

FEDERAL EMINENT DOMAIN PROCEDURES

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In federal condemnation actions, federal substantive and procedural laws, as opposed to state laws, are controlling.¹ Federal condemnations are currently controlled by Rule 71.1, formerly FRCP 71A, of the Federal Rules of Civil Procedure.

Prior to the promulgation of Fed.R.Civ.P. 71.1, individual federal statutes authorized the condemnation procedure for takings. There are still some statutes which set forth specific procedures apart from Fed.R.Civ.P. 71.1, however a clear legislative intent must be shown before these statutes will supercede 71.1. Because of the rarity of such legislative intent, the Federal Rule generally preempts predecessor statutes.²

In Southern Natural Gas Company v. Land, Cullman County, 2.0 Acres of Land,³ the Court noted that Fed.R.Civ.P. 71.1 afforded a uniform procedure for all condemnation cases which utilized the natural power of eminent domain. Therefore, the court found that any statutes, which set forth different procedures, were supplanted by the Rule.

Complaint Process under Rule 71.1

Fed.R.Civ.P. 71.1(c)(2) requires that complaints include:
(a) a short and plain statement of the authority for the taking,

(b) the use for which the property is to be taken, (c) a description of the property sufficient for its identification, (d) the interest to be acquired, and (e) as to each separate piece of property a designation of the defendants who would have been joined as owners thereof or the same interest therein. Since condemnation actions are *in rem* proceedings, the complaint names the property as the "defendant" together with at least one of the owners of some interest in the property. Fed.R.Civ.P. 71.1(c)(1).

Unlike the normal service requirements set forth elsewhere in the Rules, Fed.R.Civ.P. 71.1(d)(3)(A) mandates personal service by mail on all persons having, or claiming to have, an interest in the property for which the addresses are known and within the U.S. or its territories. Service on all other persons can be carried out by publication; however, mere ignorance of interested parties' addresses may not be sufficient to avoid personal service. The Fifth Circuit has maintained that Fed.R.Civ.P. 71.1(c)(3) also requires that all parties whose names can be ascertained by "a diligent search of the records, considering the character and value of the property involved and the interest to be acquired" must be personally served.

Under Fed.R.Civ.P. 71.1, the failure to properly serve interested parties will allow those parties and their assigns to challenge the taking. In United States v. Catlin,⁴ the court held that the lack of notice to a party who should have been notified that a property interest is being taken does not void the taking,

but does preserve the party's ability to subsequently challenge the statutory validity of the taking and file a claim for compensation.

Answer

In order to preserve any objection to the taking an answer is required within 21 days. Fed.R.Civ.P. 71.1(e). However, those owners who do not object to the taking need only file a notice of appearance. Fed.R.Civ.P. 71.1(e). Even if no answer is filed, the rule preserves the condemnees' rights to present evidence on the issue of just compensation and to share in the proceeds.

Deposit and Distribution

Where a Declaration of Taking is filed along with the complaint, a deposit of estimated compensation can be made with the court. Fed.R.Civ.P. 71.1(j). Title then passes to the condemning authority and the court and counsel are required to expedite the proceedings for the distribution of the deposited money and for the ascertainment of just compensation. Additionally, the court may choose to enter an interim distribution while the action is pending as it has the authority to "order such distribution of a deposit as the facts warrant." Fed.R.Civ.P. 71.1(c)(4).

Federal Court Jurisdiction Over State Actions

Federal Courts are generally reluctant to deal with issues unless it is clear that federal standing exists. An example of this can be found in Columbia Gas Transmission Corporation v.

Deana Drain,⁵ where the Fourth Circuit refused to accept jurisdiction over a title dispute. Although the court recognized that it had authority to handle gas utility condemnations, it refused to accept the Natural Gas Act, 15 U.S.C.S., Section 717, et seq. as a jurisdictional basis for the Gas Company's claim that it maintained title to a property previously condemned.

However, this is not to say that federal courts never find standing over condemnation matters. In Washington Metropolitan Area Transit Authority v. One Parcel of Land in Prince George's County,⁶ a federal district court found standing, noting that not only do the federal courts have a right to determine who among competing claimants is entitled to payments of compensation, but also that this the decision may be made as a preliminary matter. Federal courts will look to the law of the state in which the parcel is located to make such determinations.

State condemnation actions are generally not automatically removable to federal courts. The exception to this general rule is for diversity jurisdiction as described in 28 U.S.C. 1332(C)(1). In Union Pacific Railroad Company v. 174 Acres of Land,⁷ the court noted that the railroad company could bring a diversity action against an owner so long as the railroad is properly authorized to condemn property within the State.

Discovery

Fed.R.Civ.P. 26 governs discovery in federal condemnation actions, as well as other federal matters. The rule requires that

the discovery disclosure must include: (a) the name, address, and telephone number of all known possible witnesses or persons having discoverable material, (b) copies of or descriptions and locations of all documents, data compilations and tangible things that may be used to support the party's claims, (c) computations of any damages claimed by the party, (d) the identity of any expert witnesses, and (e) any written reports prepared by such expert witnesses. Under this rule, the condemning authority is required to provide the landowner with a copy of its appraisal of the condemned property.

A controversial area remains whether the experts retained in anticipation of litigation but not called at trial are required to be provided. This is now controlled by Fed.R.Civ.P. 26(b)(4)(B), under which discovery from such experts may only be obtained upon a showing of exceptional circumstances in which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter.⁸

Right to Jury Trial, Commissioner Appointments and Standards

Jury trials in condemnation actions are different from normal jury trials inasmuch as the jury's decision in condemnation trials is limited to the issue of just compensation. While there is no constitutional right to a jury trial in federal condemnation proceedings,⁹ in those areas of Fed.R.Civ.P. 71.1 where Congress has not specially provided for a constituted tribunal, a jury trial may be available under Fed.R.Civ.P. 71.1(h).

Requests for jury trials must be filed within the 20 days allowed for an answer, and should not easily be denied. In Questar Southern Trails Pipeline Company v. 4.26 Acres of Land,¹⁰ the court held that a trial by jury should be allowed except in extraordinary and exceptional circumstances. In addition, the Court held that a commission should be appointed only in cases where there is a peculiar circumstance such that a trial by a jury would be inadvisable. A large number of facts to be dealt with in the case is not persuasive enough in and of itself to require a commission rather than a jury trial.

The only requisite standard for the appointment of Commissioners is that the appointees must be disinterested parties. Absent compelling evidence to the contrary, there is an assumption by the Court that the Commissioners will faithfully perform their tasks without any personal bias.¹¹

The standard of review of a Commission's report under Fed.R.Civ.P. 71.1(h) is the same as the power over the findings of fact under Fed.R.Civ.P. 53(e)(2). If the Judge determines that the Commission's findings are inadequate or clearly erroneous, the Court may use its discretion to either modify the report on the basis of the record made by the Commissioners, reject the report in whole or receive such parts as it deems worthwhile, or recommit the report to the Commissioners with instructions.¹²

In summary, the trial court has the discretion to appoint a Commission to determine just compensation under Fed.R.Civ.P.

71.1(h). The broad language of the statute permits the courts to appoint Commissions for any number of reasons, including the character of the property, the location of the property, the quantity of the property, or other reasons in the interest of justice.

Right to Take Issues

It is theoretically possible that a condemnation case could be defended on the basis that the proposed taking had not been authorized by Congress. However, as a practical matter this never happens because the Attorney General will generally not commence condemnation actions without an appropriation.

Whether a taking is for a public use or public purpose is potentially a legislative question. The only permissible challenge is an allegation that Congress lacked the constitutional power to enact the legislation authorizing the taking.¹³

In Hawaii Housing Authority v. Midkiff,¹⁴ the state legislation allowed for a forced transfer of title to real property from lessors to lessees as part of a program to abolish the remnants of a Polynesian feudal land tenure system. The Court held that the Fifth Amendment's "public use" requirement was coterminous with the extent of sovereign power, and that the mere fact that the property was being transferred to private owners did not mean that the taking had only a private purpose. The Supreme Court held that the basic Police Power allowed the state to destroy the "oligopoly" of land ownership under the Hawaiian trust

system.

Issues of comparative desirability or necessity for the taking are usually either legislative or administrative determinations and are not subject to review by the Court in a condemnation case.¹⁵ Further, it is no defense to a taking that more property is being taken than is strictly necessary for the project, or that other property would be more suitable for the project.¹⁶ Generally the judiciary defers to a legislative public use determination unless the use involves what is either impossible or "palpably without reasonable foundation."¹⁷ The Richardson case is one of the best explanations of how federal courts will review legislative necessity delegations. This opinion dictates that one may be better off looking at the State court for necessity relief!

Property Standards

There is a tension between the narrow concept of "property" employed in condemnation cases and the broad definition which may be found elsewhere in the law.

The Fifth Amendment mandates compensation for "property taken," yet compensation for "consequential" losses such as loss of business value, business opportunity, and goodwill are ordinarily excluded. In U.S. v. Petty Motor Co.,¹⁸ the court held that:

Just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes but a so-called "market value." It is

recognized that an owner often receives less than the value of the property to him, but experience has shown that the rule is reasonably satisfactory.

The Petty approach seems to conflict with the depiction of property set forth in Lynch v. Household Finance Corp.,¹⁹ which stated:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental inter-dependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Courts have sometimes applied a broad view of the right to ownership to takings cases. When the government in Armstrong v. U.S.²⁰ asserted sovereign immunity to prevent the enforcement of materialmen's liens on certain boats that the government had constructed, this action was deemed a "taking" of the liens. The Court noted that the result of the government's action was the destruction of *all* of the materialmen's property rights under their lien claims and was therefore compensable.

However, there are also other more restrictive views of property in condemnation actions. For example, in Omnia Co. v. U.S.,²¹ the Supreme Court held that, when involved in a wartime taking of property which voided a profitable contract, the frustration of the contract was simply non-compensable. Similarly, in Mitchell v. U.S.,²² a taking of land destroyed a profitable business, and although the owner received compensation

for the real estate, a separate claim for the value of the business was denied because there was no "finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land."²³

Dismissal after Entry of Award, Costs, and Attorney Fees

If the governmental agency has not actually taken possession of the property, it can choose to dismiss a condemnation proceeding after entry of an award. Fed.R.Civ.P. 71.1(i)(3). This concept was demonstrated in United States v. 4,970 Acres of Land²⁴, where an appellate panel reversed a trial court's refusal to enter a dismissal where possession had not yet been turned over. However, when the government does dismiss the action, it must pay the owner's costs and attorney fees. 42 U.S.C. 4654.

42 U.S.C. 4655 allows for the payment of reasonable attorney fees and reasonable costs in a condemnation proceeding in which either (a) the final judgment is that the federal agency cannot acquire the property by condemnation, or (b) the proceeding is abandoned by the United States. Under the Equal Access to Justice Act, attorney fees may be available to a "prevailing party" unless the position of the United States was "substantially justified" or special circumstances would make the award unjust. 28 U.S.C 2412.

An award under this statute is not available to individuals whose net worth exceeds \$2 million or to entities whose net worth exceeds \$7 million or employ more than 500 employees as set forth

in 28 U.S.C. 2412(d)(2)(B).

VALUATION ISSUES

Just Compensation Standard

The definition of fair market value is the most probable price that would be negotiated between a willing buyer and willing seller when neither is under compulsion and both are fully informed. Compensation is generally paid only for the actual land taken, giving no consideration to the particular circumstances of the property owner.²⁵

The court in U.S. v. Miller, explains how "fair market value" as applied in condemnation cases may vary somewhat from ordinary negotiated considerations of value. While an owner is to be indemnified for his loss, he is not to be compensated in any way for the gain to the condemning authority. In addition, factors relating to the reluctance of the owner to part with the property or its unique suitability for the owner's particular purpose cannot be considered.

Highest and Best Use, Changed Use, and Assemblage Standards

Similar to the just compensation standard is the highest and best use standard. The definition of highest and best use is frequently described as the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered..."²⁶

A common issue is whether uses other than those in existence

at the time of the taking can be considered. In Board of County Supervisors of Prince William County, Virginia v. United States,²⁷ the U.S. Court of Appeals for the Federal Circuit held that property owned by the County, which had been acquired in order to protect the Manassas Battlefield, should be valued based upon its highest and best use. Citing Olson, the Court of Appeals set forth the standard as the amount commanded in the open market at the time of the taking in light of the highest and most profitable use, including what it may have been devoted to in the near future.²⁸ The Court of Appeals panel relied upon McCandless v. United States²⁹ in holding "the rule is well settled that, in condemnation cases, the most profitable use to which the property can probably be put in the reasonably near future may be shown and considered as bearing upon the market value."³⁰

Another frequent issue in the highest and best use determination is whether assemblage may be considered or whether the valuation must occur in isolation from other properties. In U.S. v. Powelson,³¹ when property was taken for construction of the Tennessee Valley Dam, the owner claimed that he could have used the property for the construction of a four-dam system in the area for the generation of electricity. Only one of the four dams would have been erected on the taken property, and it would not have been economically viable by itself. The Supreme Court held that property value can be determined in light of a special or higher use that need not be measured merely by the current use of the property, or the uses to which it could be put as a separate

tract.

One of the leading cases on assemblage is Baetjer v. U.S.,³² in which the appellate court held that tracts physically separated from one another may constitute a "single tract" for the purpose of calculating severance damages if they can be put to an integrated, unitary use, or even if there is a possibility of there being so combined for such a use in the reasonably foreseeable future.³³

The Prince William panel also discussed how the property should be considered in combination with other parcels in the determination of the highest and best use. In citing Powelson,³⁴ the panel held it would allow a combination of properties to be considered as the highest and most profitable use so long as there was a reasonable probability that the parcels would have been combined in the reasonably near future.³⁵

Date of Taking Issues

United States of America v. Eltzroth³⁶ addresses the issue of whether the date of the physical seizure must also be considered as the date of valuation for what is being seized. In that case, an easement was taken over 30 years prior to the taking of the remainder of the property. The court deemed the valuation for the easement should be as of the date of seizure of the land, with the remainder being valued as of the date of the filing of the taking under the Takings Act.

1. United States v. Miller, 317 U.S. 369 (1943).
2. Kirby Forest Industries v. U.S., 467 U.S. 1 (1984).
3. 197 F.3d 1368 (11th Cir. 1999).
4. 324 U.S. 229, 241; 89 L.Ed. 2d 911.
5. 191 F.3d 552 (4th Cir. 1999).
6. 197 F. Supp. 2d 339 (2002).
7. 193 F.3d 944 (8th Cir. 1999).
8. U.S. v. Block 44, 177 FRD 687 (MD Fla, 1997), U.S. v. 215.7 Acres, 719 F Supp 273 (D Del, 1989), and U.S. v. 22.80 Acres, 107 FRD 20 (ND Cal, 1985).
9. U.S. v. Reynolds, 397 U.S. 14 (1970); Bauman v. Ross, 167 U.S. 548 (1897).
10. 194 F. Supp. 2d 1192 (2002).
11. City of Stilwell v. Ozarks Rural Electric Cooperative Corporation, 166 F.3d 1064 (10th Cir. 1999).
12. Southern Natural Gas Company v. Land, Cullman County, 2.0 Acres of Land, 197 F.3d 1368 (11th Cir. 1999).
13. Berman v. Parker, 348 U.S. 26 (1954); U.S. Ex Rel TVA v. Welch, 327 US 546 (1945).
14. 467 U.S. 229 (1984).
15. U.S. v. Carmack, 329 U.S. 230 (1946).
16. Berman v. Parker, *supra*.
17. Richardson, et al v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997).
18. 327 U.S. 372 (1946).

- 19.05 U.S. 538, 552 (1972).
20. 364 U.S. 40 (1960).
- 21.261 U.S. 502 (1923).
- 22.267 U.S. 341 (1925).
- 23.Id. at 345.
24. 130 F.3d 712 (5th Cir. 1997).
- 25.Monongahela Navigation Co v. U.S., 148 U.S. 312 (1893).
- 26.Olson v. U.S., supra, citing Boom Co v. Patterson, 98 U.S. 403 (1878), and Clark's Ferry Bridge Co v. Public Service Comm of Pennsylvania, 291 U.S. 227 (1934).
- 27.276 F.3d 1359 (D.C. Cir. 2002).
- 28.Id.at 1364.
- 29.298 U.S. 342 (1936).
- 30.Id. at 345-6.
- 31.319 U.S. 266 (1943).
- 32.143 F.2d 391 (1st Cir 1944).
- 33.For a discussion of assemblage in the context of treatment of separate parcels as a single parcel for the purpose of calculating severance damages to a parcel not taken, see Ackerman, Just Compensation - Remainder Damages in Partial Taking Cases, Mich Bar J Vol 61, No 6 (June, 1982) (available by link at Ackerman-Ackerman.com).
- 34.319 U.S. 266 at 275-6; 87 L.Ed. 1390 (1943).
- 35.276 F.3d at 1364.
- 36.124 F.3d 632 (4th Cir. 1997).