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EC65-830 Governmental taking of Farm Lands for Highway Purposes

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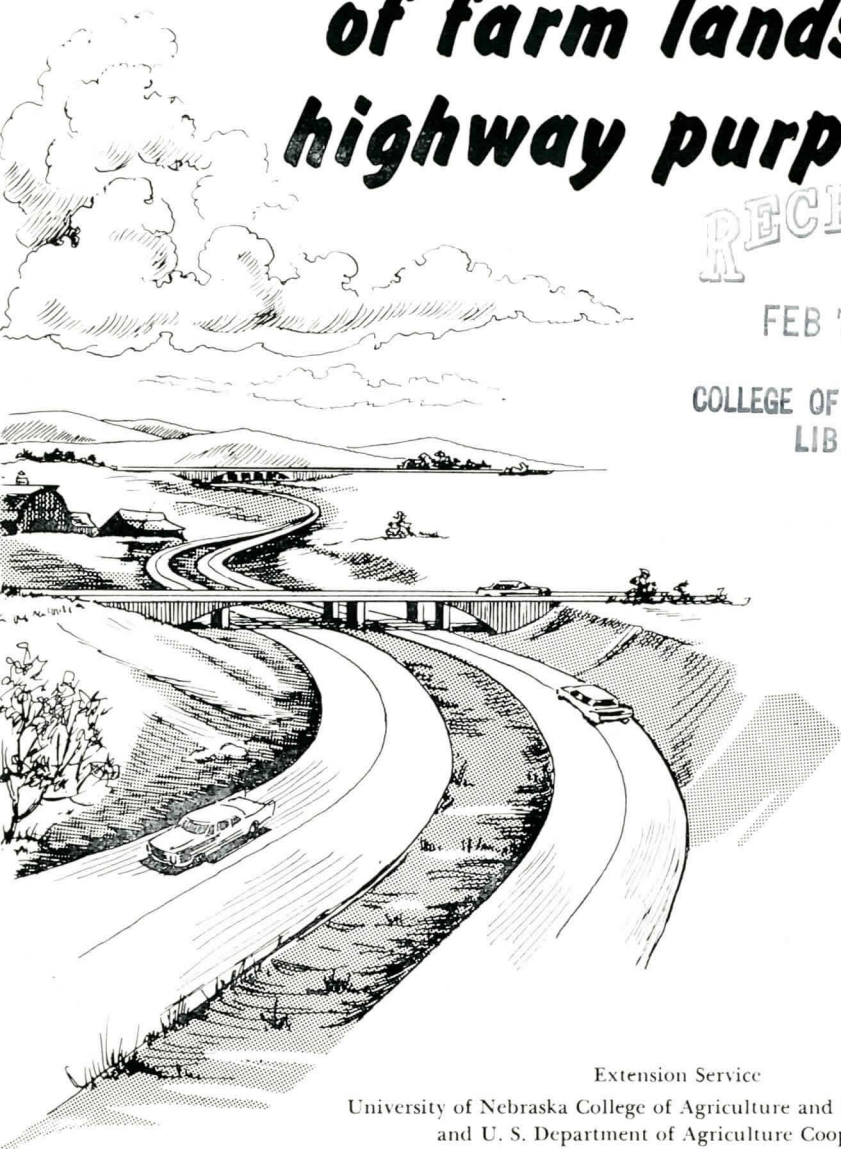
EC 65-830

GOVERNMENTAL *taking* *of farm lands for* *highway purposes*

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CONCLUSION

Eminent domain is a complex area of law. This circular is not intended to be a substitute for competent, experienced legal advice. A landowner who is concerned about any particular problem or question with reference to eminent domain should consult an attorney.

ACKNOWLEDGMENTS

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GOVERNMENTAL TAKING OF FARM LANDS FOR HIGHWAY PURPOSES

By Harvey Perlman¹

INTRODUCTION

Development of the interstate highway system and improvement of state highways make it necessary for farmers to understand the power of the state to take or use private property for the public good. This is accomplished through the exercise of the power of eminent domain. Railroads and public utilities also have this power, which they frequently use to obtain right-of-ways through private property.

This circular, designed to familiarize farmers with the procedure used in the condemnation of land, describes Nebraska law which generally would be applicable to all state condemnations, whether for highways, power lines, irrigation ditches, etc. However, some of the general rules stated in this circular are subject to exceptions in special circumstances and, therefore, may not necessarily apply in all situations. No attempt has been made to cover federal condemnation procedures.

What Is Eminent Domain?

Eminent domain is the right or power of the state to take private property for the public welfare. This power is inherent in the governing body; it need not be granted by the state constitution.

Are There Limitations on the Power?

The only limitations on the power of eminent domain are those expressed in the federal and state constitutions. The Fifth Amendment of the federal constitution provides that private property shall not be taken without just compensation. The Nebraska Constitution goes further and states that private property shall not be taken nor damaged without compensation. These provisions have been interpreted to mean that the property taken must be put to a public use. Thus, the state cannot take one man's property and give it to another.

¹ University of Nebraska College of Law, Class of 1966, Editor-in-chief, *Nebraska Law Review*, 1965-66.

Who May Exercise the Power?

The power of eminent domain is exercised by the legislature, but it may delegate this power to various departments and agencies. The Department of Roads, for example, has the right to condemn land for the use of public highways.

What Is Public Use?

If land is taken for a public use, it must be used to benefit the public-at-large, rather than private individuals. However, the mere fact that some individuals will benefit from the project more than others does not make the taking any less public.

Why Have Eminent Domain?

Our system of government was founded on the basis of private property. However, the private property rights of one individual must be balanced against the welfare of the public-at-large. Without eminent domain economic progress would likely be impeded. One individual conceivably could stop the construction of a highway, railroad, or electric line.

PRELIMINARY PROCEDURE

Determination of Land to Be Taken

The Department of Roads has authority to route state highways, and after the final decision on routing has been made, the landowner cannot contest the fact that his land is taken in preference to that of a neighbor.

Negotiations

After the Department of Roads has decided to take an individual's land for the construction of a highway, it must negotiate with the landowner in good faith. This negotiation is a prerequisite to bringing a law suit to condemn the land. There must be a good faith offer, a reasonable attempt by the Department to induce the owner to accept the offer, and a good faith attempt to agree. Any legal proceedings begun before such negotiations are void.

Survey

After negotiations have failed, the Department has the right to examine and survey the land it wishes to condemn. The Department is responsible for any damage to personal property caused by such survey.

COUNTY COURT

Petition

After the survey is completed, the Department files a petition in the county court of the county in which the land lies, stating that it wishes to secure the land by condemnation.

Appraisers

Within three days after the filing of the petition the county judge appoints three disinterested landowners in the county to act as appraisers. They are instructed to meet on a certain date to appraise the property and determine the damages to be sustained by the landowner. The appraisers are required by statute to carefully inspect and view the property sought to be taken and any other property that might be damaged.

Notice to the Landowner

After the appraisers are selected, the owner of the land in question must be notified so that he may protect his interests by testifying at the meeting of the appraisers.

Meeting of Appraisers

The appraisers meet and hold an informal hearing at which time they inspect and view the property and hear any person (or his representative) interested in the amount of damages. These include, for example, adjacent landowners. After the inspection and view, the appraisers assess the damages and file a written report with the county judge. The state must pay all costs of the appraisal.

Deposit of Award

The state may take possession of the property only after it has deposited with the county judge the amount of damages established by the appraisers. Upon depositing that amount the state has the right to possession of the land. However, it may not dispossess the landowner until it is ready to devote the property to a public use.

APPEAL TO DISTRICT COURT

Right of Appeal

Either the landowner or the state may appeal the appraisal to the state district court. However, such an appeal may not delay the

state from taking possession of the property so long as it has made the required deposit with the county judge. A jury trial is afforded unless waived by both the state and the landowner.

Payment of Award During Appeal

If the state and the landowner agree, the county judge may turn over to the landowner during appeal to the district court up to 80 percent of the state's appraisal deposit. However, the policy of the state is that it will not agree to any payment above the state's original offer. Interest stops, however, on that amount as of the date of the state's consent, whether the landowner exercises his option to take the money or not. If the district court determines that damages are less than the amount paid, the excess sum received by the landowner must be refunded to the state with interest at 6 percent per annum.

If the landowner appeals, and the district court award is greater than the amount allowed by the appraisers, the landowner is entitled to 6 percent interest on the amount finally allowed less interest at the same rate on all amounts withdrawn or stipulated for withdrawal in accordance with the paragraph above.

Attorney Fees for Appeal

The district judge may, at his discretion, award the landowner a reasonable sum to pay attorney and witness fees during appeal in the following situations: (1) if the appeal is taken by the landowner and the award is 15 percent more than the appraisal; (2) if the appeal is taken by the state and the final award is not less than 85 percent of the appraisal; or (3) if the appeal is taken by both parties and the award is greater than the appraisal.

Court Costs of Appeal

If the state appeals, it must pay all court costs for such appeal. If the landowner appeals he must pay court costs unless the district court award is greater than the appraisal.

APPEAL TO SUPREME COURT

Appeal

Either party has the right to make a final appeal to the Nebraska Supreme Court from the award in the district court. Costs of the appeal are determined the same as in district court.

JUST COMPENSATION

Measure of Damages for Land Taken

The value of land taken by eminent domain is measured by the owner's loss rather than the taker's gain. The state must pay the fair and reasonable market value of the land actually taken. This is determined in view of all the reasonable uses to which the land is adapted and any reasonable use to which it might be applied in the immediate future. Anything connected with the land that would influence its market value in the mind of a good faith potential purchaser should be considered.

Farm Land Taken

Soil productivity is one of the primary elements to be considered in the determination of farm land values. The quantity and quality of the crops raised on the land may be used as evidence of soil productivity. However, since crop prices vary to a great extent, the jury cannot apply prices actually received by the landowner in a particular year in determining the value of the property.

Property Damaged by Eminent Domain

In taking part of a farmer's land, the Department may reduce the value of the remainder of his land. Under the Nebraska Constitution this necessitates compensation. Examples of such damage are changes in access to roads, reduction in land value due to proximity of the highway to dwellings, removal of trees, rearrangement of fields and drainage facilities, and changes in fencing requirements.

All condemnation damages which cause a reduction in value of the farmer's property may be recovered. The jury may consider every element of annoyance and disadvantage resulting from the taking which would influence a potential purchaser's estimate of the market value of the land. The landowner receives compensation for these items through their effect on the market value of the property, but not as separate items of damage. The state must pay the difference between the fair and reasonable market value of the remainder of the land before and after the taking.

Condemnation of Tenant's Interest

A tenant on land taken by eminent domain has a property interest for which he must be compensated. The tenant is entitled to be paid the fair market value of his unexpired term, which is the rental value minus the rent he is paying. If the rent is more than the rental

value, the tenant is not entitled to compensation. Thus, if the land would bring \$1,000 a year in rent but the tenant is paying only \$900, he could recover \$100 per year for the remainder of his lease. If, however, he were paying \$1,000 per year or more, he could recover nothing.

Damage to Land Not Taken

The construction of highways and other projects may result in either temporary or permanent damage to land not actually taken by the state. A landowner is, therefore, entitled to bring a reverse condemnation suit against the state and obtain compensation for all damages suffered.

Burden of Proof

If there is an appeal to the district court, the landowner or tenant must bear the burden of proving all elements of damage to his interest in the land.