HIGH SPEED LEFTOVERS: TAKINGS AND JUST COMPENSATION

I. INTRODUCTION

California is in the midst one of the largest transportation projects in modern U.S. history in its attempt to connect the northern and southern regions of the Golden State by train. The massive undertaking has a growing budget of sixty-four billion dollars and is projected to be completed by 2029. Similar to the AGV Italo of Europe, and the Shinkansen of Japan, the California’s High-Speed Rail (HSR) will cut travel times considerably for many Californians. The HSR is projected to travel at 220 miles per hour and allow travelers to go from San Francisco to Los Angeles in two hours and forty minutes.

Along with the growing infrastructure come a number of growing pains. Many farmers in the Central Valley have contiguous parcels that are being severed by the HSR. This creates a unique hardship for farmers and ranchers that is not shared by neighboring landowners. In many cases, the HSR is dividing land, resulting in severed irrigation lines that span the parcel, creating the need for new irrigation systems. Other farmers own farm equipment that is used for their entire property, which is becoming land locked, because of the rail lines. These land divisions force farmers to add a four-to-six-mile commute to get to their severed piece of land. The construction of the HSR

2 High-Speed Rail: Connecting & Transforming California, CALIFORNIA HIGH-SPEED RAIL AUTHORITY (June 2017), http://hsr.ca.gov/docs/newsroom/fact%20sheets/HSR.Connecting.Factsheet.pdf.
5 Interview with Michael Dias, Founding Partner, Dias Law Firm Inc., in Hanford, Cal. (June 8, 2017).
6 Telephone Interview with Frank Olivera, Co-Chairman, Citizens for California High Speed Rail Accountability (May 17, 2017).
7 Interview with Michael Dias, supra note 5.
9 Id.
10 Id.
also involves building of enclosures such as fences and walls to ensure the safety of the surrounding community.\textsuperscript{11} This requires farmers to increase the perimeter area required for turning their farm equipment.\textsuperscript{12}

In other cases, land is being acquired for the HSR, but it is being neglected by the High-Speed Rail Authority.\textsuperscript{13} This results in infestation in plots of land that turn into breeding grounds for snakes and other pests, which are likely to go affect neighboring parcels.\textsuperscript{14} Another common problem that is affecting farmers and property owners alike is the use of out of state appraisers.\textsuperscript{15} As the appraisers are not from the area, they are not fully aware of the local topography and potential uses for the land, which is reflected in the initial bids that landowners receive.\textsuperscript{16} All of these are factors should be taken into consideration when determining just compensation.\textsuperscript{17}

California diverges from the federal standard of just compensation, as it requires the highest price for the property that a willing buyer would have paid in cash to a willing seller.\textsuperscript{18} The California standard differs from the federal standard, which requires a full and perfect equivalent for the property taken.\textsuperscript{19} The key distinction between the two is that California has a higher threshold for property that is being taken, as it requires “the highest price.”\textsuperscript{20} In order to assure that farmers are receiving just compensation for their land, it is important to keep farmers informed of legal remedies and the factors being taken into consideration in computing just compensation.\textsuperscript{21}

This comment will discuss the standards for just compensation based on federal and state law as applied to land acquisition for the High-Speed Rail Project in the Central Valley. Section II of this comment will lay out the factual background of the development of the High-Speed Rail Project, and the

\textsuperscript{11} California High-Speed Train Project Design Criteria, Design Criteria 6–1.
\textsuperscript{12} California High-Speed Train Project Environmental Impact Report, California High-Speed Train Project Environmental Impact Report 1–2.
\textsuperscript{13} Interview with Michael Dias, supra note 5.
\textsuperscript{14} Id.
\textsuperscript{15} Interview with William Brewer, Partner, Motschidler, Michaelides, Wishon, Brewer & Ryan LLP, in Fresno, Cal. (May 27, 2017).
\textsuperscript{16} Interview with Michael Dias, supra note 5.
\textsuperscript{17} Id.
\textsuperscript{18} Interview with William Brewer, supra note 15.
\textsuperscript{20} Interview with William Brewer, supra note 15.
\textsuperscript{21} Id.
problems facing both the Rail Authority and Landowners in the Central Valley. Section III discusses the legal authority for Federal takings and just compensation as established under the Fifth Amendment’s takings clause and California’s standard for Just Compensation under Article 1, Section 19(a) of the California State Constitution. Section IV discusses recommendations that may provide for ease in acquisition of land and compensation based on the “highest price” as outlines under the California Standard for just compensation under Article 1, Section 19(a). The comment will conclude in part V providing a summary of the developments of just compensation for land acquired by the Rail Authority from the first round of offers to know, and acknowledge the need for more transparency between the Rail Authority and landowners moving forward.

II. FACTUAL BACKGROUND

A. History of California’s High-Speed Rail Project

The plan for a high-speed rail project was introduced as part of the HSR Development Act of 1994, authored by then-California representative, Lynn Schenk.\(^{22}\) California was determined as a feasible destination for the HSR in 1996, by the HSR Commission.\(^{23}\) That same year, the California HSR was created by the state legislature.\(^{24}\) By November 2008, the bond measure Proposition 1A was approved by the state’s voters, and in 2009, eight billion dollars in federal funds was made available to the California High-Speed Rail Authority (CHSRA).\(^{25}\) Construction of Phase I began in 2012, and will connect the northern region of San Francisco to the southern region of Los Angeles.\(^{26}\) The first portion of construction has been coined as, the “Backbone” of the High-Speed Rail and will span from Merced to Bakersfield.\(^{27}\) The Backbone consists of four construction packages.\(^{28}\) Package 1 will span from Madera to Fresno, Packages 2 and 3 will connect Fresno to the Tulare county line, and Package 4 will span from Tulare County to north of Bakersfield.\(^{29}\) Between the areas of Madera and Bakersfield there are a total of 1678 parcels of land.


\(^{23}\) Id.


\(^{25}\) Id.

\(^{26}\) Id.


\(^{28}\) Id.

\(^{29}\) Id.
that are approved for acquisition, 1208 of which have been acquired as of this writing.\(^{30}\)

Although the bond measure for construction of the HSR was voter-approved, some Californians feel they are being left behind as construction of the high-speed rail continues.\(^{31}\) Farmers in the Central Valley have growing concerns about the acquisition of their property for purposes of HSR construction.\(^{32}\) Farmers who are willing to sell their land are concerned about the means being used for determining compensation for these acquisitions.\(^{33}\) The CHSRA uses fair market value to determine compensation owed to landowners.\(^{34}\) However, many farmers feel that they are not being justly compensated for their land.\(^{35}\)

The first phase of land acquisition began in 2012.\(^{36}\) The initial appraisals faced a substantial push back from farmers who argued that many factors were not being taken into consideration such as turning radius, severed pipelines, additional commute due to bisected parcels, and infestation.\(^{37}\)

As construction of the High-Speed Rail begins to develop, a number of property owners have begun to deal with the results of that development.\(^{38}\)

**B. The Damage to Farmers That Results from a High-Speed Rail Taking**

As Phase 1 of the high-speed rail develops, land is quickly being appropriated by the right-of-way authority resulting in confrontations between landowners and the High-Speed Rail authority.\(^{39}\) Currently, 453 eminent domain lawsuits have been filed\(^{40}\) along with 591 Resolutions of Necessity (RON), 279 of which have been settled.\(^{41}\) There are growing concerns as land acquisition begins to develop.\(^{42}\)

Some farmers worry that the rail’s route, which would diagonally cut through their fields, would make it financially burdensome to continue

\(^{30}\) Telephone Interview with Karen Massie, Information Officer, California High Speed Rail Authority (Mar. 18, 2017).

\(^{31}\) Telephone Interview with Frank Olivera, *supra* note 6.

\(^{32}\) Interview with Michael Dias, *supra* note 5.

\(^{33}\) Telephone Interview with Karen Massie, *supra* note 30.

\(^{34}\) *Your Property, Your High-Speed Rail Project, CALIFORNIA HIGH-SPEED RAIL AUTHORITY*, https://www.hsr.ca.gov/docs/about/legislative_affairs/JLAC_2.pdf (last visited Jul 2017).

\(^{35}\) Telephone Interview with Karen Massie, *supra* note 30.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Telephone Interview with Karen Massie, *supra* note 30.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Interview with Michael Dias, *supra* note 5.
For instance, The Rail Authority has planned to lay track east of 9th Avenue in Kings County. The track will cross 8th Avenue and travel southeast until it lines up with 7 1/2 Avenue. The train will ultimately align itself with Highway 43. However, this path will tear up permanent crops of walnuts, cherries, and almonds. Farm management will be more difficult as parcels will be severed, resulting in increased travel times of several miles. Landowners make multiple trips across their land daily, if the rail line cuts through their property, they will have to drive four to seven miles out of the way just to get to the other side of the field. Many grape farmers say that the Authority plans to put fences so close to their fields that they will be required to tear out additional vines in order to make room to turn their tractors. Cherry farmers argue that the state will disrupt irrigation systems by cutting off portions of their fields from their wells.

Chapter 3.14 of the Environmental Impact Report/Environmental Impact Statement conducted by the High-Speed Rail Authority asserts that diagonal alignments would bisect parcels, potentially creating remainder parcels that are too small to maintain economic activity. The right-of-way authority asserts that large remainder parcels are not at risk based on size alone, meaning that the Authority is not appropriating land based on size. However, diagonal alignments could cause hardships in maintaining economic activity on otherwise viable parcels. For example, a remainder parcel may become isolated from the farm activity center, requiring farm workers (and farm equipment) to take long detours on public roads. The right-of-way authority intends to combat this by selling remainders to neighboring landowners, in

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44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
51 Id.
52 California High-Speed Train Project Environmental Impact Report, supra note 12.
53 Id.
54 Id.
55 Id.
cases in which the landowner feels that the economic value of the land has been disrupted.\textsuperscript{56}

The acquisition process used by the HSR allows the authority to acquire the land via protection acquisition, in which the authority determines where it is financially feasible to purchase a property that is about to be developed to save costs and protect it for the project.\textsuperscript{57} This protection can only occur after a draft environmental document has been circulated.\textsuperscript{58}

The acquisition process does not create a definitive timeline in which the property will be developed. This results in a number of problems for neighboring landowners.\textsuperscript{59} In places like Hanford, California, raisin crops have been taken by the HSR for over a year.\textsuperscript{60} However, no development has taken place, the result is that the crops begin to rot due to neglect, and become breeding grounds for snakes and insects.\textsuperscript{61} This in turn requires neighboring farmers to spray their own crops more often in order to avoid infestation.\textsuperscript{62} Also, because there is no upkeep these decaying pieces of land become attractive places for passing drivers to dump their old furniture and other trash.\textsuperscript{63} Furthermore, early land acquisition deprives farmers from harvesting the land for another season.\textsuperscript{64} Therefore, early acquisition results in wastage.\textsuperscript{65}

Another key problem in the acquisition process are the appraisals that are being given to farmers.\textsuperscript{66} The Rail Authority has asserted that all high-speed rail appraisers (regardless of where they make their home) are certified by the State of California and must follow the state and federal rules and regulations regarding property acquisition.\textsuperscript{67} However, the fact that the appraisers are certified by the State of California does not account for their lack of knowledge on local topography.\textsuperscript{68} In many cases, appraisers from Los Angeles and Texas are being used to appraise farmland in Fresno.\textsuperscript{69} This is problematic because these appraisers are not familiar with local concerns regarding cropping patterns or water issues in the valley.\textsuperscript{70} In some instances, unrelated

\textsuperscript{56} Telephone Interview with Don Grebe, Director, Real Property for the California High-Speed Rail Authority (April 6, 2017).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Interview with Michael Dias, supra note 5.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Interview with Michael Dias, supra note 5.
\textsuperscript{65} Id.
\textsuperscript{66} Telephone Interview with Frank Olivera, supra note 6.
\textsuperscript{67} Telephone Interview with Don Grebe, supra note 56.
\textsuperscript{68} Telephone Interview with Karen Massie, supra note 30.
\textsuperscript{69} Id.
\textsuperscript{70} Interview with Michael Dias, supra note 5.
comparable properties being used to establish valuation.\textsuperscript{71} For instance, a property in Madera or Porterville may be used to establish the valuation of a property in Hanford.\textsuperscript{72}

The burden of proof to show damages is on the landowner.\textsuperscript{73} In order to assert damages the farmers must prove that their land is intrinsically less valuable because the activities available to be carried out on the property have become limited.\textsuperscript{74}

\section*{III. LEGAL AUTHORITY}

\subsection*{A. Eminent Domain}

\subsubsection*{1. Federal Eminent Domain}

The Federal Eminent Domain power is restricted by the Fifth Amendment of the U.S. Constitution.\textsuperscript{75} The power of eminent domain provides that the government may take private property so long as two conditions are satisfied.\textsuperscript{76} First, that the taking is for a public use, and second, that the landowner be given just compensation.\textsuperscript{77}

The power of eminent domain allows the government to take title from a private party for public use.\textsuperscript{78} \textit{Kelo v. City of New London, 545 U.S. 469 (2005)}, served as a landmark case in developing the meaning of public use.\textsuperscript{79} In \textit{Kelo}, the city of New London, Connecticut approved a new development project that involved using its eminent domain authority to seize private property to sell to private developers.\textsuperscript{80} The court held that a state’s use of eminent domain to condemn property from private individuals and redistribute it to other private individual constitutes a public use under the Fifth Amendment if it is rationally related to a conceivable public purpose.\textsuperscript{81}

\textit{Berman v. Parker, 348 U.S. 26 (1954)}, established that the Fifth Amendment does not limit Congress’ power to seize private property with just compensation to any specific purpose.\textsuperscript{82} The court concluded that the power to

\begin{thebibliography}{99}
\bibitem{71} \textit{Id.}
\bibitem{72} \textit{Id.}
\bibitem{73} \textit{City of Los Angeles v. Superior Court, 124 Cal.Rptr.3d 499, 506 (2011).}
\bibitem{74} \textit{Id.}
\bibitem{75} U.S. Const. amend. V.
\bibitem{76} Burbank-Glendale-Pasadena Airport Authority v. Hensler (2000) 83 Cal.App.4th 556, 561 (internal citation omitted).
\bibitem{77} U.S. Const. amend. V.
\bibitem{78} U.S. Const. amend. V.
\bibitem{79} \textit{Kelo v. City of New London, 545 U.S. 469 (2005).}
\bibitem{80} \textit{Id.}
\bibitem{81} \textit{Id.}
\bibitem{82} \textit{See Berman v. Parker, 348 U.S. 26 (1954).}
\end{thebibliography}
determine what values to consider in seizing property for public welfare is Congress’ alone, and there is nothing in the Fifth Amendment that stands in the way. The land acquisition process of the state of California does however differ from the federal standard.

2. California Eminent Domain

The California Constitution provides greater protection than United States Constitution because it states that, “private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for the owner.” The primary distinction between the federal and California standards of eminent domain is that California compensates for damaged property.

This means that land does not need to be actually taken in order to constitute a taking, it must merely be damaged by a taking, in order to be compensable. This point is of particularly important for landowners who have bisected parcels. In cases in which a parcel is only being partially taken, the landowner can argue that the remaining parcel over which he or she still maintain title is effected by the taking. A common example of this is severed pipelines. If a water system spans the length of the parcel and there is a partial taking of property, under the California Constitution, the landowner will be able to assert damages on the remaining parcel caused by the taking.

The landowner has the added burden of showing that the injury suffered is specific to the landowner. Therefore, an injury that is common amongst all landowners is not compensable. It is not enough for the landowner to claim that the noise of the rail is an annoyance, as that is common to all landowners in the vicinity. However, a landowner can claim that building a wall or structure near a property line prevents the landowner from being able to turn his or her farm equipment, which results in having to take out extra grape

83 U.S. Const. amend. V.
86 Interview with William Brewer, supra note 15.
88 Telephone Interview with Karen Massie, supra note 30.
89 Interview with Michael Dias, supra note 5.
90 Telephone Interview with Karen Massie, supra note 30.
91 Interview with William Brewer, supra note 15.
93 Id.
94 Id.
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This is a unique injury, that is particular to landowners whose parcels have been bisected, and is not common amongst the class. Therefore, it should be compensable, as the injury likely causes a taking.

B. Takings

There are a variety of takings that fall under the Takings Clause of the Fifth Amendment, which include Direct Condemnation, Inverse Condemnation, and Judicial Takings. Direct and Inverse Condemnation cases only arise if the landowner and Rail Authority cannot agree on a price for transfer of title. For purposes of this piece we will not look into Judicial Takings but will discuss Federal and California takings instead.

1. Direct Condemnation

Direct Condemnation occurs when the government takes private property for public use and pays fair compensation to the owner. Eminent Domain is the government’s remedy for a taking. Eminent domain takes place when the government initiates a condemnation action. In respect to high-speed rail, a condemnation authority will assert its power of eminent domain to attain title to the property from a landowner. A taking occurs when the condemnation authority establishes a price based on just compensation and that price is paid. If a landowner refuses to sell his property to the Rail Authority, a condemnation lawsuit will be prepared and filed by the Rail Authority, this process will be discussed further in the sections below.

2. Inverse Condemnation

Inverse condemnation can occur through a physical taking or regulatory taking. A Physical Taking occurs when the regulation is considered a taking and is per se unconstitutional and requires just compensation. A regulatory

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95 Interview with Michael Dias, supra note 5.
96 Raterman-Doidge, supra note 92.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
104 Raterman-Doidge, supra note 92.
105 Id.
106 Id.
taking occurs when the government regulation diminishes the value of a private citizen’s property, requiring just compensation.\textsuperscript{107}

The landowner’s remedy to eminent domain is an inverse condemnation action.\textsuperscript{108} This occurs when the landowner claims that the government took property by invasion.\textsuperscript{109} Here, the landowner must show that there are damages to their property, a temporary invasion, or when the government has failed to file an eminent domain suit to compensate landowners for damages or taking of the property that have occurred due to a public improvement project.\textsuperscript{110} Inverse condemnation proceedings are implemented when there has been a taking by the government, but the government has failed to file an action prior to the taking, or reimburse the property owner for his or her land.\textsuperscript{111}

3. Federal Takings

The Fifth Amendment of the United States Constitution reads, “nor shall private property be taken for public use, without just compensation.”\textsuperscript{112} The process by which private property is acquired is known as eminent domain.\textsuperscript{113} It’s applicability to the states is provided through the Fourteenth amendment which states, “Nor shall any State deprive any person of life, liberty, or property, without due process of law”.\textsuperscript{114} The Fourteenth Amendment provides that due process of law be provided for a violation of a fundamental right and a right is fundamental if it is expressly stated in the Constitution or if the Supreme Court has ruled it as being fundamental.\textsuperscript{115} Therefore, both the Fifth and the Fourteenth Amendments ensure that some form of reimbursement be provided in order to compensate a party for the seizure of private property.\textsuperscript{116} The California standard for takings is higher than the federal standard.\textsuperscript{117}

4. California Taking

In California, the California State Constitution is the leading authority for acquisition of land in the state of California.\textsuperscript{118} Article 1, Section 19(a) of the California State Constitution states that private property may be taken or

\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} U.S. CONST. amend. V.
\textsuperscript{113} CAL. CODE CIV. PROC. § 1240.010.
\textsuperscript{114} U.S. CONST. amend XIV, § 1.
\textsuperscript{115} U.S. CONST. amend XIV, § 1.
\textsuperscript{116} Interview with William Brewer, supra note 15.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
damaged for a public use and only when just compensation... has first been paid to, or into court for the owner.\textsuperscript{119} Article 1, Section 19(e5) states that, public work or improvement means facilities or infrastructure for the delivery of public services such as streets or highways, public transit, railroads.\textsuperscript{120} In early American history, the state used its taking power to establish roads, which served a public purpose because they improved infrastructure.\textsuperscript{121} Similarly, the High Speed Rail serves the economy by improving infrastructure and contributing to the economy, thus serving a public purpose.\textsuperscript{122} While the High Speed Rail does likely serve a public purpose, there still remains potential problems with just compensation.\textsuperscript{123}

\textit{C. Just Compensation}

Under the Just Compensation Requirement of the Fifth Amendment, “a full and perfect equivalent for the property taken” must be given.\textsuperscript{124} The general standard for just compensation is the market value of the property, or what a willing buyer would pay a willing seller.\textsuperscript{125} “However, just compensation does not require payment for losses or expenses incurred by property owners...incidental to, or as a consequence of the taking of real property, if they are not reflected in the market value of the property taken.”\textsuperscript{126}

\textsuperscript{119} CAL. CONST. art. 1, §19(a).
\textsuperscript{120} CAL. CONST. art. 1, §19(e)(5).
\textsuperscript{121} Powell & Rohan, supra note 11; § 79E.01[1][b].
\textsuperscript{122} Merced to Bakersfield High-Speed Rail Project, California High-Speed Rail Authority (2009), http://www.hsr.ca.gov/docs/programs/statewide_rail/proj_sections/Merced_Bakersfield/Merced_to_Bakersfield_Boards_for_Scoping_Meetings.pdf (last visited Jun 2017).
\textsuperscript{123} Id.
\textsuperscript{126} Mitchell v. United States, 267 U.S. 341 (1925); United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372
“Fair market value is the highest price for the property that a willing buyer would have paid in cash to a willing seller assuming that, there is no pressure on either one to buy or sell, and the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.”¹²⁷ A key distinction between the federal standard for fair market value and the California standard is that California bases fair market value on “highest price”.¹²⁸ This is important because it distinguishes between the federal standard of “what a willing buyer would pay a willing seller.”¹²⁹ Therefore, California does not merely compensate a taken property owner for the mean price what a property is worth but rather the highest price.”¹³⁰

“The estimate of just compensation is not required to be made by a jury but may be made by a judge or entrusted to a commission or other body.”¹³¹ If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review.¹³² In many cases, the entire parcel of land is not taken, altering the fair market value standard for just compensation.¹³³ A partial taking occurs when the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining portion severance damages as well as the value of the taken portion.¹³⁴ If only a portion of a tract is taken, the owner's compensation...

¹²⁷ CACI No. 3501.
¹²⁸ Interview with William Brewer, supra note 15.
¹³⁰ Interview with William Brewer, supra note 15.
¹³¹ Bauman v. Ross, 167 U.S. 548 (1897) (Even when a jury is provided to determine the amount of compensation, it is the rule at least in federal court that the trial judge is to instruct the jury with regard to the criteria and this includes determination of “all issues” other than the precise issue of the amount of compensation, so that the judge decides those matters relating to what is computed in making the calculation.); United States v. Reynolds, 397 U.S. 14 (1970).
¹³³ Interview with William Brewer, supra note 15.
¹³⁴ United States v. Miller, 317 U.S. 369, 375 -76 (1943) ("On the other hand," the Court added, "if the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken.") Id.
includes any element of value arising out of the relation of the part taken to the entire tract.\textsuperscript{135} The reason that these cases are going to court is because the landowners are not receiving the highest price for their land.\textsuperscript{136} The department of transportation picks a mean price in appraising the cost of the land. This is not legal, as the price should be the highest price.\textsuperscript{137} This is partially a result of inadequate appraisals.\textsuperscript{138} During negotiations between landowners and the High-Speed Rail Authority, the actual price that landowners receive is always higher than the initial offer presented to the landowner.\textsuperscript{139} This is important to note, as settlements between landowners and the HSRA are often in the form of contract.

\textbf{IV. LEGAL ANALYSIS}

\textit{A. High-Speed Rail’s Impact on Just Compensation}

“A majority of the HSRA’s property transactions are settled by contract.”\textsuperscript{140} This means that most landowners tend to negotiate with the Authority on a price and relinquish title to the HSRA.\textsuperscript{141} “However, if the Authority and the landowner cannot agree on the terms of sale, the Authority may initiate the eminent domain process, and acquire the desired property through a condemnation proceeding.”\textsuperscript{142}

Prior to filing a condemnation action, the Authority gives landowners the “opportunity to question whether public interest, necessity, planning and location” do indeed require the proposed property in order to complete the project.\textsuperscript{143} The Authority then prepares the documents for the condemnation lawsuit, which are “filed with the court in the county where the property is located.”\textsuperscript{144} Then, a “summons and complain in eminent domain will be served on all persons having a property interest in the parcel. The persons served then have 30 days to answer the lawsuit.”\textsuperscript{145}

Condemnation lawsuit documents are prepared by the Authority and led with the court in the county where the property is located.\textsuperscript{146} The summons and

\textsuperscript{135} See Bauman v. Ross, 167 U.S. 548.
\textsuperscript{136} Interview with William Brewer, \textit{ supra} note 15.
\textsuperscript{137} \textit{Id}.
\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{Id}.
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} \textit{Your Property, Your High-Speed Rail Project, supra} note 34.
\textsuperscript{141} \textit{Id}.
\textsuperscript{142} \textit{Id}.
\textsuperscript{143} \textit{Id}.
\textsuperscript{144} \textit{Id}.
\textsuperscript{145} \textit{Id}.
\textsuperscript{146} \textit{Id}.
complaint in eminent domain will then be served on all persons having a
property interest in the parcel. The persons served must answer the lawsuit
within 30 days. “The purpose of a condemnation trial is to determine the
amount of just compensation.” “The trial is usually conducted before a judge
and jury.” “Both the Authority and the property owner will have the
opportunity to present evidence” in order to establish valuation.

“The only type of legal evidence that can be used to establish value in
eminent domain cases is the opinion of qualified experts and the property
owners.” “[T]he general rule in eminent domain actions is that ‘the right to
a jury trial. ... goes only to the amount of compensation.’ “All other
questions of fact, or mixed facts and law, are to be tried ... without reference
to a jury.” The California Civil Jury Instructions (CACI) define the rule for
Valuation Testimony as follows:

You must decide the value of property based solely on the testimony of the
witnesses who have given their opinion of fair market value. You may
consider other evidence only to help you understand and weigh the testimony
of those witnesses.

You may find the same fair market value testified to by a witness, or you may
find a value anywhere between the highest and lowest values stated by the
witnesses.

If the witnesses disagreed with one another, you should weigh each opinion
against the others based on the reasons given for each opinion, the facts or
other matters that each witness relied on, and the witnesses’ qualifications.

The jury ultimately determines the amount of compensation available to
landowners. The parties may also choose not to have a jury, in those cases
the judge will decide the amount of compensation. “A jury hearing a condemnation action cannot disregard the evidence as to
testimony and render a verdict that falls below or exceeds the limits established by
the witnesses.” “The trier of fact in an eminent domain action does not make

147 Id. 148 Id. 149 Id. 150 Id. 151 Id. 152 Aetna Life & Casualty Co. v. Los Angeles, 170 Cal. App. 3d 865, 877 (1985).
155 CACI No. 3515 156 Your Property, Your High-Speed Rail Project, supra note 34.
157 Id. 158 Aetna, 170 Cal. App. 3d 865, 877.
a determination of market value based on its opinion.”159 “Rather, it determines the market value of the property based on the opinions of the witnesses that establish the valuation.”160

The trier of fact may establish valuation by choosing a figure between the two parties or accept the evidence of any one expert over the other.161 However, evidence will be considered insufficient to support a verdict when, “no reasonable interpretation of the record” supports the figure.162

The purpose of the trial is to determine the amount of just compensation.163 Usually the trial is conducted before a judge and jury.164 Both the property owner and Authority will have the opportunity to present evidence of property value.165 The jury will determine the amount of compensation after being instructed as to the law by the judge.166 In those cases where the parties choose not to have a jury, the judge will decide the amount of compensation.167

After trial, “a judgment will be prepared by counsel and signed by the judge.”168 It states that, “upon payment of the amount of the verdict for the benefit of the private parties having an interest in the property, title will be transferred to public ownership.”169 “When the Authority makes the payment as required by the judgment, the final order of condemnation is then signed by the judge and recorded with the County Recorder’s office.”170 Upon recording the final order, the transfer of title is complete.171

B. Land Acquisition Process

The land acquisition process begins after the Department of Transportation has established the desired route.172 The first step in the acquisition process is notifying impacted property owners of the State’s plan.173 The property is then appraised by the HSRA, and an offer is made to the owner.174 If the parties

159 Id.
160 Id.
162 Id.
163 Your Property, Your High-Speed Rail Project, supra note 34.
164 Id.
165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
173 Id.
174 Id.
agree there is a contractual transfer of title. However, if the parties do not agree the state will then proceed with legal action to take the land through eminent domain. A trial is held to decide what amount would justly compensate the landowner for the taken property. When the decision is finalized, title is transferred to the state, and payment is made to the landowner.

C. The Right of Necessity

The transfer of personal property from a private person to the HSRA is facilitated by a right-of-way agent. The right-of-way agent is assigned to purchase private property and explain the effects of partial acquisition of remaining property when necessary. The Rail Authority hires right-of-way agents to secure property rights on behalf of the Authority.

Prior to land acquisition, the Rail Authority must file a Resolution of Necessity (RON). A RON is a formal resolution that is used to acquire property before commencing the eminent domain proceeding in court Pursuant to Cal Code Civ Proc § 1245.220. The RON “must be adopted before the eminent domain action begins in court.”

The Rail Authority allocates land through a five-part process following the filing of a RON. This process starts with a survey in which an appraisal map is created, and the surveyor prepares a boundary survey. Next, the Appraisal process begins and the right-of-way agent works with the affected property owner to identify affected utilities and the agent attempts to resolve any conflicts. In addition, the agent addresses any issues of concern regarding the affected parcel that the landowner may have such as, turning radius, severed pipelines, or infestation. Following the Appraisal is the Acquisition,

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175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
180 Id.
181 Aetna, 170 Cal. App. 3d 865, 877.
183 Id.
184 Id.
186 Id.
187 Id.
which only begins after approval of the Notice of Determination, during which negotiations take place between the property owner and the right-of-way agents.\textsuperscript{188} Finally, there is a relocation process where the right-of-way agent assists the landowner in determining if he or she is eligible for benefits, such as moving related expenses, or cost differentials.\textsuperscript{189} Although the HSRA’s appraisal process is widely used to determine fair market value, a number of factors may still affect the integrity of the final price the landowner receives.\textsuperscript{190}

\section*{D. Appraisal Method}

“There are three methods of calculating fair market value in eminent domain proceedings: the market data approach, the income approach, and the replacement cost method.”\textsuperscript{191} The market data approach determines fair market value by comparing the parcel in question with comparable properties that have been recently sold.\textsuperscript{192} The income approach, takes into consideration “the amount of income the property produces or is able to produce.”\textsuperscript{193} Finally, the replacement cost method looks into the “cost of acquiring comparable land and improvements minus any amount of applicable depreciation.”\textsuperscript{194}

The most common appraisal method used for agricultural lands is the market data approach.\textsuperscript{195} Here, the subject property is compared to recently sold comparable properties.\textsuperscript{196} A potential issue with this method is that no two properties are the same.\textsuperscript{197} Therefore, many factors need to be taken into consideration such as location, property size, and when the comparable property was sold.\textsuperscript{198}

Another potential issue with the market data approach is the appraisers.\textsuperscript{199} In the Central Valley, farmers are particularly concerned with appraisals from out of state appraisers.\textsuperscript{200} The out of state appraisers would not be qualified in

\begin{itemize}
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Interview with William Brewer, supra note 15.
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Interview with William Brewer, supra note 15.
\item \textsuperscript{196} supra note 182.
\item \textsuperscript{197} Interview with William Brewer, supra note 15.
\item \textsuperscript{199} Interview with Michael Dias, supra note 5.
\item \textsuperscript{200} Id.
\end{itemize}
the agricultural appraisal process. They do not understand cropping patterns and potential water issues local farmers face. A solution to this dilemma would be to bring in appraisers from the central valley.

Many of the appraisers used to determine valuation of agricultural land in the central valley have been appraisal firms from Texas. The comparable properties being used to establish valuation from some of these appraisers are not similar; for instance, an appraisal firm established the valuation for a parcel in Hanford using comparable properties from Porterville and Madera. This is problematic for a number of reasons, the location of the parcel is not being taken into consideration, so farmland that is in a rural area of Hanford, would get a similar valuation to a parcel near downtown. In other cases, there are properties that do not have a comparable equivalent, making pricing those properties that much more difficult. For example, downtown Fresno is home to ValPrint, a 60 year old print and design firm. The firm was offered $430,000 for the warehouse, which the owner believes to be worth in excess of $700,000. However, the biggest concern is finding a comparable property, because the HSR and the owner are so off in price. In order to sustain the business the owner will likely have to incur additional debt to replace the property.

Another problem that is facing both the HSRA and landowners is the initial appraisal. Typically, the Authority sends a letter requesting a date for appraisal, the problem that farmers are facing is that they are only provided with limited dates, that often conflict with harvest season. The result of which is appraisers coming to the property and appraising without the landowners. These “flash appraisals” are problematic because they deprive landowners the opportunity to provide more information on factors they believe they should be compensated for. In one instance, a couple from Kings County witnessed a truck pull up on their land and take pictures of the

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201 Id.
202 Id.
203 Id.
204 Id.
205 Id.
207 Id.
208 Id.
209 Interview with Michael Dias, supra note 5.
211 Telephone Interview with Karen Massie, supra note 30.
property, when the owner asked whether the agent needed permission to assess the property the agent replied, “no, I don’t need access to your property.”\(^{212}\)

Flash appraisals are problematic because they result in low-ball offers.\(^{213}\) Although the Rail Authority does not believe that flash appraisals are taking place, they do admit that there is an issue, and landowners have not been replying to the initial requests by the authority to do conduct supervised appraisals.\(^{214}\) Despite the tension between in acquisition, the HSRA does have methods to the ensure smooth transition of property between the two parties.

**V. Recommendations**

The HSRA has asserted that in cases in which the farmer believes that the economic value of the parcel is diminished, they will buyout the farmer, or sell the remainder to neighboring landowners.\(^{215}\) Many farmers in Kings County do not believe they are receiving fair market value for the remainders and that flash appraisals are depriving them of any economic value that their land may still possess.\(^{216}\) This has resulted in a standstill between farmers and the rail authority in the Central Valley.\(^{217}\) Although the situation may seem overwhelming, there are steps that can be taken to ease the tension between the HSRA and landowners.

**A. Better Land Acquisition Process**

In order to ensure that both the HSR and farmers are on better terms moving forward, there needs to be more transparency between the two parties.\(^{218}\) The HSR uses a process called protection acquisition, in which the authority determines where it is financially feasible to purchase a property that is about to be developed to save costs and protect it for the project.\(^{219}\) This protection can only occur after a draft environmental document has been circulated.\(^{220}\)

The benefit of protection acquisition is that it allows the HSR to acquire the land sooner, resulting in more negotiating time, and allowing the project to continue without later delays.\(^{221}\) The problem with protection acquisition is

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\(^{213}\) Telephone Interview with Karen Massie, *supra* note 30.


\(^{215}\) Telephone Interview with Don Grebe, *supra* note 56.

\(^{216}\) Telephone Interview with Karen Massie, *supra* note 30.

\(^{217}\) *Id.*

\(^{218}\) Interview with Michael Dias, *supra* note 5.

\(^{219}\) Telephone Interview with Don Grebe, *supra* note 56.

\(^{220}\) *Id.*

\(^{221}\) *Id.*
that there is no definite time in which the land that is being taken will be
developed.222 This results in a number of problems of the neighboring
landowners.223

Early acquisition of farmland has resulted in snake and insect infestation by
snakes and insects, as the Authority fails upkeep on taken property.224

Both the Authority and landowners would benefit if the HSR changed its
acquisition methods and started to acquire land as development approaches,
rather than obtaining the land all at once through protection acquisition.225 This
would allow farmers to potentially farm for an additional harvest season, and
would prevent taken land from turning into neglected parcels that often turn
into dumpsites.226 The creation of dumpsites may impact the value of
surrounding parcels in later stages of acquisition, as these dumpsites are very
attractive breeding grounds for snakes and insects.227 This is just one of many
factors that may have an affect on the valuation of property.228

B. Improved Appraisal Methods

Another key problem that is being presented in the acquisition process is the
appraisal amounts that are being offered to farmers.229 It would be much more
beneficial to both parties if local appraisers were being employed exclusively
for appraisals on local farmland.230 The Rail Authority has asserted that all
high-speed rail appraisers (regardless of where they make their home) are
certified by the State of California and must follow the state and federal rules
and regulations regarding property acquisition.231 However, the fact that the
appraisers are certified by the State of California does not combat their
knowledge on local topography.232 In many cases, appraisers from Los
Angeles and Texas are being used to appraise farmland in Fresno.233 This is
problematic, because these appraisers are not familiar with local topography
such as, cropping patterns, water issues in the valley.234 In some instances,
unrelated comps are being used to establish valuation, for instance a property
in Madera or Porterville may be used to establish the valuation of a property

222 Interview with William Brewer, supra note 15.
223 Id.
224 Interview with Michael Dias, supra note 5.
225 Id.
226 Id.
227 Id.
228 Id.
229 Telephone Interview with Karen Massie, supra note 30.
230 Id.
231 Telephone Interview with Don Grebe, supra note 56.
232 Interview with Michael Dias, supra note 5.
233 Id.
234 Id.
Some farmers argue that initial offers from the Rail Authority are substantially lower than fair market value. For example, the Rail Authority offered a farmer in the Central Valley $29,000 per acre, the net income produced by the orchards is $8,000 a year per acre. The farmer’s financial consultants estimate a market value of $60,000 per acre. This means the Rail Authority’s initial offer is less than half of what the farmer estimates his property at.

A key method that landowners can use to combat insufficient appraisals is by hiring their own appraisers. According to Don Grebe, the authority’s director of real property, the Authority for up to $5,000 for doing a separate appraisal can compensate landowners. This will substantially turn the tide in the landowners favor, because many appraisers in the central valley are refusing to work for the Authority and would be more than willing to do appraisals on behalf of landowners. This would benefit landowners because local appraisers are familiar with local geography and will take into account additional factors that out of state appraisers may not such as well access, severed pipelines, are re-lasering parcels. More often than not the landowner receives substantially more for their land if they get a second appraisal than they would had they taken the initial offer by the state. A second appraisal creates more transparency, because more factors that impact the value of the land will be identified and therefore create a more just offer to landowners.

VI. CONCLUSION

Since the first round of appraisals, the relationship between farmers in the Central Valley and the HSR Authority has come a long way. Many of the issues farmers have had with the takings, such as severed pipelines, the turning radius for farm equipment, and access to well water, are now being compensated for. However, new factors are now beginning to be arise as the acquisition process continues. These new concerns, such as neglect of ascertained parcels, and increased commute time for bisected parcels, are not

235 Telephone Interview with Karen Massie, supra note 30.
237 Id.
238 Id.
239 Id.
240 Nidever, supra note 210.
241 Id.
242 Interview with Michael Dias, supra note 5.
243 Id.
244 Interview with William Brewer, supra note 15.
245 Interview with Michael Dias, supra note 5.
being compensated for. The common theme remains in effect, as most landowners do not realize what factors should be taken into consideration in regard to just compensation until after the parcel has been taken. The burden remains on the landowner to assert what damages to their land will occur and must be compensated for. It is important for landowners to employ their own appraisers in order to aid the government in maintaining transparency. This will close the gap in inaccurate offers and allow landowners an opportunity to attain the best possible price for their land.

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