JUST COMPENSATION OR JUST PLAIN UNFAIR: THE EFFECT OF EMINENT DOMAIN ON CALIFORNIA DAIRY FARMERS

I. INTRODUCTION

In a popular advertising campaign, the California Milk Advisory Board promotes products containing milk made in California by claiming, "Great milk comes from Happy Cows. Happy Cows come from California."[1] However, these happy cows have produced more than just milk in California's Central Valley. They also contribute to an accumulation of smog that settles stagnantly over the area.[2] Poor air quality has led to health problems for many unhappy Central California residents.[3] While the debate over the existence of global warming is still being fought, its effects are now widely accepted as fact.[4] Experts believe that progressively higher temperatures will have deleterious effects on the agricultural industry;[5] however, farms continue to be a significant source of the very pollutants that may lead to future food shortages.[6] Due to the harmful impact that California's happy cows have on the environment, dairy farmers are subject to strict regulations that restrict both air and water pollution.[7]

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[1] CALIFORNIA MILK ADVISORY BOARD, MILESTONES IN CA CHEESE HISTORY: 200-PLUS YEARS OF CHEESE MAKING IN THE GOLDEN STATE (2009), http://www.californiadairypressroom.com/Press_Kit/Milestones.

[2] David L. Crow, *Air Pollution Control Officer's Determination of VOC Emission Factors for Dairies*, Aug. 1, 2005, at 6, http://www.valleyair.org/busind/pto/dpag/APCO%20Determination%20of%20EF_August%201_.pdf.

[3] Press Release, Cal. Envtl. Protection Agency Air Res. Bd., San Joaquin Valley Air Quality Study Final Report Released (Jan. 17, 1997) (on file with author). http://www.arb.ca.gov/newsrel/nr211797.htm.

[4] JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 872 (West 2009).

[5] William R. Cline, *Global Warming and Agriculture*, Finance & Development, 41 (2008).

[6] Research by the Air Resources Board has determined that San Joaquin Valley agriculture loses nearly $1 billion per year from the effects of ozone on the weight and yield of crop. Press Release, Cal. Envtl. Protection Agency Air Res. Bd., *supra* note 3.

[7] *See infra* Part IV.

These regulations create a unique problem for California dairy farmers who lose part of their land through eminent domain. A reduction in the amount of land a dairy farmer owns reduces the farmer's ability to comply with the environmental regulations to which the dairy industry is subject.[8] A partial taking also diminishes the value of the remaining dairy land to prospective buyers who would be disinclined to purchase a farm with a limited capacity for profitability.[9] This Comment will discuss eminent domain generally, and will focus particularly on partial takings of dairy property for highway expansion. Next, it will explore the environmental regulations affecting the dairy industry and it will discuss how these regulations affect farms that lose acreage through eminent domain. Finally, this Comment will examine the typical damages awarded to landowners in eminent domain actions and will argue that both severance and business damages are appropriate to compensate dairy farmers for the losses they suffer when part of their dairy land is taken through eminent domain.

II. EMINENT DOMAIN

While it may seem contrary to the American socio-political construct that the government may take the property of its citizens without their consent, eminent domain has been a part of this country's law since its infancy.[10] Although the government is empowered to take property,[11] the exercise of this power is restricted by the Fifth Amendment to the United States Constitution, which requires the taking be for a public use.[12] During the nation's early years, for example, eminent domain was frequently used to establish roads, which was considered a quintessential public benefit.[13] Roads allow the public to travel from one place to another with ease.[14] They also contribute to the growth of the economy, as they allow

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[8] E-mail from Anthony Mendes, Dairy Producer, A.F. Mendes Inc. (Sept. 5, 2009, 12:30 PST).

[9] *Id.*

[10] Bruce L. Benson, *The Evolution of Eminent Domain: A Remedy for Market Failure or an Effort to Limit Government Power and Government Failure*, 12 THE INDEPENDENT REVIEW 423, 428 (2008), http://www.independent.org/pdf/tir/tir_12_03_04_benson.pdf.

[11] The Constitution assumes the government's power to condemn the land of its citizens without ever expressly granting it. The concept of the government's inherent power was adopted from English common law. RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 79E.01[1][a] (Michael Allan Wolf ed., Matthew Bender).

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

[13] POWELL & ROHAN, *supra* note 11, § 79E.01[1][b].

[14] California Department of Transportation, *Caltrans Strategic Plan 2007-2012*, 11 (2007), *available at* http://www.dot.ca.gov/perf/StrategicPlan2007-2012_with_.pdf.

products to be shipped from one area of the country to another in short periods of time.[15] It is obvious that these important functions of the transportation system benefit the public.[16] The second constitutional requirement regarding the exercise of the government's use of eminent domain is that the property owner must be given just compensation.[17] The California Constitution affords even greater protection than the United States Constitution because it states, "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." (emphasis added).[18] This means that even if land is not actually taken, but is merely damaged by a taking, the resulting damage is compensable.[19]

The possible loss of land through eminent domain is of particular concern to California dairy farmers.[20] Livestock farms produce odors which are objectionable to residential neighbors.[21] In order to avoid obvious nuisance liability, dairies are located in sparsely populated areas.[22] Because dairies need to transport their product long distances, it is important that dairies are located adjacent to highways.[23] However, roads are often widened in order to accommodate the increasing volume of commuters on congested roads.[24] To acquire the needed land, the State uses the power of eminent domain.[25] According to the California Department of Transportation, the first step in this process is for the Department to survey the land and select its desired route.[26] When the plans are finalized, impacted property owners are contacted and notified of the State's decision.[27] The property to be taken is then appraised, and an offer is made to the owner.[28] If the parties agree, the matter can be handled as a

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[15] *Id.*
[16] *See id.*
[17] U.S. CONST. amend. V.
[18] CAL. CONST. art. I, § 19.
[19] *Id.*
[20] *See* Mendes, *supra* note 8.
[21] *See, e.g.*, Weinhold v. Wolff, 555 N.W.2d 454, 458 (IA Sup. Ct. 1996).
[22] *See id.* at 459.
[23] *See Dairy Production*, EPA.GOV, (last updated Sept. 10, 2009) http://www.epa.gov/agriculture/ag101/printdairy.html#impact.
[24] *See Caltrans Strategic Plan 2007-2012*, *supra* note 14, at 10-13.
[25] CALIFORNIA DEPARTMENT OF TRANSPORTATION, YOUR PROPERTY YOUR TRANSPORTATION PROJECT 2 (2008), http://www.dot.ca.gov/hq/row/pubs/yourprop_eng.pdf.
[26] *Id.* at 2-3.
[27] *Id.* at 3.
[28] *Id.*

contractual property transfer.[29] However, if the owner and the Department of Transportation do not agree on the land's value,[30] the Department will request permission to begin legal action to take the land by eminent domain proceedings.[31] A trial is held to decide what amount would justly compensate the landowner for the property to be taken.[32] When the decision is made, title is transferred to the State, and payment of the determined amount is paid to the landowner.[33]

III. THE IMPACT OF DAIRIES ON THE ENVIRONMENT

During the nation's early history, the lack of refrigeration and viable transportation options meant dairies were generally small and centered near major cities.[34] Pasteurization occurred on the farm, and the bottles were quickly delivered to stores for distribution to the public.[35] The industrialization of the dairy industry led to advances in the storage and transportation of milk, making it much more widely available.[36] To maximize their profits, dairies became larger and more concentrated.[37] Dairy products are now a staple in the American diet.[38] Currently California leads the nation in milk production.[39] Within California, eight of the top ten dairy producing counties are located in California's Central

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[29] *Id.* at 7.

[30] Just compensation is a matter of fact which spurs much litigation since the landowner and government rarely agree on a figure. POWELL & ROHAN, *supra* note 11, § 79E.04[1].

[31] PROPERTY YOUR TRANSPORTATION PROJECT, *supra* note 25, at 7.

[32] *Id.*

[33] *Id.*

[34] *Dairy Production*, *supra* note 23.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] The top ten states for milk production in 2009: 1. California (39,512 million pounds); 2. Wisconsin (25,239 million pounds); 3. New York (12,424 million pounds); 4. Idaho (12,150 million pounds); 5. Pennsylvania (10,551 million pounds); 6. Minnesota (9,019 million pounds); 7. Texas (8,840 million pounds); 8. Michigan (7,968 million pounds); 9. New Mexico (7,904 million pounds); and 10. Washington (5,561 million pounds). California Department of Food and Agriculture, *2009 Dairy Statistics Annual* 8 (2009), http://www.cdfa.ca.gov/dairy/dairystats_annual.html.

Valley.[40] There are over 1,500 dairies located in the Central Valley alone.[41]

In his book, *In Defense of Food: An Eater's Manifesto*, Michael Pollan explains that the industrialization of the meat and dairy industries have made meat and milk much more affordable to the general public, significantly increasing the public's consumption of them.[42] Pollan argues that our food system promotes protein as the master nutrient, contributing to the cycle of overproduction and overconsumption.[43] In his earlier work, *Omnivore's Dilemma: A Natural History of Four Meals*, he explains that the catalyst making meat and dairy so affordable was the invention of Concentrated Animal Feeding Operations ("CAFOs").[44] This term refers to the mass gathering of cows into small areas where they are fed an unnatural diet of grains rather than grass, and are given large amounts of hormones and antibiotics to counteract the unsanitary and unhealthy conditions in which they are raised.[45] Although these practices make a great deal of business sense from a profit maximization standpoint, Pollan warns that CAFOs produce major health and environmental problems.[46]

The Environmental Protection Agency ("EPA") is similarly concerned about the health effects of CAFOs.[47] According to the EPA, industrialization of the farming industry and the operation of such feeding operations as CAFOs has also led to environmental problems because there are now more cows and more manure in smaller areas of farmland.[48] All animal feeding operations, including CAFOs, are capable of impacting air, surface water, groundwater, and soil.[49] Both the industrial processes used in dairy production, as well as the herd's biological processes, create air and water pollution.[50] Cows produce methane as a by-product of

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[40] The top ten counties in California for milk production in 2009: 1. Tulare; 2. Merced; 3. Kings; 4. Stanislaus; 5. Kern; 6. Fresno; 7. San Joaquin; 8. San Bernardino; 9. Madera; and 10. Riverside. *Id.* at 11.

[41] California Environmental Protection Agency, *Confined Animal Facilities*, WATERBOARDS.CA.GOV (Jul. 2, 2008), http://www.waterboards.ca.gov/centralvalley/water_issues/dairies/index.shtml.

[42] MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER'S MANIFESTO 30 (2008).

[43] *Id.*

[44] MICHAEL POLLAN, OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 67 (2006).

[45] *Id.* at 200.

[46] *See generally id.* at 65-84.

[47] *Dairy Production*, *supra* note 23.

[48] *See id.*

[49] *Id.*

[50] *Id.*

the digestion of food.[51] Methane is particularly hazardous to the environment because it stays in the atmosphere for up to 15 years and traps heat at a rate of over 20 times greater than carbon dioxide.[52] In California, several studies have analyzed the amount of emissions produced by dairy farms, however none of these studies has been able to adequately determine the volatile organic compounds ("VOCs") emissions for every aspect of dairy operations.[53] The San Joaquin Valley Air Pollution Control District (the "Pollution Control District") has evaluated these studies and concluded that the most accurate estimate is 19.3 pounds of emissions per cow each year.[54] In addition to the pollution created by the cows themselves, farming operations create a substantial amount of dust.[55] According to the California EPA, the levels of airborne dust particles in the Central Valley can cause throat and lung irritation, and may contribute to already existing health problems such as pulmonary illness, asthma, bronchitis, emphysema and lung cancer.[56]

Water pollution is also an important environmental concern. Manure is a valuable resource for dairy farmers because it can be used to fertilize the crops they grow as food for their cattle.[57] Crops deplete the soil of nitrogen.[58] As a rich, natural source of nitrogen, manure can be used to replenish the soil.[59] Dairy farmers obviously have ready access to massive quantities of manure, which makes it a cheap and convenient fertilizer. Farmers typically store the manure on the premises in a storage facility until it is needed.[60] Although very valuable, cow manure is prone to contaminating nearby surface and groundwater reserves.[61] Both surface water and underground water can become drinking water in the

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[51] *Sources and Emissions: Where Does Methane Come From?*, EPA.gov (June 22, 2010), http://www.epa.gov/methane/sources.html.

[52] *Methane*, EPA.gov (June 22, 2010), http://www.epa.gov/methane/index.html.

[53] *See* Crow, *supra* note 2, at 10-11.

[54] *Id.* at 30.

[55] *See* San Joaquin Valley Air Pollution Control District Rule, 8081 (2004), http://www.valleyair.org/rules/currntrules/r8081.pdf.

[56] Press Release, Cal. Envtl. Protection Agency Air Res. Bd., *supra* note 3.

[57] U.S. ENVIRONMENTAL PROTECTION AGENCY, SOURCE WATER PROTECTION PRACTICES BULLETIN 4 (2001), http://www.epa.gov/safewater/sourcewater/pubs/fs_swpp_livestock.pdf.

[58] *See id.*

[59] *Id.*

[60] *See id.*

[61] California Regional Water Quality Control Board Central Valley Region Order, R5-2007-0035 (2007), http://www.swrcb.ca.gov/rwqcb5/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf.

communities surrounding agricultural areas,[62] and may cause illness if tainted.[63] If the stored manure infiltrates deep enough into the soil, bacteria such as E. coli, Cryptosporidium, Giardia Lamblia, and Salmonella can reach the underground water reserves.[64] Excess nitrogen can also be carried into the groundwater supply, and if consumed, can cause blue baby syndrome.[65] Surface water contamination occurs when water from crop land, treated with manure fertilizer, runs off into nearby streams and canals.[66] Weather events such as a heavy rain contribute to this problem.[67] For these reasons, farmers must store and apply manure to their crops in an environmentally sound manner.[68]

IV. ENVIRONMENTAL REGULATIONS AND THEIR IMPACT ON DAIRIES

The Pollution Control District is the agency responsible for creating the rules and regulations that govern dairy emissions in California's Central Valley.[69] These regulations require farm owners to take measures to mitigate their farm's emissions.[70] Permits are issued to dairy farmers in order to ensure compliance with these regulations.[71] In the past, dairies were exempt from permitting rules, however in California, this changed

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[62] In 2006 approximately 100 wells in Morrison, Wisconsin were tainted by agricultural runoff. Residents of the town were plagued by a variety of health problems including stomach illnesses and diarrhea from drinking the water, as well as ear infections from using the water to bathe. However, Wisconsin is not the only state where contamination occurs. According to one study 15 percent of California wells located in agricultural areas are also contaminated at levels which exceeded federal standards. Many other states have similar contamination problems. Although regulations have been put into place to prevent these problems, the industry is largely self-regulated and violations are not discovered until after contamination has occurred. A powerful farm lobby has prevented stricter regulations from being put into effect. Charles Duhigg, *Health Ills Abound as Farm Runoff Fouls Wells*, N.Y. TIMES, Sept. 17, 2009, at A1.

[63] SOURCE WATER PROTECTION PRACTICES BULLETIN: MANAGING LIVESTOCK, POULTRY, AND HORSE WASTE TO PREVENT CONTAMINATION OF DRINKING WATER, *supra* note 57 at 2.

[64] *Id.* at 1-2.

[65] Blue baby syndrome occurs when nitrate binds to hemoglobin making it difficult for the blood to oxygenate the brain causing a blue color in babies afflicted with the disease. MICHAEL POLLAN, *supra* note 44 at 46-47.

[66] Mendes, *supra* note 8.

[67] *Id.*

[68] Telephone Interview with Paul Martin, Director of Environmental Services, Western United Dairymen (Aug. 31, 2009).

[69] San Joaquin Valley Air Pollution Control District, *About the District*, valleyair.org, (2006), http://www.valleyair.org/General_info/aboutdist.htm#Mission.

[70] Martin, *supra* note 68.

[71] Crow, *supra* note 2, at 2.

with the passage of Senate Bill 700 in 2004.[72] This bill eliminated the exemptions dairies previously enjoyed with regard to permitting.[73]

Because greenhouse gases are not considered a problem in many areas, dairies are not regulated with respect to greenhouse gas emissions.[74] Instead, the Pollution Control District attempts to control VOCs.[75] VOCs are precursors to greenhouse gases.[76] When VOCs attach to a nitrous oxide mix, smog is produced.[77] These compounds are temperature dependant and are a greater problem in the summer.[78]

The Pollution Control District Rule 4570 applies only to dairies that house 1,000 or more milking cows.[79] A dairy owner must apply for a permit by submitting an application detailing the measures the dairy owner will use to limit the VOCs his farm emits.[80] These mitigation measures are categorized into classes based on their effectiveness in reducing VOC emissions.[81] Dairy farmers must choose a number of activities from the list of available mitigation measures including implementing changes in: feeding and solid animal waste management procedures; milk parlor, free stall barn, and corral area maintenance; and methods of applying animal waste to growing crops.[82] Any loss of a portion of the dairy property that is used in the dairy's mitigation process will force them to make changes to their business model in order to compensate for the loss of the mitigation measures. Loss of property would also require the dairy owner to re-test their emissions to ensure the farm stays within

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[72] *Id.*

[73] *Id.*; *see also* Cal. Envtl. Prot. Agency, *Senate Bill 700 – Chapter 479*, ARB (June 30, 2010), http://www.arb.ca.gov/ag/sb700/sb700.htm.

[74] Martin, *supra* note 68.

[75] Rule 4750 defines a Confined Animal Facility as "a facility where animals are corralled, penned, or otherwise caused to remain in restricted areas for commercial purposes and primarily fed by a means other than grazing for at least forty-five (45) days in any twelve (12) month period." It also defines a dairy as "a CAF that is primarily concerned with the production of milk, butter, or cheese for commercial purposes." San Joaquin Valley Air Pollution Control District Rule, 4750 (2006), http://www.valleyair.org/rules/currntrules/r4570.pdf.

[76] Martin, *supra* note 68.

[77] *Id.*

[78] The VOC emissions produced by confined animal facilities like dairies are approximately 27,000 tons every year. This averages to over 70 tons every day. SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DIST., RE-ADOPTION OF RULE 4750 INITIAL STUDY AND NEGATIVE DECLARATION, 1 (2006), http://www.valleyair.org/notices/docs/priorto2008/4-27-06/is-nd-rule4570.pdf.

[79] San Joaquin Valley Air Pollution Control District Rule, 4750 5-6 (2006), http://www.valleyair.org/rules/currntrules/r4570.pdf.

[80] *Id.* at 6.

[81] *Id.* at 2, 6.

[82] *Id.* at 8-12.

the applicable emissions guidelines after the new and/or modified mitigation measures are in place.

Pollution Control District Rule 4550 regulates the amount of dust particles a dairy may emit.[83] This rule only applies to dairy farms with 500 or more mature dairy cows.[84] The dairy must implement a plan detailing the ways in which it will reduce the amount of dust it produces, and it must keep documentation of its compliance with this plan.[85] In order to obtain a permit, dairies must have an "ambient air analysis"[86] performed at their fence line.[87] Eminent domain causes the most serious interference with compliance with Rule 4550. The production facility is the greatest source of dust on a dairy farm.[88] Since Rule 4550 requires the ambient air test to be performed at the fence line, the goal of dairy farm owner is to locate the production facility at an adequate distance from the fence to prevent dust from escaping the property and causing health problems for those in the surrounding area.[89] The loss of land through eminent domain will move the highway (and thus the fence line) closer to the polluting areas of the farm. This change may cause some farms to fail the ambient air quality tests and not pass permitting requirements. One solution would be to reduce the farm's production of milk which would correspond to a reduction in dust. However, such an action would seriously harm the farm's potential for profitability. Another option would be to relocate the production facility to an area on the farm which would allow it to pass the test, however this would be very costly.

The California Regional Water Quality Control Board has enacted a Waste Discharge Requirements General Order for Existing Milk Cow Dairies to regulate water quality on and around dairies in the Central Valley region.[90] The order prohibits any contact of manure and surface

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[83] San Joaquin Valley Air Pollution Control District Rule, 4550, 1 (2004), http://www.valleyair.org/rules/currntrules/r4550.pdf.

[84] *Id.* at 4.

[85] *Id.* at 9.

[86] Ambient air quality measures the quality of the air in order to ensure it is not harmful to public health. Scientists determine the levels of substances that are dangerous and the dairies are limited with regard to the levels of these substances that they emit. These limits effect "equipment, operations, fuel specifications, or maintenance procedures." KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 40.02 (Matthew Bender 2010).

[87] Martin, *supra* note 68.

[88] *Id.*

[89] *Id.*

[90] California Regional Water Quality Control Board Central Valley Region Order, R5-2007-0035 (2007), http://www.swrcb.ca.gov/rwqcb5/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf.

or ground water reserves.[91] Dairy farms must work to eliminate the risk of water contamination by storing and applying manure properly.[92] To prevent excess nitrogen from leaking into underground water reserves, farmers may only apply 1.4 times the amount of nitrogen than the crop can absorb.[93] Dairy farmers are required to meticulously record and monitor the application of fertilizer used so as not to exceed the allowed amount.[94] Permits are issued based on herd size, a description of the dairy, and an environmental baseline test measuring the dairy's waste discharge.[95] This rule requires the dairy to submit a "Nutrient Management Plan" which ensures the facility is monitoring the environmental effects of its waste discharge on the quality of surrounding sources of water.[96] This regulation requires non-complying dairies to make improvements to their facilities, such as: "recycling flush water, grading, establishing setbacks, installing flow meters, exporting manure, and leasing or purchasing land."[97]

It is possible that a manure storage area itself will be condemned. This requires the farm to construct a similar storage facility on another portion of the property which would satisfy the strict construction guidelines outlined in the general order. This will require an additional technical report be filed addressing the adequacy of the new facility.[98] Because permits are partly based on herd size, dairies may be required to reduce their herd size in order to comply with manure management requirements.[99] When a dairy is built, it is made with a specific number of cows in mind.[100] A farm is most efficient when it houses the maximum number of cows possible.[101] The fewer cows a dairy owns the less milk it can produce, which directly affects its profitability.[102] Another costly option is to transport the excess waste offsite.[103]

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[91] *Id.* at 3-6.
[92] Mendes, *supra* note 8.
[93] Martin, *supra* note 68.
[94] Mendes, *supra* note 8.
[95] California Regional Water Quality Control Board Central Valley Region Order, R5-2007-0035, 4 (2007), http://www.swrcb.ca.gov/rwqcb5/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf.
[96] *Id.* at 1, 3.
[97] *Id.*
[98] These reports are required by the general order and can cost as much as $30,000 simply to prepare. *Id.*
[99] Mendes, *supra* note 8.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

Thus, it is clear that whether the land taken is used for growing food for the animals, housing the animals themselves, or storing manure, a reduction in the amount of land a farmer possesses can significantly impair his ability to comply with the above mentioned regulations and continue to successfully operate the business.[104] Farmers are struggling to stay compliant with the regulations with the land they already have, and when the regulations took effect, many farmers had to purchase land simply to continue producing their previous output.[105] Compliance with the regulations under ordinary circumstances can be financially burdensome, ranging from $30,000 to $100,000 per year.[106] In addition to the extra costs and lost profits incurred due to an exercise of eminent domain on a strictly regulated farm, the land which remains after the taking is itself less valuable because a limited ability to comply with regulations makes the land less attractive to future potential buyers of the property.

V. JUST COMPENSATION

The method of determining just compensation depends on the amount of land that is taken.[107] If the entire property is taken, the land owner will generally be given the land's fair market value.[108] Fair market value is defined as:

> [T]he highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.[109]

There are three methods to calculate fair market value in eminent domain proceedings.[110] The first is the market data approach, which considers the recent sale of comparable properties.[111] The second is the income approach, which looks to the amount of income the property produces or is able to produce.[112] The third is the replacement cost method, which analyzes the cost of acquiring comparable land and improvements

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] POWELL & ROHAN, *supra* note 11, § 79E.04[1].
[108] *Id.*
[109] CAL. CIV. PROC. CODE § 1263.320 (West 2007).
[110] Hugh B. Horton, *Condemnation of Rural Property for Highway Purposes*, 8 Am. Jur. *Trials* 57, § 5.5 (1965).
[111] *Id.*
[112] *Id.*

minus any amount of applicable depreciation.[113] The land's value is judged based on its highest and best use.[114] The property is not only appraised for the nature of its current use, but also by any use to which it could reasonably be put.[115] For example, if an entire parcel of land used for dairy farm purposes is condemned, the fair market value of the property would be awarded based on the highest and best use of the land and using one of the above described valuation methods.[116]

There are situations where fair market value is not an adequate remedy. This is often the case where a portion of the property is taken, since it is possible that the portion taken is in some way so important to the remaining land that its very loss damages the remainder.[117] The appropriate compensation in such circumstances is called severance damages.[118] In these cases, the landowner must be compensated for *both* the fair market value of the land actually taken, and the amount the taking has damaged the remainder.[119] It is difficult to determine the exact amount that the remaining portion of land has been damaged by the taking. However, severance damages are typically determined by the difference between the remaining property's fair market value before and after the taking.[120] To determine severance damages, a credible expert must testify to the effects of the taking on the value of the remaining land and the jury uses this information to determine the award for damages.[121] Any factor that causes the fair market value of the property to drop can be factored into the determination of severance damages.[122]

The severance damages amount can be reduced if the State can show that the landowner can make changes to the property in order to return it to its previous utility and that the cost of doing so is less than the cost of severance damages.[123] If the loss of a manure storage facility makes the farm inoperable, and it would cost less simply to pay the dairy farm the amount required to reconstruct the new manure storage facility than it

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[113] *Id.*

[114] City of San Diego v. Barratt Am. Inc., 27 Cal.Rptr.3d 527, 537 (Cal. Ct. App. 2005).

[115] Cnty. of San Diego v. Rancho Vista Del Mar, Inc., 20 Cal.Rptr.2d 675, 682 (Cal. Ct. App. 1993).

[116] *See* Horton, *supra* note 110.

[117] CAL. CIV. PROC. CODE § 1263.410 (West 1976).

[118] City of San Diego v. Neumann, 6 Cal. 4th 738, 741 (Cal. 1993).

[119] Steele v. Dep't of Transp., 671 S.E.2d 275, 278 (Ga. Ct. App. 2008).

[120] Pacific Gas & Electric Co. v. Hufford, 319 P.2d 1033, 1038 (Cal. 1957).

[121] Horton, *supra* note 110 at § 63.

[122] Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, 161 P.3d 1175, 1184 (Cal. 2007).

[123] Sys. Components Corp. v. Dep't of Transp., 985 So.2d 687, 690 (Fla. Dist. Ct. App. 2008).

would to compensate them for total loss of the business that resulted from the loss of the facility, the State can do the former.[124] The appraiser considers factors such as the cost to remedy the harm in his calculations of severance damages, but the cost to cure the damages is not a separately recoverable amount.[125] For example, factors such as the cost to reconstruct a manure storage facility or to relocate the production facility can be considered in the computation of the total award, but are not by themselves compensable.[126]

It is unclear how a California dairy farm will be compensated under the current regulatory scheme. This Comment contends that because of the applicable environmental regulations, the taking of any acreage damages the remainder of the property in its ability to obtain permitting and remain profitable, and the court in a condemnation action of a dairy property should award both severance damages as well as business damages. In *City of San Diego v. Neuman*, 863 P.2d 725 (1993), the court indicated in dicta that a dairy farm could be entitled to severance damages.[127] Justice Panelli explained that, "in the case of a dairy farm, for example, if all the pasturage is condemned, the value of what remains may be significantly impaired."[128] Indeed, if the farm lost all the land it used to grow food for its animals, it would be forced to either cease operating altogether or spend a significant amount of money importing food to the facility. This is no less true if a dairy farm were to lose the land upon which it depends as a buffer between the production facility and the fence line or a manure storage facility as these areas are essential to the farm's regulatory compliance. Similarly, if the taking causes the farm to reduce the size of its herd, the loss of cows can be compared to a loss of crops since the loss of crops is a factor that can be considered in an award of severance damages.[129]

Another important factor in the expert's valuation of severance damages is compensation for the diminution of the value of the farm in the eyes of future buyers because of the taking.[130] One case which illustrates the importance of a future buyer's perspective of the property is *Pacific Gas & Electric Co. v. Hufford*, 319 P.2d 1033 (1957). In *Hufford*, the landowner used his land to graze cattle.[131] However, eminent domain was

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[124] *See id.* at 691.
[125] Steele v. Dep't of Transp., 671 S.E.2d 275, 278 (Ga. Ct. App. 2008).
[126] *See id.*
[127] City of San Diego v. Neumann, 863 P.2d 725, 745 (Cal. 1993).
[128] *Id.*
[129] *See* City of Gilroy v. Filice, 34 Cal. Rptr. 368, 374 (Cal. Ct. App. 1963).
[130] Pacific Gas & Electric Co. v. Hufford, 319 P.2d 1033, 1042 (1957).
[131] *Id.* at 1035.

used to grant Pacific Gas & Electric Company ("PG&E") an easement through the land allowing PG&E to access a service road and erect six large electricity towers.[132] The noise and disruption caused by the towers affected the cattle's ability to gain weight as quickly as they should.[133] PG&E objected to the evidence presented by the landowner's valuation expert, who based the amount recommended for severance damage, in part, on the reduction of value the ranch would have in the eyes of a future prospective buyer.[134] However, the court held it proper to allow expert testimony to explain the effect of the taking on the value of the remaining property to future prospective buyers.[135]

As applied to dairy farms, this principle allows that the remaining property after a taking may be adversely affected because of the discount that prospective purchasers will apply, as they take into account the regulatory environment in which operations can be conducted on the remainder. For just compensation to be given in the case of a taking of dairy property, it is important to award the extra costs associated with continued environmental compliance after the taking. It is also critical that the dairy be compensated for the diminution of the value of the farm as evidenced by the decrease in its marketability to future purchasers.[136] It is possible that some prospective purchasers may be interested in the land for other uses. Such purchasers would not need to concern themselves with environmental regulations applicable to dairy operations. If the trier of fact determines that this is the state of the market for the remainder property, the landowner would not be able to recover an award of this type of damages.[137] However, as noted above, dairy farms are typically located in remote areas, and near other dairies to avoid nuisance lawsuits.[138] They are also equipped with very specific structures that are unique to a diary operation.[139] In light of the unique nature of dairy operations, the possibility that a non-dairy purchaser would be interested in the land seems highly unlikely.

While the United States Constitution requires that States provide just compensation for the loss of property, this requirement has been interpreted not to require compensation for "intangible losses and incidental

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[132] *Id.*
[133] *Id.* at 1041.
[134] *Id.* at 1041-42.
[135] *Id.* at 1042.
[136] *See id.*
[137] *See id.*
[138] *See* Weinhold v. Wolff, 555 N.W.2d 454, 458 (1996).
[139] *See Dairy Production, supra* note 23.

or consequential damages."[140] For example, a landowner is not compensated for any sentimental value he attaches to his land because this is too speculative a value to be determined accurately.[141] Similarly, lost profits are not generally considered in the valuation of the property because of their speculative nature[142] and because the benefit of the profits have not been transferred to the buyer.[143] In other words, the State is compensating the landowner for the value of the property being taken, and not for the business which happens to be conducted upon it.

Because of the variables affecting a farm's output, it is possible that the courts will consider the pure loss of profits caused by an involuntary reduction in herd size to be too speculative to be compensable.[144] Although historical outputs would show the volume of milk the dairy produces, the market price of milk is volatile.[145] Therefore, it may be impossible to determine a definite calculation of lost profit at the time the land is taken. A related issue will be the question of how long the farm will be deprived of these profits, since there is no determining how long the farm might be in business.

While the varying factors affecting a dairy's lost profits may lead most jurisdictions to generally deny business damages, some jurisdictions have enacted legislation that allows juries the flexibility of awarding such damages in certain circumstances.[146] Business damages compensate the business owner for damages that are not constitutionally required to be paid, but which cause the business to suffer hardship because of the taking nonetheless.[147] Jurisdictions differ in the determination of whether these expenses will be recoverable.[148] California, for example, does not

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[140] U.S. CONST. amend. V; System Components Corp. v. Dep't of Transp., 985 So.2d 687, 690 (Fla. Dist. Ct. App. 2008).

[141] POWELL & ROHAN, *supra* note 11, § 79E.04[2][a].

[142] City of San Diego v. Fritz Neumann, 863 P.2d 725, 731 (1993).

[143] *See* POWELL & ROHAN, *supra* note 11, § 79E.04[2][a].

[144] *See Neumann*, 863 P.2d 725 at 731 (1993).

[145] ECON. RESEARCH SERV., MILK PRICING IN THE UNITED STATES (2001), http://www.ers.usda.gov/publications/aib761/aib761.pdf (last visited June 28, 2010).

[146] *See* Matthews v. Div. of Admin, State, Dep't of Transp., 324 So.2d 664, 666 (Fla. Dist. Ct. App. 1975).

[147] Sys. Components Corp. v. Dep't of Transp., 985 So.2d 687, 692 (Fla. Dist. Ct. App. 2008).

[148] *Compare* Simmons v. Dep't of Transp., 484 S.E.2d 332, 335 (Ga. Ct. App. 1997) (explaining that a Georgia landowner "was constitutionally entitled to 'just and adequate' compensation for the value of his property on the date of taking including consequential damages to his business and expenses for relocation."), *with* State v. Bristol Hotel Asset Co., 293 S.W.3d 170, 173 (2009) (explaining that in Texas "lost profits or injury to a business are not compensable over and above the value of the land taken and the diminution in the value of the remainder tract.")

have a statute which allows for business damages.[149] However, California Civ. Proc. Code section 1263.510 does provide that a business which has been forced to relocate can recover for a loss of goodwill.[150] The statute defines goodwill as "the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."[151] If the dairy farmer is unable to continue operating after the taking, it will be forced to relocate. This statute allows compensation for the loss suffered when the established business moves to a new area and is forced to build a new customer base.[152] While this statute makes an attempt at fairness, it falls far short in the particular circumstances of the dairy farm as it fails to compensate for the business expenses eminent domain may cause.[153]

The inequity is clear when California's method of compensation is compared to that of Florida, which would eliminate the dairy farmer's current predicament altogether.[154] Florida Statutes section 73.071(3) states:

> The jury shall determine solely the amount of compensation to be paid, which compensation shall include: . . . (b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the tak-

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[149] *See* CAL. CIV. PROC. CODE § 1263.510 (West 2007) (providing only compensation for loss of good will and no compensation for business damages).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *See id.*

[154] However, the Florida statute has itself been criticized due to its application of damages. Justice Lehan's dissent in *Tampa-Hillsborough Cnty. Expressway Auth. v. Campoamor Modern*, 436 So.2d 922 (1983), addressed the constitutionality of the statute in a diary condemnation case. The Tampa-Hillsborough County Expressway Authority (the "Authority") initiated eminent domain proceedings to condemn portions of land belonging to Campoamor Modern Feed, Inc. ("Compoamor"). Campoamor requested business damages due to its assertion that the taking completely destroyed the use of the remaining property for its current use as a dairy farm. The trial court denied the Authority's motion to rule on the constitutionality of the Florida statute, and awarded $301,070 in business damages as well as damages for the condemned land. The Authority appealed, but the court of appeals denied the Motion for Rehearing and the trial court's award of business damages was affirmed. In his dissent, Justice Lehan wrote that the statute was unconstitutional because it allows landowners who have had only a part of their land condemned to receive the benefit of business damages while not affording the same benefit to landowners whose entire property is condemned. Although the court ultimately found this argument unconvincing and upheld the Florida statute's constitutionality, it is important to consider such concerns when constructing similar statutes in other jurisdictions. Tampa-Hillsborough Cnty. Expressway Auth. v. Campoamor Modern, 436 So.2d 922, 922 (Fla. Dist. Ct. App. 1983).

> ing, including when the action is by the division of road operations of the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 4 years' standing before January 1, 2005, or the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing on or after January 1, 2005, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, *the probable damages to such business which the denial of the use of the property so taken may reasonably cause*; any person claiming the right to recover such special damages shall set forth in his written defenses the nature and extent of such damages.[155]

The Florida statute is not explicit as to the types of business damages which would be compensable, but Florida courts have interpreted the statute in awarding "lost profits, loss of goodwill, and costs related to moving and selling equipment."[156] While California law would already compensate for a loss of goodwill, and costs related to moving equipment in an award of severance damages, there is no current compensation for lost profits.[157] This seems particularly unfair because of the California Constitution's declaration that even properties that are merely damaged by a taking should be compensated.[158]

Matthews v. Div. of Admin., State, Dep't of Transp., 324 So. 2d 664 (1975), involved the aforementioned damages statute. It discussed the issue of recovery for loss of profits.[159] The business in *Matthews* was a laundromat alleged to have been rendered completely useless by the taking of an adjacent plot.[160] The landowner sought damages for the value of the business and loss of good will.[161] The State argued that the damages sought were speculative because there was no evidence any lost profits.[162] The court held that lost profits were compensable in addition to loss of good will where the business' ability to make a profit was reduced by the taking.[163] Therefore, under the Florida rule, lost profits due to a reduction in herd size would not be considered too speculative to be

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[155] Sys. Components Corp. v. Dept. of Transp., 985 So.2d 687, 689 (Fla. Dist. Ct. App. 2008) (emphasis in original).

[156] *Id.*

[157] *Compare* CAL. CIV. PROC. CODE § 1263.410 (West 1976) *with* System Components Corp., 985 So.2d at 690.

[158] CAL. CONST. art. I, § 19.

[159] Matthews v. Div. of Admin., State, Dep't of Transp., 324 So. 2d 664, 665 (Fla. Dist. Ct. App. 1975).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 668.

compensable and would be recovered as damages if there was conclusive proof of such damages through evidence of historical output and market price.[164]

Because severance damages compensate for the damage the remaining land has suffered, and the statutorily authorized business expenses compensate for injury to the business that is conducted on the land, both may be awarded in cases where they are both warranted.[165] However, this will not be true where the severance damages and the business damages are identical.[166] This simply avoids the unjust possibility of a windfall by a business recovering twice for the same loss under both severance and business damages. For instance, compensation for the movement of structures on the property to a different location could arguably fall under either severance or business damages.[167] However, *Matthews* provided some guidance by indicating that the cost of making physical changes to the premises, which were required by the taking, are to be considered in severance damage calculations but not in the determination of business damages.[168] Therefore, any physical relocation of buildings or structures should be factored into an award of severance damages and no unjust enrichment occurs.[169]

VI. CONCLUSION

The unique regulatory environment in which California dairy operations function creates the potential for unfairness when the principles of eminent domain are applied to takings of dairy property. In order to protect our health and environment, it is extremely important that dairies comply with the current strict environmental regulations.[170] However, after condemnation, dairies must bring their farms back into regulatory compliance through extremely costly measures.[171] Although these expenses are only indirectly caused by the taking, their effects are very real to the farmers who are forced to either pay them or lose their permit to conduct business. Because compliance with these regulations should be encouraged, this Comment suggests that this unfairness could be elimi-

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[164] *See id.*

[165] Sys. Components Corp., v. Dep't of Transp., 985 So. 2d 687, 690 (Fla. Dist. Ct. App. 2008).

[166] *Id.*

[167] *See* Matthews v. Div. of Admin. State, Dep't of Transp., 324 So. 2d 664, 666-667 (Fla. Dist. Ct. App. 1975).

[168] *Id.* at 667.

[169] *See id.*

[170] *See supra* Part III.

[171] *See supra* Part IV.

nated or mitigated by the adoption of legal provisions analogous to those that have been adopted by the state of Florida. This Comment argues for damage awards that include: (a) fair market value of the property taken; (b) severance damages to compensate for the damage the taking has done to the market value of the remainder in the eyes of future dairy purchasers; and (c) damages for business expenses when such damages are provable with reasonable certainty.[172] Adoption of the recommended changes would not guarantee compensation, but would allow courts to consider actual awards on a case-by-case basis to remedy the injustices such as those facing the dairy industry. In the case of a dairy farm which has lost land through eminent domain, the farm's lost profits, re-construction expenses of environmentally required facilities, costs associated with the compiling of required environmental reports, and the transportation and storage of waste are all expenses which should be considered when determining just compensation.

NICEA BATES

[172] *See supra* Part V.