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Forum Juridicum: The Problems of the Owner in Federal Condemnation

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FORUM JURIDICUM

THE PROBLEMS OF THE OWNER IN FEDERAL CONDEMNATION

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The 1965 seminar of the Louisiana Chapter of the American Right-of-Way Assocation reviewed recent federal condemnation cases.[1] When these were compared with decisions of Louisiana state courts, the result was to emphasize the disadvantages that burden an owner who must fight for "just compensation" in federal courts.

For example, under Louisiana law special benefits may be offset only against severance damages.[2] But in federal eminent domain cases it is constitutional for the Congress to direct that special benefits be offset, not only against severance damages, but also against the value of the land actually taken for a project.[3]

This the Congress has done with respect to property partially taken in connection "with any improvement of rivers, harbors, canals or waterways."[4] Likewise, in enacting statutes for putting in streets in the District of Columbia, Congress directed that special benefits be assessed against owners from whom the land was taken.[5]

In the Algiers Cut-Off Canal case in Louisiana, brought under 33 U.S.C. section 595, the commission found that a particular tract of land taken for the canal was worth $17,500. However, special benefits to the remaining land were found to be in excess of that amount, and the landowner was given no cash payment, despite arguments of unconstitutionality and the speculative nature of the special benefits.[6]

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1. These numbered well over one hundred reported decisions since January 1, 1963, and only a few could be taken up during one afternoon.

2. LA. CIVIL CODE art. 2633 (1870); LA. R.S. 19:9 (1950); Louisiana Highway Comm'n v. Grey, 197 La. 942, 2 So.2d 654 (1941). That is the modern trend throughout the country. 3 NICHOLS, EMINENT DOMAIN, 97, § 8.6206:1 (1950).

3. United States v. Miller, 317 U.S. 369, 376 (1943).

4. 33 U.S.C. § 595 (1958).

5. Baruman v. Ross, 167 U.S. 548 (1896).

6. United States v. 1,000 Acres of Land, More or Less, in Plaquemines Parish, La., 162 F. Supp. 219 (E.D. La. 1958).

It is clear that, if the Congress directs, land may be taken without payment of money, on the basis of anticipated special benefits. While no Supreme Court case seems to have passed directly on the point, it seems probable that, even in the absence of a statute such as 33 U.S.C. section 595, the broad language of earlier opinions would require that the value of land taken be offset by estimated special benefits.

Two recent opinions by federal courts are efforts to soften what, to an owner, must seem a harsh rule.

In *United States v. 133.79 Acres of Land, Etc.*,[7] the Government, under 33 U.S.C. section 595, took a permanent easement to construct channel improvements in connection with the control of the Arkansas River. The perpetual easement area took some 97 acres of a small island of about 160 acres.

The government appraiser valued the entire tract at $12,000 before the taking, and then valued the remainder of the land, 62 acres, after the imposition of the easement, at $60,000. Of course, on that basis, the owner would get nothing for his land.

The Court stated the rule established by the United States Court of Appeals for the Fifth Circuit in 1958 as follows: "Special benefits are those which arise from the peculiar relation of the land in question to the public improvement . . . in other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways."

The Court concluded that the Government had shown no special or direct benefits to this particular piece of land because of the taking of some 97 out of 160 acres. The decision seems correct, because the landowner had an island with frontage on the river before the taking, and he similarily had frontage on the river after the taking.[8]

Special and direct benefits seem to be found when the project results in giving an owner frontage on a street or a canal which he did not have before. Even though benefit may accrue to land

7. 230 F. Supp. 973 (W.D. Ark. 1964).
8. See United States v. Alcorn, 80 F.2d 487 (9th Cir. 1935).

at a short distance from the new canal or the new street, it generally seems to be held to have received only general benefits, and not special benefits.

Likewise, in *United States v. 2,635.04 Acres of Land, Etc.*,[9] the Government was trying to offset special benefits under 33 U.S.C. section 595 by evaluating the remainder land as suitable for a campsite or lake shore development. This gave a higher value for the remainder land than that fixed by the owner's appraisers.

The court held that "benefits that can only be realized by the expenditures of substantial sums of money in a project so uncertain as this lake shore lot development, are not, in our judgment, the kind of benefits Congress contemplated. . . . This testimony is highly speculative and too remote to have any realistic effect upon value. We regard it as incompetent and prejudicial to the rights of the" owners.

Another hazard to an owner is the right of the federal government to harm the owner's land, short of a "taking," without payment of just compensation. This is now a common thing around airfields and missile sites. The Federal Constitution, unlike many state constitutions, provides just compensation only for property "taken," and not for mere damage to property.[10]

For example, two cases in 1964 found as a fact substantial interference with the owners' use and enjoyment of their property in the vicinity of an Air Force Base, but denied recovery.

In *Bellamy v. United States*,[11] the claim rested on plaintiff's allegations that the Air Force, at all hours of the day and night, would fasten jet engines on what were called "trim tabs," to test them. The jet engines were run at very high speeds, emitting loud noises and fumes and causing surrounding objects to vibrate. The noise created at certain times ranged between 90 and 95 decibels.

However, the court held that "unless this interference amounts to a total destruction or deprivation of all or most of

9. 336 F.2d 646 (6th Cir. 1964).

10. U.S. CONST. amend V. *Cf.* LA. CONST. art. I, § 2, providing that "private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

11. 235 F. Supp. 139 (E.D.S.C. 1964).

the plaintiff's interests, it does not constitute a taking and is not compensable under the Tucker Act."[12]

In *Leavell v. United States*,[13] the testing of jet engines on Shaw Air Force Base caused a decibel range of from 90 to 117, "shaking windows and rattling pictures and dishes, drowning out conversation, radio and television, and making it difficult if not impossible to sleep."

The Court pointed out that there had to be "a taking" of the property under the fifth amendment, that there is a distinction in federal law between a taking and consequential damages, and that to be compensable, a taking, short of actual occupancy, has to be government action in which the "effects are so complete as to deprive the owner of all or most of his interest in the subject matter."

In *Avery v. United States*,[14] the court was dealing with a claim for avigation easements taken over 33 parcels of land in Florida. Before the litigation, the United States has secured avigation easements over some parcels allowing flights as low as 29 feet above the ground. Plaintiffs now contended that the introduction of larger and noisier aircraft constituted a further taking and an uncompensated expansion of the existing easement. The court held that the introduction of new aircraft, and the increase of operations, resulting in greater noise and greater inconvenience, caused a further reduction of land values. It was a new and further taking as to these parcels.

Other parcels involved overflights, but above an altitude of 500 feet. Consequently, there was no compensable taking of an easement on those parcels, and the inconvenience and injury to the property, incidental and unavoidably attendant upon the use of airways, was not compensable, even though the vibrations and noise were just as bad as over those parcels subject to an easement.

These principles, antedating the cases just discussed, led to the interesting and anomalous case of *United States v. 3276.21 Acres of Land* (Miramar),[15] where the court was puzzled as to what to tell the jury to return as a formal verdict.

12. This is to be distinguished from continuous low altitude flights which amount to a "taking" of a permanent avigation easement. United States v. Causby, 328 U.S. 256 (1946).

13. 234 F. Supp. 734 (E.D.S.C. 1964).

14. 330 F.2d 640 (Ct. Cl. 1964).

15. 222 F.2d 887 (S.D. Cal. 1963).

The government had started a condemnation suit in July 1958 and made a deposit for taking the fee of certain land around an airbase. However, there were flights that had begun over the surrounding land prior to February 1952, and the government claimed that they had become so extensive and had so interfered with the rights of the owners that the government had taken an incipient easement beginning in February 1952; and that by July 1958, the date of the filing of suit, the government had acquired title to an avigation easement by the prescriptive or limitation period of six years. Therefore, the government contended that in July 1958, when it started the condemnation suit, it already owned an avigation easement by prescription, and all it had to pay for was the value of the fee, less the damages caused by the avigation easement.

The court had found that the flights were not sufficient to be a taking until August 1955; and that, thereafter, beginning in August 1955, the flights were so extensive and oppressive that they constituted a taking of an easement which would give the government title, if the flights lasted six years without suit being brought by the owners, or at such time as the government did file suit and make a deposit to cover the easement. Because of the deposit and suit of 1958, the government acquired title in fee.

The landowners took the position that, under the well-known case of *United States v. Miller*[16] (which holds that the landowner has no right to any increase in value due to the fact that a particular tract is clearly or probably within a government project, even though suit had not yet been filed, and hence speculative value has to be excluded in determining what is just compensation), the reverse must be true; and the court must exclude any depreciation in value caused by the prospective taking, once the government is committed to a project.

In submitting the case to the jury the trial judge had given the jury the right to make two different findings so that there would be a complete record for an appellate court, if it went up on review. The first alternative was in valuing the land at the date of taking (July 1958), to ignore all flights over the land after August 5, 1955 (when the court had found that for the first time the government had taken an easement), until the date

16. 317 U.S. 369 (1943).

of taking the fee in July 1958. Also, the jury was to ignore all regular and systematic flights over the land which occurred *prior* to August 1955. The jury came back with a verdict of $3,250,000.00.

The second alternative was again to ignore all flights after August 1955, until the date of taking (because the court had found that from August 1955 on, the government had taken an easement and had to pay for it), but the jury could take into account the regular and systematic flights over the land which occurred *prior* to August 1955, (which was the first time that they became so extensive that the court felt that an easement had actually been taken). The jury found under this alternative a verdict of $3,075,000. The difference in the verdicts was that, when the jury considered the regular and systematic flights, less than an easement, which occurred over the land prior to August 1955, which they considered as a detriment or a burden on the land, they brought back a verdict of $175,000.00 less.

Faced with these two alternate verdicts, the court discussed the matter at some length. The problem is one we're facing in Louisiana and Mississippi, with airfields being built; and the Pearl River-Louisiana and Mississippi-testing project, in which the government is taking an easement over a large area of land, for a vibration or non-habitation easement. But, we don't know when the government may have to extend the borders of that easement and take lands, perhaps all the way to the Gulf Coast, in order to allow the project to develop to its full extent. There may be vibrations and annoyances coming up gradually in the areas beyond the present perimeter, so that the holding in the *Miramar* case may be of significance for those of us in the Mississippi and Louisiana condemnation cases going on now, and for the next several years.

Since the government had actually taken an easement from August 1955 on (for which it had to pay), the jury could ignore that and try to estimate the value of the land as of the date of taking in 1958, because the government had to pay any damage that occurred from 1955 on, in any event; and the jury did not have to depreciate the land because of the fact that the easement existed from 1955 to 1958.

The real question before the jury was what it should do about the regular and systematic flights that had occurred before

August 1955, before the government had been held to have taken an easement.

First the court discussed the *Miller* case, and said that that case and following cases had to be limited to the particular holding; namely, that where property is "in the area contemplated to be included within the government project" its value on condemnation may not be increased or decreased by the fact that the government will probably take the property. However, trespassing over defendant's property "not sufficient to constitute a taking" comes within a different rule.

The court felt that its finding that there was no incipient taking up to August 1955 meant that the flights were not so frequent and oppressive as to constitute a direct and immediate interference with the land, and thus a taking. The fifth amendment allows payment only for property "taken" for public use. The court said this must be distinguished from state constitutions (like Louisiana's) which provide that private property shall not be taken or damaged for public use without just compensation. Therefore, this was an incidental damage, short of a taking, which must be borne by the landowner.

The court determined that inconvenience or injury or damage, caused by flights not so extensive as to constitute a taking, are not matters which may be considered in a condemnation case, in awarding compensation.

The court pointed out that the jury verdict, in the alternative, meant a substantial difference to the owners, as much as $70.00 per acre on their tract of 2,400 acres.

The court finally determined that the jury, in evaluating the premises was entitled to depreciate it, apparently, by the fact that the land was subject to trespassing prior to August 1955; and ordered judgment entered for the lesser amount.

As I understand that holding, in the present situation that we have in Mississippi, if lands beyond the perimeter of the present vibration easement are affected somewhat, but not sufficiently to constitute taking, and it is not for several years that the government decides to take additional lands or an easement over additional lands for vibrations beyond the present perimeter, the jury will be allowed to consider the fact that

the land has been depreciated by those trespasses, short of a taking. Moreover, if the interference with the land beyond the perimeter is oppressive enough so that the government can argue that it is now taking an easement, even though it is not paying for it beyond the present perimeter of the testing area, and more than six years go by, it is possible that the government will then argue prescription or limitations, and try to use that easement without paying any compensation. It is a grave problem and one that will have to be considered within the next three or four years, in Mississippi and Louisiana.

It would be natural to suggest that owners should take more frequent appeals or fight their cases with more vigor in the trial courts.

But the difficulty is that no costs of litigation may be assessed against the United States in eminent domain areas.[17] Large eminent domain suits require from thirty to ninety days for trial. Expert fees run into several thousands of dollars. A record of several thousand pages may cost ten or fifteen thousand dollars to multilith or print for an appeal; especially if the owner goes all the way to the United States Supreme Court.

If an appeal costs $20,000, which cannot be recovered from the United States, it is clear that an owner cannot afford to appeal a $20,000 mistake by the trial court. Even if he wins, the owner ends up with nothing.

CONCLUSION

Our job as lawyers is to try cases within the rules as we find them in decided cases. But, we should suggest changes that will be equitable to the landowner, and not an unfair burden to the government.

17. United States Tennessee Valley Authority v. Easement and Right of Way Over Certain Land in Smith County, Tennessee, 214 F. Supp. 29 (M.D. Tenn. 1959). Recent legislation, approved July 18, 1966 (PL 89-507, 80 Stat. 308, amending U.S.C. § 2412 (1966)), now authorizes the award of costs to the prevailing party, in any action brought by or against the United States or United States agency or official in his official capacity. Unfortunately, this does not help in this particular specialized litigation because, in eminent domain cases, the United States is always the prevailing party. For that reason Rule 71A(1) states that, in a condemnation action, "costs are not subject to Rule 54(d)." 28 U.S.C. 2412 and Rule 54(d) are quite similar, and subdivision (1) of Rule 71A was included so as to avoid automatic imposition of costs in favor of the United States, as the prevailing party, against all landowners in all eminent domain proceedings. See Judge Wright's opinion in United States v. 1,000 Acres of Land, More or Less, in Plaquemines Parish, La., 162 F. Supp. 219 (E.D. La. 1958).

First, legislation in the Congress could expand the rule of just compensation to include payment for damages to land, as well as for land taken; and to prevent the offset of estimated special benefits against the value of land actually taken.

Secondly, the Congress should allow the assessment of litigation costs against the government, including expert fees and attorneys' fees. The present cost of contesting the value set by the government, inevitably prevents the owner from receiving just compensation.

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