STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

THE IDAHO TRANSPORTATION DEPARTMENT and through the IDAHO TRANSPORTATION BOARD,

Plaintiff,

vs.

TAYLOR FAMILY INVESTMENTS,LLC, ET AL,

Defendant.

Case No. **CV 2011 7918**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff Idaho Transportation Department's (ITD) Motion for Summary Judgment, filed October 1, 2012, seeking dismissal of a number of "claims" by Defendant Taylor Family Investments, LLC (Taylor) as well as seeking to bar Taylor's appraiser from using a particular real estate transaction as a comparable sale. Motion for Summary Judgment, pp. 1-2. As this decision makes clear, Taylor has not in fact raised these "claims" which ITD argues are subject to summary judgment.

In its Complaint filed October 3, 2011, ITD seeks to "take and condemn certain real property owned by Defendants for an authorized public purpose, namely, the highway project to widen and improve U.S. Highway 95 south of State Highway 52 to north of the community of Sagle." Complaint, p. 2. ITD further alleges that prior to the commencement of this lawsuit, ITD had sought in good faith to purchase the necessary

property from Taylor and has been unable to make a reasonable bargain for or to negotiate such a settlement. Complaint, p. 4. On November 9, 2011, Taylor filed an Answer to the Complaint and Demand for Jury Trial on November 9, 2011. Answer, p. 1. In its Answer, Taylor admits that the parties were unable to negotiate a settlement for the purchase of the necessary property but denies that ITD offered Taylor fair market value for the property taken. Answer, p. 3. Taylor's Answer is devoid of any affirmative defenses or counterclaims. There are simply no "claims" made in Taylor's Answer, only denials of certain of ITD's claims. ITD states that Taylor has refused and continues to refuse to grant the necessary property to ITD for fair market value. Complaint, p. 4. However, prior to the filing of ITD's Complaint, on April 27, 2011, the parties entered into an Agreement where Taylor granted possession of the necessary property to ITD. *Id.,* pp. 4-5. The parties were and are still unable to reach any agreement as to the value of the land and damages, if any, to the remainder of the property. *Id.*

ITD filed its Motion for Summary Judgment and supporting brief on October 1, 2012. Motion for Summary Judgment, p. 1; Brief in Support of Motion for Summary Judgment, p. 1. ITD requests summary judgment "[1] dismissing improper claims for compensation and damages based on allegations of loss of access and loss of visibility" by Taylor, [2] barring Taylor's appraiser from using a real estate transaction made in lieu of a settlement of a condemnation as a "comparable sale" in his appraisal and [3] barring Taylor's claim for compensation for the cost to pave Sylvan Road on the eastern border of Taylor's property. Motion for Summary Judgment, p. 2.

Taylor filed "Defendant's Response to Plaintiff's Motion for Summary Judgment" on October 16, 2012, essentially claiming that the "claims" that Taylor has supposedly made are not claims, but rather factors that go to amount of compensation allowed;

thus, summary judgment is not appropriate. Response to Plaintiff's Motion for Summary Judgment, pp. 5-6.

On October 23, 2012, ITD filed "Plaintiff ITD's Reply Brief in Support of Motion for Summary Judgment." In that brief, ITD states: "Taylor argues that it has not made any 'claims' based on loss or impairment of access or loss of visibility, and these are simply "market factors" that affect the value of the property after the US-95 Project." *Id.,* p. 3. ITD then argues that since Taylor's experts, Skip Sherwood and Cary Vogel, base their appraisals in some part on these factors, Taylor has established a "claim". *Id.* Assuming this Court can somehow equate a factor in appraisal with a claim of a party (which the Court cannot), the Court has no idea of the significance of these "claims" (or factors). Nowhere in ITD's briefing does it set out for this Court exactly "how" Sherwood and Vogel base their appraisals on "these factors." ITD has taken excerpts from each of Taylor's appraisals where they discuss issues of access, view and another condemned parcel as a comparable, (Plaintiff ITD's Brief in Support of Motion for Summary Judgment, p. 12, 27, 29), but the Court cannot find from those excerpts exactly what value, if any, these experts place on those features. The Court has been accorded no deposition transcripts. Without citation, ITD claims: "The fact that Taylor has not asserted specific 'claims' or specified dollar amounts for these damages is not a defense to ITD's motion for summary judgment." Plaintiff ITD's Reply Brief in Support of Motion for Summary Judgment, p. 18. This Court disagrees with that assertion. Essentially, at this time this Court is being asked to make an advisory opinion on an evidentiary issue which ITD inaptly couches as a legal issue for summary judgment purposes. ITD then blames a lack of specificity at this time upon Taylor's experts and their "refusal to quantify these claims". *Id.* ITD's obvious solution to that lack of specificity would be for ITD to take the depositions of Sherwood and Vogel, pin

them down, get them to state a monetary amount on these features (or not), and then, perhaps make a motion for summary judgment, or, more appropriately, a motion in limine. At the present time ITD is simply asking this Court to *assume* that Sherwood and Vogel will attach a monetary amount to these features.

In its reply brief, ITD argues that in light of *State v. HI Boise, LLC,* 153 Idaho 334, 282 P.3d 595 (2012), Taylor is improperly relying on the following quote from *State ex rel. Rich v. Fonburg,* 80 Idaho 269, 328 P.2d 60 (1958), that "Where a part of the owner's continguous land is taken in a condemnation proceeding, *all inconveniences* resulting in the owner's remaining land, including an easement or access to a road or right of way formerly enjoyed, which decrease the value of the land retained by the owner, are elements of severance damage for which compensation should be paid." Plaintiff ITD's Reply Brief in Support of Motion for Summary Judgment, p. 12. (italics added). ITD claims *HI Boise* makes it "…clear that *not all* forms of alleged damages are compensable…" *Id.* (italics added). But then, without any citation, ITD argues: "Thus, contrary to Taylor's misstatement of the law and its misuse of *Fonburg,* a landowner *cannot* recover any form of alleged damages in condemnation cases merely because a physical taking has occurred." *Id.,* p. 14. (italics in original). According to ITD, the Idaho Supreme Court has gone from "all inconveniences" in 1958 via *Fonberg*, to "not all inconveniences" earlier this year in *HI Boise*, to "no inconveniences" can be recovered at the present time for purposes of this case. This will be discussed in detail later in this memorandum opinion.

This case is set for a jury trial on February 4, 2013.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion for summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id.*

III. ANALYSIS.

A. There is no "Claim" Upon Which Summary Judgment Can Be Granted.

Idaho Code § 7-711 sets forth the assessment of damages in eminent domain cases:

> 7-711. Assessment of damages. – The court, jury or referee must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:
> 1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed.

I.C. § 7-711. It is the mandatory duty of the court, jury or referee to ascertain and assess the value of the property sought to be condemned. *Hughes v. State*, 80 Idaho 286, 293, 328 P.2d 397, 400 (1958). The Idaho Supreme Court has set forth the rule for the assessment of damages in eminent domain cases:

> In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner.

Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod, 20 Idaho 568, 576, 119 P.60, 62 (1911). The Supreme Court has also stated:

> It is often difficult to determine the market value of property, for the reason that there may be no general demand for the same, or it may be that the property is only valuable for a specified purpose . . . and a value can only be estimated upon the basis of the fitness of the property for the specific use on account of its formation, its location, or other specific, natural, or artificial adaptability to the use for which it is sought. In a case, therefore, where no general market value can be ascertained, these latter elements must be taken into consideration and are proper subjects of inquiry in arriving at the value of the property.

Id. The general rule is that, where property is taken, all matters that may affect the convenient use and future enjoyment of the property retained are proper for consideration as affecting the market value of the land, not as themselves elements of damage. *Hughes*, 80 Idaho 286, 294, 328 P.2d 397, 401. The Court in *Idaho-Western* went on to say that landowners in eminent domain proceedings should be given "every opportunity to disclose to the jury the real character of the property, its location, its surroundings, its use, its improvements, if any, and their age, condition, and quality, its adaptability to any special use or purpose, its productiveness and rental value, and *in short, everything which affects its saleability and value as between buyers and sellers generally.* 20 Idaho 568, 578-79, 119 P.60, 62. (emphasis added). Under the laws of Idaho, three facts must be determined in a condemnation suit where it is sought to only take a part of the land: 1) the value of the property sought to be condemned, including all improvements pertaining to the property, 2) if the property sought to be condemned is only a part of the larger parcel, the damages which will accrue to the remaining portion by reason of the severance, and 3) if the property sought to be condemned is only a part of the larger parcel, the benefits which will accrue to the remaining portion after the severance of the part condemned, so that it may be deducted from damages sustained by the severance. *Idaho-Western*, 20 Idaho 568, 581-82, 119 P. 60, 64. The Idaho Supreme Court in *Idaho-Western* held that it was proper for the landowner to introduce such available evidence and proof tending to show the depreciation in value caused to the remaining property. *Id.*

Where a part of the owner's contiguous land is taken in a condemnation proceeding, all inconveniences resulting to the remaining land, including access to a road formerly enjoyed, which decrease the value of the land retained by the owner, are

elements of severance damage for which compensation should be paid. *State ex rel. Rich v. Fonburg*, 80 Idaho 269, 278, 328 P.2d 60, 64 (1958). The State is required to pay just compensation not only for the value of the land actually taken, but also is required to compensate for damages, if any, which the severance will cause to the remainder portion of the property. *State ex rel. Moore v. Bastian*, 97 Idaho 444, 446, 546 P.2d 399, 401 (1976). The right of access to a public highway is no exception, as it is a property right which cannot be taken or materially interfered with without just compensation. *Fonburg*, 80 Idaho 269, 278, 328 P.2d 60, 64. In *Fonburg*, the State brought an eminent domain proceeding to condemn a portion of the defendant's farm for highway purposes. 80 Idaho 269, 274, 328 P.2d 60, 61. The highway was to be constructed along the north side of the defendant's farm and south of the Camas Prairie Railroad. *Fonburg*, 80 Idaho 269, 274, 328 P.2d 60, 62. Construction of the highway would prevent the defendant from crossing the new highway from his land to the railroad, except by a circuitous route permissible at one point. *Id.* The Court held that accessibility to the railroad formerly enjoyed, then limited due to the highway, decreased the value of the remainder and thus was an element of severance damage to be submitted to and considered by the jury. *Fonburg*, 80 Idaho 269, 279, 328 P.2d 60, 65. The Court further held that the jury should have been instructed that the easement and right of access, ingress and egress to the highway, as formerly enjoyed and curtailed by the highway, was an element of damage to be considered. *Id.* The Court has held that in a condemnation proceeding, impaired access to a highway is an element to be considered by the jury in fixing damages. *Hughes*, 80 Idaho 286, 295, 328 P.2d 397, 402.

Regarding access, the Idaho Supreme Court has recently re-affirmed that no compensable taking occurs where the right is not destroyed or substantially impaired and the remaining access is reasonable. *State, Idaho Transp. Bd. v. HI Boise, LLC*, 153 Idaho 334, __, 282 P.3d 595, 599; *Merritt v. State*, 113 Idaho 142, 145, 742 P.2d 397, 400 (1987). In *HI Boise*, the defendants claimed that they suffered damages for loss of access due to vehicles having to take a more circuitous route to access the property. 153 Idaho 334, __, 282 P.3d 595, 597. The Court held that the defendant could not bring a claim for loss of access simply because it takes a more circuitous route to get to the property. *HI Boise*, 153 Idaho 334, __, 282 P.3d 595, 601-602. The Court distinguished *HI Boise* from *Fonburg*, stating that *Fonburg* was not merely a physical taking, but a taking involving a near complete destruction of Fonburg's rights and, further, that the physical taking in *Fonburg* directly caused the destruction of the access, rather than just incidentally occurring alongside it. *HI Boise*, 153 Idaho 334, __, 282 P.3d 595, 601. In that case, it is worth noting that the State had filed condemnation proceedings against the defendant and the *defendant counterclaimed* for inverse condemnation asserting, among other things, the claim for loss of visibility. *HI Boise*, 153 Idaho 334, __, 282 P.3d 595, 597 (emphasis added).

Similarly, the defendants in *Bastian* not only claimed compensation for the property actually taken, but also *specifically sought damages* for the depreciation in the value of the remainder land by reason of expected traffic diversion. 97 Idaho 444, 446, 546 P.2d 399, 401 (emphasis added). The Court in *Bastian* held that the right of access does not encompass a right to any particular pattern of traffic flow or a right of direct access to or from both directions of traffic. 97 Idaho 444, 447, 546, P.2d 399, 402.

Furthermore, there is no inherent right of access to a newly relocated highway. *James v. State By and Through Idaho Bd. of Highway Directors*, 88 Idaho 172, 178, 397 P.2d 766, 770 (1964). In *James*, the plaintiff landowners *initiated an action* against the State to recover damages for alleged deprivation of access to their business property via inverse condemnation. 88 Idaho 172, 174, 397 P.2d 766, 767 (emphasis added). The Court held that the plaintiffs failed to show any substantial impairment of their access because at most the diversion of traffic constituted a more inconvenient, circuitous route to the business. *James*, 88 Idaho 172, 178-79, 397 P.2d 766, 770.

The defendant in *HI Boise, LLC* also *submitted a damages claim* for loss of access to its property: "the circuity claim". 153 Idaho 334, __, 282 P.3d 595, 597. In *HI Boise, LLC* the State made some improvements to the Vista Interchange and I-84, which included construction of a sound wall, which limited the visibility of the defendant's property. 153 Idaho 334, __, 282 P.3d 595, 597. The defendant in *HI Boise, LLC* also submitted a visibility claim: "The [district] court also granted summary judgment to ITD on HI Boise's visibility claim." 153 Idaho 334, __, 282 P.3d 595, 597. The sound wall was constructed on State property only. *Id*. The Idaho Supreme Court held that Idaho does not recognize visibility as a compensable property right in and of itself. *HI Boise*, 153 Idaho 334, __, 282 P.3d 595, 603-04 (2012). What is important to this Court is both the "circuity claim" and the "visibility claim" were raised by HI Boise as specific items of damage *in its counterclaim for inverse condemnation.* 153 Idaho 334, __, 282 P.3d 595, 597. Taylor has made no such counterclaim for inverse condemnation, let alone any claim for specific damages regarding visibility and access.

It should be noted that other cases involving damages for loss of access are situations where the landowners have made a specific claim for such damages, such as

a counterclaim, complaint, or specific allegation of particular damages. These cases include situations where the landowners bring a suit against the State for loss of access damages (*Weaver v. Village of Bancroft*, 82 Idaho 189, 190, 439 P.2d 697, 698 (1968); *Powell v. McKelvey*, 56 Idaho 291, 291, 53 P.2d 626, 627 (1935); *Johnston v. Boise City*, 87 Idaho 44, 49, 390 P.2d 291, 293 (1964); *Mabe v. State*, 83 Idaho 222, 224, 360 P.2d 799, 799 (1961); *Brown v. City of Twin Falls*, 124 Idaho 39, 40, 855, P.2d 876, 877 (1993)), where landowners bring a counterclaim in response to a condemnation proceeding (*HI Boise*, 153 Idaho 334, __, 282 P.3d 595, 597), and where such damages are specifically sought (*Bastian*, 97 Idaho 444, 446, 546 P.2d 399).

In this case, ITD alleges that Taylor has made claims regarding damages for loss of access and loss of visibility. In its response, Taylor clearly states that it “has not presented any claims for loss of visibility.” Defendant’s Response to Plaintiff’s Motion for Summary Judgment, p. 14. Such a statement appears to indicate to the Court that Taylor does not plan to make any claims in the future as well. Thus, it appears that the claim based on loss of visibility is not an issue before the Court, at least for summary judgment purposes.

With regard to the “claims” relating to loss of access and even loss of visibility, ITD argues that Taylor’s appraiser’s reports which make mention of the restricted access and limited visibility are “claims” under which precedent denies Taylor damages. It is true that generally *HI Boise* bars claims for loss of visibility and *Bastian* and other cases cited above bar claims for loss of access where the access has not been substantially impaired. However, as stated above, the case law shows that where “claims” have been made regarding loss of access and loss of visibility, those claims have come in the form of formal complaints, counterclaims or specific claims for

particular damages. This Court cannot find an appellate Idaho case which indicates a "claim" has been made simply because the factor is mentioned in an appraiser's report. In this case, Taylor has not submitted a counterclaim and is in fact the defendant in this action. Furthermore, in its Answer, Taylor simply denied ITD's claims and requested a jury trial. There was no mention of specific allegations of damages related to loss of visibility or loss of access.

At the hearing on October 30, 2012, the Court asked counsel for ITD on several occasions if there had ever been a district court judge in the State of Idaho which had agreed with ITD's argument that a factor in an appraiser's report can rise to the level of a "claim" for purposes of summary judgment in a case where no specific counterclaim was made and no claim for inverse condemnation was made. The response each time was that Judge Wilper did so in *HI Boise,* with no other instances given. But as mentioned above, both the "circuity claim" and the "visibility claim" were raised by HI Boise as specific items of damage *in its counterclaim for inverse condemnation.* 153 Idaho 334, __, 282 P.3d 595, 597.

The Court finds that at this time, there is no "claim" upon which it could grant summary judgment. The Court agrees with Taylor's argument:

> I.R.C.P. 56(a) provides guidance for summary judgment for a claimant:
>
> > A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time, after the expiration of twenty (20) days from the service of process upon the adverse party or that party's appearance in the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in that party's favor upon all or any part thereof.
>
> The rule is instructive in this regard and begs the question what "claim " put forth by ITD is it seeking summary judgment as a matter of law upon? The result of a motion for summary judgment is…inarguably, a judgment. A judgment in one which provides relief to the party that was requested. These questions are not simply academic, but go to the heart of the remedy that ITD is requesting. What relief is being sought through ITD's

> motion? If it is a declaration that Taylor has no rights that are impacted by this taking, why then is this a proceeding for condemnation with damages yet to be determined? Quite simply, none of these "claims" are appropriate for summary judgment, as Plaintiff is not entitled to a judgment on any claim which it elects to raise on Taylor's behalf.

Defendant's Response to Plaintiff's Motion for Summary Judgment, pp. 6-7.

Accordingly, ITD's motion for summary judgment must be denied.

B. If Treated as a Motion in Limine, Taylor's Expert Testimony on These Issues Will be Excluded at Trial.

1. Introduction.

This case is set for trial three months from the date of this decision. The parties' witnesses need to know what they will be allowed to testify regarding the basis of their opinions. Not addressing this issue at this time could result in the total preclusion of an expert's testimony, excluding portions of the expert's testimony, a judgment notwithstanding the verdict or a retrial of the case. In *State v. Bastian,* 97 Idaho 444, 449, 546 P.2d 399, 404 (1976), the Idaho Supreme Court held: "On retrial if those expert witnesses cannot eliminate that portion of the damages which is noncompensable, i.e., that portion resulting from the establishment of traffic control medians, then and in that event their testimony must be stricken and the jury advised to disregard it in its entirety." Citing *State Highway Commission v. Central Paving Co.,* 240 Or. 71, 399 P.2d 1019 (1965); *Mabe v. State,* 86 Idaho 254, 385 P.2d 401 (1963); *State v. Ness,* 516 P.2d 1212 (Alaska 1973); *Rose v. State,* 19 Cal.2d 713, 123 P.2d 505 (1942). A few years earlier, in *Symms v. V-1 Oil Co.,* 94 Idaho 456, 459, 490 P.2d 323,326 (1971), it seems the Idaho Supreme Court would countenance an expert opinion based in part on improper factors, as long as the opinion was in part based on proper factors.

Idaho Code § 7-711 states that the jury must ascertain and assess the value of the property sought to be condemned. Furthermore, *Idaho-Western* set forth the rule that when a condemnation is only partial, the landowner is entitled not only to the value of the property condemned but also to damages to the remaining property as a result of the condemnation. The Idaho Supreme Court has held in *Idaho-Western* that a landowner is allowed to introduce evidence and proof that tends to show the depreciation in value of the remaining property. Similarly, the Court in *Fonburg* held that impaired access is an element that can be considered by a jury in fixing damages in a condemnation proceeding. It would seem based on these two cases that a limitation on access and visibility are factors that could be considered in an appraiser's report on the value of the property under *Idaho-Western*. More recent cases show a change by the Idaho Supreme Court. If Taylor can find authority that clearly states that factors such as a diminution in access, diminution in visibility, while not items of compensable damage in an eminent domain case, are nonetheless factors which an appraiser can consider, the Court may be inclined to change its ruling in limine. As discussed below, *HI Boise, LLC* would indicate such is not allowed any more under Idaho case law. And while the analysis in *HI Boise, LLC* is nothing like the analysis in *Utah Department of Transportation v. Admiral Beverage Corp.,* 275 P.3d 208 (2011), it does seem wholly illogical for the Idaho Supreme Court to prohibit such as claims for damage, yet allow this Court to allow Taylor's expert (or ITD's for that matter) to testify about such as factors supporting their opinions regarding diminution in value due to the taking. The following cases illustrate this lack of logic in such a result. In *State Highway Commission v. Central Paving Co.,*240 Or. 71, 76-77, 399 P.2d 1019, 1022-23 (Or.

1965), a case cited by the Idaho Supreme Court in *Bastian,* the Oregon Supreme Court held:

> The trial judge should have given plaintiff's requested instruction and should not have given the instruction he gave. Further, it was error to permit the testimony of defendants' loss based in part upon circuity of route. Circuity of route was inextricably bound up with witness Taggart's estimate of the value of defendants' land after the taking. Counsel for plaintiff, in moving to strike the testimony, clearly identified the element of circuity of travel as the objectionable factor in Taggart's estimate. The trial court overruled the objection on the ground that a witness' testimony was not objectionable merely because 'he can't exactly break it down in dollars and cents.' A value witness need not attribute a value to each of the elements properly employed in reaching his ultimate estimate of value. However, if the estimate is based in part upon an element improperly employed, the estimate is not competent evidence and the state is entitled to inquire as to the value attributed to the improperly employed element for the purpose of reducing the estimate by that amount, or, if it cannot be segregated, to insist that the witness' estimate be stricken. Therefore, the judgment must be reversed and the cause remanded for a new trial.

Also cited by the Idaho Supreme Court in *Bastian* is *Mabe v. State,* 86 Idaho 254, 385 P.2d 401 (1963). In *Mabe*, the Idaho Supreme Court noted: "The witnesses made no effort to segregate the non-compensable element of diversion of traffic from their estimates." 86 Idaho 254, 260, 385 P.2d 401, 405. The jury awarded the plaintiff damages, but the district court granted the State a judgment notwithstanding the verdict based on the admission of damage evidence caused by diversion of traffic, which was non-compensable. The Idaho Supreme Court affirmed the district court's grant of a judgment notwithstanding the verdict. The Idaho Supreme Court cited with approval:

> 'Opinions of witnesses based upon supposed elements of damage which were not recognized by law as proper to be considered in condemnation proceedings should have been excluded. Only such opinions as are based on evidence of lawful elements of damage can be of benefit to a jury in the assessment of the amount of damage.' *Illinois Power and Light Corporation v. Talbot,* 321 Ill. 538, 152 N.E. 486, 488.

86 Idaho 254, 262, 385 P.2d 401, 406.

Idaho Rule of Civil Procedure 56(c) regarding summary judgments is for situations involving claims of a party, where there is no genuine issue of material fact and as the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). A motion to limit a witness' testimony is not typical of a summary judgment motion. Rather, such a request is usually brought as a motion in limine. As such, this Court will analyze the motion as such.

2. Standard of Review.

The standard of review of a motion in limine is as follows: Trial Courts have broad discretion when ruling on motions in limine; they are reviewed under an abuse of discretion standard. *Puckett v. Verska,* 144 Idaho 161, 167, 158 P.3d 937, 943 (2007). The Supreme Court has not found reversible error where a witness made a statement contrary to a motion in limine, received an admonishment, and the District Court later issued a curative instruction. *Puckett*, 114 Idaho 161, 168, 158 P.3d 937, 944; *see Van Brunt v. Stoddard,* 136 Idaho 681, 686-687, 39 P.3d 621, 626- 627 (2001). Importantly, where a trial court has unqualifiedly ruled on the admissibility of evidence in response to a motion in limine prior to trial, no further objection is necessary at trial and the issue is preserved for appellate review. *State v. Hester,* 114 Idaho 688, 700, 760 P.2d 27, 39 (1988); *Evans v. State*, 135 Idaho 422, 429, 18 P.3d. 227, 234 (Ct. App. 2001). However, where a trial judge elects to hear the foundation for evidence instead of definitively ruling on a motion in limine, the counsel opposing the evidence must object as the evidence is presented. *Kirk v. Ford Motor Co.,* 141 Idaho 697, 701, 116 P.3d 27, 31 (2005); *Hester*, 114 Idaho at 699.

3. Comparable Sale.

In this case ITD requests that the Court bar Taylor's appraiser Sherwood from using a transaction between ITD and a private property owner which was made under threat of condemnation as a comparable sale for his sales comparison. Plaintiff ITD's Brief in Support of Motion for Summary Judgment, p. 29.

The comparable sales approach to appraising property values the property by looking to the market value of similar properties to determine the market value of the property being appraised. *Riverside Development Co. v. Vandenberg*, 137 Idaho 382, 385, 48 P.3d 1271, 1274 (2002).

When a parcel of land is taken by eminent domain, generally the sales price which the owner paid is admissible either as evidence of present value or to rebut other estimates of value, assuming that the sale was recent and voluntary, that the parties to the sale were willing and able to protect their own interests and that no major change in conditions or fluctuations in value occurred since the sale. *State ex rel. Symms v. Collier*, 93 Idaho 19, 22, 454 P.2d 56, 59 (1969). Evidence of sales of comparable properties may be offered under three conditions: 1) on direct examination of expert or lay witnesses as independent substantive evidence of the value of the property to which the comparison relates, 2) on direction examination of the value-witness to give an account of the factual basis upon which he founds his opinion on the issue of value of the real estate in controversy, or 3) on cross-examination of the value-witness to test his knowledge, experience and investigation and thus affect the weight to be given to his opinions. *Collier*, 93 Idaho 19, 23, 454 P.2d 56, 60. Strict foundation requirements apply when evidence of comparable sales is offered as substantive proof of the value of the property taken while a lesser foundation of comparability is required when evidence

of other sales is offered in support of, and as background for, opinion testimony and not as independent substantive evidence of value. *Id.*

ITD argues:

> In response to ITD's motion for summary judgment, Taylor has failed to come forward with any legal authority that would permit its appraiser to use a sale made under threat of condemnation as a "comparable sale" to show "fair market value" of the Taylor property. Therefore, summary judgment should be entered barring any use of that sale for any purpose in this case.

Plaintiff ITD's Reply Brief in Support of Motion for Summary Judgment, p. 5. In ITD's opening brief, it cited cases from other jurisdictions for ITD's proposition that "Courts uniformly reject real estate transactions under threat of condemnation as evidence of fair market value." Plaintiff ITD's Brief in Support of Motion for Summary Judgment, p. 32.

Idaho does not have any case law regarding the use of condemnation sales as comparable sales. However, an actual reading of cases ITD cited show that while courts may "uniformly reject" real estate transactions made under threat of condemnation as a comparable in assessing fair market value, there are conditions under which such can be used as a comparable. In the instant case, no information has been given to this Court as to why Taylor's experts think that this sale made under the threat of condemnation is relevant, or why it was or was not an arms-length transaction.

In *State By and Through Dept. of Highways v. DeTienne*, the Montana State Highway Department brought a motion in limine to prevent testimony from other landowners along the project regarding their sales to the Department. 218 Mont. 249, 253, 708 P.2d 534, 537 (1985). The Montana Supreme Court held that the sales were properly barred because they were not fair market transactions, but were made because of impending condemnation proceedings, and so were not made between a willing buyer

and willing seller. *Id*. Current fair market value is the price agreed upon between a willing and informed buyer and seller. *Id*. The Court cited 5 *Nichols on Eminent Domain* § 21.33:

> Even in those jurisdictions where evidence of comparable sales is admitted, it is generally held by the weight of authority that evidence of the sale of a parcel of land subject to condemnation to the proposed condemnor or to another potential condemnor may not be admitted as evidence of the value of the land condemned. Evidence showing what the company seeking to condemn has paid for other lands would probably be taken by the jury as indicating the market value, when, as a matter of fact, it does not tend to show the market value of the land. A company condemning land might be willing to give more than it is worth, and the owner of land might be willing to take less than it is worth, that is, less than its market value, rather than have a lawsuit. Moreover, when a company seeks to get land or condemn it for public uses, having the power to condemn, the landowner would probably come to some agreement with it rather than have a lawsuit, and this agreement would show a compromise rather than the market value of the land. There are many reasons which might be advanced in support of this almost, if not quite, universal rule. As hereto stated, such sales are almost always in the nature of a compromise.

DeTienne, 218 Mont. 249, 255, 707 P.2d 534, 537. The Montana Supreme Court went on to hold that sales to condemnors are not admissible to establish fair market value when the sales are part of the same project which resulted in the condemnation of other property. *DeTienne*, 218 Mont. 249, 255, 707 P.2d 534, 538.

Virginia has also addressed this issue of comparable sales in *Dean v. Board of County Sup'rs of Prince William County*. 281 Va. 536, 708 S.E.2d 830 (2011). In *Dean*, the Court held that the general rule is that the amount paid by condemnors for similar land is not admissible as an indication of fair market value unless the offering party produces evidence sufficient to establish that the sale was voluntary and free from compulsion and is not a compromise. 281 Va. 536, 540, 708 S.E.2d 830, 832-33. The reasoning for this is that usually transactions between landowner and condemnor fail to meet the tests of "comparable sales" because neither the purchaser nor the seller is

acting as a free agent due to the fact that the price paid is typically influenced by compromise or compulsion of the pending litigation. *Dean*, 281 Va. 536, 541, 708 S.E.2d 830, 833. That Court also held that evidence as to other sales in the same locality is admissible if they are "close enough in time and on a free and open market as to permit a fair comparison." *Dean*, 281 Va. 536, 540, 708 S.E.2d 830, 832.

Oregon has addressed this issue as well. *City of Portland By and Through Portland Development Commission v. Holmes*, 232 Or. 505, 376 P.2d 120 (1962). In *Holmes* the Court stated that while there could be no question that evidence of voluntary sales of similar property in the vicinity of property sought to be condemned is admissible as independent evidence of the value of the property in question, the same is not true for involuntary sales. 232 Or. 505, 510, 376 P.2d 120, 123. The Court stated that:

> Evidence of sales of neighboring lands, even where permitted, is not admitted unless voluntary on both sides. Sale which is not voluntary has no tendency to prove market value. It is not competent for either party to put in evidence the amount paid by a condemning party to the owners of the neighboring lands taken at the same time and as part of the same proceedings, however similar they may be to that in controversy, whether the payment was made as a result of a voluntary settlement, an award or verdict of a jury.

Id.

Finally, Georgia has strictly held that sales of land to condemning authorities are inadmissible either as direct or indirect evidence in condemnation proceedings on the issue of the fair market value of the land to be condemned. *Jordan v. Department of Transp.*, 178 Ga.App. 133, 133-34, 342 S.E.2d 482, 483 (Ct.App. 1986). The reasoning is that based upon the fact that in such transactions neither party is necessarily free from compulsion, as one party needs to acquire the property and the other party needs to give up the property. *Jordan*, 178 Ga.App. 133, 133, 342 S.E.2d 482, 483.

In this case ITD requests that the Court bar Taylor's appraiser, Sherwood, from using as a comparable sale for his sales comparison, a transaction between ITD and a private property owner made under threat of condemnation. Brief in Support of Motion for Summary Judgment, p. 29. Even though Idaho has not addressed this issue, other state courts have, and the general consensus appears to be that sales made under condemnation proceedings cannot be used as comparable sales because the buyers and sellers are not "willing" as required for comparable sales analysis. Taylor in its response states Sherwood did not rely exclusively on the sale in question and that "[f]rankly, it just isn't very important in the whole scheme of things." Response to Plaintiff's Motion for Summary Judgment, p. 18. While Sherwood might not have relied exclusively on such appraisal, and perhaps gave it very little weight, if there is any weight given to this appraisal, and it forms the basis of Sherwood's opinion, under *Bastian*, Taylor runs the risk of having all of Sherwood's testimony precluded (or stricken in its entirety if allowed in as evidence).

4. Cost of Paving and Improving Sylvan Road.

It appears from ITD's Motion for Summary Judgment and supporting brief that ITD now plans to pave Sylvan Road, thus appearing to eliminate this issue as a factor in damages. Motion for Summary Judgment, p. 2; Brief in Support of Motion for Summary Judgment, p. 33. Taylor complains that ITD's plans are changing, but this is frequently what happens during the course of all litigation, whether in civil actions such as eminent domain cases, breach of contract, or personal injury, and in criminal cases as well. From a "factual" standpoint, if at the time of trial ITD has paved Sylvan Road, or has an irrevocable commitment to pave such in the immediate future, then it is highly unlikely that Taylor's expert witness will be able to include that as part of their damage calculation. This issue is decided from a factual standpoint, not from a legal standpoint.

If Taylor's experts have included the cost of paving Sylvan Road as part of their opinion on damages, and Sylvan Road becomes or will become paved at ITD's expense, then Taylor's experts will simply have to change their opinion to reflect that change in the facts.

5. Loss of Access.

As mentioned above, from a factual standpoint, Taylor's access may actually improve. If the facts show Taylor's access has somehow diminished, access has undisputedly not been taken in its entirety, nor has Taylor's access been substantially impaired. *Fonburg*, *Hughes*, *Merritt,* and *HI Boise, LLC*, show that impairment of access must be substantial or entire for it to be compensable. As such, if there is an impairment of access, since it is not substantial or entire, Taylor's experts will not be allowed to include that factor in their calculations. On the other hand, ITD's experts will be foreclosed from discussing the cost to ITD or value to Taylor of creating these new access points.

6. Loss of Visibility.

There are differences between *HI Boise, LLC* and the present case. In *HI Boise, LLC*, the landowner made an actual *claim* for loss of visibility caused by the road construction, and in the present case, Taylor seeks to have his expert testify about such loss of visibility as a component of severance damages. As mentioned above, that distinction is what causes this Court to be unable to grant summary judgment to ITD, but that distinction seems to have little weight on making an evidentiary decision for trial. In *HI Boise, LLC,* while there was a physical taking of a small strip of HI Boise, LLC's land, the sound wall which caused the lack of visibility was not built on the land being taken from HI Boise, LLC; instead, it was built on right of way already owned by ITD. This is a significant difference, because in the present case, Taylor is making the claim that there

is a loss of visibility of its property from the new Highway 95, and it *appears* to claim that such loss of visibility is caused by the elevated road which is being built through its land. The excerpts of Sherwood's and Vogel's reports attached to the Affidavit of Mary York in Support of ITD's Motion for Summary Judgment, filed October 1, 2012, are not hallmarks of clarity. Assuming that it is in fact the construction of the elevated portion of the new Highway 95, and that such elevated portion is constructed on Taylor's condemned land, then this case is different from *HI Boise, LLC*. In *HI Boise, LLC,* the Idaho Supreme Court noted "…out-of-state case law recognizing loss of visibility requires that the alleged obstructions be located on condemned property." 153 Idaho 334, ___, 282 P.3d 595, 603. The Idaho Supreme Court noted that:

> These cases turn on the fact that a legally cognizable property right—the physical property itself—rather than a severance of some stand-alone right to visibility. Idaho Code § 7-711(2)(a) provides a similar rule, allowing only "damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned."

Id. This Court lacks sufficient facts at this time to make an evidentiary ruling on whether visibility may be a factor considered by the valuation experts.

7. Miscellaneous.

This distinction between claims of specific property rights on one hand and severance damages on the other hand, is extremely confusing. The Court will make the following observations about testimony regarding severance damages.

First, it seems that it must be proven that the severance damages flow from the actual physical taking. The Idaho Supreme Court in *HI Boise, LLC,* wrote: "Further, as in *Bastian,* although there was at least one physical property right—possession of a strip of land—contemporaneously taken in this case, the alleged circuity damages do not flow from that taking." 153 Idaho 334, ___, 282 P.3d 595, 601. As mentioned above, the

Idaho Supreme Court made short work disposing of the visibility claim because the wall was not being built on the condemnee's land. The Idaho Supreme Court in *HI Boise, LLC,* wrote:

> And finally, the *Fonburg* language on which HI Boise heavily relies—that severance damages include damages for "all inconveniences"—is simply a loose and somewhat misleading translation of I.C. § 7–711(2)(a). *Id.* at 278, 328 P.2d at 64.[FN10] Severance damages are only triggered upon a finding as a matter of law that a property right—such as a right of access—has indeed been severed. *See Bastian,* 97 Idaho at 447, 546 P.2d at 402. Our jurisprudence—as demonstrated by *Bastian, Brown*, and *Merritt*—dictates that no severance occurs where the court finds as a matter of law that an access right has merely been regulated by an exercise of police power rather than taken by eminent domain. *Id.* Although HI Boise strenuously argues otherwise, *Fonburg* does not contradict nor alter that analysis.[FN11]
>
> FN10. In all, we stated:
> Where a part of the owner's contiguous land is taken in a condemnation proceeding, all inconveniences resulting to the owner's remaining land, including an easement or access to a road or right of way formerly enjoyed, which decrease the value of the land retained by the owner, are elements of severance damage for which compensation should be paid.
> *Id.*
> FN11. Other cases cited by HI Boise are similarly distinguishable. For example, in *Nelson Sand & Gravel,* construction of an interstate highway obstructed access between two parcels of land, requiring an extra four and a half miles of travel to access one from the other. 93 Idaho at 583, 468 P.2d at 315. We held: "Even though circuity of travel as distinct from a total destruction of access, may not be compensable, this court has held that substantial impairment of an access which decreases the market value of land remaining after condemnation is compensable." *Id.* (citing *Mabe v. State ex rel. Rich,* 83 Idaho 222, 360 P.2d 799 (1961) and *Fonburg,* 80 Idaho 269, 328 P.2d 60). Like *Fonburg, Nelson Sand & Gravel* involved more than a mere traffic diversion, but rather a four-and-a-half-mile "substantial impairment" of access constituting severance of a property right. *Id.* Further, the change in access was a direct result of the physical taking rather than an incident of some accompanying regulatory action. *Id.*

Id.

This brings us to the Court's second observation. From the above is seems clear to this Court that the Idaho Supreme Court has established a link between an item of

severance damage and an established property right. In other words, even though Taylor has not brought a claim for loss of visibility, unless Taylor can establish why it has a property right to visibility, its expert cannot use such as a factor in severance damage.

It is unknown if the Idaho Supreme Court had read *Utah Department of Transportation v. Admiral Beverage Corp.,* 275 P.3d 208 (October 18, 2011), when it decided *HI Boise, LLC,* on June 29, 2012, but the Utah Supreme Court reached entirely the opposite result, holding "…in assessing fair market value in the context of severance damages we have always allowed evidence of all factors that affect market value." 275 P.3d 208, 214. The current Utah Supreme Court in *Admiral Beverage* is now aligned with the 1958 *Fonburg* Idaho Supreme Court which clearly held "that severance damages include damages for 'all inconveniences'". The current Utah Supreme Court in *Admiral Beverage* gave a detailed and well-reasoned explanation as to why its earler decision in *Ivers v. Utah Department of Transportation*, 154 P.3d 802 (2007), which was aligned with the 2012 *HI Boise, LLC* Idaho Supreme Court's decision that its *Fonburg's* holding "that severance damages include damages for 'all inconveniences'" was "simply a loose and somewhat misleading translation of I.C. § 7–711(2)(a)", was so misguided as to no longer be worthy of stare decisis. In *Admiral*, the Utah Supreme Court noted its *Ivers* decision held that severance damages had to be for "protectable property rights" (275 P.3d 208, 216), and, understandably, that was the ruling the Utah Department of Transportation was seeking in *Admiral*. 275 P.3d 208, 216. Instead, they got this:

> ¶ 17 After reviewing our *Ivers* decision, we conclude that the requirements for us to overturn that precedent are satisfied in this case. A careful review of the Utah Constitution, applicable statutes, and our eminent domain case law reveals that *Ivers* was wrongly decided. I ndeed, until *Ivers,* we had never held that a landowner who has had a portion of his property physically taken may recover severance compensation only for damages to "recognized property rights." To the contrary, our measure of severance damages has *always* been the diminution in market value of

the remainder property. *See infra* ¶ 30 n. 4. And in assessing fair market value in the context of severance damages we have *always* allowed evidence of all factors that affect market value. *See id.* Against this long line of precedent, *Ivers* is revealed for what it is—an aberration that was wrongly decided.

¶ 18 We are also convinced that more good than harm will come from overruling *Ivers.* Moreover, the *Ivers* rule is simply unworkable in practice. Using market valuation to measure severance damages is more in line with both constitutional and common sense notions of property value.

¶ 19 We hold that when a landowner[2] suffers the physical taking of a portion of his land, he is entitled to severance damages amounting to the full loss of market value in his remaining property caused by the taking. However, we reaffirm our prior rule that when a landowner alleges "damages" not connected to an actual physical taking, the landowner may recover only for damage to protectable property rights.

I. *IVERS* WAS WRONGLY DECIDED

¶ 20 Under the Fifth Amendment to the United States Constitution, the government may not take private property without providing just compensation. U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."). Under the Utah Constitution, this protection also extends to damage to private property. UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation.").

¶ 21 Consistent with the plain language of article I, section 22, this court has interpreted the eminent domain provision of the Utah Constitution as being distinct from, and providing greater protection than, those constitutional provisions that provide compensation only for the "taking" of private property. *See Bingham v. Roosevelt City Corp.,* 2010 UT 37, ¶ 13, 235 P.3d 730 ("[B]ecause the Utah Constitution bounds the ability of the government not only to 'take,' but also to 'damage,' private property, we have characterized this state constitutional provision as being broader than its federal counterpart." (alteration omitted)); *see also Coalter v. Salt Lake City,* 40 Utah 293, 120 P. 851, 853 (1912) ("Consequential damages to property which are caused by making public improvements are recoverable under the Constitution of this state...."). The policy behind Utah's constitutional provision is to ensure that the burden for damage done to private property is "distributed among all the taxpayers" rather than "upon those only who sustained the injury." *Kimball,* 90 P. at 397; *see also Stockdale v. Rio Grande W. Ry. Co.,* 28 Utah 201, 77 P. 849, 852 ("The tendency under our system is too often to sacrifice the individual to the community, and it seems very difficult, in reason, to show why the state should not pay for the property of which it destroys or impairs the value, as well as for what it physically takes." (internal quotation marks omitted)).

¶ 22 Consistent with the Utah Constitution's broad takings provision, it is well settled that Utah's constitutional guarantee of just compensation is triggered when there is "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's

right to its use and enjoyment is in any substantial degree abridged or destroyed." *Stockdale,* 77 P. at 852.[3] Implicit in this formulation is the requirement that a property owner first demonstrate some "protectable property interest" in the property before the property owner is entitled to damages. *Harold Selman, Inc. v. Box Elder Cnty.,* 2011 UT 18, ¶ 23, 251 P.3d 804 (alteration omitted) (internal quotation marks omitted). This is because a fundamental threshold question in a takings or damages claim is whether the thing taken or damaged qualifies as property. *See Bingham,* 2010 UT 37, ¶ 16, 235 P.3d 730. Thus, "the prohibition on takings found in the Utah Constitution applies only to 'protectable interest[s] in property.' " *Id.* (alteration in original) (quoting *Bagford v. Ephraim City,* 904 P.2d 1095, 1097–98 (Utah 1995)). Stated another way, "a takings claim presents two distinct inquiries: First, the claimant must demonstrate some protectable interest in property. If the claimant possesses a protectable property interest, the claimant must then show that the interest has been taken or damaged by government action." *Harold Selman,* 2011 UT 18, ¶ 23, 251 P.3d 804 (alterations omitted) (internal quotation marks omitted). A claimant who makes this showing is then entitled to "just compensation." UTAH CONST. art. I, § 22.

¶ 23 Neither party challenges this general framework. But UDOT contends that Admiral may not recover for its loss of visibility. UDOT argues that Admiral does not have a constitutionally protected interest in the visibility of its property. "Absent such an interest," according to UDOT, "no taking has occurred under the Utah Constitution."

¶ 24 In support of its argument, the state cites cases in which we have denied the takings claims of parties who have been unable to demonstrate damage to a protectable property interest. Most recently, we denied the claim of a group of landowners who alleged that a nearby city's diversion of water from an aquifer below the landowners' property amounted to a taking. *Bingham,* 2010 UT 37, ¶ 1, 235 P.3d 730. The group of landowners had not lawfully appropriated the water. *Id.* ¶ 30. Thus, "the [g]roup lacked a claim of entitlement to the continued presence of water in its soil," and therefore its interest was not within the protection of the takings clause. *Id.* We also denied the claim of a garbage company that sought damages from Ephraim City for passing an ordinance requiring all city residents to pay for city operated garbage collection. *Bagford,* 904 P.2d at 1096. That claim failed because the company's "business in Ephraim City was based only on the expectation of being able to continue doing business there, not on a legal right to do so." *Id.* at 1100. These claimants simply did not have a property interest that was damaged.

¶ 25 Similarly, we have repeatedly held that a landowner does not have a protectable property interest in a particular flow of traffic past the landowner's business. *See, e.g., Hampton v. State ex rel. Rd. Comm'n,* 21 Utah 2d 342, 445 P.2d 708, 711 (1968) (holding that the right of ingress or egress does not encompass a right "in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property" (internal quotation marks omitted)). As a result, a

property owner is not entitled to compensation when the construction of a public improvement causes a decreased flow of traffic past his business, even though the result may be a decrease in the market value of his property.

¶ 26 UDOT argues that these cases foreclose Admiral's claim for severance damages for loss of visibility. But UDOT's argument suffers from a fundamental flaw: In this case, it is undisputed that Admiral did suffer a taking when UDOT took a portion of Admiral's real property. The above cases are inapposite because each concerned the threshold question of whether a landowner could state a takings claim at all—not the amount of compensation due a landowner who has indisputably suffered a physical taking of at least a portion of his property. At issue here, as in *Ivers,* is the question of how to determine the just compensation to which Admiral is entitled.

¶ 27 Under the *Ivers* rule, Admiral is entitled to compensation only for damages to “protectable property rights.” As discussed below, this rule can be squared neither with this court’s well-established precedent regarding the proper measure of severance damages nor the statutory framework for assessing such damages.

28 First, *Ivers* contravenes our longstanding precedent holding that constitutional requirements are satisfied only when a property owner is made whole by placing him in the position he would have occupied but for the taking. Once a landowner demonstrates that a protectable property interest “has been taken or damaged by government action,” *Harold Selman,* 2011 UT 18, ¶ 23, 251 P.3d 804 (internal quotation marks omitted), the landowner is entitled to “just compensation,” UTAH CONST. art. I, § 22. And it is well established that when the requirement of “just compensation” is triggered, the landowner is entitled to compensation “to the extent of the damages suffered.” *Stockdale,* 77 P. at 852. This has been interpreted to require “ ‘that the owners must be put in as good a position money wise as they would have occupied had their property not been taken.’ ” *City of Hildale v. Cooke,* 2001 UT 56, ¶ 19, 28 P.3d 697 (quoting *State ex rel. Rd. Comm’n v. Noble,* 6 Utah 2d 40, 305 P.2d 495, 497 (1957)); *see also Seaboard Air Line Ry. Co. v. United States,* 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923) (“[T]he owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.”). And “[t]he constitutional requirement of just compensation derives ‘as much content from the basic equitable principles of fairness as it does from technical concepts of property law.’ ” *Utah State Rd. Comm’n v. Friberg,* 687 P.2d 821, 828 (Utah 1984) (quoting *United States v. Fuller,* 409 U.S. 488, 490, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973)). “[T]o be fair and just, [compensation] must reflect the fair value of the land to the landowner.” *Id.* Compensation meets this standard of fairness when it makes the landowner financially whole by placing him in the position he would have occupied were his property not taken. *See id.; see also Seaboard,* 261 U.S. at 304, 43 S.Ct. 354.

¶ 29 Under this framework, a landowner who has suffered a physical taking of land is entitled to the market value of the property taken. *S. Pac.*

Co. v. Arthur, 10 Utah 2d 306, 352 P.2d 693, 695 (1960) ("The standard of what is 'just compensation' ... is the market value of the property taken...."); *see also United States v. Miller,* 317 U.S. 369, 373–74, 63 S.Ct. 276, 87 L.Ed. 336 (1943) (holding that a landowner whose land is taken in a condemnation proceeding is entitled to the "market value" thereof). In addition, if the government takes only a portion of a tract of land, the landowner is entitled to additional compensation if "the severance of the condemned property, and the use of *that* property, *caused* damage to the remaining property." *Ivers v. Utah Dep't of Transp.,* 2007 UT 19, ¶ 18, 154 P.3d 802. This includes damages caused by an improvement that is "built on property other than that which was condemned" if "the use of the condemned property is essential to the completion of the project as a whole." *Id.* ¶ 21. And this rule applies whether or not the improvement is built upon land abutting the state-owned property. This is because the state's condemnation of land is the "but for cause" of the damage; if the state had not condemned the land, the state would not have been able to complete the project. *See id.*

¶ 30 Where severance damages are appropriate, it falls to the finder of fact to determine the appropriate amount. It is well accepted that the proper measurement of severance damages is determined by comparing the market value of the portion of property not taken with its market value before the taking. *See Cooke,* 2001 UT 56, ¶ 20, 28 P.3d 697 (" 'The cardinal and well-recognized rule as to the measure of damages to property not actually taken but affected by condemnation is the difference in market value of the property before and after the taking.' " (quoting *Salt Lake Cnty. Cottonwood Sanitary Dist. v. Toone,* 11 Utah 2d 232, 357 P.2d 486, 488 (1960))).[4] Other than in *Ivers,* we have never held that a landowner may recover severance compensation only for damages to "protectable property rights." In fact, we have never held that severance damages could properly be measured by anything other than diminution in market value of the remaining property.

¶ 31 Properly determining the fair market value of property requires "that all factors bearing upon such value that any prudent purchaser would take into account ... be given consideration."[5] *Weber Basin Water Conservancy Dist. v. Ward,* 347 P.2d 862, 863 (Utah 1959). In over a century, we had never, until *Ivers,* deviated from this approach when considering the measurement of severance damages. *See Farmers New World Life Ins. Co. v. Bountiful City,* 803 P.2d 1241, 1244 (Utah 1990) ("Generally, all unavoidable injuries arising out of the proper construction of a public use which directly affect the market value of the abutting property may be considered in calculating [severance] damages." (emphasis omitted))[6] Thus, when measuring severance damages, "there should not be any attempt to isolate and appraise as a separate item of damage any loss of value due to noise or any other such intangible factor." *Rohan,* 487 P.2d at 859. Rather, "in order to correctly evaluate the severance damages, i.e., the damage to the remaining property, it is obvious that it should be viewed in the composite as it will be after the taking and after the improvement has been constructed." *Id.*[7]

¶ 32 Not only is the *Ivers* rule inconsistent with constitutional requirements, it also runs afoul of the statutory framework that the legislature has put in place for assessing severance damages. Under that framework, when a landowner has only a portion of his land taken, the landowner is entitled to (1) the value of the property taken and (2) severance compensation for the damages that "accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement." Utah Code Ann. § 78B–6–511(2) (2008). In cases where the remainder property will be benefitted by the construction of the improvement, the statute requires that the amount of the benefit must be subtracted from the severance compensation. *Id.* § 78B–6–511(4).

¶ 33 This statutory framework measures severance damages as the diminution in market value of the remainder property. Under it, just compensation is calculated by subtracting the benefits to the property from the harm caused "by reason of its severance ... and the construction of the improvement." *Id.* § 78B–6–511(2). But the *Ivers* rule runs afoul of this statutory framework because it would not allow Admiral to place on the "harm" side of the equation all of "the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement." *Id.* But UDOT is able to subtract any increase in value of the remainder property owing to the improvement, even if such value does not accrue to a "protectable property right." *See id.* § 78B–6–511(4). Thus, the *Ivers* rule contravenes Utah's statutory framework for assessing severance damages.

¶ 34 Applying *Ivers* to the facts of this case demonstrates the manner in which it violates both the statute and our constitutional guarantees of just compensation. Admiral purchased both of the parcels after having them appraised for their fair market value, which specifically included the value of the properties' visibility. But under *Ivers,* UDOT could take Admiral's property without paying any compensation for lost visibility. Thus, UDOT would receive a windfall because the value of the properties' visibility would be shifted from Admiral to UDOT without compensation.

¶ 35 We have little trouble concluding that *Ivers* was wrongly decided. Our review of precedent reveals that the constitutionally required measure of severance damages is the diminution in market value of the remainder property. And the statutory framework for assessing severance damages accords with the constitutional requirements. *Ivers* contravenes both.

II. MORE GOOD THAN HARM WILL COME FROM OVERRULING *IVERS* BECAUSE THE *IVERS* RULE IS UNWORKABLE IN PRACTICE AND USING MARKET VALUE TO MEASURE DAMAGES COMPORTS WITH COMMON SENSE NOTIONS OF PROPERTY VALUE

¶ 36 We have determined that *Ivers* was wrongly decided. Such a determination alone, however, is generally insufficient to justify overruling our precedent. Rather, we must also inquire whether departing from precedent will produce "more good than harm." *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.,* 2010 UT 65, ¶ 23, 245 P.3d 184 (internal

quotation marks omitted). In this case, we are convinced that restoring our pre-*Ivers* precedent satisfies this requirement.

¶ 37 First, the portion of our *Ivers* holding requiring that "protectable property interests" be segregated and separated out from severance damages is unworkable in practice. This is primarily because it is extremely difficult for an appraiser to segregate and apportion market value based on artificial distinctions between protectable and nonprotectable property rights.

¶ 38 This difficulty manifests itself in several ways. First, there is no set of conventions that appraisers can readily apply when they are asked to value a property in reference to its protected and nonprotected property rights. The facts of this case provide a good example. The parcels at issue were appraised several times. Admiral's expert, Jerry Webber, first appraised the parcels in 1994 before Admiral purchased them. In assessing fair market value, Mr. Webber considered all factors customarily taken into account by a willing buyer and seller, including view from and visibility of the property.

¶ 39 Mr. Webber and two other appraisers later conducted additional appraisals to determine the amount of severance damages to which Admiral is entitled. Each appraisal assigned a fair market value to each parcel. To arrive at the fair market value of the parcels, the appraisers considered all factors affecting market value. The appraisers did not assign specific values to any of the numerous factors affecting market value, including any decrease in value due to loss of visibility. In fact, all three appraisers testified that it was impossible to isolate and identify the values associated with loss of view and loss of visibility.

¶ 40 Second, in assessing the value of real property, appraisers routinely locate and analyze sales of "comparable" properties. Generally, a comparable sale is an arm's length transaction between a willing buyer and a willing seller in which the sale price is determined by market forces. In such a sale, the buyer and the seller take into consideration all known factors that affect the value of the property. Information regarding such comparable sales is often readily available. But comparable sales in which the buyer and seller ignore value that can be attributed to categories of certain nonprotectable property rights is simply not available. In fact, Mr. Webber stated in his affidavit that it was "impossible to find" any "comparable sales that would indicate and verify the value of 'view from the property' alone and exclude 'visibility of the same property' from I–15."

¶ 41 These facts demonstrate the unworkability of the *Ivers* rule. Given the extreme difficulty, if not impossibility, of properly apportioning value based on artificial distinctions between protectable and nonprotectable property rights, the *Ivers* rule would also require that appraisers resort to rank speculation when attempting to exclude the loss of visibility from fair market value. Not only is there no factual basis for such speculation, but requiring it would result in an increase in unnecessarily complex, drawn-out litigation involving valuation of partially condemned property. In contrast, using market value as the measure of severance damages is

relatively simple and fact-based. Thus, restoring our pre-*Ivers* case law will again allow property to be appraised using accepted, well-developed and uncontroversial appraisal methodologies.

¶ 42 In addition to the unworkability of *Ivers,* using market value to measure severance damages is consistent with common sense notions of property value. The average landowner assumes that the value of his land is equal to the amount that a willing buyer would pay for it. And the average landowner ought to be able to expect that he will be compensated for any reduction in that amount that results if the state takes part of his property. The *Ivers* rule directly undermines this basic concept by asking landowners to recognize an artificial distinction between so-called protectable and nonprotectable property rights.

CONCLUSION

¶ 43 The *Ivers* rule, which prevents recovery of severance damages for loss of visibility, directly conflicts with both Utah statute and our well-established precedent. It also contravenes our constitutional requirement to provide "just compensation" to those citizens whose property is taken by the state. We therefore conclude that *Ivers* was wrongly decided and overrule the part of that decision that prevents a landowner from recovering severance damages based on the fair market value of his property before and after the taking. In so doing, we restore our long-standing precedent allowing recovery for all damages that are caused by a taking. When a portion of a landowner's property is taken, he is entitled to put on evidence of all factors that impact the market value of his remaining property. Therefore, we reverse and remand for proceedings consistent with this opinion.

275 P.3d 208, 214-220. While this Utah Supreme Court case is not binding upon this Court, Idaho Supreme Court precedent, and thus, *HI Boise, LLC,* is binding.

IV. CONCLUSION AND ORDER.

For the reasons stated above, ITD's motion for summary judgment is denied, but unless presented with additional authority by Taylor, the Court will make evidentiary rulings in limine at trial consistent with the above discussion.

IT IS HEREBY ORDERED ITD's Motion for Summary Judgment is DENIED.

Entered this 31st day of January, 2013.

____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of January, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
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____
Jeanne Clausen, Deputy Clerk