Condemnation of Agricultural Land in South Dakota

by

David E. Gilbertson

Originally published in SOUTH DAKOTA LAW REVIEW
20 S. D. L. REV. 623 (1975)

CONDEMNATION OF AGRICULTURAL LAND IN SOUTH DAKOTA

This comment consists of a discussion of eminent domain law in South Dakota. Special emphasis is placed upon eminent domain law as it relates to agricultural land.

INTRODUCTION

While the exercise of eminent domain is not limited to agricultural lands, a quick glance through South Dakota case law on the subject will show that a substantial portion of the cases have dealt with rural land. Roads, powerlines, dams, irrigation networks and other public projects are common throughout the countryside. Although most rural residents see such projects as beneficial, the owner of farmland whose property is directly affected presumably views the project from a different perspective. One may, of course, sympathize with that person, but it is important to note that the power of eminent domain may be employed both to encourage growth in society and to conserve the resources of the state and that these goals fall within the legitimate purview of state government.

Eminent domain has been defined as "the right of the Nation or State, or of those to whom the power has been lawfully delegated to condemn private property for the public use, . . . upon paying the owner just compensation, to be ascertained according to law."[1] The power of the state to acquire land for the public use through eminent domain developed under the common law before adoption of the state and federal constitutions.[2] Therefore, the power of the state to exercise its right of eminent domain is an inherent right of its sovereignty; it is not vested upon any constitutional or statutory grant of power.[3] "The right to recover damages when private property is taken or damaged for a public purpose does not arise from this provision of the Constitution; it prevents the Legislature from invading the right."[4]

South Dakota adopted article VI section 13 of its constitution in order to place two restrictions upon this inherent power. These restrictions were that land be taken or damaged only for the public use and that just compensation be paid to the owners of the land.

---

1. Sanitary Dist. v. Manasse, 380 Ill. 27, 31, 42 N.E.2d 543, 545 (1942).
2. United States v. 2,005.32 Acres of Land, 160 F. Supp. 193, 196 (D.S.D. 1958); Hyde v. Minnesota D. & P. Ry., 29 S.D. 220, 229, 136 N.W. 92, 95 (1912).
3. Darnall v. State Highway Comm'n, 79 S.D. 59, 63, 108 N.W.2d 201, 203 (1961); Hyde v. Minnesota D. & P. Ry., 29 S.D. 220, 229, 136 N.W. 92, 95 (1912).
4. Alcorn v. Edmunds County, 59 S.D. 512, 514, 241 N.W. 323, 324 (1932).

According to the constitution, "[p]rivate property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedures established by the Legislature . . . ."[5] This comment will focus on various legal issues that have arisen in connection with judicial interpretation of this constitutional provision. Such issues include the questions of who can exercise the power of eminent domain, what is a public use, what is just compensation and what procedures must be followed. In discussing these issues, cases which do not deal with agricultural land will be considered along with cases involving rural land, as their rule of law applies to any exercise of the power of eminent domain.

WHO CAN EXERCISE THE POWER OF EMINENT DOMAIN?

Although the power of eminent domain rests with the state as part of its sovereignty, the power to determine who may exercise it and when it may be exercised rests with the state legislature.[6] The legislature may delegate the power to condemn land to "public agents"[7] and has, in fact, delegated it to a multitude of agencies.[8] Many of these agencies may acquire extensive amounts of agricultural land when they exercise their eminent domain power.

THE TAKING OF LAND FOR THE PUBLIC USE

As noted, private property[9] may be acquired or damaged in South Dakota when it is taken for a public use. Two theories exist

---

5. S.D. CONST. art. VI, § 13.

6. Winona & St. P. Ry. v. City of Watertown, 4 S.D. 323, 328, 56 N.W. 1077, 1078 (1893).

7. *Id.*

8. *E.g.*, Carriers, S.D. COMPILED LAWS ANN. § 49-2-12 (1967); Cemetery Corporations, S.D. COMPILED LAWS ANN. § 47-29-19 (1967); Counties, S.D. COMPILED LAWS ANN. § 7-18-9 (1967); Game, Fish and Parks, S.D. COMPILED LAWS ANN. § 42-2-19 (1967); Irrigation Districts, S.D. COMPILED LAWS ANN. §§ 46-13-6 to 10, 46-14-5 (1967); Municipalities, S.D. COMPILED LAWS ANN. § 9-27-1 (1967); Railroads, S.D. COMPILED LAWS ANN. § 49-20-1 (1967); South Dakota Conservancy Districts and Subdistricts, S.D. COMPILED LAWS ANN. §§ 46-17-18, 46-18-25 (1967); South Dakota Department of Transportation, S.D. COMPILED LAWS ANN. ch. 31-19 (1967); Water Conservancy Districts, S.D. COMPILED LAWS ANN. §§ 46-16-44 to -49 (1967); and Watershed Districts, S.D. COMPILED LAWS ANN. §§ 46-24-34, 44, 71 (1967).

9. The South Dakota Supreme Court has ruled that in certain cases public as well as private land may be subject to the power of eminent domain. In Winona & St. P. Ry. v. City of Watertown, 4 S.D. 323, 56 N.W. 1077 (1893), the City of Watertown attempted to condemn a strip of land through the respondent's railway station. The court noted that the legislature had the power to authorize such an action but that the authorizing statute must so specifically state when the two uses are inconsistent. Here the court found the uses inconsistent and refused to allow the taking:

> The principle of construction almost universally applied by the courts in such cases is that mere general language granting the power to condemn is not to be taken as including the power to appropriate land already subjected to another public use, particularly where the subsequent use will interfere with the former. Power to do that can be granted only by express language, covering the particular case, or by necessary implication; and such necessary implication will not ordinarily exist where the general power can

as to what constitues a public use. They are the "use by the public" theory and the "public benefit" theory.

The "use by the public" definition requires that there be a "use or right of use on the part of the public or some limited portion of it."[10] This definition of a public use was adopted by the South Dakota Supreme Court in *Illinois Central Railroad v. East Sioux Falls Quarry*[11] in 1913. In *Illinois Central*, the landowner maintained that the taking of his land by the railroad to build a spur line to a private enterprise was a taking for a private use rather than a public use. The court upheld the taking on the ground that the line was open to any shipper or any member of the public who desired to use it and therefore in this case the land was sought for a "public use."

In the years since *Illinois Central* was decided, it has become obvious that the "use by the public" rule has not kept pace with the changing needs of society. Therefore, a second theory of what constitutes a public use, the "public benefit" theory, has developed. It has been embraced by many of the states but not by South Dakota.[12] The public benefit theory allows acquisition for the public use as long as it constitutes a "benefit, utility or advantage" to the public.[13] However, because the courts have declared that they will not review a condemnor's determination of what constitutes a public use, unless fraud, bad faith or abuse of discretion can be shown,[14] the public benefit theory has been criticized as being virtually worthless as a protection against a private taking on the rationale that almost any acquisition will ultimately benefit the public in some manner.[15]

To discuss the problems of South Dakota's adherence to the use by the public rule, it will be necessary to depart from the agricultural context and analogize to the area of urban renewal. In

---

be beneficially exercised without taking the particular land in question, or where the two public uses are necessarily inconsistent. *Id.* at 329-30, 56 N.W. at 1078.

The opposite result occurred in Town of Emery v. Chicago M. & St. P. Ry., 35 S.D. 583, 153 N.W. 655 (1915). There the South Dakota Supreme Court allowed Emery to take land for a street across the railway's land. The court interpreted the authorizing statute to provide for such action and declared: "The police power of the state to subject private property to public use was not surrendered when the railway company obtained this right of way, nor has there since been any such surrender, even if there could be." Town of Emery v. Chicago M. & St. P. Ry., *supra* at 587-8, 153 N.W. at 656.

10. Illinois Central R.R. v. East Sioux Falls Quarry, 33 S.D. 63, 77, 144 N.W. 724, 728 (1913).

11. *Id.*

12. When South Dakota adopted the "use by the public test" in *Illinois Central*, it did consider the "public benefit" rule but felt that the "use by the public" rule was better suited to the state's needs. *Id.*

13. *Id.*

14. *E.g.*, Miro v. Superior Court, 5 Cal. App. 3rd 87, 84 Cal. Rptr. 874 (1970).

15. Comment, *Rex Non Protest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266, 272 (1972).

Berman v. Parker[16] the United States Supreme Court was faced with the question of the constitutionality of a taking of a private building under an urban renewal program and its ultimate sale to a third party. The condemning authority had the power to resell the land for industrial use. Thus the land would become private property and there would be no "use or right of use on the part of the public."[17] Nevertheless, the Court upheld the taking:

> In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.[18]

A contrary result occurred in *Edens v. City of Columbia*[19] when an urban renewal statute was also challenged as not being a taking for the public use. The South Carolina Supreme Court distinguished the holding in *Berman* on the grounds that *Berman* had applied the public benefit theory. The *Edens* court then held the urban renewal statute unconstitutional, applying the "use by the public" test to land that would have been acquired for privately used light industrial sites.[20]

This problem is also present in the agricultural context. Irrigation districts, for example, have the power to acquire land by eminent domain.[21] Yet there is no right of the general public to use these facilities. The water is apportioned by the board of directors of the irrigation district[22] and use of water not authorized by the board is forbidden.[23]

Another problem might arise when the State of South Dakota acquires land by eminent domain[24] and attempts to set it aside for

---

16. 348 U.S. 26 (1954).
17. Illinois Central R.R. v. East Sioux Falls Quarry, 33 S.D. 63, 77, 144 N.W. 724, 728 (1913).
18. 348 U.S. at 32 (citations omitted). Although the Supreme Court has never explicitly adopted either rule, its decisions have been in harmony with the public benefit rule. *E.g.*, United States *ex rel.* Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946).
19. 228 S.C. 563, 91 S.E.2d 280 (1956).
20. A reading of the South Dakota urban renewal statutes shows that they are not in harmony with the use by the public rule but are in harmony with the public benefit theory. South Dakota Compiled Laws Ann. § 11-8-55 does not require that land sold or leased by a municipality be available for use by the public:

> A municipality may sell, lease or otherwise transfer real property or any interest therein acquired by it for an urban renewal project, and may enter into contracts with respect thereto, in an urban renewal area for residential, recreational, commercial, *industrial,* educational or *other uses* (emphasis added).

21. S.D. Compiled Laws Ann. §§ 46-13-6 to -10 (1967).
22. *Id.* § 46-13-25.
23. *Id.* § 46-13-26.
24. *Id.* § 41-2-19.

marshlands and other areas for the protection and growth of wildlife. A major reason for the creation of marshlands is not for use by the public, but it is rather to keep the public out. However, there is no doubt that the creation of such areas constitutes a public benefit.

If the above statutes are to be held constitutional, it becomes apparent that South Dakota will have to change its antiquated "use or right of the public to use" interpretation of a public use to the "public benefit" interpretation. A failure to do this may result in the curtailment of public projects necessary to the growth of our state and protection of its natural resources.[25]

Necessity of the Taking

While land may be acquired or damaged under eminent domain for a public use, the condemnor can take no more than is necessary for that use.[26] The determination of necessity can be further broken down into two separate considerations: 1) the necessity of the project in general, and 2) the necessity for the taking of a particular piece of land or estate in land.[27]

South Dakota follows what has been considered a traditional approach to judicial review of the necessity of a condemnation. In *Chicago, Milwaukee & St. Paul Railroad v. Mason*[28] the South Dakota Supreme Court held that it did not have the authority to rule on the necessity of the taking of a specific parcel of land. The court went on to modify this statement, noting that it did possess the power to prohibit the excessive appropriation or the taking of land not within the scope of the required purpose. Thus the court in limited situations will review the necessity of the taking of a particular piece of property for a particular project.

On the other hand, the South Dakota Supreme Court has refused to review the overall necessity of a project. In *Great Northern Railway v. Chicago, St. Paul, Minneapolis & Omaha Railway*[29] the defendant alleged that there was no public necessity for the plaintiff railroad to secure by condemnation an easement across the defendant railroad's track for one of the plaintiff's tracks. The court refused to rule on the need for the project as a whole, finding that the need had been determined by the legislature. If the de-

25. Some courts that follow the use by the public theory have rationalized their way around this dilemma by adopting the view that the public use ends with the clearance of the slum and that therefore after the slum is cleared away, the land may be sold. *See* State *ex rel.* Allerton Parking Corp. v. City of Cleveland, 4 Ohio App. 2d 57, 211 N.E.2d 203 (1965). This strained rationale, however, would not work in all situations.

26. Chicago, Minnesota & St. P. R.R. v. Mason, 23 S.D. 564, 568, 122 N.W. 601, 603 (1909).

27. Comment, *Abusive Exercises of the Power of Eminent Domain-Taking—A Look at What the Taker Took*, 44 WASH. L. REV. 200, 216 (1968).

28. 23 S.D. 564, 568, 122 N.W. 601, 603 (1909).

29. 78 S.D. 168, 99 N.W.2d 439 (1959).

fendant was to have had a chance of being successful, he should have challenged the taking of the particular site of the crossing and alleged that the taking was excessive or not within the scope of the project. The defendant would then have obtained the limited judicial review of the necessity of a particular site as set forth in *Mason*.[30]

The federal courts and the State of California have adopted an even stricter approach stating that once the public use is established, the courts have *no* authority to rule on the necessity of a taking. In *Berman v. Parker*,[31] Justice Douglas, speaking for the Court, declared that as long as the condemnee received just compensation, he had received the due process required by the fifth amendment and that the Court would not consider the issue of necessity:

> It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.[32]

The Supreme Court of California has held in the same spirit that it will not review the necessity of a taking even where it was alleged that the condemnation was arbitrary, capricious, fraudulent or in bad faith.[33]

Nichols, in his treatise on eminent domain, believes that the above disagreement as to the scope of judicial review of necessity is academic because if any court were faced with a completely unnecessary taking, it would overturn the taking despite previous statements to the contrary:

> While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements, it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land *in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme.* In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but felt that that body had acted *with total lack of judgment or in bad faith. In every*

30. Another exception to the court's refusal to review the necessity of a taking is statutorily created. The legislature impliedly authorized judicial review of all land acquired by the Department of Transportation because it required that all condemnation be done in "good faith." A determination of good faith would, of course, be made by the courts. S.D. COMPILED LAWS ANN. § 31-19-2 (1967).

31. 348 U.S. 26 (1954).

32. *Id.* at 36.

33. People v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959).

case, therefore, it is a judicial question whether the taking is of such a nature that is or may be founded on a public necessity.[34]

JUST COMPENSATION AND DAMAGES

The second South Dakota constitutional guarantee to those who have their land taken or damaged by a condemnor is that they will receive just compensation for their loss.[35] The key problem in determining what constitutes just compensation is to find the extent to which the landowner has been legally damaged.

The Measure of Just Compensation

The measure of the compensation for damages suffered by the landowner is the market value of the property before the taking less the market value of the property after the taking.[36] Market value is defined as the highest price for which land can be sold in the open market by a willing seller to a willing buyer, neither acting under compulsion and both exercising reasonable judgment.[37] This measure of damages "has been uniformly adhered to by the [South Dakota Supreme] court."[38] While the landowner is allowed the fair market value of the property taken or damaged, the South Dakota constitution does not guarantee him a profit.[39] Furthermore, the burden of establishing the value of the damages rests with the landowner,[40] who also has a duty to mitigate his damages.[41]

When determining damages, off-setting benefits must be considered. In the event that benefits accrue to the owner of the subject property which are of a nature that accrue only to the remainder of the tract after the taking and are not common to other lands in the area of the taking, these benefits must be taken into

34. J. SACKMAN, 1 NICHOLS ON THE LAW OF EMINENT DOMAIN § 4.11(2) (3d ed. 1974) (emphasis added).

35. S.D. CONST. art. VI, § 13.

36. State Highway Comm'n v. Fortune, 77 S.D. 302, 311, 91 N.W.2d 675, 678 (1958).

37. State Highway Comm'n v. American Memorial Parks, 82 S.D. 231, 236, 144 N.W.2d 25, 28 (1966). *See also* City of Huron v. Jelgerhuis, 77 S.D. 600, 605, 97 N.W.2d 314, 317 (1959); Sheraton-Midcontinental Corp. v. County of Pennington, 77 S.D. 554, 556-57, 95 N.W.2d 892, 893 (1959).

38. 82 S.D. at 236-37, 144 N.W.2d at 28.

39. *Id.* at 240, 144 N.W.2d at 29, *quoting* Olson v. United States, 292 U.S. 246 (1934).

40. Basin Electric Power Cooperative v. Cutler, — S.D. —, 217 N.W.2d 798, 801 (1974); City of Huron v. Jelgerhuis, 77 S.D. 600, 605, 97 N.W.2d 314, 317 (1959).

41. In State Highway Comm'n v. Pinney, 84 S.D. 311, 313, 171 N.W.2d 68, 69(1969), the South Dakota Supreme Court approved the following instruction:

> The landowner has a duty to minimize his damages and to use all reasonable exertion and steps to protect himself, and avert, as far as practicable, the injurious consequences of the taking. However, any expenses which the landowner reasonably and in good faith incurs in an effort to minimize his loss, are to be taken into account in computing the compensation to be awarded him.

consideration by the jury in determining the fair market value of the property after the taking or damage.[42]

Care must also be taken to ascertain that the damage has been caused by eminent domain and not through the state's mere negligence.[43] This distinction is important in light of South Dakota's recent affirmance of the doctrine of sovereign immunity against suits for negligence.[44] Another related controversy, which is, however, beyond the scope of this comment, involves the increased use of the police power by the state and the question of whether a particular action by the state is a compensable taking or a noncompensable use of the police power.[45]

In making a determination of damages it has been held that the total cost of the project must not influence the valuation of the taking of a single parcel. In *State Highway Commission v. Beets*[46] the defendant owned a parcel of land along the proposed sight of an interstate highway. The jury, which was charged to determine the value of the taking, had been informed by the condemnor: "Now your job here today as I see it is to decide what the State of South Dakota is going to pay for land running from north of Spearfish clear to the Wyoming line."[47] The South Dakota Supreme Court reversed because of the condemnor's statement and the judge's refusal to admonish the jury that this was an incorrect statement concerning just compensation. The condemnor's comment was inconsistent with the measure of just compensation because a willing seller would not have such thoughts in his mind when he made an offer to a willing buyer.

Personal Property and Non-Fee Interests

In cases where land, buildings and equipment are involved, they are all valued together, not separately.[48] If the personal property or equipment cannot be removed, just compensation must be paid. If it can be removed, however, no compensation is available.[49]

If less than a fee title is held in the property by the condemnee, such as an equitable interest subject to a mortgage, the holder of the equitable interest is entitled to compensation to the extent of

42. State Highway Comm'n v. Bloom, 77 S.D. 452, 459-60, 93 N.W.2d 572, 576-77 (1958). *See also* S.D. COMPILED LAWS ANN. § 31-19-17 (1967).
43. *See* Vesely v. Charles Mix County, 66 S.D. 570, 287 N.W. 51 (1939).
44. Shaw v. City of Mission, — S.D. —, 225 N.W.2d 593 (1975).
45. For an excellent discussion of this area see Garton, *Ecology and the Police Power*, 16 S.D.L. REV. 261 (1971). *See also* Hurley v. State Highway Comm'n, 82 S.D. 156, 143 N.W.2d 722 (1966); Darnall v. State Highway Comm'n, 79 S.D. 59, 108 N.W.2d 201 (1961).
46. — S.D. —, 224 N.W.2d 567 (1974). The author of this comment prepared the brief for the State Highway Commission in this case.
47. *Id.* at 224 N.W.2d 569.
48. City of Huron v. Jelgerhuis, 77 S.D. 600, 608-09, 97 N.W.2d 314, 319 (1959).
49. *Id.* at 608, 97 N.W.2d at 319.

its value.[50] If a lease is involved, "the courts are in general agreement that when the lease is for an extended period of time the tenant is entitled to the value of his leasehold less the rent reserved."[51] Under the prevailing and South Dakota rule, a loss of profits sustained by the lessee because of the taking is not compensable.[52] If fixtures have been installed by the lessee which are permanent in character, they constitute part of the real property so far as the condemnor is concerned and must be paid for.[53] When the damages are apportioned between the lessor and the lessee, however, the fixtures are treated as personal property of the lessee and thus he receives that portion of the damages.[54]

The condemnor may be required or may choose to take less than a fee estate in the land. For example, a railroad may by constitutional provision take only an easement over property for a track.[55] Because it may not take the property in fee, the issue of compensation for an additional servitude may arise. In *Kirby v. Citizens' Telephone Co. of Sioux Falls*[56] the plaintiff, the owner of a reversionary interest on land that had been previously acquired for a street, maintained that he was entitled to additional compensation when telephone poles were strung along the street easement. He asserted that the poles constituted an additional servitude upon his remainder interest. The South Dakota Supreme Court rejected this argument stating that the street had originally been condemned for all street uses and "though such use may not have been known when the streets were dedicated, appropriated, or condemned for street purposes, . . . the abutting fee owner is not entitled to compensation for any damages he may sustain by reason of such use."[57] The court felt that because the owner of the land had been previously compensated for all street uses, he was entitled to no additional compensation.

Severance Damages

A party whose unit of land is partially taken under condemnation proceedings is entitled to recover not only for the value of the land actually taken, but also for the damage to the remaining land.[58] As severance damage is part of the determination of just

50. State Highway Comm'n v. Miller, 83 S.D. 124, 129, 155 N.W.2d 780, 782 (1968).
51. State Highway Comm'n v. Foye, — S.D. —, 205 N.W.2d 100, 102 (1973).
52. *Id.*
53. *Id.* at —, 205 N.W.2d at 101.
54. *Id.* at —, 205 N.W.2d at 101-02.
55. Only an easement may be acquired for railroad and highway right of way. S.D. CONST. art. VI, § 13.
56. 17 S.D. 362, 97 N.W. 3 (1903). *See also* Aberdeen Cable T.V. Service Inc. v. City of Aberdeen, 85 S.D. 57, 176 N.W.2d 738 (1970), *cert. denied*, 400 U.S. 991 (1971).
57. *Id.* at 366, 97 N.W. at 4.
58. Basin Electric Cooperative v. Cutler, — S.D. —, 217 N.W.2d 798 (1974); State Highway Comm'n v. Hayes' Estate, 82 S.D. 27, 140 N.W.2d 680

compensation, it is included in the damages for the taking and not determined separately by the trier of fact:[59]

> [A]ny elements of detriment such as additional labor, expense or inconvenience in the operation of the remaining land as a ranch which were appreciable and substantial in nature and had a reasonable tendency to lessen the market value of the land could be taken into consideration.[60]

When land is acquired, the issue of whether nearby land has been "severed" from the acquired land depends on whether the two were considered as one unit. In *Hurley v. State Highway Commission*[61] the South Dakota Supreme Court stated that generally in order for land to be considered one unit, there must be unity of title, contiguity of use, and unity of use. The *Hurley* court noted, however, that in *State Highway Commission v. Fortune*[62] the court had relaxed the requirement of contiguity of use by stating that separate parcels of land held in one ownership will be considered a single unit if they are devoted to a single use.

> In many cases the court can, as a matter of law, determine that lots are distinct or otherwise, but ordinarily it is a practical question to be decided by the jury or other similar tribunal which passes upon matters of fact, which should consider evidence on the use and appearance of the land, its legal divisions and the intent of its owner and conclude whether on the whole the lots are separate or not. In such cases the land itself rather than the map should be looked at and one part of a parcel is not to be considered separate and independent merely because it was bought at a different time from the rest and is separated from it by an imaginary line.[63]

In *Fortune*, separate parcels of land were owned by a father and his son. They argued that because the separate parcels were operated as one ranch, the value of the land affected should be that of both parcels. However, the South Dakota Supreme Court rejected this contention because of lack of unity of title.

The South Dakota Supreme Court has commented that severance damage will not be automatically presumed where part of the parcel is taken or damaged. In *Basin Electric Cooperative v. Cutler*[64] the condemnor sought to run a power line across seven

(1966); City of Bristol v. Horter, 73 S.D. 398, 43 N.W.2d 43 (1950); Schuler v. Board of Supervisors, 12 S.D. 460, 81 N.W. 890 (1900).

59. State Highway Comm'n v. Hayes' Estate, 82 S.D. 27, 34, 140 N.W.2d 680, 684 (1966).

60. State Highway Comm'n v. Bloom, 77 S.D. 452, 464, 93 N.W.2d 572, 579 (1958).

61. 82 S.D. 156, 164, 143 N.W.2d 722, 727 (1966).

62. 77 S.D. 302, 91 N.W.2d 675 (1958).

63. Hurley v. State Highway Comm'n, 82 S.D. 156, 165, 143 N.W.2d 722, 727 (1966), *discussing* State Highway Comm'n v. Fortune, 77 S.D. 302, 91 N.W.2d 675 (1958), *citing* J. SACKMAN, 4 NICHOLS' ON THE LAW OF EMINENT DOMAIN § 14.31 (3d ed. 1965).

64. — S.D. —, 217 N.W.2d 798 (1974).

sections of a 5,960 acre ranch. The jury granted the defendant landowner five dollars per acre damages for the entire unit. The supreme court reversed on the grounds that the defendant had not established damages to the remainder of the unit.

The defendant had maintained that the powerlines would cause weed and irrigation problems and would make it difficult to check cattle with an airplane. The court dismissed this contention with the observation that such problems were limited to the area of the taking for which the landowner had already been compensated. The defendant landowner further alleged that the power lines would increase the danger of fire, leaving gates open and the possibility of mixing bulls. The court said these claims were also local in nature and that the condemnee was protected because he could bring a tort or contract claim against the condemnor on appropriate facts. The court commented that "severance is not 'manna from heaven;' it must be based on actual loss of value."[65]

Mineral Damage

The general rule for a taking or damage to mineral deposits is that the value of the minerals is considered as part of the land; it is not determined separately. In *State Highway Commission v. Ullman*,[66] the condemnor claimed that at trial there had been a double valuation of land since the gravel had allegedly been valued separately. The court agreed that such double valuation would be incorrect but found that in this case no double valuation had occurred. It then stated the general rule as to the valuation of minerals:

> [I]ncome from gravel is already considered along with all sources of income producible from the land and is reflected in what land sells for in the market.
>
> We would agree that double valuation should not be permitted, but we also believe that if land has valuable deposits of oil, coal, gold, silver, gravel, sand, etc., *whatever has a value in the market is properly allowable as evidence of market value in the computation of the before and after value.*[67]

In *Chicago, Milwaukee & St. Paul Railroad v. Mason*,[68] the land sought to be condemned also contained sand and gravel. The condemnee alleged that the proper measure of damages for the gravel and sand could be computed by multiplying the value per yard of the sand or gravel by the number of cubic yards of such minerals on the land and made an offer of proof of these values. The trial court rejected this offer. On appeal, the South Dakota

65. *Id.* at —, 217 N.W.2d at 801.
66. — S.D. —, 221 N.W.2d 478 (1974).
67. *Id.* at —, 221 N.W.2d at 481 (emphasis added).
68. 23 S.D. 564, 122 N.W. 601 (1909).

Supreme Court sustained the lower court ruling to hold that the suggested measure of damages was incorrect because no accurate measure could be made of the quantity of sand and gravel beneath the ground.[69]

Speculative and Consequential Damages

Damages in an eminent domain proceeding must include present and prospective damages caused by the condemnor but not those which are speculative or remote or damages which are sentimental only.[70] Speculative damages are those in which either the very existence of a damage is doubtful or the pecuniary seriousness of the damage is grossly conjectural.[71] The prospective uses of the property which may be considered in establishing just compensation must be so reasonably probable as to have an effect on the present market value of the land; a purely imaginative or speculative use cannot be considered. There must be a possibility significant enough to be a practical consideration which would actually influence prices.[72]

The issue of prospective uses of land was raised in *Belle Fourche Valley Railway v. Belle Fourche Land Co.*[73] The landowner claimed that he should have been entitled to show that his lands were suitable for use as apple orchards. The condemnor countered by asserting that the land was still virgin prairie and that a large outlay would be required to develop an orchard. The South Dakota Supreme Court, citing *Mason*, decided that the jury should have been allowed to consider the future potential of the land as an apple orchard: "[T]he market value of the land . . . [relates to] any and all uses to which the land might be put, in view and in light of present business conditions, and those which might be reasonably expected in the immediate future."[74]

The opposite result occurred in *State Highway Commission v. American Memorial Parks.*[75] In that case the respondent cemetery owned land which it maintained should be valued as platted burial plots. The court, again citing *Mason*, rejected this contention as such use was not reasonably expected in the immediate future. The court based its decision on three related points. First, at the present rate of sales, the respondent would not need the disputed

69. *Id.* at 569, 122 N.W. at 603. *See also* State Highway Comm'n v. Ullman, — S.D. —, 221 N.W.2d 478 (1974); State Highway Comm'n v. American Memorial Parks, 82 S.D. 231, 144 N.W.2d 25 (1966).

70. State Highway Comm'n v. American Memorial Parks, 82 S.D. 231, 245, 144 N.W.2d 25, 32 (1966).

71. 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 59 (1953).

72. J. SACKMAN, 4A NICHOLS ON THE LAW OF EMINENT DOMAIN § 14.241 (3d. 1974); 27 AM. JUR. 2d *Eminent Domain* § 279 (1966).

73. 28 S.D. 289, 133 N.W. 261 (1911).

74. *Id.* at 293-94, 133 N.W. at 263, *citing* Chicago, M. & St. P.R. v. Mason, 23 S.D. 564, 122 N.W. 601 (1909).

75. 82 S.D. 231, 144 N.W.2d 25 (1965).

ground for forty-seven years; second, the disputed land was platted after, not before, condemnation proceedings were commenced; and third, the cemetery had the power of eminent domain to acquire other adjacent land. Whether a use is reasonably probable, then, would seem to depend on the facts of the case.

Time of Determination of Damages

In recent years the value of agricultural land has often doubled in a year or two. Therefore, the time of measuring the value of the land taken or damaged can be crucial. For example, many years elapse from the time when an interstate highway is first planned to cross a particular parcel of land until the highway is completed. In *Hurley v. State*[76] the South Dakota Supreme Court faced this problem. A previous South Dakota case had determined that damages be ascertained as of the time of filing suit or the time of trial, even though the land in that case had actually been taken seventeen years earlier.[77] The *Hurley* court felt that this solution might tend to encourage the condemnee to stall the negotiations in hopes of taking advantage of increases in the value of the land. Therefore, the court modified its earlier holding and found that "the correct date or time that compensation is to be ascertained is the date of taking or damaging—or here the substantial interference with the owner's access."[78] If the land were damaged before legal proceedings, the date of the damage would be the date of valuation. If legal proceedings were instituted first, the valuation would be measured as of the time of the trial.[79]

Establishing Just Compensation in Court

Generally the value of a piece of land is determined by comparing it with the selling prices of nearby parcels of land which have similar characteristics. However, selling prices of other parcels which have been sold to the condemnor are not admissible.[80] Just compensation is the highest price for which the property can be sold in the open market between a willing seller and a willing buyer, neither acting under any compulsion and both exercising reasonable judgment.[81] Therefore, sales to a condemnor would be inadmissible

76. 81 S.D. 318, 134 N.W.2d 782 (1965).
77. Falk v. Missouri River & N.W. Ry., 28 S.D. 1, 132 N.W. 233 (1911).
78. Hurley v. State Highway Comm'n, 81 S.D. 318, 323, 134 N.W.2d 782, 784-85 (1965).
79. The South Dakota Department of Transportation by statute may reduce further the time from when it decides to condemn a parcel until the measurement of damages is determined. The Department may file a declaration of taking and deposit the estimated compensation with the clerk of courts. At that time, title vests in the State of South Dakota and under *Hurley*, compensation would then be determined. S.D. COMPILED LAWS ANN. §§ 31-19-23, 24 (1967).
80. City of Rapid City v. Baron, No. 11414 (S.D. Sup. Ct., filed April 4, 1975).
81. *Id.* at 5.

because the seller would be selling with the threat of condemnation hanging over his head and the condemnor would be buying with the knowledge that it will have to institute expensive condemnation proceedings if its attempt at purchase fails.

The value of similar parcels of land may not be introduced as direct evidence of the value of the disputed land but may be used as a basis for an opinion by an expert witness on the value of the land being condemned.[82] Whether the land is similar enough to allow evidence of its value to be admitted for such purposes rests with the discretion of the trial court.[83] If, however, the sale price of the similar land reflects an "important enhancement of value" because of the condemnor's project, the sale is "clearly" not admissible.[84] Witnesses who are sufficiently expert in valuation as to be of aid to the jury[85] may testify as to the value of land; an unqualified witness will not be allowed to give his opinion.[86] Furthermore, the burden of establishing expertise is upon the party seeking to introduce the opinion evidence. "When a witness is introduced by one of the parties for the purpose of giving opinion evidence, there is no presumption that he is qualified, and his competency must be affirmatively established."[87]

According to *Nichols*, the following qualifications must be shown to establish a proper foundation of the witness's knowledge to make an appraisal of the land's value:

1. A knowledge of the value standards of the class of property to which the subject property belongs. In this connection
   (a) He must have a knowledge of market value,
   (b) In the vicinity of the subject property,
   (c) Based in part, at least, on personal observation and not on hearsay.
2. A knowledge of the particular property to be valued, though in some instances it is not necessary that the witness have seen the property, as the factual information may be supplied by a hypothetical question.[88]

Whether the witness meets these qualifications in South Dakota is a preliminary question of fact for the trial judge.[89] Such a decision will not be set aside on appeal unless it is "clearly erroneous."[90]

82. State Highway Comm'n v. Lacey, 79 S.D. 451, 456-57, 113 N.W.2d 50, 52 (1962).
83. *Id.*
84. *Id.* at 454, 113 N.W.2d at 51-52.
85. J. SACKMAN, 5 NICHOLS ON THE LAW OF EMINENT DOMAIN § 18.4 (3d ed. 1974).
86. *Id.* § 18.4(1).
87. *Id.* § 18.44(1).
88. *Id.* § 18.4(4). *See also* Moulton v. Globe Mut. Ins., 36 S.D. 339, 154 N.W. 830 (1915).
89. State Highway Comm'n v. Hayes' Estate, 82 S.D. 27, 41, 140 N.W.2d 680, 688 (1966).
90. *Id.*

South Dakota recognizes two exceptions to the requirement that the witness must be affirmatively qualified as an expert before he will be allowed to testify to valuation. First, owners of the land in question are permitted to testify to its value.[91] Second, neighbors of the owner are also allowed to testify as to the value of land without establishing themselves as experts on the presumption that they are "owners . . . necessarily acquainted with values."[92]

Elements of Condemnation Procedure

The South Dakota constitution declares that the legislature has the authority to establish procedures for ascertaining just compensation[93] and the legislature has fixed those procedures by statute in chapter 21-31 of the South Dakota Code.[94] Because eminent domain is a special statutory proceeding, all of these statutory requirements must be strictly followed.[95] Thus a brief description of them may be helpful.

The authorized condemnor must file a petition with the circuit court in the county where the land is located, requesting that just compensation be ascertained.[96] The petition must name the condemnor and also all persons having interests or liens.[97] The condemnor is listed as the plaintiff and the landowner as the defendant.[98] The petition is also to contain a description of the land sought to be condemned.[99] The South Dakota Supreme Court has ruled that the petition must be in writing and state all jurisdictional facts concerning the proceedings.[100] The petition must be verified and an affidavit attached stating that the proceeding is in good faith for the purposes specified in the petition.[101] Any resolution, ordinance or other proceeding of a corporation required by law to effect a taking must also be attached to the petition.[102] The summons must be served on all known defendants after the filing of the petition.[103] Any person who alleges an interest in the land and who has not been named a party to the action may join the action by interpleader.[104] If the defendant fails to appear

91. State Highway Comm'n v. Olson, 81 S.D. 401, 408, 136 N.W.2d 233, 238 (1965); Moulton v. Globe Mut. Ins., 36 S.D. 339, 154 N.W. 830 (1915).
92. State Highway Comm'n v. Beets, — S.D. —, 224 N.W.2d 567, 569 (1974), *citing* State Highway Comm'n, v. Hayes' Estate, 82 S.D. 27, 140 N.W.2d 680 (1966).
93. S.D. Const. art. VI, § 13.
94. The South Dakota Department of Transportation (formerly the South Dakota Highway Department) has an alternative statutory proceeding. *See* S.D. Compiled Laws Ann. ch. 31-19 (1967).
95. Lewis v. St. Paul, M. & M. Ry., 5 S.D. 148, 58 N.W. 580 (1894).
96. S.D. Compiled Laws Ann. § 21-35-1 (1967).
97. *Id.* § 21-35-2 (1967).
98. *Id.*
99. *Id.*
100. Lewis v. St. Paul, M. & M. Ry., 5 S.D. 148, 58 N.W. 580 (1894).
101. S.D. Compiled Laws Ann. § 21-35-4 (1967).
102. *Id.* § 21-35-5.
103. *Id.* § 21-35-9.
104. *Id.* § 21-35-7.

within twenty days of service, the condemnor may apply to the circuit court to impanel a jury to ascertain just compensation.[105] After the action is commenced, the comdemnor must file a notice of proceeding with the register of deeds in that county.[106]

The condemnor may deposit his determination of just compensation with the clerk of courts and notify the defendant. If the defendant fails to accept the offer within ten days, the offer is deemed withdrawn and cannot be used as evidence in court. Furthermore, if the condemnee does not thereafter obtain a judgment for a greater sum than that deposited by the condemnor, the condemnee cannot recover costs.[107] The only issue that will be tried by the jury is the amount of just compensation required for the taking or damage;[108] the question of the legality of the taking is for the court. The condemnation proceeding may be dismissed by the condemnor at any time including the period after the return of the verdict up to the time of the entry of judgment if the condemnor pays all legitimate expenses and injuries.[109] An appeal to the South Dakota Supreme Court will not delay the work or improvement involved provided the condemnor deposits the amount of the verdict with the clerk of courts and posts a bond which guarantees payment of any additional compensation that may be awarded to the landowner in the future proceedings.[110]

The question of procedure in inverse condemnation actions has most recently arisen in *Hurley v. State Highway Commission*.[111] An inverse condemnation action is brought by the landowner when his land has been taken or damaged and the condemnor has failed to file an action.[112] The procedural problem arises because the constitution[113] states that only the legislature can establish procedures for eminent domain. The constitution does not, however, establish such a procedure for inverse condemnation actions by aggrieved landowners. In an early case,[114] the court had stated that the landowner should follow the procedure set forth in the code which allows an aggrieved person to file an original action in the South Dakota Supreme Court. In *Hurley* the court abandoned that procedure, citing several difficulties with it.[115] It declared that article

105. *Id.* § 21-35-12.
106. *Id.* § 21-35-8.
107. *Id.* § 21-35-11.
108. *Id.* § 21-35-15.
109. Fairmont & V. Ry. v. Bethke, 37 S.D. 446, 159 N.W. 56 (1917).
110. S.D. COMPILED LAWS ANN. § 21-35-20 (1967).
111. Hurley v. State Highway Comm'n, 82 S.D. 156, 143 N.W.2d 722 (1966).
112. *Id.* at 168-69, 143 N.W.2d at 729.
113. S.D. CONST. art. VI, § 13.
114. Darnall v. State Highway Comm'n, 79 S.D. 59, 108 N.W.2d 201 (1961).
115. Hurley v. State Highway Comm'n, 82 S.D. 156, 168, 143 N.W.2d 722, 728-29 (1966):
    1. A $500 bond is required to assert a constitutional right;
    2. A jury trial is a matter of grace rather than a right guaranteed

VI section 13 was self-executing and that the landowner was therefore entitled to file a common law action in circuit court:

> When the constitution forbids taking of, or damage to, private property, and points out no remedy and no statute affords one for the invasion of the right of property thus secured, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.[116]

CONCLUSION

This comment has discussed the legal issues which arise in connection with the two constitutional guarantees extended to the landowner whose land is acquired by eminent domain: that land shall be taken only for a public use and that the landowner shall receive just compensation for his loss. It should be apparent from the scarcity and age of the case law on what constitutes a public taking that the issue is seldom raised and that those who do raise it are generally unsuccessful. However, the public use limitation is important in that it guarantees that a condemnor cannot take another person's property for its own private ends.

It was noted that there are two theories as to what constitutes a public use; the "use by the public" theory which requires that some actual use by the public must be demonstrated to justify the taking and the "public benefit" theory which requires only that the public "benefit" from the taking. South Dakota's adherence to the "use by the public" theory is unfortunate in that it may threaten the legality of takings for irrigation districts and for marshlands, among other purposes. Thus this comment recommends that the South Dakota Supreme Court reject the "use by the public" theory and adopt the "public benefit" theory so as to guarantee that the state will be assured of adequate power to enact proper ecological and conservation measures.

The major issue in nearly every eminent domain proceeding has evolved around the second constitutional guarantee, the right

---

by § 13, Art. VI and § 6, Art. VI of our constitution;
3. Necessary or indispensable parties defendant cannot be joined;
4. As a condition precedent there must be a specific appropriation to pay the claim presented;
5. All questions of fact must be referred to a referee;
6. The procedure is complex, limited, delaying in nature and contrary to the spirit of § 20, Art. VI of our Constitution which assures all persons that "All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay";
7. Because it is restrictive and qualified it does not afford a proper, satisfactory, or complete remedy;
8. The Supreme Court is not a proper forum for the determination of fact issues.

116. *Id.* at 169, 143 N.W.2d at 729, *citing* 16 C.J.S. *Constitutional Law* § 49 at 149.

to just compensation for land taken or damaged. As has been shown, several factors are interwoven in the ultimate determination of the amount of the condemnee's loss: the amount of land taken or damaged, severance damages, mineral value, the time of the taking or damaging and the reasonable future uses to which the land may be put. These are, of course, questions of fact for the jury within the guidelines set out in this comment.

While this comment has sought to deal with issues that would concern the condemnation of agricultural land, most of the legal principals discussed herein also apply to any other condemnation. If land is taken, no matter where it is or what it is used for, its owner is entitled to due process of law and just compensation for his loss.

DAVID E. GILBERTSON