



RANCH CONNECTIONS

SUMMER 2008

The Selling Under Duress: Eminent Domain for Farmers & Ranchers

Virtually every level of government (including Special Districts and other developer created entities) have the power of eminent domain, to take private property for any proper "public purpose."

Public purpose has been defined so broadly that government rarely loses in a fight about whether it can take private property. In some rare cases where there is a clear ulterior motive or no legitimate public purpose whatsoever it may be possible to block a taking. In the vast majority of cases, however, the landowner's rights center around how much he will be paid for the property and whether compensable damages will be awarded as part of the proceeding.

Every landowner has the right to "just compensation" if his or her property is taken by the power of eminent domain. Just compensation means the reasonable market value of the property taken, plus any damages that occur to the remainder of property when only a partial taking occurs.

Just compensation for the portion of property taken is determined in a judicial proceeding conducted either by three commissioners, or a jury, at the landowner's election. When a landowner chooses to have value determined by a commission,

Continued on page 5

By Darrell G. Waas, shareholder and director of Otten Johnson Robinson Neff & Ragonetti P.C., a Denver based law firm with a statewide practice in all aspects of real estate, including eminent domain.



The Selling Under Duress: Eminent Domain for Farmers & Ranchers

continued from page 1

a district court judge in the county where the property is located appoints three landowners, usually real estate professionals or former judges, to determine value. Those commissioners conduct a proceeding at which appraisers testify regarding their opinions of the fair market value of the property as of the date of taking. If the landowner chooses to have the case determined by a jury, a regular jury trial is scheduled in the county where the property is located and six landowners are selected according to the county's normal jury selection procedures. Eminent domain proceedings typically take 8-14 months start to finish and, unless the government takes possession of the property prior to the valuation trial, the owner gets nothing until after trial. In addition, the owner always has to fund its own attorney fees – though they can ultimately be recovered from the condemning authority if the final determination of value exceeds the government's final offer by more than 33%.

In nearly every case fair market value is ultimately determined based upon competing appraisals. It is not uncommon for appraisals to differ by 50-100%. Before a condemnation action can be initiated the condemning authority must make a good faith offer for the purchase of property, and such offers are almost always supported by an appraisal that has been procured by the government before starting the case. Once a landowner receives a statutory notice of intent, it is important to secure legal representation as strict time limits can apply and govern important aspects of the proceeding. In any case involving a



significant piece of property the landowner will want to immediately retain eminent domain counsel as well as an appraiser who can assist in evaluating a response to the government's offer, as well as present expert testimony if the matter proceeds to adjudication before either a panel of commissioners or a jury.

In many cases involving the location or expansion of highways or the taking of easements for pipelines, transmission towers, and related uses, the government takes less than the entire ownership. In such cases it is critical to evaluate whether the taking of a portion of the property, or the proposed use, will create additional damages to the remainder property. It is not uncommon for damages to be substantially in excess of the fee value of property taken, so a careful evaluation of whether damages exist, and how they can be quantified, is critical to effective defense of a condemnation action.

Farms and ranches in the path of development are often the target for acquisition on the theory that they can be seized before they become highly valued in the marketplace for imminent development. Colorado law regarding valuation of property in eminent domain has evolved in some respects to the disadvantage of landowners by restricting what assumptions about future use can be made in reaching a valuation. Government will almost always claim that agricultural property must be valued as-is rather than at a higher value representing the property's development potential. However, the law allows property owners to secure the value of their property in eminent domain at its "highest and best" use. Aggressively presenting a valuation opinion that presumes a future use different than historical use is the key component for securing just compensation for farm and ranch owners.

A notice that the government wants to acquire all or some of your property cannot be taken lightly - the government knows that it can lawfully seize the property whether or not you want to sell. Gaining expert professional assistance immediately upon learning of the government's interest is often the key to gaining a satisfactory outcome. ■

Every landowner has the right to "just compensation" if his or her property is taken by the power of eminent domain.