate a condemnation proceeding). If the particular purpose for which property is being taken is an authorized “public use,” then the condemning authority possesses the right of eminent domain and may exercise that power for the specified public use. The Idaho Legislature has dispensed this power liberally, granting the power of eminent domain to counties, cities, urban renewal districts, irrigation districts, highway districts and a wide variety of other special purpose districts.

The uses for which the right of eminent domain may be exercised is set forth in Article I, Section 14 of the Idaho Constitution.

The necessary 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, . . . is hereby declared to be a public use, and subject to the regulation and control of the state.

The Supreme Court has also upheld the use of the eminent domain power by electric utilities, urban renewal agencies, pipeline companies, highway authorities, and public works agencies. *See Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903); *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *Boise City v. Boise City Dev. Co.*, 41 Idaho 294, 238 P. 1006 (1925); *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935). With respect to the ability of a private entity or individual to exercise the right of eminent domain, Idaho courts have typically approved of the right in instances where the taking of property is for the “exploitation of natural resources for the benefit and use of the general public” and for proposed uses that “serve the public of this state.” *Cohen v. Larson*, 125 Idaho 82, 84, 867 P.2d 956, 958 (1993); *see* IDAHO CONST., art. I, § 14 (defining “public use” as a use “necessary to the complete development of the material resources of the state”).

For private rights of eminent domain, courts have rejected the right where private individuals have sought to “take the property of other private individuals in order to enhance their purely private enjoyment of their property,” but have upheld the right where there is “some

private benefit” so long as it is clear that “the public undoubtedly also benefit[s]” from the proposed use. *Cohen*, 125 Idaho at 85, n.4, 867 P.2d at 959, n.4 (citing *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972) (right to condemn private land upheld for use in urban renewal project in light of a “clearly public purpose” even though a private benefit also accrued from the proposed public purpose of urban renewal); *Burlington Northern, Inc. v. Finneman*, 96 Idaho 456, 530 P.2d 940 (1974) (private right to condemn property to build railroad classification yard upheld even though private enterprise incurred private benefit, because the public “undoubtedly also benefited” from proposed public purpose)). Examples of cases in which a private entity was authorized to exercise the powers of eminent domain include, *Canyon View Irr. Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980) (irrigation and reclamation of arid lands); *McKenney v. Anselmo*, 91 Idaho 118, 416 P.2d 509 (1966) (removal of timber from property); *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 P. 680 (1916) (logging roads); *Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288 (1955) (pipelines).

Additionally, Idaho courts have required that for a private entity to exercise eminent domain authority, the public use must serve the interests of the state and provide some benefit to the state, its public, and/or its economy. *Potlatch Lumber Co. v. Peterson*, 12 Idaho at 787, 88 P. at 431 (“All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain.”) (citations omitted). The court in the *Potlatch* case, also held that the term “public use” is a flexible one that is not “confined to the public use mentioned at the time of forming the constitution.” *Id.* Moreover, “[t]he power [of eminent domain] requires a degree of elasticity to be capable of meeting new conditions and improvements of the ever increasing necessities of society.” *Potlatch*, 12 Idaho at 786, 88 P. at 432 (citations omitted).

Since the *Potlatch* case, Idaho courts have consistently interpreted the term “public use” to be a flexible concept that depends “upon the needs and wants of the community.” *Cohen*, 125 Idaho at 84-85, 867 P.2d at 958-59 (“The notion of public use is a flexible one depending on the needs and wants of the community, and we note that the public, the legislature, and the courts of this state have demonstrated an awareness of public benefits, including environmental and population concerns, that perhaps were not recognized a century ago.”); *Burlington Northern, Inc.*, 96 Idaho at 458, 530 P.2d at 942 (“The power of eminent domain, where clearly granted must be capable of adapting to the changing times.”).

However, despite the flexible and adaptive view of what constitutes a public use, Idaho courts have uniformly held that the public use must benefit the State of Idaho. A recent statement by Idaho courts on the issue is the case of *Backman v. Lawrence*, 147 Idaho 390, 210 P.3d 75 (2009). There, the Idaho Supreme Court, rejecting a private right of eminent domain for purposes of providing a private right of access to a single residence, stated that a “proposed use need not be strictly public, but it must at least benefit the public welfare or the economy of the state.” *Id.* at 400, 210 P.3d at 85 (quoting *Cohen*, 125 Idaho at 84, 867 P.2d at 958 (emphasis in original)).

Thus, in Idaho for a private entity to exercise eminent domain authority, the public use must serve the interests of the state, and there must be some benefit conferred to the State of Idaho, its public, and/or its economy. *Id.*

### **C. Necessity**

A number of Idaho cases have addressed the “necessity” requirement of Idaho Code § 7-704. The Idaho Supreme Court has not addressed this issue for many years, but the general tenor of the cases is that the court will strongly defer to the determination of whether the acquisition is necessary or not. *See Boise City v. Boise City Dev. Co.*, 41 Idaho 294, 238 P. 1006 (1925); *Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911).

Unlike the determination of whether a taking has occurred, which is an issue of law, the issue of necessity is an issue of fact, and the court will not disturb findings that are based on substantial conflicting evidence. *See Blackwell Lumber Co. v. Empire Mill Co.*, 29 Idaho 421, 160 P. 265 (1916), appeal dismissed, 244 U.S. 651 (1917).

### **D. Greatest Public Good/Least Private Injury**

Idaho Code Section 7-705 further states that the property taken “must be located in the manner which will be most compatible with the greatest public good and the least private injury . . . .” Idaho courts have not interpreted this provision substantively.

### **E. Good Faith Negotiations**

Idaho law requires that before a government agency may institute condemnation proceedings, it must seek “in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof . . . .” Idaho Code § 7-707(7). Only after such attempts at purchase and settlement fail can the government then commence condemnation proceedings. The Idaho Supreme Court has held that the mere submission of a good faith offer by letter is insufficient to meet the requirements of this section. *See State ex rel. Rich v. Blair*, 83 Idaho 475, 365 P.2d 216 (1961). However, a process where the plaintiff engaged in significant negotiations over 13 months was considered sufficient. *See Idaho Power Co. v. Lettunich*, 100 Idaho 582, 602 P.2d 540 (1979). Further, where the property owner stated that he did not want an easement over his property and the testimony supported the valuation of the offer, the court has upheld a finding of good faith negotiation. *See Southside Water & Sewer Dist. v. Murphy*, 97 Idaho 881, 555 P.2d 1148 (1976).

### **F. Advice of Rights Form**

In addition to the four threshold requirements for the exercise of eminent domain, Idaho Code Section 7-711A requires that the condemning authority give the property owner a very specific “advice of rights” form at the commencement of negotiations. While giving such a form is not a formal prerequisite to exercising eminent domain, because of the serious consequences for failure to provide the form, the advice of rights form should be part of any negotiations with the landowner:

If the condemning authority does not supply the owner of the real property with this form, there will be a presumption that any sale or contract entered into between the condemning authority and the owner was not voluntary and the condemning authority may be

held responsible for such relief, if any, as the court may determine to be appropriate considering all of the facts and circumstances.

Idaho Code § 7-711A.

## **II. Legal and Procedural Requirements to Condemn Property**

Title 7, Chapter 7 of the Idaho Code governs the conduct of eminent domain proceedings in Idaho. This chapter creates a number of unique features that differentiate a condemnation proceeding from other civil proceedings.

The plaintiff in a condemnation proceeding is always a government entity with the condemnation power or the “corporation, association, commission or person in charge of the public use for which the property is sought ... .” Idaho Code § 7-707(1). The landowner is the defendant in the action.

### **A. Types of Takings**

There are three basic categories of eminent domain/condemnation/takings cases.

1. **Direct Condemnation:** Direct condemnations occur when a condemnor files a complaint to take property pursuant to the power of eminent domain. The condemnor fixes the date of value by filing the summons, and determines and defines the scope of the take in the Complaint. Typically, the case is simply to determine the just compensation owing. These are the most common types of eminent domain cases.

2. **Inverse Condemnation:** Inverse condemnations are filed by property owners, typically against entities with the power of eminent domain, alleging that some action taken by the entity rises to the level of a taking. The easiest types of inverse cases occur when there has been a physical invasion of the landowner’s property, such as where the government constructs a road that encroaches on private property without paying just compensation (perhaps due to an error in the survey). However, there are many fact patterns which can give rise to an inverse case. For example, if a dam has been constructed and causes a flooding (physical invasion of water) across land, the property owner may claim that his land has been taken. Or if there are aircraft overflights which cause such excessive noise that the property cannot be used (indirect, non-physical invasion), the owner may claim a taking of his property. The action complained of may be on or off the property; the relevant question is the impact of the action on the subject property. In inverse condemnation cases, the court is usually called upon to determine both the scope and the date of the taking, as well as the threshold question of whether there has actually been a taking of property or property rights due to the actions of the defendant.

3. **Regulatory Takings:** Regulatory takings cases are filed by property owners, typically against entities with the power of eminent domain, alleging that some regulatory action taken by the entity rises to the level of a taking. For example, if a zoning regulation has been passed such that a property owner can no longer use his land for any economically viable purpose, the property owner may claim that the regulation has the effect of taking the property. In regulatory cases, the court is usually called upon to determine both the scope and the date of

the taking, as well as the threshold question of whether the regulation complained of actually rises to the level of a take and deprives the owner of property or property rights. In these cases, one of the issues that often arises are “police powers,” which are regulatory actions which can be taken by an entity to protect public health, safety and welfare and which do not give rise to compensation. For example, the installation of a median on a busy street may result in the loss of business to an adjacent property owner with a commercial building. However, it is well-established in Idaho that the installation of medians within the public right-of-way is a permissible exercise of the government’s police power and is therefore not a compensable taking.

## **B. Property Subject to Taking**

In Idaho, most any property, property rights and estates are subject to a taking for public use. Specifically, Idaho’s statutes provide that the following property and property interests may be taken:

1. All real property belonging to any person.
2. Lands belonging to the government of the United States, to this state, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use.
3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.
4. Franchises for toll roads, toll bridges and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads or other more necessary public use.
5. All rights-of-way for any and all the purposes mentioned in section 7-701, which includes electric distribution and transmission lines, as well as any and all structures and improvements thereon and the lands held or used in connection therewith. In addition, these uses shall also be subject to a limited use, in common with the owners thereof, when necessary, but such uses, crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and least private injury.
6. All classes of private property not enumerated may be taken for public use when such taking is authorized by law.

Idaho Code § 7-703. In addition to these uses, Idaho Code § 7-702 provides that fee simple title, easements and rights of entry may be acquired.

## **C. Taking Possession Before Trial (“Quick Take” Proceedings)**

Idaho Code § 7-721 sets forth certain circumstances where the condemning entity may take possession of and use any property it seeks to acquire through condemnation “at any time

after just compensation has been judicially determined and payment thereof made into court.” Generally, the condemning entity may go through a “quick take” when it needs to acquire possession of land prior to a final determination of just compensation and it has been unable to negotiate a possession agreement with the property owner.

In these cases, the condemning government will file a motion asking that it be placed in lawful possession of the property. Idaho Code § 7-721(1). Within 20 days, the court is to hold a hearing on the motion to determine: (1) whether the entity has the right of eminent domain; (2) whether or not the use to which the property is to be applied is authorized by law; (3) whether or not the taking is necessary to such use; and (4) whether or not the entity has sought in good faith to purchase the property. Idaho Code § 7-721(1-2). If the court finds these four criteria are satisfied, then the court will hear “evidence as it may consider necessary and proper for a finding of just compensation . . . .” Idaho Code § 7-721(3).

In its discretion, the court may appoint a disinterested appraiser as an agent of the court, at the expense of the government. *Id.* The appraiser will be given 10 days to report his conclusions to the court. *Id.* Within 5 days after receiving the appraiser’s report or within 5 days after the hearing if no appraiser was appointed, the court shall “make an order of just compensation.” *Id.* Thereafter, the government may deposit the ordered amount with the court, upon which the court will enter an order fixing a date when the government is entitled to possession of the property. Idaho Code § 7-721(5).

Once the money is deposited with the court, any “party defendant” may file with the court an application to withdraw his portion of the amount deposited by the government. Idaho Code § 7-721(6). If there is only one party defendant, then the court shall authorize the withdrawal. However, if there be more than one party defendant, then the court shall hold a hearing, giving notice to each party whose interest would be affected by the withdrawal. *Id.* At the hearing, the court shall determine what portion of the deposited funds each party defendant may withdraw. *Id.*

Notably, the court’s order of just compensation, the amount deposited with the court by the government, and the appraiser’s report are not admissible in evidence in further proceedings to determine the actual just compensation owed to the property owner. Idaho Code § 7-721(4).

#### **D. Commencement of Condemnation Proceeding**

A condemnation action must be commenced in the county where the property is located. Idaho Code § 7-706. The action is commenced by the filing a complaint and issuance of a summons.

#### **E. Condemnation Complaint**

In order to commence condemnation proceedings, the condemner must file a complaint containing the following information:

1. **Identification of Plaintiff:** The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff.
2. **Identification of Defendant:** The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.
3. **Identification of Right of Eminent Domain:** A statement of the right of the plaintiff.
4. **Identification of Project:** If a right-of-way be sought, the complaint must show the location, general route and termini, and must be accompanied with maps thereof.
5. **Identification of Property to be Acquired:** A description of each piece of land sought to be taken, and whether the same includes the whole, or only a part, of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties.
6. **Order of Condemnation:** An order of condemnation, or resolution, or other official and binding document entered by the plaintiff which sets forth and clearly identifies all property rights to be acquired including rights to and from the public way, and permanent and temporary easements known or reasonably identifiable to the condemning authority.
7. **Statement of Good Faith Negotiations:** In all cases where the owner of the lands sought to be taken resides in the county in which said lands are situated, a statement that the plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof, and was unable to make any reasonable bargain therefore, or settlement of such damages; but in all other cases these facts need not be alleged in the complaint, or proved.

Idaho Code § 7-707.

#### **F. Condemnation Summons**

Idaho Code § 7-708 sets forth special requirements for a summons in a condemnation action. The summons must include the names of the parties, a general description of the whole property, a statement of the public use, a reference to the complaint to describe the specific parcels, and a notice to the defendants to appear and show cause why the property should not be condemned. Otherwise, the summons is the same as in a civil matter.

## **G. Persons Entitled to Defend in a Condemnation Action**

Idaho Code § 7-709 empowers all persons occupying or claiming an interest in the property to appear and defend the action, whether or not they are named in the complaint. The broad grant of authority set forth in the statute would permit lessees, mortgagees, lien-holders and even adverse possessors to defend in a condemnation action.

## **III. Key Concepts in Condemnation Cases**

There are many concepts in eminent domain which do not arise in other types of cases.

### **A. Date of Valuation**

A property owner's right to compensation is constitutionally vested and is to be measured as of the time of the taking, when the damage has accrued and fixed. In a direct condemnation case this is the date of the summons. Idaho Code § 7-712 specifically provides as follows:

7-712. Damages - Date of accrual. - For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages. The compensation and damages awarded shall draw lawful interest from the date of the summons.

In *State ex rel Moore v. Bastian*, 97 Idaho 444, 546 P.2d. 399 (1976), the Idaho Supreme Court recognized that the damages that will accrue, do so as of the date of the issuance of the summons:

In Idaho, the value of the property actually taken in an eminent domain proceeding and the damages which will accrue to the remaining property by reason of the severance are computed as of the date of the issuance of the summons, not the date that the property is actually taken.

*Id.* at 449 (citing Idaho Code § 7-712).

In inverse condemnation cases, the court must determine the date of taking. "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979); *see also Lobdell v. State*, 89 Idaho 559, 567, 407 P.2d 135 (1965). If there has been a project, *i.e.*, road construction or other public project

undertaken, the date of taking is at the time of project completion. *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 143, 75 P.3d 194, 197 (2003).

## **B. “Before” Condition and “After” Condition**

These terms refer to the property before the taking, as of the date of value, and after the taking, as of the same date. The property has completely different assumptions and characteristics as before the taking, we assume there is no project planned or constructed and no taking, and after the taking we assume that the project has been completed and the take is reflected in the property size and other characteristics. We are making hypothetical assumptions as of the same date in time in order to try and compare the before-take condition to the after-take condition.

## **C. Project Influence**

Project Influence in eminent domain cases reflects the concept that, in the interests of fairness, the valuation of a landowner’s property in the before-take condition does not take into consideration any influence on value attributable to the project, whether such influence is good or bad. In determining the amount of just compensation, the land is valued in the before-take condition as if the project never existed.

The rationale behind this principle is that neither the landowner nor the government should benefit from the project’s influence on land values. If the value of the land is enhanced as a result of the project, the landowner should not be allowed to use the increased value in determining the before value and just compensation. Likewise, if the value of the land is diminished as a result of the project, the government should not be allowed to use the lower value in determining the before value and just compensation. *See City of Caldwell v. Roark*, 92 Idaho 99, 102, 437 P.2d 615, 618 (1968).

## **D. Just Compensation**

Just Compensation is the constitutional requirement for the taking of private property for public purposes. IDAHO CONST., art. I, § 14.

Idaho Code § 7-711 establishes how just compensation is determined. In cases involving a total taking of property, just compensation is established by determining the fair market value of the property and any permanent improvements taken. Idaho Code § 7-711(1); IDJI 2d 7.05; *see State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 832, 820 P.2d 695, 702 (1991); *State ex rel. Moore v. Bastian*, 97 Idaho 444, 446, 546 P.2d 399, 401 (1976).

In cases involving partial takings, just compensation is determined by assessing the value of the property taken, plus the damages that accrue to the remainder property due to its severance from the property being condemned and the construction of the improvement as proposed by the condemnor. Idaho Code § 7-711(2). Additionally, Idaho is one of the few states in the nation that allows for awards of business damages. Idaho Code § 7-711(2)(b). Under Idaho’s eminent domain statutes, business damages are available “to any business qualifying under this subsection having more than five (5) years’ standing which the taking of a portion of the

property and the construction of the improvement in the manner proposed by the plaintiff may reasonably cause.” *Id.* Additionally, “[t]he business must be owned by the party whose lands are being condemned or be located upon adjoining lands owned or held by such party.” *Id.* To obtain an award of business damages, the landowner must comply with the procedures required under the statute. *Id.*

### **E. Fair Market Value**

The “fair market value” of property is the “amount which would be agreed upon by a willing buyer and willing seller.” *Ada County Highway Dist. v. Magwire*, 104 Idaho 656, 659, 662 P.2d 237, 240 (1983). The Idaho Civil Jury Instructions, which were recently revised and amended, provide a more detailed explanation:

The term “fair market value means the cash price at which a willing seller would sell and a willing buyer would buy the subject property, in an open marketplace free of restraints, taking into account the highest and most profitable use of the property.

It presumes that the seller is desirous of selling, but is under no compulsion to do so, and that the buyer is desirous of buying, but is under no compulsion to do so.

It presumes that both parties are fully informed, knowledgeable and aware of all relevant market conditions and of the highest and best use potential of the property, and are basing their decisions accordingly.

It presumes that the market is open and competitive, and that the subject property has been exposed to the market for a reasonable time.

IDJI 2d 7.09.

Generally, evidence which bears on the fair market value, and which is not otherwise inadmissible, may be admissible in a condemnation action. *See State ex rel. Moore v. Bastian*, 97 Idaho at 448, 546 P.2d at 403. By the same measure, evidence which is not confined to establishing the fair market value of the property, is generally not. *See Idaho Farm Dev. Co. v. Brackett*, 36 Idaho 748, 755, 213 P. 696, 697 (1923) (citing *Rawson-Works Lumber Co. v. Richardson*, 26 Idaho 37, 141 P. 74 (1914)).

### **F. Highest and Best Use**

Property in condemnation is valued assuming its highest and best use (note that the “highest and best use” determination is different from the “actual and functional use” determination applied in tax assessment valuations). Idaho courts have consistently followed the general principle that compensation must be paid based upon the property’s highest and best use.

In *State ex rel. Symms v. City of Mountain Home*, 94 Idaho 528, 493 P.2d 387 (1972), the Idaho Supreme Court expressly set forth the guidelines for the valuation of property in question:

The compensation which must be paid for property taken by eminent domain does not necessarily depend upon the uses to which it is devoted at the time of the taking; rather, all the uses for which the property is suitable should be considered in determining market value. The highest and best use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as a measure of value, but to the full extent that the prospect of demand for such use affects the market value of the property. It must be shown that the use for which the property is claimed to be adaptable is reasonably probable. Furthermore, in order to establish adaptability, the owner must prove the economic feasibility of the suggested use. If, as a matter of fact, the parcel taken is part of a larger tract held by the same owner, it is error to consider such parcel as if it constituted an entire tract separate and apart from other property in the possession of the same owner; the amount awarded for the land taken must reflect any enhanced value arising from its availability for use in conjunction with the land not taken.

*Id.* at 530-31 (internal citations omitted).

Other Idaho cases that follow this same principle are *City of Caldwell v. Roark*, 92 Idaho 99, 437 P.2d 615 (1968), *Ada County Highway Dist. v. Magwire*, 104 Idaho 656, 662 P.2d 237 (1983), and *Eagle Sewer Dist. v. Hormaechea*, 109 Idaho 418, 707 P.2d 1057 (1985).

The highest and best use is that use of a property which is: (1) legally permissible, or there is a reasonable probability of getting the legal permission necessary, (2) physically possible, (3) economically feasible, and (4) maximally profitable.

However, the highest and best use of the property is not any *possible* use to which the property may be put. Rather, “it must be shown that the use for which the property is claimed to be adaptable is *reasonably probable*.” *Id.* (quoting *Symms v. City of Mountain Home*, 94 Idaho at 531, 493 P.2d at 389) (emphasis added).

### **G. Larger Parcel**

A valuation issue which is unique to condemnation cases is the determination of what is the “larger parcel,” which sometimes arises in a partial takings case. Under Idaho Code § 7-711, when the condemning authority takes a portion of a citizen’s property, he or she is entitled to severance damages to the remainder. *C&G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003), citing *Covington v. Jefferson County*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). In arriving at a figure for just compensation, the amount of severance damages to the remainder must be considered. Idaho Code § 7-711. To address this question, one has to know what the remainder is. That determination can involve looking at what constitutes the larger tract

or parcel before the taking so that the value of the part taken and damages to the remaining tract of land can be determined.

If there is only one parcel, there is generally no dispute as to the larger parcel. However, when the landowner has two or more parcels of land, the question may arise as to whether the parcels are all treated as one tract for purposes of determining the amount of compensation owed. When more than one parcel or lot of land is owned by the same property owner, or if the parcels are under common ownership and control, it may be necessary to determine what constitutes the larger parcel—a determination which is not simply made by looking at the size of the lot from which there is a taking.

The general rule is that the larger parcel must meet three unities—the parcel must be physically contiguous, and have unity of ownership and unity of use. *See State ex rel. Symms v. Nelson Sand & Gravel, Inc.*, 93 Idaho 574, 579, 468 P.2d 306, 311 (1970). In order for separate lots or tracts of land to be considered as one “larger parcel,” the parcels must be used as a single unit with the same highest and best use, as well as being physically contiguous and under the same ownership or control.

“Ordinarily, the question whether two pieces of land constitute a single parcel is a practical one for the jury, which should consider evidence on the use and appearance of the land, its legal divisions, and the intent of its owner.” *Symms v. City of Mountain Home*, 94 Idaho at 531-32, 493 P.2d at 390-91; *see also, Eagle Sewer Dist. v. Hormachea*, 109 Idaho 418, 707 P.2d 1057; *City of Caldwell v. Roark*, 92 Idaho 99, 437 P.3d 615. However, the larger parcel becomes a question of law when no reasonable mind could differ on the issues. 4A-14B NICHOLS ON EMINENT DOMAIN § 14B.04[1] (2011).

#### **H. Most Injurious Use**

Idaho cases have recognized a rule that allows a landowner to present evidence of damages that it may sustain “by reason of the most numerous and injurious use to which the condemning party might lawfully put the property under its condemnation.” *Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 20 Idaho 568, 589, 119 P. 60, 67 (1911).

The rule was first recognized in the 1911 *Idaho-Western* case. There, the court concluded that where the railroad company was condemning a part of a tract of land and did not indicate or stipulate the specific manner in which it intended to use the property—specifically, it did not specify the number of tracks it proposed to lay or whether it would be using the land for switching purposes—it was proper for the landowner to introduce evidence to show the probable damage it will sustain by the reason of the most numerous and injurious use to which the company might lawfully put the property under its condemnation for railroad purposes. The court noted that the railroad company could have specified its intended purpose for the property through its pleadings or through stipulation. However, where it did not, “[i]t was competent, therefore for the landowner to prove the damages that it would probably sustain by reason of the most numerous and injurious use to which the condemning party might lawfully put the property under its condemnation for railroad purposes.” What this ruling meant, was that the landowner

was permitted to present evidence of the damages that would be caused by a double track railroad, rather than a single track that appeared to be the intended use of the property.

Since the *Idaho-Western* case, the rule has been applied in *Crane v. City of Harrison*, 40 Idaho 229, 232 P. 578 (1925); *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935); *Foster's Inc. v. Boise*, 63 Idaho 201, 118 P.2d 721 (1941); *Reisenaur v. State*, 120 Idaho 36, 813 P.2d 375 (Ct. App. 1991). In each of these cases, the court applied the rule looking backward in time to determine what had been acquired at the time of the original acquisition of the property—either through dedication or condemnation. Additionally, in each case, the court denied the landowner's claims of a taking and damages, reasoning that where original dedication nor condemnation of the right-of-way contemplated the most "numerous and injurious use" the property could lawfully be put to under the condemnation action, the new use of the street did not create a new taking—so long as the new use was of the same type and character as the original use. The basic rule is that the property owner is only entitled to payment for a take and damages once, and for all time. See *Reisenaur*, 120 Idaho 36, 813 P.2d 375.

## I. Special and General Benefits

In calculating severance damages to a landowner's remaining property, the amount of damage to the remaining property value may be offset by any special benefits to the property. See Idaho Code §7-711(3); *Orofino v. Swayne*, 95 Idaho 125, 128, 504 P.2d 398 (1972).

Special benefits are benefits from the condemnation project which are unique to the subject property and which directly benefit the remaining property at issue. See *Rich v. Fonburg*, 80 Idaho 269, 280, 328 P.2d 60 (1958); *State v. ex rel. Symms v. Collier*, 93 Idaho 19, 24, 454 P.2d 56, 61 (1969).

Idaho Code § 7-711(3) states that the jury must decide:

[H]ow much the portion not sought to be condemned, and each estate or interest therein, will be speciallly and directly benefited, if at all, by the construction of the improvement proposed by the plaintiff. . . . (emphasis added).

Condemnation law distinguishes such special benefits from general benefits. General benefits from the condemnation project are benefits which are general in nature and benefit the public generally rather than confer a discrete benefit directly upon the remaining property at issue. See *Fonburg*, 80 Idaho at 280.

If the condemnor asserts a special benefit, the condemnor has the burden of proof to show that the benefits are unique to the remaining property, and that those benefits directly flow to the remaining property as a result of the condemnation project before such benefits may offset severance damages.

It is logically necessary to analyze the benefits to both the subject property, as well as the neighborhood properties, to determine whether the benefit is unique and directly flows to

the defendant's remaining property or generally benefits the neighborhood. *See* Idaho Code § 7-711(3).

Special benefits may be offset against severance damages but are not offset against the taking itself; the condemnor must always pay fair market value for the land acquired regardless of any special benefits. There is no offset for general benefits.

#### **IV. Issues Particular to Condemnation Cases**

##### **A. Burden of Proof and Order of Proof**

In condemnation cases, the defendant landowner bears the burden of proving the highest and best use of the property and the fair market value of the property taken. *See, e.g., State of Idaho v. Bastian*, 97 Idaho 444, 449, 546 P.2d 399, 404 (1976); *State of Idaho v. Collier*, 93 Idaho 19, 454 P.2d 56 (1969); *State of Idaho v. McGill*, 79 Idaho 467, 321 P.2d 595 (1958); and *State of Idaho v. Dunlick, Inc.*, 77 Idaho 45, 286 P.2d 1112 (1955). As a result of the landowner's burden, the order of proof in condemnation cases differ from in a typical civil case.

The well-known treatise on eminent domain law, NICHOLS ON EMINENT DOMAIN states that,

The general rule is that the right to open and close goes to the one on whom the burden of proof lies in the first instance -- upon the party who would suffer defeat if no evidence should be given on either side. It consequently follows from what has been already stated that the owner should have the right to open and close, and this is generally the law. The failure of the trial court to follow this rule is not, however, necessarily ground for setting aside the verdict if it does not appear that the owner was harmed. In some jurisdictions it is held that the right to open and close rests in the discretion of the trial court, while in several other states the fact that the condemnor is petitioner or plaintiff on the record in the whole case has led the courts to give that party the right to open and close, even on the issue of damages.

*State v. McGill*, 79 Idaho at 471, 321 P.2d at 597 (quoting 5 NICHOLS ON EMINENT DOMAIN, 3rd ed., § 18.5(2), pp. 205-07).

Idaho cases have acknowledged that the determination of the "order of trial and the order of presentation of evidence is an administrative decision within the discretion of the trial court." *State of Idaho v. Collier*, 93 Idaho 19, 21, 454 P.2d 56, 58 (1969); *see also State of Idaho v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968); *Lehman v. Bair*, 85 Idaho 59, 375 P.2d 714 (1962). In the exercise of that discretion, different courts have reached differing conclusions as to the best order of proof for trial. In *McGill*, the court concluded that "the better procedure was to allow the defendant to open and close." *McGill*, 79 Idaho at 470-71, 321 P.2d at 597. However, the court held that it was not reversible error for the trial court to refuse to follow such a procedure. *Id.* Then in *Collier*, the court cited with approval the following order of trial:

1. The state was to present evidence as to the physical location of the property involved;
2. Then the defendants were to present evidence of the value of the property;
3. Thereafter the state was to present its evidence of value;
4. Finally the parties were to present any necessary rebuttal evidence.

*Collier*, 93 Idaho at 21, 454 P.2d at 58. Both methods are commonly used in condemnation trials.

### **B. Judge/Jury Issues and Bifurcated Proceedings**

There is only one factual issue for the jury in an eminent domain proceeding, and that is the amount of just compensation to be awarded. All other issues are for the court to decide. *City of Lewiston v. Lindsey*, 123 Idaho 851, 857, 853 P.2d 596, 602 (Ct. App. 1993) (“[A]ll issues, whether legal or factual, other than just compensation, are for resolution by the trial court.”) (citing *Reuth v. State*, 100 Idaho 203, 222-23, 596 P.2d 75, 94-95 (1978); *Tibbs v. City of Sandpoint*, 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979)). Some issues, like highest and best use, relate to value and are therefore decided by the jury. Other issues, such as the existence of a prescriptive right-of-way and its impacts on the scope of the taking may require a court decision. Whether these issues are decided pre-trial on summary judgment motions, in a bifurcated proceeding, or at the jury trial but ruled on by the court, is discretionary and depends on the facts and circumstances of each case. In a direct condemnation case, there is often no dispute as to the scope of the take and the only dispute is the amount of just compensation owed. In that instance, the jury may resolve all issues. In an inverse case, however, the court must determine whether there is a taking, the extent or scope of the taking, and possibly the date of taking. In that case, there are issues for both the court and the jury to decide.

### **C. Hearsay Admissible**

Unlike in most cases, hearsay is generally admitted (under limited circumstances) in eminent domain cases. An expert witness is permitted to rely upon hearsay in which he uses to make up his opinion. *United States v. 5139.5 Acres of Land*, 200 F.2d 659 (4th Cir. 1952); *Covina Union High Sch. Dist. of Los Angeles Co. v. Jobe*, 345 P.2d 78, 174 Cal.App.2d 340 (Ct. App. 1959); *McElligott v. Freeland*, 33 P.2d 430, 139 Cal.App. 143 (Ct. App. 1934). Typically, experts on both sides have relied on hearsay in part to aid them in arriving at their conclusions. This is common practice in the real estate and development business, and it is necessary in arriving at the expert’s final opinion of value.

Hearsay evidence should be allowed specifically with regards to comparable sales and prices paid for property. Two factors need to be considered in order to allow this type of testimony: it must be shown that the witness is an expert and that the sales are comparable and recent. *State Highway Commission v. Greenfield*, 399 P.2d 989, 145 Mont. 164 (1965). Idaho

Rule of Evidence 702 (Expert Witnesses) states that a witness may testify as an expert witness if they possess scientific, technical, or other specialized knowledge which will assist the trier of fact.

It is in the discretion of the trial court to allow an expert to render an opinion based upon hearsay. An expert may rely on hearsay as long as he testifies to the specific basis of his opinion and reaches an opinion through his own independent judgment. *Doty v. Bishara*, 123 Idaho 329, 848 P.2d 387 (1992). It is typical in condemnation cases that each witness, particularly the valuation witnesses, will base some portion of their opinion on hearsay evidence. However, the final opinion of each witness is based on his own independent judgment. The courts generally have allowed such testimony, as well as exploration into the basis for each expert's opinion on cross-examination.

## **V. Judgments and Orders**

The conclusion of condemnation cases involves a two-step process. *See* Idaho Code § 7-716. The first step involves the entry of an order that declares the amount of condemnation owed the landowner. Then upon the condemnor's payment of the amount of compensation owed, then "the court must make a final order of condemnation" that must describe the property being condemned and the purposes of the condemnation. *Id.* The final order of condemnation is then filed with the recorder's office, and the property will vest in the condemnor for the identified purposes. *Id.*

In practice, this process typically involves the entry of a first judgment that provides the amount of just compensation owed, and a second judgment and decree of condemnation, which transfers ownership of the condemned property or property rights to the condemnor after payment is made.

## **VI. Cost and Attorney Fee Issues**

As with other aspects of condemnation cases, cost and attorney fee awards in condemnation actions are governed by particularized rules. Generally speaking, costs and attorney's fees in condemnation cases may be awarded in certain circumstances.

### **A. In the Event of Abandonment or Project Change**

Idaho Code § 51-1104 provides for attorney's fees and costs when there has been an unsuccessful or abandoned eminent domain proceeding, or in circumstances where the condemnor has changed the project and/or the taking after the initial complaint. The statute provides relevant factors for the court's consideration.

### **B. At the Conclusion of the Case**

Under Idaho eminent domain law, the district court is to engage in a two-part analysis in order to determine whether attorney fees and costs are appropriate. First, it must make a determination of who the prevailing party is under Rule 54(d)(1)(B) and the guidelines established in *Ada County Highway Dist. v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983),

and its progeny. Second, once the prevailing party has been identified, the court is to determine the amount of costs and attorney fees to be awarded based on the provisions of Rules 54(d)(1) and 54(e)(3).

Idaho cases on cost and fee issues in eminent domain set forth a number of factors for consideration, which were summarized in *State ex rel. Smith v. Jardine*, 130 Idaho 318, 320, 940 P.2d 1137, 1139 (1997):

Preliminarily, we restate the standard a trial court is to use in considering an award of attorney fees in a condemnation case. In *Ada County Highway Dist. v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983), the Court concluded that “an award of reasonable attorneys’ fees to [a] condemnee in an eminent domain proceeding is a matter for the trial court’s guided discretion and ... such award will be overturned only upon a showing of abuse.” *Id.* at 877, 673 P.2d at 1071. In *Acarrequi*, the Court also listed “some factors which the trial court should consider in exercising that discretion,” which the Court said “are matters for consideration and not rigid guidelines within which a trial court is required to operate.” *Id.* The Court also said that in deciding whether to award attorney fees, the trial court “should” consider the following factors:

- (1) “a condemnor should have reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict;”
- (2) “an offer would not be timely if made on the courthouse steps an hour prior to trial;” and
- (3) “[a]n offer should be made within a reasonable period after the institution of the action to relieve the condemnee not only of the expense but of the time, inconvenience and apprehension involved in such litigation, and also to eliminate the cloud which may hang over the condemnees title to the property.”

*Id.* at 878, 673 P.2d at 1072.

In *Acarrequi*, the court also said that the trial court “may” consider the following factors in making its decision whether to award attorney fees:

- (1) “any controverting of the public use and necessity allegations;”
- (2) “the outcome of any hearing thereon;”
- (3) “any modification in the plans or design of the condemnor's project resulting from the condemnee’s challenge;” and

(4) “whether the condemnee voluntarily granted possession of the property pending resolution of the just compensation issue.”

*Id.* See also *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 826, 820 P.2d 695, 696 (1991); *Ada County Highway Dist. v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

The court in *Jardine* also established a hierarchy between the *Acarrequi* guidelines and Rule 54(d)(1)(B), stating that the guidelines and the Rule are to both be applied to determine the prevailing party, but the provisions of the Rule is only to apply to the extent that they do not conflict with the *Acarrequi* guidelines. *Jardine*, 130 Idaho at 321, 940 P.2d at 1140. The court in *Jardine* also held that the issue of whether a reasonable offer of settlement was timely made is a case-specific determination. “[E]ach case will depend on its own circumstances.” *Id.*

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