

# Agenda

## Advisory Committee on Model Civil Jury Instructions

January 11, 2010  
4:00 to 6:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	John Young
Eminent Domain	Tab 2	Juli Blanch Perrin Love
Verdict Forms	Tab 3	Frank Carney
Gross Negligence	Tab 4	Frank Carney

**Committee Web Page:** <http://www.utcourts.gov/committees/muji/>

**Published Instructions:** <http://www.utcourts.gov/resources/muji/>

**Meeting Schedule:** Matheson Courthouse, 4:00 to 6:00 p.m.

February 8, 2010  
March 8, 2010  
April 12, 2010  
May 10, 2010  
June 14, 2010  
September 13, 2010  
October 12, 2010 (Tuesday)  
November 8, 2010  
December 13, 2010

Tab 1

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

December 14, 2009

4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West, and Perrin Love, chair of the eminent domain subcommittee

Excused: Timothy M. Shea (who joined the meeting late)

The committee reviewed the following eminent domain instructions:. Mr. Love noted that the subcommittee tried to walk a fine line between making the instructions understandable and being faithful to the statutes and case law.

1. *CV1601. Condemnation proceedings.* Mr. Fowler asked if “public use” was ever a jury issue. Mr. Love said that it was not. Mr. Carney wondered whether there should be a committee note to that effect, but Mr. Love did not think a note was necessary because it is well known among lawyers practicing in this area. Mr. Summerill asked whether it was different for claims brought directly under the state constitution, which is self-executing. Mr. Love replied that it was not, since there was no constitutional right to a jury on the issue of public use at common law. Mr. Love suggested adding a committee note to explain that the instructions do not cover inverse condemnation and constitutional claims. Mr. Young suggested that the subcommittee decide whether to address the issue in a committee note. Subject to the possible addition of a committee note, the committee approved the instruction.

2. *CV1602. Definition of just compensation.* Mr. Ferguson asked whether “severance damages” was understandable. The committee noted that the term is explained in CV1617. The committee revisited CV1602 in connection with CV1604, as set out below.

3. *CV1603. Burden of proof.* Mr. Love noted that Mr. Shea had taken out the phrase “by a preponderance of the evidence,” consistent with the committee’s practice. The committee approved the instruction.

4. *CV1604. Verdict to be based on fair market value.* Mr. West thought the second sentence of the instruction was objectionable because it explained what the jury cannot award instead of what it can. Mr. Love noted that the second sentence was the reason for the instruction, since juries often want to award a property owner more than the property’s fair market value because the owner does not want to part with the property. He also noted that the instruction was in MUJI 1st, but Mr. Carney pointed out that that is not necessarily sufficient reason to include the instruction in MUJI 2d. Mr. Summerill noted that the last sentence of the instruction stated the same thing only in a positive manner. Mr. Carney raised a philosophical point, namely, when should the

instructions include both a positive statement of the law (*e.g.*, what the jury may consider or award) and the converse (*e.g.*, what the jury cannot consider or award). Mr. Fowler thought that some circumstances arise so frequently that it is appropriate to deal with them in a jury instruction, and that it is not sufficient to say that the attorneys may argue the point. Mr. Ferguson noted that the first sentence invites the second sentence, since a jury may think that putting the owner in as a good a position as if the property had not been taken allows the jury to compensate the owner for the forced nature of the "sale." Mr. Ferguson thought that if the first sentence is given, the second should be given as well.

Dr. Di Paolo joined the meeting.

Mr. Ferguson suggested deleting the first two sentences. Mr. Love thought that, if the second sentence is deleted, the first sentence should be revised to include language that the reviewing committee took out, namely, that the owner should be put in "as good a position moneywise" as if the property had not been taken, "no more or less." Dr. Di Paolo thought that jurors would understand "moneywise" and that, although "no more or less" may not add anything, it does not hurt to be redundant, especially with a lay audience. Mr. Carney noted that the jury could be instructed not to award a whole laundry list of other items. Mr. West thought it was improper to instruct on other items that cannot be awarded. Mr. Young thought that, either evidence of the owner's unwillingness to sell would not be admitted or, if it was, the court would give a limiting instruction anyway. Mr. Love noted that that has not been his experience, because an instruction like CV1604 has always been given. Mr. Young asked if the instruction was necessary given the fact that the jury's award must be limited to damages established by expert testimony, as stated in CV1609. Mr. Carney thought that if the first two sentences of CV1604 were deleted, the instruction would not add anything not already covered by CV1602. Dr. Di Paolo thought that CV1602 and CV1604 did not mean the same thing and thought the instructions could be combined. The committee revised CV1602 to read:

Alternative 1:

In deciding the amount of just compensation, you must put [name of property owner] in as good a position moneywise as if [his] property had not been taken, no more or less.

Just compensation is the fair market value of the property taken on [valuation date].

Your determination of just compensation must be limited to the fair market value of the property taken.

Alternative 2:

In deciding the amount of just compensation, you must put [name of property owner] in as good a position moneywise as if [his] property had not been taken, no more or less.

Just compensation is:

(1) the fair market value of the property taken, and

(2) severance damages, if any, to [name of property owner]'s remaining property caused by the taking.

You should determine these two amounts separately, on [valuation date], and add them together to determine just compensation.

Your determination of just compensation must be limited to the fair market value of the property taken and severance damages to the remaining property, if any.

The committee approved CV1602 as revised.

5. *CV1605. Fair market value.* Dr. Di Paolo asked whether “all of the facts about the property” include the fact that the property has been condemned. Mr. Love said no. He noted that the committee had struggled with the terms “highest probable price” and “prudent and willing.” He noted that some subcommittee members thought that “prudent” was not an accurate statement of the law; others thought it was antiquated and was too easily confused with “prudish”; and still others thought that it had to be included. Dr. Di Paolo suggested “reasonable” for “prudent.” Mr. Love noted that “prudent” is used in FIRREA regulations and in most appraisals. Messrs. Young and Carney thought that if the jury instruction used a term different from the term in evidence, the jury would be confused. Dr. Di Paolo thought that jurors would understand “prudent.” As for “highest probable price,” Mr. Carney suggested dropping “highest,” but Messrs. Nebeker and Ferguson thought that “probable” alone weakened the concept. Dr. Di Paolo, on the other hand, thought that if the instruction was stated only in terms of the “highest price,” the jury might think that, as between competing evaluations, it was required to select the highest appraisal, not necessarily the best appraisal or the one that made the most sense. Mr. Carney noted that he did not find “probable” in any of the cases cited for the instruction. The committee therefore struck “probable” and approved the instruction as modified.

Mr. Shea joined the meeting.

6. *CV1606. Fair market value of easement.* Mr. Ferguson questioned whether “unreasonably interfered” should be defined. The committee thought not. Mr. Summerill asked whether the last paragraph should conclude, “You should consider . . .” Mr. Love thought it was unnecessary. It is included in the second paragraph to highlight the fact that an easement may not deprive an owner of all the uses of his property. Mr. Nebeker raised the issue of temporary easements. Mr. Love said that the subcommittee had decided not to address them because all appraisers value them the same way, as a percentage of the fair market value of the fee estate. The committee approved the instruction as drafted.

7. *CV1607. Highest and best use.* Mr. Love noted that the phrase “merely possible” was included in the *City of Hildale* case. Mr. Shea thought it was redundant and noted that “remote or speculative” is used elsewhere. Mr. Carney thought that “merely” constructions should be avoided. Mr. Shea suggested that the instruction use either “potential” or “possible” but not both. Dr. Di Paolo suggested “unlikely” for “merely possible, remote or speculative.” Mr. Love noted that the cases use “remote or speculative.” Mr. West would delete the last sentence entirely on the grounds that it just says what the law is not. The committee returned to its earlier discussion on when to give negative instructions. Mr. Young suggested that the general principle should be to instruct on what the law is and not on what it is not. Dr. Di Paolo noted that some situations open up implications. If the implication is likely and improper, then something needs to be done to cancel it out. Mr. Young noted that the last sentence was a little disjointed because it dealt with two different concepts. Mr. Summerill asked why the instruction used the term “reasonably certain” rather than “feasible,” as in the *City of Hildale* case. Several committee members thought that the terms were not synonymous. Mr. Love noted that *Hildale* used both terms interchangeably. He noted that “reasonably certain” as used in the case law may be less than “more likely than not.” The test is whether it affects fair market value. Mr. Love suggested substituting “reasonably probable” for “reasonably certain.” The committee revised the instruction to read:

You must determine fair market value based on the property’s highest and best use. Highest and best use is not necessarily the actual use of the property on [valuation date]. The highest and best use includes any reasonably probable potential use that results in the property’s highest value. A potential use is reasonably probable if:

...

Highest and best use does not include a use that is remote or speculative.

The committee approved the instruction as revised.

8. *CV1608. Reasonable probability of change in zoning or land use restriction.* Mr. Love noted that CV1608 talks in terms of reasonable probability and suggested making CV1607 consistent. Mr. Carney noted that the medical malpractice instructions took out the phrase “reasonable certainty” on the grounds that “reasonable” and “certainty” were incompatible. The committee replaced “reasonable certainty” with “reasonably probable” in CV1607 and approved CV1608.

9. *CV1609. Verdict based on testimony of witnesses.* Mr. West asked whether the instruction was unique to eminent domain proceedings or whether it should be in the general instructions. Mr. Love said it was unique to eminent domain, where the appraisers’ opinions set both a floor and a ceiling on the jury’s award. The instruction is not limited to expert testimony, though, because an owner can give his opinion of fair market value. At Dr. Di Paolo’s suggestion, the last phrase was revised to read, “within the range of fair market values offered by the witnesses.” The committee approved the instruction as revised.

10. *CV1610. Owner testifying.* Dr. Di Paolo asked why owners are singled out for special treatment and why the instruction was not already covered by CV1609. Mr. Love noted that owners are entitled to give their opinions regarding fair market value even though they are not qualified as an appraiser. Mr. Ferguson suggested that the instruction was telling the jury, “The owner can testify, but don’t take his opinion too seriously.” Mr. Carney thought the instruction was argumentative. Mr. Young suggested combining it with CV1609 and adding “any self-interest” or “the witness’s ownership interest in the property” to the list of factors the jury can consider in CV1609. Mr. Ferguson asked whether the concept was already covered by the general instruction on the credibility of witnesses. The subcommittee will consider combining CV1610 with CV1609 and adding a committee note explaining why CV1610 was deleted.

11. *Next Meeting.* The next meeting will be Monday, January 11, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

# Tab 2

**Eminent Domain**

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- (7) CV1607. Highest and best use..... 5
- (8) CV1608. Reasonable probability of change in zoning or land use restriction..... 5
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**(1) CV1601. Condemnation proceedings.**

[Name of condemnor] has the right to take private property for public use, but must pay just compensation to [name of property owner]. [Describe public improvement] is a public use. You will determine the just compensation to be awarded to [name of property owner].

**References**

- Utah Const. Article. I, Section 22.
- Utah Code Section 78B-6-511.
- State v. Ward, 189 P.2d 113 (Utah 1948).

**MUJI 1**

16.1, 16.4, 16.5

**Committee Notes**

On constitutional issues and public use? Pete Summerill and Perrin Love

[Approved](#)

**(2) CV1602. Definition of just compensation.**

Alternative 1:

Just compensation is the fair market value of the property taken, on [valuation date].

Alternative 2:

Just compensation is:

(1) the fair market value of the property taken, and

(2) severance damages, if any, to [name of property owner]'s remaining property caused by the taking.

You should determine these two amounts separately, on [valuation date], and add them together to determine just compensation.

**References**

Utah Code Section 78B-6-511.

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

UDOT v. Jones, 694 P.2d 1031 (Utah 1984).

Utah State Rd. Comm'n v. Friberg, 687 P.2d 821 (Utah 1984).

**Committee Notes**

Alternative 1 should be given when the owner's entire property is taken. Alternative 2 should be given when part of the owner's property is taken and severance damages are in issue. If Alternative 2 is used, the judge should instruct the jury on the definition of "severance damages." See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=16#1617](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=16#1617)>Instruction CV1617, Severance damages.

**MUJI 1**

16.5

[Approved](#)

**(3) CV1603. Burden of proof.**

[Name of property owner] has the burden to prove the fair market value of the property taken [and the amount of severance damages, if any, to the remaining property].

[[Name of condemnor] has the burden to prove the fair market value of special benefits, if any, to the remaining property.]

### References

Utah Code Section 78B-6-511(4).

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Utah State Rd. Comm'n v. Friberg, 687 P.2d 821 (Utah 1984).

Utah State Rd. Comm'n. v. Williams, 452 P.2d 548 (Utah 1969).

Utah State Rd. Comm'n. v. Taggart, 19 Utah 2d 247, 430 P.2d 167 (1967).

Utah State Rd. Comm'n. v. Hansen, 14 Utah 2d 305, 383 P.2d 917 (1963).

### Committee Notes

The bracketed part of the instruction relating to severance damages should be given only in partial taking cases in which severance damages are in issue. The bracketed part of the instruction relating to special benefits should be given only in partial taking cases in which special benefits are in issue. If the condemnor contends that a property owner had a duty to mitigate severance damages, an additional instruction as to that burden of proof may be given. See generally, Utah State Rd. Comm'n. v. Williams, 452 P.2d 548 (Utah 1969).

Subcommittee will draft mitigation instruction.

### MUJI 1

16.6

[Approved](#)

### ~~CV1604. Verdict to be based on fair market value.~~

~~In deciding the amount of just compensation, you must put [name of property owner] in as good a position as if [his] property had not been taken. You may not add any compensation because [name of property owner] did not want to sell [his] property. Your determination of just compensation must be limited to the fair market value of the property taken [and severance damages to the remaining property, if any].~~

### References

~~City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.~~

~~State v. Kendell, 20 Utah 2d 356, 438 P.2d 178 (1968).~~

~~State v. Noble, 305 P.2d 495 (Utah 1957).~~

### Committee Notes

~~The bracketed part of the instruction relating to severance damages should be given only in partial taking cases in which severance damages are in issue.~~

### MUJI 1

16.19

**(4) CV1604. Fair market value.**

Fair market value of the property is the highest ~~probable~~ price that a prudent and willing buyer would pay to a prudent and willing seller in an open market assuming that:

- (1) there is no pressure on either one to buy or sell; and
- (2) the buyer and the seller know all of the facts about the property.

You are to determine fair market value of the property on [valuation date].

**References**

Utah Code Section 78B-6-511.

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Redevp. Agency of SLC v. Mitsui Invest., Inc., 522 P.2d 1370 (Utah 1974).

Utah State Rd. Comm'n v. Wood, 452 P.2d 872 (1969).

State v. Noble, 305 P.2d 495 (Utah 1957).

Sigurd v. State, 142 P.2d 154 (Utah 1943).

**Committee Notes**

[Approved](#)

**(5) CV1605. Fair market value of easement.**

[Name of condemnor] has taken the right to use part of [name of property owner]'s property for a specific purpose. That right is called an "easement." After an easement has been taken, [name of property owner] can use the property within the easement for any purpose that does not unreasonably interfere with the easement.

You must determine the fair market value of the easement taken on [valuation date]. In determining fair market value, you must consider how [name of property owner] can use [his] property within the easement.

[You must also determine whether the easement causes severance damages to [name of property owner]'s remaining property, and the amount of those damages, if any.]

**References**

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Wykoff v. Barton, 646 P.2d 756 (Utah 1982).

Provo City Corp. v. Knudsen, 558 P.2d 1332 (Utah 1977).

North Union Canal Co. v. Newell, 550 P.2d 178 (Utah 1976).

**Committee Notes**

This instruction should be modified, or an additional instruction given, if there is a dispute about the scope of the easement or the uses remaining to the property owner after the easement is taken, to explain the scope and respective uses under the

easement. The bracketed part of the instruction relating to severance damages should be given only in partial taking cases in which severance damages are in issue.

This instruction addresses the taking of a permanent easement. This instruction should be modified, or an additional instruction given, if a temporary easement is in issue.

[Approved](#)

**(6) CV1606. Highest and best use.**

You must determine fair market value based on the property's highest and best use. Highest and best use is not necessarily the actual use of the property on [valuation date]. The highest and best use includes any potential use that is reasonably probable and that results in the property's highest value and is reasonably certain. A potential use is reasonably certain-probable if:

- (1) the property is physically suited or adaptable to the potential use;
- (2) the property is legally available for the potential use, or if there is a reasonable probability that any legal restriction or barrier will be removed or modified; and
- (3) there is enough demand for the use in the marketplace to influence the fair market value of the property.

Highest and best use is not necessarily the actual use of the property on [valuation date], and does not include a use that is merely possible, remote or speculative.

**References**

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Utah State Rd. Comm'n v. Jones, 24 Utah 2d 154, 467 P.2d 420 (1970).

Utah State Rd. Comm'n v. Jacobs, 16 Utah 2d 167, 397 P.2d 463 (1964).

State v. Tedesco, 4 Utah 2d 248, 291 P.2d 1028 (1956).

**Committee Notes**

The Committee modified the former MUJI 16.17 to eliminate the enumeration of seven factors that the jury may consider. The Committee believes that those seven factors may or may not be relevant in any particular case, and that there may be other relevant factors. The jury ought to be free to consider any factor that a willing buyer and a willing seller would take into account in determining highest and best use.

[Approved](#)

**(7) CV1607. Reasonable probability of change in zoning or land use restriction.**

In determining the property's highest and best use, you may consider potential changes in zoning [and/or land use] restrictions if you find that, on [valuation date]:

- (1) there was a reasonable probability of a change; and
- (2) a prudent and willing buyer and seller would consider the probability of a change in agreeing on a purchase price for the property.

You must disregard potential changes in zoning [and/or land use] restrictions that are remote or speculative.

**References**

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Utah State Rd. Comm'n. v. Jacobs, 16 Utah 2d 167, 397 P.2d 463 (Utah 1964).

[Approved](#)

**(8) CV1608. Verdict based on testimony of witnesses.**

You must determine the fair market value of the property taken, [and any severance damages to the remaining property], based solely on the testimony of the witnesses who have given their opinion. You may consider other evidence only to help you understand and weigh the testimony of the witnesses.

If the witnesses disagreed with one another, you should weigh each opinion against the other[s], based upon the reasons given for each opinion, the facts and other things that each witness relied upon, and each witnesses' qualifications.

Your verdict must be within the range of [fair market](#) values offered by the witnesses.

**References**

UDOT v. Jones, 694 P.2d 1031 (Utah 1984).

Utah State Rd. Comm'n. v. Steele Ranch, 533 P.2d 888 (Utah 1975).

Utah State Rd. Comm'n. v. Hopkins, 506 P.2d 57 (Utah 1973).

Utah State Rd. Comm'n v. Silliman, 448 P.2d 347 (Utah 1968).

Utah State Rd. Comm'n. v. Taggart, 430 P.2d 167 (Utah 1967).

Weber Basin Water Conserv. Dist. v. Skeen, 328 P.2d 730 (Utah 1958).

**Committee Notes**

The bracketed part of the instruction relating to severance damages should be given only in partial taking cases in which severance damages are in issue.

[Approved](#)

**(9) CV1609. Owner testifying.**

[Name of property owner] has given [his] opinion of the fair market value of the property. In weighing this opinion, you may consider [name of property owner]'s self-interest, familiarity with the property, and experience and qualifications to testify about fair market value.

**References**

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Utah State Rd. Comm'n v. Steele Ranch, 533 P.2d 888 (Utah 1975).

Williams v. Oldroyd, 581 P.2d 561 (Utah 1978).

Utah State Rd. Comm'n v. Johnson, 550 P.2d 216 (Utah 1976).

**Committee Notes**

This instruction should be given if the Court determines there is a proper foundation for owner testimony as to value or highest and best use. See, e.g., UDOT v. Jones, 649 P.2d 1031 (Utah 1984); Utah State Road Comm'n v. Johnson, 550 P.2d 216 (Utah 1976).

**MUJI 1**

16.2

**(10) CV1610. Viewing of property.**

You may consider your viewing of the property only to help you evaluate the evidence you have seen and heard in the courtroom. Your viewing of the property is not itself evidence, and you may use it only to help you gain a better understanding of the testimony.

**References**

Weber Basin Water Conservancy Dist. v. Moore, 272 P.2d 176 (Utah 1954).

**MUJI 1**

16.18

**(11) CV1611. Project influence.**

In determining the fair market value of the property, you must disregard any increase or decrease in value before [valuation date] caused by [describe public improvement] or by the likelihood that the property would be acquired for [describe public improvement.]

**References**

Utah Code Section 57-12-13(3).

Board of County Comm'rs of Tooele County v. Ferrebee, 844 P.2d 308 (Utah 1992).

Redevelopment Agency v. Grutter, 734 P.2d 434 (Utah 1986).

United States v. Reynolds, 397 U.S. 14 (1970).

**Committee Notes**

This instruction should be given when any increase or decrease in value before the taking is caused by the public improvement for which the property is being condemned, is in issue. The instruction should be modified, or an additional instruction given, when an increase or decrease in property value is outside the original "scope of the project," see generally, Redevelopment Agency v. Grutter, 734 P.2d 434 (Utah 1986), United States v. Reynolds, 397 U.S. 14 (1970).

**(12) CV1612. Value of undeveloped land.**

In determining the fair market value of the property, you may consider whether the property is suitable for development or subdivision, but you must not value the property as if the property had been developed or subdivided.

**References**

State v. Tedesco, 4 Utah 2d 248, 291 P.2d 1028 (1956).

**Committee Notes**

This instruction should be given when the property taken is undeveloped land, suitable for development, but no tangible steps have been taken for development. The propriety of the instruction, and the precise wording of the instruction, may vary when certain steps or actions have been taken to subdivide the property, but subdivision has not been completed. See generally, 4 Nichols on Eminent Domain § 12B.14.

**(13) CV1613. Value of improved property.**

In determining the fair market value of the property, you must value the land and the improvements as a whole. You must not value the land and improvements separately and then add them together. You may consider the value of the improvements to the extent that they enhance the value of the property as a whole.

**References**

Utah State Rd. Comm'n v. Brown, 531 P.2d 1294 (Utah 1975).

Utah State Rd. Comm'n v. Papanikolas, 427 P.2d 749 (Utah 1967).

**Committee Notes**

This instruction should be given when the condemned property is improved.

This instruction may be modified, or an additional instruction given, in a partial taking action, when the loss of improvements is claimed as severance damage.

**(14) CV1614. Business injury or loss of profits.**

Alternative 1:

In determining the fair market value of the property, you must disregard any loss of income or profits to the [describe business conducted on the property] caused by the taking. The business is not part of the property, and any loss of business income or profit does not affect the fair market value of the property.

Alternative 2:

One or more of the witnesses has testified to the fair market value of the property using the [describe income approach to value, or capitalized income valuation method]. You may consider this testimony in determining the fair market value of the property. You may not, however, award [name of property owner] a [separate] amount for loss of income or profits to the [business conducted on the property] caused by the taking. The business is not part of the property, and any loss of business income or profit does not affect the fair market value of the property.

**References**

Utah State Rd. Comm'n. v. Ouzonnian, 491 P.2d 1093 (Utah 1971).

State v. Noble, 305 P.2d 495 (Utah 1957).

State v. Tedesco, 291 P.2d 1028 (Utah 1956).

**Committee Notes**

The Committee believes that these alternative instructions should be given to avoid any confusion when an appraiser determines the fair market value of property by capitalizing income. Alternative 1 should be given when no witness capitalizes income on the property to determine fair market value; Alternative 2 should be given when one or more witnesses capitalize income.

**(15) CV1615. Interest and moving expenses.**

In determining just compensation you must disregard any amount for interest, moving expenses or costs of these proceedings. These amounts will be determined separately by me according to the law.

**References**

Utah Code Section 78B-6-510(5).

State Road Comm'n v. Brown, 531 P.2d 1294 (Utah 1975).

Redevelopment Agency v. Barrutia, 526 P.2d 47 (Utah 1974).

**MUJI 1**

16.12

**(16) CV1616. Severance damages.**

[Name of condemnor] has taken only part of [name of property owner]'s property. In addition to determining the fair market value of the property taken, you must determine whether there have been any severance damages to the remaining property. Severance damages means any loss of fair market value to the remaining property caused by the taking [or by the proposed construction of [describe public improvement] on the property taken].

The measure of severance damages is the difference between the fair market value of the remaining property before the taking, as part of the entire property, and the fair market value of the remaining property after the taking.

Severance damages must be reasonably certain and not remote or speculative.

**References**

Utah Code Section 78B-6-511(2).

Ivers v. UDOT, 2007 UT 19, 154 P.3d 802.

UDOT v. Harvey Real Estate, 2002 UT 107, 57 P.3d 1088.

City of Hildale v. Cooke, 28 P.3d 697, 2001 UT 56.

Carpet Barn v. State, 786 P.2d 770 (Utah 1990).

UDOT v. D'Ambrosio, 743 P.2d 1220 (Utah 1987).

State v. Williams, 22 Utah 2d 301, 452 P.2d 548 (Utah 1969).

### **Committee Notes**

This instruction should be given only if (1) there is a partial taking and (2) the property owner claims severance damages to the remaining property.

Ordinarily, construction has been completed before trial, and the jury considers whether the public improvement as constructed causes severance damage. The word “proposed” in brackets should be included in the instruction in the trial when construction has yet to be completed. **started?**

Ordinarily, there is no difference between the amount of severance damages caused by the taking or caused by construction of the improvement. The bracketed part of the instruction should be given in the instance in which there are claimed severance damages caused by construction in addition to those caused by the taking.

This instruction should be modified, or an additional instruction given, if a property owner alleges severance damages caused by construction of the public improvement outside the owner’s condemned property. In *Ivers v. UDOT*, 2007 UT 19, 154 P.3d 802, the Utah Supreme Court held that a property owner could recover severance damages for loss of view caused by construction of the improvement outside the owner’s condemned property if “the condemnation and use of the condemned land is essential to the project.” 2007 UT 19, ¶ 22. The Committee is uncertain as to whether *Ivers* applies to any alleged severance damages other than loss of view, and therefore believes that any instruction for severance damages caused by construction of the improvement outside the owner’s property should be tailored to the facts and circumstances of a particular case.

As appropriate, this instruction may be modified, or an additional instruction given, to clarify that an owner is not entitled to severance damages from a non-compensable loss, such as a loss of visibility from the public highway. See, e.g., *Ivers*, supra, ¶ 15.

### **(17) CV1617. Access.**

[Name of condemnor] may regulate access to and from the public roads to promote the general welfare, but must provide [name of property owner] with reasonable access to [his] property. Access may be reasonable even though it is not the most direct or convenient access. The right of reasonable access does not include a right to access at a specific location on the property, or from a specific road or intersection, or in a specific direction.

If you find that [name of property owner] does not have reasonable access to [his] remaining property after the taking, then you must consider this change in access in determining severance damages. If you find that [name of property owner] has reasonable access after the taking, then you must disregard this change in access in determining severance damages.

### **References**

Utah Code Section 72-7-103.

State v. Harvey Real Estate, 2002 UT 107, 57 P.3d 1088.

State Rd. Comm'n. v. Utah Sand & Gravel, 454 P.2d 292 (Utah 1969).

State Rd. Comm'n., v. Utah Sugar Co., 22 Utah 2d 77, 448 P.2d 901 (Utah 1968).

Hampton v. State, 445 P.2d 708 (Utah 1968).

Utah Road Comm'n v. Hansen, 14 Utah 2d 305, 383 P.2d 917 (Utah 1963).

Springville Banking Co. v. Burton, 349 P.2d 157 (Utah 1960).

### **Committee Notes**

This instruction should be given only when a property owner claims that a partial taking has deprived the owner of reasonable access to the remaining property after the taking, when the access was derived from the fact that the property abutted a public street or right of way. This instruction should be modified when a specific easement, access point, or right of way has been taken or closed in connection with a partial taking. For example, if a property owner has a legally established access point, right of way, or easement, derived from a contract, deed, or prior governmental grant, that access point would be a property right and the taking of that access point must be considered in determining severance damages, whether or not the owner still had reasonable access without the access point. See generally, Hampton v. State, 445 P.2d 708 (Utah 1968).

### **(18) CV1618. Special benefits.**

If you find that the taking caused severance damages, then you must determine whether the taking and the construction of [describe public improvement] create a special benefit that increases the fair market value of the remaining property.

A benefit is special if it results directly from the taking or the [proposed] construction of the [describe public improvement] on the property taken, and is not shared by the general public.

Special benefits must be reasonably certain and not remote or speculative.

If you find that special benefits have increased the fair market value of the remaining property, you must subtract the amount of that benefit from any severance damages to the remaining property. If the special benefits are greater than the severance damages, then you must find that there are no severance damages. You cannot subtract the amount of any special benefit from the fair market value of the property taken.

### **References**

Utah Code Section 78B-6-511(4).

Hempstead v. Salt Lake City, 32 Utah 261, 90 P. 397 (Utah 1907).

Kimball v. Salt Lake City, 32 Utah 253, 90 P. 395 (Utah 1907).

### **Committee Notes**

This instruction should be given only if (1) there is a partial taking, (2) the property owner claims severance damages, and (3) the condemnor claims that the taking has created a special benefit to the remaining property.

Ordinarily, construction has been completed before trial, and the jury considers whether the public improvement as constructed creates special benefits. The word "proposed" in brackets should be included in the instruction in the rare trial when construction has yet to be completed **started?**

**(19) CV1619. Apportionment of just compensation among multiple interests.**

The [identify property owner, lessee, easement owner and any other interest holder] all have an interest in the property, and are entitled to just compensation for the taking of their interest.

First you must determine the fair market value of the property taken [and severance damages to the remaining property, if any,]. Then you must divide that amount between/among the [property owner, tenant, easement owner and any other interest holder], according to the interest of each. The total amount of the compensation cannot be more than the fair market value of the property taken, [and severance damages to the remaining property, if any,] as a whole.

**References**

Utah State Rd. Comm'n. v. Brown, 531 P.2d 1294 (Utah 1975).

**Committee Notes**

To be given when there are multiple defendants.

**(20) CV1620. Apportionment of just compensation between owner and tenant.**

To apportion the total amount of just compensation between the [name of property owner] and [name of lessee], you must determine the "bonus value" of [name of lessee]'s lease, if any. Bonus value is the difference between:

(1) the present value of the total rental payments that [name of lessee] would have paid under [identify rental agreement] from [insert date], the date that [name of lessee] lost possession of the premises, until [insert date], when the [identify rental agreement] would have ended; and

(2) the present value of the fair market rent for the premises from [insert date], the date that [name of lessee] lost possession of the premises, until [insert date], when the [identify rental agreement] would have ended.

Fair market rent is the amount that a willing and informed tenant would pay to rent the property for that period between [insert dates for loss of possession and end of lease], and that a willing and informed owner would accept, on the open market.

If the present value of the rental payments that [name of lessee] would have paid between [insert dates for loss of possession and end of lease term] is less than the present value of the total fair market rent during that period, the difference is the bonus value of the lease. [Name of Lessee] is entitled to the bonus value as just compensation for the taking of its lease. [Name of property owner] is entitled to any remaining balance.

If [name of lessee]'s lease has no bonus value, then [name of lessee] is not entitled to any amount of just compensation, and the owner is entitled to the entire amount of just compensation.

### References

Utah State Rd. Comm'n. v. Brown, 531 P.2d 1294 (Utah 1975).

### Committee Notes

This instruction should be given after [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=16#1619](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=16#1619)>Instruction CV1619</a>, Apportionment of just compensation among multiple interests.

This instruction does not contemplate that the jury will itself undertake the appraisal of the leasehold by computing its value. Rather, the instruction is intended to guide the jury in assessing and utilizing expert testimony on the issue of leasehold valuation. The purpose of this instruction is therefore similar in purpose to the instruction on just compensation.

Many lease agreements contain provisions addressing the apportionment of compensation in the event of condemnation. This instruction would be appropriate only if the lessee's right to condemnation compensation is not governed by the lease or other agreement.

**Subcommittee will try to rework this instruction.**

# Tab 3

## Notes on Special Verdict Forms

I am using “negligence” instead of “fault” because fault is already defined to include causation in CV 201 (“Fault means any wrongful act or failure to act that causes harm to the person seeking recovery. The wrongful act or failure to act alleged in this case is [negligence, etc.]”). Does that mess things up?

We need to continue to try to prevent the "net verdict" in comparative fault cases by advising the jury not to themselves make the deduction for any percentage of fault. See, Bishop v. GenTec, 2002 UT 36; 48 P.3d 218; Haase v. Ashley Valley Med. Center, 2003 UT App. 260 (unpublished op.). We’ve done this in CV 211, we’ve done it in the med-mal special verdict form, and we should continue to do so in the negligence special verdict form as well.

As in the med-mal special verdict, special damages need to be itemized in the negligence special verdict forms, for several reasons:

First, in medical malpractice actions § 78-14- 4.5 requires the court to make deductions from past medical expenses for those previously paid by collateral sources. This cannot be done unless the amount of past medical expenses is specifically determined by the jury.

Second, liens and reimbursement claims are usual nowadays. An unspecified award of special damages gives no guidance to lien claimants on whether the lien attaches– did the jury award special damages for medical expenses, for lost wages, or for something else, or all of them? If so, in what amounts?

Third, a judge cannot feasibly assess prejudgment interest on past special damages if there is no distinction made in the special verdict between past and future special damages.

Finally, amounts may be awarded for special damages that are not supported by the evidence, and specificity in the special verdict allows the court the opportunity to correct such miscalculations or improper awards.

FJC

**Special Verdict - One Defendant (No Comparative Fault)**

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the evidence favors the issue by a preponderance, answer “Yes.” If you find that the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the greater weight of evidence is against the issue, answer “No.”

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and then advise the bailiff.

(1) Was [name of defendant] negligent? (Check one.)

Yes \_\_\_\_\_ No \_\_\_\_\_

*(If you answer “Yes,” please answer Question 2. If you answer “No,” stop here, and sign and return this verdict.)*

(2) Was this negligence a cause of [name of plaintiff]’s harm? (Check one.)

Yes \_\_\_\_\_ No \_\_\_\_\_

*(If you answer Yes,” please answer question 3. If you answer “No,” stop here, and sign and return this verdict.)*

(3) What amount do you find would fairly compensate [name of plaintiff] for [his] harm?  
*(Only answer this if you checked “yes” on both Questions 1 and 2.)*

**(a) Economic Damages:**

(1) Past Medical Expenses \$ \_\_\_\_\_

(2) Future Medical Expenses: \$ \_\_\_\_\_

(3) Past Lost Wages: \$ \_\_\_\_\_

(4) Future Lost Wages: \$ \_\_\_\_\_

(5) Other Economic Damages: \$ \_\_\_\_\_

**(b) Noneconomic Damages:** \$ \_\_\_\_\_

**Total Damages:** \$ \_\_\_\_\_

*(When you have completed this verdict, please have your foreperson date and sign it, and advise the bailiff that you have reached a verdict.)*

\_\_\_\_\_

Date

Jury Foreperson

\_\_\_\_\_

## Special Verdict - One Defendant (Comparative Fault)

### MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the evidence favors the issue by a preponderance, answer "Yes." If you find that the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the greater weight of the evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and then advise the bailiff.

(1) Was [name of defendant] negligent? (Check one.)

Yes\_\_\_\_\_ No\_\_\_\_\_

*(If you answer "Yes," please answer Question 2. If you answer "No," stop here, and sign and return this verdict.)*

(2) Was this negligence a cause of harm to [name of plaintiff]? (Check one.)

Yes\_\_\_\_\_ No\_\_\_\_\_

*(If you answer "Yes," please answer question 3. If you answer "No," stop here, and sign and return this verdict.)*

(3) Was [name of plaintiff] also negligent as alleged by defendant? (Check one.)

Yes\_\_\_\_\_ No\_\_\_\_\_

*(If you answer "Yes," please answer Question 4. If you answer "No," please skip Questions 4 and 5 and go on to Question 6.)*

(4) Was [name of plaintiff]'s negligence a cause of his own harm?

Yes\_\_\_\_\_ No\_\_\_\_\_

*(If you answered Question 4 "Yes," please answer Question 5. If you answered Question 4 "No," please skip Question 5 and go on to Question 6.)*

(5) Assuming all the negligence that caused plaintiff's harm totals 100%, what percentage of that fault is attributable to:

[Name of Defendant]: \_\_\_\_\_ %

[Name of Plaintiff]: \_\_\_\_\_ %

Total: 100 %

*(Please answer Question 6 if you checked "yes" on both Questions 1 and 2. Do **not** make a deduction from damages for any percentage of fault that you have assessed to plaintiff. The judge will make any necessary deductions later.)*

(6) What amount do you find would fairly compensate [name of plaintiff] for [his] harm?

**(a) Economic Damages:**

(1) Past Medical Expenses \$\_\_\_\_\_

(2) Future Medical Expenses: \$\_\_\_\_\_

(3) Past Lost Wages: \$\_\_\_\_\_

(4) Future Lost Wages: \$\_\_\_\_\_

(5) Other Economic Damages: \$\_\_\_\_\_

**(b) Noneconomic Damages:** \$\_\_\_\_\_

**Total Damages:** \$\_\_\_\_\_

*(When you have completed this verdict, please have your foreperson date and sign it, and advise the bailiff that you have reached a verdict.)*

\_\_\_\_\_

Date

Jury Foreperson

# Tab 4

CV202B "Gross Negligence" defined.

You must decide whether [names of persons on the verdict form] were grossly negligent. Gross negligence means a failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.

References

Daniels v. Gamma West, 2009 UT 66, ¶43

Atkin Wright & Miles v. Mountain State Tel. & Tel. Co., 709 P.2d 330, 335 (Utah 1985)