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## Eminent Domain - The Effect of a Revocable License on the Determination of Compensation

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## RECENT DECISIONS

**Eminent Domain—The Effect of a Revocable License on the Determination of Compensation**—The United States started proceedings under the Second War Powers Act<sup>1</sup> to condemn land which the appellees owned in fee, land leased from the State of New Mexico, and the public domain on which the appellees held grazing permits. The district court permitted the ranchers to introduce evidence of the carrying capacity of the ranches considering the land owned in fee and the permit lands as an economic unit. The United States appealed from this ruling. *Held*: Judgment reversed. The grazing permits were canceled coincidentally with the taking and it was error to consider the availability of the permit land in assessing the value of the free land taken. *United States v. Cox*, 190 F. 2d 293 (1951).

In a companion case decided on the same day, with the same facts except that the fee land alone was taken and the public domain was not, it was held that the permits were outstanding at the time of the taking and it was proper to consider the availability of the permit land in valuing the fee land taken. *United States v. Jaramillo*, 190 F.2d 300 (1951).

In both cases under consideration the ranchers owned small pieces of land which in themselves had a little value but on which they had developed water holes which were very valuable when considered in connection with the accessibility of the adjoining public domain. The grazing permits held by the ranchers were issued by the Secretary of the Interior under the Taylor Grazing Act<sup>2</sup> which authorized him to create grazing districts and issue ten-year permits to ranchers who were able to make the best use of the land. It was expressly provided that no property interest was created by the Act<sup>3</sup> and the Secretary of the Interior was authorized to reclassify these lands and open them for any other use whenever he determined that they were more valuable for such use.<sup>4</sup> Thus in *Osborne v. United States*<sup>5</sup> these permits were declared to be mere revocable licenses. Therefore, two issues are presented by the principal cases: firstly, when either the private land alone is taken, or both the public and the private lands are taken, should the availability of the public domain be considered an element of value of the private land; and secondly, can a value be placed on the availability of the public domain since the permits were merely revocable licenses.

The right to compensation when property is taken by the United

<sup>1</sup> 50 U.S.C.A. §171a (1948).

<sup>2</sup> 43 U.S.C.A. §§315—315r (1948).

<sup>3</sup> 43 U.S.C.A. §315b (1948).

<sup>4</sup> 43 U.S.C.A. §315f (1948).

<sup>5</sup> 145 F. 2d 892 (9th Cir. 1944).

States under its eminent domain power is secured by the Fifth Amendment to the Constitution.<sup>6</sup> The general rules developed in interpreting this provision are: that compensation must be paid for any kind of right or interest in land taken which has a market value, that the payment must be certain and reasonably prompt, and that the method by which the amount is determined and the payment is made must adequately protect the interests of the property owner.<sup>7</sup> Of course, to be adequately compensated the owner must receive the fair market value of the property,<sup>8</sup> and in determining this value it is proper to consider all the elements which an ordinarily prudent buyer would take into account.<sup>9</sup> Thus it is necessary to consider all the possible uses to which the land could be put and to base compensation on the most advantageous use,<sup>10</sup> and a use need not be excluded from consideration although its adaptability depends upon the continuance of extrinsic condition over which the landowner has no control.<sup>11</sup> It is sufficient if the use is so probable and practical as to affect market value.<sup>12</sup> As a further result of the necessity for just compensation, the value of the property must be fixed as of the time of the taking and the effect of the taking on the value, due to a change in the nature of surrounding property etc., cannot be considered.<sup>13</sup>

The most valuable use rule forms the basis of the rancher's contention for valuing his ranch together with the permit land as an economic unit in each of the cases under review. When merely the fee land of the rancher is taken, his permit is not affected since the public domain is still classified within a grazing district and is available for grazing at the time of the taking. Therefore, the rule requires that the effect of the permit on the fair market value be determined. This was the reasoning used by Circuit Judge Murray in the *Jaramillo Case* and no dissents were taken therefrom.

On the other hand when both the fee land of the rancher and the permit land are taken in the same proceedings, a question arises as to the effect of the taking of the permit land on the permit. In such case it is necessary to look to the statute creating the permit. If by the terms of the statute only a common law revocation is necessary, the permit would be revoked by the taking of the permit land under the common law rule that a revocable license is revoked by an act of the licensor inconsistent with the maintenance of the license.<sup>14</sup> Of

<sup>6</sup> ". . . nor shall private property be taken for public use, without just compensation." U.S.C.A. Const. Amend. 5.

<sup>7</sup> 29 C.J.S. EMINENT DOMAIN §§99—104.

<sup>8</sup> 18 AM. JUR. EMINENT DOMAIN §242.

<sup>9</sup> 29 C.J.S. EMINENT DOMAIN §273.

<sup>10</sup> 18 AM. JUR. EMINENT DOMAIN §244.

<sup>11</sup> *City of Tilsa v. Creekmore*, 167 Okl. 298, 29 P. 2nd 101 (1934).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Morton Butler Timber Co. v. United States*, 91 F. 2d 884, 891 (6th Cir. 1937).

<sup>14</sup> THOMPSON ON REAL PROPERTY §651 (1924).

course if the permit is revoked, it is not possible to consider the use of the permit land in valuing the fee land of the rancher. This is the view Judge Murray takes in the majority opinion of the *Cox Case*.<sup>15</sup>

But if the statute prescribes a procedure which must be followed to revoke the license and that procedure is not complied with, a mere common law revocation would not be sufficient to cancel the license, and it would be outstanding at the time of the taking. In such case the rule of most valuable use must be applied and although the permit would be rendered useless by the taking of the permit land, its value to the fee land must be considered because the value must be fixed as of the time of taking and the effect of the taking on the value cannot be considered. This is the reasoning applied by Chief Judge Phillips in the dissent in the *Cox Case*.<sup>16</sup>

It can be seen therefore, that the difference in the two views expressed in the *Cox Case* is basically due to the different interpretations taken of the Taylor Grazing Act as a premise of each opinion. Under section (f) of this Act<sup>17</sup> the Secretary of the Interior is required to give reasonable notice to permit holders in order to open the lands in a grazing district to any other use. Here the lands were taken for military purposes at the request of the War Department. Under section (q)<sup>18</sup> when the public domain is taken for war purposes the head of the department so taking "shall" pay the ranchers a fair compensation for losses suffered but no procedure is set up to revoke the permits, nor elsewhere in the act is any provision for revocation made. Thus the only requirement laid down by the statute is when the grazing land is opened for other uses. In the *Osborne Case*<sup>19</sup> the situation was identical with that presented in the *Cox Case* except that the Secretary of the Interior revoked the permits before the condemnation proceedings were started. This would be the proper procedure if a statutory revocation was necessary, but condemnation for

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<sup>15</sup> "But in our view, there can be no legally significant difference in the withdrawal of the permits for war purposes by the Secretary of the Interior, as in the Osborne Case, and the cancellation of the permits by a declaration of taking in condemnation proceedings."

"But, it (evidence of the value of the permit lands to the ranch) is not competent unless the permit lands are available and accessible for that purpose and they cannot be said to be available and accessible here, since the permits were withdrawn or canceled coincidental with the taking."

<sup>16</sup> "At the time of the taking and at the time of the trial below the public lands had not been withdrawn from the grazing district by the Secretary of the Interior and the permits had not been revoked, but were in full force and effect." "But, it does seem to me that to the extent public lands adjacent to the privately owned lands available on the date of the taking for use in connection therewith increased the value of the privately-owned lands and water rights, such increased value was a proper item to be taken into consideration in determining the value of the privately-owned lands."

<sup>17</sup> 43 U.S.C.A. §315f (1948).

<sup>18</sup> 43 U.S.C.A. §315q (1948).

<sup>19</sup> *Supra* note 5.

war purposes probably would not come within "opening for any other use" under section (f)<sup>20</sup> since that section is entitled "Homestead entry within district or withdrawn lands" and since use for war purposes specially comes within section (q).<sup>21</sup> Furthermore a statutory provision will not be presumed to repeal the common law unless the language naturally or necessarily leads to that conclusion.<sup>22</sup> Therefore a common law revocation is probably all that is necessary. Thus the majority opinion seems better law and the procedure followed in the *Osborne Case* was probably superfluous.

The rule derived from Judge Murray's opinions in the two cases presented here is that when merely the fee land of the permit holder is taken, the availability of the permit land must be considered an element of value thereof, but if both lands are taken the additional value due to the permit can't be considered.

The question remains what value can be placed on the availability of the permit land when the fee land alone is condemned, since the permits created no property interest and were revocable at will. Of course, no compensation is required for the loss of the license itself. The Fifth Amendment to the Constitution requires compensation only for the loss of property interests, and the existence of value alone doesn't generate an interest protected by this Amendment.<sup>23</sup> Thus it has been held that a revocable license is not a property interest recognized by the Constitution and if the permit land alone were taken no compensation would be required for the loss of the permit.<sup>24</sup> However, when the land of the permit holder is taken, the fair market value test<sup>25</sup> requires that the effect of an outstanding permit on the market value of the land be determined. In doing so the jury need not apply any mathematical formulas but must determine a recovery which is reasonable in light of all the relevant facts introduced.<sup>26</sup> In order to recover damages evidence of their existence and extent, or data from which they may be computed, must be introduced.<sup>27</sup> However, the degree of certainty which must be established depends on the nature of the case, and a proximate estimation of witnesses may be sufficient.<sup>28</sup>

In fixing compensation it is always necessary to consider the environment in which the property is situated. Thus in valuing urban

<sup>20</sup> *Supra* note 17.

<sup>21</sup> *Supra* note 18.

<sup>22</sup> 15 C.J.S. COMMON LAW §20.

<sup>23</sup> *Reichelderfer v. Quinn*, 287 U. S. 315, 53 S. Ct. 177, 77 L. Ed. 331, 83 A.L.R. 1429 (1932).

<sup>24</sup> *Clapp v. Boston*, 133 Mass. 367 (1882); *United States v. Honolulu Plantation Co.*, 182 F. 2d 172 (9th Cir. 1950).

<sup>25</sup> *Supra* note 8.

<sup>26</sup> 25 C.J.S. DAMAGES §88.

<sup>27</sup> 25 C.J.S. DAMAGES §28.

<sup>28</sup> 25 C.J.S. DAMAGES §26 (c).

real estate there are many factors such as schools, roads, parks, and surrounding property which may be properly considered although there is no right in the property owner to have them maintained in the condition then prevalent. Therefore, if evidence is introduced that the availability of the permit land would effect market value, the increase in value due to the permit must be determined. Thus in the *Jaramillo Case* the trial court instructed the jury that it should give to the fee land such additional value due to the availability of the permit land as it thought necessary to be given. However, witnesses for the ranchers were permitted to separately value the permit land and add this to the value of the fee land. Because of this, the judgment was reversed, it being improper to separately appraise the different elements constituting the whole.<sup>29</sup> However, the court held that the instructions given were proper and directed the trial court to proceed in accordance with the views expressed in the opinion, that is, to consider the availability of the permit land as an element of value of the fee land provided that consideration be also given to the fact that the permits could be withdrawn at any time without obligation to compensate therefor.

Thus back in the district court *Jaramillo* will have to show the value of the land as an economic unit. This could be done by showing the carrying capacity of the ranch with the permit land and multiplying this figure by a peranimal unit value and then adding the estimated value of the improvements. This was the method used in the *Cox Case*. Then to show how much of this value he could get in the open market because of the revocability of the permits he would have to produce witnesses who could estimate the effect of the availability of the permit land on the value of the fee land in the open market. Apparently the permits were usually not revoked and were considered valuable in the open market because the dissenting opinion in the *Cox Case* points out that the availability of permit lands had been taken into consideration by buyers and sellers in that region for many years.

Thus while these two cases did not place a value on the effect of a revocable license on the land benefited thereby, the ruling in the *Jaramillo Case* laid the groundwork for future cases doing so.

JOHN GROGAN

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**Evidence—When Is Fact of Prior Criminal Offense Admissible to Show Common Scheme—**Defendants, members and employees of Union Local No. 65, were charged with obstructing an officer who

<sup>29</sup> *United States v. Meyer*, 113 F. 2d 387, 397 (7th Cir. 1940).