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Mineral Rights in Rights-of-Way: Acquisition, Valuation, and Disposition

A report prepared under ongoing NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs", for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by Vicki J. Fowler. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with issues related to the acquisition and ownership of highway rights-of-way. Three specific issues are addressed: (1) status of the title acquired by the highway agency, (2) valuation of mineral lands, and (3) disposal methods for minerals underlying highway rights of way.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new papers, seven supplements, and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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Mineral Rights in Rights-of-Way: Acquisition, Valuation, and Disposition

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INTRODUCTION

The acquisition and ownership of highway rights-of-way have created numerous issues involving the minerals located in, on, or underlying the right-of-way. The acquisition of rights-of-way, by purchase or condemnation, frequently involves the acquisition or damaging of the mineral interest. Since minerals are usually only acquired when the public agency obtains the fee estate, the first issue addressed is the status of the title acquired by the highway agency through right-of-way acquisition.

The second major issue facing highway agencies in the acquisition of mineral bearing rights-of-way is the valuation of those mineral lands. This paper attempts to explore several of the valuation questions that have plagued courts and to describe the recent cases that may indicate a trend toward liberalization of the rules regarding the evidence admissible on the valuation of mineral lands under condemnation.

Thirdly, the method of disposing of minerals underlying highway rights-of-way, including the leasing of oil and gas, has created problems for highway agencies. This paper describes some of the issues, some of the answers, and some practical suggestions for dealing with the problems.

The issues regarding minerals for highway agencies are myriad; the answers are generally inconclusive, and this paper is but an introduction.

ACQUISITION

A basic issue underlying the acquisition and disposition of minerals is the meaning of the term "mineral" itself. The word "mineral" is not a term of art. Its meaning varies with the context within which it is used and with the jurisdiction defining it. For this reason, as an introductory matter, "mineral" is used herein in a broad sense. It should be noted, however, that some courts limit the scope of the term "mineral" and exclude materials that are not rare and exceptional in nature and that may ordinarily be considered a part of the soil inherent in the surface, such as sand, gravel, clay, and stone. Acquisition and disposition of these materials lying within and on highway rights-of-way have been the subject of frequent litigation.

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Similarly, although "mineral" may not include hydrocarbons in all contexts, these substances are included within the ambit of this paper. Courts have had difficulty in defining the character of ownership in oil and gas in place in the ground because of the unknown character of oil and gas in its subterranean state in the early years of production. However, all states recognize that the owner of land has a property interest in oil and gas which may be under his land. Until this interest is severed, by mineral deed, lease, or grant with reservation or exception, all recognize that the owner of the surface has the exclusive right to explore and produce. Thus, for the purposes of this paper, "mineral" is used in a broader sense to include any natural substance having sufficient value to be mined, quarried or extracted for its own sake or its own specific use.[1]

Status of Title When Right-of-Way Acquired

The issues relating to the ownership of minerals will frequently depend on the status of the title which was acquired with the acquisition of the right-of-way.

There are four major methods of acquiring land for state highway purposes from private owners: conveyance, eminent domain (condemnation), dedication, and prescription. While the latter two methods will be discussed briefly, this paper focuses on the status of title acquired through the more prevalent methods of conveyance and condemnation.

Conveyance

Whether the Public Agency has acquired ownership of the minerals underlying the right-of-way which has been conveyed by deed will depend upon whether or not the conveyancing instrument is construed to include the entire fee estate. Generally the conflict arises when words of the granting clause (or the habendum clause) suggest a conveyance of the entire fee estate and words in another clause indicate that the purpose of the grant is for a right-of-way limited to surface user.[2]

General rules of construction require that a court determine the intent of the parties to the conveyance based upon the entire document. The existence of any ambiguity as to the interest conveyed permits a court to consider extrinsic or independent evidence, but the degree and character of ambiguity which justifies consideration of extrinsic evidence varies from court to court.[3]

Where a deed is an unequivocal grant of a strip of land, without any mention of the use to be made of the land, the courts encounter no difficulty in finding a fee simple conveyance. Similarly, the explicit grant of a right of surface user, rather than the land itself, without language of a fee simple grant, creates an easement. Frequently, deeds have necessitated judicial construction to determine whether the inclusion of a right-of-way purpose, either expressly recited within an instrument or implied from its terms, operates to alter the estate otherwise conveyed by the granting clause.

The denomination of the instrument as a "Right-of-Way Deed," an

express statement of intended use, the conveyance of a "strip of ground" rather than "land" over, upon, and across a larger parcel owned by one party, and the inclusion of a waiver by the grantor of any claim for damages arising from construction, operation, or use of the right-of-way have all been held indicative of an easement limited to surface user.[4]

While use of the word "ground" may be found indicative of an easement, the reverse is not always the case, i.e., instruments which have conveyed parcels or strips of "land" have also been construed as easement conveyances.[5] It is further noted that use of a warranty deed form is not generally regarded as incompatible with the conveyance of an easement.[6] Rather, the warranty of title contained in a deed is considered effective only as to the interest actually conveyed. The "estate" is not ascertained by the use of the words "convey and warrant" alone. The entire deed must be examined to determine what estate the parties intended to convey. In some states the grant of a "right-of-way" without more language is the grant of an easement; the term "right-of-way" is considered descriptive of merely easement rights limited to the use of the surface.[7]

Where the deed includes rights of ingress and egress along, upon, and over the very lands that are the subject of the conveyance, an easement may be indicated. The rights of access are considered attributes of fee ownership. Therefore, the inclusion of a grant for such rights would have been unnecessary if the intent of the parties were to convey a fee simple title in and to the strips of land in question.[8] An easement may also be found if the property conveyed is not fixed as to boundary location; where, for example, language in the deed provides that the affected land will shift to conform to the road or highway as actually constructed.[9] A fee simple conveyance should contain a definite description of the property conveyed. An easement, however, may be less definite, depending on the nature of the intended use.

Of course, the more language contained in an instrument which expressly or impliedly indicates an intention to limit the estate conveyed, the more likely the estate will be construed as an easement. However, a mere statement of a right-of-way purpose is not sufficient in some jurisdictions to limit the estate conveyed to an easement.[10] Those jurisdictions rely upon a statutory presumption that a conveyance of property transfers the entire interest held by the grantor unless there is a clear manifestation of contrary intent. The purpose clause may be regarded merely as an expression of the anticipated use by the immediate grantee of the property and not as a limitation of the estate granted unequivocally in the granting clause. Occasionally, a court will determine that the critical element is the existence of a provision for reversion or forfeiture should such right-of-way use cease, and in the absence of such a provision, the recitation of a right-of-way purpose will not create an easement where the instrument is otherwise a fee grant.[11]

A state highway department's statutory authority to acquire rights-of-way, even by voluntary conveyance, may be expressly limited to an easement estate. At least one state supreme court has held that the estate in land acquired by the state highway commission by deed could be no more than what is "necessary for a state highway system" as set out in a statute authorizing the acquisition.[12] In *Whitworth v. Mississippi State Highway Commission,*[13] the court declared, that although bargained-for consideration was paid for land and the deed contained no reservation of minerals, the state was not entitled to take more than an easement. The estate acquired was measured, not by the language of the deed, but by the language of the statute. The statute did not expressly limit the estate which could be acquired, but the court examined the requirement that it be "necessary" for a highway system and concluded that oil and gas rights were not "necessary." Some jurisdictions have expressed a strong disinclination to construe instruments granting an interest in land to a public entity as a conveyance of any interest greater than an easement.[14] Such courts have taken the view that parties who execute right-of-way deeds to states, cities, towns, railroads, ditch, or irrigation companies, or any other entity authorized to exercise the power of eminent domain, do not intend to convey any interest greater than that which could be taken in condemnation proceedings.[15]

The inclusion of language appropriate in a full fee conveyance, together with language indicative of an easement limited to surface user, may be treated as creating an ambiguity which necessitates an examination of surrounding circumstances in order to determine the intent of the parties. Those circumstances may include whether: (1) the purposes for which the public agency was created include mineral acquisition and development; (2) the amount of consideration advanced for the lands conveyed was adequate to compensate the grantor for the loss of the minerals as well as the surface; and (3) the statutory scheme for disposition of excess or vacated public land implies fee ownership.[16]

Although the amount paid for the right-of-way may appear to be full fee value, a court may not find this dispositive of the intent of the parties. Depending upon the use contemplated at time of purchase, the amount of consideration paid for an easement may take into account the effect of the proposed use on the property rights retained by the grantor. The value paid may logically reflect the loss to the grantors of virtually any surface use in connection with the affected lands. Additionally, the potential for mineral development of the lands may well have been unknown at the time the right-of-way was acquired and comparative land values of the locale and era may fail to reflect this potential.

If an interest in land is acquired for the purpose of widening an existing highway, the court may consider the nature of title held by the public in the existing highway right-of-way. In *Lalim v. Williams County,*[17] the North Dakota court construed an instrument in the form of a warranty deed which used the language of a fee grant in conveying to a county two strips of land adjacent to an existing highway. The court found the right-of-way purpose obvious from the face of the deed and stated that the use of the word "land" in the granting clause created sufficient ambiguity to permit judicial construction. Since the purpose of the conveyance was highway widening, since the grantor held a fee interest in the interior portion of the highway, and since the county could have obtained only an easement if eminent domain proceedings had been used, it was held that the grantee county received only an easement and that title to the underlying oil and gas remained in the grantor.

In summary, a public agency which acquires highway rights-of-way by voluntary conveyance only acquires the subsurface mineral estate where: (1) its authorizing statute allows such acquisition; and (2) the conveyancing instrument is clear and unambiguous in establishing that the parties intended to convey the fee estate, or the surrounding circumstances so indicate. A conveyance which uses the words "right-of-way," or grants access rights over the property conveyed, or which does not fix definite boundaries, or which includes any ambiguous language may well provide a court with sufficient grounds to rule that the public agency has acquired only an easement interest with no right to any minerals.[18]

Eminent Domain

Where rights-of-way are acquired through eminent domain proceedings, title to the minerals will be determined by construction of the authorizing statute and, where necessary, by reference to the judicial decree entered at the conclusion of the proceedings. The general rule is that:

> ... when land is taken for the public use either by a public or private corporation or by the public at large, unless a fee is necessary for the purposes for which the land is taken, the body which makes the taking acquires only such an interest in the land as will be necessary for the exercise of its franchise and of the right to apply the land then or at any future time to all the uses directly or incidentally conducive to the enjoyment thereof, and to nothing else.[19]

However, "where a statute expressly authorizes the acquisition of a fee it will be given effect ... even though an easement would be sufficient to accomplish the purpose of the condemnation."[20] Some state statutes expressly prohibit the acquisition of any interest in a mineral deposit[21] or in oil and gas[22] when the state acquires a highway right-of-way or easement.

Several cases dealing with the nature of the estate conveyed by an exercise of eminent domain provide helpful analysis on the question of when title to the mineral estate is acquired by condemnation of a right-of-way.

A Nebraska decision, *Burnett v. Central Nebraska Public Power and Irr. Dist.*,[23] involving the acquisition of land for a reservoir, sets forth the following general principles:

1. Where an eminent domain statute expressly limits the extent of the interest acquirable by a condemner, no greater interest can be taken.
2. If the taking of a fee is expressly authorized a condemner may take the interest he finds necessary up to and including the fee.[24]
3. Where the nature of the interest is not specified, the courts will then determine the part of the feehold required to satisfy the public purpose for which the power has been granted.

Further, unless a statute specifically authorizes the condemning authority to take title to real property in fee simple, language incorporated in the condemnation petition or judgment cannot enlarge or extend the power of the condemning authority beyond the limits imposed by the authorizing statute.[25] However, a declaration of taking which reserves to the condemnee "all oil, gas and other minerals in and under said land" may not reserve gravel exposed at the surface of the land.[26]

A fee interest in a condemned right-of-way is not a favored construction either judicially or legislatively. In at least two instances, state legislatures have amended highway condemnation statutes in response to judicial construction of those statutes vesting the state with fee simple title in and to condemned highway rights-of-way. In *State, ex rel. Mitchell v. State Highway Comm'n,*[27] the Kansas Supreme Court held that under a special state highway commission condemnation statute, the commission acquired a fee title to all land condemned for the purposes specified in the statute. The court based such a construction on language authorizing the commission to acquire title to *any* lands, or interest or rights therein. The court also relied heavily upon that portion of the statute which authorized disposition of any real estate, or *any* right, or *any* title, or *any* degree or *any* variety of interest therein.[28] The court construed this to mean that the commission could sell, assign, or convey in any manner the whole interest in the land acquired or any lesser interest. The court reasoned that it would be illogical to assume the legislature authorized the commission to sell something to which it never acquired title. With respect to oil and gas, this decision was legislatively overturned by the enactment of a statute which reconveyed title to oil and gas in place to the present owners of the land overlying the oil and gas.[29] The legislation is not limited to oil and gas interests obtained by condemnation, but also includes rights-of-way obtained by purchase or dedication. The mandated conveyance by the state is, of course, subject to any prior disposition. The state retained an "easement right" to sand, gravel, and stone for construction and maintenance of the state highway. No other minerals are addressed by the statute and, presumably, fee title to lands containing minerals, other than oil and gas, sand, gravel, and stone, acquired prior to the statute remains vested in the state. The Kansas statute now prohibits the state from acquiring any interest greater than an easement for highway purposes when it acquires the right-of-way by condemnation. The petition in condemnation proceedings is required to state that right, title, or interest in or to oil and gas is not being condemned.

State Highway Commission v. State[30] construed a North Dakota statute which used the word "purchase" with regard to the taking of land under the power of eminent domain and the words "title" or "vested" with reference to the title acquired by the State for highways. The court found the language of the statute indicative of a legislative intent that the State acquire fee interest in highway rights-of-way obtained under the statute. A subsequent decision in *Wallentinson v. Williams County*[31] qualified the interest received under the statute as a fee simple determinable based on a provision for vacation, and held that the determinable fee interest carried with it the right to execute oil and gas leases covering right-of-way minerals.

The analysis in *Wallentinson* is particularly interesting in its use of a vacation statute to uphold an acquisition of fee title and then to uphold a legislative divesting of title. The statute in force at the time of the taking of the land by the state provided that the State Highway Commission could vacate any land which had been taken or acquired for highway purposes under the Act by executing and recording a deed revesting the title in the persons, their heirs, successors or assigns, in whom it was vested at the time of taking.[32] A statute subsequently passed in 1953, apparently in response to the decision in *State,* provided that all oil, gas, and fluid materials were not a part of and not essential for highway purposes and all rights previously taken were vacated and returned to the person or persons in whom the title was vested at the time of the taking, subject to any existing contracts or agreements covering such property.[33]

The State of North Dakota contended in the case that it was still the owner of the oil, gas, and other fluid minerals in and under the tracts involved because the 1953 statute, which revested the title in the prior owners, was contrary to North Dakota constitutional provisions prohibiting the granting of special privilege or the making of gifts or donations to any individual.[34] The court held that the statute under which the tracts were acquired gave the Highway Commission the right to vacate any land taken for highway purposes when such land, in the discretion of the commission, was no longer needed for the purposes for which it was taken; accordingly, while the State did acquire a fee title, it was a limited or determinable fee and not a fee simple absolute, being subject to reversion when the land was no longer needed for highway purposes. In denying the State's contention that the 1953 statute giving the prior owners the title to oil, gas, and other fluid minerals was unconstitutional, the court stated that in view of the fact that the legislature had previously given the Highway Commission the authority to vacate land when it was determined that such land was no longer needed for the purposes for which it was acquired, the legislature itself could exercise the same power.

When a contest arises over the estate condemned in eminent domain proceedings, reference should be made to the statute authorizing the condemnation and any subsequent revesting legislation such as that enacted in Kansas and North Dakota. Any such statute should be carefully examined to determine what minerals are covered. As noted above, only oil and gas are covered by the Kansas and North Dakota enactments (North Dakota includes all fluid materials). Presumably, solid minerals such as coal, lignite, sulphur, limestone, and uranium remain vested in the state.

Where the interest is not limited by statute to an easement, the entire statutory scheme, including vacation and disposition, the language of the petition in condemnation, and the record of court proceedings, including the ascertainment of damages, may aid in determining whether title to the minerals was acquired by condemnation of the right-of-way.

It must be noted, however, that even if only an easement was acquired, the condemnor is entitled to subjacent support and "acquires" minerals to the extent they are required for that purpose.[35] The general rule that the mineral owner will be liable to the surface owner for damages caused by subsidence resulting from removal of the minerals[36] is applicable where the surface owner acquired its interest through an exercise of the power of eminent domain.[37] Thus, if the acquisition of an easement, or the surface estate, creates a subsurface support requirement where none previously existed, or if support of the highway will require that more of the minerals be left in place than previously required, compensation for the taking or damaging of the mineral estate will probably be required.[38] Additionally, because the mineral estate is considered dominant and the surface estate servient, the mineral owner or his lessee is entitled to make whatever use of the surface is reasonable and necessary for the extraction and production of the minerals. If the mineral owner's common law right to reasonably use the surface as necessary to extract the minerals is interferred with by the public agency, a second taking by inverse condemnation may arise.[39] Finally, if the imposition of the easement and the public project constructed thereon render the mineral owner's property rights valueless or result in the virtual destruction of the economic viability of commercial extraction of the minerals, a claim for just compensation, under the fifth amendment,[40] or for damages for a violation of civil rights under 42 U.S.C. § 1983,[41] may be available to the mineral owners. Failure to consider these rights at the time of acquisition may subject the state to a future liability.

Thus, any condemning agency should seriously consider joining, as a party to the condemnation suit, any owner of a mineral interest which might be heavily impacted by the public project. Even where a right-of-way easement is acquired through voluntary conveyance, the future impact on the rights of the mineral owner or his lessee should be considered to ensure that those rights are not later determined to have been taken for a public purpose without the payment of just compensation.

Dedication

Property may be acquired for highway rights-of-way under the common law rules of dedication or by the dedication procedure set out in state statutes. Normally, under common law dedication, only an easement for surface use is acquired.[42] If a statutory dedication has been made, however, construction of the statute will be necessary to determine whether the Legislature intended to authorize the governing body to take the fee. In some jurisdictions neither a common law nor a statutory dedication will pass the fee to the public.[43]

The contrast among jurisdictions is illustrated by two leading cases in Colorado and Nebraska. In *City of Leadville v. Bohn Mining Company,*[44] the Colorado Supreme Court held that the Legislature did not use the term "fee" in its technical sense, but instead intended that it vest perpetual title to street areas as long as they were used for the dedicated purpose. The Colorado court emphasized that the statute provided for the vesting of the "fee" in "streets, avenues, alleys", etc. and not in "land", "ground", or "premises".[45] Therefore, the dedicator retained the mineral estate. The Nebraska court in *Belgum v. City of Kimball*[46] stated that the city had acquired title to oil and gas, even though the statute provided for reversion of title to the adjacent owners

upon vacation of the street. The language of the vacation statute was effective only to limit the city's title to a base, qualified or determinable fee.

The fact that there are statutory methods for dedication does not prevent a common law dedication. There is authority that an attempted statutory dedication which does not strictly comply with the statute (in jurisdictions where the statute would give a fee) is in effect a common law dedication which results in merely an easement.[47]

Prescription

Generally, prescriptive rights-of-way are not acquired by the public. The public normally obtains rights to use property for public purposes under common law dedication, grant, or condemnation. Prescriptive easements are based on continuous adverse use. Thus, rights-of-way that are acquired by adverse possession generally are merely easements or are limited to the use upon which the prescriptive right is based.[48]

VALUATION

Mineral rights valuation issues generally occur whenever the public entity condemns a fee estate containing valuable minerals or an easement overlying valuable mineral deposits. If the entire fee estate is being acquired, the just compensation mandated by the fifth amendment to the United States Constitution and state constitutions requires that the owner receive the fair market value of the property.[49] Where the property contains valuable surface or subsurface minerals, the effect of those minerals on fair market value and the method of establishing such value has created a large body of divergent case law. Where the minerals are not being "taken", either because only the surface estate or an easement is being acquired, the issue arises in reference to land-owner claims that the taking has damaged the mineral estate and just compensation must include such damages.

Although the object of the legal rules governing the valuation of minerals and fair compensation for the owners remains constant, the specific rules that have developed sometimes vary among jurisdictions. This paper summarizes the general law rather briefly and focuses in more detail on the validity of particular valuation techniques, an area in which there is some disagreement.

Generally Accepted Basic Rules

In a condemnation proceeding to acquire fee title, the *landowner* has the burden of proving the amount of value added to his land by the presence of minerals.[50] The general valuation rule is that the existence of mineral deposits on condemned land is an element to be considered in determining the fair market value of the land, but there can be no recovery for deposits valued separately as saleable items and then added to the value of the land itself.[51] Courts regularly, although sometimes unclearly, make distinctions between the measure of just compensation—the fair market value of the entire property taken—and the *evidence* admissible to establish just compensation. The Supreme Court of Delaware expressed the distinction as follows:

> [E]vidence may be presented and considered . . . as to the quantity of the gravel therein, its quality, and its value in the ground, after due consideration of the costs of removal and marketing . . . but under no circumstances does this mean that the land value and the gravel value can be determined separately and then added together, as was done here, to arrive at the just compensation. . . .[52]

Since the measure of just compensation is usually limited to the fair market value of the property as enhanced by the minerals located therein, courts frequently reject evidence of the value of minerals separate and apart from the land because such a valuation "involves an estimate of the future profits to be derived from the mining and marketing of such minerals," a process courts usually consider too speculative to be probative.[53]

The existence of mineral deposits may be a factor in determining the value of the land as a whole, even if the land is not currently being used for mineral extraction, because a "prospect" has value, even though "there is an element of speculation . . . in the estimate thereof," since such "prospects" are freely bought and sold.[54] The rule derives from the eminent domain principle that the value of the land is determined according to the highest and best use reasonably expected in the near future, even if that is not the current use, to the extent that the prospect of such use affects the market value of the property.[55] As an example, in *State ex rel. State Highway Comm'n v. Reynolds,*[56] the court held that a lessee was entitled to compensation for the remainder of the term on its mining lease, even though it had not exercised its rights under the lease as of the time of taking. But when the development of minerals present in the land is inconsistent with the highest and best use of the land, evidence regarding the value of the land as enhanced by the presence of minerals is inadmissible.[57]

The landowner must provide a sufficient quantum of proof that the value of land is actually enhanced by mineral deposits.[58] There is no compensation when the minerals are present in such a small quantity as to be unmineable or when the cost is so high as to make mining economically unfeasible.[59] The absence of a demand for the commercial development of minerals precludes a showing of the value of condemned property as enhanced by the presence of minerals.[60] In *Dawson v. Papio Natural Resources Dist.,*[61] the Nebraska Supreme Court reversed the trial court and held that the landowner must establish some present demand for the sand or show that it could be economically mined under present conditions of demand and transportation costs before introducing evidence of how the sand enhanced the land's value.

The requirement for a commercial market is merely an extension of the foundational requirement for a demand for a prospective use. As the Supreme Court held in *Olson v. United States,*[62] mere physical adaptability does not affect market value, rather the prospective use

must be "needed or likely to be needed" in the reasonably near future. A fairly strict standard for future need was established:

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value. . . .[63]

In addition to requiring a foundational showing of a "reasonable future demand" or "potential market" for the mineral prior to admitting valuation evidence, courts have also considered such evidence of market demand, in and of itself, probative of the value of condemned land as enhanced by the presence of mineral deposits.[64]

Evidence of a market demand for minerals must exclude, however, the market created by the condemning authority's construction project.[65] This is in accord with the rule that "a condemnor should not be required to purchase property at a price enhanced by the particular project for which the property was taken."[66]

Evidentiary Rules of Valuation

Determination of the value of land with mineral deposits necessarily involves approximation. Many courts have attempted to reduce the speculative nature of mineral valuation by limiting such evidence to "comparable sales," which establish the market value of similar property containing mineral deposits.[67] The preference for evidence of comparable sales arises from courts' perceptions of such evidence as less speculative than other evidence of value and because it more closely approximates the market place.[68]

In the absence of probative evidence of comparable sales, the trier of fact must resort to other means of determining fair market value.[69] The Supreme Court in *Montana Railway Co. v. Warren,*[70] a case often cited and relied upon, expressed the considerations involved in weighing the admissibility of opinion testimony regarding the value of land:

> Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. After a witness has testified that he knows the property and its value, he may be called upon to state such value.

A longstanding rule governing expert testimony as to the value of condemned land with mineral deposits is that the quantity and quality of the minerals in place cannot be multiplied by the per ton or unit value to arrive at market value, the "unit times price" or "multiplication method."[71] Though the number of units may not be multiplied by price to arrive at overall value, evidence of the unit value of the mineral in place may be admissible as a factor in determining overall market value.[72] The distinction is important and understandable in light of the reasons expressed by courts in rejecting a "unit times price" method of valuation. Among the various stated reasons for holding a unit times price method improper are:

1. The measure of damages is market value not output.[73]
2. No buyer would buy on such a basis, because it would take many years to recover the purchase price, if recoverable at all.[74]
3. It constitutes a separate valuation of minerals apart from the land.[75]
4. A quantity times price valuation does not take into consideration the possibility of fluctuation in market, taxes, costs, or the possibilities of business disasters.[76]
5. It requires either the acceptance of gratuitous assumptions or the reaching of separate conclusions on collateral issues.[77] In general, it involves too many conjectures and too much speculation, and is too contingent on future conditions.[78]

State v. Arnold,[79] in banning any consideration whatsoever of the multiplication method, described the "evil" of the method:

> The evil of the method is not simply the nature of leading the appraiser to an inaccurate appraisal but more important, because it has the illusion of scientific certainty and validity, it is too likely to be grasped upon by the jury as the sole criterion of value even though the expert witnesses in making their estimates purport to eliminate from their computation the element of speculation.

Despite these strong statements by courts, the flat prohibition on the use of the "unit times price" method of valuation is gradually disappearing in many jurisdictions. Courts which admit evidence that suggests the forbidden "unit times price" method of valuation generally do so because the method can be related to actual market practices.

These courts still adhere to the majority rule that prohibits valuing minerals apart from the land. Nevertheless, these courts admit evidence of the minerals' worth as a *factor* to be considered in determining the value of the land as a whole. The method often approved, if employed by qualified experts, is the capitalization of income or "income approach," which relates the value of the land to the present value of the income the land produces, rather than allowing a simple "unit times price" calculation.[80] The Sixth Circuit recently ruled, in a case where no truly "comparable" sales were introduced in evidence, that "the fair market value of a coal deposit is determinable by multiplying the recoverable tonnage of minerals by a given royalty per ton, and by discounting the sum thus obtained to present value."[81] The court held that such a royalty capitalization method could be probative if an active market existed for the mineral in place, transactions in the market place commonly took the form of royalty payments, and the figures used represented the conclusions of an industry expert.[82]

The Tenth Circuit has stated that when evidence of comparable sales is unavailable,

> [t]he courts have recognized that if the proof is not deficient, a present value for mineral interests taken in eminent domain proceedings may be determined by estimating the anticipated income that might be derived from the sale of the minerals over a period of time, and capitalizing that income in terms of its present worth.[83]

The court distinguished the income method from the impermissible and

simplistic "unit times price" method, stating: "Many other factors were developed in the evidence and used in the landowners' demonstration of the contributory value of the limestone in place."[84]

Some state courts have also accepted the income approach for valuing lands taken by condemnation when it is the best means for determining just compensation, generally when no evidence of comparable sales is available. The cases discussed below illustrate a trend liberalizing the scope of evidence admissible to prove the value of mineral lands taken by condemnation.

State ex rel. State Highway Comm'n v. Nunes,[85] an early and leading case, stands for the proposition that the income approach is an acceptable method of valuation, when properly employed, if the principal value of the land condemned is attributable to income produced from exploiting minerals present therein. The court listed several criticisms of the multiplication method, including that the method assumes a stable demand for the mineral, eliminates the possible competition or substitution of other minerals, and fails to consider the efficiency of management and business judgment as factors in actually marketing the minerals.[86] The Oregon Supreme Court nevertheless concluded that, as a practical matter, fair compensation was often impossible to determine without some reliance on capitalization, even if some evidence of comparable sales is available. Despite the conjecture required, the court saw no reason to exclude from consideration factors on which a well-informed buyer would rely in determining a fair price for the property. The court in *Nunes* also distinguished the income approach from the simple "unit times price" method:

> This does not mean that the value of the land can be estimated simply by multiplying the quantity of materials times the existing market price per unit. The appraiser must refine the computation by deducting costs of operation, making allowances for variances in the market price of the materials, calculating the extent of the market for such materials in relation to the amount of materials taken, the possible rise and fall of income, and accounting for other factors which expert appraisers take into consideration in applying the capitalization method.[87]

The *Nunes* court rejected the capitalization evidence proferred in that case because the witness lacked the expertise to employ the method properly and, in fact, simply had capitalized the product of quantity and price. Despite its attempted distinction, the Oregon Supreme Court apparently viewed the income approach as a more refined version of the "unit times price" rule rejected by most courts. However, the court did distinguish the method approved from one that merely capitalizes profits to arrive at a valuation figure and reiterated that income capitalization is only one factor to be considered in arriving at the value of the land.[88]

The Indiana Court of Appeals accepts the general rule that business profits, whether past or future, are generally not admissible to show the value of land taken in condemnation proceedings.[89] Yet, the Indiana court in *State Highway Commission v. Jones,*[90] relying on the reasoning in *State v. Nunes, supra,* held that:

> where income is produced from the sale of minerals or other soil materials, then the "income approach" for valuing land with its incumbent use of the capitalization method is proper where such is the best method for ascertaining the fair market value. In the case at bar, which we are now asked to decide, several experts opined that the capitalization method was the best method to determine value. Such evidence was admissible for the reason that this case involves the appropriation of land suitable for quarrying which was a part of an ongoing quarrying operation, the purpose of which was to process materials intrinsic to the land. The capitalization of [net] income was not used to project future profits and to compensate the lessor and lessee for those lost profits, but rather it was used to calculate the fair market value of the land at the time of the taking.

Those courts that have accepted the income approach have done so in limited circumstances. The income approach appears to be permissible only when the condemned property is currently used for mineral production or there is a lease or royalty agreement which provides a similar identifiable framework for computation.

Recent decisions suggest that a number of jurisdictions continue to apply a strict rule prohibiting any evidence of the separate value of minerals, except in extraordinary situations. For example, the Missouri Supreme Court recently rejected the use of the income method even in valuing leased land currently being mined, viewing the method as overly speculative and an attempt to aggregate the value of land and minerals.[91] The Maryland Court of Appeals specifically criticized the methodology employed by the court in *Nunes, supra,* calling it "simply a more sophisticated version of the multiplication method which in the final analysis is imbalanced by speculation."[92] In a case involving the expropriation of land in transition from use as a sand and gravel quarry to use for residential purposes, the Maryland court noted that allowing a witness to testify as to the per unit value in place multiplied by an estimated quantity almost inevitably results in the improper valuation of minerals separately from the land. The court did limit application of the restrictive rule in two situations, however. Such testimony could be received outside the hearing of the jury to establish that an expert used a multiplication formula as a factor in determining the value of the land as a whole and the capitalization of royalty agreements containing a minimum annual royalty would be permissible.[93]

The Supreme Judicial Court of Massachusetts has ruled that the trial court may exclude evidence such as the current and projected market price per unit of minerals when the evidence assumes the accuracy of quality and quantity estimates and constant market, labor, and other production costs.[94] The court considered evidence based on profits projected from the sale of mineral deposits considered distinct from the land as necessarily speculative, especially since the land was not being used for mining and zoning regulations prohibited that use.

Though the majority of courts adhere to the traditional rule or limit evidence to the capitalization of income approach, in a few jurisdictions, courts have liberalized the evidentiary rule to the extent that evidence of the value of minerals apart from the land is admissible, even where the evidence is based on a modified "unit times price" method without capitalization of the income.

The Texas Court of Appeals exemplifies this clearly minority rule; that court approved the admission of evidence of the in-place quantity of extractable minerals multiplied by the value per cubic yard in place to determine the value of the mineral deposits.[95] The court held that the evidence was admitted as a factor in determining the market value of condemned realty rather than as evidence intended to show the value of the mineral as an income producing commodity. Thus, although the court did require the experts to consider market prices and excavation, transportation, and processing costs, it did not require capitalization of income to establish the present value of the clay in place. The court did, however, require that the jury be instructed that they could not add the value of the land to the value of the mineral to arrive at an aggregate value.[96]

The West Virginia Supreme Court explicitly approved the Texas court's "trend toward liberalizing the unit rule," on the grounds that permitting separate valuation evidence to be considered as a factor in arriving at the fair market value of the land is less speculative than merely permitting evidence of the presence and quality of minerals and leaving the jury to estimate just compensation without any evidence of the extent to which minerals enhance the value of the land.[97] The court in *West Virginia Dept. of Highways v. Berwind Land Co.*, like the Texas Court of Appeals, required evidence of value to be tempered by evidence of production and marketing expenses but did not require capitalization of any figures. In a later case, the West Virginia Supreme Court noted that when the royalty method of evaluation is used, the landowner need not provide evidence of marketing and production expenses.[98]

Valuation Issues When Only the Surface Or An Easement Is Taken

When only the surface estate or an easement is condemned, the measure of just compensation is the value of the land taken plus the damages that are occasioned to the remainder as a result of the taking, generally the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder after the taking.[99] In establishing before and after fair market value in cases of partial taking, courts apply the same principles governing the highest and best use of the property, consideration of minerals which enhance the land's value, and valuation of the property as a whole as they would in a taking of the condemnee's entire property.[100] A landowner may be entitled to damages based on the impossibility of extracting minerals from an entire tract if condemnation severs the land into two areas, making mining commercially unfeasible.[101]

The condemnee must establish the real and actual damages accruing to the remainder due to a partial taking.[102] When the owner claims no "severance damages," or the trial court finds none, the before and after value rule does not apply, and the owner's compensation is limited to the market value of the land taken.[103]

When a public authority condemns only the surface of the land taken, leaving reserved mineral rights in the owners of mineral estates underlying condemned property, no consideration need be given to the effect of the mineral deposits on the market value of the land.[104] But ownership of minerals in place carries with it the right to use the surface estate as reasonably necessary to enforce and enjoy the mineral estate.[105] Therefore, the owner is entitled to compensation for the:

> [r]eduction in the present value of mineral rights caused by an interference with or prohibition against exercise of those rights resulting from the use to which the surface will be put, where there is evidence of the present value of the mineral rights and of the value of such rights after the taking.[106]

The measure of the condemnee's loss is the diminution in the value of the mineral estate caused by the taking.[107]

An exception to the rule that the value of the land and mineral deposits may not be determined separately occurs when the mineral deposit itself is the subject of condemnation. In such cases, the mineral deposit is treated as merchandise rather than as part of the land, and the owner of the right is entitled to the separate value of the minerals in place.[108] The same rule applies to the valuation of severed minerals which a lessee may remove during the balance of his lease.[109]

When ownership of the mineral estate is severed from ownership of the land, the valuation process may vary. The fee interest in the land taken may be valued with the sum awarded as representing the fair market value of the land to be subsequently apportioned between the owner of the mineral estate and the owner of the fee. In *Lomax v. Henderson*,[110] all interests in the condemned property were valued by the court, but the court refused to divide the award between the owners of the separate estates because the owners of the mineral estate failed to prove the minerals possessed any market value. In *Valls v. Arnold Industries, Inc.*,[111] the court awarded compensation to the owners of the mineral estate even though the owners presented no evidence of the actual presence of minerals or that the value of the land would be enhanced by their presence. The court reasoned that because a mineral estate has market value, and often commands a substantial price in the market, the owners may not be deprived of their estate without just compensation, even though their compensation diminished the sum awarded the owner of the surface estate. As an alternative to multiple valuations, in some jurisdictions there is a single proceeding, in which separate valuation of the mineral estate and the surface estate occurs.[112] The Kentucky Court of Appeals has noted that valuation of the entire estate, without regard to the separate estates involved, is proper unless the separate estates are not coextensive, in which case the owners of the mineral estate are entitled to a separate valuation.[113] In any event, the sum of the separate awards cannot exceed the total amount of the condemnation verdict.[114]

In summary, the valuation of mineral rights has presented a difficult valuation issue for the courts. Each case must be evaluated individually, and the law of that jurisdiction consulted. The proper rule of valuation may well depend on the nature of the estate or interest being actually acquired and whether the property is being mined at the date of taking, the property is covered by an existing mineral lease, a commercial market for the mineral exists, or comparable sales data are available.

DISPOSITION

A state's rights with respect to the disposition of minerals in, on, and underlying highway rights-of-way will be determined in the first instance by the type of estate acquired by the state in the right-of-way. Any rights as to disposition will occur either as the result of fee ownership of the land and minerals or, in some cases, as a result of rights such as subjacent support which expressly or by implication attach to and are made a part of that estate in land known as an easement.

Disposition of Excavated Materials When State Owns Easement Only

When the state has acquired only an easement in the affected land, it may nevertheless have rights regarding the disposition of material excavated in connection with grading or street improvements. First, it is recognized that the materials, whether soil, gravel, or other mineral, within the boundaries of the right-of-way, belong to the owner of the fee, and that he may remove them as long as there is no interference with the public easement and improvement. The materials, however, may be used by the public authority for improvement or repairs, if needed. When a street easement is graded or improved by excavation, the apparent majority rule is that when the materials are removed for the good faith purpose of improving the highway, and not simply for the purpose of using the materials elsewhere, ownership of the material so removed is in the public authority and it may dispose of it as it sees fit.[115] In *Campbell v. Monaco Coal Mining Co., et al.*,[116] it was held that where landowners were compensated in eminent domain proceedings for an easement for highway purposes over land known to contain coal which was valueless because of its depth below the surface, removal of coal was essential to construction of the highway, and the contractor at substantial additional expense salvaged the coal and sold it on being informed that the highway department was not interested in the coal, neither the contractor nor the buyer of coal was liable to the landowners. The same result is found in voluntary conveyance situations; a specific reservation of excavated materials must appear on the face of the instrument which grants the easement or the fee owner will not be entitled to damages for subsequent disposition of excavated materials.[117]

The cases are not in harmony as to the scope of this right, some holding that materials may be taken from any part of the highway and used at another point or any other right-of-way within the jurisdiction, whereas other cases apply a more restricted rule, requiring that both highways be regarded as part of one plan of public improvement[118] or disallowing it entirely.[119] In *Minot Sand and Gravel Company v. Hjelle*,[120] the court held that the state's right in known commercially valuable aggregate underlying the right-of-way, beyond its right to lateral and subjacent support for the highway, did not extend beyond the right to excavate and use only the amount of the aggregate necessary for repair or construction of the highway immediately above or adjacent to the land where the aggregate was removed. Any additional removal of the aggregate would entitle the owner to just compensation for the aggregate taken.

Disposition of Minerals Owned in Fee

Disposition may consist of outright sale or merely leasing for mineral development. In order to ascertain the authority of a state highway agency to dispose of minerals underlying rights-of-way and the proper procedure thereof, state statutes must be examined. Those states that have specifically statutorily addressed the disposition of minerals underlying highway rights-of-way are few. Texas has addressed the issue by prohibiting the state highway agency from granting oil and gas leases on rights-of-way acquired for highway purposes, although rights-of-way may be leased for the development of minerals other than oil and gas.[121] Leases in existence on the effective date of the legislation (1981) are not affected.

Usually the only apparently applicable statutory provisions pertain to disposition of excess or surplus lands no longer needed for highway purposes. Such statutes may require sealed bids or public auction,[122] or may require that the state offer the land or real property first to the original condemnee or seller.[123]

Oil and Gas Leasing

When the state owns a fee interest in the minerals, disposition may take the form of leasing for mineral development. It has even been held that the state, as the owner of a determinable fee interest, has the right to execute nonoperating oil and gas leases and that the leasing of right-of-way lands under a nonoperating lease is not inconsistent with its use for highway purposes.[124] All jurisdictions recognize the general rule that an oil and gas lessee has the implied right to make reasonable and necessary use of the surface estate for conducting exploration, drilling, and production operations pursuant to an oil and gas lease.[125] This general rule applies regardless of whether the fee interests in the mineral and surface estates are owned by the same party, since the mineral estate is dominant and the surface estate is servient. Consequently, absent an express provision to the contrary in the lease or elsewhere in the chain of title, an oil and gas lease entitles the lessee to make reasonable and necessary use of the surface estate without liability to the surface owner.[126] A fee owner of both the surface and mineral estates has an opportunity to protect his interests in the surface at the time of leasing by inserting a nondevelopment or other appropriate surface use clause in the lease. From a state highway agency's point of view, the ideal and, perhaps, only practical surface use clause is a "nondevelopment" clause. Such a clause prohibits the lessee from using any part of the surface estate in exploring for and producing oil and gas. Nondevelopment clauses are particularly suitable when the land involved is a small parcel such as a right-of-way that can be pooled with other lands to form a well-spacing unit, or where a lessee is willing to slant-drill a directional well to a bottom-hole location from adjacent lands.[127]

An oil and gas lease covering highway rights-of-way should not involve long distances of highway because production from a well-spacing unit, which covers only a small segment of the leased rights-of-way, will hold

the remaining lands under lease without further development. It is advisable to lease, under one instrument, rights-of-way traversing no more acreage than is the standard acreage which comprises well-spacing units in the area (frequently 40 acres for oil and 160 acres for gas). While the lessee may be subject to an implied covenant to develop with respect to rights-of-way not in the vicinity of production or in a particular spacing unit, it is preferable to place an express drilling obligation on the lessee by a separate lease that will generally require that a well be commenced on the smaller leased parcel within a specified primary term such as 3, 5, or 10 years.

In summary, a state's rights with respect to the disposition of minerals in, on, and underlying highway rights-of-way must be initially determined by the nature of the interest acquired by the state in the right-of-way. Fee ownership will carry with it the right to dispose of minerals by sale or lease in accordance with state statutory provisions. Those statutes pertaining to the disposition of excess or surplus lands acquired for highway purposes may provide guidance as to any restrictions on disposition, such as a right of first refusal on the part of the original grantor, condemnee, or dedicator, and as to the proper procedures for sale or lease. Even ownership of an easement limited to surface use may give a state the right to dispose of materials excavated for the purposes of highway construction or improvement.

APPENDIX

Examples of nondevelopment clauses are as follows:

a. Lessee expressly agrees that it will erect no derrick or install any oil well equipment, machinery or in any way disturb the surface of any real property located in . . . .

b. Lessee shall have no right, without prior written consent of Lessor being first obtained, to drill any well or wells from the surface of that portion of the leased lands hereinafter described, nor to use the surface thereof for any purpose whatsoever. Lessee may, however, slant-drill into said land and produce all of the substances covered by this lease lying in producing intervals which are under, beneath or recoverable from said lands by means of a well or wells, the surface drill sites of which are located on other lands, including that portion of the leased lands not hereinafter particularly described, and which well or wells are slant-drilled through and into the following-described land, the producing intervals of which are bottomed under the same, and produce the substances therefrom. Lessee shall have such rights-of-way, easements and servitudes in and through the subsurface of the following-described land as may be required to so drill and produce; however, all of Lessee's subsurface activities shall be conducted so as not to interfere at any time or in any manner with Lessor's use of the surface and so much of the subsurface of the said lands which may be required for any purpose or use whatsoever which Lessor may wish to make of the same at any time in the future.

c. It is further understood and agreed by and between the parties hereto that the above-described tracts of land are now used for such purposes that Lessor herein desires that no well be drilled nor obstructions placed thereon; and it is further agreed that Lessee or his assigns may at any time, without further consent of Lessors, consolidate, jointly operate and develop this lease and land covered hereby with any other lease or leases covering lands within the spacing unit (as established by special field order or, if none, by state-wide rule) for wells to be drilled in the area of the above-described land. In the event of any such consolidation, the premises so consolidated shall be jointly operated and developed as an entirety, the same as if the Lessors herein and the owner or owners of Lessor's interest in and under said lease or leases so consolidated herewith had joined in the execution of one lease in the first instance covering the entire property so consolidated. In the event of such consolidation or communitization, the owner or owners of Lessor's interest in and under the respective leases so consolidated, shall be entitled to participate in the royalties accruing from any well or wells drilled on said consolidated leased premises in the proportion that the acreage embraced in each respective lease bears to the entire consolidated leased premises. It is further agreed that the drilling or completion of a well on any part of the consolidated leased premises shall be considered and construed as the drilling and completion of a well under the terms and conditions of each of the leases so consolidated.

[1] 54 Am. Jur. § 6 at 191–192. Although attempts have been made to include underground water as a "mineral," courts have generally rejected the argument, and thus such water is not included within the scope of this paper. Vogel v. Cobb, 141 P.2d 276 (Okla. 1943).

[2] "Right-of-way," when used in this paper, reflects the broader definition of the term; it merely describes the land on which the highway, road, ditch, or railroad is situated without any intention to denote the character of estate conveyed.

[3] Northwest Realty Co. v. Jacobs, 273 N.W.2d 141 (S.D. 1978); Basin Oil Co. of California v. City of Inglewood, 125 Cal. App. 2d 661, 271 P.2d 73 (1954).

[4] North Sterling Irrigation District v. Knifton, 137 Colo. 40, 320 P.2d 968 (1958); Board of County Commissioners of the County of Logan v. Morris, 147 Colo. 1, 362 P.2d 202 (1961); Hurd v. Byrnes, 264 Or. 591, 506 P.2d 686 (1973); Northwest Realty Co. v. Jacobs, 273 N.W.2d 141 (S.D. 1978).

[5] Northwest Realty Co. v. Jacobs, 273 N.W.2d 141 (S.D. 1978); Hurd v. Byrnes, 264 Or. 591, 506 P.2d 686 (1973); Harvest Queen Mill & Elevator Co. v. Sanders, 189 Kan. 536, 370 P.2d 419 (1962); Wason v. Pilz, 31 Or. 9, 48 P. 701 (1897).

[6] Anderson, et al. v. Juanita Coal and Coke Co., 83 Colo. 562, 267 P. 400 (1928); Tallman v. Eastern Illinois & Peoria R Co., 379 Ill. 441, 41 N.E.2d 537 (1942), *contra,* Crowell & Conner v. Howard, 200 S.W. 911 (Tex. Civ. App. 1918).

[7] State Highway Commission v. Dannevik, 79 N.M. 630, 447 P.2d 510 (1968); Mannix v. Powell County, 60 Mont. 510, 199 P. 914 (1921).

[8] North Sterling Irrigation Dist. v. Knifton, 137 Colo. 40, 320 P.2d 968 (1958).

[9] Northwest Realty Company v. Jacobs, 273 N.W.2d 141 (S.D. 1978); Farmers Reservoir, et al. v. Sun Production Co. v. Amoco Production Co., Civ. Action #31508 (Dist. Ct., Adams County, Colo., August 18, 1983).

[10] Sun Oil Company v. Emery, 183 Neb. 793, 164 N.W.2d 644 (1969); Basin Oil Co. of California v. City of Inglewood, 125 Cal. App. 661, 271 P.2d 73 (1954). *But see,* Calcasieu Lumber Co. v. Harris, 77 Tex. 18, 13 S.W. 453 (1890).

[11] City of Huron v. Wilcox, 17 S.D. 625, 98 N.W.88 (1904).

[12] Miss. Code Tit. 30, §§ 8023, 8038 (1942). *See also* Miss. Code Annot. § 65-1-47 (1972) which now specifically excludes oil and gas rights from acquisition by the State Highway Commission.

[13] 203 Miss. 94, 33 So.2d 612 (1948).

[14] The acquisition policy for Federal-Aid highways allows reservation of subsurface minerals to the owner "where acquisition of such rights is not reasonably necessary for the construction, protection, support, and preservation of the highway facility to be constructed." 23 C.F.R. 712.203. Thus where an easement would not be sufficient under the federal regulations, a strong argument is available that the authority to acquire should be construed as consistent with federal law and regulations to ensure funding for Federal-Aid highways. *See also* discussion of subsurface support requirements, *infra.*

[15] *E.g.* Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905); Harvbest Queen Mill & Elevator Co. v. Sanders, 189 Kan. 536, 370 P.2d 419 (1962). *But see,* Radetsky v. Jorgensen, 70 Colo. 423, 202 P. 175 (1921).

[16] North Sterling Irrigation District v. Knifton, 137 Colo. 40, 320 P.2d 968 (1958); Northwest Realty Corp. v. Jacobs, 273

N.W.2d 141 (S.D. 1978); State *ex rel.* Mitchell v. State Highway Comm., 163 Kan. 187, 182 P.2d 127 (1947).

[17] 105 N.W.2d 339 (N.D. 1960).

[18] Although the mineral estate may be retained by the grantor, the state may retain some control over the removal of those minerals under its right to subsurface support. *See* discussion, *infra*.

[19] 3 NICHOLS ON EMINENT DOMAIN § 9-2(2) (1973).

[20] *Id.* at § 9-2(3); *see e.g.,* Wright v. State *ex rel.* Department of Highways, 204 Okl. 380, 230 P.2d 462 (1951). The constitutional constraint that property be taken only for a public purpose has apparently not prevented courts from construing the statutory authorization to allow acquisition of the fee estate.

[21] COLO. REV. STAT. 1973 § 38-1-105(4). (Except as necessary for subsurface support.)

[22] Kan. G.S. 1957 Supp. 68-413(b)(3).

[23] 147 Neb. 458, 23 N.W.2d 661 (1946).

[24] Although courts grant extreme deference to the public agency's decision regarding what is "necessary" for the public project, it should be recognized that final authority is vested in the judiciary to ensure that private property is acquired only for "public" purposes. Berman v. Parker, 348 U.S. 26, 35, 75 S.Ct. 98, 104, 99 L.Ed. 27 (1954), W. S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967); Ledford v. Corps. of Engineers, 500 F.2d 26 (6th Cir. 1974).

[25] Kansas Gas and Elec. Co. v. Winn., 227 Kan. 101, 605 P.2d 125 (1980); Moon Lake Water Users Association v. Hanson, 535 P.2d 1262 (Utah 1975).

[26] Bumpus v. U.S., 325 F.2d 264 (10th Cir. 1963) (applying Federal law).

[27] 163 Kan. 187, 182 P.2d 127 (1947).

[28] Kan. G.S. 1945 Supp. 68-413.

[29] Kan. G.S. 1957 Supp. 68-413, 413(a).

[30] 20 N.D. 673, 297 N.W. 194 (1941).

[31] 101 N.W.2d 571 (N.D. 1960).

[32] N.DAK. LAWS (1927) ch. 159.

[33] N.DAK. LAWS (1953) ch. 177 § 100.

[34] N.DAK. CONST., § 20, 185.

[35] Minot Sand and Gravel Co. v. Hjelle, 231 N.W.2d 716 (N.D. 1975); Brownfield v. Commonwealth Dept. of Transportation, 364 A.2d 767 (Pa. Cmwlth. Ct. 1976).

[36] Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E. Ed. 96 (Ill. 1943); *see generally,* Annot., Liability of Mine Operator for Damage to Surface Structure by Removal of Support, 32 A.L.R. 2d 1309.

[37] Subsurface support may be explicitly acquired by statute (*see* for example, 1973 COLO. REV. STAT. § 43-1-209), or by implication under common law, *see* Dept. of Conservation v. Harold's Farm, Inc., 385 N.E.2d 1097 (Ill. App. 1979).

[38] For an interesting comparison of how courts have dealt with the proper method by which the landowner may raise the compensability of subsurface support requirements, *compare* Russell Coal Co. v. Board of County Commissioners of Boulder County, 270 P.2d 772 (Colo. 1954) (State must condemn coal which would be necessary to support turnpike and determination regarding such necessary support is for judiciary; thus State's attempt to exclude minerals from condemnation improper and against public policy), *with* Dept. of Conservation v. Harold's Farm, Inc., 385 N.E.2d 1097 (Ill. App. 1979) (entity has authority to exclude minerals from condemnation; however, owner may cross-petition for damages to the remainder).

[39] Chambers-Liberty Counties Navigation District v. Banta, 453 S.W.2d 134 (1970); *see* discussion *infra* in "Disposition" section.

[40] *See generally,* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158, 29 A.L.R. 1321 (1922); United States v. Causby, 328 U.S. 256, 90 L. Ed.2d 1206, 66 S. Ct. 1062 (1946) (Government's use of part of property for overflights constituted a "taking").

[41] *See generally,* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981); Unbanizadora Versalles, Inc. v. Rios, 701 F.2d 993 (1st Cir. 1983).

[42] Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280, 282 (1921).

[43] *E.g.,* Town of Citronelle v. Gulf Oil Corp., 270 Ala. 378, 119 S.2d 180 (1960).

[44] 37 Colo. 248, 86 P. 1038 (1906).

[45] 86 P. at 1039–41.

[46] 163 Neb. 774, 81 N.W.2d 205 (1957).

[47] Lambach v. Town of Mason, 386 Ill. 41, 53 N.E.2d 601 (1944), (held that abutting owner had title to minerals underlying the streets, but it would have been vested in the city had the dedication plat conformed to the statute); Oklahoma City v. State, 193 Okla. 520, 145 P.2d 418 (1944).

[48] Stamatis v. Johnson, 71 Ariz. 134, 224 P.2d 201 (1950); North Sterling Irrigation District v. Knifton, 137 Colo. 40, 320 P.2d 968 (1958); Drieth v. Dormer, 148 Neb. 422, 27 N.W.2d 843 (1947); Casey v. Corwin, 71 N.W.2d 553 (N.D. 1955); White v. Wheatman Irrigation District, 413 P.2d 252 (Wyo. 1966).

[49] Market value is almost universally defined as the price that would result from arms-length negotiations between a knowledgeable, willing seller and an equally knowledgeable, willing buyer, with neither under any obligation to buy or sell. *See generally,* NICHOLS ON EMINENT DOMAIN, § 12.2(1) (3d ed. 1978).

[50] Edwin Moss and Sons, Inc. v. Argraves, 148 Conn. 734, 173 A.2d 505, 506 (1961).

[51] *E.g.,* Montana Railway Co. v. Warren, 137 U.S. 348, 34 L.Ed. 681, 682–83, 11 S. Ct. 96 (1890); United States v. 91.90 Acres of Land, 586 F.2d 79, 87 (8th Cir. 1978), *cert. den.,* 441 U.S. 944 (1979); Arkansas State Highway Comm'n v. DeLaughter, 250 Ark. 990, 468 S.W.2d 242, 246 (1971); Eljay Realty Co. v. Argraves, 149 Conn. 203, 177 A.2d 677, 678–79 (1962); State *ex rel.* State Highway Dept. v. J.H. Wilkerson & Son, Inc., 280 A.2d 700, 701 (Del. 1971); Dept. of Transportation v. Toledo, Peoria & Western Railroad Co., 75 Ill.2d 436, 27 Ill. Dec. 482, 389 N.E.2d 546, 549 (1979); Gradison v. State, 260 Ill. 688, 300 N.E.2d 67, 72 (1973); State Dept. of Highways v. Hart, 249 So.2d 310, 315 (La. App. 1971); State *ex rel.* State Highway Comm'n v. Reynolds, 530 S.W.2d 34, 36 (Mo. App. 1975); Iske v. Metropolitan Utilities District of Omaha, 183 Neb. 34, 157 N.W.2d 887, 896 (1968); Hultberg v. Hjelle, 286 N.W.2d 448, 453 (N.D. 1979); Preston v. Stover Leslie Flying Service, Inc., 174 Ohio St. 441, 190 N.E.2d 446, 450 (1963); State Highway Comm'n v. Nunes, 230 Or. 547, 379 P.2d 579, 582 (1963); Edwards v. Dept. of Environmental Resources, 14 Pa. Comm'w. 371, 322 A.2d 138, 139 (1974); Farr v. State Highway Board, 189 A.2d 542, 545 (Vt. 1963); State v. Hobart, 5 Wash. App. 469, 487 P.2d 635, 637 (1971); *see* 4 NICHOLS ON EMINENT DOMAIN, § 13.22 at 13-125 to 127 (3rd ed. 1978); 156 A.L.R. 1416, 1417–18 (1945). *But see,* Equitable Gas Co. v. Kincaid, 285 S.E.2d 421, 423 (W.Va. 1981) (evidence of separate value of minerals present in land may be used to prove market value of land in certain circumstances).

[52] State *ex rel.* State Highway Dept. v. J.H. Wilkerson & Son, Inc., 280 A.2d 700, 702 (Del. 1971).

[53] Preston v. Stover Leslie Flying Service, Inc., 174 Ohio St. 441, 190 N.E.2d 446, 450 (1963); *see also,* Hultberg v. Hjelle, 286 N.W.2d 448, 456 (N.D. 1979); Farr v. State Highway Board, 189 A.2d 542, 545 (Vt. 1963). *But see* United States v. 103.38 Acres of Land, More or Less, 660 F.2d 208, 212 (6th Cir. 1981); State *ex rel.* Dept. of Highways v. Nevada Aggregates & Asphalt Co., 92 Nev. 370, 551 P.2d 1095, 1097–98 (1976); Equitable Gas Co. v. Kincaid, 285 S.E.2d 421, 423 (W.Va. 1981); Coastal Industrial Water Authority v. Trinity Portland Cement Division, 523 S.W.2d 462, 468 (Tex. Civ. App. 1975).

[54] *See,* Montana Railway Co. v. Warren, 137 U.S. 348, 34 L.Ed. 681, 682, 11 S. Ct. 96 (1890); *see also* State Highway Comm'n v. Ullman, 88 S.D. 492, 221 N.W.2d 478, 483 (1974).

[55] Olson v. United States, 292 U.S. 246, 78 L.Ed. 1236, 1244, 54 S.Ct. 704 (1934); Ruth v. Dept. of Highways, 145 Colo. 546, 359 P.2d 1033, 1035–36 (1961).

[56] 530 S.W.2d 34, 36 (Mo. App. 1975).

[57] *See,* Hultberg v. Hjelle, 286 N.W.2d 448, 456 (N.D. 1979).

[58] *See,* Commonwealth, Dept. of Highways v. Gearhart, 383 S.W.2d 922, 926 (Ky. App. 1964).

[59] West Virginia Dept. of Highways v. Berwind Land Co., 280 S.E.2d 609, 619 (W.Va. 1981); *see,* Twin Lakes Hydraulic Gold Mining Syndicate v. Colorado M. Ry. Co., 16 Colo. 1, 27 P. 258, 259 (1891).

[60] Greystone Heights Redevelopment Corp. v. Nichols Investment Co., 500 S.W.2d 292, 295 (Mo. App. 1973).

[61] 206 Neb. 255, 292 N.W.2d 42, 47 (1980).

[62] 292 U.S. 246, 78 L.Ed. 1236, 1244, 54 S. Ct. 704 (1934); *see also,* Ruth v. Dept. of Highways, 145 Colo. 546, 359 P.2d 1033, 1035–36 (1961).

[63] 292 U.S. 257.

[64] *See,* United States v. Land in Dry Bed of Rosamond Lake, 143 F.Supp. 314, 321 (S.D. Cal. 1956); State Dept. of Highways v. Hart, 249 So. 2d 310, 316 (La. App. 1971); State v. Hobart, 5 Wash. App. 469, 487 P.2d 635, 637 (1971).

[65] Dept. of Transportation v. Toledo, Peoria & Western Railroad Co., 75 Ill. 2d 436, 27 Ill. Dec. 482, 389 N.E.2d 546, 549 (1979); Farr v. State Highway Board, 189 A.2d 542, 546 (Vt. 1963).

[66] Arkansas State Highway Comm'n v. Hampton, 244 Ark. 49, 423, S.W.2d 567, 569 (1968); Board of County Comm'rs v. Vail Associates, Ltd., 171 Colo. 381, 468 P.2d 842 (1970).

[67] *E.g.,* Montana Railway Co. v. Warren,

137 U.S. 348, 34 L.Ed. 681, 683, 11 S. Ct. 96 (1890); United States v. 179.26 Acres of Land in Douglas County, 644 F.2d 367, 371 (10th Cir. 1981); United States v. 103.38 Acres of Land, More or Less, 660 F.2d 208, 211 (6th Cir. 1981); Arkansas State Highway Comm'n v. Hampton, 244 Ark. 49, 423 S.W.2d 567 (1968); Gradison v. State, 260 Ind. 688, 300 N.E.2d 67, 73 (1973); Hoy v. Kansas Turnpike Authority, 184 Kan. 70, 334 P.2d 315, 319 (1959); H. E. Fletcher Co. v. Commonwealth, 350 Mass. 316, 214 N.E.2d 721, 726–27 (1966); Dawson v. Papio Natural Resources Dist., 206 Neb. 255, 292 N.W.2d 42, 43 (1980); State v. Hobart, 5 Wash. App. 469, 487 P.2d 635, 639 (1971); *see also* Tennessee Gas Transmission Co. v. Mattevi, 144 N.E.2d 123, 126 (Ohio 1956) (price paid earlier for same property inadmissible when property and market conditions have changed); Hultberg v. Hjelle, 286 N.W.2d 488, 458 (N.D. 1979) (evidence of comparable sales of minerals separate from surface admissible). The comparable sales method values a condemned tract by reference to recent sales of allegedly comparable property in the vicinity of the land condemned. United States v. 103.38 Acres of Land, More or Less, 660 F.2d 208, 210 (6th Cir. 1981).

[68] 660 F.2d at 212.

[69] Id. at 211.

[70] 137 U.S. 348, 34 L.Ed. 681, 683. 11 S. Ct. 96 (1890).

[71] *E.g.*, United States v. Land in Dry Bed of Rosamond Lake, 143 F. Supp. 314, 315 (S.D. Cal. 1956); *see also* United States v. 179.26 Acres of Land in Douglas County, 644 F.2d 367, 372 (10th Cir. 1981); United States v. 91.90 Acres of Land, 586 F.2d 79, 87 (8th Cir. 1978), *cert. den.*, 441 U.S. 944 (1979); Arkansas State Highway Comm'n v. Hampton, 244 Ark. 49, 423 S.W.2d 567, 570 (1968); Gradison v. State, 260 Ind. 688, 300 N.E.2d 67, 73 (1973); Smith v. State Roads Comm'n, 257 Md. 153, 262 A.2d 533, 536 (1970); State Highway Comm'n v. Mann, 624 S.W.2d 4, 8 (Mo. 1981); State *ex rel.* State Highway Comm'n v. Nunes, 233 Or. 547, 379 P.2d 579, 585 (1963); Nobel v. West Penn Power Co., 26 Pa. Comm'w. 577, 388 A.2d 781, 785 (1978); State *ex rel.* Dept. of Highways v. Nevada Aggregates & Asphalt Co., 92 Nev. 370, 551 P.2d 1095, 1097 (1976); State v. Hobart, 5 Wash. App. 469, 487 P.2d 635, 637 (1971). *But see,* United States v. 103.38 Acres of Land, More or Less, 660 F.2d 208, 213–14 (6th Cir. 1981) ("unit times price" formula competent evidence if and only if market value exists for mineral in place and valuation witness possesses requisite industry expertise); Arkansas State Highway Comm'n v. Cochran, 230 Ark. 881, 327 S.W.2d 733, 734 (1959) ("unit times price" permissible method of valuation when land taken had been leased at royalty rate for mining); City of St. Louis v. Union Quarry & Construction Co., 394 S.W.2d 300, 307 (Mo. 1965) ("unit times price" permissible as last resort method of valuation when only use of property was exploitation of minerals).

[72] State *ex rel.* Dept. of Highways v. Nevada Aggregates & Asphalt Co., 92 Nev. 370, 551 P.2d 1095, 1098 (1976); State Highway Comm'n v. Nunes, 233 Or. 547, 379 P.2d 579, 585 (1963); State v. Hobart, 5 Wash. App. 469, 487 P.2d 635, 637 (1971).

[73] State Road Commission v. Noble, 305 P.2d 495, 498 (Utah 1957).

[74] United States *ex rel.* TVA v. Indian Creek Marble Co., 40 F. Supp. 811 (E.D. Tenn. 1941).

[75] United States v. 620 Acres of Land, 101 F. Supp. 686 (W.D. Ark. 1952); Werner v. Commonwealth, 432 Pa. 280, 247 A.2d 444 (1968); Gradison v. State, 260 Ind. 688, 300 N.E.2d 67, 73 (1973).

[76] State Road Commission v. Noble, 305 P.2d 495 (Utah 1957).

[77] Smith v. State Road Commission, 257 Md. 153, 262 A.2d 533 (1970).

[78] State v. J.H. Wilkerson & Son, Inc., 280 A.2d 700 (Del. 1971); United States v. 620 Acres of Land, 101 F. Supp. 686 (W.D. Ark. 1952); Georgia Kaolin Co. v. United States, 214 F.2d 284 (5th Cir. 1954).

[79] 341 P.2d 1089, 1104 (Ore. 1959).

[80] State Highway Comm'n v. Jones, 173 Ind. App. 243, 363 N.E.2d 1018, 1021 (1977).

[81] United States v. 103.38 Acres of Land, More or Less, 660 F.2d 208, 212 (6th Cir. 1981).

[82] Id. at 213-14.

[83] United States v. 179.26 Acres of Land in Douglas County, 644 F.2d 367, 373 (10th Cir. 1981).

[84] *Id.*

[85] 233 Or. 547, 379 P.2d 579, 584–85 (1963).

[86] Id. at note 8.

[87] Id. at 585 (citations omitted).

[88] Id. at 583–84.

[89] *See,* State Highway Comm'n v. Jones, 173 Ind. App. 243, 363 N.E.2d 1018, 1023 (1977).

[90] Id. at 1025.

[91] State *ex rel.* State Highway Comm'n v. Mann, 624 S.W.2d 4, 8–9 (Mo. 1981).

[92] Smith v. State Roads Comm'n, 257 Md. 153, 262 A.2d 533, 536 (1970).

[93] *Id.* at 538.

[94] H.E. Fletcher Co. v. Commonwealth, 350 Mass. 316, 214 N.E.2d 721, 725–26 (1966).

[95] Coastal Industrial Water Authority v. Trinity Portland Cement Division, 523 S.W.2d 462, 468 (Tex. Civ. App. 1975).

[96] Id. at 470, 471.

[97] West Virginia Dept. of Highways v. Berwind Land Co., 280 S.E.2d 609, 617 (W.Va. 1981).

[98] Equitable Gas Co. v. Kincaid, 285 S.E.2d 421, 423 (W.Va. 1981).

[99] *E.g.*, Arkansas State Highway Comm'n v. DeLaughter, 250 Ark. 990, 468 S.W.2d 242, 247 (1971); Eljay Realty Co. v. Argraves, 149 Conn. 203, 177 A.2d 677, 678 (1962); Ruth v. Dept. of Highways, 145 Colo. 546, 359 P.2d 1033, 1035 (1961); Hoy v. Kansas Turnpike Authority, 184 Kan. 70, 334 P.2d 315, 322 (1959); H. E. Fletcher Co. v. Commonwealth, 350 Mass. 316, 214 N.E.2d 721, 724 (1966); Highway Comm'n v. Ullman, 88 S.D. 492, 221 N.W.2d 478, 482 (1974).

[100] *E.g.*, United States v. 91.90 Acres of Land, 586 F.2d 79, 86–87 (8th Cir. 1978) (may not estimate tonnage of clay in ground and then multiply times fixed unit price, but may establish that presence of clay enhances value of property); Eljay Realty Co. v. Argraves, 149 Conn. 203, 177 A.2d 677, 678 (1962) (evidence of net profits from gravel business inadmissible even when nature of property condemned is such that profits derived therefrom are chief source of its value); Hoy v. Kansas Turnpike Authority, 184 Kan. 70, 334 P.2d 315, 323–24 (1959) (plaintiffs entitled to compensation according to reasonably probable highest and best use of their land); Commonwealth, Dept. of Highways v. Gearhart, 383 S.W.2d 922, 923, 925–26 (Ky. App. 1964) (proof of valuable mineral deposit relevant but insufficient to support verdict); H.E. Fletcher Co. v. Commonwealth, 350 Mass. 316, 214 N.E.2d 721, 725–26 (1966) (within discretion of trial court to exclude capitalization of income evidence as overly speculative when determining before and after value of condemned property); Hultberg v. Hjelle, 286 N.W.2d 448, 455 (N.D. 1979) (value of minerals not to be determined separately from and added to value of land; State Highway Comm'n v. Ullman, 88 S.D. 492, 221 N.W.2d 478, 483 (1974) (value of gravel deposits relevant to value of land only if deposits affect land's market value). *But see,* State *ex rel.* State Highway Comm'n v. Mann, 624 S.W.2d 4, 10 (Mo. 1981), in which the Missouri Supreme Court distinguished a partial taking from a complete taking. The court held that computing the present value by capitalization of an income stream is more speculative in cases involving a partial taking, because the starting date of the income stream from the area taken is unknown.

[101] *See* Tennessee Gas Transmission Co. v. Mattevi, 75 Ohio Abs. 396, 144 N.E.2d 124, 126 (1956).

[102] State Highway Comm'n v. Antonioli, 145 Mont. 411, 401 P.2d 563, 567 (1965).

[103] Arkansas State Highway Comm'n v. DeLaughter, 250 Ark. 990, 468 S.W.2d 242, 247 (1971); Ruth v. Dept. of Highways, 145 Colo. 546, 359 P.2d 1033, 1035 (1961).

[104] Brownfield v. Commonwealth Dept. of Transportation, 26 Pa. Comm'w. 308, 364 A.2d 767, 770 (1976); 4 NICHOLS ON EMINENT DOMAIN, § 13.22[1] at 13-143 (3d ed. 1978).

[105] Lomax v. Henderson, 559 S.W.2d 466, 467 (Tex. Civ. App. 1977).

[106] Cajon Electric Power Cooperative, Inc. v. Estate of Thomas, 408 So.2d 1001, 1004 (La. App. 1981); *see,* Gulf Interstate Gas Co. v. Garvin, 303 S.W.2d 260, 262 (Ky. App. 1957), *modified,* 368 S.W.2d 309 (Ky. App. 1963); Oklahoma Turnpike Authority v. Burk, 415 P.2d 1001, 1004 (Okla. 1966); Lomax v. Henderson, 559 S.W.2d 466, 467 (Tex. Civ. App. 1977).

[107] Lomax v. Henderson, 559 S.W.2d 466, 467 (Tex. Civ. App. 1977). *But see,* Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309, 313 (Ky. App. 1963) (damages based on diminution in fair market value of land as a whole).

[108] *See, e.g.*, Mackie v. Fegin, 2 Mich. App. 698, 141 N.W.2d 312, 315 (1966); State *ex rel.* State Highway Comm'n v. Foeller, 396 S.W.2d 714, 719 (Mo. 1965) (per curiam); Board of County Comm'rs of Roosevelt County v. Good, 44 N.M. 495, 105 P.2d 470, 472 (1940); Hultberg v. Hjelle, 286 N.W.2d 448, 457 (N.D. 1979); 4 NICHOLS ON EMINENT DOMAIN, § 133.22[1] at 13-147 (3d ed. 1978).

[109] Smithrock Quarry, Inc. v. State, 60 Wash.2d 387, 374 P.2d 168, 171 (1962).

[110] 559 S.W.2d 466, 467 (Tex. Civ. App. 1977).

[111] 328 So. 2d 471, 474 (Fla. App. 1976).

[112] *See,* Commonwealth, Dept. of Highways v. Chapman, 391 S.W.2d 367, 368 (Ky. App. 1965); *see also,* United States v. 342.81 Acres of Land, 134 F.Supp. 430, 434 (N.D. Ga. 1955); Iske v. Metropolitan Utilities District of Omaha, 183 Neb. 34, 157 N.W.2d 887, 896-97 (1968) (lessee of sand and gravel rights received compensation in the same proceeding as surface owner).

[113] *See,* Commonwealth, Dept. of Highways v. Southard, 438 S.W.2d 338, 340 (Ky. App. 1969).

[114] Valls v. Arnold Industries, Inc., 328 So. 2d 471, 474 (Fla. App. 1976).

[115] 3 NICHOLS ON EMINENT DOMAIN, § 10.212; Yuba County Water Agency v. Heirs of Martin, 119 Cal. Rptr. 444 (App. 1975); Campbell v. Monaco Coal Mining Co. et al., 85 N.E.2d 800 (Ohio 1949).

[116] Campbell v. Monaco Coal Mining Co., 85 N.E.2d 800 (Ohio 1949).

[117] State *ex rel.* Goldberry v. Weir, 395 N.2d 901 (Ohio 1978).

[118] 39 A C.J.S. Highways § 138(b).

[119] Minot Sand and Gravel Co. v. Hjelle, 231 N.W.2d 716 (N.D. 1975).

[120] *Id.*

[121] TEX. REV. CIV. STAT. ANN. arts 6673a-1, 6673a-2 (Vernon 1977).

[122] Mont. Code Annot. § 60-4-202 (1981).

[123] UTAH STAT. § 78-34-20 (Supp. 1983) (property acquired by condemnation).

[124] Wallentinson v. Williams County, 101 N.W.2d 571 (N.D. 1960).

[125] 4 Summers, THE LAW OF OIL AND GAS § 652 (1954); 20 Rocky Mt. Min. L. Inst. 227 (1975).

[126] *E.g.,* Chambers-Liberty Counties Navigation Dist. v. Banta, 453 S.W.2d 134 (Texas 1970); Costa Mesa Union School Dist. v. Security First Nat. Bank, 62 Cal. Rptr. 113 (Cal. App. 1967); Federal Oil Company v. Culver City, 3 Cal. Rptr. 513 (Cal. App. 1960).

[127] See "Appendix" for examples of typical nondevelopment clauses.

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