

Ranching, Energy Development and Eminent Domain

Ronald R. Weedon and Patrick E. Reece

Discovery and utilization of coal and oil resources in the West have led to an aggressive development of energy transportation systems. This type of activity is not without precedent. Over 100 years ago railroads played a key role in the settlement of our western states. However, this process developed under a system of government rather than private land ownership. Land was given to railroad companies as inducement to construct transportation facilities which would in turn encourage settlement and provide a badly needed means of shipping livestock products to market.

Development of today's energy resources has stimulated a new wave of land development which may be in direct conflict with established ranch operations. Land ownership in most plains states is no longer dominated by the federal government. Consequently, methods of land acquisition used during the last century are no longer available, and a new approach based upon an old concept is now being utilized, eminent domain. There are potential threats in the current process of eminent domain which all range livestock producers should understand.

Present Legal Conditions

Eminent domain is defined as the power of the nation or sovereign state to take or authorize the taking of private property for public use without the owner's consent. The power of eminent domain is based upon a political right founded on the common necessity of appropriating the property of individual members of the community for the benefit of the whole community. Power of eminent domain has not been directly granted by the Constitution. Rather, it is inherent in the concept of sovereignty. Property acquired through this process may be used by the state, public or private corporations, or by a private citizen for the welfare of the public.

Unless a state constitution provides otherwise, the legislative branch of the government possesses sole authority to exercise the power of eminent domain or to legislate the power to another body. Exercise of the power of eminent domain is subject to all the prohibitions found in the Constitution of the United States and the several states. These prohibitions are that property shall not be taken for public use without due process of law. Condemning more property than is needed for public use is held to be a denial of due process. Any person whose property is taken by eminent domain is assured an opportunity to present objections and claims.

The power of eminent domain arises only when a governmental agency cannot acquire land by negotiation or purchase. Common uses of eminent domain include the construction of public buildings, military camps, sewage systems, streets, highways, bridges, railroads, canals, reservoirs, slum clearance, and urban development. Courts have also determined that condemnation of the land for the construction of pipelines and powerlines may also be conducted through the power of eminent domain. The interest taken in land by eminent domain may be an easement or fee interest. Courts have generally determined that the condemner is not entitled to the minerals underlying the land condemned.

Compensation

As a general rule, the owner is permitted to show evidence of all the uses for which the land is suitable, including the highest and most profitable commercial, industrial, or agricultural use for which there is or will be a demand. Owners may show their intended use or improvement of the property, or the probable value of future use of the property if it is practical and actually influences the present market value. A purely speculative or imaginative value can not be considered. Landowners may not object merely because another location might have been more suitable or just as suitable for a given purpose. Proof must be limited to the present conditions of the property and the uses of which it is currently adapted. Maintenance of complete ranch production records is a critical issue in documenting real estate value. The rancher needs to closely examine the total and real value of land based upon the market value of resources involved in all types of uses. As an example, ranchers who allow hunting on their property should consider that this form of recreation enhances the actual economic value of the ranch.

Evidence of rental income or value may be admitted and considered in determining the value of condemned land. It is proper to consider the value of crops growing on the land at the time of the condemnation. It is also proper to consider the value of mineral deposits and buildings and other improvements. Where only a portion of the property is taken, the owner of the property may be entitled to severance damages, that is, the difference in a fair and reasonable market value of the remainder of the land, before and after the taking. Evidence of every element of annoyance and disadvantage resulting from the improvement which would influence a prospective purchaser, including, smoke, noise, soot, cinders and vibrations, may be considered. However, temporary inconveniences caused by construction are not compensable provided the inconveniences are "reasonable."

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Under an easement interest, the measure of damages is the difference in the reasonable market value of the land before and after the taking. Additionally, when real property has been condemned, the cost of removing personal property may be compensable.

Condemnation Process

There are similarities in the condemnation procedures among the Western states. Once condemnation has been initiated, the condemner, generally, may examine and survey land to determine the correct legal description, by court order if necessary. A petition is then filed in the court. However, the condemner must attempt to negotiate with the owner prior to filing a petition. Once a condemnation petition has been filed, the court appoints appraisers who then give notice to all concerned that they will view the property at a certain time to discuss the matter of damages. The appraisers then make a written report to the court and a certified copy of the condemnation award is forwarded to the Register of Deeds. The condemner deposits the amount of the award in the court, and thereafter, the court provides the condemner with evidence of ownership. If either the condemner or owner is dissatisfied with the award, an appeal must generally be made within 30 days. If the landowner intends to appeal, statutes should be examined to determine if there is a level of adjustment under which the landowner must pay legal expenses even though a change in the award is granted. In Nebraska, the condemner is required to pay the landowner's expenses only if the award is increased 15% or more. Payment of legal expenses includes not more than two expert witnesses.

Rancher's Position

Early in the process, a great deal can be accomplished through negotiations. Landowners should be encouraged to seek the assistance of a professional negotiator as soon as possible. The benefits of a professional negotiator could be substantial. Once condemnation proceedings have started, however, the situation becomes much less flexible.

Negotiations are much more effective when landowners organize and unite in their cause. Organization provides an opportunity to develop more publicity and pressure than as individuals. It is also much easier for a condemner to take one person to court than a group of individuals. Condemners may not be anxious to appear before juries if they are neighbors and friends of the person whose property is being taken. It is a common habit of developers to keep their plan as quiet as possible for as long as possible to play upon the inertia of people and the inherent individuality of ranchers. Ranchers need to stay alert, initiate teamwork and seek the best possible legal counsel in environmental law.

If an easement is sought, coercion can be put on a condemner to locate the easement along property or section lines. Powerlines or pipelines which cross a piece of property may have an effect on farming and ranching operations. The width of an easement is a matter of negotiation. Condemners should be left with the narrowest possible strip of land for their purposes, thereby minimizing the potential damage from construction and maintenance crews. Condemning organizations have commonly been given the initial authority to decide what land is taken within the framework of nonexcessive abuse. Because the interpretation of nonexcessive abuse is relative to the parties involved, ranchers need to examine the legal restraints on land condemnation for their respective states.

When facing condemnation proceedings, the rancher may seek help from environmental organizations. These groups are experienced, have access to excellent legal counsel on a national level, and can often help with the cost of litigation. They may also have access to experts in environmental inventory and assessment.

If a proposed project is federal in nature or involves a federal agency, an Environmental Impact Statement (EIS) must be prepared in accordance with the National Environmental Policy Act. This statement must include a detailed discussion of the environmental impact of the proposed action. It must include alternatives to the proposed action and a discussion of the action's potential impact on long-term productivity. Irreversible commitments of resources involved in the proposed action must also be included. These statements are often inadequately prepared by consultants hired by the condemning agency or corporation. Ranchers should insist that the EIS be thoroughly prepared. Legislation such as the Endangered Species Act of 1973 may also be used to a rancher's advantage should the habitat or individuals of an endangered species be present.



Adequate legal protection may not be provided to landowners where energy transport systems cause extensive vegetation and soil disturbance or create barriers to the movement of livestock and equipment. The control of public service commissions and interstate commerce commissions over revegetation, fencing and construction and location of crossings for livestock is often limited by incomplete legislated guidelines. Issues frequently beyond the current authority of these commissions with regard to railroad construction include the ability to mandate revegetation or the time frame and methods of revegetation. While railroads must generally build legal boundary fences on each side of their right-of-way, completion of fencing is frequently not required until six to nine months after the completion of the railroad. Consequently, ranchers may find it necessary to build fences at their own expense or lose the potential livestock production from the affected pastures during the railroad construction.

Conclusions

Payments to ranchers for the impacts of condemnation should represent true compensation. The value of the standing forage or current cattle production does not provide a fair assessment. Compensation should be based upon prices determined for several years, rather than a single year because of the impact of inflation and variation in the market and weather conditions over time. Just compensation should also reflect the inherent productivity of the land through time, especially with regard to rangeland.

Natural resources are the foundation for both the range livestock and energy industries. Beyond this similarity, there are few aspects in common. Fossil fuel industries practice removal of a limited resource, while the range livestock industry practices the long-term maintenance and utilization of a renewable resource. Furthermore, energy transportation industry has been heavily favored by legislative action. Consequently, strong antagonism frequently arises. Still the range livestock industry must deal with the issues at hand in order to reach the best possible compromise. The sovereign power of eminent domain is at times necessary, and the rights of the individual must at times be subordinated for the

good of the whole. However, eminent domain laws and the responsibilities of the condemner and associated agencies need to be critically examined by the range livestock industry. In principle, current laws generally seek only to compensate, not to replace. Eminent domain laws must be modified to more adequately reflect the expenses of replacing needed real estate within a range livestock operation and the legal and professional expenses of the landowner in arriving at a fair and just compensation.

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Renewable Resources Inventory Conference

Four hundred scientists and inventory specialists are expected to gather in Corvallis, Oregon, August 15-19 to attend an international conference on Renewable Resource Inventories for Monitoring Changes and Trends. The conference is sponsored by several professional societies and international organizations, including the Society for Range Management.

Four keynote speakers will be featured. They will present their views on the managers need for information on changes and trends in renewable resources. Gerd Hildebrandt, Professor of Forestry at Albert Ludwigs University in Freiburg, West Germany, will give a global perspective to the subject. Robert E. Buckman, Deputy Chief of Research, USDA—Forest Service, Washington, DC, will present the national perspective; H. Mike Miller, State Forester, Salem, Oregon, will cover the State perspective and W. Lee Robinson, Vice President, Longview Fiber Company, Longview, Washington, will discuss how industrial decisions are affected by changes and trends information.

Specific details of field trips and mini-workshops are offered in the registration packet that is available from the Conference Assistant, School of Forestry, Oregon State University, Corvallis, Oregon 97331.

Range and Pasture Seeding in the Southern Great Plains

A symposium on the most promising new grasses for western Oklahoma and north, west and south Texas; the latest technology on seedbed preparation, planting methods, seed harvesting, seed processing (modification/coatings) and seed testing; and a panel discussion by ranchmen will be conducted October 19, 1983 in Vernon, Texas, at the Wilbarger Auditorium between 8:30 a.m. and 3:30 p.m. You will see the newest equipment for planting, harvesting and seed processing/modification. Keynote speaker is past-president of SRM, John "Chip" Merrill.

The \$10.00 registration includes a printed proceedings and catered lunch. Pre-registration is requested. The sponsors are Texas A&M University Agricultural Research and Extension Center at Vernon, TX; Southern Plains Range Research Station at Woodward, OK; SCS Plant Materials Center at Knox City, TX; SRM in Texas and Oklahoma; and

others.

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The 2nd International Rangeland Congress Adelaide, Australia • May 13 – 18, 1984



The 2nd International Rangeland Congress, under the auspices of the Australian Rangeland Society and the Australian Academy of Science, will convene in Adelaide, Australia.

Adelaide is located at the foot of the Mount Lofty Ranges and adjacent to the wide sandy sweep of St. Vincent's Gulf. The city and its suburbs - separated by a green belt of parks and gardens - blend old colonial Australian architecture and housing styles with modern city buildings and arcades of boutiques, eating spots and antique shops. The outstanding Barossa Valley and the southern district wine areas are a short distance from the city. To the north of Adelaide are the Flinders Range and to the south Kangaroo Island, Australia's largest fauna reserve.

All sessions will be held at the University of Adelaide, with the opening ceremonies on Sunday, May 13, and concurrent symposia from Monday, May 14 through Thursday, May 17. Symposia topics include: Dynamics of Range Ecosystems, Grazing Industries, Range Resource Monitoring and Administration, Ecophysiology of Rangeland Plants, Mining and Rangelands, Conservation and Wildlife, Fire in Arid and Semi-arid Regions, Technological Improvements of Arid Rangelands, Animal Production, Management of Grazing Systems, Developing World - Challenges and Opportunities, Man and the Biosphere, and Primary Producers. In addition, there will be lunchtime lectures, publications, displays, and Associate and Social Programs.

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