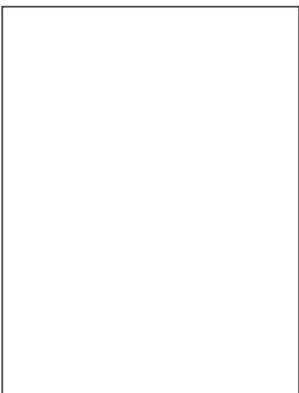


Proximity Damages From Transmission Corridors And Transmission Lines



Joseph T. Waldo has practiced law since graduating from William & Mary Law School in 1978. Over the course of a decade, Joe found himself having to defend his own property from being taken as part of a condemnor's eminent domain plan. In 1998, he founded Waldo & Lyle, P.C., thus starting the only law firm in

Virginia dedicated to representing only property owners in condemnation proceedings. Joe has tried over 100 cases on behalf of property owners facing an eminent domain condemnation. Believing that public education is as valuable to protecting property rights as succeeding in the courtroom, Joe lectures nationally, writes, and frequently makes media appearances to advocate for the defense of individual property rights. He can be reached at jtw@emdomain.com.



Joshua E. Baker grew up in Manassas, Virginia, and has been a Virginian since 1984, when his family moved from Providence, Rhode Island. Josh joined Waldo & Lyle in the fall of 2006 after graduating from William & Mary Law School earlier that year. During law school Josh was the Executive Articles Editor of Volume

14 of the William & Mary Bill of Rights Journal. Josh's Note *Quieting the Clang: Hathcock as a Model of the State-Based Protection of Property Which Kelo Demands* was published in Volume 14, Issue 1 of the William & Mary Bill of Rights Journal. His interest in property rights grew during his study of political philosophy and government. Today he is able to put those lessons into practice as he represents property owners in eminent domain proceedings. He can be reached at jeb@emdomain.com.

Joseph T. Waldo and Joshua E. Baker

Don't be unduly swayed by the generalities — arriving at damages will be a little bit different in every case.

IN THE LAST DECADE a number of experts have attempted to demonstrate that utility corridors or high-voltage power lines have little or no effect on property values of the homes surrounding the lines or corridors. *See e.g.*, Interstate Natural Gas Association of America Foundation, Natural Gas Pipeline Impact Study, 1990; James A. Chalmers and Frank A. Voorvaart, *High-Voltage Transmission Lines: Proximity, Visibility, and Encumbrance Effects*, The Appraisal Journal, Summer 2009. *But see*, Peter F. Colwell, *Power Lines and Land Value*, The Journal of Real Estate Research, Spring 1990. Their methods have varied, but their findings have been quite similar — there is no appreciable impact on value. The studies then explain the ways in which their findings are limited.

Cutting through the complex, dizzying, and impressive mathematical analysis, one finding appears to be emphasized across these studies — their findings should not be generalized outside of the data sets on which they rely. For example, in 2009 an article appeared in the Appraisal Journal, *High-Voltage Transmission Lines: Proximity, Visibility, and Encumbrance Effects*, drew the following conclusions from the data analyzed:

- There is no evidence that proximity to or visibility of a 345kV transmission line has any impact on residential real estate value;
- Encumbrance of the transmission line on adjoining properties has a consistent negative effect on value, though the effect is usually quite small, the study cites a one percent impact on total value;
- There is no evidence of a greater effect on value during down markets;
- Higher-valued properties show no greater vulnerability to transmission lines.

The author of the article concludes that “[a]n opinion supporting [high-voltage tension lines] effects would have to be based on market data particular to the situation in question and could not be presumed or based on casual, anecdotal observation. It is fair to presume that the direction of the effect would in most circumstances be negative, but the existence of a measurable effect and the magnitude of such an effect can only be determined by empirical analysis of actual market transactions.”

Broad statistical studies of residential home sales simply cannot accurately reflect all of the variables that are at play in the sale of a particular, individual home or any other property. Property owners with property damaged by power lines or utility corridors, or, more accurately, the appraisers analyzing such properties, must examine the specific facts of the case and the particular ways in which the specific property is affected by the project. (In preparation for this outline Joseph T. Waldo interviewed Johnny H. Lambert, a licensed Real estate broker in Virginia. Mr. Lambert documented and confirmed sales transactions, history, and market data in Patrick, Carroll, Henry, and Wythe counties, Virginia as impacted by a high-pressure natural gas pipeline.)

The just compensation trial is intended to quantify the diminution in value between the before and after conditions that are attributable to the place-

ment of the utility on the property and in some instances near the property and the damages created by the presence of the utility or project. Case law around the country varies regarding the degree, to which, if at all, a jury may consider the visibility of a line or project from the subject property, fear in the marketplace about the presence of the line or corridor, and their proximity to the subject property.

A starting place for these considerations is the state constitutions and statutes and the requirements they set forth for the payment of just compensation. In all states the owner must be compensated for the land or property taken by the easement. But how are damages to the remainder calculated for just compensation? Can or must owners abutting the subservient estate be paid just compensation or are they excluded from payment because no physical taking has occurred on their property? The answer depends on a number of factors, including whether the state constitution provides that just compensation must be paid when property is “taken or damaged” for a public use. (See the Appendix at the end of this article for a list of state just compensation statute references.)

It is rare that a power line or utility transmission line or corridor taking requires the complete acquisition of a property, making such acquisitions in nearly all partial taking cases. As with other partial takings, the standard valuation rules apply to the property over which the easement is taken, which requires an appraiser to determine the value of the whole on the before, the value of the easement taken and the value of the remainder after the easement has been taken. The burden rests with the property owner to prove any damages to their property.

In proving damages to the remainder, the owner typically focuses on three causes of damage:

- Damage caused by impairment of the use of the property (access, circuitry, change of grade,

severing of the property, etc.);

- Damage caused by aesthetic impacts/visibility of the power line or utility corridor from the property/disruption of viewshed;
- Damage caused by the fear of or danger from proximity to the power line.

VALUATION • Owners are to be paid just compensation reflecting the diminution in value of the remainder:

- “The measure of damage caused by an easement acquisition is the loss of salable utility both to the area encumbered and to the *unencumbered portion* of the larger parcel.” J.D. Eaton, *Real Estate Valuation in Litigation* 357 (2d ed. 1995) (emphasis added);
- “[C]ompensation must be made once for all and must be estimated according to the full measure of the right acquired.” *United States v. 2,648.31 Acres of Land*, 218 F.2d 518, 523 (4th Cir. 1955);
- “The Government must pay just compensation for those interests ‘probably within the scope of the project from the time the Government was committed to it.’ It may not take advantage of any depreciation in the property taken that is attributable to the project itself.” *Almota Farmers Elevator and Warehouse Company v. United States*, 409 U.S. 470 (1973) (citations omitted);
- “[B]efore the Kilvert Street project, Bruzzese was enjoying the highest and best use of the property as a wholesale distribution and processing operation but that following the alteration the property’s use was limited to warehousing and processing.” *Bruzzese v. Wood*, 674 A.2d 390, 394 (R.I. 1996);
- “Texland Corp. was located in the manufacturing and warehousing district, an area zoned for heavy industrial uses. Texland Corp. fronted on two streets with South 17th Street as the primary ingress and egress into the property. The

viaduct, supported by piers five feet in diameter, elevated vehicular traffic over Texland Corp.’s property. Texland Corp. was in the business of warehousing and transporting stored goods, which involved the use of large commercial trucks. Testimony revealed that the piers supporting the viaduct interfered with the trucks’ ability to maneuver in backing and parking to such an extent that the warehouse could not be used for its intended purpose because the trucks could not access the property. Although the property could still be accessed, the court determined there was a material and substantial impairment of access because the access for which Texland Corp.’s property was specifically intended was rendered unreasonably deficient.” *State v. Northborough Ctr., Inc.*, 987 S.W.2d 187, 190 (Tex. App. 1999) (internal citations omitted).

Legal Treatment Of Proximity

Proximity of a power line or transmission corridor to the property being considered is a factual consideration that plays a role in supporting just compensation for an increase in fear and loss of aesthetics, which are discussed later in this article. Generally, when damages are permitted for fear and aesthetic loss, the more remote a property becomes from the power line or transmission corridor the more remote the owner’s ability will become to prove their property is damaged by the power line or transmission line corridor.

In interpreting the addition of the provision of just compensation for property “damaged” by a taking, the Virginia Supreme Court, quoting from section 227 of Lewis on Eminent Domain, has stated:

“It was asked in argument where are the claims to compensation to stop, if the rule is so applied? The answer, I think, is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitra-

tor that a special value attaches to the premises in question by reason of their proximity to or relative position with the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking; for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy.”

Tidewater v. Shartzer, 107 Va. 562 (1907).

Courts have also found that when a power line exists on abutting property, but makes a particular use of the owner’s property more difficult or impossible, just compensation should include the damage due from the physical restrictions the line imposes. See, e.g., *United Power Association v. Heley*, 277 NW2d 262 (ND 1979).

The greatest proximity of a power line to a property is when the power line is actually on the property. Power lines present on a property have the potential for impairing an owner’s use of the property in a number of ways, discussed below.

Diminution In Value Of Remainder Due To Change In Access

The owner must understand the condemnor’s right to ingress and egress the easement acquired:

- “[D]estruction of access or substantial impairment thereof may form a basis for recovery.” *Ark. State Highway Comm’n v. Billingsley*, 247 Ark. 49, 52 (1969); see also, *Bruzzese v. Wood*, 674 A.2d 390 (R.I. 1996);
- “If the restriction or alteration of access from

subject property to a public road diminishes the value of the property remaining after the taking, then such loss of access becomes a compensable element of damage.” *Trustees of Wade Baptist Church v. Miss. State Highway Comm’n*, 469 So. 2d 1241, 1245 (Miss. 1985);

- “[D]iminution in the value of property resulting from a loss of access constitutes damage... property has been damaged for a public use within the meaning of the Constitution when access is materially and substantially impaired even though there has not been a deprivation of all reasonable access.” *State v. Northborough Ctr., Inc.*, 987 S.W.2d 187, 190 (Tex. App. 1999).

Diminution In Value Of Remainder Due To Change In Grade

If the condemnor’s initial construction plans and cross sections are not reviewed, change of grade and its impact will not be measurable until construction is completed:

- “We are of the opinion that the authorities thoroughly establish the doctrine that under a constitutional provision guaranteeing compensation to the owner of private property damaged for public use a municipality is liable for damage done by raising or lowering the grade of a street, otherwise the language of the Constitution would be meaningless.” *Dickerson v. Town of Okolona*, 135 S.W. 863, 864-65 (Ark. 1911).
- “Where a city in changing the grade of streets permanently injures private property, and thus infringes the explicit provision of the Bill of Rights that private property shall not be taken or damaged for public use without compensation, an action lies for the injury.” *Swift & Co. v. Newport News*, 52 S.E. 821, 825 (Va. 1906).

Diminution In Value Due To On-Site Circuity

Off-site circuity is often noncompensable, whereas on-site circuity is a compensable element of damage:

- Compare *Triangle, Inc. v. State*, 632 P.2d 965, 969 (Alaska 1981) (holding that additional half mile that customers must travel to gain access to property is not compensable) with *Mo. ex rel. State Highway Comm'n v. Ellis*, 382 S.W.2d 225 (Mo. 1964).
- “As to the inconvenience and inaccessibility at the filling station, the evidence showed (after the taking) a sharp dip in place of a level driving space and the leaving of (only) a five-foot lane (outside the pump island), a situation which made it inconvenient and impracticable for customers to maneuver alongside the pumps. Such inconvenience and accessibility in practical effect destroyed the business of the filling station as it then existed. The Owners then offered evidence to show the cost of grading down and moving back the filling station on the theory of cost of restoration of its use to which the property was adapted. We think this was proper.” *Mo. ex rel. State Highway Comm'n v. Ellis*, 382 S.W.2d 225 (Mo. 1964);
- “The State’s taking eliminated the room for maneuvering tractor trailers on the claimant’s land to back in the east door and along the center concrete truckway. Even the claimant’s own trucks for delivery took more room to maneuver and go in the east door than the remaining property provided.” *Groeschel v. State*, 74 A.D.2d 658, 659 (N.Y.A.D. 1980);
- “Testimony revealed that the piers supporting the viaduct interfered with the trucks’ ability to maneuver in backing and parking to such an extent that the warehouse could not be used for its intended purpose.” *State v. Northborough Ctr., Inc.*, 987 S.W.2d 187, 190 (Tex. App. 1999).

Legal Treatment Of Visibility/Aesthetic Impact

Whether the aesthetic impact of power lines, wires and support structures can be considered an element of just compensation in eminent domain proceedings varies by jurisdiction, by type of property use and whether the structures are physically on the property. (The authors have relied heavily upon *Un sightliness Of Power line Or Other Wire, Or Related Structure, As Element Of Damages In Easement Condemnation Proceeding*, 97 A.L.R.3d 587 (1980).) Some courts have denied damages for aesthetic loss when there has been no direct physical disturbance of the property, which evidences some crossover concerns with the consideration of proximity as an element of just compensation. Whether unsightliness or aesthetic loss is compensable for lines and structures placed off the owner’s property will depend largely on whether the state constitution provides just compensation for property taken *and damaged*. A basic consideration for the property rights attorney ponder is whether an inverse condemnation action could be sustained for the loss of the viewshed, which will be dependent on the totality of facts and the conditions of a given situation. Many jurisdictions hold that the loss of view is compensable only if the loss results from an improvement located on the property that is taken:

- *State Comm’r of Transp. v. Weiswasser*, 149 N.J. 320 (1997) (holding just compensation requires compensation for diminution of value of remainder property that is specifically attributable to visibility lost as direct result of removal of portions of property through partial-taking condemnation.);
- *State Highway Comm’n v. Hesselden Inv. Co.*, 84 N.M. 424, 427 (1973) (holding that loss of view is a compensable consequential damage);
- *Appalachian Electric Power Company v. Gorman*, 191 Va. 344 (1950). The landowner’s map of proposed development plans, showing subdivisions, roads and other improvements, was admissible to show the adaptability of the property. The

easement to be taken across Gorman's property cut diagonally through the property and would interfere with a direct view of the mountains from portions of the parcel and "will add some hazards to the land." One witness at trial stated the property was "as fine a piece of property for subdivision as I have seen anywhere in the United States; and I have subdivided from north and south, east and west." Gorman had a landscape architect plat the tract into 100 lots and streets, having the streets follow the natural contours of the property, to avoid cuts and fills. One appraiser depreciated the property as a whole by 50 percent due to the easement and its impact on how the property would have to be resubdivided to rework the roads not to follow the natural contours and the difficulty in selling the unaffected lots because the presence of the line and tower would make the entire subdivision a second-rate development. The Court found that the plat was not speculative, but was "useful and material in illustrating how the taking of the easement and the construction and operation of the power line changed the present and immediate situation with respect to the development of the tract and thereby affected both the present and immediate future use of the entire tract."

Aesthetic Loss Non-Compensable

The visibility of the transmission line and its structures has been treated differently depending on the use of the property at the time of the taking. A few general rules govern the authorities holding that aesthetic loss is non-compensable. In many instances a direct, physical disturbance of the property or a right of property must be shown. This is not a novel viewpoint in states requiring damages to be connected only to a taking of the owner's property and do not require just compensation for damages caused by takings not on the property. Some "damage" states have an evidentiary requirement for an

owner to make a showing that: (1) there is a direct physical disturbance of a right the owner enjoyed in connection with the property, causing them special damages beyond those experienced by the public generally; and (2) the damage is actually incurred and is not merely possible nor merely affecting the feelings of the property owner.

Aesthetic Loss Compensable

Aesthetic loss can be compensable under a number of different federal and state laws and under differing scenarios. Not surprisingly, a number of states permit aesthetic loss as an element of just compensation when the power line is built on the property itself. In this regard the aesthetic loss is a type of severance damage that must be connected to a diminution in market value and unsightliness affecting the value of land is a proper element for the jury to consider in determining damage to the residue. When loss of visibility is compensable, the property owner's attorney must be prepared to prove damages relating to the diminution in value of the remainder. Two types of loss of visibility diminish the value of property: the loss of a view from the property and the loss of the ability to be viewed from abutting streets or populated areas. An owner has a right to a view from the property as well as a right to be viewed from the abutting street.

If the property is no longer visible from a populated or heavily traveled area such as a roadway, "[t]he rule is settled that the owner of real property abutting a public highway has an easement of reasonable view of his property from the highway and the destruction or impairment of that view is the destruction of a valuable property right." *People v. Wasserman*, 240 Cal. App. 2d 716, 731 (1966).

If the property no longer has a view of a desirable area, such as an ocean view, there can be a diminution in the value of the property. "Loss of ocean view and access were elements for which severance damages could be awarded." *Ocean City v. Maffucci*, 326 N.J. Super. 1, 18 (1999).

Legal Treatment Of Fear

There are three prevailing legal treatments of fear as a component of just compensation. (The authors have relied heavily upon Viatus M. Gulbis, Annotation, *Fear of Power line, Gas or Oil Pipeline, or Related Structure as Element of Damages in Easement Condemnation Proceeding*, 23 A.L.R.4th 631 (1983).) One view holds that it is properly a consideration for just compensation without any proof that the fear is reasonable. A second holds that the fear must be shown to be reasonable, while the third view holds that fear is too remote and speculative a damage to be considered as part of just compensation.

Fear Is Compensable

This most property-owner friendly viewpoint holds that one element of just compensation is the diminution in value attributable to a potential buyer's fear of the power line. Some of these states extend the list of elements to include annoyance, inconvenience, and fears about the maintenance of the power line, including the generalized fears of the public regarding electromagnetic exposure. *See e.g., United States use of Tennessee Valley Authority v. Easement & Right of Way*, 405 F2d 305 (6th Cir. 1968) (court held that unfounded fears regarding power lines could affect market value and should be considered in just compensation); *Appalachian Power Co. v. Johnson*, 137 Va. 12 (1923) (fear only permissible for consideration to extent it affects market value).

Fear Must Be Reasonable To Be Compensable

Many states require the diminution in land value attributable to the fears of prospective buyers to be shown to be reasonable. In many permutations of this view there must be a "reasonable probability" of danger shown based upon the specific facts of the case before fear can be a compensable element of just compensation. *See e.g., Southwestern Public Service Co. v. Vanderburg*, 581 S.W.2d 239 (Tex. 1979) (where jury was permitted to consider danger

of electrocution affect on fair market value of the property).

Fear Is A Non-Compensable Speculative Damage

In several states, courts have ruled that fear of harm or danger from power lines is speculative and that just compensation cannot be made for damages considered too remote or too speculative. *See e.g., Central Ill. Light Co. v. Nierstheimer*, 185 N.E.2d 841 (Ill. 1962) (holding that testimony regarding potential for wire to snap did not have a substantial basis and could not be considered in just compensation). The attorney seeking just compensation for a landowner must tie the practical fears of the public to a specific damage to the property. An owner may receive compensation for the fear of owning property near power lines if such fears impact market value. The fear itself is not compensable, but the effect of the fear on the marketplace is compensable if it can be shown that the market value of the property suffered due to a lack of desirability. The landowner's attorney should be ready to maximize the jury's view of the property to assist the jury's ability to understand that the property is less desirable as a result of the project. In states where a view is not conducted other demonstrative evidence must be used to allow the jury to understand the impact on the property.

The attorney seeking just compensation for a landowner must tie the practical fears of the public to a specific damage to the property:

- *Chappell v. Virginia Electric and Power Company*, 250 Va. 169 (1995). The Virginia Supreme Court found that testimony that the landowner, appearing as the only witness for himself, had proffered during trial, as to the public's fear of electromagnetic fields caused by high voltage power lines and the effect of this public fear on the market value of the landowner's property, was inadmissible. The Court repeated its rule for valuing residue in partial takings, stating, "in

every eminent domain case involving a partial taking, the measure of damages to the residue of the property not taken is the difference in the fair market value immediately before and immediately after the taking,” but that “speculative matters should not be considered” when the trier of fact is determining just compensation. Here Chappell had no sales of comparable property and admitted that “it is difficult to prove market value loss when there are no actual sales of comparable property.” Because the testimony Chappell offered failed to quantify any damage to the fair market value of the residue attributable to the alleged public fear of high-voltage transmission lines it was inadmissible. The clear implication of the Court’s ruling is that had Chappell offered a market-based quantification of the damage to his residue his testimony would have been admissible;

- *Virginia Electric and Power Company v. Marks*, 195 Va. 468 (1953). VEPCO appealed the portion of an award of \$6,950 for damages to the residue, which the Virginia Supreme Court upheld, finding that the evidence supporting such a verdict was not speculative. VEPCO argued that three of the five commissioners had considered “speculative evidence of the adaptability of the land” for purposes of a swimming lake. The trial court had given an instruction to the commissioners that “in estimating the value of the land taken ‘all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered’... that there should be considered ‘all uses to which it might be reasonably adapted,’ but that such uses ‘must be so reasonably probable as to have an effect on the present market value of the land’ and that no regard should be given to ‘purely imaginative or speculative value.’” The commissioners were further instructed that in their consideration of the damage to the residue they should “allow only such damages as,

from their judgment and from the evidence, they may reasonably anticipate will result from the construction, operation and maintenance’ of the transmission lines in question.” The trial court set forth the formula for calculating damage to the residue by charging the commissioners to “award the owner the difference between the market value of the same at the time of the taking of the right of way and its market value after the right of way has been taken and considering all the uses which the Power company may make of it””

- *Appalachian Power Co. v. Johnson*, 137 Va. 12 (1923). The commissioners awarded \$2,500 for the land taken, but nothing for damage to the residue. The power company appealed the report as excessive. The Virginia Supreme Court reversed and remanded the case to be retried in front of new commissioners. At trial Johnson, over the power company’s objection, had introduced testimony that a power line had fallen and killed livestock, but gave no particulars of the situation. The Virginia Supreme Court found that “the commissioners could have properly taken into consideration the effect of the fear of the line breaking down and injuring persons and property...if the liability to such injury in fact depreciated the market value of the property.” However, the Court found that the commissioners had not limited their consideration of the evidence on this point to the effect on present fair market value of the property and the rights being taken, but that they had not confined their use of such testimony to the finding of the market value of the property being taken.

DAMAGES A PROPERTY OWNER SHOULD CONSIDER • Some damages to consider include the following:

1. Service/Maintenance of the corridor:

- Herbicide spraying, farms disqualified from organic status.

2. Privacy:

- Inspection by utility personnel;
- Is it a public right of way?

3. Noise:

- “Popping” and “buzzing.”

4. Visibility/Aesthetics:

- Aesthetic loss.

5. Health issues:

- Exposure to electromagnetic fields.

6. Fear:

- Health and safety issues.

7. Future rights included in language of the easement:

- Providing for the future addition of lines within the easement being taken;
- Reserving future rights to place power lines underground;
- Restricting of placing any improvements on the easement land, including buildings or other structures, which can include fences;

- Providing the right to keep the corridor clear of any vegetation or growth;
- Providing the right to cut down trees outside the easement that, if they fell, would fall within a certain number of feet of the lines, towers, or other equipment;
- Describing, often in vague language, the equipment or facilities that can be placed in the easement;
- Creating a three-dimensional easement: “this perpetual right, privilege, and easement of right of way extends over, under, upon and across...”;
- Requiring written permission from power company to make certain uses of the property;
- Right to enter the property to “inspect, rebuild, remove, repair, improve, relocate” equipment and facilities and make “changes, alterations, substitutions, additions to or extensions of” equipment and facilities;
- Designating who will own trees felled outside of or cleared within the easement and at what point after being cut down that ownership is effective;
- Allowing stumps, fallen trees, other debris to remain in the easement;
- Permitting other utility companies to make use of the easement, specifically watch for phone and communication companies;
- Restricting access to, across, through, alongside, or near the easement.

APPENDIX**State Just Compensation Statutes**

State	Article	Section
1. Alaska	1	18
2. Arizona	2	17
3. Arkansas	2	22
4. California	1	19
5. Colorado	2	15
6. Georgia	1	Section 3, paragraph 1
7. Hawaii	1	20
8. Illinois	1	15
9. Iowa	1	18
10. Louisiana	1	4
11. Minnesota	1	13
12. Mississippi	3	17
13. Missouri	1	26
14. Montana	2	29
15. Nebraska	1	21
16. New Mexico	2	20
17. North Dakota	1	16
18. Oklahoma	2	23
19. South Dakota	6	13
20. Utah	1	22
21. Virginia	1	11
22. Washington	1	16
23. West Virginia	3	9
24. Wyoming	1	32