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Federal Government Condemnation Cases

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FEDERAL GOVERNMENT CONDEMNATION CASES*

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THE MOST UNIQUE ASPECT of federal government condemnation cases triable in the federal court of this state is now a thing of the past. Before its recent amendment, Federal Rule of Civil Procedure 81 (a) (7) specifically exempted from the operation of these rules all condemnation cases except as to appeals. Consequently the federal condemnation cases tried in this state came under the provisions of the following federal statute:

> "The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 of this title shall conform, *as near as may be,* to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding."[1] (Emphasis supplied).

It was, of course, the intent of the Congress to favor owners of property affected by federal condemnation proceedings by directing that the practice and similar matters would follow the procedure in the state courts with which counsel, naturally, would be most familiar.

The actual result, however, probably failed to prove as satisfactory as Congress had anticipated. The statute and the decisions left it largely to the discretion of each federal judge as to how far it was proper to follow the state rules of practice, forms, and so on. No amount of research, especially in a state like ours where condemnation cases in the Federal Courts had been relatively rare, could inform counsel for the landowners as to what was the practice in such cases in the Federal Court. The only sure method was to ascertain the rulings of the particular federal judge presiding in trials in which the client is interested. As a result the reporter herein has sat through weeks of trial of the other fellow's condemnation cases to obtain a better understanding of this dim vista now to have the consequent conclusions wiped out by the amendment of the rule.

The rule has been declared not to require the federal court

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* This is the text of an address delivered at the 1954 meeting of the North Dakota Chapter of the Order of the Coif.

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1. 25 Stat. 357 (1888), 40 U.S.C. § 258 (1946). Procedure in condemnation cases is now governed by Fed. R. Civ. P. 71A.

to apply the substantive law of the state, as careful perusal of the statute indicates.[2] This is applied to the measure of compensation.[3] Nevertheless, there was plenty of room for uncertainty and counsel sometimes complained that the federal judges in determining what was "near as may be" under this statute were as poor judges of distance as the man who named "near beer."

But enough of the past. Under the new rule governing federal condemnations a definite practice is established. One of the most interesting provisions is that where the defendant landowner feels he has no defense or legal objection to the taking of the property involved (this covers 99.96 per cent of the cases) he is not required to answer but is given the specific right to file a notice of appearance which entitles him to full notice as to the time of trial and also provides that at the trial he may present testimony as to the damages suffered by reason of the taking by condemnation of his property.[4] This covers also severance or consequential damages resulting to property retained by him.

Since the new rule became operative it has been our practice not to file an answer but instead a notice of appearance. However, after consultation with the United States District Attorney and with the Federal Judge and for the convenience of all concerned, we expand the plain notice of appearance slightly to give it some of the aspects of an answer. For instance, if the government takes part of a farming unit, even though a portion of the land may lie at a distance from that taken, it is our practice to state in the notice of appearance that consequential damages will be asked for the lands remaining, and to describe them, so as to give the government fair notice and an opportunity to make their own estimate of such damage.

Similarly, where the government, as in the condemnation of lands for Garrison Reservoir above Sanish, is leaving the oil and gas rights in the landowner, subject to certain restrictions such as against pollution of reservoir water by prospecting for or producing oil or gas, we state that consequential damages will be claimed and if the ownership of the oil and gas is fractional, state the amount of such fraction.

We do not state the amount of damages claimed in dollars in any event. Strange as it may seem, the owner's estimate of the

2. United States v. Miller, 317 U.S. 369 (1943); Brown v. United States, 263 U.S. 78 (1923).
3. United States v. Miller, note 2, *supra.*
4. Fed. R. Civ. P. 71A (e).

value of his land, until he has had it examined and appraised by experienced and professional appraisers, is often most uncertain. It is quite a common thing where answers are filed by landowners which commonly state the amount of damages claimed, to see counsel put to the necessity of amending the figures upward to do justice to his client in the light of later information obtained, or conversely, to ask to lower the figure by amendment to avoid antagonizing the jury by an estimate later found to be excessive.

As the only question remaining at the time such cases go to the jury is the amount of damage, the order of proof is reversed. The landowner is required to put on his evidence first and formerly had no inkling, in most cases, of what the government testimony would be as to value until the close of his own case on direct. In the last four years, however, the government has commonly stated in the opening statement to the jury its contention as to damages as to each tract, the cases usually involving ten to fifteen tracts each. Ordinarily, however, the government does not disclose such figures until the actual trial.

The task of making a fair estimate as to the defendant's damages is further complicated by the fact that the owner is entitled to the fair market value of the land at the time it is taken, not only for the uses to which it was then being put but also the "highest and most profitable and best use for which it was fitted in the reasonably near future". In one Hawaiian case it was held that evidence was admissible to show that the highest and best available use of the land was for raising sugar cane though water necessary would have to come from lands owned by others and on which the owners had no present claim.[5]

Spending a moment on the matter of severance damages, Federal District Judge Charles Vogel, who has tried the majority of cases involving recent land condemnations in this state, has generally held that the owners could present testimony concerning lands remaining in their ownership to show damages to such lands even though not contiguous with the lands being taken, provided the tracts had commonly been used together as a ranching or farming unit and evidence shows they were most useable and valuable as such.[6] There is a strong line of cases, however,

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5. McCandless v. United States, 298 U.S. 342 (1936).
6. *Accord*, City of Stockton v. Marengo, 137 Cal. App. 760, 31 P.2d 467 (1934); Duggan v. State, 214 Iowa 230, 242 N.W. 98 (1932).

which hold that in order for severance damages to be allowable the lands retained must be contiguous.[7]

Always the chief, and usually the only, issue in these cases is that of land values. The courts, frankly admitting the inadequacies of such measurements, have nevertheless held that fair market value of land is the measure of damages for which the government is liable.[8] This is commonly defined as the price at which the mind of the informed purchaser would meet with that of the informed seller where neither is under compulsion to deal. Many courts have frankly stated that this is a far from satisfactory measure but the best one that has been evolved to date. It naturally gives opportunity for wide diversity of opinions, especially in applying the rule as to what is the best, most profitable available use of the property involved.

Along the Missouri River bottom lands the problem is further complicated by the fact that many of these lands have not been utilized until the recent discovery of the speed and economy with which heavy tractors equipped with bulldozers could clear the land of brush and trees up to about a foot in diameter. The difficulty is that these bottom lands are quite unlike those nearby but on higher ground from the standpoint of soil types and moisture supply and the height of the water table. Further, most of the lands have been held in the families of early settlers, handed down from father to son or within the family, and very few of them have been placed on the market for sale.

Sales of "comparable lands" which are usually those within the same neighborhood and within a few miles of the land involved in the valuation proceedings are common standards for valuation. In order to get two or three of such "comparable sales" in these cases it has been necessary at times to cover 50 or 60 miles of river bottom lands.

One of the unusual phenomena in the government practice of condemnation is the Judgment on Declaration of Taking. This is based on a federal statute[9] which provides that at or after the commencement of condemnation case the authority taking the land (in these cases the Secretary of War) after depositing in court the amount of the value of the lands so taken, according to the government estimate, may file such a Declaration signed by

7. See, e.g., Atchison, T. & S.F. Ry. v. Southern Pac. Co., 13 Cal. App. 2d 505, 57 P.2d 575 (1936).
8. United States v. Miller, 317 U.S. 369 (1943).
9. 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1946).

him which immediately transfers title to the government of the property involved. On such a Declaration the federal district court enters a Judgment on Declaration, which often causes considerable consternation among landowners' counsel who are unfamilar with this practice. They, of course, are immediately concerned with availability and time for appeal and will find little light on the topic in a short search of the statutes.

Actually, such judgments are interlocutory in nature and in no way affect the right of the landowner to contest the government valuation of his land. Under the statutes and the rules, the trial court has the power to permit the landowner to apply for and receive any part or all of the deposit as to his property. Commonly, 100 per cent of it is allowed to be withdrawn. The ultimate determination of the value of the land awaits the trial of the case, which may be months or years after the entry of Judgment on Declaration. The government pays no interest on the amount deposited but is required by statute to pay six per cent interest on any amount contained in the verdict over the amount of the government's deposit. There is, therefore, no occasion for an appeal and none lies from the Judgment on Declaration.

Often it is actually a considerable assistance to the landowner to have the deposit made and Judgment on Declaration entered. The time of valuation is then fixed as of the time the Declaration is filed. If he wishes the owner may withdraw the deposit and use it to purchase replacement lands or otherwise, as he may see fit. He does run the risk, however slight it may be, of being required to repay the government the difference should the jury return a verdict for less than the amount of the government deposit.[10]

It might be fitting at this point to observe that a recent amendment of the federal income tax statutes has simplified the replacement problem of the former owner. Formerly, where property was taken by condemnation or sold under threat of condemnation the landowner could set up a replacement fund under certain restrictions from which he could purchase property similar to that taken or sold without being liable for income tax on the gain realized. The law in that event treated it as an exchange. To do this he had to trace the funds from the sale to the new purchase.

Under the present law, however, this is not required and any repurchase of similar lands made after certainty of condemna-

10. United States v. Miller, 317 U.S. 369, 380-81 (1943).

tion is apparent, beginning, we believe, with December, 1944, and ending with the end of the tax year after the money is obtained or deposited by the government, is considered as an exchange and not taxable, provided the money was deposited or received December 31, 1950. Further, it has been held that property otherwise qualifying can be used as replacement even though it is purchased on contract for sale which does not require payment within the period above stated.

Since these condemnation cases are *per se* and of necessity problems of valuation, the considerations of valuation cases generally are applicable here. The somewhat artificial standards, however necessary, adopted by the courts, make testimony on such matters particularly difficult for inexperienced witnesses. While the owners themselves are automatically qualified to give their opinion upon values of the property, it does not necessarily follow that such opinion will be very persuasive as far as the jury is concerned. In most instances the owners have never been in court before and virtually in every case never have never been in court on a condemnation case. It therefore follows that the most dependable testimony is usually that of a competent, experienced and professional appraiser with as much knowledge of the particular locale involved as possible. Juries have repeatedly demonstrated in verdicts in these cases that such testimony is most convincng to them. As a result it is not surprising if the landowner may sometimes feel like the defendant in the criminal case who on being offered counsel by the judge replied that personally he would prefer a couple of good witnesses. If he cannot have both competent counsel and competent witnesses that would, perhaps, be the best choice in many cases.

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