

## The United States

The American jurisdiction contains a vast amount of primary statutory material which relates to public works. There is also a substantial amount of case made law in keeping with the litigious nature of the jurisdiction. The American Constitution enshrines the right to be free from arbitrary confiscation of property except where there is full compensation.

As with other jurisdictions the right to utilise powers of compulsory acquisition, or condemnation as they are known in the United States is generally contained in a specific Act. That specific Act will specify the nature and extent of the power granted and the ends for which it may be used. However the use of those powers is codified in the federal code which contains detailed procedural provisions relating to public works and compulsory acquisition. At state level each state constitution tends to mirror the American constitution though there are differences. Each state also has a state code plus various statutes. Again these materials contain public works related provisions.

The federal and state law impose restrictions upon the basic freedoms guaranteed by the Constitution. This is in recognition of the fact that public work is necessary for the betterment of society as a whole. However the extent to which the United States Courts will uphold the constitution and the rights of citizens to maintain property rights should not be underestimated. To be constitutionally and statutorily lawful, the taking must be for a genuine public purpose and observe the procedural requirements of notice and give an opportunity to be heard. A fair adjudicatory process to resolve disputes is generally mandatory. This includes disputes as to whether there should be a taking and if so, the amount of "just compensation".

There has been renewed activism in the federal courts for the concept of substantive due process. This has led to actions attacking a condemnor on the grounds that the decision making process violated constitutional rights. Thus the Constitution provides an extra avenue of recourse for land owners.

An important area of condemnation law in the United States has been the impact of acquisition on native land holdings. These can be categorised as takings which involved condemnation with or without compensation and takings which were in fact merely confiscation. Initially in the United States, and similarly to other jurisdictions, native title was regarded as a mere occupation right which could be extinguished at will by the State. Via the doctrine of plenary power the State was able to exert virtually unlimited power over native peoples and their property. Now the United States is facing land claims which dwarf anything experienced in New Zealand. Many of these involve issues relating to condemnation. A substantial amount of this law is being created in the Courts which takes it outside the scope of this review. However a deal of interesting material has been canvassed. Australia and New Zealand appear to be ahead of the United States in terms of statutory intervention in this area. That statement must of course be viewed against the development of reservations in the United States as semi-self governing entities. The reservations are not particularly relevant to the New Zealand experience, where as noted by the terms of reference, Maori land is often located in and around other non Maori land. The land claims currently being asserted in cities like New York are closer and more relevant to the

New Zealand situation.

**a) Acquisition and compensation provisions**

*i the general principles adopted when land is required by the state for a public purpose;*

The rights of eminent domain in the US are exercised subject to Constitutional Rights:

**"Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation....

**"Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ..."

The fifth Amendment gives a firm right to compensation for property taken for public use. Both the fifth and fourteenth amendments call attention to the necessity to exercise due process of law. The constitutional rights of American citizens are strong and fundamental to the political and social makeup of the United States.

Title 40 of the United States Code deals with Public Buildings, Property and Works.

Chapter 3, s257 and s258a are relevant:

**"TITLE 40 - PUBLIC BUILDINGS, PROPERTY, AND WORKS  
CHAPTER 3 - PUBLIC BUILDINGS AND WORKS GENERALLY**

**Sec. 257. Condemnation of realty for sites and other uses**

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

**Sec. 258a. Lands, easements, or rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure**

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration

of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto -

- (1) A statement of the authority under which and the public use for which said lands are taken.
- (2) A description of the lands taken sufficient for the identification thereof.
- (3) A statement of the estate or interest in said lands taken for said public use.
- (4) A plan showing the lands taken.
- (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest in accordance with section 258e-1 of this title on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. "

The District Courts have jurisdiction in Federal condemnation disputes:

**"TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE  
PART IV - JURISDICTION AND VENUE**

**CHAPTER 85 - DISTRICT COURTS; JURISDICTION**

**Sec. 1358. Eminent domain**

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

**CHAPTER 87 - DISTRICT COURTS; VENUE**

**Sec. 1403. Eminent domain**

Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts. "

**"PART 6. PROCEDURE**

**CHAPTER 27. FEDERAL EMINENT DOMAIN PROCEDURE**

**Sec 27.02 Procedure**

The Former Rule<sup>47</sup>

Congress originally did not refer to specific court practices to be followed in

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<sup>47</sup> Source: Lexis Nexus. Nichols on Eminent Domain.

condemnation proceedings brought by the United States. However, specific statutory delegations of the power of eminent domain to the Secretary of the Treasury and other officers, provided that the practice, pleadings, and forms of proceedings would conform to the practice, pleadings, and forms existing at the time in similar cases in the state courts of record within which the district court is held.

Under this statute, federal condemnation proceedings were required to follow state procedure. Federal authorities could not select a procedure prescribed for a special and limited class of cases. However, state practice did not have to be followed in matters of substance. There was a requirement in matters of substance that before proceedings were instituted, there be a bona fide attempt to acquire the land by purchase. Other problems of substantive law, such as the necessity of the taking, time of taking possession, amount of compensation, costs, and the right to abandon, were not subject to conformity. The same rule applied to the nature of the title acquired.

Conformity also had to be abandoned in cases in which it was normally applicable when adoption of the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of Congress. Consequently, in states where condemnation was effected by administrative order and compensation was assessed upon a petition brought by the owner, state practice was not followed because it would have been inconsistent with the federal statute, which required condemnation to be by judicial process.

The general conformity statute, now repealed, provided that "the practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding." In eminent domain proceedings brought by the United States, the federal courts were directed to conform the practice "as near as may be" to that of the state court. This rule as stated above was subject to limitations. It was held, for example, that the statute did not require conformity in the matter of allowing interest upon the award, but left the matter to the discretion of the court as to whether the local rule was fair. As to the question of trial by jury, it was held that conformity to the local rule was required.

## 2. Rule 71A<sup>48</sup>

The usefulness of the Conformity Act in developing a uniform system of condemnation procedure within a state was short-lived. The phrase "as near as may be," created a field of exceptions wider in scope than the rule itself. Other reasons were developed for departures from conformity, besides the license found in the Act itself. As a practical matter, exact conformity was impossible. The personal conduct and administration of the judge in the discharge of his functions and the rule-making power of the courts enlarged the field of exceptions. Specific federal enactments on points of procedure also superseded the requirement of conformity. The wide development of rule by exception led finally to promulgation of the present rule in an

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<sup>48</sup> Ibid.

attempt to attain uniformity of procedure.

The present rule governing procedure in the federal courts for the condemnation of property is set forth in Rule 71A of the Rules of Civil Procedure, which was adopted by the Supreme Court of the United States on April 30, 1951 and became effective August 1, 1951, 18 and amended, effective July 1, 1963. By this rule, the Rules of Civil Procedure for the United States District Courts are made applicable to the procedure for the condemnation of real and personal property under the power of eminent domain except as specifically otherwise provided in Rule 71A.

A need for a uniform condemnation rule in the federal courts arose from the fact that Congress had prescribed diverse procedures for certain condemnation proceedings by various statutes, and in the absence of such statutes, had prescribed conformity to local state practice under 40 U.S.C. se 258. This general conformity added to the diversity of procedure, since in the United States there are many methods of procedure in existence. Therefore, in 1931 there were approximately 269 different methods of judicial procedure in different classes of condemnation cases and fifty-six methods of non-judicial or administrative procedure. These numbers have increased in the intervening years. Consequently, the general requirement of conformity to state practice and procedure, particularly where the condemnor was the United States, has led to expense, delay and uncertainty.

There are many acts of Congress authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes do not specify the exact procedure to be followed, but when procedure is prescribed, it is by no means uniform.

As originally promulgated, the Federal Rules governed appeals in condemnation proceedings and were not otherwise applicable. Pre-appeal procedure usually conformed to state procedure. The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district court, including the District of Columbia. To achieve this purpose, Rule 71A prescribes such specialized procedure as is required by condemnation proceedings. Otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary.

Promulgation of a rule for condemnation procedure is within the rule-making power. The Enabling Act 27 gives the Supreme Court "the power to prescribe, by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." Such rules, however, must not abridge, enlarge or modify substantive rights.

Rule 71A provides a uniform procedure for all cases of condemnation in which the national power of eminent domain is invoked, and to the extent stated in subdivision (k) of the Rule, for cases invoking a state's power of eminent domain.

Rule 71A supplants all statutes prescribing a different procedure. While the almost exclusive utility of the rule is for the condemnation of real property, it also applies to condemnation of personal property, either as an incident to a taking of real property or as the sole object of the proceeding, when permitted or required by statute. Requisitioning of personal property with the owner's right to sue the United States,

where the compensation cannot be agreed upon, continues to be the normal method for acquiring personal property. Rule 71A in no way interferes with or restricts any such right. Only where the law requires or permits the formal procedure of condemnation to be utilized, does the rule have any applicability to the acquisition of personal property.

Rule 71A is not intended to and does not supersede the Declaration of Taking Act, which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in court. It has been held that the rule applies not only to actions commenced after the effective date, but to further proceedings in actions commenced prior to the effective date, except where its application, in the opinion of the court, would not be feasible or would work injustice.

Currently I have been unable to download Rule 71A as the online source is down. However I will continue to attempt to source it. In any event its tenor is clear from the matters discussed below.

### 3. Applicability of State Substantive Law to Federal Condemnations.<sup>49</sup>

It has been established that federal law controls the measuring of just compensation, when the federal government or one of its instrumentalities appropriates property. It is accepted that no state may abridge the eminent domain power of the federal government or regulate the manner in which it is exercised. Accordingly, most federal condemnations are transacted and litigated without reference to the substantive law of the state in which the affected land lies. However, in a number of instances federal courts have held that state substantive law may be controlling in one or more aspects of a federal condemnation. For example, the federal courts have generally treated the definition of "property" in a condemnation case to be a matter of state substantive law, or in the alternative, have held federal law to be controlling on the question but stated that federal law should normally coincide with the state's definition of property.

### 4. Effect of the Uniform Relocation Assistance and Real Property Acquisition Policies Act.<sup>50</sup>

The Uniform Relocation Assistance and Real Property Acquisition Policies Act governs federal takings as well as condemnations for any federally assisted project, and sets forth several procedural guidelines that must be followed irrespective of whether the litigation proceeds in a federal or state court. Section 4651 of the Act stipulates as follows:

**"Sec. 4651. Uniform policy on real property acquisition practices**

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

- (1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

- (2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.
- (3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.
- (4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 258a of title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.
- (5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II of this chapter will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.
- (6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.
- (7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.
- (8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.
- (9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.
- (10) A person whose real property is being acquired in accordance with this subchapter may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, and part thereof, any interest therein, or any compensation paid therefor to a Federal agency, as such person shall determine."

Procedures Of States:

California: Cal. Civ. Proc. Code (1982) provides as follows:

**"Sec 1230.040. RULES OF PRACTICE.** Except as otherwise provided in this title, the rules

of practice that govern civil actions generally are the rules of practice for eminent domain proceedings."

In California the decision as to whether to use the power of eminent domain or to acquire land by other means such as purchase is discretionary.

**"Sec 1230.030. ACQUISITION OF PROPERTY; PURCHASE, EMINENT DOMAIN OR OTHER MEANS.** Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

**Sec 1230.050. POWERS OF COURT.** The court in which a proceeding in eminent domain is brought has the power to:

- (a) Determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with this title.
- (b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order for possession as a matter of right.

**Sec 1245.220. NECESSARY ADOPTION OF RESOLUTION.** A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article."

A resolution of necessity is a mandatory pre requisite to the exercise of the power of eminent domain.

**"Sec 1245.230. RESOLUTION; CONTENTS.** In addition to other requirements imposed by law, the resolution of necessity shall contain all of the following:

- (a) A general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the public entity to acquire the property by eminent domain.
- (b) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification.
- (c) A declaration that the governing body of the public entity has found and determined each of the following:
  - (1) The public interest and necessity require the proposed project.
  - (2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
  - (3) The property described in the resolution is necessary for the proposed project.
  - (4) The either the offer required by Section 7267.2 of the Government Code has been made to the owner or owners of record, or the offer has not been made because the owner cannot be located with reasonable diligence.

If at the time the governing body of a public entity is requested to adopt a resolution of necessity and the project for which the property is needed has been determined to be an emergency project, which project is necessary either to protect or preserve health, safety, welfare, or property, the requirements of Section 7267.2 of the Government Code need not be a prerequisite to the adoption of an authorizing resolution at the time. However, in those cases the provisions of Section 7267.2 of the Government Code shall be implemented by the public entity within a reasonable time thereafter but in any event, not later than 90 days after adoption of the resolution of necessity."

The eminent domain process is controlled by the Courts. In this respect the process differs from other jurisdictions where the courts proper act only on review and the compensation is generally dealt with by a specialist tribunal.

**"Sec 1250.110. COMPLAINT; FILING.** An eminent domain proceeding is commenced by filing a complaint with the court.

**"Sec 1250.120. SUMMONS; FORM AND CONTENT**

- (a) Except as provided in subdivision (b), the form and contents of the summons shall be as in civil actions generally.
- (b) Where process is served by publication, in addition to the summons, the publication shall describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding.

**"Sec 1250.310. COMPLAINT; CONTENTS.** The complaint shall contain all of the following:

- (a) The names of all plaintiffs and defendants.
- (b) A description of the property sought to be taken. The description may, but is not required to, indicate the nature or extent of the interests of the defendant in the property.
- (c) If the plaintiff claims an interest in the property sought to be taken, the nature and extent of such interest.
- (d) A statement of the right of the plaintiff to take by eminent domain the property described in the complaint. The statement shall include:
- (1) A general statement of the public use for which the property is to be taken.
  - (2) An allegation of the necessity for the taking as required by Section 1240.030; where the plaintiff is a public entity, a reference to its resolution of necessity; where the plaintiff is a quasi-public entity within the meaning of Section 1245.320, a reference to the resolution adopted pursuant to Article 3 (commencing with Section 1245.310) of Chapter 4; where the plaintiff is a nonprofit hospital, a reference to the certificate required by Section 1260 of the Health and Safety Code; where the plaintiff is a public utility and relies on a certification of the State Energy Resources Conservation and Development Commission or a requirement of that commission that development rights be acquired, a reference to such certification or requirement.
  - (3) A reference to the statute that authorizes the plaintiff to acquire the property by eminent domain. Specification of the statutory authority may be in the alternative and may be inconsistent.
- (e) A map or diagram portraying as far as practicable the property described in the complaint and showing its location in relation to the project for which it is to be taken. "

Florida: Fla. Stat. Ann. (1987) provides as follows:

**"Sec 73.012. PROCEDURE.** Actions in eminent domain shall be governed by the rules of civil procedure and the appellate rules unless otherwise provided by this chapter. "

Good faith negotiation is required prior to the use of condemnation powers including the making of an offer based upon an appraisal.

**"Sec 73.015 PRESUIT NEGOTIATION.**

- (1) Effective July 1, 2000, before an eminent domain proceeding is brought under this chapter or chapter 74, the condemning authority must attempt to negotiate in good faith with the fee owner of the parcel to be acquired, must provide the fee owner with a written offer and, if requested, a copy of the appraisal upon which the offer is based, and must attempt to reach an agreement regarding the amount of compensation to be paid for the parcel.
- (a) At the inception of negotiation for acquisition, the condemning authority must notify the fee owner of the following:
1. That all or a portion of his or her property is necessary for a project.
  2. The nature of the project for which the parcel is considered necessary, and the parcel designation of the property to be acquired.
  3. That, within 15 business days after receipt of a request by the fee owner, the condemning authority will provide a copy of the appraisal report upon which the offer to the fee owner is based; copies, to the extent prepared, of the right-of-way maps or other documents that depict the proposed taking; and copies, to the extent prepared, of the construction plans that depict project improvements to be constructed on the property

taken and improvements to be constructed adjacent to the remaining property, including, but not limited to, plan, profile, cross-section, drainage, and pavement marking sheets, and driveway connection detail. The condemning authority shall provide any additional plan sheets within 15 days of request.

4. The fee owner's statutory rights under § 73.091 and 73.092.

5. The fee owner's rights and responsibilities under paragraphs (b) and (c) and subsection (4).

(b) The condemning authority must provide a written offer of compensation to the fee owner as to the value of the property sought to be appropriated and, where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking. The owner must be given at least 30 days after either receipt of the notice or the date the notice is returned as undeliverable by the postal authorities to respond to the offer, before the condemning authority files a condemnation proceeding for the parcel identified in the offer.

(c) The notice and written offer must be sent by certified mail, return receipt requested, to the fee owner's last known address listed on the county ad valorem tax roll. Alternatively, the notice and written offer may be personally delivered to the fee owner of the property. If there is more than one owner of a property, notice to one owner constitutes notice to all owners of the property. The return of the notice as undeliverable by the postal authorities constitutes compliance with this provision. The condemning authority is not required to give notice or a written offer to a person who acquires title to the property after the notice required by this section has been given.

(d) Notwithstanding this subsection, with respect to lands acquired under § 259.041, the condemning authority is not required to give the fee owner the current appraisal before executing an option contract.

(2) Effective July 1, 2000, before an eminent domain proceeding is brought under this chapter or chapter 74 by the Department of Transportation or by a county, municipality, board, district, or other public body for the condemnation of right-of-way, the condemning authority must make a good faith effort to notify the business owners, including lessees, who operate a business located on the property to be acquired.

(a) The condemning authority must notify the business owner of the following:

1. That all or a portion of his or her property is necessary for a project.

2. The nature of the project for which the parcel is considered necessary, and the parcel designation of the property to be acquired.

3. That, within 15 business days after receipt of a request by the business owner, the condemning authority will provide a copy of the appraisal report upon which the offer to the fee owner is based; copies, to the extent prepared, of the right-of-way maps or other documents that depict the proposed taking; and copies, to the extent prepared, of the construction plans that depict project improvements to be constructed on the property taken and improvements to be constructed adjacent to the remaining property, including, but not limited to, plan, profile, cross-section, drainage, pavement marking sheets, and driveway connection detail. The condemning authority shall provide any additional plan sheets within 15 days of request.

4. The business owner's statutory rights under § 73.071, 73.091, and 73.092.

5. The business owner's rights and responsibilities under paragraphs (b) and (c) and subsection (4).

(b) The notice must be made subsequent to or concurrent with the condemning authority's making the written offer of compensation to the fee owner pursuant to subsection (1). The notice must be sent by certified mail, return receipt requested, to the address of the registered agent for the business located on the property to be acquired, or if no agent is registered, by certified mail or personal delivery to the address of the business located on the property to be acquired. Notice to one owner of a multiple ownership business constitutes notice to all business owners of that business. The return of the notice as undeliverable by the postal authorities constitutes compliance with these provisions. The condemning authority is not required to give notice to a person who acquires an interest in the business after the notice required by this section has been given. Once notice has been made to business owners under this subsection, the condemning authority may file a condemnation proceeding pursuant to chapter 73 or chapter 74 for the property identified in

the notice.

- (c) If the business qualifies for business damages pursuant to § 73.071(3)(b) and the business intends to claim business damages, the business owner must, within 180 days after either receipt of the notice or the date the notice is returned as undeliverable by the postal authorities, or at a later time mutually agreed to by the condemning authority and the business owner, submit to the condemning authority a good faith written offer to settle any claims of business damage. The written offer must be sent to the condemning authority by certified mail, return receipt requested. Absent a showing of a good faith justification for the failure to submit a business damage offer within 180 days, the court must strike the business owner's claim for business damages in any condemnation proceeding. If the court finds that the business owner has made a showing of a good faith justification for the failure to timely submit a business damage offer, the court shall grant the business owner up to 180 days within which to submit a business damage offer, which the condemning authority must respond to within 120 days.

1. The business damage offer must include an explanation of the nature, extent, and monetary amount of such damage and must be prepared by the owner, a certified public accountant, or a business damage expert familiar with the nature of the operations of the owner's business. The business owner shall also provide to the condemning authority copies of the owner's business records that substantiate the good faith offer to settle the business damage claim. If additional information is needed beyond data that may be obtained from business records existing at the time of the offer, the business owner and condemning authority may agree on a schedule for the submission of such information.

2. As used in this paragraph, the term "business records" includes, but is not limited to, copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for the 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim.

- (d) Within 120 days after receipt of the good faith business damage offer and accompanying business records, the condemning authority must, by certified mail, accept or reject the business owner's offer or make a counteroffer. Failure of the condemning authority to respond to the business damage offer, or rejection thereof pursuant to this section, must be deemed to be a counteroffer of zero dollars for purposes of subsequent application of § 73.092(1). "

Compensation negotiations may be submitted to non binding mediation.

"(3) At any time in the presuit negotiation process, the parties may agree to submit the compensation or business damage claims to nonbinding mediation. The parties shall agree upon a mediator certified under § 44.102. In the event that there is a settlement reached as a result of mediation or other mutually acceptable dispute resolution procedure, the agreement reached shall be in writing. The written agreement provided for in this section shall incorporate by reference the right-of-way maps, construction plans, or other documents related to the taking upon which the settlement is based. In the event of a settlement, both parties shall have the same legal rights that would have been available under law if the matter had been resolved through eminent domain proceedings in circuit court with the maps, plans, or other documents having been made a part of the record.

(4) If a settlement is reached between the condemning authority and a property or business owner prior to a lawsuit being filed, the property or business owner who settles compensation claims in lieu of condemnation shall be entitled to recover costs in the same manner as provided in § 73.091 and attorney's fees in the same manner as provided in § 73.092, more specifically as follows:

(a) Attorney's fees for presuit negotiations under this section regarding the amount of compensation to be paid for the land, severance damages, and improvements must be calculated in the same manner as provided in § 73.092(1) unless the parties otherwise agree.

(b) If business damages are recovered by the business owner based on the condemning authority accepting the business owner's initial offer or the business owner accepting the

condemning authority's initial counteroffer, attorney's fees must be calculated in accordance with § 73.092(2), (3), (4), and (5) for the attorney's time incurred in presentation of the business owner's good faith offer under paragraph (2)(c). Otherwise, attorney's fees for the award of business damages must be calculated as provided in § 73.092(1), based on the difference between the final judgment or settlement of business damages and the counteroffer to the business owner's offer by the condemning authority.

(c) Presuit costs must be presented, calculated, and awarded in the same manner as provided in § 73.091, after submission by the business or property owner to the condemning authority of all appraisal reports, business damage reports, or other work products for which recovery is sought, and upon transfer of title of the real property by closing, upon payment of any amounts due for business damages, or upon final judgment.

(d) If the parties cannot agree on the amount of costs and attorney's fees to be paid by the condemning authority, the business or property owner may file a complaint in the circuit court in the county in which the property is located to recover attorney's fees and costs.

This shall only apply when the action is by the Department of Transportation, county, municipality, board, district, or other public body for the condemnation of a road right-of-way.

(5) Evidence of negotiations or of any written or oral statements used in mediation or negotiations between the parties under this section is inadmissible in any condemnation proceeding, except in a proceeding to determine reasonable costs and attorney's fees.

**"Sec 73.0155 CONFIDENTIALITY; BUSINESS RECORDS PROVIDED TO A GOVERNMENTAL CONDEMNING AUTHORITY**

Business records provided by the owner of a business to a governmental condemning authority as part of an offer of business damages pursuant to § 73.015 are exempt from the disclosure provisions of S 24(a), Art. I of the State Constitution and § 119.07(1) if the disclosure of such records would be likely to cause substantial harm to the competitive position of the person providing such records and if the person providing such records requests that such records be held exempt. Nothing in this section shall be construed to prevent inspection of such records by the Attorney General, members of the Legislature, and interested state agencies; however, such records shall remain exempt from further disclosure. This exemption is subject to the Open Government Sunset Review Act in accordance with § 119.15 and expires on October 2, 2004, unless reviewed and reenacted by the Legislature. "

Where agreement cannot be reached via negotiation the condemnation process is submitted to the Courts. The condemnor files a petition in the county Court where the property lies. This significantly different to procedures in the United Kingdom, Canada, Australia and New Zealand where generally it is for the property owner to object to the compulsory acquisition.

**"Sec 73.021. PETITION; CONTENTS.** Those having the right to exercise the power of eminent domain may file a petition therefor in the circuit court of the county wherein the property lies, which petition shall set forth:

(1) The authority under which and the use for which the property is to be acquired, and that the property is necessary for that use;

(2) A description identifying the property sought to be acquired. The petitioners may join in the same action all properties involved in a planned project whether in the same or different ownership, or whether or not the property is sought for the same use;

(3) The estate or interest in the property which the petitioner intends to acquire;

(4) The names, places of residence, legal disabilities, if any, and interests in the property of all owners, lessees, mortgagees, judgment creditors, and lien-holders, so far as ascertainable by diligent search, and all unknown persons having an interest in the property when the petitioner has been unable to ascertain the identity of such persons by diligent search and inquiry. If any interest in the property, or lien thereon, belongs to the unsettled estate of a decedent, the executor or administrator shall be made a defendant without joining the devisee or heir; if a trust estate, the trustee shall be made a defendant without joining the devisee or heir; if a trust estate, the trustee shall be made a defendant without joining the cestui que trust. The court may appoint an administrator ad litem to represent the estate of a deceased person whose

estate is not being administered, and a guardian ad litem for all defendants who are infants or are under other legal disabilities; and for defendants whose names or addresses are unknown. A copy of the order of appointment shall be served on the guardian ad litem at least ten days before trial unless he or she has entered an appearance;

(5) Whether any mobile home is located on the property sought to be acquired and, if so, whether the removal of that mobile home will be required. If such removal shall be required, the petition shall name the owners of each such mobile home as defendants. This subsection shall not apply to any governmental authority exercising its power of eminent domain when reasonable relocation or removal expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power.

(6) A statement that the petitioner has surveyed and located and taken for the uses and purposes set forth in the petition, and that the interest sought be vested in the petitioner.

**"Sec 73.031. PROCESS; SERVICE AND PUBLICATION**

(1) Upon the filing of the petition, the clerk of the court shall issue a summons to show cause why the property should not be taken, directed "to all whom it may concern," containing the names of all the defendants named in the petition, commanding them and any other persons claiming any interest in the property described to serve written defenses to the petition on a day specified in the summons not less than twenty-eight nor more than sixty days from the date of the summons. A copy of the summons and the petition shall be served upon all resident defendants in the manner provided by law and not less than twenty days before the return day.

(2) If any defendant is alleged to be a non resident of the state, or if the name or residence of any defendant is alleged to be unknown, or if personal service cannot be had upon any defendant for any other reason, the clerk shall cause a notice to be published at least once each week for 2 consecutive weeks prior to the return day in some newspaper published in the county; provided, however, that if the petitioner be a municipality and a newspaper is published therein, the notice shall be published in such a newspaper. This notice shall contain the names of the defendants to whom it is directed, a description of the property sought to be appropriated, the nature of the action, and the name of the court in which it is pending. The clerk shall mail a copy of the summons and the petition to each out-of-state defendant at the address as set forth in the petition. The clerk shall file a certificate of mailing which, together with proof of publication, shall constitute effective service as though the defendant had been personally served with process within this state.

(3) The failure of any party to receive notice by mail shall not invalidate the proceedings of the court or any order made pursuant to this chapter. "

A jury may be empanelled which is the sole judge of the compensation to be paid. Again this is significantly different to other jurisdictions examined.

**"Sec 73.071. JURY TRIAL; COMPENSATION; SEVERANCE DAMAGES**

(1) When the action is at issue, and only upon notice and hearing to set the cause for trial, the court shall impanel a jury of twelve persons as soon as practical considering the reasonable necessities of the court and of the parties, and giving preference to the trial of eminent domain cases over other civil actions, and submit the issue of compensation to them for determination, which issue shall be tried in the same manner as other issues of fact are tried in the circuit courts.

(2) The amount of such compensation shall be determined as of the date of trial, or the date upon which title passes, whichever shall occur first.

(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

(a) The value of the property sought to be appropriated;

(b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 4 years' standing, owned by the

- party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recover such special damages shall set forth in his or her written defenses the nature and extent of such damages; and
- (c) Where the appropriation is of property upon which a mobile home, other than a travel trailer as defined in § 320.01, is located, whether or not the owner of the mobile home is an owner or lessee of the property involved, and the effect of the taking of the property involved requires the relocation of such mobile home, the reasonable removal and relocation expenses incurred by such mobile home owner, not to exceed the replacement value of such mobile home. The compensation paid to a mobile home owner under this paragraph shall preclude an award to a mobile home park owner for such expenses of removal and relocation. Any mobile home owner claiming the right to such removal or relocation expenses shall set forth in his or her written defenses the nature and extent of such expenses. This paragraph shall not apply to any governmental authority exercising its power of eminent domain when reasonable removal or relocation expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power.
- (4) When the action is by the Department of Transportation, county, municipality, board, district, or other public body for the condemnation of a road, canal, levee, or water control facility right-of-way, the enhancement, if any, in value of the remaining adjoining property of the defendant property owner by reason of the construction or improvement made or contemplated by the petitioner shall be offset against the damage, if any, resulting to such remaining adjoining property of the defendant property owner by reason of the construction or improvement.
- However, such enhancement in the value shall not be offset against the value of the property appropriated, and if such enhancement in value shall exceed the damage, if any, to the remaining adjoining property, there shall be no recovery over against such property owner for such excess.
- (5) Any increase or decrease in the value of any property to be acquired which occurs after the scope of the project for which the property is being acquired is known in the market, and which is solely a result of the knowledge of the project location, shall not be considered in arriving at the value of the property acquired. For the purpose of this section, the scope of the project for which the property is being acquired shall be presumed to be known in the market on or after the condemnor executes a resolution which depicts the location of the project.
- (6) The jury shall view the subject property upon demand by any party or by order of the court.
- (7) If the jury cannot agree on a verdict the court shall discharge them, impanel a new jury, and proceed with the trial."

The provisions in respect of New York are quite different again and require a public hearing to be conducted prior to acquisition. New York: N.Y. Em. Dom. Proc. Law (1979) provides as follows:

**"Sec 201. PUBLIC HEARINGS.** Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably proximate to the property which may be acquired for such project.

**"Sec 202. NOTICE.** (A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five consecutive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality. If the official newspaper is

one of general circulation in such locality, publication therein as specified shall be deemed sufficient compliance.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Inadvertent failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

**"Sec 203. CONDUCT OF THE PUBLIC HEARING.** At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted. Copies of such record shall be available to the public for examination without cost during normal business hours at the condemnor's principal office and the office of the clerk or register of the county in which the property proposed to be acquired is located. Copies shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

**"Sec 204. DETERMINATION AND FINDINGS**

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality. If the official newspaper is one of general circulation in such locality, publication therein as specified shall be deemed sufficient compliance. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

- (1) the public use, benefit or purpose to be served by the proposed public project;
- (2) the approximate location for the proposed public project and the reasons for the selection of that location;
- (3) the general effect of the proposed project on the environment and residents of the locality;
- (4) such other factors as it considers relevant.

**"Sec 205. AMENDMENTS FOR FIELD CONDITIONS.** Subsequent to publishing its determination and findings and only in the event that further study of field conditions warrant, the condemnor shall have the right to make amendments or alterations in its proposed public project to accommodate such field conditions. Such amendments or alterations shall not require further public hearings nor invalidate any acquisition for the proposed public project.

**"Sec 206. EXEMPTIONS.** The condemnor shall be exempt from compliance with the provisions of this article when:

- (A) pursuant to other state, federal, or local law or regulation it considers and submits factors similar to those enumerated in subdivision (B) of section two hundred four, to a state, federal or local governmental agency, board or commission before proceeding with the acquisition and obtains a license, a permit, a certificate of public convenience or necessity or other similar approval from such agency, board, or commission or;
- (B) pursuant to article VII or article VIII of the public service law it obtained a certificate of environmental compatibility and public need or;
- (C) pursuant to other law or regulation it undergoes or conducts or offers to conduct prior to an acquisition one or more public hearings upon notice to the public and owners of property to be acquired, and provided further that factors similar to those enumerated in subdivision (B) of section two hundred four herein may be considered at such public hearings, or;
- (D) when in the opinion of the condemnor the acquisition is de minimus in nature so that the

public interest will not be prejudiced by the construction of the project or because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement of this article.

(E) when it complies with the procedures contained in section 41.34 of the mental hygiene law. "

In the New York jurisdiction aggrieved parties file for review of the determination. In particular the Court will inquire into whether the federal and state constitutions were complied with.

**"Sec 207. JUDICIAL REVIEW**

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to section two hundred four of this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without the requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceedings may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with that first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

- (1) the proceeding was in conformity with the federal and state constitutions,
- (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,
- (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and
- (4) a public use, benefit or purpose will be served by the proposed acquisition.

**"Sec 208. JURISDICTION OF COURTS.** Except as expressly set forth in section two hundred seven, and except for review by the court of appeals of an order or judgment of the appellate division of the supreme court as provided for therein, no court of this state shall have jurisdiction to hear and determine any matter, case or controversy concerning any matter which was or could have been determined in a proceeding under this article. "

The Court's also have jurisdiction to hear and determine all claims arising from the acquisition of real property. A jury is not utilised in New York

**"Sec 501. JURISDICTION**

(A) The court of claims shall have exclusive jurisdiction to hear and determine all claims arising from the acquisition of real property by or in the name of the people of the state of New York, or when jurisdiction is specifically conferred upon it by statute.

(B) In all claims arising from the acquisition of real property other than as provided in subdivision (A) of this section, the supreme court, held in the judicial district where the real property or any portion thereof is situated, shall have exclusive jurisdiction to hear and determine all claims arising from the acquisition of real property and shall hear such claims

without a jury or without referral to a referee or commissioners.

**"Sec 502. SERVICE OF NOTICE OF ACQUISITION**

(A) In all acquisitions in which the court of claims has jurisdiction under subdivision (A) of section five hundred one, and provided certification pursuant to section four hundred three of this law has been made, the condemnor within ninety days after filing the acquisition map pursuant to subdivision (A) of section four hundred two of this law, shall serve either by personal service or by certified mail, upon each condemnee a notice of acquisition and a copy of that portion of the acquisition map affecting the condemnee's property. Thereupon, the condemnor shall:

- (1) cause proof of such service to be filed and recorded in the office of the county clerk or register whose duty it shall be, upon the filing of the proof of such service, to record the same in the books in his office used for recording deeds, and to index the same in the deed index books in his office, listing the names of the persons served as grantors. The record of the proof of such service shall be presumptive evidence of due service of such map and notice of acquisition on the person served. Service of a copy of such map and notice shall not be required to be made on any condemnee whose claim arising from or growing out of such acquisition has been adjusted; and
- (2) if it is unable to serve a copy of such map and notice of acquisition, or cause the same to be served upon a condemnee personally within the state, after making an effort so to do, service in lieu thereof may be made by the condemnor by causing such map and notice of acquisition to be filed in the office of the county clerk or register aforesaid, and by causing such notice to be recorded in said office; and
- (3) simultaneously therewith, cause a certificate to be filed and recorded in said office, which certificate shall state that the condemnor has been unable to serve a copy of such map and notice of acquisition, or cause the same to be served upon such condemnee personally within the state after a reasonable and proper effort to do so. The certificate shall direct that service be effected by filing and recording as herein provided. It shall be the duty of such county clerk or register, upon filing of the notice of acquisition and certificate, to record the same in the books of his office used for recording deeds, and to index the same in the deed index books in his office, listing the person named in such certificate as a grantor. The record of such notice and certificate shall be presumptive evidence of due service of such acquisition map and notice of acquisition on the person named in said certificate.

(B) In all acquisitions in which the supreme court has jurisdiction under subdivision (B) of section five hundred one, the condemnor, within thirty days after entry of the order granting the petition vesting title, shall cause a notice of acquisition to be either served upon each condemnee or his attorney of record pursuant to the civil practice law and rules or published in at least ten successive issues of the official newspaper in the locality where the project will be situated or in at least ten successive issues of a newspaper of general circulation in such locality. In the event that the only newspaper available in such locality is a weekly publication, the above described notice shall be published in such newspaper in at least three successive issues. In the event the notice of acquisition is published, a copy of such notice shall also be mailed by first class mail to each condemnee or his attorney of record. The notice shall contain a general description of the real property acquired, and shall also set forth:

- (1) the date the order vesting title was entered,
- (2) that the acquisition map has been filed,
- (3) the office where such order has been entered and where such map has been filed; and
- (4) direct that condemnee's of such property shall, on or before a date therein specified, file a written claim, or notice of appearance pursuant to section five hundred three herein with the condemnor and the clerk of the court of the county in which the order has been filed.

**"Sec 503. FILING AND SERVICE OF CLAIMS; NOTICE OF APPEARANCE**

(A) In a claim for damages arising from the acquisition of real property under subdivision (A) of section five hundred one herein, a condemnee shall file within three years after service of the notice of acquisition or date of vesting, whichever is later, or within such time as is fixed by order of the court pursuant to sections five hundred five and five hundred twelve, a claim for damages with the clerk of the court having jurisdiction of the matter, and a copy of said claim upon such other official designated in the notice of acquisition to receive such service.

In any acquisition pursuant to subdivision (A) of section five hundred one service shall be upon the attorney general. The claimant may, at any time subsequent to the running of the three year period, receive the amount of the condemnor's offer upon proof of his entitlement thereto. The failure of a condemnee to file a claim within such three year period shall be deemed an acceptance of the amount paid as full entitlement of such claim.

(B) In a claim for damages arising from the acquisition of real property under subdivision (B) of section five hundred one herein, a condemnee shall, within the time specified by the court, file a written claim, or notice of appearance with the clerk of the court having jurisdiction of the matter and a copy of the same shall be served upon either the condemnor's chief legal officer or upon such other official designated in the notice of acquisition.

(C) In the event that a claim is made for compensation for fixtures or for any interest other than the fee in the real property acquired, a copy of such claim together with a schedule of fixture items, where applicable, shall also be served by such claimant upon the fee owner of the real property, and the condemnor's chief legal officer or upon such other official designated in the notice of acquisition.

**"Sec 504. CONTENT OF CLAIM, OR NOTICE OF APPEARANCE. The claim, or notice of appearance shall include:**

(A) the name and post office address of the condemnee;

(B) reasonable identification by reference to the acquisition map or otherwise, of the property affected by the acquisition, and the condemnee's interest therein;

(C) a general statement of the nature and type of damages claimed, including a schedule of fixture items which comprise part or all of the damages claimed;

(D) if represented by an attorney, the name of the condemnee's attorney and his office and post office address and telephone number subscribed at the end of the claim. The claims and copies thereof, may be either typewritten, printed, or photocopies of the original."

**"Quick-take" procedures.**

Under quick-take procedures a condemnor may take the property in question prior to the final determination of compensation. This is advantageous to the condemnor as the determination of value is often slow and results in delay. See for example Illinois, Ill. Rev. Stat. Ch. 110, para. 4-103 and 7-109 (1981). The justification for the quick-take procedure is that there is adequate assurance for the land owner that just compensation will be paid. It is simply a matter of determining the value. Thus once the condemnor has established authority to take and shown necessity there is no reason why it should not take title at that point. A deposit may be required in some circumstances which may be anywhere from 100% to 200% of Court ordered appraised value.

Because the quick-take procedure is seen as being more extreme than ordinary condemnation the Courts will construct quick-take powers more restrictively. In practice this means that the purpose must be expressly authorised by the statute.

See for example the following Federal provisions:

**"TITLE 40 - PUBLIC BUILDINGS, PROPERTY, AND WORKS  
CHAPTER 3 - PUBLIC BUILDINGS AND WORKS GENERALLY  
Sec. 258a. Lands, easements, or rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure**

...

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said

declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest in accordance with section 258e-1 of this title on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. "

*ii the provisions that exist for the payment of compensation, to whom and on what basis such compensation is valued;*

Just compensation is required under the federal and state constitutions and that is reflected in the statutory provisions.

New York

From Chap 73 THE CONSOLIDATED LAWS - EMINENT DOMAIN  
PROCEDURE LAW - NEW YORK

**"ARTICLE 3  
OFFER AND NEGOTIATIONS**

**"Sec. 301. Policy.** The condemnor, at all stages prior to or subsequent to an acquisition by eminent domain of real property necessary for a proposed public project shall make every reasonable and expeditious effort to justly compensate persons for such real property by negotiation and agreement.

**"S 302. Appraisals; prevesting discovery.** Real property to be acquired by the exercise of the power of eminent domain shall be appraised on behalf of the condemnor by an appraiser. In order to adequately prepare such appraisal upon which the condemnor's offer is based, the condemnor shall have the right to inspect such property prior to vesting. The owner, his agents or employees, tenants or other occupants shall upon reasonable notice by a written request by the condemnor, provide pertinent data or information including books and records necessary to prepare such appraisal. A party affected by such request may, where the request for such information is objected to as unreasonable or burdensome, petition a court of competent jurisdiction for relief. Failure of the owner to comply with this section shall suspend the condemnor's obligation to make an offer to such owner pursuant to article three until such time as this information is provided.

**"Sec. 303. Offer.** The condemnor shall establish an amount which it believes to represent just compensation for the real property to be acquired. The condemnor shall make a written offer to acquire the property for one hundred per centum of the valuation so established. In no event shall such amount be less than the condemnor's highest approved appraisal. Wherever

practicable, the condemnor shall make the offer prior to acquiring the property and shall also wherever practicable, include within the offer an itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property."

Note that a condemnee may reject an offer of compensation in full yet accept the offer as an advance payment and then make claim for further compensation.

**"S 304. Advance payment; actions thereafter.**

(A) The written offer, or any adjustment thereof made prior to acceptance, shall state that:

- (1) the offer constitutes the amount of the condemnor's highest approved appraisal of the just compensation for the property, and that payment will be made together with appropriate interest;
- (2) a condemnee may accept the offer as payment in full; or
- (3) a condemnee may reject the offer as payment in full and instead elect to accept such offer as an advance payment, and that such election shall in no way prejudice the right of a condemnee to claim additional compensation; however, the failure of the condemnee to file a claim within the time of filing claims as provided in subdivision (A) of section five hundred three of this law shall be deemed an acceptance of the amount paid as full settlement of such claim;
- (4) upon the acceptance of the written or an adjusted offer, the condemnor shall enter into an agreement or stipulation with the condemnee providing for payment pursuant to such agreement, either as payment in full or as an advance payment. The right of the condemnee to the advance payment shall not be conditioned on the waiver of any other right.

(B) The offer shall be deemed rejected in the event that a condemnee within ninety days of the offer fails or refuses to notify the condemnor in writing that the advance payment is accepted.

(C) In the event a condemnee shall reject the offer or the offer shall be deemed rejected pursuant to subdivision (B) or a condemnee unreasonably fails to provide the condemnor with all papers reasonably necessary to effect a valid transfer of title as acquired, within ninety days of receipt, the condemnor's obligation to pay interest on the amount of the offer shall be suspended until such time as the condemnee accepts the offer as payment in full, or as an advance payment, or provides the necessary title papers as the case may be.

(D) In the event an owner accepts the offer as payment in full or as an advance payment for property in an acquisition under supreme court jurisdiction pursuant to subdivision (B) of section five hundred one of this chapter and the condemnor determines that there is a conflict of title or a conflict arises over the percentage of the condemnation award which should be paid to each of several owners of interests in the condemned property, the condemnor shall, unless it is otherwise agreed, deposit the full or advance payment, as the case may be, with the clerk of the supreme court having jurisdiction of the claim. This deposit shall be placed in an interest bearing account until payment of such sum, including accumulated interest, is directed to be made by the court on application of any person claiming an interest in the amount deposited. After the deposit as herein provided has been made, the condemnor shall notify all persons claiming an interest in the condemnation award that the amount payable thereunder has been deposited and is subject to an application by an interested person or persons to a distribution proceeding. The determination of the supreme court and final judgment of distribution shall, unless set aside or reversed on appeal, be final and conclusive upon the owners or other persons claiming any interest in or lien or encumbrance on the property so appropriated and the amount deposited. A deposit pursuant to this section shall terminate the condemnor's obligation to pay interest on the amount so deposited provided that interest is paid on such deposit. No sum paid into court or deposited shall be charged fees, commissions or poundage.

(E) (1) In the event that an owner accepts the offer as payment in full or as an advance payment for property in an acquisition under the court of claims jurisdiction pursuant to subdivision (A) of section five hundred one of this chapter and the attorney general determines that there is a conflict of title or a conflict arises so that he is unable to make certification of the person or persons legally entitled to the amount payable under an agreement adjusting all legal damages caused by any such acquisition, the condemnor shall request the comptroller to, and the comptroller shall, deposit the amount payable under such

agreement in a special interest bearing account in any bank in which moneys belonging to the fund from which such compensation is payable may be deposited, to be distributed as ordered by the court of claims on application of any person claiming an interest in the amount deposited. After making the deposit as herein provided, the attorney general shall notify all parties claiming an interest in the fund that the amount payable thereunder has been deposited and is subject to an application by an interested person or persons to a distribution proceeding. The procedure on such an application shall be the same as provided in section twenty-three of the court of claims act respecting the distribution of deposited court of claims awards, except that the proceeding shall be conducted in the court of claims, in the district in which the appropriated property is located and such application shall be made by filing the original and one copy of the verified petition with the chief clerk of the court of claims in Albany, and upon service of a copy of the verified petition upon the attorney general at his office in Albany. The determination of the court of claims and final judgment of distribution shall, unless set aside or reversed on appeal, be final and conclusive upon the owners or other persons claiming any interest in or lien or encumbrance on the property so appropriated and the amount deposited. No judgment of distribution shall be made unless the court shall first obtain personal jurisdiction over all persons certified by the attorney general as having or claiming to have an interest in the fund. A deposit made pursuant to this paragraph shall terminate the condemnor's obligation to pay interest on the amount so deposited provided that interest is paid on such deposit. No sum paid into court or deposited shall be charged fees, commissions or poundage. In the event a condemnee at any time subsequent to a deposit made pursuant to this paragraph one, but prior to an application for distribution, provides the condemnor with the papers referred to in subdivision (C) of this section in a form satisfactory to the attorney general, the condemnor shall request the comptroller to, and the comptroller shall, without any court order being required, withdraw the sum deposited together with all interest accrued thereon, and redeposit the same, including the interest thereon, to the account from which it was withdrawn for the purpose of effecting payment by the comptroller as provided by law.

(2) In the event that an owner does not accept the offer as payment in full or as an advance payment for property in an acquisition under the court of claims jurisdiction pursuant to subdivision (A) of section five hundred one of this chapter, at any time subsequent to the vesting of title in the state of New York, but in no event after ninety days from the vesting of title in the state of New York, the condemnor shall, upon receiving written approval of the attorney general, request the comptroller to, and the comptroller shall, after his audit and acceptance of the highest approved appraisal referred to in section three hundred three and paragraph one of subdivision (A) of section three hundred four herein, deposit the amount of the condemnor's offer in a special interest bearing account in any bank in which moneys belonging to the fund from which such compensation is payable may be deposited, to be distributed as ordered by the court of claims on application of any person claiming an interest in the amount deposited. Notwithstanding any other provision of law to the contrary, if such an acquisition is being made for a federally-aided project and the condemnor determines it necessary to deposit the amount of the highest appraised value without delay in order to proceed with the letting of a construction contract and to comply with federal laws, rules and regulations, the condemnor may request the comptroller to make the deposit herein provided at any time subsequent to the vesting of title in the state of New York and provided an offer of payment in full or as an advance payment has been made to the owner. The written approval of the attorney general shall not be necessary under this paragraph, but the comptroller shall, after making the aforesaid deposit, transmit to the attorney general a notice in writing approximately identifying the proceeding or project, the map and parcel number or numbers and the name of the depository bank, together with the date and amount of the deposit. After the deposit has been made as herein provided, the attorney general shall notify all parties having or claiming to have an interest in the fund that the amount payable thereunder has been deposited and is subject to an application by an interested person or persons to a distribution proceeding. The procedure on such an application shall be the same as provided in section twenty-three of the court of claims act respecting the distribution of deposited court of claims awards, except that the proceeding shall be conducted in the court of claims, in the district in which the appropriated property is located and such application shall be made by filing the original

and one copy of the verified petition with the chief clerk of the court of claims in Albany, and upon service of a copy of the verified petition upon the attorney general at his office in Albany. The determination of the court of claims, and final judgment of distribution shall, unless set aside or reversed on appeal, be final and conclusive upon the owners or other persons claiming any interest in or lien or encumbrance on the property so appropriated and the amount deposited. No judgment of distribution shall be made unless the court shall first obtain personal jurisdiction over all persons certified by the attorney general as having or claiming to have an interest in the fund. A deposit made pursuant to this paragraph shall terminate the condemnor's obligation to pay interest on the amount so deposited provided that interest is paid upon such deposit. No sum paid into court or deposited shall be charged fees, commissions or poundage. In the event an offer is accepted subsequent to a deposit made pursuant to this paragraph and if no application for distribution has been made, the condemnor shall request the comptroller to, and the comptroller shall, without any court order being required, withdraw the sum deposited together with all interest accrued thereon, and redeposit the same including interest thereon to the account from which it was withdrawn for the purpose of effecting payment by the comptroller as provided by law.

(3) Nothing contained in this section shall, in any way, affect the right of a condemnee who has not accepted the condemnor's offer as payment in full from filing a claim in the court of claims within the time limited therefor. Furthermore, in the event three years from the date of any deposit made pursuant to this subdivision have elapsed, and no application for distribution as aforesaid has been made, the comptroller may, without any court order, withdraw the sum deposited together with all interest accrued thereon and redeposit the same in the account from which such sum was withdrawn for the purpose of effecting payment by the comptroller as provided by law.

(4) Notwithstanding the provisions of paragraphs one and two of this subdivision, the comptroller is authorized, at his discretion, to make any deposits required pursuant to paragraphs one and two of this subdivision into the eminent domain account created pursuant to section ninety-seven-dd of the state finance law. Such deposits may be invested with other state moneys by the comptroller in those obligations specified in section ninety-eight-a of the state finance law. Notwithstanding the provisions of section sixteen of the state finance law or any other general or special law to the contrary, if moneys are deposited by the comptroller in the eminent domain account established pursuant to section ninety-seven-dd of the state finance law, the condemnee shall be entitled to receive interest at the rate determined by the comptroller based on the rate of earnings of such investments during the period of deposit.

(F) At any time subsequent to making the written offer, the amount of such offer may be adjusted or revised by the condemnor to reflect correction of error or miscalculation.

(G) The reservation of the right to claim additional compensation, pursuant to paragraph three of subdivision (A) of this section, shall not extend or affect in any way the time limit for the filing of such claim as provided in section five hundred three of this law.

(H) When an advance payment to a condemnee made pursuant to this section by the condemnor exceeds the award of the court for that property, the court shall, on motion, enter judgment in favour of the condemnor for the amount of such excess and appropriate interest. Such motion shall be made on notice served within thirty days after delivery to the condemnor of the decision of the court making the award.

**"S 305. Use and occupancy.**

(A) A condemnee, tenant or other person holding, using or occupying property acquired pursuant to this chapter, shall be liable to the condemnor for the fair and reasonable value of such holding, use or occupancy from the date of acquisition to the date the property is vacated and possession surrendered to the condemnor. Provided, however, that in the event the property at the time of acquisition is occupied by the former owner for residential purposes, the liability of such former owner for the fair and reasonable value of such residential holding shall not commence until ninety days after the date of acquisition or until the date on which the property ceases to be occupied by the former owner for residential purposes, whichever occurs first.

(B) The amount of the fair and reasonable value for such temporary use and occupancy

established by the condemnor shall be paid to the condemnee at reasonable intervals; any amount due and payable may be retained by the condemnor from any unpaid damage or consideration to be paid by it to such condemnee, tenant or other person for the property or interest therein acquired from him. Either party may bring an action and make application to a court of competent jurisdiction to establish the fair and reasonable amount of money due for such holding, use or occupancy of the property, in the event the value established by the condemnor is unacceptable. The condemnor may enforce any judgment ensuing from such actions according to the applicable provisions of law.

(C) Where a condemnee, tenant or other person holding, using or occupying property acquired pursuant to this chapter is entitled to an award for the acquisition of the property by the condemnor, any unpaid portion of the sum fixed for use and occupancy either by agreement, expressed or implied, or by court action to establish the same, shall be a lien against such award, or payment by agreement, subject only to liens of record at the time of the vesting of title in the condemnor and liens under section four hundred seventy-five of the judiciary law."

**New York:** Other miscellaneous compensation rules.

From Chap 73 THE CONSOLIDATED LAWS - EMINENT DOMAIN  
PROCEDURE LAW - NEW YORK

**"S 701. Additional allowance.** In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred.

**"S 702. Incidental expenses.**

(A) The condemnor shall reimburse a condemnee an amount separately computed and stated, representing the following incidental expenses:

- (1) any recording fees, transfer taxes and other similar expenses in connection with the acquisition of the property by the condemnor or in connection with the transfer of the property to the condemnor; and
- (2) any penalty incurred by the condemnee for prepayment of any preexisting recorded mortgage entered into in good faith, encumbering such property; and
- (3) the pro rata portion of the real property taxes, water rents, sewer rents, special ad valorem taxes and other charges paid or payable to a taxing entity which are allocable to a period subsequent to the date of vesting title or the effective date of possession of such property in the condemnor, whichever is earlier.

(B) In the event that the procedure to acquire such property is abandoned by the condemnor, or a court of competent jurisdiction determines that the condemnor was not legally authorized to acquire the property, or a portion of such property, the condemnor shall be obligated to reimburse the condemnee, an amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, and other damages actually incurred by such condemnee because of the acquisition procedure.

(C) In the event that a court of competent jurisdiction determines that the condemnor did in fact take property after the condemnor denied that there was any taking of property and made no offer to settle the claim, the condemnor shall be obligated to reimburse a condemnee an amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees incurred in establishing the de facto taking.

**"Sec. 708. Acquisition of other than real property.** Whenever any condemnor is authorized to acquire for a public use, title to property other than real property, the acquisition of such property shall be in the manner and procedure prescribed for the acquisition of real property under this chapter."

The following are the general provisions from the California State Code that relate to compensation.

**"CODE OF CIVIL PROCEDURE**

**PART 3, Title 7:**

**Article 1. General Provisions**

1263.010. (a) The owner of property acquired by eminent domain is entitled to compensation as provided in this chapter.

(b) Nothing in this chapter affects any rights the owner of property acquired by eminent domain may have under any other statute.

In any case where two or more statutes provide compensation for the same loss, the person entitled to compensation may be paid only once for that loss.

1263.015. At the request of an owner of property acquired by eminent domain, the public entity may enter into an agreement with the owner specifying the manner of payment of compensation to which the owner is entitled as the result of the acquisition. The agreement may provide that the compensation shall be paid by the public entity to the owner over a period not to exceed 10 years from the date the owner's right to compensation accrues. The agreement may also provide for the payment of interest by the public entity; however, the rate of interest agreed upon may not exceed the maximum rate authorized by Section 16731 or 53531 of the Government Code, as applicable, in connection with the issuance of bonds.

1263.020. Except as otherwise provided by law, the right to compensation shall be deemed to have accrued at the date of filing the complaint.

**Article 2. Date of Valuation**

1263.110. (a) Unless an earlier date of valuation is applicable under this article, if the plaintiff deposits the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 or the amount of the award in accordance with Article 2 (commencing with Section 1268.110) of Chapter 11, the date of valuation is the date on which the deposit is made.

(b) Whether or not the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 and the amount on deposit is not increased accordingly within the time allowed under Section 1255.030, no deposit shall be deemed to have been made for the purpose of this section.

1263.120. If the issue of compensation is brought to trial within one year after commencement of the proceeding, the date of valuation is the date of commencement of the proceeding.

1263.130. Subject to Section 1263.110, if the issue of compensation is not brought to trial within one year after commencement of the proceeding, the date of valuation is the date of the commencement of the trial unless the delay is caused by the defendant, in which case the date of valuation is the date of commencement of the proceeding.

1263.140. Subject to Section 1263.110, if a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of such new trial unless, in the interest of justice, the court ordering the new trial orders a different date of valuation.

1263.150. Subject to Section 1263.110, if a mistrial is declared and the retrial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of the retrial of the case unless, in the interest of justice, the court declaring the mistrial orders a different date of valuation.

### **Article 3. Compensation for Improvements**

1263.205. (a) As used in this article, "improvements pertaining to the realty" include any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation.

(b) In determining whether particular property can be removed "without a substantial economic loss" within the meaning of this section, the value of the property in place considered as a part of the realty should be compared with its value if it were removed and sold.

1263.210. (a) Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation.

(b) Subdivision (a) applies notwithstanding the right or obligation of a tenant, as against the owner of any other interest in real property, to remove such improvement at the expiration of his term.

1263.230. (a) Improvements pertaining to the realty shall not be taken into account in determining compensation to the extent that they are removed or destroyed before the earliest of the following times:

(1) The time the plaintiff takes title to the property.

(2) The time the plaintiff takes possession of the property.

(3) If the defendant moves from the property in compliance with an order for possession, the date specified in the order; except that, if the defendant so moves prior to such date and gives the plaintiff written notice thereof, the date 24 hours after such notice is received by the plaintiff.

(b) Where improvements pertaining to the realty are removed or destroyed by the defendant at any time, such improvements shall not be taken into account in determining compensation. Where such removal or destruction damages the remaining property, such damage shall be taken into account in determining compensation to the extent it reduces the value of the remaining property.

1263.240. Improvements pertaining to the realty made subsequent to the date of service of summons shall not be taken into account in determining compensation unless one of the following is established:

(a) The improvement is one required to be made by a public utility to its utility system.

(b) The improvement is one made with the written consent of the plaintiff.

(c) The improvement is one authorized to be made by a court order issued after a noticed hearing and upon a finding by the court that the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement. The court may, at the time it makes an order under this subdivision authorizing the improvement to be made, limit the extent to which the improvement shall be taken into account in determining compensation.

1263.250. (a) The acquisition of property by eminent domain shall not prevent the defendant from harvesting and marketing crops planted before or after the service of summons. If the plaintiff takes possession of the property at a time that prevents the defendant from harvesting and marketing the crops, the fair market value of the crops in place at the date the plaintiff is authorized to take possession of the property shall be included in the compensation awarded for the property taken.

(b) Notwithstanding subdivision (a), the plaintiff may obtain a court order precluding the defendant from planting crops after service of summons, in which case the compensation awarded for the property taken shall include an amount sufficient to compensate for loss caused by the limitation on the defendant's right to use the property.

1263.260. Notwithstanding Section 1263.210, the owner of improvements pertaining to the realty may elect to remove any or all such improvements by serving on the plaintiff within 60 days after service of summons written notice of such election. If the plaintiff fails within 30 days thereafter to serve on the owner written notice of refusal to allow removal of such improvements, the owner may remove such improvements and shall be compensated for their reasonable removal and relocation cost not to exceed the market value of the improvements. Where such removal will cause damage to the structure in which the improvements are located, the defendant shall cause no more damage to the structure than is reasonably necessary in removing the improvements, and the structure shall be valued as if the removal had caused no damage to the structure.

1263.270. Where an improvement pertaining to the realty is located in part upon property taken and in part upon property not taken, the court may, on motion of any party and a determination that justice so requires, direct the plaintiff to acquire the entire improvement, including the part located on property not taken, together with an easement or other interest reasonably necessary for the demolition, removal, or relocation of the improvement."

The provisions implement a form of the willing seller willing/buyer measure of market value.

#### **"Article 4. Measure of Compensation for Property Taken**

1263.310. Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.

1263.320. (a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

(b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

1263.321. A just and equitable method of determining the value of nonprofit, special use property for which there is no relevant, comparable market is as set forth in Section 824 of the Evidence Code, but subject to the exceptions set forth in subdivision (c) of Section 824 of the Evidence Code.

1263.330. The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:

- (a) The project for which the property is taken.
- (b) The eminent domain proceeding in which the property is taken.
- (c) Any preliminary actions of the plaintiff relating to the taking of the property.

#### **"Article 5. Compensation for Injury to Remainder**

1263.410. (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.

(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation

required to be awarded for the property taken or from the other compensation required by this chapter.

1263.420. Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken. (b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

1263.430. Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken.

1263.440. (a) The amount of any damage to the remainder and any benefit to the remainder shall reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized.

(b) The value of the remainder on the date of valuation, excluding prior changes in value as prescribed in Section 1263.330, shall serve as the base from which the amount of any damage and the amount of any benefit to the remainder shall be determined.

1263.450. Compensation for injury to the remainder shall be based on the project as proposed. Any features of the project which mitigate the damage or provide benefit to the remainder, including but not limited to easements, crossings, underpasses, access roads, fencing, drainage facilities, and cattle guards, shall be taken into account in determining the compensation for injury to the remainder.

#### **"Article 6. Compensation for Loss of Goodwill**

1263.510. (a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

(1) The loss is caused by the taking of the property or the injury to the remainder.

(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.

(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

(b) Within the meaning of this article, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

1263.520. The owner of a business who claims compensation under this article shall make available to the court, and the court shall, upon such terms and conditions as will preserve their confidentiality, make available to the plaintiff, the state tax returns of the business for audit for confidential use solely for the purpose of determining the amount of compensation under this article. Nothing in this section affects any right a party may otherwise have to discovery or to require the production of documents, papers, books, and accounts.

1263.530. Nothing in this article is intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business.

#### **"Article 7. Miscellaneous Provisions**

1263.610. A public entity and the owner of property to be acquired for public use may make an agreement that the public entity will: (a) Relocate for the owner any structure if such relocation is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of such relocation.

(b) Carry out for the owner any work on property not taken, including work on any structure, if the performance of the work is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of the work.

1263.620. (a) Where summons is served during construction of an improvement or installation of machinery or equipment on the property taken or on the remainder if such property is part of a larger parcel, and the owner of the property ceases the construction or installation due to such service, the owner shall be compensated for his expenses reasonably incurred for work necessary for either of the following purposes:

- (1) To protect against the risk of injury to persons or to other property created by the uncompleted improvement.
- (2) To protect the partially installed machinery or equipment from damage, deterioration, or vandalism.

(b) The compensation provided in this section is recoverable only if the work was preceded by notice to the plaintiff except in the case of an emergency. The plaintiff may agree with the owner

- (1) that the plaintiff will perform work necessary for the purposes of this section or
- (2) as to the amount of compensation payable under this section.

**"Article 8. Remediation of Hazardous Materials on Property to be Acquired by School Districts**

1263.710. (a) As used in this article, "remedial action" and "removal" shall have the meanings accorded to those terms in Sections 25322 and 25323, respectively, of the Health and Safety Code.

(b) As used in this article, "required action" means any removal or other remedial action with regard to hazardous materials that is necessary to comply with any requirement of federal, state, or local law.

1263.711. As used in this article, "hazardous material" shall have the same meaning as that term is defined in Section 25260 of the Health and Safety Code, except that under no circumstances shall petroleum which is naturally occurring on a site be considered a hazardous material.

1263.720. (a) Upon petition of any party to the proceeding, the court in which the proceeding is brought shall specially set for hearing the issue of whether any hazardous material is present within the property to be taken.

(b) If the court determines that any hazardous material is present within the property to be taken, the court shall do all of the following:

(1) Identify those measures constituting the required action with regard to the hazardous material, the probable cost of the required action, and the party that shall be designated by the court to cause the required action to be performed.

(2) Designate a trustee to monitor the completion of the required action and to hold funds, deducted from amounts that are otherwise to be paid to the defendant pursuant to this title, to defray the probable cost of the required action.

(3) Transfer to the trustee funds necessary to defray the probable cost of the required action from amounts deposited with the court pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 or pursuant to Section 1268.110. In the case of any payment to be made directly to the defendant pursuant to Section 1268.010, the plaintiff shall first pay to the trustee the amount necessary to defray the probable cost of the required action, as identified by the court, and shall pay the remainder of the judgment to the defendant.

The total amount transferred or paid to the trustee pursuant to this paragraph shall not exceed an amount equal to 75 percent of the following, as applicable:

(A) Prior to entry of judgment, the amount deposited as the probable amount of compensation pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

(B) Subsequent to entry of judgment, the fair market value of the property taken, as determined pursuant to Article 4 (commencing with Section 1263.310). If the amount determined as fair market value pursuant to that article exceeds the amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6, that excess shall be available, subject to the 75 percent limit set forth in this paragraph, for transfer to the trustee for the

purposes of this paragraph or for reimbursement of the plaintiff for payments made to the trustee pursuant to this paragraph. If the amount determined as fair market value pursuant to Article 4 (commencing with Section 1263.310) is less than the amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6, the plaintiff shall be entitled to a return of amounts thereby deposited, a judgment against the defendant, or both, as necessary to ensure that the total amount transferred or paid to the trustee pursuant to this paragraph not exceed an amount equal to 75 percent of the fair market value of the property taken, as determined pursuant to Article 4 (commencing with Section 1263.310).

(4) Establish a procedure by which the trustee shall make one or more payments from the funds it receives pursuant to paragraph (3) to the party causing the required action to be performed, upon completion of all or specified portions of the required action. Any amount of those funds that remains following the completion of all of the required action shall be applied in accordance with the provisions of this title that govern the disposition of the deposit amounts referred to in paragraph (3).

(c) The actual and reasonable costs of the trustee incurred pursuant to this section shall be paid by the plaintiff.

1263.730. Where the required action is caused to be performed by the plaintiff, and the amount available to the trustee under this article is insufficient to meet the actual cost incurred by the plaintiff to complete the required action, the plaintiff may either apply to the court for a new hearing regarding identification of the probable cost, or complete the required action at its own expense and bring an action against the defendant to recover the additional costs.

1263.740. The presence of any hazardous material within a property shall not be considered in appraising the property, for purposes of Section 1263.720, pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6, or pursuant to Article 4 (commencing with Section 1263.310).

1263.750. (a) Notwithstanding any action taken pursuant to this article, the plaintiff shall have available all remedies in law that are available to a purchaser of real property with respect to any cost, loss, or liability for which the plaintiff is not reimbursed under this article.

(b) If the plaintiff abandons the proceeding at any time, the plaintiff shall be entitled to compensation for the benefit, if any, conferred on the property by reason of the remedial action performed pursuant to this article. That benefit shall be applied as an offset to the amount of any entitlement to damages on the part of the defendant pursuant to Section 1268.620 or, if it exceeds the amount of those damages, shall constitute a lien upon the property, to the extent of that excess, when recorded with the county recorder in the county in which the real property is located. The lien shall contain the legal description of the real property, the assessor's parcel number, and the name of the owner of record as shown on the latest equalized assessment roll. The lien shall be enforceable upon the transfer or sale of the property, and the priority of the lien shall be as of the date of recording. In determining the amount of the benefit, if any, neither party shall have the burden of proof. For the purposes of this subdivision, "benefit" means the extent to which the remedial action has enhanced the fair market value of the property.

1263.760. An offer by the plaintiff to purchase the property subject to this article shall be deemed to satisfy the requirements of Section 7267.2 of the Government Code.

1263.770. This article shall only apply to the acquisition of property by school districts."

Further provisions in respect of compensation in Florida include:

**"73.071 Jury trial; compensation; severance damages; business damages.--**

(1) When the action is at issue, and only upon notice and hearing to set the cause for trial, the court shall impanel a jury of 12 persons as soon as practical considering the reasonable necessities of the court and of the parties, and giving preference to the trial of eminent domain cases over other civil actions, and submit the issue of compensation to them for determination, which issue shall be tried in the same manner as other issues of fact are tried in the circuit courts.

(2) The amount of such compensation shall be determined as of the date of trial, or the date upon which title passes, whichever shall occur first.

(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

(a) The value of the property sought to be appropriated;

(b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 4 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recover such special damages shall set forth in his or her written defenses the nature and extent of such damages; and

(c) Where the appropriation is of property upon which a mobile home, other than a travel trailer as defined in s. 320.01, is located, whether or not the owner of the mobile home is an owner or lessee of the property involved, and the effect of the taking of the property involved requires the relocation of such mobile home, the reasonable removal or relocation expenses incurred by such mobile home owner, not to exceed the replacement value of such mobile home. The compensation paid to a mobile home owner under this paragraph shall preclude an award to a mobile home park owner for such expenses of removal or relocation. Any mobile home owner claiming the right to such removal or relocation expenses shall set forth in his or her written defenses the nature and extent of such expenses. This paragraph shall not apply to any governmental authority exercising its power of eminent domain when reasonable removal or relocation expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power.

(4) When the action is by the Department of Transportation, county, municipality, board, district, or other public body for the condemnation of a road, canal, levee, or water control facility right-of-way, the enhancement, if any, in value of the remaining adjoining property of the defendant property owner by reason of the construction or improvement made or contemplated by the petitioner shall be offset against the damage, if any, resulting to such remaining adjoining property of the defendant property owner by reason of the construction or improvement. However, such enhancement in the value shall not be offset against the value of the property appropriated, and if such enhancement in value shall exceed the damage, if any, to the remaining adjoining property, there shall be no recovery over against such property owner for such excess.

(5) Any increase or decrease in the value of any property to be acquired which occurs after the scope of the project for which the property is being acquired is known in the market, and which is solely a result of the knowledge of the project location, shall not be considered in arriving at the value of the property acquired. For the purpose of this section, the scope of the project for which the property is being acquired shall be presumed to be known in the market on or after the condemnor executes a resolution which depicts the location of the project.

(6) The jury shall view the subject property upon demand by any party or by order of the court.

(7) If the jury cannot agree on a verdict the court shall discharge them, impanel a new jury, and proceed with the trial.

History.--s. 1, ch. 65-369; ss. 23, 35, ch. 69-106; s. 1, ch. 70-283; s. 1, ch. 77-51; s. 19, ch. 79-400; s. 36, ch. 85-180; s. 361, ch. 95-147; ss. 58, 59, ch. 99-385.

[Note.--Section 59, ch. 99-385, provides that "[e]ffective January 1, 2000, the amendments to subsection (3) of section 73.071, Florida Statutes, as contained in this act shall stand repealed effective January 1, 2003."

**"73.0715 Valuation of electric utility property.--**When any person having the right to exercise the power of eminent domain seeks the appropriation of property used for the generation, transmission, or distribution of electric energy, the jury shall determine solely the amount of compensation to be paid. Such compensation shall include the reproduction cost of the property sought to be appropriated less depreciation, together with going concern value, and, when less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking.

History.--s. 2, ch. 82-53.

*73.072 Mobile home parks; compensation for permanent improvements by mobile home owners.--*

(1) When all or a portion of a mobile home park as defined in s. 723.003(6) is appropriated under this chapter, the condemning authority shall separately determine the compensation for any permanent improvements made to each site. This compensation shall be awarded to the mobile home owner leasing the site if:

- (a) The effect of the taking includes a requirement that the mobile home owner remove or relocate his or her mobile home from the site;
- (b) The mobile home owner currently leasing the site has paid for the permanent improvements to the site; and
- (c) The value of the permanent improvements on the site exceeds \$1,000 as of the date of taking.

(2) "Permanent improvement" means any addition or improvement to the site upon which a mobile home is located, which addition or improvement cannot be detached and removed from the site without destroying its practical utility at another site. If capable of removal to another site, compensation for the expense of removal and relocation shall be as provided by law.

(3) A mobile home owner who is the lessee of the site and is required to remove his or her mobile home as the result of a taking of all or a part of a mobile home park may petition to intervene as a party defendant in proceedings under this chapter, for purposes of asserting his or her right to the separate compensation to be determined and awarded under this section. Failure to intervene shall not constitute a waiver of the right of a mobile home owner to institute a separate action to recover from a mobile home park owner the compensation awarded to such park owner for the permanent improvements made by the mobile home owner to the site on which his or her mobile home is located.

History.--s. 1, ch. 78-315; s. 4, ch. 84-80; s. 9, ch. 87-224; s. 362, ch. 95-147."

***iii whether powers of compulsory acquisition exist and if so, the criteria under which such provisions can be invoked including whether the powers can be delegated and to whom;***

Yes. The powers of compulsory acquisition are called condemnation.

***iv whether separate provisions exist for the acquisition of land by agreement and, if so, whether the compensation provisions are set in legislation and are the same as for the compulsory acquisition of land. Include any ability to delegate the powers of acquisition;***

See the Federal Code

**"Sec. 4651. Uniform policy on real property acquisition practices**

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

***v whether a definition of "public work" or "public purpose" is provided and whether there is any differentiation between "essential" work and "non essential" work;***

From Chap 73 THE CONSOLIDATED LAWS - EMINENT DOMAIN  
PROCEDURE LAW - NEW YORK

There is no definition of public work or public purpose, but public project is defined. See below:

"s103(G) "Public project" means any program or project for which acquisition of property may be required for a public use, benefit or purpose.

*vi the mechanism for recording the transfer of ownership to the state;*

No relevant information.

*vii what interest in land may be acquired;*

California

"CHAPTER 3. THE RIGHT TO TAKE

Article 2. Rights included in Grant of Eminent Domain Authority

CODE OF CIVIL PROCEDURE

SECTION 1240.110-1240.160

1240.110. (a) Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any interest in property necessary for that use including, but not limited to, submerged lands, rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, right of temporary occupancy, public utility facilities and franchises, and franchises to collect tolls on a bridge or highway.

(b) Where a statute authorizes the acquisition by eminent domain only of specified interests in or types of property, this section does not expand the scope of the authority so granted."

*viii whether there are any distinctions between the use of acquisition powers by federal or state agencies;*

There are differences between the state and federal codes as to powers of condemnation. However the respective statutory provisions impose similar procedures and rules. Furthermore the constitutions of each state protect property rights in a similar manner to the federal constitution. Whether the federal or state provisions apply to a condemnation depends on the agency making acquisition and possibly the location of the land. See previous discussion on that point.

*ix whether acquisition of aboriginal lands is dealt with in a different manner in any of the above respects. Include whether the compensation provisions contemplate a "valuation of or compensation for" spiritual or other special values that aboriginal peoples may have in respect of land.*

It does not appear that spiritual or other special values that aboriginal peoples may have in respect of land are taken into account in awarding compensation. On the contrary in the past aboriginal title has seen as being excluded from the ordinary constitutional protections in respect of the confiscation of property. State organisations have been free to confiscate land and extinguish aboriginal title without paying compensation and without due process.

**b) Disposal provisions.**

The only State that seemed to have any kind of regulated disposal mechanisms was

New York. These are set out below. The provisions are quite limited in their application.

*i the general principles adopted when land held for a public purpose is no longer required for that purpose (or any other public purpose);*

New York

From Chap 73 THE CONSOLIDATED LAWS - EMINENT DOMAIN  
PROCEDURE LAW

**"Sec. 406. Abandonment.**

(A) If, after an acquisition in fee pursuant to the provisions of this chapter, the condemnor shall abandon the project for which the property was acquired, and the property has not been materially improved, the condemnor shall not dispose of the property or any portion thereof for private use within ten years of acquisition without first offering the former fee owner of record at the time of acquisition a right of first refusal to purchase the property at the amount of the fair market value of such property at the time of such offer. In the event that the acquisition was a partial taking in fee, such offer need not be made unless such former fee owner has title to the contiguous remainder parcel at the time the condemnor determines to dispose of the property. A notice of the offer shall be served on the former fee owner by registered or certified mail return receipt requested. Such former fee owner shall have sixty days after service of such notice to serve a written acceptance upon the condemnor.

(B) Where the condemnor has in good faith and with reasonable diligence attempted to ascertain the identity of persons entitled to notice under this section and mailed notice to the last known address of record of those ascertained, the failure to in fact notify those persons entitled thereto shall not invalidate any subsequent disposition of property pursuant to this section."

*ii whether provisions (similar to the statutory offer contained in section 40 of the Public Works Act 1981) exist to return surplus land to the person from whom it was acquired for the public purpose. Where such provisions exist, on what terms and conditions is such an offer made;*

New York has such provisions. See above. The other state and federal provisions examined have no such restrictions.

*iii any mechanism for returning land to successors of former owners where the former owner has died and whether this is restricted to immediate successors;*

No such mechanism was located..

*iv whether provisions exist to reunite the surplus land with the original title notwithstanding current land ownership;*

See s 406 of the New York Act detailed above.

*v where "offer back" type provisions do exist, whether there is any time limit after which an offer is not required, i.e. is the right of the former owner to receive an offer extinguished after a certain time period following acquisition;*

In New York there is a 10 year time limit after which offer back is not required. See s

406 above.

*vi the mechanism for recording the transfer of ownership to the state;*

No relevant information.

*vii what interest in land may be acquired;*

No relevant information.

*viii whether former aboriginal land is dealt with in a different manner.*

There is no indication that aboriginal land is dealt with in a different manner on disposal.

**c) Analysing what provisions exist for private providers (e.g. utility companies) of public services as against core and local government.**

See the following provisions from the Florida jurisdiction:

**"73.151 Railroads and canal companies.--**

(1) Whenever land sought to be condemned to the use of a railroad or canal company is in the possession, under any law of this state, of another railroad or canal company which is using the same in the construction or operation of its railroad or canal, the use of no more land than is necessary to furnish to the petitioner a right-of-way 105 feet in width across such railroad or canal shall be condemned for such use.

(2) If it shall be necessary for any railroad company organized under any law of this state to use, for the purpose of its road, any lands over which any other railroad company shall have previously acquired the right-of-way for its road, the right to use such lands may be acquired as in other cases. Such lands shall not be taken in a manner to interfere with the main track of the railroad first established except for crossing, as provided by law.

History.--s. 1, ch. 65-345; s. 1, ch. 65-369.

**"73.161 Right-of-way for telephone and telegraph over railroad right-of-way.--**

(1) If any telegraph or telephone company fails to secure the consent of any railroad or railway company for the construction of its lines along and upon the right-of-way of any railroad in this state, the same may be acquired by eminent domain. If the defendant railroad or railway company has a principal office or place of business in this state, and any portion of the right-of-way sought to be condemned extends into the county wherein such principal office or place of business is located, then the eminent domain action shall be had in such county. No map need be filed with the petition, but it shall state about how many poles per mile will be erected on such right-of-way, and about how far from each other, and from the centers of the main track of the railroad, their length and size, the depth they will be planted in the ground, and the amount of land that will be occupied by them. No pole shall be set at a greater distance than 10 feet from the outer edge of the right-of-way. In such action, the petitioner shall give bond for costs in the penalty of \$200, payable to the defendant, with surety to be approved by the clerk.

(2) The judgment shall authorize the petitioner to enter upon the right-of-way of the defendant and construct its lines thereon. Said judgment shall further provide that such lines shall be constructed so as not to interfere with the operation of the trains of said defendant or any telephone or telegraph line already upon such right-of-way; and, furthermore, that if, at any time, the railroad or railway company shall desire, for railway purposes, the immediate use of any land occupied by said petitioner, then the petitioner shall, upon reasonable notice in writing, at its own expense, remove its line to some other place adjacent thereto on such right-of-way so as not to interfere with the track or use of said railway or any telephone or telegraph line already on said right-of-way, and that the said line shall not be erected on any

embankment or slope of any cut of such right-of-way, and if at any time the said railroad or railway company shall require for railroad purposes its entire right-of-way at any point occupied by said line, the said petitioner shall, at such point, remove said line entirely off such right-of-way.

(3) The telegraph or telephone company by such action shall acquire only an easement in and to said railroad right-of-way for the purpose of constructing, maintaining, and operating its telegraph or telephone line thereon, and only the interests of such parties as are brought before the court shall be condemned in such action. If the easement or right-of-way claimed extends in or through more counties than one, the whole right and controversy may be heard and determined in any county into or through which such right-of-way extends, except as herein otherwise provided.

History.--s. 1, ch. 65-369. "

**d) Analysing the form of legislation and related legislation i.e. is the legislation enabling or prescriptive.**

Generally, enabling statutes that are governed by central rules.

**e) Analysing any general provisions or exclusions in public works legislation relating to aboriginal peoples vis a vis treaties, or agreements between a government and an aboriginal people.**

It seems that the USA is still a long way behind New Zealand in dealing with issues of native title. A clear example of the way native title has been dealt with in the US is given by the case of *Tee-Hit-Ton Indians v. United States* 348 US 272 (1955). In that case, the Supreme Court held that the United States may (with limited exceptions) take or confiscate the land or property of an Indian tribe without the due process of law and without paying just compensation, despite the protections given in the US Constitution. The Court found that property held by aboriginal title is not entitled to the constitutional protection that is accorded to all other property.

This right of occupation by the Indian Tribes is not viewed as a property right, but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties, but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legal enforceable obligation to compensate the Indian. See *Tee-Hit-Ton Indians v. United States*, supra, 348 U.S. at page 279, 75 SCt at page 317. The manner, method and time of such extinguishment are said to raise political not justiciable issues.

*South Dakota v. Bourland*, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993) In this case, Congress, in the Flood Control and Cheyenne River Acts, abrogated the Cheyenne River Sioux Tribe's rights under the Fort Laramie Treaty to regulate non-Indian hunting and fishing on lands taken by the United States for construction of the Oahe Dam and Reservoir.

*Fools Crow v. Gullet*, 706 F.2d 856 (8th Circ. C.A., 1983) Plaintiff spiritual leaders of the Lakota and Tsistsistas Nations, brought suit for declaratory and injunctive relief and damages in relation to the state's actions in developing and regulating public use of Bear Butte. This was said to violate the free exercise of religious rights under the first amendment, the American Indian Religious Freedoms Act, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The lower Court found the plaintiffs' interests to be outweighed by compelling

state interests in preserving the environment and the resource from further decay and erosion, protecting the health, safety, and welfare of park visitors, and improving public access to this unique site. On the ground that the Court below had not erred in fact or law, the appeal was dismissed.

See also the article below from the New York times which gives an idea of the magnitude of the difficulties faced by the United States a result of prior confiscation without compensation and due process.

“Battle Over Iroquois Land Claims Escalates”<sup>51</sup>

The Oneidas want 250,000 acres of rural New York between Syracuse and Utica. The Cayugas are staking claim to a 64,000-acre wishbone at the northern tip of Cayuga Lake. The Senecas are eyeing the Buffalo bedroom community of Grand Island. And the Mohawks, though distracted by a possible Catskills casino, are asking for various islands and parcels straddling the Canadian border....

For years, these Indian nations, all members of the Iroquois confederation, have demanded the return of vast swaths of land based on treaties dating back to George Washington's administration. But within the next few months, the stakes will increase as two cases head toward a trial and the Onondagas file the last, and most valuable, Iroquois land claim: a heavily populated tract of 64,000 acres that includes Syracuse...."

These claims are similar to the New Zealand position in that they involve claims for land located in close proximity to non-native land as opposed to the reservation type situation. Such land was acquired by a variety of methods. In some cases the land was acquired via the power of eminent domain with the state resuming the land, often without just compensation or due process. In other cases the land was effectively confiscated. It is apparent that aboriginal title and land use rights were not recognised as giving full ownership rights but were mere rights of occupancy. In that regard the state felt able to acquire such land and simply extinguish native title. See the discussions below. Similar attitudes were prevalent in New Zealand, Australia and Canada during the colonial development phases of their respective legal histories.

"No one is saying that Syracuse will suddenly change hands, or that anyone will be forcibly uprooted. But with the Iroquois backed by the federal government, the claims will probably lead to settlements or litigation costing taxpayers hundreds of millions of dollars, and could intensify the anger over one of the biggest and touchiest topics in upstate New York...."

As with New Zealand the previous inappropriate actions of the state have exposed it to costly claims.

"And unlike other states, particularly in the West, which typically have Indian land claims in thinly populated areas resulting from the federal seizure of land, New York occupies a dubious position: it has more claims than any other state, but has been the slowest to resolve those claims, which total roughly 620 square miles, about double the size of New York City...."

As yet the United States does not appear to have legislated for the difficulties to the extent that has occurred in New Zealand or Australia. However there are various agreements and provisions in place in respect of “reservations”. The same applies in

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<sup>51</sup> Page 1 (New York Times), Tuesday, May 16, 2000. By David W Chen.

Canada. New Zealand and Australia have not followed this path of limited self determination.

"To some residents, the real issues are: Why us? Why now? The subject has triggered such an antagonistic reaction that it could be a major issue in the fall elections and a potential problem for the Democratic Senate candidate, Hillary Rodham Clinton, whose husband's administration has been accused by Gov. George E. Pataki of giving unconditional support to unfair Indian land claims and a lawsuit naming 20,000 landowners as defendants....

During the late 1700's and early 1800's, New York State bought or seized most Iroquois properties without Congressional ratification, thereby violating the Federal Trade and Intercourse Act of 1790. Yet for years, the Iroquois failed to reverse these deals, stymied by discrimination and legal obstacles....

In 1970, the Oneidas became the first Iroquois nation to file a land claim in federal court. And in 1985, the Supreme Court sided with the Oneidas, in a 5to4 decision concerning a test case that named Oneida and Madison Counties as defendants and claimed only 900 acres. At that point, the state and the Oneidas began settlement talks, which yielded mostly accusations of footdragging. Then, in December 1998, the Oneidas and the Justice Department, hoping to pressure the state and the two counties, moved to name 20,000 landowners as defendants....People noticed....

Mr. Pataki, for instance, sent a pointed letter to President Clinton in early April, accusing the administration of offering "unconditional support" to a tribe that held residents "hostage under clouded real estate titles and the constant threat of eviction, while systematically executing a plan to amass large quantities of land upon which it pays no real estate taxes, evades all state and federal environmental and land use regulations, and wages a war of unfair business competition against the law abiding, taxpaying business owners in central New York.".....

And in the Senate campaign, both Mayor Rudolph W. Giuliani of New York and Mrs. Clinton have sympathized with the landowners, though neither has discussed the issue at length.

To date, the only land claim to go to trial in New York has been the Cayuga case. In 1980, the Cayugas, who have no land in New York, filed a claim for 64,000 acres in Seneca and Cayuga Counties. In February, a jury awarded them \$37 million in a decision that stunned the Cayugas, who had appraised the land at \$660 million. But a second phase of the trial is set to begin in July, and the Cayugas may challenge the award. In northeastern New York, the struggling Mohawks claimed 15,000 acres in 1985, mostly in St. Lawrence and Franklin Counties, as well as Barnhart Island the site of the New York Power Authority's Robert Moses Robert H. Saunders hydroelectric dam.

No less confusing are the Senecas, who live on three reservations and have two separate governments in western New York. They are claiming land in different areas, too, with the big prize being Grand Island, a middleclass Buffalo suburb, population 18,500, in the Niagara River. The Senecas filed their claim for roughly 18,000 acres in 1993. Not much happened, though, until late March, Mr. Rifkin said, when the state filed a motion to dismiss the case, based on old maps disputing the Senecas' historic claim."

The following discussion from Nichols is helpful and illustrative of judicial trends in the United States in respect of native lands.

"Sec 2.224 State acquisition of Indian lands.

The lands of an Indian tribe may be taken by eminent domain for town-site purposes. During the period when this country was developing and civilisation was spreading westward it was held to be for the public good that a civilised town be erected in lands otherwise incapable of

such settlement, the public good being considered synonymous with the public use.<sup>52</sup> Early judicial reasoning seemed to lead to extreme results, but it by no means followed that a white owner of a vast tract, who refused to allow its development, could be compelled to part with it to intending settlers. In distinguishing such a situation, the court specifically pointed out that Indians, in the eye of the law, are classed as dependents or wards, with infants and insane persons, and that the involuntary alienation of the property of such persons is a common subject of legislation.

Even in later years, and for purposes other than the spread of civilisation, appropriation of Indian lands by the state for the public use of the state has been permitted.<sup>53</sup> Congress has

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<sup>52</sup> *Indian Territory--Tuttle v. Moore*, 3 Ind. Ter. 712, 65 S.W. 585. Massachusetts--Cooms, Petitioner, 127 Mass. 278.

<sup>53</sup> *New York--Wadsworth v. Buffalo Hydraulic Ass'n*, 15 Barb. 83; *St. Rigis Tribe of Mohawk Indians v. State*, 4 Misc. (2d) 110, 158 N.Y.S.(2d) 540, rev'd, 5 A.D.(2d) 117, 168 N.Y.S.(2d) 894, aff'd, 5 N.Y.(2d) 24, 152 N.E.(2d) 411, cert. denied, 359 U.S. 910, 3 L. Ed. (2d) 573, 79 S. Ct. 586, in which the court said: This right of occupation by the Indian Tribes is not a property right, but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties, but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legal enforceable obligation to compensate the Indian. *Tee-Hit- Ton Indians v. United States*, supra, 348 U.S. at page 279, 75 SCt at page 317. And 'The manner, method and time of such extinguishment raise political not justiciable issues.'

See also *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347, 62 SCt 248, 252, 86 LEd 260. In our opinion, 'Original Indian Title' is not compensable. However, claimant tribe contends that its interest and rights in the land in question were sufficiently recognized by Great Britain and by Canada in their times and by the State of New York so as to make such interest and rights compensable; and that the Indians of New York in reference to compensability for the taking of their lands in this State have the protection of the State Constitution, Art. I, § 13, and of the Indian Intercourse Act, 25 U.S.C.A. § 177. Where the sovereign has declared that thereafter Indians are to hold certain lands permanently, compensation must be paid for subsequent taking. There is no particular form for recognition of Indian right of permanent occupancy. It may be established in a variety of ways, but there must be the definite intention by constituted authority to accord legal rights, not merely permissive occupation. *Tee-Hit-Ton Indians v. United States*, supra, 348 U.S. at pages 278-279, 75 SCt at pages 316-317; *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101, 69 SCt 968, 978, 93 L. Ed. 1231.

See also *Dixon v. State of New York*, 4 Misc.(2d) 76, 155 N.Y.S.(2d) 723, in which the court said: The Federal Government, generally, has paramount authority over Indians, but they are subject to State control and legislation when there is no conflict between the Federal and State laws. However, the Onondaga Tribe members, also referred to as Onondaga Nation of Indians, are wards of the State of New York. They are not an independent nation. (U. S. Code, tit. 25, § 71.) The sovereignty of the State of New York attaches, and the fee of the land is in the State and is regulated by the State Indian Law. The State has authority to appropriate property on the Indian Reservation for the construction and improvement of highways. (Indian Law, § 12; Highway Law, § 53; U. S. Code, tit. 25, § 311, 357; *O'Meara v. Commissioners of Highways of Towns of Alleghany & Carrollton*, 3 Thomp. & C. 235, rev'd. on other grounds sub nom. *Matter of Petition of Freeholders of Cattaraugus County*, 59 N. Y. 316; *France v. Erie Ry. Co.*, 2 Hun 513, opinion in 5 Thomp. & C. 12.)

See also *Jones Cut Stone Co. v. State of New York*, 7 Misc.(2d) 1048, 166 N.Y.S.(2d) 742. Contra--*Tuscarora Nation of Indians v. Power Authority of State of New York*, 257 F.(2d) 685 (U.S.C.A., 2nd Cir., July 24, 1958), reversing, on this point, 164 F. Supp. 107, app. dismissed as moot, 362 U.S. 608, 4 L. Ed.(2d) 1009, 80 S. Ct. 960. Cf. *Nicodemus v. Washington Water Power Co.*, 264 F.(2d) 614, in which the appellant argued that the order of the district court was void because the appellee failed to obtain approval or permission of the Secretary of the Interior before proceeding with the condemnation action. This contention was held to be without merit, the court saying: Appellant contends that the Congress specifically provided for a manner and means of condemning a right of way through Indian lands, Title 25 U.S.C.A. Chapter 8, Sections 311, 312, 313, 320 and 321; all of which requires approval of the Secretary of the Interior, which provides "that the Secretary of the Interior is authorized and empowered to grant a right-of-way and specifically defined the manner and means in which the approval of the Secretary of State (sic) shall be obtained, and the limitations of the state easements to

authorized the condemnation of Indian lands allotted in severalty, under the laws of the State in which the land is located.<sup>54</sup>The state is authorized to condemn for any public purpose as well

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be granted." We have carefully perused the sections designated by appellant. Section 311 deals with opening of highways. Section 312 deals with rights of way for railway, telegram and telephone lines; townsite stations. Section 313 deals with width of rights of way. Section 320 relates to acquisition of land for reservoirs or materials. Section 321 relates to rights of way for pipe lines. Section 323, Title 25 U.S.C.A. provides: "The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians." In our opinion Section 323 and Section 357 offer two methods for the acquisition of an easement across allotted Indian land for the construction of an electric transmission line. The United States has consented to both methods.

In *United States v. State of Minnesota*, 8 Cir., 113 F.2d 770, the question involved was whether the State of Minnesota might acquire by virtue of Section 357, Title 25 U.S.C.A., an easement over allotted land for the establishment of a public highway, without having first secured from the Secretary of the Interior permission for the opening and establishment of such public highway through allotted Indian land, as provided in Section 311, Title 25 U.S.C.A. The Court stated at page 773: "The land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highway. Section 3, 25 U.S.C.A. § 357, authorizes the maintenance of condemnation proceedings. By Section 4 of the Act, 25 U.S.C.A. § 311, the Secretary of the Interior is authorized to grant permission for the opening and establishment of a public highway through lands allotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, the Government having consented to each of these methods. So considered, each of these sections is an effective and reasonable provision in the procedure for the acquisition of a right of way, neither dependent upon the other." We hold that the appellee was not required to secure the permission of the Secretary of the Interior before initiating the condemnation suit under Section 357.

However, it has been held that authorization to acquire by condemnation does not authorize a taking of Indian lands and a consequent action in inverse condemnation. *United States-- United States v. Clarke*, 100 S. Ct. 1127 (1980), citing *Treatise*, and rev'g 590 F.2d 765. (See § 8.1[4] *infra*).

*Cherokee Nation of Oklahoma v. United States*, 782 F.2d 871 (10th Cir. 1986), where the United States Court of Appeals for the Tenth Circuit held that due compensation for any losses or diminution in property value was owed to an Indian nation when the government exercised a navigational servitude in the water way which ran through the land of that Indian nation. The Indian nation contended that they entered into a treaty with the United States government (hereinafter referred to as to the treaty of Echota) in which the government failed to reserve to itself an easement in the body of water where they wished to place a navigational servitude. The Indian nation asserted that this failure to reserve an easement granted the Indians a fee simple title to the bed of the Arkansas River; therefore, the navigational servitude should be disallowed. The court, however, felt that certain factors must be considered in determining whether the servitude should be allowed. After looking to the interest of interstate commerce, navigation improvement and the preservation of water ways for public use, the court decided that a navigational servitude could lie as an exception to the taking clause. After the decision to allow the servitude, the Indian nation then petitioned the court for compensation due them as a result of the imposition of the servitude. In deciding if such compensation was proper, the court balanced the public and private interests at stake. The court reached the conclusion that by allowing the navigational servitude rights which were granted to the Indian nation in the Treaty of New Echota would be altered or extinguished without the express authorization of Congress. The court insisted that the modification of an Indian treaty should not be taken "lightly"; therefore, the Indian nation had a right to just compensation from the government for any loss or diminution in property value which resulted from the imposition of a navigational servitude.

<sup>54</sup> *United States--25 U.S.C. § 357*. Condemnation of lands under laws of States Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as

as specifically for highway purposes.<sup>55</sup> This type of condemnation proceeding, to which the United States is an indispensable party, must be brought in federal court.<sup>56</sup> In this connection it may be pointed out that, although the United States has sought to regulate the land transactions of the Indians by the so-called "non-intercourse" acts of 1790, 1793, 1799, 1802 and 1834,<sup>57</sup> an exception has been made with respect to the power of the state.<sup>58</sup>

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damages shall be paid to the allottee. (Mar. 3, 1901, c. 832, § 3, 31 Stat. 1084.) See also *United States Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, 719 F. 2d 956. See also *Southern California Edison Co. v. Rice*, 685 F.2d 354. The principle has been applied to claims in inverse condemnation: *Department of Highways v. Crosby*, 410 P.2d 724, 729 (Alaska 1966).

<sup>55</sup> *United States--25 U.S.C. 311: Opening Highways* The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation. *United States v. City of Pawkaska*, 502 F.2d 821 (10th Cir. 1974). See also *United States v. City of McAlester*, 604 F.2d 42 (10th Cir. 1979); *Oklahoma Gas & Elec. Co. v. United States*, 609 F.2d 1365. But see: *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1979).

<sup>56</sup> *United States--Minnesota v. United States*, 305 U.S. 382, where the court, in an action based on 25 U.S.C. 311, supra, dismissing the condemnation action brought by Minnesota held the United States an indispensable party: The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States own the fee of these parcels, the right of way cannot be condemned without making it a party

<sup>57</sup> 25 U.S.C. 177.

<sup>58</sup> *United States--United States v. Franklin County*, 50 F. Supp. 152; See also *State of New Mexico, ex rel. State Highway Comm. of New Mexico v. United States*, 148 F. Supp. 508, in which the court said: One of the landmark cases as to the status and property rights of Indian Tribes is the case of *United States v. Cook*, 19 Wall 591, 86 U.S. 591, 22 L. Ed. 210, decided by the Supreme Court of the United States in 1873. The then Chief Justice Waite held in substance that the right of the Indians in certain lands in Wisconsin acquired by the Menomonee Tribe by Treaty and agreement with the Government was that of occupancy, alone. He further stated that Indians, as such, had no power of alienation, except to the United States. The fee was in the United States, subject only to this right of occupancy. He stated: "This is the title by which other Indians hold their lands." The *Candelaria* case decided the additional point, among others, that a Pueblo community in New Mexico is a juristic person with capacity to sue and defend, with respect to its lands. I can come to but one conclusion, after reading the *Candelaria* case, and that is that to acquire title to Indian lands of whatsoever nature, the title of both the Indian Pueblo on the one hand, and of the United States of America on the other hand, must be acquired, either by agreement or by eminent domain, exercised within the ambit of Congressional enactment.

The Court of Appeals concluded that the United States was an indispensable party to the condemnation proceedings. When each of the foregoing authorities are considered, and the many Acts of Congress dealing with Indian lands are studied, this Court, at least, has come to the ultimate opinion that there are certain characteristics concerning the title to Indian lands common in all Indian titles. In the first place, under all of the Indian land title actions, certain possessory rights are granted the Indians, sometimes communally, sometimes jointly and sometimes severally. Secondly, there are certain restraints upon alienation reserved in the sovereign power of the United States of America. This may be under the provisions of an Executive Order, under the terms of a conveyance to the Tribe, or under the terms of a trust deed wherein the United States of America is the trustee and either the Tribes or individual allottees are the beneficiaries.

As can be seen, there may be varying rights as between the Government of the United States on the one hand, and the Indian Tribes or individuals therein on the other. The ramifications of these problems need not be further elaborated upon, here. Suffice it to say, there is either the relationship of trustee and beneficiary, or of guardian and ward. In either event, both the guardian or trustee must be a proper and indispensable defendant in condemnation proceedings, and so, also, must the beneficiaries and wards. That this theory receives at least tacit approval from the courts and textbook writers, will be seen from

*United States v. Chavez*, 290 U.S. 357, 54 S. Ct. 217, 78 L. Ed. 360, and *Pueblo De San Juan v. United States*, 10 Cir., 47 F.(2d) 446. And in *Tuscarora Nation of Indians v. Power Authority of State of New York*, 164 F. Supp. 107, rev'd, 257 F.(2d) 685, appeal dismissed as moot, 362 U.S. 608, 4 L Ed (2d) 1009, 80 S. Ct. 960, the court stated: Plaintiff's land is unique among Indian lands in New York, having been purchased, rather than granted or ceded by the government. Plaintiff holds record title to the lands in dispute, but the effect of that title has not been determined. The act of the Legislature in 1821, after several petitions by plaintiff, permitted plaintiff to hold its land nationally and extended to it a tax-free status, and other protections constituting reservation status. It may be claimed that this had the effect of vesting the fee in the state in return for the favoured status granted.

Research reveals no previous decisions on either the ability of an Indian tribe to hold land in fee, if purchased, or the effect of giving purchased land reservation status. But that question need not be dealt with here. For it is clear that if the fee is in the state, it may be taken by the state. But if the fee is not in the state, then it is privately held. If privately held, the fee is subject to the power of eminent domain and just compensation for the taking, unless it falls within a category excluded by Federal law or the State Constitution. The plaintiff urges particularly Section 177 and Section 233 of Title 25 U. S. C. A., which was an amendment to the Indian Law becoming effective in September, 1952, and which the plaintiff claims excludes the alienation of lands in reservations in New York State. The Public Authorities Law, Section 1007 of the State of New York, contemplates a right of eminent domain in the sovereign state as Power Act, 16 U.S.C.A. § 814, from taking such lands. Moreover, the acquisition of property as taken by the State Power Authority is the method outlined in the State Highway Law of New York, Section 30. See 212 F.(2d) 227. Under the Federal Power Act, as held in

*Missouri v. Union Electric Light and Power Company*, 42 F.(2d) 692, necessity for taking property under power of eminent domain is exclusively within the power of Congress to determine by direct enactment or delegation of its power to an office or board. Under this section, a licensee, such as the Power of Authority of the State of New York, has a general power to take. See *Burnett v. Nebraska* etc., 147 Neb. 458, 23 N.W.(2d) 266;

*United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276. There is no constitutional requirement that the appropriation now involved be specifically authorized by an Act of Congress. The Federal law urged as applicable by plaintiff has been examined above and found to present no bar to the exercise of eminent domain in the sovereign state as has been examined, and, far from presenting a bar to public condemnation, discloses an intent by the state to exercise exclusive control over Indian lands in New York.

In addition, Section 233 of Title 25 U. S. C. A. in its reference to the alienation of Indian lands in New York meant merely that the general law of New York relating to the alienation of land should not, as a result of Sec. 233, be construed to apply to Indian lands, but rather that the peculiar nature of such lands (i.e. a mere possessory right in the Indian Nations), should continue to be recognized. If the Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incongruous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing, either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress.

However, on this point, the decision of the District Court in the Tuscarora case was reversed by the Court of Appeals, 2nd Cir. (July 24, 1958), 257 F.(2d) 685, appeal dismissed as moot, 362 U.S. 608, 4 L. Ed. (2d) 1009, 80 S. Ct. 960, the court said: Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U. S. C. A. § 233, pointed up and reaffirmed its paramount authority over Indian tribal lands. The primary question now to be decided is whether sections 177 and 233 of Title 25 U.S.C.A. prohibit the taking of any portion of the lands of the Tuscarora or whether the general power of the sovereign, namely, the United States, to take the lands of any of its subjects for appropriate public purposes, provided just compensation is paid, is paramount and impliedly written into all statutes affecting property. The court below came to the conclusion that 'There is no constitutional requirement that the appropriation now involved be specifically authorised by an act of Congress' and that neither sections 177 or 233 of Title

From the above it is clear that the United States jurisdiction has made no steps to restrict the acquisition of Indian land by compulsory means. Far from affording the type of special protection advocated by the Waitangi Tribunal here in New Zealand in respect of the acquisition of Maori land by compulsory means for public works, Indian land has tended to be less protected and susceptible to acquisition without proper compensation or process. Native title has been regarded as an inferior, occupation style right, enjoyed at the pleasure of the state.

### **Federal Acquisition of Indian lands.**

The Indian tribes are separate communities under the guardianship of the United States.<sup>59</sup> They have always been subject to the sovereignty of the United States<sup>60</sup> and, by virtue of such fact, have likewise been subject to the exercise of the federal power of eminent domain.<sup>1</sup> The European nations which discovered and conquered the North American continent based their title to the land on the international principles of discovery and conquest. Their title was subject to the Indians' right of occupancy; the original states and the United States succeeded to the title of the European nations. Many of the treaties with the Indians dealt with their right of occupancy, and all grants from the Indians are considered not as grants of title but as releases of their right of occupancy.<sup>61</sup> By some treaties the Indians were vested with title to the lands they occupied. It is in connection with such titles that the power of eminent domain has been exercised. As guardian of the Indians and in the management of their property the federal government has done many things in connection with such property without the payment of compensation. The acts, however, are not manifestations of the federal power of eminent domain and are subject to constitutional restraint. If the federal government does, in fact, appropriate Indian

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25 U. S. C. A. presented any bar to the exercise of eminent domain. The wording of these two statutes does not, in our opinion, lead to such a conclusion.

New York-- *Seneca Nation v. Christie*, 126 N.Y. 122, 27 N.E. 275, aff'd, 162 U.S. 283, 40 L. Ed. 970, 16 S. Ct. 828. In *St. Regis Tribe of Mohawk Indians v. State of New York*, 5 N.Y.(2d) 24, 152 N.E.(2d) 411, the court said: The final point raised by claimants is that even if the 1856 payment be intended as a satisfaction of the claims of the Indians to Barnhart's Island, it cannot effect that result as it is in conflict with the Indian Intercourse Act (U.S.Code, tit. 25, § 177).

In *Seneca Nation of Indians v. Christie*, 126 N.Y. 122, at page 142, 27 N.E. 275, at page 280, we stated, with regard to that Act: 'There is room for question whether the act of 1802 was intended to apply to treaties made by a sovereign state with tribes within the state for the extinguishment of the Indian title to lands therein.' Our language in that case was the basis of a holding in *United States v. Franklin County*, D.C., 50 F. Supp. 152, to the effect that the provisions of the Indian Intercourse Act do not apply to the State of New York. No authority has been cited to us which would indicate a contrary result.

<sup>59</sup> *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 34 L. Ed. 195, 10 S. Ct. 965; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 47 L. Ed. 183, 23 S. Ct. 115; *United States v. Jim*, 34 L. Ed. 2d 282 (1982), in which the court said: It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members."

<sup>60</sup> *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 34 L. Ed. 295, 10 S. Ct. 965.

<sup>61</sup> *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681; *Holden v. Joy*, 17 Wall. 211, 21 L. Ed. 523.

lands for a public use it is considered an exercise of the power of eminent domain and compensation must be made.<sup>62</sup>

<sup>62</sup> *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 47 L. Ed. 183, 23 S. Ct. 115 (Tribal lands leased; rentals used for the benefit of the tribe). *Chase, Jr., v. United States*, 256 U.S. 1, 65 L. Ed. 801, 41 S. Ct. 417 (Sale of surplus lands). See also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 47 L. Ed. 299, 23 S. Ct. 216; *United States v. Alaska Packers Ass'n*, 79 F. 152, app. dismissed, 174 U.S. 803, 43 L. Ed. 1188, 19 S. Ct. 881; *Gritts v. Fischer*, 224 U.S. 640, 56 L. Ed. 928, 32 S. Ct. 580; *Sizemore v. Brady*, 235 U.S. 441, 59 L. Ed. 308, 35 S. Ct. 135.

United States-- *United States v. Pueblo of Taos*, 515 F.2d 1404 (Ct. Cl. 1975). *Choctaw Nation v. Atchison, T. & S.F. Ry.*, 396 F.(2d) 578. The court said: In *Tee-Hit- Ton Indians v. United States*, 348 U.S. 272, 281, 75 S.Ct. 313, 318, 99 L.Ed. 314, an aboriginal possession case, the Court said that: "No case in this Court has ever held that taking of Indian title or use by Congress required compensation." Each of these tribes "was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government." In *Choctaw Nation v. United States*, 119 U.S. 1, 27, 7 S.Ct. 75, 90, 30 L.Ed. 306, the Court, quoting from an earlier decision, said: "These Indian tribes are the wards of the nation; they are communities dependent on the United States "In exercising control and management, the United States must act in good faith and in the best interests of its wards. In making final disposition of the affairs of the tribes, Congress was faced with the problem of the vesture of title upon the abandonment of an easement. It determined that title should vest in the abutting landowners. These landowners were either Indian allottees or their successors in title. Such disposition was neither unfair to the Indians nor contrary to their best interests. The contingent right went to the individual Indians or those who held under them. The United States as guardian did not benefit from the results of abandonment.

As to the valuation of Indian lands taken by eminent domain, see *United States v. 205.03 Acres of Land*, 251 F. Supp. 858 (§ 12.32, footnote 17, infra ); *Confederated Salish & Kootenai Tribes v. United States*, 401 F.(2d) 785. See also *Inupiat Community of the Arctic Slope v. United States*, 680 F.2d 122 (Ct. Cl. 1982), in which the court said: Aboriginal title is a right of occupancy based on possession from time immemorial. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39, 65 S. Ct. 690, 692, 89 L. Ed. 985 (1945). Such title may be recognized or unrecognized. If recognized, its extinction is compensable; the taking of unrecognized title is not compensable. *Id.* at 338-40, 65 S. Ct. at 692-93. The Inupiat claim only unrecognized title.

In *Tee-Hit- Ton Indians v. United States*, 348 U.S. 272, 75 S. Ct. 313, 99 L. Ed. 314 (1955), the Supreme Court approved a decision of this court that the United States was not required to pay just compensation for taking timber from land in Alaska the Indians held by unrecognized aboriginal title. The Court stated that "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." *Id.* at 285, 75 S. Ct. at 320. The court explained that unrecognized aboriginal title means mere possession not specifically recognized as ownership by Congress . . . . This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. *Id.* at 279, 75 S. Ct. at 317. The Court quoted with approval the following statement from *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 347, 62 S. Ct. 248, 252, 86 L. Ed. 260 (1941): Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. 348 U.S. at 281, 75 S. Ct. at 318.

See also *United States v. Dann*, 706 F.2d 919 (1983), in which the court held: (1) "Aboriginal title" is the right of occupancy arising from aboriginal possession of land; it is valid against all parties until it is extinguished by the United States. (2) Extinguishment of aboriginal title by the United States does not give rise to a right of compensation under the Fifth Amendment. (3) Taking of recognized title, that may result from treaty or statute, gives rise to a right of compensation under the Fifth Amendment.

See also *Klamath and Modoc Tribes v. United States*, 436 F.(2d) 1008, in which the court said: When Congress deals with the Indian property it can act in one of two capacities. First, Congress can exercise

a guardianship over Indian property, derived from its plenary power recognized in the Constitution to control tribal Indian affairs. Or, it may exercise its fundamental power of eminent domain and take Indian property, for which it must pay just compensation. *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 390 F.2d 686, 690-693, 182 Ct.Cl. 543, 550-557 (1968). The court must determine in each instance, with regard to each piece of property, the capacity in which Congress has acted. In the general law of eminent domain there is no universal test to determine, where Congress has not expressed an intention to condemn, whether and when a taking has nevertheless occurred as a result of the Federal Government's conduct; a court must always evaluate the individual circumstances of the case to answer those questions. See *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958); *Arthwohl v. United States*, 434 F.2d 1319, 193 Ct. Cl. -- (Dec. 1970); *Eyherabide v. United States*, 345 F.2d 565, 567, 170 Ct.Cl. 598, 601 (1965); *R. J. Widen Co. v. United States*, 357 F.2d 988, 933-994, 174 Ct.Cl. 1020, 1027-1029 (1966). Where, however, as with the Antelope Desert, a taking is sought to be predicated on the Government's disposition of Indian property to third parties, the Fort Berthold opinion, *supra*, provides more detailed guidance. The criterion is whether Congress in disposing of the property has made a good faith effort to realize its full value for the Indians, whether it has in effect performed the trustee's traditional function of transmuting property into money. 390 F.2d at 691, 182 Ct.Cl. at 553. If the Government does so, there is no taking. If, on the other hand, the Government fails to make such an effort, it can be liable for a taking if it gives or sells the property to a third party. 390 F.2d at 693, *Id.* at 557.

See *United States v. Creek Nation*, 295 U.S. 103, 109-110, 55 S.Ct. 681, 79 L.Ed. 1331 (1935). Fort Berthold also recognized that, even if there has been no eminent domain taking, Indians could recover under the Indian Claims Commission Act, provided they could show that the consideration received for the property was so far below its fair market value as to amount to fraudulent conduct, gross negligence, or some other breach of the Government's fiduciary duty. 390 F.2d at 690, 182 Ct.Cl. at 551. The present cases come, not under the Claims Commission Act, but under 28 U.S.C. § 1491 and 1505, *supra*, note 19, and we need not now decide whether the same principle applies. By agreement of the parties, evidence of valuation was excluded from the trial, and therefore any liability predicated on the theory of breach of fiduciary duty as to the Antelope Desert or the other properties sold to third parties must await subsequent proceedings.

U.S.Const. art. I, § 8, cl. 3. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 350, 379, 8 L.Ed. 483 (1832); *Perrin v. United States*, 232 U.S. 478, 482, 34 S.Ct. 387, 58 L.Ed. 691 (1914). There is also a significant difference in the measure of recovery under the two theories. If a taking is found, plaintiffs are entitled to the fair market value of the property at the time of the taking, less any amount actually received for the property, plus interest on that sum from the date of the taking. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937); *United States v. Klamath Indians*, 304 U.S. 119, 123, 58 S.Ct. 799, 82 L.Ed. 1219 (1938); *Uintah and White River Bands of Ute Indians v. United States*, 152 F.Supp. 953, 139 Ct.Cl. 1 (1957). If, however, damages were awarded for the Government's breach of its fiduciary obligations, no interest would be recoverable.

See also *Confederated Salish and Kootenai Tribes v. United States*, 437 F.(2d) 458, in which the court said: With regard to the lands discussed in that portion of the commissioner's opinion, we are of the view that the defendant did take those lands by eminent domain, but that that conclusion is sufficiently grounded on the fact that Congress provided, in authorizing the disposition of the tribal lands to homesteaders, that the proceeds could be used for the benefit of non-Indians, i. e. through the irrigation project which was beneficial to white settlers as well as Indians. See Findings 12(b) and 12(c). We agree with the trial commissioner that such diversion to others of the proceeds of the Indians' land was inconsistent with a good faith effort to give the Indians the full money value of their land, and that under the principles of *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 390 F.2d 686, 182 Ct.Cl. 543 (1968), an eminent domain taking necessarily resulted. In this respect, the present case differs materially from *Klamath and Moadoc Tribes v. United States*, Ct.Cl., and *Anderson v. United States*, Ct.Cl., 1008 F.2d 436, in which we are today deciding that constitutional takings did not follow from the disposition of those tribal lands to third parties because the United States made a good faith effort to obtain full value for those Indians. The court expressly declined to agree with that part of the Commissioner's opinion dealing with lands disposed of to settlers. There the Commissioner had said: There can be, and is, no doubt that the United States has broad power to control and manage the property and affairs of its Indian wards in good faith for their welfare.

## **Australia: Further Analysis and Recommendations.**

### **Emerging trends in the approach taken in the acquisition and disposal of land required or held for public purposes.**

#### **Public Works processes.**

Australia has implemented a system which follows well established public works processes. Specific Acts empower bodies and organisations to exercise powers of compulsory acquisition. The scope and purpose for which the powers may be used are spread across these specific statutes. Umbrella legislation controls procedures for acquisition, compensation and disposal. The systems has tended to grow up state by state and opportunities to adopt a unify approach between the states and the Commonwealth government have not been taken. Generally the Australian Commonwealth regime has followed a similar path to New Zealand.

#### **Compensation.**

There has been a general move to fuller compensation. Gradually more heads of compensation have been able to be claimed for special losses or business losses. However the legislation still aims to achieve market value compensation as is the case in the other jurisdictions examined. There has been no move to go beyond market compensation in recognition of the compulsory nature of the process or to achieve faster acquisition. (It appears that such an approach is adopted in France which is reputed to have the most generous compensation regime in Europe). However it is possible that some organisations adopt a more generous approach to negotiated acquisitions.

#### **Native title.**

Initially the trend in Australia was to extinguish native title via wholesale acquisition, often without compensation. Similar activities were seen in the developmental periods in the history of New Zealand, the United States and Canada. There has now been a move to regulate this area following litigation which arose under the Racial Discrimination Act 1975. Now specialist legislation in the form of the Native Title Act protects native title. The Act implements the same protections for native title as exist for ordinary title holders under the land transfer system. As has happened in New Zealand with the Waitangi Tribunal process for investigating land claims the Native Title Act seeks to determine such claims, award compensation where appropriate and then ratify past acts which would otherwise have been invalid. The Native Title Act has moved to regulate future acts which involve extinguishment or dealings with native title. However the Act also creates the framework for Indigenous Land Use Agreements whereby dealings with native land may be negotiated and dealt with via registered contracts rather than resorting to further alienation.

### **Major differences in the approach in comparison with the New Zealand legislation.**

#### **Native title**

Acquisition and dealings with native title for public works for future purposes is now fully regulated by the Native Title Act. See previous discussions. A framework also exists for the negotiation of land use agreements in respect of the future use. This is considerably different to the New Zealand legislation which at this stage is mainly

concerned with addressing past inequities. The Australian approach is interesting given the recommendations of the Waitangi Tribunal that Maori land be acquired for public works only in limited circumstances and with full consultation. The Tribunal has also recommended that the Crown consider the acquisition of interests less than the fee to avoid further alienation. It was felt that such an approach also better reflects a “partnership approach” with the two parties remaining in a close relationship rather than the Crown simply taking land in exchange for compensation. This type of approach seems to suit the use of contractual land use agreements and could be similar to the acquisition of a leasehold right to use the land for public works purposes.

### **Federal and State structure.**

Australia operates a federal system different to New Zealand’s own system of government. There is more autonomy at state level in respect of public works procedures and acquisitions. There is thus no unified public works procedure as is seen in this country. Rather federal and state systems exist independently. Rights, procedures and protections will depend on which body is making an acquisition and which set of statutory procedures apply.

### **Disposal.**

Australia limits its disposal regime restrictions to a seven year period from the date of acquisition by compulsory process. In Victoria the restriction applies for 18 months only. This is a significant departure from the New Zealand position.

The application of the disposal restrictions also appears to be significantly different and afford the decision maker with a good deal of discretion. In particular the Minister need only “have regard to the general principle that the interest should, if practicable, be first offered for sale to the former owner at market value”. This is quite different to s 40 in New Zealand where if the statutory pre requisites are met (ie the land is surplus and the exemptions do not apply) the right of pre-emption automatically arises whether the position has been considered or not. (That has led to difficulties in New Zealand as discussed in the case law review).

In Australia it would appear that even where the exemptions do not apply the Minister need only consider the general principle that the land should be offered back, albeit that the Act makes it a mandatory or paramount and important consideration. It is strongly arguable that the Minister could still decide against an offer back if there were compelling and relevant reasons for doing so.

At the very least s 121 of the Commonwealth Act appears to avoid the difficulty in New Zealand where land automatically becomes subject to an offer back requirement once it is surplus on an objective basis. Once that occurs the New Zealand authority is under a positive obligation to offer the land back, whether that authority has considered the matter or not. In Australia there is no ability to dispose of land acquired for public works without Ministerial consent. Offer back is merely a mandatory ground that the Minister must have regard to in deciding whether to consent. No pre-emptive right would seem to vest in the former owner. The only legally enforceable expectation a former owner would have is that the Minister have regard to the mandatory consideration. In this regard the Australian provision is superior to that of New Zealand.

**Provisions considered to be most effective in ensuring the needs of the state for current and future public works can be met.**

**Native Title .**

The provisions of the Native Title Act for validating past acts involving public works which may have been illegal put an end to further expensive litigation arising on the basis of racial discrimination. The Act put in place processes for assessing compensation and cleaning up those previous injustices. This meant certainty could be re-established.

The restrictions on the future acquisition of native land also work to prevent further inequities and thus future claims. The previous methods involving the illegal and inequitable acquisition and extinguishment of native title were no longer a socially acceptable option. The present process establishes a system which protects native title holders but provides acquiring bodies with a process whereby native lands can be sought for public works. The process ensures full consultation and compensation. The use of Indigenous Land Use Agreements promotes the parties working together and cuts down on further alienation of native land.

**Disposal.**

The time limit on the disposal restrictions greatly ameliorates difficulties in trying to find former owners from whom land was acquired many years previously. In Victoria the restriction applies for only 18 months and in other states there are no restrictions at all. The short time limits assist to guard against the fear of “excess condemnation” (that is the improper use of acquisition powers for profit making) whilst providing public works bodies greater freedom in dealing with their lands.

**Exemptions on disposal.**

The exemptions to the Australian disposal regime are limited and more straight forward as compared with New Zealand. Under the Commonwealth Act no disposal restrictions apply if the land was not acquired under s 41(4)(a) (the compulsory acquisition section). Thus where land is acquired by agreement there is no requirement to offer back. This is the case even where a pre-acquisition declaration in relation to the acquisition has become absolute and is in force, or the Minister has given a certificate under section 24 in respect of the acquisition that the land is required urgently. In other words where they may have been the real threat of compulsion in the background and the compulsory process was well under way.

The exemptions in respect of disposal also appear to be quite clear in the Australian legislation and afford the decision maker with a discretion. In particular the Minister need only “have regard to the general principle that the interest should, if practicable, be first offered for sale to the former owner at market value”.

**Challenges to a proposed public works acquisition.**

The Minister may reject the recommendations of the Appeal Authority on review provided the Minister considers them. This affords the Minister with considerable power to ensure that a proposed public work can proceed. Another important feature is that only affected persons being those with proprietary interests may seek to challenge the proposed acquisition. This is preferable for the acquiring authority

compared to the Canadian jurisdiction where anyone can apply.

**Litigious provisions which should be avoided.**

Without having undertaken a complete review of Australian case law it is difficult to establish which provisions expose the Australian authorities to fiscal risk or litigation. However readings have indicated areas where there has been litigation. As expected there have been various challenges as to whether a power of compulsory acquisition has been properly exercised or had properly arisen. There has also been a lot of litigation relating to compensation which again is to be expected. As noted in the review of the New Zealand case law such litigation is probably a necessary cost of the public works regime unless the Crown is to be entitled to confiscate land without challenge and determine compensation itself. At least such costs lie at the front end of projects and are part of the cost of “getting the job done” which can be budgeted for. The litigation in this area did not appear inordinate and compared favourably with the position in the United Kingdom where the acquisition and compensation phase appears to be bogged down with difficulties. See previous discussions and the “United Kingdom: Further analysis and recommendations” section of the report.

Interestingly the provisions which resulted in heavy loss to the Crown in an unintended fashion were those of the Racial Discrimination Act 1975 which called into question the validity of titles granted by the states at least since 1975 (and possibly previously) without regard to the existence of aboriginal interests.

The recognition of native title created a huge perceived threat to the integrity of the existing land management systems of the states which had operated without Commonwealth interference for two centuries. In particular it called into question the acquisition of land for public works. The scale of mining operations, pastoral leases and other activities must be borne in mind.

Because the Commonwealth and the states were not entitled to discriminate against native title holders the holders of such interests were entitled to the same protections and treatments as the holders of other interests. Only the Commonwealth was empowered to validate those grants or to enable the states to do so.

The implications required legislation as to resolve such matters on a case by case basis would have been too expensive and the adversarial nature of the process too divisive. One case cost the Western Australian government \$3.5 million alone.

Though the Racial Discrimination Act could hardly be characterised as litigious provisions which need to be avoided it is an example of how an area of the law can be “opened up” by seemingly standard provisions with unexpected results. A similar phenomenon was seen here in the *New Zealand Maori Council Case* which resulted from a provision requiring the Crown to Act consistently with the principles of the Treaty of Waitangi. The point is not that such provisions should not exist but that statutory amendment relating to public works and native title in particular must be carefully drafted to avoid unforeseen consequences.

**Provisions considered to be equitable in ensuring the rights of landowners are taken into consideration when acquisition of their land for a public work is**

**required.**

**Native title.**

The Native Title Act places restrictions on the acquisition of native lands. Full consultation must occur and compensation paid. The use of land use agreements has also been promoted as a way of avoiding further alienation of native land.

**Challenges.**

The legislation gives the right to apply to the Minister for a reconsideration of a pre-acquisition declaration by an affected owner. The owner may also appeal to the Administrative Appeals Tribunal who will consider the matter in full and make recommendations to the Minister. (However the Minister may reject those recommendations). Given the draconian nature of compulsory acquisition powers which allow the acquiring body to take actions which significantly affect the lives of citizens the right to be heard and the principles of natural justice are fundamental procedural safeguards to the process.

**Compensation.**

Full compensation is available to affected persons under a wide range of categories.

**Provisions for disposal which are effective in ensuring an equitable and contestable disposal process.**

**Disposal.**

The Commonwealth Act in particular seeks to apply an offer back regime in favour of former owners if the land becomes surplus to requirements inside a specified timeframe and other exemptions do not apply. This respects the rights of land owners who on a moral view can strongly argue that they ought to have a first option if their land is no longer required. A failure to comply with the disposal restrictions will be subject to review by the Courts.

Where the former owner is no longer alive or in existence the offer back obligation transfers to whoever is fairly entitled to the benefit of the offer.

The Act establishes the general principle that land should be offered back to a former owner on disposal. That principle is a mandatory consideration to which the Minister must have regard.

**Purchase price.**

The former owner has the right to judicially contest the price at which the offer back is made where there is a disagreement as to the property's market value.

**Recommendations as to any provisions that might be suitable for adaptation to the New Zealand situation.**

**Native title.**

The Australian Native Title Act provisions are of interest. NZ has its own Waitangi system in respect of resolving past difficulties relating to Maori land and public works. The Native Title Act also aims to extend the same protections to native title as is enjoyed by the holders of other interests in land. However by analogy the

provisions of the Native Title Act as they relate to future dealings definitely lend support to the principles advanced by the Waitangi Tribunal which has recommended that acquisition of Maori land for public works should be subject to tighter controls. In particular the Native Title Act seeks to promote consultation and also the use of Indigenous Land Use Agreements to prevent further alienation. There is no real reason to differentiate between Maori land held in fee or by native title in advocating closer consultation and acquisition of lesser interests than the fee by the Crown. The point is to preserve aboriginal type land use rights, however that land is held. This can be achieved by the acquisition of lesser interests such as leasehold or by the use of contractual arrangements such as the Indigenous Land Use Agreements.

**Disposal.**

The Australian disposal regime appears superior to that of New Zealand and should be considered in any redraft of our own legislation.

First the time limit in respect of offer back greatly alleviates difficulties in trying to locate and deal with former owners after a long period of time has elapsed.

Secondly the disposal sections as a whole and the exemptions in particular appear much clearer and easier to follow and apply than their New Zealand counterparts.

Thirdly as I interpret s 121 of the Commonwealth Act the offer back is a powerful and mandatory consideration to which a Minister must have regard in authorising any disposal. This is far superior to the New Zealand position where a pre-emptive right automatically vests in the former owner where statutory pre cursors relating to the status of the land are objectively met even though the matter may not have been considered or determined.

The section would perhaps be improved if it were made clear what other considerations the Minister might properly have regard to in authorising a disposal.

## **Canada: Further Analysis and Recommendations.**

### **Emerging trends in the approach taken in the acquisition and disposal of land required or held for public purposes.**

#### **Public Works processes.**

The Canadian jurisdiction is now a modern regime. Full compensation is provided and the system no longer results in the arbitrary confiscations that were previously seen. Canada has also moved to a fairly unified system across the Commonwealth and various provinces.

#### **Aboriginal title.**

Restrictions on the acquisition of aboriginal lands have emerged. Initially during its development phase Canada adopted a similar approach to native land interests to that seen in other jurisdictions such as the United States, New Zealand and Australia. In other words wholesale extinguishment of native title. In recent times there have been extensive agreements reached between the government and land claimants.

### **Major differences in the approach in comparison with the New Zealand legislation.**

#### **Challenges to acquisition.**

Canada adopts a public inquiry system similar to the United Kingdom. The public inquiry differs to the position in New Zealand where application may be made to the Environment Court. In particular in Canada anyone may apply and make submissions to the inquiry.

#### **Acquisition by agreement.**

There is no great emphasis on acquisition by agreement as compared with other jurisdictions such as the United States in particular where there are statutory requirements to pursue negotiated settlements. Under those requirements condemnation may not be used as a stick to move negotiations along. In Canada there appear to be no acquisition by agreement provisions at all.

#### **Disposal**

Restrictions on disposal are very limited in Canada. It was not seen as a feasible option to implement offer back type requirements though there is some concern that the present system is unfair to land owners. There is also concern that lack of offer back restrictions will lead to "excess expropriation" whereby the authority takes extra land with a view to later resale at a profit. However there is no evidence as to how real those concerns are. There is some support in Canada for a non statutory offer back regime similar to that adopted in the United Kingdom ("the Crichton Down Rules").

#### **Aboriginal Title.**

Apart from settlement agreements in respect of land claims and the establishment of reservations there is little in the way of developments in respect of the public works legislation. However some restrictions apply in respect of the acquisitions of land which

is within reservations or which was subject to prior agreements. This is a departure from the position in New Zealand where there is no such restriction at all. The restrictions also differ to those in Australia under the Native Title Act. In that country what is protected is native title, whereas in Canada the restrictions apply in respect of specific lands.

### **Expropriation powers.**

In a large number of states such as Ontario there is no expropriation power in the main statutory code. The power is conferred by provincial legislation. In Ontario there are over 8000 authorities with expropriating powers which is a vast number. This has led to a messy array of statutory powers of expropriation. However the main procedures are still consolidated.

### **Provisions considered to be most effective in ensuring the needs of the state for current and future public works can be met.**

#### **Disposal.**

Canada has extremely limited offer back requirements which eases the acquiring authority's position and significantly reduces risk as compared with New Zealand. The authority is better able to pursue market value on disposal. Canada provides support for the idea that the an offer back regime is not essential in a modern public works regime. The offer back requirement was apparently rejected on the basis that it would be too hard to create prescriptive rules for its application. Instead it was proposed that disposal require the consent of the approving authority. That body would look into the background of the matter and ascertain the wishes of former owner. Presumably this would be a non statutory process similar to the Crichton Down rules applied in the United Kingdom.

The provinces also have little in the way of offer back requirements. In Manitoba it only applies where the former owner still own the unexpropriated part of the land from which the land in question was severed. In British Columbia a 2 year offer back restriction is in force.

#### **Challenges.**

The Canadian jurisdiction contains provisions which increase the ability of the acquiring authority to carry out its proposals. For example in the case of British Columbia the public inquiry may be dispensed with where the development is a linear project such as road, railway or hydro or electricity transmission line or pipeline. Under one set of provisions an inquiry may also be avoided by the executive on the grounds of urgency, emergency or to avoid prejudicial delay, or in the public interest. That allows political and public policy considerations to be brought into play. (And also significantly erodes procedural protections in favour of the land owner).

Though in the case of an inquiry under the Canada Act anyone may apply the position in British Columbia is more restrictive where only a land owner may apply. The ability of the decision maker to go against the recommendations of the inquiry also creates considerable power to proceed with the intended project regardless of opposition.

### **Litigious Provisions.**

There was no indication that any of the provisions of the Canadian legislation were unusually litigious. Much litigation occurs around the acquisition and compensation phases though this is hardly unusual. The unrestricted right to apply to the public inquiry seems to open the way for parties to cause the acquiring authority difficulties. However the powers of the public inquiry are limited in any event.

### **Provisions considered to be equitable in ensuring the rights of landowners are taken into consideration when acquisition of their land for a public work is required.**

#### **Compensation.**

There has been a move to full compensation in Canada from a previously arbitrary system. The compensation provisions themselves are largely what one would expect in a modern system. The provisions do differ slightly from state to state.

The most important element is that an offer of compensation must be made straight away or as soon as practicable after notice of confirmation of expropriation has been made. This occurs prior to the determination of compensation under the statutory provisions and is based on a written appraisal of property value. This is a significant feature of the Canadian expropriation codes and is designed to alleviate financial difficulty as a result of the planned expropriation. As previously noted some expropriating authorities voluntarily make advance payments of up to 50% of the property value. This is a major difference to other jurisdictions. It is also interesting in light of the Central Railway proposal in the United Kingdom discussed at length previously. Generous negotiation packages are likely to speed up the acquisition process, preserve property values and reduce the chance of entrenched opposition.

#### **Public Inquiries.**

Any person may apply where a public inquiry is convened under the Canada Act including those with non proprietary interests.

#### **Native Lands.**

The Canada Act places restrictions on the acquisition of specified native lands. Though the position is slightly different to the situation in New Zealand as a result of the phenomenon of reservation lands and the limited right of self government it seeks to prevent further alienation from those peoples.

### **Provisions for disposal which are effective in ensuring an equitable and contestable disposal process.**

The Canadian jurisdiction is characterised by its lack of restrictions on disposal and does not have an equitable or contestable disposal regime from the point of view of the former land owner.

**Recommendations as to any provisions that might be suitable for adaptation to the New Zealand situation**

The Canadian jurisdiction provides support for the contention that New Zealand should scale back its s 40 offer back regime or dispense with it altogether or adopt a non statutory system. As far as my inquiries reveal the fear that without an offer back regime in Canada excess expropriation will occur has not been demonstrated to be a real fear.

The Canadian jurisdiction provides some support for the recommendations of the Waitangi Tribunal that acquisition of specified native lands should be restricted.

Finally the Canadian jurisdiction also provides some support for the use of generous negotiation packages following the initial expropriation procedures but prior to determination of compensation. Such use could be under statutory provisions or under a non statutory policy.

## **United Kingdom: Further Analysis and Recommendations.**

### **Emerging trends in the approach taken in the acquisition and disposal of land required or held for public purposes.**

#### **Public works processes.**

The United Kingdom public works regime has grown up in a piecemeal fashion via a variety of methods and systems. There has been a slow move towards consolidation and codification but the United Kingdom is still the least consolidated of the jurisdictions investigated. Generally the public works regime has become more and more unwieldy and difficult to understand and apply due to its size and complexity. This applies both for the public who are affected by it and departments seeking to apply it.

#### **Disposal**

The United Kingdom had traditionally had more relaxed disposal controls than is the case in New Zealand. Statutory controls are now virtually non-existent. But in response to public anger over the use of acquired lands the non-statutory Crichton Down rules were enacted to ensure fairness. That move was designed to ensure a fairer disposal regime but the procedures do not go as far as the statutory procedures seen in New Zealand and Australia for example.

#### **Planning blight and delay.**

Elongated time frames in respect of public schemes are a growing concern in the United Kingdom. There is no quick fix solution on the horizon. Some efforts have been made to address the problems via non-statutory means utilising generous negotiation packages. (See for example the scheme promoted by Central Railway discussed previously). This essentially involves initiatives at a promoter level to find better ways of getting a scheme underway and reducing opposition. It appears that authorities are becoming turned off the use of the cpo procedure due to perceived difficulties with the use of cpo powers. The cpo procedure is seen as being too expensive, less likely to succeed as opposed to negotiation and difficult to implement. There has been an unofficial move to negotiation with cpo used as a threat to ensure negotiations are kept moving. Planning blight is seen as an increasing difficulty as the time frames for completion of schemes become elongated.

### **Major differences in the approach in comparison with the New Zealand legislation.**

#### **Disposal.**

The United Kingdom has adopted non-statutory rules as to the disposal of land no longer required for public work. It is suggested that this reduces risk for the disposing body as compared with the New Zealand position. Under the United Kingdom provisions a body is better able to retain land, privatise it or apply it to some other "government" use. This is considerably wider than in New Zealand where land can only be retained for some

other public work.

A time limit also applies to offer back though the period at 25 years is a long one.

#### **Native title.**

The United Kingdom has no native title issues.

#### **Provisions considered to be most effective in ensuring the needs of the state for current and future public works can be met.**

#### **Disposal.**

The non legislative disposal procedure places the United Kingdom in between Canada which has no offer back requirements and jurisdictions such as New Zealand and Australia. The provisions grant the body considerable latitude in matters of disposal whilst still addressing the rights of former owners.

The requirement that an authority dispose of land at the best price ensures that the Crown realises its assets at market value and reduces the overall cost of public works. (See s 123 of the Local Government Act 1972). The ability to transfer land to other authorities for other government purposes also ensures efficiencies in the public sector as a whole. This is a superior provision to that which exists in New Zealand in respect of disposal. As previously discussed in New Zealand an authority may be forced to dispose of land to a former owner where a different Crown entity requires the land to meet another obligation or need.

#### **Acquisition procedures.**

Access to the public inquiry forum is limited to those with proprietary interests (as compared to the Canada Act where anyone can apply).

#### **Litigious provisions which should be avoided.**

#### **Acquisition provisions.**

The acquisition phase including public inquiry generally occur very slowly. This exacerbates difficulties caused by planning blight. The complex and unconsolidated nature of the provisions relating to compulsory acquisition contribute to the problem.

The complex system has led to institutional failings and a reluctance to utilise cpo powers. The associated cost of losing a cpo inquiry is seen as being too high to risk compulsory acquisition in many cases.

#### **Provisions considered to be equitable in ensuring the rights of landowners are taken into consideration when acquisition of their land for a public work is required.**

#### **Acquisition.**

The public inquiry provisions ensure natural justice is observed by granting affected parties an opportunity to be heard and put their case.

The non statutory scheme put together by Central Railway is a good example of a progressive approach to acquisition procedures.

**Provisions for disposal which are effective in ensuring an equitable and contestable disposal process.**

**Disposal.**

The Crichel Down Rules do not arm the former owner with the same level of rights in respect of offer back as s 40 in New Zealand. In that respect they are less equitable and less contestable. However the rules have resulted in a fairer system vis a vis former owners than was previously the case in the United Kingdom.

**Recommendations as to any provisions that might be suitable for adaptation to the New Zealand situation.**

It is suggested that the non statutory “Crichel Down Rules” are a superior procedure to our statutory offer back regime. They aim to ensure fairness to former owners and thus afford an extra degree of integrity to the system. However they provide the Crown authority with greater flexibility and expose it to less risk than under disposal provisions such as New Zealand’s s 40. For that reason it is suggested that they should be investigated with a view to adopting a similar non statutory procedure in this country.

Before doing so the Crown should seek advice as to whether non statutory guidelines such as the Crichel Down Rules could be enforced by a former owner and how they would compare with the enforceability of the current s 40 procedures by judicial review. .

Sections 122 (power to appropriate land no longer required for purpose for which acquired for any other government purpose) and 123 (obligation to obtain best price on disposal) of the Local Government Act 1972 (UK) are recommended for the New Zealand jurisdiction for the reasons previously discussed. The provisions would lessen the risks of fiscal loss which exist under New Zealand’s present legislation.

The emergence of non statutory methods of advancing large public works projects such as the Central Railway proposal are of interest and should be investigated by individual departments to see if such an approach might be of assistance.

## **United States: Further Analysis and Recommendations.**

### **Emerging trends in the approach taken in the acquisition and disposal of land required or held for public purposes.**

#### **Public works processes.**

The United States has experienced a move towards a unified federal system of condemnation following the enactment of rule 71A of the Civil Rules of Procedure in 1951.

#### **Native title.**

Difficulties in respect of the acquisition of native lands for public works have begun to emerge in the form of substantial land claims. In the past wholesale acquisition and extinguishment of native title without compensation occurred. The old judicial attitudes to native title are at last beginning to change.

#### **Negotiation**

A strong trend towards negotiation has emerged with many statutes placing an emphasis on negotiated settlements. In Florida for example good faith negotiation prior to condemnation is required. Similarly the Uniform Relocation Assistance and Real Property Acquisition Policies Act promotes negotiation and expeditious agreements. Such an approach is designed to reduce litigation. This approach extends as far as a rule against using the threat of condemnation as a coercive lever. In Florida there is even provision for mediation where agreement cannot be reached.

#### **Due process.**

In the United States there is an emphasis on acquisition in accordance with constitutional rights. This includes the observance of substantive due process.

### **Major differences in the approach in comparison with the New Zealand legislation.**

#### **Disposal.**

There is a general lack of disposal restrictions. Excess condemnation is controlled via constitutional limitations on the use of eminent domain.

#### **Judicial system.**

The Courts are heavily involved in the condemnation process which is quite different to other jurisdictions where the Courts merely sit on review and specialist compensation bodies are employed. Judicial bodies also act in the public inquiry phase in Canada or the United Kingdom. In New Zealand or Australia the decision to acquire can be challenged before the Environment Court or Administrative Appeals Authority respectively by the landowner. By way of contrast in the United States if no agreement is reached in the negotiation phase the condemnor must file suit rather than simply proceeding to acquire the land. Obviously this adds to the expense for the condemnor and is weighted towards

the citizen. It appears that the Court examines all elements of the condemnation including compensation. In Florida a jury determines compensation.

In New York the condemnor must convene a prior public hearing to inform the public about the project and receive submissions. The condemnor must then publish findings.

#### **Native title.**

There has been little development of statutory protection for aboriginal rights in respect of public works outside of the reservation system. The United States has been slower to recognise aboriginal title rights. The state may still extinguish such rights without compensation or due process.

#### **Provisions considered to be most effective in ensuring the needs of the state for current and future public works can be met.**

#### **Disposal.**

The lack of disposal restrictions allows the acquiring authorities more freedom in dealing with their assets. The threat of excess condemnation is controlled at the acquisition stage via constitutional limitations and the scrutiny of the Courts.

#### **Acquisition.**

The “quick take” procedures allow the acquiring authority to move forward where the only outstanding matter is the determination of compensation and preliminary matters such as whether the power to acquire has arisen and whether it has been properly exercised have been disposed of. The interests of the landowner are protected by the paying into Court of a bond calculated to be in excess of the land value.

Provisions such as the Uniform Relocation Assistance and Real Property Acquisition Policies Act promote expeditious acquisition and negotiation. The rule against coercion prohibits stand over tactics.

#### **Litigious provisions which should be avoided.**

The United States appears to have an excessive level of judicial involvement and scrutiny as compared to other jurisdictions. It is believed that this would increase the costs of condemnation.

#### **Provisions considered to be equitable in ensuring the rights of landowners are taken into consideration when acquisition of their land for a public work is required.**

#### **Constitutional safeguards.**

The citizens of the United States enjoy Constitutional protection including the observance of substantive due process. Condemnation is also subject to the general scrutiny of the

Courts.

### **Negotiation.**

The emphasis on negotiation without the use of stand over tactics promotes consultation with land owners. Condemning authorities are not able to use their acquisition powers to roll over opposition.

### **Compensation provisions.**

New York has an interesting provision which allows a landowner to reject an offer in full compensation but accept the cash and then claim for more. This allows the acquisition to move forward subject to a claim on the part of the landowner for the extra amount. Again this is typical of the United States approach where matters which merely relate to the level of compensation should not be allowed to hold up the acquisition process. Rather the approach is to secure the compensation by way of bond and proceed with the acquisition whilst compensation is finalised.

### **Provisions for disposal which are effective in ensuring an equitable and contestable disposal process.**

This section is not really relevant in the United States jurisdiction. There is little in the way of disposal restrictions and offer back requirements.

### **Recommendations as to any provisions that might be suitable for adaptation to the New Zealand situation.**

#### **Disposal.**

The United States jurisdiction provides support for dispensing with New Zealand's disposal restrictions and offer back regime. As with Canada there does not seem to be any real suggestion that extra condemnation results from the lack of disposal restrictions. Acquisition must be in good faith and in accordance with the enabling statutory power or it will be unlawful. Issues of fairness could be addressed by the imposition of non statutory guidelines or rules for offer back as seen in the United Kingdom.

#### **Negotiation.**

The statutory emphasis on negotiation is seen as a positive development and is recommended. This is supported by developments in the United Kingdom where there has been a move away from the use of acquisition powers by departments as negotiation is seen as a better option.

However the prohibition on using powers of compulsory acquisition as a coercive tool to leverage negotiations seems fanciful. The authority would theoretically be unable to make reference to legitimate statutory powers which it possesses and may well end up using and the land owner would likely be aware of those power. That provision is not recommended for adaptation to the New Zealand situation.

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<sup>i</sup> *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 34 L. Ed. 295, 10 S. Ct. 965; *Seneca Nation of Indians v. Brucker*, 262 F.(2d) 27, aff'g 162 F. Supp. 580, cert. denied, 360 U.S. 909, 3 L. Ed. (2d) 1260, 79 S. Ct. 1294; *Nicodemus v. Washington Water Power Co.*, 264 F.(2d) 614; *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108; *Tuscarora Nation of Indians v. Power Authority of State of New York*, 164 F. Supp. 107, modified on another ground, 257 F.(2d) 885, appeal dismissed, 362 U.S. 608, 4 L. Ed. (2d) 1009, 80 S. Ct. 960.

United States-- *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983). (See n.38 infra). In *Federal Power Comm. v. Tuscarora Indian Nation*, 362 U.S. 99, 4 L. Ed.(2d) 584, 80 S. Ct. 543, it was said: The Court of Appeals did not find to the contrary. Indeed, it found that the Act's definition of "reservations" includes only those located on lands in which the United States "has an interest." But it thought that the national paternal relationship to the Indians and the Government's concern to protect them against improper alienation of their lands gave the United States the requisite "interest" in the lands here involved, and that the result "must be the same as if the phrase 'owned by the United States [etc.],' were not construed as a limitation upon the term 'tribal lands [etc.],' " 265 F2d, at 342. We do not agree. The national "interest" in Indian welfare and protection "is not to be expressed in terms of property "

*Heckman v. United States*, 224 U.S. 413, 437, 56 L ed 820, 829, 32 S. Ct. 424. The national "paternal interest" in the welfare and protection of Indians is not the "interest in lands owned by the United States" required, as an element of "reservations," by § 3(2) of the Federal Power Act. (Emphasis added). Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation and no "interest" in them is "owned by the United States," we hold that they are not within a "reservation" as that term is defined and used in the Federal Power Act, and that a Commission finding under § 4(e) of that Act 'that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired' is not necessary to the issuance of a license embracing the Tuscarora lands needed for the project..

The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. The Court of Appeals recognized that this is so. 265 F.2d, at 343. Section 21 of the Act, by broad general terms, authorizes the licensee to condemn 'the lands or property of others necessary to the construction, maintenance, or operation of any' licensed project. That section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.

But there is no such requirement with respect to conveyances to or condemnations by the United States or its licensees; "nor is it conceivable that it is necessary, for the Indians are subject only to the same rule of law as are others in the state." *United States v. Oklahoma Gas & E. Co.*, 318 U.S. 206, 211, 87 L. ed. 716, 721, 63 S. Ct. 534. But, sec 177 is not applicable to the sovereign United States nor, hence, to its licensees to whom Congress has delegated federal eminent domain powers under sec 21 of the Federal Power Act. The law is now well settled that: "A general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States v. Wittek*, 337 U.S. 346, 358, 359, 93 L ed 1406, 1413, 1414, 69 S. Ct. 1108. This Court has several times applied, in combination, the rules (1) that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary, and (2) that general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect. It did so in

*Henkel v. United States*, 237 U.S. 43, 59 L ed 831, 35 S. Ct. 536 (sustaining the right of the United States to take Indian lands for reservoir purposes under the general Reclamation Act of June 17, 1902, 32 Stat 388), In *Spalding v. Chandler*, 160 U.S. 394, 40 L ed 469, 16 S Ct 360 (sustaining the power of the Government to convey a strip of land through a tract owned by an Indian tribe to one Chandler for the use of the State of Michigan in constructing a canal, even though the conveyance was in derogation of a treaty with the Indian tribe), and in *Cherokee Nation v. Southern Kansas R. Co.* 135 U.S. 641, 34 L ed 295, 10 S. Ct. 965.

In the light of these authorities we must hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation; that the lands in question are not subject to any treaty between the United States and the Tuscaroras (see notes 10 and 18); and that 25 U.S.C. § 177 does not apply to the United States itself nor prohibits it, or its licensees under the Federal Power Act, 16 U. S. C. A., in the manner provided by § 21, upon the payment of just compensation. See also *Seneca Nation of Indians v. United States*, 338 F.2d 55. The court said: This appeal presents an exceedingly narrow issue. While asserting rights under the Treaty of November 11, 1794 (7 Stat. 44) between the United States and the Seneca Nation to keep its lands inviolate, the Seneca Nation also recognizes the power of Congress to take or to sanction the taking of its land for public purposes without regard to the treaty. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295 (1890); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938). See *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885 (2 Cir.), cert. denied, 358 U.S. 841, 79 S.Ct. 66, 3 L.Ed.2d 76 (1958). Indeed, there is no question of the right of the United States to condemn the land here in question for the public purposes of constructing the reservoir project. *Seneca Nation of Indians v. Brucker*, 104 U.S. App. D.C. 315, 262 F.2d 27 (D.C.Cir. 1958), cert. denied, 360 U.S. 909, 79 S.Ct. 1294, 3 L.Ed.2d 1260 (1959).

The replacement or relocation of existing highways unquestionably is a part of the reservoir project authorized by Congress, Act of June 28, 1938, 52 Stat. 1215, as amended, 33 U.S.C.A. § 701c-1. The land involved in this action is land necessary to extend the re-routed Route 17 from a two-lane to a four-lane limited access highway. The decision to make this extension was made by the Secretary of the Army and Congress delegated this authority to the Secretary. See 33 U.S.C.A. § 701c-1; 33 U.S.C.A. § 701r-1(c). As my Brother Moore once recognized,

*Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 893 (2 Cir.), cert. denied, 358 U.S. 841, 79 S.Ct. 66, 3 L.Ed.2d 76 (1958), Congress need not itself specifically and expressly authorize by 'special enactment' each particular taking of Indian land, but can choose to delegate some of its authority to

administrative offices and agencies. We see no reason to interfere with this reasonable exercise of delegated administrative discretion as to the amount of land required for the relocation of the road. See *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). It is hard to see how a four-lane road will interfere with communication among the Senecas so much more than a two-lane road and, as the District Court found, the increased highway requirements result in part from the Allegheny Reservoir Project itself. Because the Secretary of the Army acted within his authority and reasonably, we affirm the judgment. See also *United States v. 10.69 Acres of Land*, 425 F.2d 317. In *United States v. 687.30 Acres of Land*, 319 F. Supp. 128, the court said: Defendants argue that although Indian Treaty land may be condemned pursuant to eminent domain power, it requires a special Act of Congress abrogating the Treaty insofar as it relates to the particular land in question, before such condemnation can be carried out. Such a conclusion would not necessarily place an additional limitation on the power of eminent domain but would only prescribe a certain mode of procedure when Indian lands are involved. However, the case law seems to be contrary to defendant's contention. In *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295 [1890], the United States Supreme Court held that an Indian Nation is not sovereign in the sense that the United States or a State is sovereign, but is a dependent political community, subject to the paramount authority of the United States. The Court further held that the United States may exercise the right of eminent domain in respect to lands in the Territories, or in any of the States, for purposes necessary to the execution of the powers belonging to the General Government, such an exercise being essential to "the independent existence and perpetuity of the United States." The court said as follows: "The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects or are germane to the execution of the powers granted to it, provided only, that they are not taken without just compensation being made to the owner." 135 U.S. at 657, 10 S.Ct. at 971.

In *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 [1912], the United States Supreme Court stated: "There are many cases, recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States." It was said in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 [1960] as follows: "[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."

In *Seneca Nation of Indians v. United States*, 338 F.2d 55 [2d Cir. 1964], cert. denied., 380 U.S. 952, 85 S.Ct. 1084, 13 L.Ed.2d 969, it was said by Judge [Now Mr. Justice] Marshall as follows: "Congress need not itself specifically and expressly authorize by 'special enactment' each particular taking of Indian land, but can choose to delegate some of its authority to administrative offices and agencies." 338 F.2d at 56-57. The condemnation of Indian land in the present case is unquestionably a part of the multiple-purpose project for the improvement and use of the Missouri River between Sioux City, Iowa, and the mouth of the river. This project is a part of the comprehensive plan adopted by Congress for flood control, navigation, irrigation, power development, recreation, and the fullest possible development and utilization of the water resources within the Missouri river basin. See, Act of June 28, 1938, 52 Stat. 1215; Act of December 22, 1944, 58 Stat. 887; Act of March 2, 1945, 59 Stat. 10; Act of October 23, 1962, 76 Stat. 1173; Act of December 11, 1969, 83 Stat. 323.

The land involved in this action is land necessary for use with the Oxbow Recreation Lakes, Snyder-Winnebago Complex, which is being developed as part of the overall improvement project. In addition, the government sets out in its brief several excerpts from House and Senate Reports and committee hearings which establish the fact that Congress was aware of the Snyder-Winnebago Complex plans. The decision to condemn the lands in question was made by the Secretary of the Army and Congress delegated such condemnation authority to him. See Act of April 24, 1888, 25 Stat. 94. And since Congress is not itself required to specifically and expressly authorize by a special enactment each particular taking of Indian land, but can choose to delegate some of its authority to administrative agencies, *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 893 [2d Cir. 1958], cert. denied., 358 U.S. 841, 79 S.Ct. 66, 3

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L.Ed.2d 76; *Seneca Nation of Indians v. United States*, 338 F.2d 55 [2d Cir. 1964], cert. denied, 380 U.S. 952, 85 S.Ct. 1084, 13 L.Ed.2d 969, this Court should not interfere with a reasonable exercise of the delegated administrative discretion.