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# Procedural Aspects of Inverse Condemnation—Title on Interest Acquired by Transportation and Other Public Agencies

*A report prepared under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the Research. The report was prepared by James H. Thompson. Larry W. Thomas, TRB Counsel for Legal Research, is principal investigator, serving under the Special Technical Activities Division of the Board.*

## THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving right-of-way acquisition and control, as well as highway law in general. This report deals with the procedural aspects of inverse condemnation.

This paper will be included in a three-volume text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, and a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981. The three volumes now total more than 2,000 pages comprising 48 papers, some 23 of which have been supplemented during the past 2 years. Copies have been distributed to NCHRP sponsors, other

offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

A third addendum will be issued late in 1982 and is expected to contain 7 new papers (including that comprising this Digest) and supplements to 7 existing papers.

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## INTRODUCTION

Highway departments frequently are sued by property owners for damages for an alleged taking or damaging of their property by the department;[1] however, the departments often pay compensation as a result thereof without receiving a fee simple title, or other legal interest, easement, or servitude to the property "taken." Moreover, as will be demonstrated herein, in some instances the department has paid compensation for the equivalent of the full "fee" value of the property and, yet, has not obtained a fee simple title. Of course, the landowner is unlikely to be concerned whether the department receives title, or an equivalent title, to the propery taken.

This paper examines some of the procedural problems and suggests alternatives for securing title or appropriate legal interest commensurate with the compensation awarded.

## OVERVIEW

The legal actions involved are generally of two types: (1) "tort in inverse" involving actionable interference, such as trespass or negligent entry, and (2) "inverse condemnation." Both involve either a substantial impairment of a property owner's right in his property or a physical invasion and permanent occupation of the property.

The courts have characterized some "tort in inverse" cases as "inverse" or "reverse" condemnation. The "tort in inverse" is a traditional remedy for damage, allegedly permanent in character, due to the negligence of a governmental agency. Inverse condemnation actions embrace traditional tort theories and, in time, have blurred them.[2] (Occasionally, a landowner sues in ejectment, which is essentially an action to try title, but courts, particularly where there were improvements at public expense, have generally not held in favor of the property owner.)

There may be a third type, a "hybrid inverse," in which the inverse condemnor is both a counterclaimant and a third-party plaintiff.[3] (See discussion *infra*, at note 62.)

Regardless of classification, there are various remedies available to a landowner when a public agency fails to institute condemnation proceedings but enters upon and occupies private property for public use without payment or legal authority to do so.[4]

This paper does not discuss the various defenses that may be available to a public agency in these actions.[5] Rather, cases are analyzed in which liability is established, and the court has attempted to decree some muniment of title to the public agency.

## JUDICIAL MEANS OF SECURING TITLE IN THE PUBLIC AGENCY

It may be noted that the landowner's remedies empower the court to divest ownership or title in the property. For example, trespass, nuisance, negligent entry, injunction, and implied contract for the value of the land are *in personam,* not *in rem* actions, as explained hereafter.

Whether an action is *in personam* or *in rem* depends upon the nature of the proceeding and the type of judgment that may be entered. In this instance, proceedings are *in personam* when the claim is for a money judgment and *quasi in rem* when the action divests the landowner of property rights. A true condemnation proceeding is one instituted against specific property and is *in rem.* Only in a condemnation case does the court decree a transfer of title.[6] When there is a claim against the public agency for money and against the property owner for some interest in the land, then the judgment is said to operate *quasi in rem.*[7]

The difference among *in personam, in rem,* and *quasi in rem* actions, though seldom discussed, appears to explain those decisions in which the inverse condemnor, or the inverse tortfeasor, received a deed as a condition to the landowner being awarded compensation. In some cases the inverse condemnor received only the title or right to possession asserted by the owner. Even in cases in which the owner has "waived the tort" and sued on implied contract for the value of the land, or for damages for past, present, and future use, the agency acquired a deed by judgment, which had *quasi in rem* effect. In other cases, it seems that the inverse tortfeasor or inverse condemnor did not receive the equivalent of a fee simple title, which it would have in the usual condemnation proceeding.

### Right to Receive Award Conditioned Upon Conveyance or Release of Property Interest

In this category the court's judgment required the property owner to convey his property interest to the public agency as a condition to the latter's payment of the award.

The earliest court decisions in this area, and by far the most numerous, were the elevated railway cases arising in New York City in the late 1880's and 1890's. The railway companies were franchised to locate tracks in or over city streets. Numerous cases were brought by abutting property owners seeking compensation for interference with their rights of access, light, and air. The railway companies defended primarily on the ground that the plaintiffs did not own the title in the streets, but this defense was rejected because of the landowners' rights as abutters. The

railway's entry and physical invasion was intentional under a supposed right of prior grant. The railway companies appealed from judgments of damages awarded for the value of the property interest, because the judgments did not provide for any vesting of that interest in the railway company.

For example, in *Hughes v. Metropolitan El. Ry.*,[8] plaintiff, the property owner, was required not only to convey her estate in the street easement but also to deliver a release of a mortgage encumbering the easement area.

In *Giordano v. Manhattan Ry.*[9] a decree was modified on appeal to direct the owner to deliver a conveyance of all interest in the street area.

The judgment in *Kissam v. Brooklyn El. Ry.*[10] was held to be defective and was modified to require plaintiff, on receipt of payment of the award, to "execute and deliver to the [railway company] a release of the easement . . . and a release of any mortgage or other lien that may exist thereon."

In *Korn v. New York El. Ry.*[11] the decree was modified on appeal to require a partner, who was not a party, to join in the release of his equitable partnership interest, even though the legal title was vested solely in the plaintiff.

In time, the trial courts began to enter judgments which provided for a release of mortgages or other liens affecting the easement as a condition to receiving payment of the award.[12]

It should be noted that these modified judgments and decrees were directed to the owner and did not operate in and of themselves to vest title or interest in the public agencies.

In an early nonelevated railway case, *Williams v. Mayor of New York,*[13] the city appropriated, in absence of condemnation, plaintiff's wharf and appurtenances. The court affirmed a judgment directing the owner to convey the property to the city with a good and sufficient deed, thus following the rule developed in the railway decisions.

More recently, judgments entered in three cases required the owners to execute deeds. For example, in *Arastra Limited Partnership v. City of Palo Alto,*[14] an inverse condemnation proceeding, the owner alleged that the city's open space zoning regulations constituted the final step in acquiring a 500-acre parcel. After holding that the city had "taken" the parcel, the court considered the question of title:

> Considered narrowly, the damages here might be computed solely on the basis of the easements constructively acquired. . . . This, however, leaves the parties in intolerable positions. The City would have paid out amounts which well could approach the full value of fee title but would have no title. The plaintiff, on the other hand, would have title but little more. . . . Accordingly, it will be held that the measure of plaintiff's damages shall be the fair market value of the fee title on the effective date of [the regulations], and it will be further ordered that, concurrently with payment therefor, plaintiff shall convey such fee title to the City.[15]

*Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency* [16] is another inverse condemnation proceeding in which the judgment provided that the Elks were to quitclaim their interest in the property.[17]

In *Milliner v. Gov't of Virgin Islands* [18] the court stated that "it goes without saying, upon payment of just compensation, the property will be that of the Government." [19] On appeal, the government contended that the judgment was inconsistent with the award, because it failed to direct the plaintiff to convey title to the road. The Third Circuit agreed; it remanded the case to the District Court and directed that the judgment require plaintiff to convey title to the parcel upon payment of the award.

In the foregoing decisions, the public agency received a muniment of title in exchange for payment of the award. Presumably, the owners conveyed their interest and only their interest. In other words, the agency received no more than the interest asserted by plaintiffs in the proceeding. It did not receive a title "quieted" against the world, not even necessarily a title divested of all private interests. For example, the deeds in two of the last three inverse condemnation cases, *supra,* were not the equivalent to the title ordinarily acquired in direct condemnation.

#### Satisfaction of the Judgment Vests Title or Interest

Several decisions have held that if a judgment is silent on the question of title or interest, the satisfaction of the judgment, nevertheless, operates to vest title or right of user in the public agency.

For example, in *City of East Dallas v. Barksdale* [20] plaintiff sued for the value of land tortiously taken for widening an alley. The Court held that it is proper to vest title to the easement in the city after, not before, satisfaction of the award.

In *State Highway Comm'n v. Puskarich,*[21] where the landowner recovered on the theory of an implied contract for the value of the land, the Court held that payment of the award, and thus satisfaction of the judgment, operated to pass title to the state for public use. The Court stated:

> The general rules in regard to the effect, with respect to the title of the property involved, of a judgment in condemnation proceedings apply also where the action or proceeding is one which is considered as a substitute for condemnation proceedings. Thus in actions where the recovery of the value of the land taken, and in actions for damages where the past, present, and future damages are recoverable, a satisfied judgment operates to transfer such title or proprietary right as defendant is entitled to.[22]

In *Texas Electric Service Co. v. Linebery* [23] the Court held that where continuance and maintenance of a transmission line did not permanently injure the property, an easement should have been granted to the public utility upon satisfaction of the judgment. Also, in *Harris v. L. P. and H. Construction Co.,*[24] it was held that the public utility, upon payment of the award in an inverse condemnation proceeding, acquired an easement for continued maintenance of its improvement.[25] (In *Milliner,*

*supra* note 18, the Court, however, refused to apply the rule of satisfaction of the judgment, requiring the plaintiff to deed the property to the Virgin Islands.)

It should be noted that the final judgments in cases discussed under this subheading, if they adequately describe the property and the right or title acquired, may be recorded, thus providing notice of the public agency's interest.

#### Entry of Judgment Vests Title in Public Agency

The decisions in this category hold that an entry of judgment against the public agency is sufficient. The courts apparently were of the opinion that the public agency, already in possession and having made improvements, would honor the judgment. The judgments, assuming that the properties are adequately described, may be recorded, thereby giving notice of the interest or title in the agency. As the Court held in *Wichita & W. R.R. v. Fechheimer,*[26] if there is a permanent appropriation, then:

> [i]n order to bar any future actions for damages, and to make the present action conclusive between the parties, it should clearly appear, either by the admissions in the pleadings, or from the evidence and judgment, just what interest the landowner has parted with, and what has been acquired by the company.[27]

In *San Antonio & A.P. Ry. v. Knoepfli* [28] it was held that the judgment for the landowner resulted in a judgment in favor of the railroad for the right of possession.[29]

In *United States v. Great Falls Manufacturing Co.,*[30] without saying how the title might be vested, the Court stated that the United States would acquire whatever title the owner had asserted in the Court of Claims:

> In reference to the title which the Government will acquire, as the result of this suit, there would seem to be no difficulty. The finding of the court is that the claimant exhibited to the arbitrators a valid title to the lands in question. It does not appear that the Company has ever parted with the title; and the finding is that no title, except that of the claimant, is asserted.[31]

In *Bernard v. State Dep't of Public Works* [32] the state failed to ask for a servitude in its pleadings. The state argued on appeal that, in return for compensation paid the plaintiff, it was entitled to a decree that it owned the property affected by its canal and spoilbanks. The Court disagreed, but held that, under the state's prayer for "general and equitable relief," it was entitled to a servitude for drainage purposes.[33]

#### The Judgment Adjudicates Title in the Public Agency

In an early case, *City of Dallas v. Miller,*[34] the judgment required the city to pay for the land and vested fee title in the city. Although the plaintiff had not objected at trial, the Appellate Court noted that "the [trial] court should have decreed to the city an easement." [35]

In *Little v. King County* [36] the landowner sued the county for trespass and for taking and grading his land for a road. The trial court concluded as a matter of law that title should vest in the county "free and clear of any and all claims" of the landowner. Accordingly, the judgment required the landowner, after receipt of the award, to "make, execute and deliver to the defendant King County a quitclaim deed in due form as provided by law for the land and premises. . . ." [37]

The Supreme Court of Washington reversed, holding that the owner could not be required to give such a deed "under any theory." The Court remanded and directed that the judgment delete this requirement and add language showing that the county was vested with the right to a public road or highway.[38] The Court noted that, because it was vesting only the equivalent of an easement in the county, the land upon any abandonment would revert to the abutting owner. This result was presumably to conform to Washington law, which limited a county to the acquisition of no greater estate than necessary to maintain its roadway.

On facts similar to *Little,* the Court reached a different conclusion in *Schilling v. Carl Township, Grant County.*[39] The action was for compensation for property taken for road purposes. The Court held that the judgment should be: (1) just compensation for the owner, and (2) that upon payment thereof, a road would be legally established in order to settle the controversy.[40]

In a case in which a landowner brought an action against a school district in inverse condemnation for the value of an easement over his land, the Court held that the trial court in the judgment should have made a formal declaration of an easement.[41]

In *Cereghino v. State Highway Comm'n* [42] the Oregon Supreme Court was presented with flooding damage in a case similar to the one decided ten years earlier in *Tomasek v. State.*[43] The result, however, was different in that easements were adjudicated in favor of the State of Oregon.

The State had appealed the decision of the trial court, which had not awarded certain easements to the area that was subject to flooding. Plaintiff had relied on *Tomasek,* but the Court distinguished that case as one involving total destruction of the value of the property in which the "taking consisted in the deprivation of the former (sic) owner rather than the accretion of a right or interest to the sovereign." [44] The Court observed that Cereghino's action was not one in tort but one for compensation for a permanent injury to the land, and noted further that the State had not appealed from the trial court's finding that there had been a taking. The Court remanded the case to the trial court and directed that judgment be entered declaring easements in favor of the State for surface water. (A similar result could have obtained in *Tomasek;* see discussion *infra,* at note 48.)

In the foregoing cases the courts entered judgments which purported to transfer the plaintiff's interest notwithstanding the fact that the actions were *in personam.* Although two cases were styled "inverse condemnation" and the defendant did not counterclaim for a decree of condemnation, it seems that plaintiff's failure to object to the manner

in which the title was to pass to the defendant accounts for the result in these cases.

#### Agency Acquires Same Title as if It Had Directly Condemned the Property

Two cases were located which held that the public agency acquires the same estate as though it had instituted a condemnation proceeding.[45] The validity of such declarations of title may be dubious, in particular because the judgment fails to specify the title acquired and the appellate opinion must serve as a document of title. A title derived in this manner, obviously, cannot be compared with one from a condemnation proceeding in which a decree is obtained that divests all private interests and titles.

#### Summary

In the preceding cases, with some exceptions, the courts generally held that a landowner who recovers damages equivalent to his interest in the land may not receive a "windfall" by retaining his title to or interest in the land. Thus, the courts have taken it upon themselves to transfer, by one method or another, an interest in the land that was held to have been taken or damaged. However, there is seldom any reference to any authority for this principle or policy.[46]

### JUDICIAL REFUSAL TO SECURE TITLE IN THE PUBLIC AGENCY

On occasion courts have declined to award title to the agency when there was a taking or permanent damaging without justification.

For example, the Court in *Mitchell v. Town of Ahoskie* [47] refused to vest an easement in the city. The owner and the city failed to demand assessment of "permanent damages." The Court held that the trial court had erred: (1) in instructing the jury that the measure of damages was the value of the sewer line as it existed as if it had been extended by the city as agreed; and (2) in ordering that, on payment of damages, the city would have the right to maintain the line in its existing condition.

In another case, *Tomasek v. Oregon Highway Comm'n,* [48] the Court refused to award title to the State of Oregon for land permanently burdened with the flow of surface water. The Highway Commission had constructed an upstream bridge with approaches, the effect of which was to change the course of the river and cause the surface to be "either completely washed away or rendered . . . valueless to Plaintiff." [49]

The State argued on appeal that the judgment was improper, because there was no provision for an appropriation or conveyance to the State. It argued that

> [t]he form of judgment may be proper for a tort claim but it is not in an inverse condemnation action. . . . If the [S]tate of Oregon should pay the plaintiff $13,500.00 it is entitled to something in return; and [for] this the judgment makes no provision.[50]

The Oregon Supreme Court held:

> [U]pon facts such as we have before us, it is not necessary that there be [a] conveyance to the state, nor that the judgment provide for appropriation by the state. It is true that the state is entitled to something in return for the payment it makes; but under the facts of this case, the state already has had that something. It has *enjoyed the benefit of this taking* of plaintiff's property by the construction of its highway in the manner it desired and deemed necessary. (Emphasis supplied.)[51]

The *Tomasek* Court seemed to say that a conveyance would not add anything to the State's right to continue to have the benefit of flooding the owner's worthless land. Moreover, should the owner again sue for flooding he would probably recover only nominal damages for valueless property. The result in *Tomasek* is not satisfactory. As seen, the Court recognized that there was a "taking" of the land.[52]

The *Tomasek* Court stated that the State's argument was answered also by the case of *Levene v. City of Salem.*[53] In *Levene* the Court declined to hold that the trespass caused by flooding was either a nuisance or constituted a taking. The Court held that the city would be liable in either event. It also noted that larger drains had been installed which eliminated the likelihood of new flooding. *Levene,* thus, was a case of a temporary damaging of property and not a taking as was held in *Tomasek.* The *Levene* case is inapposite to *Tomasek.*

In *Steiger v. City of San Diego* [54] the action arose out of a city's construction of a drainage system. The city contended that it was entitled to an easement over the property if there was a "taking." The Court held, however, that the owner could maintain an action independently of any taking and that the city in its answer had not asked for an easement. The Court stated that it was not deciding whether the city could obtain an easement in a separate proceeding.

Two Kentucky decisions appear to have held that there was a permanent taking but the plaintiff was not required to convey the property to the highway department.

In *Commonwealth, Dep't of Highways v. Gisborne* [55] the Department's contractor, believing a strip of land to be within an area deeded to the State of Kentucky, occupied the land, removed shrubbery and trees, and graded it in connection with a project. The Department argued on appeal that this was a taking and that it was entitled to a deed. The Appellate Court held that this injury was temporary and that the sole issue was compensation for the Department's use and injury to the land.

In a case styled as a "reverse condemnation" action to recover damages due to a land slide, *Commonwealth, Dep't of Highways v. Widner,*[56] the Department appealed the court's decision not to require the owner to deed the property to the Department. The Appellate Court held, however:

> In the first place, the jury's award was not for the asserted value of the entire property, so that no basis exists for determination of what should be conveyed. Neither do we think there is merit in the suggestion that failure to require a deed will expose appellant to repeated claims for damages for the same injury. On the basis of the fact that these parties

have litigated the issues presented it is our view that the subsequent recovery for the same injury is foreclosed. . . . Appellant's rights in the matter are afforded adequate protection by the *lis pendens* notice available through K.R.S. 382.440, *et seq.*[57]

In that connection, Kentucky's *lis pendens* statute, unlike those of other jurisdictions, has no expiration provision for the notice, and only the party who filed it can secure its discharge and annulment. It is difficult to understand how the notice afforded by the *lis pendens* would impart notice of a legal interest in the property. The fact is that there is no legal interest vested in the state. All the *lis pendens* would disclose is that litigation had occurred between the parties and that the state had paid a judgment for money damages. The public agency in its pleadings probably should have specifically described the property, valued it separately, and sought a legal interest therein.

**VIEW THAT CONVEYANCE OF TITLE NOT NECESSARY IN INVERSE CONDEMNATION—QUESTIONABLE**

*Tomasek, supra* note 48, has been cited as authority for the proposition that it is not necessary in an inverse condemnation proceeding that there be a conveyance to the inverse condemnor.

In *Thompson v. Tualatin Hills Park & Recreation Dist.*[58] the plaintiff lost his option to purchase property for access because of the condemnation (later abandoned) of the tract which he owned and which could not be used as intended without the access property. The District argued that the plaintiff was barred from maintaining the action, because he had no property interest to convey if he obtained judgment. The Court stated, however:

> In inverse condemnation actions it is not necessary that there be a conveyance to the state, nor that the judgment provide for appropriation by the state. *Tomasek v. Oregon Highway Com[m]'n,* 196 Or[e]. 120, 152, 248 P.2d 703, 717–18 (1952). See *United States v. General Motors,* 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945); *Foster v. Herley,* 330 F.2d at 89; see also *Klopping v. City of Whittier,* 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972).[59]

On the merits, however, the *Thompson* Court held that the abandoned condemnation did not amount to a taking because there was not an abuse of authority and plaintiff was not deprived of all or most of the value of the property.

The Court's reliance on *Tomasek* is misplaced, because in that case the Court recognized that there was a "taking"; that is, there was a permanent flow of surface waters over plaintiff's land. It may be noted that in *Cereghino, supra* note 42, the Oregon Supreme Court alluded to *Tomasek* as the "former owner" of the land. The Court's reliance on *General Motors, supra* note 59, is even farther afield; indeed, that case was a condemnation action by the United States in which it was held that General Motors was entitled to compensation for fixtures and equipment destroyed or depreciated in value by the taking of a portion of GM's leasehold. The government had not acquired possession or title.

In the *Herley* case, also cited in *Thompson, supra* note 58, the city abandoned its ten-year old condemnation proceeding, and the building owner sued for damages. The Court of Appeals held that the District Court should have decided whether the case presented a federal question under the 14th Amendment for deprivation of property without due process. The *Klopping* case, *supra* note 59, involves unreasonable pre-condemnation pronouncements causing loss of rental income which precluded payment of the mortgage and loss of the property upon foreclosure.

Neither in *Thompson* nor in any of the cases cited therein did the "inverse condemnor" acquire a right of title or possession. These decisions were either incorrectly or casually styled "inverse condemnation." No other cases were found supporting the view in *Thompson,* and the "authorities" cited by the court surely are questionable.

**MISCONCEPTION OF "TORTFEASOR IN INVERSE" AS AN "INVERSE CONDEMNOR"**

In many of the decisions the characterization of the defendant as an "inverse condemnor" is inaccurate and misleading. The term "inverse" simply means that the traditional relationship of the landowner and the public agency is reversed. A public agency, which has the right to condemn and is in possession of private property without having purchased or condemned it, may be sued by the landowner in tort on one or more theories.

In most cases in which defendant was referred to as an inverse condemnor the public agency did not seek to restructure the proceeding or substitute a remedy different from that of the landowner, such as by filing a cross-petition or counterclaim for condemnation. Doing so would have enabled the court to treat the counterclaim as a petition for condemnation and at the time of judgment enter a decree divesting plaintiff's private rights in the property. Absent such action, these judgments cannot be equated with those ordinarily obtained in a direct condemnation proceeding. A judgment of the latter kind can be obtained in an inverse case only if the public agency not only files a counterclaim but also is a third-party plaintiff. That is, in its third-party complaint it brings before the court all other persons, known and unknown, having claims. All statutory requirements, such as publication of notice and *lis pendens,* also must be met.

Even the judgment, styled "judgment of inverse condemnation," entered in *Richmond Elks Hall Ass'n, supra* note 16, did not divest all private rights in the property; nor did it extinguish possible claims by third parties. Indeed, to call that case one in inverse condemnation would be a misnomer, because the judgment merely directed the Elks to quitclaim their interest.

Despite some sweeping pronouncements that the principles involved in condemnation are the same regardless of who initiates the action,[60] or that inverse differs from regular condemnation only in that the owner brings the action,[61] the nature and quality of title the public agency

receives in an "inverse" action is different and has lesser quality or is nonexistent.

The public agency may be satisfied with a deed, easement, declaration or servitude, or right of user. If so, there is no reason that the landowner's action for damages for the permanent injury to his land or for the recovery of its value should not proceed accordingly. The court may enter a judgment *in personam* as to the public agency and *quasi in rem* as to the landowner. It is a matter of considerable importance whether a public agency is or should be satisfied in a tort action to receive less than an unencumbered fee title.

Factors to consider in making that election are discussed in the following.

## QUALITY OF TITLE RECEIVED AS AFFECTED BY CROSS-PETITION, COUNTERCLAIM, OR THIRD-PARTY COMPLAINT

### Right of Public Agency to Assert Counterclaim or Cross-Petition

At the outset, it should be ascertained whether counterclaims or cross-petitions are permitted. Some jurisdictions have statutes permitting those public agencies having the right of condemnation to file such pleadings when sued in ejectment or for damages for uncompensated occupancy of private land.[62]

Other jurisdictions without that statutory basis have permitted, nonetheless, the filing of counterclaims for condemnation.[63] Others have not so permitted.[64] Counsel should be satisfied of the availability of this method of pleading before proceeding.

### Factors To Be Considered Before Proceeding with Counterclaim and Third-Party Complaint

Assuming that the public agency may assert a counterclaim or cross-petition for condemnation, there are a number of considerations, practical and legal, that the transportation attorney should evaluate. The more significant ones, which are applicable generally, are discussed in the following.

#### *Cross-Petition and Counterclaim as Property Owner's Exclusive Remedy*

*Ossman v. Mountain States Tel. & Tel. Co.*[65] was an action for trespass for crossing plaintiff's land with a transmission line. The telephone company argued that the owner was limited to the measure of damages recoverable in inverse condemnation. The plaintiff argued that he was entitled to sue either in trespass or inverse condemnation. The trial court agreed with Ossman and awarded compensatory and exemplary damages.

The Colorado Court of Appeals reversed. It held that the trial court (1) should have treated the telephone company's counterclaim for inverse condemnation as a petition in eminent domain, and (2) should have determined *in limine* whether the taking was a necessary and proper exercise of the eminent domain power. If such was the case, a trespass action would not lie.

The Colorado Supreme Court reversed the Appellate Court[66] and held:

> [A] landowner has a right to sue in trespass even though the trespasser may have the statutory power of eminent domain with respect to the land on which the trespass occurs.[67]

The Court agreed with Ossman's right to elect to proceed in trespass or condemnation under the circumstances presented.

> We find no sound reason why a landowner should be limited to an inverse condemnation remedy where a trespasser refuses to promptly initiate eminent domain proceedings.[68]

In *Hagenson v. United Telephone Company*[69] the public utility also took the position that plaintiff could not maintain an action for willful trespass and injunctive relief and that his sole remedy was to compel institution of condemnation proceedings.

The Iowa Supreme Court observed, however, that when a public utility ignores the constitution and statutes that authorize it to condemn and willfully takes private property, it may be held accountable for willful trespass regardless of motive. The Court stated:

> In such case the aggrieved property owner may maintain a common law action for damages. Also he may, in a proper case, have both actual and punitive damages. On the other hand . . . , he can elect to waive the tort and by mandamus compel the taker to institute proceedings in eminent domain.[70]

The Supreme Court concluded that the Iowa eminent domain code was not the exclusive remedy:

> [I]f the legislature had intended the method of assessing damages for taking of private property for public use be solely by eminent domain, it could have easily so declared.[71]

The Court reached a similar result for a different reason in *Harris v. L.P. and H. Construction Co.*[72] The Court treated the company's answer entitled "affirmative defense of condemnation" as a counterclaim for inverse condemnation. It held that the counterclaim was not an exclusive remedy and did not preclude the owner from damages occurring prior to condemnation. The condemnation could not be made retroactive. "In short, the proceeding by way of condemnation cannot relieve defendants from liability for the damages resulting to the plaintiffs from the prior trespassing."[73]

In Oklahoma the Supreme Court addressed the question of whether a statute authorizing a counterclaim for reverse condemnation by a public agency was plaintiff's exclusive remedy.

Thus, in *Allen v. Transok Pipe Line Co.*[74] the landowner sued in tort for trespass, alleging willful and wanton entry and injury to his land, and sought punitive and other nonproperty-type damages. The trial

court held that the owner's sole remedy was under the reverse condemnation statute and that the action in tort for personal injury and punitive damages was inconsistent with inverse condemnation.

The State Supreme Court reversed the dismissal of the complaint. It held that a reverse condemnation action provides an exclusive remedy only in those cases where the remedy of reverse condemnation is adequate; that is, "[c]ases where the land owner is merely seeking compensatory damages for the land taken. . . ." [75]

The *Transok* Court stated that, when the owner elects to sue in trespass, the defendant pipe line company may cross-petition in condemnation; the two causes of action may be tried in the same case. Furthermore, the property owner may bring the action both in trespass and reverse condemnation.

The *Transok* Court reaffirmed earlier decisions holding that a landowner may be estopped if he fails to take action when the public agency enters and erects improvements; he may be held to have acquiesced in the taking and be limited to such damages as are recoverable in reverse condemnation.[76]

The result in *Ossman, Hagenson,* and *Transok* was the same regardless of the existence of a statute authorizing a cross-petition. The plaintiff's claim for relief survived and was not merged into a cross-petition or counterclaim for inverse condemnation. The Court's refusal in *Hagenson* to allow the counterclaim to "relate back" to include damages for trespass is another way of preventing a public utility, which had willfully violated a landowner's property rights, from paying only for the value of the property taken. There is more justification for the survival of plaintiff's cause of action in *Transok* for nonproperty-related damages for tortious interference with enjoyment of property rights and emotional distress than for the survival of property-related damages occurring prior to a cross-petition for condemnation.

However, there may be an appreciable difference between a "relation-back" to assess damages to the property to the date of initial trespass and allowing the owner to receive his precondemnation damages in addition to the condemnation award from the date of filing the cross-petition.[77]

In *Brazil v. City of Auburn* [78] the Appellate Court had denied the city's contention that inverse condemnation was the owner's sole remedy. The Washington Supreme Court reversed in an opinion that thoroughly reviews the genesis of inverse condemnation. The Court held that the trial court erred in granting the owner's claim for ejectment and ordering the city to vacate the property and pay rental value. The Court said that the trial judge should have granted the city's motion for reconsideration in which the city for the first time argued that the owner's exclusive remedy was inverse condemnation.

*Sufficiency of Plaintiff Owner's Title To Be Acquired and Third-Party Practice*

Regardless of the type of action brought by the landowner, one must determine the quality of title the agency will receive should the owner be successful in obtaining a money judgment equivalent to the value of the fee, or a lesser estate or servitude. It is suggested here that if the public agency is to pay the equivalent of the fee value for the property, it should bring before the court all interests, estates, encumbrances, and liens that should be compensated or satisfied. This result can be accomplished by the public agency becoming a third-party plaintiff.

In the cases reviewed the landowner ordinarily asserted his right to possession in actions for trespass and nuisance or his right to title in actions for ejectment. In none of the cases did the landowner set forth other outstanding legal or equitable interests, encumbrances, or liens. In none did the landowner implead the holders of interests in his property in order that they would be bound by the judgment or decree. In none did the owner sue on anyone's behalf other than himself. Thus, the most that the plaintiff landowner can convey, if the court so directs, is the interest or title at issue.[79] If that interest or title is encumbered, the public agency receives an encumbered title. Furthermore, if the public agency receives an easement or lesser servitude, there is the possibility that it may be extinguished on foreclosure of a mortgage or deed of trust executed prior to the litigation.

Even when the public agency has received an unencumbered title for having paid the fee value of the property, it may, nonetheless, receive a deed that grants it less than a fee simple title. In *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency* [80] the Elks alleged that they were the fee simple owners, and the trial court so found, but the court required them to convey the property by a quitclaim deed. On appeal defendant contended that if the inverse condemnation judgment were affirmed, the agency should be entitled to a fee simple title. The Ninth Circuit held:

> We disagree with Agency's contention and uphold that portion of the district court's judgment requiring a quitclaim deed. This court observed in *Hawaiian Gas Products v. Commissioner of Int. Rev.,* 126 F.2d 4, 5 (9th Cir.), *cert. denied,* 317 U.S. 653, 63 S.Ct. 48, 87 L.Ed. 525 (1942), that "the Sovereign can get no greater title than that held by the former owner." The sole plaintiff in this case is Elks. No claim was asserted at trial on behalf of any other party. Accordingly, the compensation awarded is solely for the interest of Elks, and Elks should *not be required to give a warranty deed guaranteeing title against the claims of possible third parties.* (Emphasis supplied.)[81]

A public agency, therefore, must be on guard to avoid paying the full fee value of the property without the claims of possible third parties having been extinguished. Of course, a cross-petition or counterclaim for a decree of condemnation is sufficient to extinguish the interests of known or unknown third persons.

*Richmond Elks Hall Ass'n, supra,* was not an inverse condemnation case in the sense that there was a counterclaim for condemnation. Had it been, it is doubtful that the agency would have received a quality of title any better under a judgment of condemnation than it obtained by

quitclaim deed. Although a "judgment" may have greater legal stature than a quitclaim deed, any third-party claims would not be affected.

If the public agency is to convert the landowner's complaint into a true condemnation of all private titles and interests, it must file not only a counterclaim for condemnation of the owner's interest but also a third-party complaint to condemn the interests of nonparties.

In some instances, it may be more convenient for the agency to institute a separate condemnation proceeding rather than to file a counterclaim and a third-party complaint. Some courts have ordered a stay of a landowner's action and directed that a separate condemnation action be instituted. On the other hand, many courts, confronted with a landowner's complaint, will, in order to avoid a multiplicity of suits, restrict the agency to the action instituted by the owner, and the agency must assert its claims for condemnation therein. It may be noted that this result is even more likely when plaintiff's claim for damages occurring prior to the taking would survive a counterclaim for independent adjudication.[82] Also, if the defendant public agency were to file a separate proceeding, the court may be disposed, if the agency's condemnation proceeding would not adjudicate the owner's tort claim for precondemnation damages, to consolidate the actions for trial.

As stated, if all claims and interests are to be determined in the action instituted by the landowner, the public agency may file, in addition to a counterclaim, a third-party complaint against all other persons and entities, known and unknown, having or claiming any interest in the property described in the third-party complaint. The usual publication of notice of the filing of the third-party complaint should be made. By filing its third-party complaint, the agency will be, insofar as a judgment or decree of condemnation is concerned, in the same posture it would be in in the usual condemnation proceeding. That is, plaintiff landowner, as well as all other third parties, will be divested of any claims or interest in the property.

*Frequency of Damaging Event Where There Is No Ouster of Possession*

Often a landowner will sue in trespass or nuisance for injury to his property caused by an agency's construction of a public improvement but will not seek damages for a permanent damaging or taking. The agency is faced then with the prospect of the landowner returning to court later to collect additional damages upon a recurrence of the injury. It is possible that the owner may obtain in such piece-meal fashion a total sum in excess of the value of the land or easement.

Damages that may be expected to flow normally from the construction of a project are flooding, drainage, subsidence, and support. The public agency in these situations should assess the probability of a recurrence of further injury. If it is determined that the project may interfere permanently with a right or use of property or that the duration is so indefinite that the condition may be said to be constructively permanent, the agency may decide to acquire a permanent easement or servitude.[83]

*Whether Damages Sought Approach the Value of Fee*

The amount of damages the landowner is seeking should be considered whenever the landowner is not ousted of possession and the agency wants to convert the landowner's action into a proceeding to divest all private title and interest.

The potential for money damages should always be explored fully against the agency's own appraisal of the full fee value. If it appears that the agency may pay a sum approaching the full fee value, although not receiving a commensurate title or estate, it may want to counterclaim and file a third party complaint in order to secure a judgment divesting all private rights.[84]

*Judgment To Be Paid From General Fund or Transportation Fund*

Generally there are state constitutional and statutory provisions designating revenues from gasoline taxes to be used exclusively for construction, improvement, and maintenance of highways. Some courts have construed these restrictions to prohibit paying tort judgments from these highway funds.[85] In jurisdictions in which these funds cannot be used to pay claims sounding in tort, general funds may be available. In actions involving potentially large sums of money, the availability of general funds for payment should be considered when deciding whether to convert the landowner's action into a condemnation proceeding.

*Availability of Public Liability Insurance and Defense by Carrier*

Many governmental entities have insurance coverage for tortious actions of their officers, agents, and employees. In many instances, a landowner's complaint, which is styled "complaint for damages," may be a tort action. If insured, the agency generally is required to notify the carrier of the complaint and tender its defense to the carrier. If there is insurance coverage, that fact may be a sufficient reason not to convert the action into one for condemnation. Of course, if the carrier refuses to defend, the agency may elect to defend the tort claim or counterclaim and file a third-party complaint. In any event, the existence of insurance coverage should be considered when deciding whether to convert the action to a condemnation proceeding.

*Award of Landowner's Litigation Expenses for a "Taking"*

In response to the Federal Relocation Assistance and Acquisition Policies Act of 1970 [86] states have enacted statutes authorizing the court in either a direct condemnation proceeding or a "proceeding brought against a public body to recover compensation for the taking of property" to award the landowner reasonable costs, disbursements and expenses, including reasonable attorney fees, and appraisal and engineering fees actually incurred in the proceeding.

It should be determined whether the landowner wants to recover the

value of his land or to be compensated only for damages for tort. If a recurrence of the injury is remote or unlikely, and the cost of the project is reimbursable from federal funds, the agency may decide to defend the claim as a tort action and not be subject to paying the owner's litigation expenses.

*Date From Which Interest Is To Be Computed*

In many states, judgments, including those for torts, bear interest at a statutory rate from the date of entry.

An exception is the condemnation award in which the judgment bears interest from the date of the agency's initial trespass or entry. A condemnation case, if concluded after appeal, may require several years, and interest can become substantial. In those states that have statutes providing for judgment-interest from the date of service of the summons and complaint,[87] the matter of interest is not quite as significant.[88]

*Setting of Precedent*

As seen, if the public agency enters upon property, is in possession of it, or has constructed improvements thereon without having agreed to compensate the owner or having filed condemnation proceedings, it should file a counterclaim for condemnation and become a third-party plaintiff. In this manner it may obtain a decree of condemnation that vests an unencumbered title in it.

But if there has been no ouster of possession (for example, in instances involving precondemnation pronouncements), the agency may decide not to convert the tort suit into an action for condemnation. Instead, it may wish to deny that there has been a taking. In this way, the agency will not set a precedent that the circumstances of which the plaintiff complains constitute a "taking." In other words, converting the suit to a condemnation proceeding may invite similar actions for inverse condemnation. Thus, a denial that there has been a taking may cause other prospective plaintiffs to await the outcome of a pending suit.

## CONCLUSION

The courts are disposed to see that a landowner does not receive a windfall by retaining title to the property after receiving just compensation. Occasionally, a court has vested title in the agency even though the preceeding was not *in rem*. Even so, the former owner cannot complain, and other persons have no standing to question its assumption of power over the title.

In a few instances the court declined to vest title in the agency where it belatedly sought an easement or servitude or the assessment of permanent damages. In these cases it appears that the court viewed the claim as one in tort or for precondemnation activities.

In several cases the agency failed to seek an easement, and the court still directed or declared the existence of an easement. One court held that a general prayer for equitable relief embraced an award of a servitude.

As noted at the outset, the landowner is not motivated by a desire to see that the agency receive an interest in the property. The owner is unlikely to be concerned whether the department receives title, or an equivalent title, to the property taken. On the other hand, the owner is seldom in a position to resist a transfer of his interest when he has been compensated for a permanent damaging or taking. Usually the owner objects to a transfer of title when the trespass is not permanent.

In the cases considered the agency often did not receive a fee simple title to the property in the sense that all private rights were divested. In those cases where an unencumbered fee title was received it was because the landowner's title was unencumbered.[89]

The worst case is when an agency is compelled to pay full fee value, yet receives only a quitclaim deed [90] because of its failure to join third parties with possible claims.[91]

Of course, the quality of title received in the decisions differs from the unencumbered title or estate that may be obtained in a condemnation proceeding instituted by the agency. As explained, the agency may obtain the same quality of title in a landowner's suit by filing a counterclaim and becoming a third-party plaintiff. The agency may want to consider the factors discussed herein before deciding to proceed.

It may be that as the law becomes settled in awarding compensation for a particular kind of governmental activity the condemnor will decide to take affirmative action by instituting condemnation. Courts, however, as technology and new transportation modes impinge on property rights, may find new compensable takings of property.

One course would be to require by statute that in every suit brought by an owner, the claimant must prove a taking of his property or interest therein; that the agency is in possession of or is enjoying the benefit of a servitude; that the agency act affirmatively by filing a counterclaim and a third-party complaint to condemn the property; and that the proceedings be governed by the eminent domain code.

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[1] Cases discussed herein are applicable to transportation and highway agencies, as well as to public service and other corporations which also are authorized to condemn private property for public use.

[2] *Inverse Condemnation: The Constitutional Limits of Public Responsibility,* Bureau of Public Roads and Washington University (1964).

[3] *See* Huxtable, *Inverse Condemnation—Its Structures, Advantages and Pitfalls,* 1977 Institute of Planning, Zoning and Eminent Domain, Southwest Legal Foundation, Dallas.

[4] *See* Annot., *Election of Remedies by Owner Against Public Authority or Corporation Having Power of Eminent Domain Which Unauthorizedly Enters Land Without Instituting Valid Eminent Domain Proceedings,* 101 A.L.R. 373 (1936).

[5] *E.g.,* prior condemnation award, *res judicata,* limitations, adverse possession, sovereign immunity, and others.

[6] 26 Am. Jur. 2d, Eminent Domain, § 130 (1966).

[7] 47 Am. Jur. 2d, Judgments, § 1060 (1969).

[8] 8 N.Y.S. 535 (N.Y.C. Super. 1890).

[9] N.Y.S. 258 (Sup. Ct. 1890).

[10] 33 N.Y.S. 740 (Sup. Ct. 1895).

[11] 13 N.Y.S. 514 (Sup. Ct. 1891).

[12] See Hull v. New York El. Ry., 29 N.Y.S. 113 (Sup. Ct. 1894); Woolsey v. N.Y. El. Ry., 9 N.Y.S. 133 (Sup. Ct. 1890); Kenkele v. Manhattan Ry., 8 N.Y.S. 707 (Sup. Ct. 1890); Pappenheim v. Metro. El. Ry., 28 N.E. 518 (N.Y. 1891); Shepard v. Manhattan Ry., 62 N.E. 151 (N.Y. 1901); Fletcher v. Delaware, L. and W. Ry., 79 F.2d 306 (2d Cir. 1935); Horton v. Niagara, Lockport & Ontario Power Co., 231 A.D. 386, 247 N.Y.S. 741 (1931); Balken v. Town of Brookhaven, 70 A.D. 2d 579, 416 N.Y.S.2d 51 (1979).

[13] 12 N.Y.S. 501 (Sup. Ct. 1890).

[14] 401 F. Supp. 962 (N.D. Cal. 1975), pleadings withdrawn by stipulation of parties and decision vacated, 417 F. Supp. 1125 (N.D. Cal. 1976).

[15] *Id.* at 982.

[16] 561 F.2d 1327 (9th Cir. 1977).

[17] *See infra,* note 80.

[18] 593 F.2d 532 (3d Cir. 1979).

[19] *Id.* at 538.

[20] 18 S.W. 329 (Tex. 1892).

[21] 83 P.2d 132 (Kan. 1938).

[22] *Id.* at 135.

[23] 333 S.W.2d 596 (Tex. Civ. App. 1960).

[24] 441 S.W.2d 377, 381 (Mo. App. 1969).

[25] *See also* Istre v. South Central Bell Tel. Co., 329 So. 2d 486 (La. App. 1976).

[26] 12 P. 362 (Kan. 1886).

[27] *Id.* at 364.

[28] 17 S.W. 1052 (Tex. 1891).

[29] *See* Central Ry. v. Merkel, 32 Tex. 723 (1870). Also, in a case in which street was constructed on plaintiff's property, a landowner's judgment resulted in a "dedication" of that street to the city. Graf v. City of St. Louis, 8 Mo. App. 562 (1880).

[30] 112 U.S. 645 (1884).

[31] *Id.* at 658–659.

[32] 127 S.2d 774 (La. App. 1961).

[33] *See also,* Wallace v. Chicago, B. & Q. Ry., 190 P. 999 (Wyo. 1920); Newberry v. Evans, 97 Cal. App. 120, 275 P. 465 (1929).

[34] 27 S.W. 498 (Tex. Civ. App. 1894).

[35] *Id.* at 500.

[36] 293 P. 438 (Wash. 1930).

[37] *Id.* at 439.

[38] *Id.* at 441.

[39] 235 N.W. 126 (N.D. 1931).

[40] *Id.* at 134.

[41] Inns v. San Juan Unified School Dist., 34 Cal. Rptr. 903 (Ct. App. 1963).

[42] 370 P.2d 694 (Ore. 1962).

[43] 248 P.2d 703 (Ore. 1952). Tomasek is included among those decisions refusing to secure title or interest in the public agency; *see discussion infra,* notes 48 to 52.

[44] 370 P.2d at 699.

[45] *See* Beasley v. Aberdeen & Rockfish Ry., 59 S.E. 60, 62 (N.C. 1907); and Beetschen v. Shell Pipe Line Corp., 248 S.W.2d 66, 70, *aff'd,* 253 S.W.2d 785 (Mo. 1952).

[46] It is frequently said that the agency's right of condemnation precludes it from being a wrongdoer: "Having the right to take, a municipality, whatever its procedure, or even lack of procedure, is not a wrongdoer." Kincaid v. City of Seattle, 134 P. 504, 506 (Wash. 1913).

[47] 129 S.E. 626 (N.C. 1925).

[48] 248 P.2d 703 (Ore. 1952).

[49] *Id.* at 707.

[50] *Id.* at 717–718.

[51] *Id.* at 718.

[52] *Id.*

[53] 229 P.2d 255 (Ore. 1951).

[54] 329 P.2d 94 (Cal. App. 1958).

[55] 391 S.W.2d 714 (Ky. App. 1965).

[56] 388 S.W.2d 583 (Ky. App. 1965).

[57] *Id.* at 588.

[58] 496 F. Supp. 530 (D. Ore. 1980).

[59] *Id.* at 538.

[60] Breidert v. Southern Pac. Co., 394 P.2d 719, 721 (Cal. 1964).

[61] Martin v. Port of Seattle, 391 P.2d 540, 546 (Wash. 1964).

[62] Adolf v. Minneapolis and P. Ry., 43 N.W. 848 (Minn. 1889); Brazos River Conserv. and Recl. Dist. v. Costello, 143 S.W.2d 577 (Tex. 1940), 130 A.L.R. 1220; Allen v. Transok Pipe Line Co., 552 P.2d 375 (Okla. 1976).

[63] Ossman v. Mountain States Telephone & Tel. Co., 520 P.2d 738 (Colo. 1974). *See* 130 A.L.R. 1226.

[64] Williams v. Goose Lake Valley Irr. Co., 163 P.81 (Ore. 1917); Orr v. City of Anchorage, 119 F. Supp. 505 (D. Alaska 1954). *See* 130 A.L.R. 1226.

[65] 511 P.2d 517 (Colo. App. 1973).

[66] 520 P.2d 738 (Colo. 1974).

[67] *Id.* at 740.

[68] *Id.* at 741.

[69] 164 N.W.2d 853 (Iowa 1969).

[70] *Id.* at 857.

[71] *Id.* at 856.

[72] 441 S.W.2d 377 (Mo. App. 1969).

[73] *Id.* at 384; *See* Hampden Paint and Chemical Co. v. Springfield, A & N R.R., 124 Mass. 118, and Mapco, Inc. v. Williams, 581 S.W.2d 402 (Mo. App. 1979).

[74] 552 P.2d 375 (Okla. 1976).

[75] *Id.* at 379.

[76] The court clarified its holding in Transok by noting in Cox Enterprises, Ltd. v. Phillips Petro. Co., 550 P.2d 1324, 1327 (Okla. 1976), that it had expressly excluded cases where the entry, although technically a trespass, is "unknowing, is under a mistaken belief of authority, or where the effect of taking other property has in effect taken adjoining property." *See also,* Steiger v. City of San Diego, 329 P.2d 94 (Cal. App. 1958).

[77] There is an irreconcilable divergence among the cases, even in the same jurisdiction, as to whether the date of wrongful entry or the time of filing of condemnation proceedings should be the proper date of valuation in the event of wrongful precondemnation entry. 2 A.L.R. 3d 1038 (1965).

[78] 610 P.2d 909 (Wash. 1980).

[79] United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884).

[80] 561 F.2d 1327 (9th Cir. 1977).

[81] *Id.* at 1332.

[82] *See* Allen v. Transok Pipe Line Co., 552 P.2d 375 (Okla. 1976).

[83] This test, first announced in an overflight case, was the standard by which the court found a taking in Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977).

[84] This presupposes no difficulty in a jurisdiction in which the legislature has determined that the transportation agency's finding is conclusive in that the acquisition of a fee title is necessary to the integrity and maintenance of the project.

[85] Automobile Club of Washington v. City of Seattle, 346 P.2d 695 (Wash. 1959); State *ex rel.* Wharton v. Babcock, 232 N.W. 718 (Minn. 1930); State *ex rel.* Varnado v. Louisiana Highway Comm'n, 147 So. 361 (La. 1933).

[86] 42 U.S.C. § 4601 *et seq.*

[87] *See, e.g.,* Nevada Revised Statute, § 17.130.

[88] It may be noted here that because of presently higher interest rates in the market place, property owners have challenged the relatively low rates on condemnation judgments. In two cases the property owner succeeded in arguing that the statutory rate was unfair and did not constitute just compensation. The courts concluded that the 6 percent rate prescribed by Congress in the Declaration of Taking Act, 40 U.S.C. § 258a, was not binding, because the amount of just compensation is a matter of judicial inquiry. *See* United States v. 100 Acres, More or Less, 468 F.2d 1261 (9th Cir. 1972); United States v. Blankinship, 543 F.2d 1272 (9th Cir. 1976). *Compare* City & County of Honolulu v. Bonded Invest. Co., Ltd., 511 P.2d 163 (Haw. 1973) (5 percent rate set by the legislature controlled).

[89] *See, e.g.,* United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884).

[90] *See, e.g.,* Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977).

[91] The court perhaps cannot be faulted in declining to compel the Elks to give a warranty deed. The quitclaim deed may or may not prove to be all of the title the recreation district will ever need. Only time will tell. If the district ever decides to dispose of the property, it may convey it by a warranty deed if it is willing to assume the obligations thereunder, and if a purchaser will accept the district's assumption of those obligations.

## APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, and those responsible for land acquisition and use. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in eminent domain and land use.

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