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Procedure dealing with the subject, and the other is an even more simplified set of statutory or judicial rules suggested for Colorado. We urge you to examine these and other changes which will be suggested and lend your assistance in arriving at the best law, both procedural and substantive, for *the right to condemn private property is a creature of statute*, and such rights which deprive people of their property without their consent for the good of the public should be very clearly set forth.

FEDERAL PROCEDURE IN CONDEMNATION OF PROPERTY

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The key to procedure in the Federal Courts in the condemnation of property under the power of eminent domain is Rule 71A,¹ which became effective as an amendment to the Federal Rules of Civil Procedure August 1, 1951. This rule sets up a specialized procedure to meet the distinctive requirements of an eminent domain action, and integrates into the Federal Rules the procedure in such actions. Except as otherwise provided in that rule, the rules of civil procedure for the United States District Courts control.

The adoption of Rule 71A came in response to growing widespread dissatisfaction with the diverse procedures applied in condemnation suits in United States District Courts and the accompanying demand for some uniform procedure. The Advisory Committee on Rules, prior to its recommendation of the Rules of 1938, and again when it was considering the amendments of 1946, had given serious consideration to proposals to incorporate in the rules one covering condemnation proceedings.² The great number of condemnation suits filed by the United States during the war gave added impetus to the demand for uniformity and some degree of simplification in the rules. These procedural changes, it was argued, would make more effective both the exercise of the power of eminent domain and the constitutional right of the property owner to just compensation. Rule 71A brings condemnation proceedings under the Federal Rules of Civil Procedure; establishes, with one exception, the same procedure in the various United States District Courts; and, in an attempt to simplify the procedure, incorporates several departures from the procedure more commonly followed in the state courts and, prior to its adoption, in the federal courts.

The Rules of Civil Procedure, as adopted in 1938, were applicable in condemnation cases only on appeals. In pre-appellate procedure, a vast number of diversified procedures existed in the United States District Courts. In some of the acts authorizing the exercise of the power of eminent domain, Congress had prescribed, in varying

¹ United States Code, Title 28, Federal Rules of Civil Procedure.

² *Ibid.* Notes of Advisory Committee on Rules, following Rule 71A.

degree, the procedure to be followed. Such procedures were by no means uniform. In more numerous instances, the Congressional act authorizing the exercise of the power of eminent domain failed to specify the exact procedure to be followed. In the absence of Congressional prescribed procedure, conformity, as near as may be, to existing state practice, pleadings, forms and proceedings, with its attending uncertainty and confusion, was required.³ Rule 71A covers the condemnation of both real and personal property. For the great bulk of condemnation cases, those invoking the national power of eminent domain, it provides procedure that is uniform in all the United States District Courts. In the limited number of cases involving the exercise of the state's power of eminent domain, which reach the United States District Courts because of diversity of citizenship, the same procedure, with a single exception, applies. Subdivision (k) of the rule provides that, in those cases involving the exercise of the power of eminent domain under the law of the state, any state law making provision for trial of any issue by jury, or for the trial of the issue of compensation by jury or commission or both, shall be followed.

The following paragraphs do not purport to go beyond a descriptive summary, the primary purpose of which is to present the principal features of federal condemnation procedure, as distinguished from the procedure in other civil cases in the federal courts, with a view to reflecting in that specialized procedure the principal points of departure from condemnation procedure in courts of the state of Colorado.

COMPLAINT

The caption, in addition to meeting the general requirements of Rule 10(a), must name as defendants the property and at least one of the defendants. Broad joinder, including properties acquired for different uses, is authorized. Any defendant aggrieved by such joinder may invoke the power of the court under Rule 21 to sever and procede separately with any claim, and the court's wide discretion, under Rule 42(b), to order separate trials. The specified contents of the complaint are a short and plain statement of (1) the authority for the taking; (2) the use for which the property is taken; (3) a description of the property; (4) the interests to be acquired; and (5) identification, as to each piece of property, of the defendants joined as owners or persons interested therein. At the commencement of the action, only those persons having or claiming an interest in the property, whose names are then known, need be joined as defendants, but prior to any hearing for the determination of compensation, the plaintiff must add as defendants,

All persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be

³ 40 U. S. C. 258 (1940).

acquired, and also those whose names have otherwise been learned.

All others may be made defendants under the designation "Unknown Owners."

Since service of the complaint with the notice is not required, the plaintiff must furnish to the clerk at least one copy for the use of the defendants. The necessity for frequent amendments to add new parties or to embrace additional property or interests is recognized. Prior to the trial of the issue of compensation, the plaintiff may amend the complaint, without leave of court, as many times as desired, provided such amendment does not constitute a dismissal prohibited by subdivision (i) of the rule. Any affected party, who has not appeared, must be served with notice in the manner provided for service of process, and any affected party, who has appeared, must be served with notice of the filing of the amendment.

PROCESS

In place of a summons, the initial process is a notice. The plaintiff is directed to deliver to the clerk, at the time of the filing of the complaint, joint or several notices directed to the defendants named in the complaint. The form of the notice is calculated to advise the defendant of the claim asserted against him and what his rights are. In addition to the caption and a designation of the defendants to whom directed, the notice must state (1) that the action is to condemn property; (2) a description of his property; (3) the interest to be taken; (4) the authority for the taking; (5) the uses for which taken; and (6) advise the defendant that, within 20 days after service of the notice, he may serve upon plaintiff's attorney an answer, and failure to do so constitutes consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation.

Personal service of the notice, in accordance with Rule 4(c), is required upon any defendant who resides in the United States, its territories or its possessions and whose address is known. If personal service can not be secured either because the defendant's whereabouts can not be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country, service of the notice by publication is authorized. For the customary affidavit and court order is substituted a certificate of the plaintiff's attorney based upon a diligent inquiry within the state in which the complaint is filed. Publication is once a week for not less than three successive weeks. Under the federal decisions, this requirement is met by publication in only three issues. Prior to the last publication, plaintiff's attorney must mail a copy of the notice to any defendant, not personally served, whose place of residence is then known. Proof of publication and mailing is made by a certificate of plaintiff's attorney, to which is attached a printed copy of the published notice.

APPEARANCE AND ANSWER

Rule 71A(e) provides for an Answer and Notice of Appearance. No other pleading or motion asserting any additional defense

or objection is allowed.⁴ Any defendant who desires to assert any objection or defense to the taking of his property, must, within 20 days after the service of notice upon him, serve upon plaintiff's attorney his answer, identifying the property, stating the nature and extent of his interest, and stating his objections and defenses. The requirement that all objections and defenses be set up in the answer with no provision for preliminary motions marks a departure from Rule 12(e). The general standard of pleading is controlled by other rules, particularly Rule 8. Instead of an Answer, the defendant may serve a Notice of Appearance, designating the property in which he claims an interest. This entitles him to receive notice of all proceedings affecting such property. To the defendant who has neither answered nor appeared is preserved the right to present evidence at the trial of the issue of just compensation as to the amount of compensation to which he is entitled, and the right to share in the award.

TRIAL

The most controversial issue, prior to the adoption of Rule 71A, revolved around the question of the particular tribunal to award compensation in actions involving the exercise of the power of eminent domain under the law of the United States. To retain the board of commissioners set up under the Tennessee Valley Authority and the special jury in the District of Columbia, and to provide for any special tribunal which may be established by Congress in the future, it is provided that any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation, shall be used. In all other instances, the defendant is entitled to the determination of just compensation by trial by jury on filing a demand therefor within the time allowed for answer, or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, compensation should be determined by a commission of three persons appointed by it.⁵ Such a commission is endowed with the powers of a master under Rule 53(c). Trial of all issues shall otherwise be by the court.

TITLE AND POSSESSION

Rule 71A does not supersede any of the statutes authorizing the United States to take title to or possession of the property at the commencement of the suit, nor does it prescribe the procedure to be followed when those rights are exercised by the petitioner.

⁴U. S. v. 76.15 Acres of Land, U. S. Dist. Ct., N. D. Calif., March 7, 1952; 16 Fed. Rules Service 71A-e4, Case 1. Defendant may not file a cross-claim for breach of lease, against a co-defendant, owner of land involved.

⁵U. S. v. 3928.09 Acres of Land, U. S. Dist. Ct., W. D. S. C., December 22, 1951; 16 Fed. Rules Serv. 71A-h3, Case 1, 12 FRD 127. Court not restricted to residents of the district in appointing commissioners, and in the condemnation of lands located in two states, the same persons may be appointed by the court in each of the districts.

However, its drafters formulated the other procedure in the light of the existence of both rights and the practice which had developed in their exercise. The manner of dismissal prescribed in subdivision (i) depends upon whether or not the United States has exercised either of these rights. Again, subdivision (j), dealing with deposits and distribution, recognizes the permissive use of the declaration of taking and enjoins the court and attorneys to expedite the distribution of the money deposited in court and the ascertainment and payment of just compensation.

The Declaration of Taking Act⁶ has been characterized as a supplemental condemnation statute. The United States, in any proceeding instituted by it in any court of the United States outside the District of Columbia for the acquisition of land or an interest therein, may file with its petition, or any time prior to judgment, a declaration of taking signed by the authority empowered by law to acquire the lands. Upon the filing of the declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the estimated just compensation, title vests in the United States, and the right to just compensation vests in the persons entitled thereto. The court, upon appropriate application of the parties in interest, may order all or any part of the money so deposited paid forthwith for or on account of the just compensation to be awarded in the proceeding. Upon the filing of the declaration of taking, the court is vested with the power to fix the time within which and the terms upon which the parties in possession are required to surrender possession to the petitioner.

Without resorting to a declaration of taking, the United States, in condemnations for a work of river and harbor improvements⁷ and in proceedings under the Atomic Energy Act of 1946,⁸ may take immediate possession of the property upon the filing of the petition in condemnation. In time of war or the imminence thereof, a similar provision may be invoked in condemnation of land by the Secretary of the Army for military purposes.⁹

OPERATION OF RULE

There can be little doubt that, as far as the federal courts are concerned, Rule 71A marks a great improvement over the pre-existing conformity system. However, any critical appraisal of the extent to which it has provided the simple and improved procedure for condemnation contemplated would be premature at the conclusion of only one year's operation. The rule reflects extensive research and was the net result of prolonged mature consideration, in which both the legal profession and government officials played important roles. The Advisory Committee moved slowly and cautiously and reports that it gave more time to this rule than was required by any other rule. The basic principles and most of the

⁶ 40 U. S. C. 258 a-e.

⁷ 33 U. S. C. 594.

⁸ 42 U. S. C. 1813(b).

⁹ 50 U. S. C. 171.

specific rules have long been in operation and have been tried and tested in the judicial fire in various jurisdictions. The minor innovations for the most part represent an attempt to adapt to condemnation procedure the general principles and pervading spirit already successfully applied in the rules of civil procedure. The Supreme Court in promulgating Rule 71A makes it applicable to further proceedings in pending actions except to the extent that, in the opinion of the court, its application would not be feasible or would work injustice. The difficulties characteristic of any transition from one procedure to another and of the application of the modified procedure to pending cases have been present during this first year. To date there have been very few written opinions construing or applying the rule.

BUREAUCRATS DICTIONARY

- A Program*—Any assignment that can't be completed by one telephone call.
- A Conference*—A place where conversation is substituted for the dreariness of labor and the loneliness of thought.
- To Give Someone the Picture*—A long, confused and inaccurate statement to a newcomer.
- Co-ordinator*—The guy who has a desk between two expeditors.
- To Expedite*—To confound confusion with commotion.
- A Clarification*—To fill in the background with so many details that the foreground goes underground.
- Channels*—The trail left by inter-office memos.
- To Activate*—To make carbons and add more names to the memo.
- To Implement a Program*—Hire more people and expand the office.
- Under Consideration*—Never heard of it.
- Under Active Consideration*—We're looking in the files for it.
- Reorientation*—Getting used to working again.
- Reliable Source*—The guy you just met.
- Informed Source*—The guy who told the guy you just met.
- Unimpeachable Source*—The guy who started the rumor in the first place.
- We Are Making a Survey*—We need more time to think of an answer.
- Note and Initial*—Let's spread the responsibility for this.
- Give Us the Benefit of Your Present Thinking*—We'll listen to what you have to say as long as it doesn't interfere with what we've already decided to do.
- Will Advise You in Due Course*—If we figure it out, we'll let you know.
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Readers of *Dicta* are invited to contribute articles, anecdotes and items of interest.