

# AGRICULTURAL RURAL TAKINGS: WHEN GOVERNMENT BUYS THE FARM

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## ABSTRACT

*Though highway construction has decreased since the 1960s, eminent domain takings still occur in rural areas and greatly impact individuals and families who face eminent domain takings today. Looking to theories on just compensation in urban settings can differentiate the circumstances and needs of people living on urban and agricultural lands. Some states, like Wisconsin, have addressed this issue with specific legislation, while others struggle with balancing the need for development and the rights of rural landowners. Because rural landowners have more diffuse political power, they can be more easily overlooked than their urban counterparts. In addition, farmers have a unique and specialized understanding of their farms, and replacement land may not adequately compensate these owners for their monetary and non-monetary loss. Wisconsin's Agricultural Impact Statements provide a useful tool for addressing the specific concerns of rural landowners.*

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## I. INTRODUCTION

The United States Constitution grants our government the ability to seize private land for public use.<sup>1</sup> This eminent domain power has been championed in instances of urban renewal, scrutinized on what exactly qualifies as public use, and criticized for taking private land for private gain.<sup>2</sup> Most scholarship in the last fifty years focuses on takings in urban settings. However, rural takings have not been equally or adequately scrutinized in legal literature. Rural property owners, particularly those who use the land for agriculture, have a dependence on their land that is not captured by traditional fair market valuations. Not only do these owners rely on their land for income, but they may also have a more difficult time replacing taken property with a comparable living situation. In addition, rural landowners are presented with the issue of diffuse political power and therefore have a more limited ability to oppose government takings than communities in urban settings. Thus, it is important to evaluate how eminent domain takings impact people in rural settings and how states respond to and regulate these takings.

While scholars studied rural takings in the 1950s and 1960s—when the United States undertook massive interstate and highway construction—rural takings have not been meaningfully evaluated since. Instead, the majority of current scholarship focuses on takings that displace people within cities for economic development purposes. It is true that many takings in rural settings—mostly for roads—result in an undoubted benefit to the public.<sup>3</sup> Indeed, the modern highway and interstate system is one of the greatest accomplishments of modern technology.<sup>4</sup> That said, with high value should also come high reward (or at least

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1. See U.S. CONST. amend. V.

2. See WILLIAM J. COLLINS & KATHARINE L. SHESTER, NAT'L BUREAU OF ECON. RESEARCH, NBER WORKING PAPER SERIES: SLUM CLEARANCE AND URBAN RENEWAL IN THE UNITED STATES 2-3 (Sept. 2011), <https://perma.cc/5HLU-N8EK> (analyzing urban renewal for all cities with more than 25,000 people between 1950 and 1980. With acknowledged limitations, the authors conclude that cities that were less constrained in urban renewal participation had on average larger increases in property values, income and population than similar sized cities with more constraints on urban renewal programs). See also *Kelo v. City of New London*, 545 U.S. 469, 477-79 (2005); *Berman v. Parker*, 348 U.S. 26, 33-34 (1954).

3. See Nicea Bates, *Just Compensation or Just Plain Unfair: The Effect of Eminent Domain on California Dairy Farmers*, 20 SAN JOAQUIN AGRIC. L. REV. 59, 60 (2011) (arguing roads were considered a quintessential public good).

4. See OWEN D. GUTFREUND, TWENTIETH-CENTURY SPRAWL 57 (2004). On the economic impact of the new interstate system, Gutfreund said it “created new sources of highway revenues and handed out these funds to the states on an unprecedented scale.” In addition, Theodore Keller and John Ting explore the economic benefit of the highway system through the trucking industry, concluding that the benefits to the trucking industry

adequate compensation) to those who pay the price for it—even more so than the taxpayers. If we value the *need* for these takings, we should be prepared to give voice to and fully compensate those who are burdened with providing the land for such valuable outcomes.

By examining the effects of both urban and rural eminent domain takings, we can better understand the differences and unique circumstances rural residents face in eminent domain proceedings. Several states address rural takings, though all in different ways. Standing out in modern efforts to understand rural land takings are Wisconsin's Agricultural Impact Statements (AISs). AISs include comments from landowners on how takings will affect them personally, giving rural landowners a voice in the proceedings.<sup>5</sup>

Overall, rural takings are unique because of the subjective valuation of farmland and difficulty of replacing it, as well as diffuse political power of people in rural areas. To remedy these issues, I suggest changes in the current compensation structures. In addition, more states should consider legislating AISs, similar to Wisconsin, in order to give rural landowners a voice in eminent domain proceedings.

## II. BACKGROUND

The Fifth Amendment of the Constitution states citizens should not be deprived of property without due process of law or just compensation.<sup>6</sup> In addition, most state constitutions require state governments to provide just compensation for governmental takings, which usually consists of a fair market value calculation.<sup>7</sup> In reality, fair market value is not the sole compensation a homeowner is entitled to receive. Federal and state statutes mandate additional compensation for relocation expenses.<sup>8</sup> The Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (Uniform Act) requires takers to ensure owners can find replacement housing before taking possession of the land.<sup>9</sup> Moreover, the Uniform

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alone justify between one-third and one-half of the cost of the federal highway system. Theodore E. Keeler & John S. Ying, *Measuring the Benefits of a Large Public Investment*, 36 J. PUB. ECON. 69, 81-82 (1988).

5. This paper analyzes all AISs published in Wisconsin from January 2008 to February 2016. Landowner comments from these statements are used throughout the paper.

6. U.S. CONST. amend. V.

7. *Just Compensation in Eminent Domain*, BIERSDORF & ASSOCS., <https://perma.cc/4JTC-4FCC> (archived Jan. 27, 2020).

8. 42 U.S.C. § 4622 (2018).

9. 42 U.S.C. § 4630 (2018).

Act requires takers to provide for actual moving, mortgage, and closing costs.<sup>10</sup> For businesses, the Uniform Act provides up to an additional \$25,000 for “reestablishment expenses.”<sup>11</sup> States often provide additional compensation to help uprooted owners adapt.<sup>12</sup> For example, Wisconsin provides additional compensation for relocation costs.<sup>13</sup>

The relatively recent Supreme Court case *Kelo v. City of New London* in 2005 triggered new eminent domain legislation across the nation.<sup>14</sup> *Kelo* granted the City of New London the ability to condemn private homes for economic development, resulting in a gain for a private corporation.<sup>15</sup> The *Kelo* decision had a disapproval rating of 80%-90% nationally.<sup>16</sup> Disapproval crossed all party lines, income levels, gender, age, race, and education levels.<sup>17</sup> After *Kelo*, most states passed laws making it more difficult for governments to take land under eminent domain power.<sup>18</sup> For example, Colorado passed legislation that required “clear and convincing evidence” in order to designate land “blighted” for eminent domain purposes,<sup>19</sup> and Florida passed a law requiring localities to wait ten years before transferring land taken through eminent domain power.<sup>20</sup>

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10. § 4622.

11. *Id.* at (a)(4); see Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121-22 (2006) (showing a \$10,000 payment limit which was increased to \$25,000 in 2012).

12. Garnett, *supra* note 11, at 123.

13. WIS. STAT. § 32.19(3) (2019); DEP’T OF ADMIN., WISCONSIN RELOCATION RIGHTS 3 (Sept. 2017), <https://perma.cc/QU5V-C2D5>; see *supra* Section II(C).

14. *Kelo v. City of New London*, 545 U.S. 469 (2005); see INST. OF JUSTICE, FIVE YEARS AFTER KELO 3 (2010), <https://perma.cc/RGY6-UZJ4> [hereinafter FIVE YEARS AFTER KELO]; INST. OF JUSTICE, 50 STATE REPORT CARD 1 (2007), <https://perma.cc/9NGW-SMXX> [hereinafter 50 STATE REPORT CARD].

15. *Kelo*, 545 U.S. at 489.

16. Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 720 (2008).

17. *Id.*

18. 50 STATE REPORT CARD, *supra* note 14, at 3 (tracking reform since the controversial Supreme Court decision in *Kelo v. City of New London*, including changing the definitions of “public use” and changes in compensation levels for takings).

19. COLO. REV. STAT. § 38-1-101(2)(b) (2019).

20. FLA. STAT. § 73.013(1)(f) (2019).

Compensation structures for eminent domain takings vary by state, though few empirical studies of compensation have been carried out.<sup>21</sup> Current scholarship evaluates eminent domain power almost exclusively in urban settings. For example, Nicole Garnett examines takings in Chicago, Illinois and South Bend, Indiana to determine that current compensation structures overcompensate for government takings.<sup>22</sup> In addition, Yun-chien Chang examines current compensation levels for eminent domain takings in New York City.<sup>23</sup> While both studies assess compensation structures, they neglect to address issues that are specific to rural takings. It is true that the controversy over eminent domain in the last decade has revolved around urban economic development takings and blight issues in cities.<sup>24</sup> However, the government still utilizes its takings power to confiscate rural land for projects like transmission lines or road expansion, which greatly affect targeted rural landowners and business operators.

#### A. Urban Takings

Nicole Garnett argues that despite the common assumption that eminent domain undercompensates people, as a practical matter, three factors at work in eminent domain minimize undercompensation.<sup>25</sup> First, takers who condemn land, whether the government or a party the government grants condemning authority, avoid subjectively high value properties.<sup>26</sup> Secondly, takers frequently pay for costs beyond fair market value, such as relocation assistance.<sup>27</sup> Finally, takers and property owners bargain and may settle on above-market prices, especially when the taker is concerned about the timing of a project.<sup>28</sup>

Pushback in the form of political opposition can be especially effective at slowing down or changing an eminent domain project—as was the case in Chicago in the 1950s.<sup>29</sup> Urban renewal plans in Chicago called for expressways. While initially supportive, the Catholic community in Chicago ended up opposing any

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21. See Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990–2002*, 39 J. LEGAL STUD. 201, 201-02 (2010) (discussing the four studies to date and their limitations).

22. See Garnett, *supra* note 11, at 112.

23. Chang, *supra* note 21, at 203.

24. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 472 (2005); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981).

25. See Garnett, *supra* note 11, at 101.

26. See *id.* at 118.

27. See *id.* at 121.

28. See *id.* at 130.

29. See *id.* at 112.

plans that would divide or destroy their neighborhoods and parishes.<sup>30</sup> Ultimately, expressways were rerouted several times, with then-Governor William Stratton claiming credit for personally accommodating the church.<sup>31</sup> Political processes have been pointed to as a way to temper and police the exercise of eminent domain.<sup>32</sup> However, political power in rural settings is more diffused and a less likely to be a useful tool for landowners. If a project only affects a small number of rural owners, these owners will likely not gain the necessary political momentum to stop the project. This differs from urban settings, where even a small project may affect a large number of closely located neighbors.

One study conducted in 1995 by the United States Department of Transportation, found 90% of the surveyed homeowners were able to significantly upgrade their housing after their home was taken.<sup>33</sup> However, business owners might not face as favorable of an outcome as residential homeowners because of the high costs of relocation unique to businesses and the lost goodwill from a loyal customer base.<sup>34</sup> Two government surveys found businesses were nearly universally undercompensated.<sup>35</sup> Agricultural takings are more akin to businesses than the “overcompensated” residential takings Garnett described. Not only do farmers work their land and live off the income (or rent their land and live off the income), they may also have a difficult time relocating. In addition, “lost goodwill” is akin to the relationships rural landowners develop with neighbors and business partners in the area.<sup>36</sup> Every farm is unique, and the particular knowledge one gains from living on and working certain land is difficult, if not impossible, to replicate.

In addition, Yun-chien Chang examined condemnation in New York City between 1990 and 2002.<sup>37</sup> Chang compared the fair market value of each property to its condemnation compensation.<sup>38</sup> Over the course of these twelve years, New York paid \$17,311,176 for eighty-nine condemned properties.<sup>39</sup> Chang calculated these properties to be worth \$21,173,198.<sup>40</sup> The study showed that 7% of the condemnees received fair market value, 40% received more than fair market value,

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30. *See id.*

31. *See id.* at 114.

32. *See id.* at 115.

33. *See id.* at 124.

34. *See id.* at 106.

35. *See id.* at 125.

36. For example, crop purchasers and negotiators, equipment and seed salespersons, and individuals that lease land.

37. Chang, *supra* note 21, at 203.

38. *Id.* at 203-04.

39. *Id.* at 204.

40. *Id.*

and 53% received less than fair market value.<sup>41</sup> Interestingly, 40% received extreme compensation—either less than 50% or more than 150% of fair market value.<sup>42</sup> Chang did not find definitive evidence or support for the over or undercompensation of individuals based on blight, tax default history, location, size, title-vesting year and month, owner type, length of settlement time, or public use after takings.<sup>43</sup> The lack of support for any correlation between these factors further complicates our understanding of fairness in the compensation disparity. Additional research is needed to determine if other factors, such as education level or income of the owner, correlate strongly with over or under-compensation.

Chang posits potential theories for wide variation in compensation. First, he presents a fiscal illusion theory; government officials aim to minimize expenses and do so whenever possible, thereby lowering offers.<sup>44</sup> However, this fails to explain over compensation, and the data does not supply a pattern to support this theory. Secondly, the political interest theory hypothesizes that government officials care about political costs and benefits.<sup>45</sup> Chang finds this theory plausible, but not empirically supported due to the inability to identify political interest as the main driver of variation in compensation.<sup>46</sup> Ultimately, Chang finds the most plausible explanation is homeowners may not be aware of the market value of their home, so they might settle for far less than fair market value.<sup>47</sup> Coupled with the political interest theory, this provides a likely picture of why compensation levels vary so widely.<sup>48</sup> These theories can be extended to rural takings, where people are just as likely to inaccurately value their land.

While the previous factors influence compensation in urban takings, rural projects often present a different set of challenges. Many times, a government entity has a limited set of choices to serve the interest at hand, whereas urban development may be more flexible. There are only so many routes a transmission line can take to serve a rural area; whereas development for a manufacturing facility (as was the issue in the South Bend, Indiana) is not necessarily limited to one area.<sup>49</sup> In addition, rural landowners' and farmers' valuation of their land may

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41. *Id.* at 204.

42. *Id.*

43. *Id.* at 205.

44. *Id.* at 210.

45. *Id.* at 239.

46. *Id.* at 238-39; see generally William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929 (2004).

47. Chang, *supra* note 21, at 239.

48. See *id.*

49. Garnett, *supra* note 11, at 130-36.

not be captured by current calculations of fair market valuation or relocation costs.<sup>50</sup> Finally, the timing issue of slowing down a project is one of political pushback, an option less available to rural residents than to urban neighbors.

### *B. Rural Takings*

Throughout the beginning of the 20th century, urban renewal and population expansion called for the construction and expansion of a national highway system. Many of these thousands of new roads, particularly those constructed as interstates or limited access highways, were constructed in rural areas. Construction in rural areas was key because avoiding cities and towns allows for travel from point A to point B with minimal disruption and congestion.<sup>51</sup> Moreover, these high-speed roads required few access points to maintain high speed limits. Therefore, even if a farmer would benefit from a high-speed road being constructed on his or her farm, he or she might not be able to access the road conveniently.<sup>52</sup>

Compensation for these rural takings in the early 1940s was determined by market value, defined as the “price which would be determined in negotiations between a seller who is willing but not obligated to sell and a buyer who is willing but not obligated to buy.”<sup>53</sup> However, compensation based on market value failed to capture some nontrivial but subjective values that owners place on their land. Such valuations were deemed overly speculative, a personal loss instead of a property loss, or not different from what the public lost generally.<sup>54</sup> For example, if a farmer complained of a loss from his or her sentimental attachment to a farm that had been in the family for generations, the court would rule such a claim to be too speculative.<sup>55</sup> Thus, landowners with particularly strong attachment to their land were undercompensated during this time of mass road construction. Overall,

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50. See *supra* Section II(C).

51. See Note, *Eminent Domain: Compensation for Partial Taking of Farm Land in Constructing Limited-Access Highways*, 42 MINN. L. REV. 106, 106 (1957).

52. *Id.*

53. *Id.* at 107-08; see, e.g., *United States v. Miller*, 317 U.S. 369, 374-75 (1943); *La. Highway Comm’n v. Paciera*, 18 So.2d 193, 194 (La. 1944); *In re City of Rochester*, 255 N.Y.S. 801, 807 (App. Div. 1932).

54. Note, *supra* note 51, at 108-09.

55. *Id.* (discussing that for goodwill and future profits, almost all courts have found these damages to be too remote and speculative to be compensable). Moreover, depreciated rental value and the cost of obtaining substitute land were both determined to not constitute valid measures of value. As courts formulated “fair market” compensation in the mid-20th century, they moved closer to what they believed would be an impartial valuation.



courts worried that compensating for these types of injuries would make the public highway system too expensive.<sup>56</sup>

The United States Department of Transportation conducted a survey of highway condemnation and litigation from 1946 to 1961.<sup>57</sup> The study looked at contested takings cases for highway land and whether the increase in contested cases related to increased compensation. The study analyzed court opinions for highway condemnation takings and compared them to non-highway takings cases. In addition, the study tackles issues of the power to condemn, valuation, compensability, and procedure. This study provides a snapshot of the approaches and issues at the time of mass highway expansion in rural areas. Thus, the following results are relevant today for similar projects, even if on a smaller scale.

In total 1,890 condemnation cases were analyzed.<sup>58</sup> Of those cases, 13% contained issues relating to the power to condemn, 40% involved procedural issues, and 67% dealt with just compensation.<sup>59</sup> Overall, landowners won in 35% of the cases, while condemners succeeded in 45%.<sup>60</sup> In addition, this study reviewed a sample of about 200 appraisal files in Wisconsin to determine whether there were factors in the appraisal, negotiation, or nature of the takings that lead to condemnation over voluntary transfer.<sup>61</sup> Similar to Yun-chien Chang's study in New York City, no conclusions could be drawn from the collected data.<sup>62</sup> This

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56. *Id.* at 109.

57. U.S. DEP'T OF TRANSP., HIGHWAY CONDEMNATION LAW AND LITIGATION IN THE UNITED STATES 1 (vol. 1 1968).

58. *Id.*

59. *Id.* at 3. The United States Department of Transportation's study concluded that the public use requirement was not a significant source of contestation in highway condemnation cases. In fact, only 26 of the 1,890 (1.4%) cases studied in the report raised public use issues. *Id.* at 13. Only slightly more common was the issue of necessity, which was raised in 4.4% of cases studied. *See id.* Finally, 4.7% of cases involved issues of the condemner's statutory authority to proceed with condemnation. *See id.* at 14. Compensability, on the other hand, was at issue in 596 cases studied in the 1968 report, comprising 31.5% of all cases appealed. *See id.* at 3. Access issues—when a landowner's access to the general highway system is impaired or interfered with—arose in only 9% of cases. *See id.* at 5. Interestingly, when new highways were constructed, courts universally held that the landowner whose land was taken did not have the right to claim accessibility loss because the road did not exist before the taking. *Id.* at 23. The study included consequential damage compensability for several categories: goodwill and future profits, temporary loss of business or access during construction, moving expenses, costs of litigation, interest on the award or judgment, expenses after condemnation, loss of past expenditures, and personal inconvenience. *Id.* at 26-28.

60. *See id.* at 3.

61. *Id.* at 4.

62. *Id.* at 5-6.

further implies that more studies need to be conducted on what factors correlate to different outcomes in takings cases.

Overall, this study captures what eminent domain and takings procedure were like in the United States during a time of massive rural takings for highways. About 50% of all takings cases from 1946 to 1961 were highway takings cases.<sup>63</sup> See the following chart of the breakdown of highway and non-highway condemnation cases across the states:

TABLE 1: HIGHWAY AND NON-HIGHWAY CONDEMNATION CASES FROM 1946-1961 <sup>64</sup>							
State	Hwy	Non-Hwy	Percent Non-Hwy	State	Hwy	Non-Hwy	Percent Non-Hwy
AL	53	35	40%	NE	17	48	74%
AK	0	3	100%	NV	7	6	46%
AZ	21	8	28%	NH	14	7	33%
AR	47	38	45%	NJ	36	64	64%
CA	84	137	62%	NM	12	4	25%
CO	20	30	60%	NY	147	155	51%
CT	13	36	73%	NC	40	53	57%

63. U.S. DEP'T OF TRANSP., *supra* note 57, at 7-8. Also from this massive highway construction era is a study on the different types of compensation for eminent domain takings. In this study, Richard Ratcliff notes that a property owner will feel "treated unfairly unless he [or she] receives promptly an award which he [or she] judges will properly compensate him [or her] for what he [or she] has lost, for costs incident to the takings, for damages to property, if any, which remains in his [or her] hands in a partial taking, and for incidental disturbances and disruptions, physical and psychic." RICHARD U. RATCLIFF, WIS. COMMERCE REPORT, REAL ESTATE VALUATION AND HIGHWAY CONDEMNATION AWARDS 9 (vol. 7 no. 6 June 1966).

He also notes that many public officials believed at the time that landowners were receiving excessive awards and that compensation structures were unduly burdening taxpayers. *Id.* Balancing these interests, he acknowledges the complexity of government takings and identifies categories of economic input that should be evaluated in takings cases: costs, personal inconvenience, loss of income, property taken, damages, and benefits. *Id.* at 11-13. The courts, at this time, consistently ruled that in order to compensate justly, "fair market value" must be used, though no satisfactory definition was yet articulated. *Id.*

64. U.S. DEP'T OF TRANSP., *supra* note 57, at 7-8.

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DE	13	7	35%	ND	14	16	53%
DC	0	10	100%	OH	69	80	54%
FL	63	52	45%	OK	32	67	68%
GA	104	56	35%	OR	30	14	32%
HI	7	14	67%	PA	62	86	58%
ID	13	8	38%	PR	12	27	69%
IL	43	90	68%	RI	8	16	67%
IN	23	30	57%	SC	18	23	56%
IA	40	37	48%	SD	7	4	36%
KS	53	53	50%	TN	41	22	35%
KY	68	83	55%	TX	152	213	58%
LA	111	120	52%	UT	13	25	66%
ME	5	7	58%	VT	10	7	41%
MD	30	21	41%	VA	19	16	46%
MA	36	46	56%	WA	51	49	49%
MI	16	41	72%	WV	16	16	50%
MN	18	43	70%	WI	36	27	43%
MS	62	22	26%	WY	11	3	21%
MO	68	86	56%	<b>Total</b>	<b>1890</b>	<b>2165</b>	<b>53%</b>
MT	5	4	44%				

One recent study of eminent domain in rural settings by Nicea Bates focuses on Californian dairy farms.<sup>65</sup> Due to the nature of large dairy operations, also known as Concentrated Animal Feeding Operations, high concentrations of cows are kept in small areas, increasing the concentration of manure and other pollutants that can contaminate air, water, and soil.<sup>66</sup> In California, strict environmental regulations dictate how much land a farm must have to house a certain number of cows.<sup>67</sup> When part of a dairy farm is taken through eminent domain proceedings, the farmer may lose more than his or her farmable land. He or she may no longer be able to comply with environmental regulations and the farm may be

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65. Bates, *supra* note 3.

66. *See id.* at 63.

67. *See id.* at 65-69.

disproportionately negatively impacted because of the loss of profitability from being able to host fewer cows.<sup>68</sup> As Bates puts it:

[I]t 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.<sup>69</sup>

Bates argues that the specific and constraining environmental regulatory regime in California makes eminent domain takings more costly than is captured by current compensation structures.<sup>70</sup> Because even a small taking can drastically alter the farm's capacity and worth, she claims that the way dairy farms are currently valued fails to reflect the expensive institutional constraints listed above. In the end, she suggests adding severance damages to awards that calculate the "damage the taking has done to the market value of the remainder in the eyes of future dairy purchasers."<sup>71</sup> Wisconsin dairy farmers face similar issues with the ability to spread manure on an appropriately sized piece of land. A 2014 transmission line AIS identifies the impact a loss of land can have on dairy farmers.<sup>72</sup> "Permanent or temporary loss of farmland can cause impacts to a farmer's ability to effectively, efficiently and economically utilize the manure nutrients generated on a livestock farm. Loss of farmland may result in a reduction in the acres available to spread the farm's manure."<sup>73</sup>

Several landowners have expressed concern about the ability to spread manure after a taking in the AISs studied for this paper. Agriculture throughout the United States is highly regulated by both federal and state law. Eminent domain takings on farms thus further complicate and burden farmers' ability to comply with environmental regulations.

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68. *See id.* at 66-67.

69. *See id.* at 69.

70. *Id.*

71. *See id.* at 77.

72. ALICE HALPIN & ROBERT BATTAGLIA, WIS. DEP'T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT 92 (Oct. 28, 2014) (on file with author) [hereinafter BADGER-COULEE 345 KV TRANSMISSION LINE PROJECT].

73. *Id.* (stating farmers should consider a projects impact on their manure nutrient management plans during the transmission line easement negotiations).

### C. Beyond Market Value—Subjective Values of Land

Several scholars have also documented the psychological attachment landowners feel to their land. In the United States in particular, people feel a special attachment to their home and the land they own.<sup>74</sup> Moreover, people invest their identities in their home and see it as an extension of themselves instead of as a mere possession. Loss aversion also comes into play in eminent domain proceedings because people value things more when they personally own them compared to when they do not. Land in particular is a source of great value to many. Property scholar Carol Rose once wrote, “There is just something about land that makes you think that when you own it, it is really, really yours.”<sup>75</sup>

Americans are proud and possessive of home ownership. Americans consider a middle-class suburban home as the “lynchpin and crown jewel of the American Dream.”<sup>76</sup> Homeownership advances many values American society prioritizes: thrift, stability, economic and personal security, and industriousness.<sup>77</sup> Security allows people to invest in their property, especially in rural cases of farming. Farmers will not invest time, money, and a lifetime of work into cultivating their land if they believe it could be taken away at any time.

Building on the importance of ownership, land tenure is also an important factor in productivity and connection to land. For example, on Indian reservations, a complicated land tenure system has dramatically reduced the productivity and development of Indian lands.<sup>78</sup> These different types of trusts, sometimes controlled by the federal government, constrain Indian farmers on how they can use their land, which creates uncertainty when attempting to lease or rent land to other farmers.<sup>79</sup> Therefore, Indian land is underutilized and often sits vacant.<sup>80</sup> Moreover, federally regulated heirship rules complicate the possibility of selling

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74. See SONIA A. HIRT, *ZONED IN THE USA* 123 (2014).

75. Carl M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1143 (1996) (book review).

76. HIRT, *supra* note 74, at 8.

77. Isaac F. Megbolugbe & Peter D. Linneman, *Home Ownership*, 30 URB. STUD. 659, 659-660 (1993) (pointing out three factors that promote the idea of homeownership: 1) the belief that home ownership creates a higher-quality residential environment than renting, 2) the investment value of home ownership, and 3) homeowners fuel economic growth in the construction industry).

78. See Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J.L. & ECON. 427, 427-28 (1992).

79. See *id.* at 430.

80. *Id.* at 436-37.

or passing down land.<sup>81</sup> An anticommons problem<sup>82</sup> may render the land useless, because parcels often end up with a multitude of stakeholders (sometimes hundreds), and all landowners must agree to certain uses or decisions.<sup>83</sup> Land values on Indian reservations are significantly lower than on other American land, and Native Americans are among the poorest citizens in our country.<sup>84</sup> These links—between land tenure, value of land, and poverty—support that control of land and the ability to decide its use are important factors in a farmer’s livelihood.

The relationship between certain kinds of property and how closely it is tied to a person’s identity also plays a major role in valuation.<sup>85</sup> Margaret Radin offers one measure of this relationship as how much pain a person would feel by the loss of a particular item that could not be relieved by the replacement of that item.<sup>86</sup> She distinguishes property that fits this definition as personal and property that can be replaced without concern as fungible.<sup>87</sup> With personal property, a person is “bound up with an external ‘thing.’”<sup>88</sup> This builds upon the Lockean theory that because a person owns his or her own body, he or she owns that into which he or she invests labor.<sup>89</sup> Locke also viewed persons as “continuing self-consciousness characterized by memory.”<sup>90</sup> Memory is made up of the relationships between people and objects, thus it relates directly to viewing property as personal. In the example of a home, people invest labor, time, and hold many memories and thus view a home as personal.<sup>91</sup>

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81. *Id.* at 434.

82. An anticommons problem occurs when many actors have rights over a single resource and those actors can prevent others from using it.

83. See Anderson & Lueck, *supra* note 78, at 436-37.

84. Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, PEW RES. CTR.: FACT TANK (June 13, 2014), <https://perma.cc/2N4B-JNPD>.

85. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

86. *Id.* at 959.

87. *Id.* at 960.

88. *Id.* A study by Marc Fried found that the greater a person’s attachment to an area, the more likely they are to react with “marked grief” upon the loss of it. URBAN RENEWAL 363 (James Q. Wilson ed., 1966). Fried studied a former urban slum area in the West End of Boston and discovered that many people with pre-relocation attachment experienced signs of grief: continued longing, general depressive tone, symptoms of psychological or somatic distress, the sense of helplessness, and direct and displaced anger. *Id.* at 363-64. In fact, 46% of the 566 displaced respondents of the West End showed “a fairly severe grief reaction or worse.” *Id.* at 360.

89. See Radin, *supra* note 85, at 967.

90. See *id.* at 967.

91. See *id.* Not only do land and homes hold a special place in people’s hearts—Oliver Wendell Holmes once wrote that land “takes root in your being”—but the very act of owning something can make one more attached than an objective value reflects. Oliver

Radin observes that if one accepts that property can be placed on a spectrum between fungible and personal, those objects on the personal side should give rise to a stronger moral claim and hold more legal protection than those on the fungible side.<sup>92</sup> Following this idea, certain property should be more worthy of protection than other property.<sup>93</sup> In terms of takings, Radin argues that the personhood perspective should add a moral inquiry into some eminent domain cases. Rural land and farmland clearly fit into Radin's conception of personal property. Not only does someone attach significant personal value to a home, but they may also work and earn a living off of the land, making it even more personal. While approximately 40% of all farmland in the United States is leased, the owner of the

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Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1008 (1997). Daniel Kahneman and Amos Tversky presented the Prospect Theory in the late 1970s, which states that people measure outcomes based on gains and losses, not by final states of wealth. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979). Thus, even if a person's overall wealth was not greatly diminished, he or she would still feel loss by the government taking a piece of property they hold dear. A related theory, the endowment effect, states that people value things they own more than things they do not own. EYAL ZAMIR, LAW, PSYCHOLOGY, AND MORALITY 21 (2015). Many studies have shown that people will value an object more highly if they possess it than if they do not possess it. Among these studies include Daniel Kahneman, Jack Knetsch, and Richard Thaler's study in which some participants are given a mug and value the mug more highly than participants who did not receive mugs (as measured by the prices individuals are willing to sell or buy the mugs). Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1330-31, 1342 (1990). These factors result in the undervaluation of homes taken for eminent domain if a market value calculation is awarded. This is one of the many reasons, perhaps, states have passed statutes that call for more compensation than is granted by the constitution or by a fair market value calculation.

92. See Radin, *supra* note 85, at 978-79, 986 (pointing out that no unified theory of compensation has been developed). Frank Michelman evaluates four types of compensation in takings cases: 1) the physical invasion test states that any time the government takes physical space it will compensate a landowner; 2) a diminution of value test calculates based on the amount or degree of harm inflicted on an owner; 3) a balancing test can be used to weigh the harm to the individual being taken from and the benefit to the public; and 4) a test that looks at "anti-nuisance" measures and compares whether limiting the owner's conduct that was harmful to society in the first place, and whether he or she should therefore not be compensated. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

93. See Radin, *supra* note 85, at 991-96 (analyzing the personal aspect of property in light of the property's sanctity—stemming from liberty, residential tenancy, and a reasonable expectation of privacy).

land still derives income from the renter and may hold it just as closely as if they farmed the land themselves.<sup>94</sup>

Though the government condemns land based on creating a public benefit, homeowners are compensated on the basis of the value of the property before compensation and, therefore, do not share in the increased value from the taking.<sup>95</sup> In addition, homeowners may feel personally victimized that the government chose to take their property for a “better” use, and that the land being used as their home was not optimal.<sup>96</sup> Moreover, additional costs like relocating, lost goodwill from businesses, and the cost of replacing a condemned property mean that fair market compensation will likely never be adequate.<sup>97</sup> In addition, homeowners are often unable to say “no” to a taking, which greatly diminishes their bargaining capacity.<sup>98</sup> Thus, even negotiated compensation levels may undercompensate a property owner.

Each of these theories relates directly to rural landowners. In particular, farmers have a deep attachment to their land. Many have held the same piece of land for generations and deriving livelihood from land gives rise to greater attachment. Landowners may view the loss as more devastating than payment for their farm can replace.

Robert Ellickson has pointed to the length of time someone owns or occupies land as an important factor in calculating compensation. In *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, Ellickson advocates for a replacement for the current system of zoning rules and regulations.<sup>99</sup> In formulating a nuisance rule structure, he uses longevity of occupancy as a potential factor to be considered for compensation.<sup>100</sup> He uses the example of a long-time

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94. NAT’L AGRIC. STATISTICS SERV., 2012 CENSUS OF AGRICULTURE HIGHLIGHTS 4 (Sept. 2014), <https://perma.cc/6G8J-SNS4>. Note that this also gives rise to the possibility that those leasing land may have the right to be compensated from a taking that condemns the land they work. This presents an opportunity for further study on the topic of compensation for eminent domain takings.

95. See Garnett, *supra* note 11, at 145 n.266 (“[V]alue to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking.” (quoting *Olson v. United States*, 292 U.S. 246, 256 (1934))).

96. See *id.* at 110.

97. See *id.* at 106.

98. See *id.* at 107.

99. See generally Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682 (1973) [hereinafter *Alternatives to Zoning*].

100. *Id.* at 736-37.



owner of a single-family home who would demand more than fair market value for his or her home because of his or her experience with the house and memories attached to it.<sup>101</sup> Because attachment typically grows with time, this added calculus may aid in capturing the true value of takings of rural homes that have been in a single family for many generations. Indeed, studies have shown that duration of ownership factors into the price at which an individual would be willing to sell his or her land.<sup>102</sup> The longer a person owned the land, the higher their selling point. Additionally, some users refused to sell their land at any price, which also increased in frequency for those who owned the land for a longer amount of time.<sup>103</sup>

In 2005, Thomas Merrill testified to this phenomenon before the United States Senate, saying:

[A] promising reform idea would be to require more complete compensation for persons whose property is taken by eminent domain. The constitutional standard requires fair market value, no more and no less. Congress modified

101. *Id.*

102. Janice Nadler and Shari Seidman Diamond evaluated the psychology of eminent domain proceedings. Their experiments consisted of asking participants how high above market value they would value their land depending on how long the land had been in their family, and to what use the property would be put to by the condemners. Nadler & Diamond, *supra* note 16, at 728-737. Nadler and Diamond used categorical variables of land which had existed in a family for two years or one-hundred years, and of land being used for a children's hospital, a shopping mall, or an undisclosed use. *Id.* at 729. The survey prompt stated that the government would replace the taken home with a home of the exact same value in a nearby location, plus moving expenses. *Id.* at 731. It then asked how much the respondent would require above the replacement home and moving costs to agree to the sale. *Id.* Participants who owned the land for two years demanded on average \$27,200 extra to agree, while those owning the land for one-hundred years demanded on average an extra \$75,500 to agree to sell. *Id.* at 733.

103.

EXPERIMENT 1: PERCENTAGE REFUSING TO SELL ("NO INCENTIVE IS HIGH ENOUGH TO TRADE") BY TERM AND USE (NS IN PARENTHESES)				
Term	Use			Total
	Hospital	Mall	None	
Short	9.9%	1.0%	5.1%	<b>5.2</b>
	(91)	(99)	(98)	<b>(288)</b>
Long	13.0%	15.3%	13.0%	<b>13.7%</b>
	(92)	(85)	(100)	<b>(277)</b>
Total	<b>11.5%</b>	<b>7.6%</b>	<b>9.1%</b>	<b>9.4%</b>
	<b>(183)</b>	<b>(184)</b>	<b>(198)</b>	<b>(565)</b>

See *id.* at 731-32.

this when it passed the Uniform Relocation Act in 1970, which requires some additional compensation for moving expenses and loss of personal property. Congress could modify the Relocation Act again, in order to nudge the compensation formula further in the direction of providing truly “just” compensation.

For example, Congress could require that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property.<sup>104</sup>

Wisconsin farmer Mr. Esser expressed his concerns in a 2009 transmission line project:

Mr. and Mrs. Esser have the distinction of having the largest amount of land affected by the proposed transmission line of any farmland owners. [The American Transmission Company (ATC)] would acquire 21.4 acres of new easement on 15 Esser tax parcels. Mr. Esser is strongly opposed to the construction of the line on his land. He and his wife, one son and his wife, and their three children work full time on the farm. Twenty-two other family members work part-time or occasionally on the farm. This farm has been in the Esser family for 114 years . . . Mr. Esser said that if the route through his land is selected, he wants ATC to buy his herd because he will quit milking.<sup>105</sup>

Increasing compensation based on how long a person has owned their land can aid in capturing the true value a person may assign a home or farm in a rural area.

### III. RURAL LAND REQUIRES SPECIAL PROTECTION

Because rural landowners have less political power to stop eminent domain projects, and because the subjective loss of a farm in particular is so high, rural and farmland owners need more robust protections against government seizure of land.

#### *A. Diffuse Political Power*

Rural projects like roads and transmission lines that are clearly defined as “public goods” are very likely to proceed. Indeed, many landowners expressed that a highway may need to be built or a transmission line may need to be added, but

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104. *Id.* at 747 (citation omitted).

105. LEONARD MASSIE ET AL., WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT 19 (Leonard Massie & Peter Nauth eds., Mar. 2009), <https://perma.cc/6B8C-68V7>.

that they want it to impact their farm as little as possible. In Wisconsin's Rockdale West of Middleton Transmission Line project, landowner Mr. Dunn

indicated that he has worked around the existing line for 45 years. He would rather not have it on his land, but he could adjust to it if he needed to and he thinks the power is needed. He is not planning to sell his land, but if he needed to sell it in the future, he is concerned that the line might affect the value of the property.<sup>106</sup>

While these landowners acknowledge the public benefit of a project, they may have less political power to make the case for a personally favorable project because fewer people are affected by the project. Therefore, the political will to stop these projects or to minimize harm to certain landowners is less potent than in urban projects, which can affect large numbers of citizens in a small area.

It has long been believed in the United States that rural areas hold more political power than they deserve due to imbalances in our electoral system.<sup>107</sup> However, Debra Bassett explains in *The Politics of the Rural Vote* that this popular belief is “[e]ntirely, demonstrably false.”<sup>108</sup> Rural areas are overwhelmingly poor.<sup>109</sup> In 1999, 244 of the 250 poorest counties in America were rural, and not one of the 100 highest-contributing zip codes to political campaigns were located in a rural congressional district.<sup>110</sup> “When compared to urban residents, the rural underclass is politically weak. Widely dispersed, they lack the organization, financial resources, and concentrated voting strength necessary to influence public policy.”<sup>111</sup> Bassett goes on to state that “[a]s a result of their geographical dispersion and political invisibility, rural dwellers have been rendered politically powerless.”<sup>112</sup>

Physical proximity plays a major role in the limited political power rural residents experience. Rural is defined by the United States government as not urban, meaning any area wherein the population is by nature not dense and people live far away from each other.<sup>113</sup> Poverty rates are lowest on the fringes of urban

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106. *Id.* at 17.

107. See generally GORDON E. BAKER, RURAL VERSUS URBAN POLITICAL POWER 11-25 (1955) (discussing the imbalance of power that favors rural areas over urban).

108. Debra Lyn Bassett, *The Politics of the Rural Vote*, 35 ARIZ. ST. L.J. 743, 743 (2003).

109. *Id.* at 756.

110. *Id.* at 756-58.

111. *Id.* at 759.

112. *Id.* at 754.

113. *Id.* at 749-751; Debra Lyn Bassett, *Distancing Rural Poverty*, 13 GEO. J. POVERTY L. & POL'Y 3, 8 (2006) [hereinafter *Distancing Rural Poverty*] (explaining federal

areas (the suburbs) and are highest in remote, rural areas.<sup>114</sup> In fact, location is the most important factor to consider when determining the likelihood that someone will live in poverty.<sup>115</sup> It is no secret that money rules American politics, and those in rural areas are less likely to have the money to influence politics the way wealthier urban residents can.<sup>116</sup>

However, even if money was not a factor in politics, rural residents would still have a more difficult time creating a meaningful political opposition to projects they oppose. Because rural residents are geographically diffuse, less people will be affected by a given project than if the same sized project were undertaken in an urban or suburban area. Additionally, rural landowners do not experience the daily interactions neighbors in urban areas experience by virtue of proximity. Therefore, political coalitions may be more difficult to create, and projects may be pushed into areas that take over land of only a few landowners, unfairly burdening those individuals.

In the Wisconsin AIS CAPX 2020 Transmission Line Project: Alma to Holmen, Bryon and Lorna Anderson, landowners, stated that they were concerned “the line might be placed on the route with the fewest complainers, whether or not that is the best route.”<sup>117</sup> Ms. Ott in the Wisconsin AIS USH 10: Marshfield to Stevens Point Project stated, “[T]he expansion of USH 10 and the creation of frontage roads will help developers, but it will not help farmers or the local community.”<sup>118</sup> Rural residents impacted by eminent domain proceedings have a more limited capacity for political pushback than their urban counterparts.<sup>119</sup>

### *B. Farm Specialization*

In *The Nature of the Farm*, Doug Allen and Dean Lueck analyze why family farms have persisted throughout the 20th century, even as most industries have

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definitions of rural and how they differ between agencies. Moreover, Basset states that “[d]efining ‘rural’ as what is left over after defining ‘urban’ is characteristic of our society’s bias in favor of the urban.”).

114. KATHLEEN K. MILLER ET AL., S. RURAL DEV. CTR., PERSISTENT POVERTY AND PLACE 2 (Jan. 2002), <https://perma.cc/7WSA-GP6Z>.

115. *Distancing Rural Poverty*, *supra* note 113, at 9.

116. See TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY 9 (2014).

117. ALICE HALPIN & PETER NAUTH, WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT 19 (June 2012).

118. WIS. DEP’T OF TRANSP., AGRICULTURAL IMPACT STATEMENT ADDENDUM 5 (Feb. 2010).

119. See *id.*

mechanized and consolidated under corporate ownership.<sup>120</sup> They conclude that corporate institutions like factories differ from farms in important ways. Farms experience seasonality because multiple stages of development cannot be worked on at one time.<sup>121</sup> A farmer cannot simultaneously grow and harvest a crop. Thus, specialization of the workforce and overseeing wage labor become more costly on farms than in a factory setting.

In addition, weather patterns and geography affect farms more so than a temperature-controlled office space or factory. Farmers must be able to adapt quickly to changing circumstances and must have a deep understanding and knowledge of both the land they farm and the crops they grow to be efficient and effective.<sup>122</sup> Because farmers are often the owner of the land themselves, or are in charge of their own operation if they rent or lease land, they can more directly oversee and mitigate risks. Their capacity to do so also increases the longer they work a specific plot of land. These assertions support that farms are a special commodity, though Allen and Lueck assume that gains on farms do not arise from endowment effects, but from the simple repetition of tasks.<sup>123</sup>

While this repetition of a narrow set of tasks may increase farmer specialization, additional factors make farms less fungible or replaceable for individual farmers. Not only do farmers benefit from working the same land, gaining knowledge about unique geography, soil type, growing seasons, and weather patterns, but the longer a farm is within one family, the more is invested in the preservation of the farm.<sup>124</sup> In order to train the next generation of family members on farm tasks, certain efficiencies are sacrificed which would not be tolerated where workers are more fungible. Indeed, “the centrality of kinship relations and the direct involvement of the farm owner in day-to-day operations are distinctive factors of the family farm.”<sup>125</sup>

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120. See Douglas W. Allen & Dean Lueck, *The Nature of the Farm*, 41 J.L. & ECON. 343 (1998).

121. *Id.* at 345-47.

122. See *id.* at 348.

123. *Id.* at 349.

124. Ron G. Stover & Mary Kay Helling, *Goals and Principles of the Intergenerational Transfer of the Family Farm*, 26 FREE INQUIRY IN CREATIVE SOC. 201, 206 (1998) (listing “1) the preservation of the family farm, 2) the maintenance of the financial viability of the family farm, and 3) the use of the family farm as a retirement package” as the primary goals of farm transfer).

125. Nola Reinhardt & Peggy Barlett, *The Persistence of Family Farms in United States Agriculture*, 29 SOCIOLOGIA RURALIS 203, 207 (1989).

Non-monetized values on farms include pride of ownership, freedom of work pace and time, and continuity of family.<sup>126</sup> Prioritizing these goals differentiates a family farm from a corporation and increases the value they attach to their specific plot of land. Moreover, because farmers often pass down their operations to successive generations, they are incentivized to train younger family members—even at the cost of productivity.<sup>127</sup> In addition, farmers produce “for household livelihood rather than as an investment of capital.”<sup>128</sup> Farmers strive to earn a profit after all costs have been paid, rather than hoping to achieve the highest rate of return on their resources.<sup>129</sup> Consequently, it is difficult to fully and accurately value a family farm in the same way other businesses are valued. Simple replacement of land will not capture the entirety of the loss a family farmer may experience.

#### IV. STATE APPROACHES TO RURAL EMINENT DOMAIN CONCERNS

While all states legislate the practice of eminent domain, few address agricultural and rural areas specifically. Of those that do, New York requires an AIS similar to Wisconsin, though less detailed.<sup>130</sup> Additionally, California requires Environmental Impact Reports (EIRs). The following section discusses these reports and the controversy EIRs have caused in California. Finally, Wisconsin AISs contain important insights into how one Midwestern state undertakes eminent domain proceedings on rural and agricultural land. Wisconsin AISs are evaluated in depth to show the value these reports provide for decision makers and for farmers during an agricultural taking.

##### A. New York AIS

The state of New York passed the New York Agricultural Districts Law in 1971.<sup>131</sup> The law requires special procedures when an entity pursues an eminent domain claim on agricultural land. New York’s agricultural assessment program, which serves to limit a farm owner’s property tax liability on agricultural land, is also used in eminent domain proceedings. Within New York agricultural districts, the government’s ability to acquire land is restricted and can only be exercised

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126. *Id.* at 216.

127. *Id.*

128. *Id.* at 221 n.5.

129. *See id.*

130. N.Y. AGRIC. & MKTS. LAW § 25-AA (McKinney 2019).

131. N.Y. STATE DEP’T OF AG. & MKTS., AGRICULTURAL DISTRICTS LAW 1 (2016), <https://perma.cc/7CZV-9GDT>.

after giving serious consideration to alternative sites.<sup>132</sup> Moreover, any government entity that intends to take more than one acre of land from an actively operating farm in an agricultural district must file a notice of intent with the Commissioner of the New York State Department of Agriculture and Markets at least sixty-five days before the proposed action is taken.<sup>133</sup> An AIS that describes the project must also be filed with the Commissioner of the New York State Department of Agriculture and Markets and with the County Agricultural and Farmland Protection Board at least sixty-five days prior to the acquisition.<sup>134</sup>

New York law requires these agricultural impact statements to include a detailed description of the proposed action and its agricultural setting, the agricultural impact of the proposed action (including short-term and long-term effect), any adverse agricultural effects which cannot be avoided should the proposed action be implemented, alternatives to the proposed action, any irreversible and irretrievable commitments of agricultural resources which would be involved in the proposed action should it be implemented, mitigation measures proposed to minimize the adverse impact of the proposed action on the continuing viability of a farm enterprise or enterprises within the district, any aspects of the proposed action which would encourage non-farm development, and any other information the commissioner may require.<sup>135</sup> New York does not publish AISs online and no court has ruled on the legal weight an AIS carries in New York.

Many of the requirements of New York AISs overlap with New York requirements for Environmental Impact Statements (EISs).<sup>136</sup> Unlike New York AISs, EISs have been litigated in New York courts. They encompass a wide range of projects, including private projects that request a permit or lease from the government.<sup>137</sup> While EISs are not the focus of this paper, it is important to understand the background and controversy of preparing these reports in order to

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132. N.Y. AGRIC. & MKTS. LAW § 305(4)(a) (McKinney 2019); NELSON L. BILLS & JEREMIAH P. COSGROVE, *AGRICULTURAL DISTRICTS* 4 (Sept. 1998).

133. AGRIC. § 305(4)(b).

134. *Id.*; CHEMUNG CTY. PLANNING DEP'T, *NEW YORK STATE'S AGRICULTURAL DISTRICTS PROGRAM* 3 (Mar. 2001), <https://perma.cc/SU2N-JFR9>.

135. AGRIC. § 305(4)(b); FARMLAND INFO. CTR., *PROCESSING AN AGRICULTURAL DATA STATEMENT*, <https://perma.cc/NY2N-MHSL> (archived Sept. 29, 2019) (A sample form of a New York AIS).

136. Compare N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2019), with AGRIC. § 305(4)(b) (demonstrating overlapping requirements for EIS and AIS).

137. See ROBERT C. ELLICKSON ET. AL, *LAND USE CONTROLS: CASES AND MATERIALS* 398-400 (Vicki Been et. al. eds., 4th ed. 2013) (citing *Chinese Staff & Workers Ass'n v. City of New York*, 502 N.E.2d 176, 177-81 (1986)).

anticipate issues that may arise with AISs. For this controversy, we can look to the California Environmental Quality Act.<sup>138</sup>

### B. California EIR

In California, EIRs (California's version of an EIS) have been leveraged to slow down or stop a number of eminent domain proceedings. Similar to New York, the California Environmental Quality Act (CEQA) requires any private projects that use a public permit to prepare an EIR.<sup>139</sup> EIRs are burdensome to produce and easily challenged in court. As a result, the inclusive language of the CEQA means that California agencies and courts spend a lot of time and money producing and defending EIR—potentially to the detriment of the California taxpayer.<sup>140</sup>

For example, in *Heninger v. Board of Supervisors*, the California Court of Appeals ruled that an EIR was required for a permit where a single landowner wanted to install an alternative septic system.<sup>141</sup> The court noted, "This case illustrates how, with some well-directed legal effort, an opponent of development can delay or, sometimes, abort a project. The expense of delay, and the expense of an EIR itself, can force cancellation of plans having little or no environmental impact."<sup>142</sup> The court went on to state that because California law required an EIR for this project, all available literature on the various types of alternative sewage disposal systems and their performance needed to be reviewed, and multiple studies needed to be carried out in order to comply with CEQA.<sup>143</sup> The statutory requirements for an EIR often cause these kinds of expensive delays for development projects.

California courts have also faced questions over the adequacy of EIR. The CEQA states that if feasible alternatives to the proposed project exist, or if feasible mitigations techniques are available, a project should not be approved.<sup>144</sup> This requirement further burdens the state and makes development difficult and costly. In another EIR challenge, the Environmental Coalition of Ventura County fought a proposed landfill by claiming the report did not adequately address concerns

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138. CAL. PUB. RES. CODE §§ 21000-21177 (West 2019).

139. PUB. RES. § 21002; *see* ELLICKSON ET AL., *supra* note 137, at 400-01.

140. *See* PUB. RES. CODE §§ 21000-2117; *see also* ELLICKSON ET AL., *supra* note 137, at 400-06; Sean Stuart Varner, *The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reform*, 19 PEPP. L. REV. 1447, 1447 (1992).

141. *Heninger v. Bd. of Supervisors*, 231 Cal. Rptr. 11, 16-17 (Ct. App. 1986).

142. *Id.* at 16.

143. *Id.* at 17.

144. PUB. RES. CODE § 21002.



about the landfill spreading AIDS.<sup>145</sup> The challenge to the small project ultimately cost over \$1.2 million and produced a 1,475 page report.<sup>146</sup> Additional cost concerns include monitoring the project during and after construction and responding to negative findings. These examples serve to highlight the negative stigma EIRs has in California, although some citizens do hold valid and reasonable concerns. Indeed, many citizens utilize this process to ensure projects are well-thought-out and conscious of environmental risks.

Outside of California, other EISs have been criticized for imposing administrative burdens without giving agencies any “teeth” to actually and substantively protect the environment.<sup>147</sup> In essence, critics worry that just because an issue is investigated and reported does not mean it will, in reality, be addressed. However, proponents point to the increase in public engagement as a sign environmental issues are, at the very least, becoming more public and democratized.<sup>148</sup>

### C. Wisconsin Eminent Domain Procedures

The Wisconsin Constitution states, “The property of no person shall be taken for public use without just compensation therefore.”<sup>149</sup> Before the Supreme Court decided *Kelo*,<sup>150</sup> the Wisconsin Supreme Court declared that the term “public use” in the Wisconsin Constitution did not mean merely a public benefit. Instead, they ruled that public use implies condemned property will actually be possessed by the public, and it is not sufficient that the public will only receive “incidental benefits” from condemnation.<sup>151</sup> After the *Kelo* decision, the Wisconsin legislature responded by enacting legislation to limit the use of eminent domain to transfer property to a private owner. Section 32.02(1) of the Wisconsin Statutes grants counties, cities, towns, villages, and school districts broad condemnation authority for “any lawful purpose.”<sup>152</sup> However, other entities like the Governor, railroad

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145. Varner, *supra* note 140.

146. *Id.*

147. See ELLICKSON ET AL., *supra* note 137, at 417.

148. See *id.* at 414.

149. WIS. CONST. art. I, § 13.

150. *Supra* Section II; see *Kelo v. City of New London*, 545 U.S. 469, 469 (2005).

151. See, e.g., *David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 362, 370 (Wis. 1954) (quoting and agreeing with *Whiting v. Sheboygan & Fond Du Lac R.R. Co.*, 25 Wis. 167, 195-95 (1870) (“It appears, then, that the *public use* consists in the *possession, occupation, and enjoyment of the land itself by the public, or public agencies*, and not in any incidental benefits or advantages which may accrue to the public from enterprises of this nature [railroad construction]”) (emphasis original).

152. WIS. STAT. § 32.02(1) (2019).

companies, telecommunications corporations, and corporations have more limited authority.<sup>153</sup> Moreover, municipal governments are prohibited from acquiring property through condemnation in order to convey or lease lands to a private entity, unless the land has been deemed blighted.<sup>154</sup> Stricter definitions of what constitutes “blight” were also included in this new legislation.<sup>155</sup>

The legislature also specified when and how eminent domain power may be used. For example, eminent domain can be used for highway construction and improvement, reservoirs, dams, public utilities, and energy lines.<sup>156</sup> Further, whenever a project requires more than five acres from any one farm, an AIS must be prepared.<sup>157</sup> Additionally, if a public utility seeks property for an electric generation plant or a high-voltage transmission line, they must file an application with the city and the Public Service Commission (PSC). Unlike the Wisconsin Department of Trade and Consumer Protection (DATCP), the PSC can require compliance with certain orders by law.<sup>158</sup>

Chapter 32 of the Wisconsin Statutes defines the process of condemning land under eminent domain.<sup>159</sup> Before negotiations begin, the owner of the land (owner) has a right to a full narrative appraisal made by a qualified appraiser.<sup>160</sup> In addition, the owner may obtain an appraisal by a qualified appraiser and may submit the reasonable cost of the appraisal to the condemnor for payment.<sup>161</sup> After the appraisal is completed, the acquiring authority can begin negotiations with the owner.<sup>162</sup> If the owner might be relocated, he or she is also provided with a

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153. § 32.02(2)-(4); *see* WIS. LEGISLATIVE COUNCIL, INFORMATION MEMORANDUM: EMINENT DOMAIN 2-3 (June 2014), <https://perma.cc/Y9ES-HWBL>.

154. WIS. STAT. § 32.03(6)(b) (2019).

155. § 32.03(6)(a); *see* WIS. LEGISLATIVE COUNCIL, *supra* note 153, at 4.

156. WIS. STAT. § 32.05, 32.06 (2019) (outlining condemnation proceedings for public alleys, streets, highways, airports, mass transit facilities, solid waste disposal facilities, storm or sanitary sewers, and watercourses or water transmissions and distribution facilities” under Section 32.05. Section 32.06 outlines the condemnation procedures for matters “other than transportation.”); WIS. DEP’T OF COMMERCE, THE RIGHTS OF LANDOWNERS UNDER WISCONSIN EMINENT DOMAIN LAW 2, <https://perma.cc/5MNW-6BWW> (archived Sept. 30, 2019) [hereinafter THE RIGHTS OF LANDOWNERS].

157. WIS. STAT. § 32.035(4)(a) (2019). AISs will be analyzed further below.

158. While outside of the scope of this paper, the PSC service may present opportunities for future research on this topic.

159. WIS. STAT. § 32.01-32.29 (2019).

160. § 32.05(2).

161. *Id.*; *see* Miesen v. Wis. Dep’t of Transp., 594 N.W.2d 821, 826-27 (Wis. Ct. App. 1999) (holding that a landowner can sue the state Department of Transportation for payment of costs incurred by hiring an independent appraiser).

162. § 32.05(2a); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 6.

pamphlet on relocation benefits.<sup>163</sup> The acquirer must also provide a map showing all land affected by the proposal and a list of all neighboring landowners to whom offers are being made.<sup>164</sup> If negotiations are successful, any owner may appeal the amount of compensation within six months by filing a petition with the circuit court.<sup>165</sup>

When an acquiring authority condemns part of a property, fair market value will be calculated at the higher of either the value of the part acquired or the difference between the value of the entire property before and the value of the part the owner still holds after the taking.<sup>166</sup> If the owner is left with an uneconomic remnant as a result of a taking, the acquiring authority must offer to purchase the remnant.<sup>167</sup> In contrast, when an easement is acquired, owners are compensated based on the difference between the value of the whole property immediately before the date of evaluation and the value immediately after the easement is utilized.<sup>168</sup>

If negotiations fail, the acquiring agency will extend a jurisdictional offer to the owner and any mortgagee of record.<sup>169</sup> The offer includes the nature and description of the project, a proposed date of the project, and the amount of compensation to be paid.<sup>170</sup> The owner has twenty days to accept or reject the offer.<sup>171</sup> If the owner accepts the jurisdictional offer, the property title is transferred to the acquiring authority and all compensation is paid to the owner within sixty days, which can be extended by mutual agreement of both parties.<sup>172</sup> If the offer is rejected or if the owner does not respond within twenty days, the acquiring authority may petition the court for the county condemnation commission to make a determination of just compensation and of necessity.<sup>173</sup>

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163. § 32.05(2a); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 6.

164. § 32.05(2a); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 6.

165. § 32.05(2a); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 6.

166. WIS. STAT. § 32.09(6); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 6.

167. § 32.05(3m)(b) (“‘uneconomic remnant’ means that the property remaining after a partial taking of property, of the property remaining is of such size, shape, or condition as to be little value or of substantially impaired economic viability”); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 4, 6.

168. § 32.09(6g); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 6.

169. § 32.05(3); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 7.

170. § 32.05(3); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 7.

171. § 32.05(3)(g), (6); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 7.

172. § 32.05(6); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 7.

173. WIS. STAT. §§ 32.05(3)(g)-(h), 32.06(3), (7); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 3, 7 (defining Condemnation Commission as “A group of local residents,

If a county condemnation procedure is filed, a public notice of *lis pendens* is released to notify any interested party that the property may be acquired for public use.<sup>174</sup> A hearing on the petition must be held at least twenty days after the petition is filed.<sup>175</sup> If the court finds the authority has the right to condemn the owner's property, it will assign the matter to the condemnation commissioners for a hearing.<sup>176</sup> The county condemnation commissioner hearing process involves informal proceedings in which owners may present evidence and a compensation amount is determined.<sup>177</sup> Ultimately, however, an owner has the right to a jury trial on the issue of just compensation.<sup>178</sup> If a jury verdict or court judgment exceeds the commission's award, the acquiring authority has forty days after filing the judgment to petition for abandonment of the condemnation.<sup>179</sup> If not, the judgment must be paid within sixty days.<sup>180</sup>

Should an owner wish to challenge the right of an authority to condemn the property described in the jurisdictional offer, a proceeding must be commenced in a circuit court within forty days from the postmark of the notice of the jurisdictional offer.<sup>181</sup> In this proceeding, an owner may challenge any defects in authority's procedure, as well as the public nature and necessity of the proposed use.<sup>182</sup> Only one challenge to AIS procedure has been litigated in Wisconsin courts, *DSG Evergreen F.L.P. v. Town of Perry*, which is evaluated later in this section.

Finally, no occupant may be required to move from a dwelling, business, or farm without at least ninety days written notice from the acquiring authority.<sup>183</sup> The occupant can use the property rent free for thirty days—starting on the first or fifteenth day of the month, whichever is sooner, after the title vests in an agency.<sup>184</sup> All of these rules are owner friendly, though they still grant considerable authority to the county commissions and acquiring authorities.

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appointed by the circuit court of a county for fixed terms, who have the authority to determine just compensation for the property being acquired.”).

174. §§ 32.05(4), 32.06 (7); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 7.

175. § 32.06(7); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 7.

176. § 32.06(7); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 7-8.

177. WIS. STAT. § 32.08(6a); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 8.

178. WIS. STAT. §§ 32.05(10), 32.06(10), 32.09 (defining just compensation as the fair market value on the date of acquisition).

179. § 32.06(10)(c); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 9.

180. § 32.06(10)(d); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 9.

181. WIS. STAT. § 32.22(6), (8); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 9.

182. THE RIGHTS OF LANDOWNERS, *supra* note 156, at 9.

183. §§ 32.05(8)(b), 32.06(9)(c)(2); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 10.

184. §§ 32.05(8)(b), 32.06(9)(c)(2); THE RIGHTS OF LANDOWNERS, *supra* note 156, at 10.

Wisconsin mirrors many states in its desire to cabin condemning authority, while still granting the government its constitutional right to take land for public purposes. The federal government requires EISs for projects that will significantly impact the environment—and many states have legislated additional information in their EISs—but Wisconsin stands alone in its commitment to agricultural land.<sup>185</sup>

If a project triggers the requirement for the preparation of an AIS—meaning the project initiator has the power to use eminent domain and the project affects five or more acres of one landowner, or is marked as having a significant impact—the project initiator needs to notify the DATCP.<sup>186</sup> Once DATCP confirms the impact on farmland and receives the necessary information from the project initiator, they have sixty days to prepare an AIS.<sup>187</sup> DATCP surveys some or all of the affected farmland owners by phone or mail.<sup>188</sup> These statements, include a description of the project, a map, county-level agricultural statistics, information from the Geographic Information Systems files such as the location of drainage districts, summaries of landowner comments, discussions of potential impacts, and recommendations addressing the need for special considerations uncovered through the study.<sup>189</sup>

The appendices include soil classifications and the mailing lists of the statement.<sup>190</sup> Once the AIS is published, it is sent to the project initiator, the affected farm owners, state and local resource officials, and local newspapers.<sup>191</sup> Each of these steps serve to inform the involved parties of the effect the taking will have on the state, county, and individual agricultural settings.

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185. CHARLES J. JACOBUS, *REAL ESTATE PRINCIPLES* 136, 460-61 (10th ed. 2006); *see also* ELLICKSON ET AL., *supra* note 137.

186. WIS. STAT. § 32.035 (2018). Section 32.035 of the Wisconsin Statutes is the only framework for the AIS program; there is no administrative rule. Therefore, I contacted DATCP employee and author of all recent AISs, Alice Halpin. We communicated by email and over the phone. She provided me with the information I use in this paper on the processes of producing and using AISs. E-mail from Alice Halpin, Agric. Impact Analyst, Wis. Dep't of Agric., Trade & Consumer Prot., to author (Apr. 18, 2016, 17:02 CST) [hereinafter E-mail from Alice Halpin at 17:02 CST] (on file with author).

187. § 32.035(4)(c).

188. E-mail from Alice Halpin at 17:02 CST, *supra* note 186.

189. *Id.* The appendices also include aspects present in standard EISs, such as soil classifications and the mailing lists of the statement.

190. *Id.*

191. *Id.*

AIS must be published at least thirty days before the project initiator can begin negotiations for compensation with landowners.<sup>192</sup> DATCP drafts all of the AIS with a current staff of two full-time employees and one half-time employee.<sup>193</sup> The project initiator is responsible for paying the costs incurred to produce an AIS, for which the department charges \$120 per hour and the costs of printing and mailing.<sup>194</sup> The project initiator must pay for the AIS before it is published, which triggers the thirty day waiting period before commencing compensation negotiations.<sup>195</sup>

AISs are not subject to draft approval as are many EISs. Current DATCP practice allows the project initiator to review a draft to confirm the description of the project, but DATCP is not required to change AISs to suit either the project initiator or the landowners.<sup>196</sup> No formal process currently exists for challenging an AIS.<sup>197</sup> In the past, AIS drafters have been contacted by landowners about inaccuracies and drafters have contacted project initiators with corrected information.<sup>198</sup> If a project changes after the publication of an AIS, DATCP will draft an addendum listing the proposed changes.<sup>199</sup> DATCP has discretion over whether they will contact landowners for subsequent addendums or updates on their recommendations and it will depend on the significance of the change.<sup>200</sup> A DATCP author explained the benefits of AIS:

An AIS can make landowners better informed about the proposed project, its potential impacts on their property, and the acquisition process. The process of completing an AIS can identify potential impacts that the project initiator was not aware of, such as the existence of drainage tiling on a given field or that a particular farm is a certified organic operation. Former AIS staff members have also been able to negotiate better soil handling methods with pipeline companies, which have become standard recommendations in later AISs.<sup>201</sup>

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192. § 32.035(4)(d); E-mail from Alice Halpin at 17:02 CST, *supra* note 186.

193. E-mail from Alice Halpin at 17:02 CST, *supra* note 186.

194. *Id.*

195. *Id.*; *see* § 32.035(4)(d).

196. E-mail from Alice Halpin at 17:02 CST, *supra* note 186.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Though AISs provide clear benefits to both condemners and condemnees, they hold no legal weight in challenges of eminent domain proceedings.<sup>202</sup> Only one Wisconsin case, *DSG Evergreen F.L.P. v. Town of Perry*, has evaluated an AIS.<sup>203</sup> The Wisconsin Court of Appeals held that addendums to AISs are not subject to the same statutory requirements of notice and publication that an AISs are subject to under Section 32.035 of the Wisconsin Statutes.<sup>204</sup> Because DATCP produced an acceptable original AIS for the project in question, an addendum to the same project was not subject to limitations on engaging in condemnation negotiations or of serving a jurisdictional offer.<sup>205</sup>

Compounding the lack of legal weight, the statute contains no penalties for not notifying DATCP of a proposed project.<sup>206</sup> In addition, the project initiator is not required to follow the recommendations in an AIS.<sup>207</sup> DATCP instead relies on landowners and press to publicly pressure project initiators into compliance.<sup>208</sup> Sometimes, DATCP can convince the PSC to include their recommendations in a utility taking, wherein the PSC requires an Application for a Certificate of Public Concern and Necessity or Certificate of Authority.<sup>209</sup> If the PSC adopts DATCP's recommendations into their order for the utility, the utility taker is required to follow them.<sup>210</sup> Because no administrative rule for AIS exists, protocol and execution rest heavily upon the DATCP staff.

### 1. AIS Reports from 2008 to 2016

While exploring the legal process surrounding AISs and its legal impact on agricultural takings in Wisconsin, data provided in the documents give a picture of the state of agricultural takings in Wisconsin and the sentiments of landowners who have experienced takings. This section utilizes data covering stated project needs, project locations, and acreage drawn from roughly fifty separate Wisconsin AISs from 2008 to 2016 to describe the impact of agricultural takings on the state

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202. *Id.*

203. *See* *DSG Evergreen F.L.P. v. Town of Perry*, 789 N.W.2d 753 (Table), No. 2009AP727, 2010 WL 2852857, at \*4-5 (Wis. Ct. App. July 22, 2010).

204. *Id.* at \*5; *see also* WIS. STAT. § 32.035 (2019).

205. *Evergreen*, 2010 WL at 2852857.

206. E-mail from Alice Halpin at 17:02 CST, *supra* note 186.

207. E-mail from Alice Halpin, Agric. Impact Analyst, Wis. Dep't of Agric., Trade & Consumer Prot., to author (Apr. 18, 2016, 16:03 CST) [hereinafter E-mail from Alice Halpin at 16:03 CST] (on file with author).

208. *Id.*

209. *Id.*

210. *Id.*

Each AIS covers one project. Of the AISs provided, thirty-one projects address highway expansion or safety, twelve address energy transmission or storage, and the remainder address miscellaneous projects like airport expansion or landfill remediation.<sup>212</sup> As shown in the map in Figure 1, these takings are grouped into three regions in the state. Large spikes in project acreage occur in

ACRES TAKEN BY COUNTY

0 1,000

OpenStreetMap contributors © CartoDB, CartoDB attribution

213. *DNR Geospatial Data*, WIS. DEP'T OF NAT. RESOURCES (last visited Apr. 4, 2016) (on file with author); see WIS. DEP'T OF AGRIC., *supra* note 211.



Dane County (which hosts the city of Madison), Barron County, and the southwestern part of the state.<sup>214</sup> The takings in the southwestern part of the state and in Barron county are mainly due to the installation of gas transmission lines. Dane County, (which hosts the city of Madison) experienced takings of notably higher acreage than other counties due to projects addressing electrical transmission lines and highway expansion and maintenance.<sup>215</sup>

The majority of these projects occur in urban counties,<sup>216</sup> with over twice as many takings coming from urban counties compared to rural counties. These results are somewhat surprising, as Wisconsin consists of twenty-five urban counties and forty-seven nonmetro (or rural) counties.<sup>217</sup> However, looking to Table 2 below reveals that a large majority of project needs, as stated in each AIS, are for road maintenance and expansion. This fact helps explain the focus of takings in urban counties where agricultural land and urban growth collide. The most common project, other than roadwork, is energy transmission. These are mostly right-of-way takings for gas and electricity transmission lines.

TABLE 2: NUMBER OF PROJECT BY NEED <sup>218</sup>	
Project Need	Occurrences
Airport Expansion	3
Energy Transmission/Capacity	12
Flood Prevention	4
Highway Expansion	31
Misc.	5
Grand Total	55

Energy (natural gas or electricity) transmission line projects raised a lot of concerns from farm owners, particularly in terms of the safety of the lines and the impact that digging for gas transmission lines or installing poles for electricity may

214. *Id.*

215. See LEONARD MASSIE, ET AL., WIS. DEP'T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT 2-4 (Mar. 2009) (on file with author).

216. See ECON. RESEARCH SERV., WISCONSIN – RURAL DEFINITIONS (2000), <https://perma.cc/AW2Z-BAA3>.

217. See *id.* at 3.

218. See WIS. DEP'T OF AGRIC., *supra* note 211.

have on fields. One resident affected by the Spring Valley Transmission Line in Walworth and Kenosha Counties, Mr. Ebertowski, stated:

Our business plan prior to purchasing the property . . . was to create an Ag tourism business with bison, heritage farm animals, and locally grown produce for sale direct to consumers. We have grave concerns that the high voltage power lines running the length of our property will adversely affect our business. Notably, published research does not definitively rule out health hazards to animals (and humans). Secondly, our Ag tourism business is based on creating an old fashioned “Wisconsin farm experience” for our paying customers. This will be difficult to achieve with visitors needing to drive under high voltage power lines, past 100’ steel towers in order to access our 160+ year old farm, first settled in the 1840s. To summarize, the proposed project will greatly affect our current business plan, our investment, our livelihood, and our retirement plans.<sup>219</sup>

In addition, farmer Messutta noted:

This proposed Route (2 - Segment “G”) would literally sever the farm and significantly hamper both ongoing operations as well as development plans on file with the Village. It would in particular increase the cost of farming operations and/or reduce rental. It could no longer be offered as a unified farm property and could no longer be offered as a potential organic farm. There are also elevation changes that are severe along the proposed route, as well as at least one pond; any changes required to accommodate the proposed project could have significant additional impact to the farm, its current operations and future development. As to radiation issues, farmers remain skeptical as to long term effects and this may also impact marketability. In terms of future development, for which the property was slated, this will have a significant impact on planning for infrastructure and net land value.<sup>220</sup>

In the Branch River Transmission Line Substation project in Manitowoc County, landowners Daryl and Karen O’Hearn voiced concerns that any land taken from them would make it very difficult to sustain feeding their own livestock.<sup>221</sup> Echoing the concerns in previously discussed from Nicea Bates’ California dairy farm article, they also expressed that the substation construction would reduce their

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219. ALICE HALPIN & ROBERT BATTAGLIA, WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT: SPRING VALLEY TO NORTH LAKE GENEVA 53 (Oct. 26, 2015), <https://perma.cc/S8RV-YDXQ>.

220. *Id.* at 57.

221. ALICE HALPIN, WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT: BRANCH RIVER SUBSTATION 12 (Apr. 7, 2015), <https://perma.cc/U6BP-5BAR>.

ability to sustainably spread manure.<sup>222</sup> Another farmer expressed her deep commitment to her farm, which has been in the family for over 100 years, in light of the potential transmission line project in Rockdale:

The Stuessys want to continue farming and they have never sold any of their land for development. Mrs. Stuessy is very concerned that the proposed project might put their farm out of business. She would rather not have the line on her land, but she does not wish it on anyone else either.<sup>223</sup>

Highway expansion and maintenance is the most prevalent type of agricultural taking. For these projects, residents voiced similar and, in some instances, even stronger concerns. In one proposed construction project for a state highway, farmer Gene Allen would lose 7.7 acres of his 23.8 acres, amounting to 36% of his cropland.<sup>224</sup> Mr. Allen expressed deep concern over this project, and proposed an alternative idea wherein he would offer his neighbor an access easement in order to avoid the need for the road altogether.<sup>225</sup> In another instance, an airport runway extension project in Hartford posed concerns for John and Laura Novak.<sup>226</sup> Their farm consisted of 300 acres of cropland, and a seventy cow dairy operations with eighty additional cattle.<sup>227</sup> They were primarily concerned with loss of farmland as they “need[] all of the land” they have for the farming operation.<sup>228</sup> “Also, it is difficult to find additional cropland to rent or buy, and when it does become available, [we] can’t afford to compete for it against the larger operations.”<sup>229</sup>

While these sentiments show individual attitudes towards the potential effects from recent projects, aggregating acreage extracted from the AIS also reveals that well over 1,000 acres of agricultural land was taken for energy transmission lines and storage, and over 2,000 acres of agricultural land was taken

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222. *Id.*

223. LEONARD MASSIE ET AL., WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT: AMERICAN TRANSMISSION COMPANY, LLC 16 (Leonard Massie & Peter Nauth eds., 2015) (on file with author).

224. WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT: USG 51: IH 39/90 TO USH 12/18 11-12 (Feb. 2016) (on file with author).

225. *Id.*

226. WIS. DEP’T OF TRANSP., AGRICULTURAL IMPACT STATEMENT ADDENDUM 2: HARTFORD MUNICIPAL AIRPORT RUNWAY REALIGNMENT AND EXTENSION 2 (Oct. 2015) (on file with author).

227. *Id.*

228. *Id.*

229. *Id.*

for highway expansion and safety in Wisconsin from 2008 to 2016.<sup>230</sup> With any level of takings, Wisconsin views it important (as is evident by their production of AISs) to examine the takings impact on state and local agriculture. As an example of how AIS place each taking within the surrounding agricultural setting, Table 3 depicts an AIS breakdown of the distribution of farms within the county and state for a proposed project in Calumet county in 2015.<sup>231</sup> The table arms decision makers with information necessary to make an informed decision about the impact of the project on the area. In this example, the project impacts farmers owning as small as roughly 10 acres, making knowledge of the state and county's breakdown by size critical to the decision-making process.

Table 3: Farm Size Distribution <sup>232</sup>				
Acreage	No. Calumet County Farms	Percent Calumet County Farms	No. WI Farms	Percent WI Farms
0 – 49	264	36.7%	22,428	32.0%
50 - 179	246	34.2%	25,502	37.0%
180 - 499	143	19.9%	15,688	22.0%
> 500	66	9.2%	6,136	9.0%

The example above shows how AIS empower farmers because they can voice their concerns knowing decision makers have been educated on the farmer's and the state's ecosystem of land value, acreage, and environmental sensitivity. Given the number of projects and acreage taken over the defined period, the collection of experiences above are far from an aberration in Wisconsin (and likely in other states).<sup>233</sup> The AIS process provides a forum that goes beyond EISs because the focus is on agricultural land—where residents have less political power and may feel very strongly attached to their land.

230. See WIS. DEP'T OF AGRIC., *supra* note 211.

231. ALICE HALPIN, WIS. DEP'T OF AGIC., TRADE & CONSUMER PROT., AGRICULTURAL IMPACT STATEMENT: EISENHOWER DRIVE EXTENSION 1 (2015) (on file with author) [hereinafter EISENHOWER DRIVE EXTENSION].

232. See *id.* at 8.

233. This is a conservative estimate, as AIS reporting does not always clearly delineate the acreage to be taken in the final project.

## V. DISCUSSION

Land and homeowners across the country fear the government's ability to confiscate their property under eminent domain power. While this feeling is universal, the particular struggles of rural landowners have been overlooked by most recent scholarship. Moreover, many states fail to give adequate weight to the concerns of rural landowners in eminent domain proceedings. Wisconsin, in contrast, requires the filing of a special report that specifically addresses the agricultural setting of rural takings.<sup>234</sup>

Before unequivocally praising these AIS, however, it is important to distinguish them from the controversial and problematic EISs and EIRs used in other states—particularly in California. AISs differ from California's EIRs in the limited administrative burden and lack of judicial review over the necessity and adequacy of producing an AIS.<sup>235</sup> While this limits AISs in that it offers landowners less legal protection, AISs still give landowners the chance to comment on projects that affect them.<sup>236</sup> AIS also fully inform landowners and communities of the agricultural impacts of a given project.<sup>237</sup> This information sharing is valuable in itself because it provides transparency to sometimes opaque eminent domain proceedings and allows landowners to not only voice their own concerns, but to see what their neighbors think of a project as well.

Information sharing from AIS can allow rural landowners to exercise more uniform and coordinated political opposition to certain projects. Because political opposition is such an important tool in keeping eminent domain powers in check, AISs can temper some of the disadvantages of more dispersed and less unified rural communities. Moreover, because DATCP acts as an advocate for landowners in this process, they can steer some concerns into avenues that do allow for judicial review and legal mandates, such as the PSC process.

## VI. CONCLUSIONS AND RECOMMENDATIONS

As described above, rural takings for projects like highway construction and expansion have shaped many parts of rural America. Issues of valuation and compensability were common during the middle of the 20th century, when most roads were built. Indeed, a farmer affected by the Spring Valley Transmission Line project stated: "Hwy 12 bisected my farmland in the 1960s and significantly affected our family's ability to farm the land. This would further negatively affect

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234. WIS. STAT. § 32.035(4) (2019).

235. E-mail from Alice Halpin at 16:03 CST, *supra* note 207.

236. *Id.*

237. *Id.*

the ability to use this as farmland.”<sup>238</sup> These issues clearly still exist today, but on smaller scales. Highways are still being built and reconstructed, and transmission lines and gas pipelines run across many rural areas.

Like the urban takings issues in *Kelo* and *Poletown*, rural takings issues are most effectively addressed at the local level. Input from local residents is key in determining the least harmful of several route options, and local officials and administrators are in the best position to carry this out. Indeed, because rural residents do not carry the same amount of condensed-political pressure as urban residents, the localness of representation becomes even more important.

Garnett also advocates for a local approach for eminent domain takings because local governments are more responsive to local needs and the costs and benefits of undertaking a project. Though this recommendation references mostly urban eminent domain studies, the lesson can be extended to rural takings. If local governments need to propose, fund, and approve eminent domain projects, politicians will be more accountable and responsive to individual community members’ needs. William Fischel promotes just this idea in his evaluation of the *Poletown Neighborhood Council v. City of Detroit* case—a case in Michigan wherein the cities of Detroit and Hamtramck used eminent domain power to relocate 4,200 people for the construction of a General Motors plant.<sup>239</sup> Fischel argues local governments are more responsive to local concerns, and therefore, takings projects should be funded by local money and not by grants from the more detached branches of the federal government—which is what occurred in the disastrous *Poletown* case.<sup>240</sup>

Rural takings issues are all the more important due to our current burdensome administrative state. The number of regulations farmers must comply with increases constantly. Without making any policy statement on whether these regulations are positive or negative, they undoubtedly add to the information and conforming costs farmers must face. As exemplified by Bates in California, even a small taking can have bounding repercussions. I promote her evaluation that the cost of economic or business impacts (such as no longer being able to qualify as an organic farm, a common concern in Wisconsin AIS) should be considered in calculating compensation awards for rural takings.

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238. HALPIN & BATTAGLIA, *supra* note 219, at 54.

239. Fischel, *supra* note 46, at 940; *see Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981).

240. Fischel, *supra* note 46, at 954-55; *see WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS* 19-20, 288 (2001) (examining the positive implications of the responsiveness of local governments). *See POLETOWN LIVES!* (Information Factory 1982) (discussing the negative consequences of *Poletown*).

Moreover, I propose more states adopt Wisconsin's practice of evaluating the specific effects eminent domain projects will have on farmland. While some farms are consolidating and larger farming operations are becoming increasingly common, 88% of the 2.1 million farms in the U.S. are still small family farms.<sup>241</sup> Agricultural Impact Statements give a voice to secluded, isolated, and relatively powerless members of society. The questionnaire and comments received from affected farmers give deeper insight into how these projects and decisions truly affect people on the ground. Transmission lines, roads, and other rural takings projects undoubtedly add considerable value to the public good. However, the government and the people should at least be aware and fully informed of what is sacrificed and by whom for these great advancements.

More states should consider passing statutes mandating the drafting of AIS, especially states in the Midwest that contain thousands of acres of rural and agricultural land. Many states protect agricultural land through legislation, but no other state requires the same type of AIS utilized by Wisconsin. By adopting the Wisconsin model of AIS, states can limit their administrative burdens and give rural landowners a chance to comment on issues directly affecting them.

In addition, the amount of time a farmer has owned a piece of land should be considered in his or her compensation.<sup>242</sup> Attachment to land grows over time, and the specific knowledge one gains by living on and working a plot of land creates a valuable bond between the landowner and his or her land. Compensation structures should reflect this value and should recognize the unique circumstances of families who have owned a plot of land for generations.

Overall, rural and agricultural landowners face unique challenges in the face of eminent domain takings. By becoming more aware of their concerns and specific situations, they can make more informed decisions and understand the costs of improvements.

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241. *Family Farms are the Focus of New Agriculture Census Data*, USDA (Mar. 17, 2015), <https://perma.cc/NBE3-UYCH>.

242. *See Alternatives to Zoning*, *supra* note 99, at 736-37.