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Eminent Domain

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EMINENT DOMAIN

United States v. 58.16 Acres of Land, More or Less, Situated in Clinton County, State of Illinois and George Cooley, 478 F.2d 1055 (7th Cir. 1973).

The *United States v. 58.16 Acres of Land, Etc.*[1] (hereinafter referred to as *Cooley*) is a cogent example of the circumstances under which a condemnee will succeed in fighting the federal Government's sovereign power of eminent domain. The case involves three key issues in the condemnation process. The first is the issue of public use, the main consideration which enables the Government to justify the taking of private property. The second issue is a landowner's right to a hearing and the procedural mechanics incidental to it. The last issue is a landowner's right to appeal if he fails to receive a hearing or receives an adverse judgment. These three areas comprise the *Cooley* case and the analysis herein. The three areas are decisive in any federal condemnation case, and since all are at issue they make *Cooley* a "model" condemnation case.

The Army Corps of Engineers had constructed the Carlyle Dam and Reservoir during 1964-1966 by damming the Kaskaskia River.[2] George Cooley's farm in Clinton County, Illinois fronts this reservoir and he complained frequently to the Army from 1968 to 1970 about erosion damage due to improper water levels in the reservoir.[3] The Army took no action. They had, in fact, notified the Cooleys in January of 1971 that the cost to repair and protect the Cooleys' land would exceed its value, and that they would therefore condemn it. On June 30, 1971, the United States Government filed a complaint to acquire the Cooleys' farm. The condemnation complaint alleged that the taking of the land was commenced by the Secretary of the Army in conformity with the Declaration of Taking Act,[4] the Flood Control Act,[5] and

1. 478 F.2d 1055 (7th Cir. 1973).
2. *Id.* at 1057.
3. *Id.*
4. 40 U.S.C. § 258a-e (1970). § 258a is of ultimate concern to the topic and reads in part as follows:

> In any proceeding in any court of the United States . . . 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 . . . 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.

the River & Harbor Improvement Act.[6] The Declaration of Taking Act provides a method by which an authorized Government agency can take private land for public use by filing a declaration of taking, depositing an estimated amount of the value of the land with the court.[7] Title to the land vests immediately in the Government, the court deciding when transfer of possession shall take place.[8]

The Secretary of the Army followed the statutory procedure of the Declaration of Taking Act. The land was alleged to be taken for public use, as it was necessary to provide for flood control downstream of the Carlyle Reservoir Dam and to reduce flood crests in the Mississippi River. With the complaint, the Secretary filed a declaration of taking, notice of condemnation and a motion or order for delivery of possession, depositing $72,000 with the registry of the district court in an *ex parte* proceeding.[9] Thereupon, Cooley was ordered by the court to surrender possession of the land to the United States by January 1, 1972. This order and the notice of condemnation were served on the Cooleys. The notice required an answer within twenty days or an automatic consent to the taking was presumed.[10]

The Cooleys filed an answer within twenty days, by which they denied the contention that their land was being taken for any public use, and charged the Army Corps of Engineers with resorting to condemnation proceedings rather than repairing the damage done by erosion.[11] They claimed that only their land was sought for condemnation and that other tracts between theirs and the Carlyle Dam were not taken.[12] The Cooleys stated that the acquisition of their land could in no way further the avowed purpose of providing flood control.[13]

The United States District Court for the Eastern District of Illinois refused to schedule a hearing on the Cooleys' objections before the January, 1972 taking date, prompting the Cooley's to file a motion to vacate and a-

(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, . . . title to the said lands . . . shall vest in the United States of America.
Upon the filing of a declaration of taking, the court shall have the 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.

5. 33 U.S.C. § 701 (1970).
6. 33 U.S.C. § 591 (1970).
7. 40 U.S.C. § 258a (1970).
8. *Id.*
9. Brief for Appellant at 9, 478 F.2d 1055 (7th Cir. 1973).
10. *Id.*
11. 478 F.2d at 1057 (7th Cir. 1973).
12. *Id.*
13. *Id.* at 1057 n.3.

mend the order of possession until after a hearing could be held. The question of the right to take would obviously be moot if the Army were already in possession and had removed the Cooleys' house and farm buildings. The motion claimed that the Army's action was "arbitrary, discriminatory, capricious, vindictive and in bad faith," and that the Declaration of Taking Act was superseded by Federal Rule of Civil Procedure 71A.[14] The Government answered this motion, denying that its action was arbitrary or in bad faith, asserting that the Army's action in taking the land was not reviewable. The district court agreed, stating in a memorandum opinion that it had no jurisdiction to hear the case, and that the defendants' motion to amend was without merit. The court found that the case of *United States v. 80.5 Acres of Land, Etc., County of Shasta, California,*[15] controlled. No evidence was received by the district court. The Cooleys first opportunity for a hearing on the issues of the case would be before the Seventh Circuit Court of Appeals. They filed a notice of appeal to that court, and an order staying possession was granted by the district court pending the outcome of the appeal.

THE SEVENTH CIRCUIT DECISION

The district court had determined that *Shasta* was controlling. The court of appeals interpreted this to mean that the district court judge decided the entire case was non-reviewable. In *Shasta*, the condemnee alleged that his land was taken for recreational use, which was not within the intent of Congress in passing the statute[16] under which the land was taken.[17] The issue on appeal in that case was the intent of the Act, and the condemnees lost because the court stressed the fact that since a public use was found, the Government's action was simply not reviewable.[18]

The court of appeals in *Cooley* did not consider *Shasta* controlling. The court reaffirmed the docrtine that federal courts do have the power of judicial review to determine if a use is public or not, this being a main criterion determining the Government's right to condemn.[19] Admittedly, the

14. Brief for Appellant at 4, 478 F.2d 1055 (7th Cir. 1973). The Seventh Circuit Court of Appeals discussed Fed. R. Civ. P. 71A (sections e and h) but not as superseding the Declaration of Taking Act. Rule 71A is further discussed *infra* under SEVENTH CIRCUIT DECISION and ANALYSIS.

15. 448 F.2d 980 (9th Cir. 1971).

16. The Trinity River Project, 69 Stat. 720 (1955) (uncodified).

17. 448 F.2d at 983 (9th Cir. 1971).

18. *Id.* at 983-84.

19. *Id.* There is no doubt that the Government has the *power* to exercise eminent domain, although it is not dependent upon any specific grant in the Constitution. It is an attribute of sovereignty and is only limited by payment of just compensation as found in the fifth amendment. United States v. Parcel of Land with Improvements Thereon in Square South of 12, D.C., 100 F. Supp. 498 (D.D.C. 1951); United States v. 1010.8 Acres, More or Less, in Sussex Cty., Delaware, 77 F. Supp. 529 (D. Del. 1948); United States v. 2,005.32 Acres of Land, More or Less, Situate in Corson Cty., South Dakota, 160 F. Supp. 193 (D.S.D. 1958).

court stated, the right to review is a narrow function; the courts can decide if the proposed use is a public one, and once this is found the judicial function terminates.[20]

To aid the task of determining if a public use exists, the court believed that "exploring the good faith and rationality" of the governmental agency is proper.[21] *Southern Pacific Land Co. v. United States*[22] was quoted extensively to show that even though the determination of extent or amount of the property to be taken rests with the Government's administrative agency, when bad faith or an arbitrary action on the agency's part is found, the matter is reviewable.[23] The appellate court then distinguished *Shasta*, stating that it was not inconsistent with a case like *Southern Pacific*, since there was adequate evidence in *Shasta* to show that the land in question there was taken for proper purposes. In concluding its discussion of judicial review and public use, the court found that since the defendants properly raised questions of arbitrariness and bad faith, the district court should have heard the case and resolved those questions.[24]

Since the Cooleys had a right to a hearing to determine the issue of public use, questions arise regarding whether that hearing should have been held before or after the Cooleys had to vacate and before or after compensation was fixed. The appellate court reasoned that rule 71A(h) of the Federal Rules of Civil Procedure contemplates that the court shall, in advance of determining just compensation, decide whether the Army was authorized to take the lands condemned.[25] They quoted the only part of rule 71A(h) which could apply in the case: "Trial of all issues shall otherwise be determined by the court."[26] The court agreed with the Cooleys, finding that they were denied a proper hearing on the issues presented in their original answer to the complaint, and that a hearing should have been held before January 1, 1972 when they were required to vacate the premises. The issue should also not have been deferred until just compensation was decided, the court again relying on rule 71A(h).

20. The court relied on Shoemaker v. United States, 147 U.S. 282, 298 (1843) and Berman v. Parker, 348 U.S. 26, 35 (1954). On point in the Seventh Circuit is Greeen St. Assn. v. Daley, 373 F.2d 1, 6 (7th Cir. 1967) (no judicial review).

21. 478 F.2d at 1058, *citing* United States v. Carmack, 329 U.S. 230, 243 (1946) and United States v. Meyer, 113 F.2d 387, 392 (7th Cir. 1940), *cert. denied*, 311 U.S. 706 (1940).

22. 367 F.2d 161-62 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030 (1967).

23. *Id.*; 478 F.2d at 1058-59.

24. 478 F.2d at 1059.

25. *Id.* FED. R. CIV. P. 71A governs all federal procedure in eminent domain cases. *See* WEST'S FEDERAL PRACTICE MANUAL, § 7700 (1970). In the Brief for Appellant at 6, 478 F.2d 1055 (7th Cir. 1973), the condemnees point out that if no action of the Government in a federal condemnation suit is judicially reviewable, why provide a manner for raising defenses as in rule 71A(e) of Fed. R. Civ. P.

26. 478 F.2d at 1059, *quoting* FED. R. CIV. P. 71A(h).

The last question considered by the appellate court was whether the landowners could rightfully appeal to that court from the district court below. The issue turned on whether or not they had appealed from a "final" order or decision, since the district court had not fixed compensation and a judgment had not been entered yet. The Government contended that the order was not final, thus no right to appeal existed. The strongest case the Government cited in support of this position was *Catlin v. United States*.[27] The Seventh Circuit recognized that the case did appear at first glance to support the Government's position, as the landowners there had attempted an appeal from a denial of their motion to vacate an order to condemn under the Declaration of Taking Act,[28] a situation similar to *Cooley*. The United States Supreme Court there held that the order was not final within 28 U.S.C. § 1291, which states in essence that the courts of appeal have jurisdiction from all *final* decisions of the district courts. But the *Cooley* court noted the following language in *Catlin:*

> Hence, *ordinarily* in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation. as well as the right to take the property. This has been the repeated holding of decisions here.[29]

The Seventh Circuit did not find this to be an inflexible doctrine, as they relied on the word "ordinarily" to indicate that the Supreme Court must have envisioned some exceptions when an appeal, interlocutory in character, might be permissible.[30] On this premise, the appellate court used as examples three cases where interlocutory appeals occurred.

The first case was *Loughran v. United States*,[31] in which the Government condemned land to transfer it to the International Monetary Fund. An appeal was raised before compensation was finalized. The court there distinguished *Catlin* because once the property passed to the Government which would quickly transfer it to the fund, the landowners would be unable to retrieve it, as the fund was immune from judicial process. It was thus urgent that the court of appeals hear the case. The court then noted *Gillespie v. U.S. Steel Corp.*,[32] where the Sixth Circuit reviewed the merits of an interlocutory order from the district court, the Supreme Court affirming that review. Justice Black, speaking for the Court, said that "final" is not necessarily the last possible order made in a case.[33] He continued to state that finality must be given a practical rather than a technical construction, be-

27. 324 U.S. 229 (1945).
28. 478 F.2d at 1060.
29. 324 U.S. at 233 (emphasis added).
30. 478 F.2d at 1060.
31. 317 F.2d at 896, 898-99 (D.C. Cir. 1963).
32. 379 U.S. 148 (1946).
33. *Id.* at 152.

cause cases have long recognized that whether a ruling is "final" within the meaning of 28 U.S.C. § 1291[34] is often such a close question that both sides can bring equally strong arguments.[35] The court in *Cooley* relied upon Justice Black's statement:

> This Court, contrary to its usual practice reviewed a trial court's refusal to permit prof of certain items of damages in a case not yet fully tried, because the ruling was fundamental to the further conduct of the case.[36]

The appellate court in *Cooley* used this "fundamental for further conduct" concept for their holding in regards to the appellate review question.[37] The court admitted that the case might be different had the district court held a hearing, ruling squarely on the condemnee's motion or objections. But by refusing to hear the case, it left only compensation to be determined and avoided a ruling which was supposedly "fundamental to the further conduct of the case," and was directly appealable. To support this, the court cited *United States v. Certain Lands in the Borough of Manhattan,*[38] a condemnation case in which an interlocutory appeal from tenants of a condemned building was allowed, as the tenants' rights would have been rendered moot once they were dispossessed.

The court in *Cooley* suggested that the condemnees' appeal was actually in the nature of a mandamus, i.e., that they were requesting the court of appeals to order the district court to conduct proceedings, even though the Cooleys had not formally framed their appeal as such. The appellate court believed the district court had this power of review to hear the case initially, but failed to exercise it. Now the appellate court would direct it to use that power.

ANALYSIS

The Cooleys had to accomplish three objectives to save their land. They had to defeat the Government's allegation of public use by showing bad faith or arbitrary action on the part of the Government.[39] To do this they had to demonstrate their right to a hearing before they were required to vacate and before the district court had fixed compensation for their land. Since the district court would not hear the case on its merits, the Cooleys then

34. 28 U.S.C. § 1292(a) and (b) (1970) list the only situations or exceptions where an appellate court can have jurisdiction to review an interlocutory decree of a district court, none of which could be of any avail to the Cooleys.

35. 379 U.S. at 152.

36. *Id., quoting from* United States v. General Motors Corp., 323 U.S. 373 at 377 (1945).

37. 478 F.2d at 1061.

38. 332 F.2d 679 (2d Cir. 1964).

39. The due process clause, U.S. CONST. art. v, which prohibits the taking of life, liberty or property without due process of law, was intended to secure the individual from arbitrary exercise of Government powers. 1 NICHOLS, THE LAW OF EMINENT DOMAIN § 4.4 (3d ed. Sackman 1974).

had to successfully appeal to the Seventh Circuit, again before the district court had fixed compensation.

Most courts recognize the right to inquire into a public use,[40] and to consider bad faith in determining if a public use exists.[41] The Cooleys alleged a combination of factors to show bad faith or arbitrary acts. The Army would not answer their complaints about erosion but decided to condemn their land since repairing the damage would exceed its cost. This was alleged to be arbitrary or in bad faith. The Cooleys claimed arbitrariness since only their lone tract had been condemned, while other lands closer to the dam were not.[42] The project had been completed for seven years, thus the Cooleys claimed their land was taken for a different purpose than originally intended.[43]

These arguments can be challenged. The Government can consider costs and advantage in taking land.[44] There are also cases holding that the opinion of an authorized government official to take land is sufficient and acceptable if not made in bad faith,[45] and that a difference in judgment between a condemnee and the official does not necessarily mean an abuse of discretion on the official's part.[46] These doctrines show that it is very difficult to prove an agency official's decision is arbitrary or in bad faith, although actual malevolence is clearly determinative.[47] The condemnees claim of arbitrariness because only their land was condemned, or because they were

40. *See* note 20. A discussion on what is a "public use" is a treatise in itself. "Necessity" is not synonymous with public use. 29A C.J.S. *Eminent Domain* § 31d (1965) states that public use is not necessity for the taking, although necessity is inherent in determining public use. Necessity should merely play a part in the determination that the taking is wise and expedient to undertake at a certain time and in a certain place for public advantage. 44 WASH. L. REV. 200, 216-17 (1968).

41. *E.g.*, United States v. Carmack, 329 U.S. 230, 243-44 (1946). *See* cases cited in 478 F.2d at 1059.

42. Brief for Appellant at 7, 22, 478 F.2d 1055 (7th Cir. 1973).

43. *Id.*

44. T.V.A. v. Welch, 327 U.S. 546 (1946) (cost and advantage); Simmonds v. United States, 199 F.2d 305 (9th Cir. 1952) (cost and advantage); Southern Pacific Land Co. v. United States, 367 F.2d 161 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030 (1967); (costs) and United States v. Certain Parcels of Land in the City of Cheyenne, Laramie Cty., Wyo., 141 F. Supp. 300, 305 (D. Wyo. 1956) (costs). Title 40 U.S.C. § 257 (1970), which gives a Government power to exercise condemnation proceedings, states:

> 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.

45. Wilson v. United States, 350 F.2d 906, 907 (10th Cir. 1965).

46. United States v. Meyer, 113 F.2d 387, 392 (7th Cir. 1940), *cert. denied*, 311 U.S. 706 (1940). The Secretary of the Army differed here over the necessity for the taking of a fee simple as opposed to an easement.

47. United States v. 40.75 Acres of Land, More or Less, Situate in Du Page Cty., Ill., 76 F. Supp. 239, 249 (N.D. Ill. 1948).

treated differently from other landowners in the area is likewise insufficient, as case law indicates such decisions are properly within the governmental agency's discretion.[48] Also, when the Cooleys claimed their land was taken for a different purpose than the one originally intended, they are squarely opposed by the policy holding in *Shasta*,[49] even though the Seventh Circuit distinguished that case on its facts.

Despite the above rebuttal to the Cooleys' arguments, the appellate court ruled in their favor. Although never stating it, the court obviously found that the possibilitiy of bad faith existed, otherwise the case would have terminated, as public use would be demonstrated. The issue of cost and advantage worked to the Government's detriment because the Army apparently had no immediate use for the land,[50] even though case law supported the Government's position. The Cooleys were successful because they convinced the appellate court that all these factors combined, the years of complaints, the sudden interest in this lone tract of land after the project was completed, and the sense that perhaps the Army was doing this to stop the complaining once and for all, indicated bad faith and arbitrariness. Clearly the court's sense of due process was offended because a hearing on public use was never held.[51] Still, the question of bad faith and arbitrary action was a much closer one than is facially apparent from the decision. The Seventh Circuit did deal extensively with the concept of a bad faith exception, but from a substantive point of view, one can question whether it applied in light of the Cooleys allegations.

The question of when the hearing should have been held was decided by the court in *Cooley* by interpreting Federal Rule of Civil Procedure 71A (h) to mean that compensation need not be determined before it is found that the taking was justified. The court cites no other authority for this interpretation, although it is logicial that compensation for condemned property should not be determined until it is ascertained that the property will in fact be condemned. This is true despite the fact that the Declaration of Taking Act[52] contemplates an immediate taking once the estimated compensation is deposited with the court.[53] By this Act, the Government agency takes title to the land subject to divestment if the taking is later found to be illegal, for in time of emergency the Government might need to take lands

48. Trancontinental Gas Pipeline Corp. v. Borough of Milltown, Middlesex Cty., N.J., 93 F. Supp. 287, 292 (D.N.J. 1950) (cannot object to a condemnation solely on the basis that some other location might have been better); United States v. Agee, 322 F.2d 139, 142 (6th Cir. 1963) (other landowners offered severance damages but appellant condemnee was not).

49. 448 F.2d at 983.

50. 478 F.2d at 1061.

51. *Id.* at 1059-60.

52. 40 U.S.C. § 258a (1970).

43. *Id.* *See* note 2.

quickly and expediently.[54] The Declaration of Taking Act does not bestow independent authority to condemn lands, it only provides a proceeding "ancillary or incidental to suits brought under other statutes."[55] Rule 71A is complimentary and consistent with the Declaration of Taking Act,[56] and the appellate court correctly looked to rule 71A for the applicable condemnation procedure.[57]

The concept of finality which the court had to deal with in *Cooley* was admittedly a difficult task. The basic premise that a "final decision is generally one which ends the litigation on the merits and leaves nothing for the lower court to do but execute the judgment"[58] is of no help in defining the many situations which might occur but do not fit precisely into that dogma.[59] As the *Cooley* court recognized, there is no all-purpose test for finality.[60] The *Catlin* case, which was quoted by the appellate court for recognizing that exceptions to the finiality rule do exist, held firmly against the landowners. Indeed, the case is widely followed for the proposition that orders entering judgment on the declaration of taking and denying a motion to vacate the judgment do not make a case appealable as a final decision.[61] But even if the interpretation of *Catlin* is faulty, the court in *Cooley* still avoids the finality rule by simply not labelling the appeal "interlocutory" thus placing it outside of 28 U.S.C. § 1292(a) and (b). There are a few exceptional cases such as *Forgay v. Conrad*,[62] as well as *Manhattan* aand *Loughran* which *Coo-*

54. Catlin v. United States, 324 U.S. 229 (1945).

55. *Id.* *See* United States v. Dow, 357 U.S. 17 (1958); and United States v. 55.103 Acres of Land, More or Less, Situate in Moultrie Cty., State of Ill., 249 F. Supp. 253, 255 (E.D. Ill. 1966).

56. *E.g.*, 374 F.2d at 223-4; WEST'S FEDERAL PRACTICE MANUAL, § 7700 (1970). *See* City of Oakland v. United States, 124 F.2d at 964 regarding how state procedure should not be construed to be inconsistent with the Declaration of Taking Act, and *Nichols, supra* note 39, at § 2.13 regarding state consent, and vol. 6A § 27.2, 27.25 n.64 which supports the premise that rule 71A is not intended to and does not supresede the Declaration of Taking Act.

57. WEST'S FEDERAL PRACTICE MANUAL, § 7700 (1970).

58. 324 U.S. at 233.

59. As Charles Wright states, "Such a definition cannot account for the fact that an order in a condemnation case that decrees title in the United States where compensation is not settled is *not* final and appealable, but an order in an antitrust case finding a statutory violation and ordering a divestiture, but leaving open the question as to how this divestiture should be accomplished is final and appealable." WRIGHT, FEDERAL COURTS, 395-96 (1963).

60. Republic Natl. Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1947).

61. *E.g.*, United States v. Kasnas City, Kansas, 159 F.2d 125, 129 (10th Cir. 1946); and United States v. 687.30 Acres of Land (3 cases consolidated on appeal), 451 F.2d 667, 669 (8th Cir. 1971). At no other place in *Catlin* except for the "ordinarily" quote in *Cooley* does the Supreme Court suggest that the denial of a motion to vacate after a declaration of taking is appealable. At 324 U.S. 233 the Court stated that a final decision ends the litigation on the merits and leaves nothing for the court to do but execute judgment. At 238 the Court stated that the Declaration of Taking Act does not alter the rule that an appeal must be of a "final" nature, even though the Act provides for immediate vesting of title and taking of possession.

62. 47 U.S. 201, 204 (1848). Also, Eden Memorial Park Assn. v. United States,

ley cites. All have the common disposition of an appeal being granted by an appellate court because the controversy had gone to a point where it would have been useless to delay an appeal.[63]

In eminent domain cases, if the statutes are interpreted literally and the Government agency follows accepted procedure, the case often ends at that point. The appellate court was obviously concerned that the Cooleys failed to obtain a hearing before being dispossessed having raised the seemingly valid grounds of arbitrariness and bad faith. Whether the appellate court did believe that there was actual bad faith on the Secretary of the Army's part is not certain, although the Government didn't help its case by dwelling on the argument that courts had no right to review, while practically ignoring the other issues in their brief.[64]

The appellate court in *Cooley* decided that the Supreme Court had recognized exceptions to 28 U.S.C. § 1292(b) and final appeals in general, and whether the court used the exceptions from *Manhattan*, or Justice Black's "fundamental for further conduct" language from *Gillespie*, or a close reading of *Catlin*, the result is the same, and appellate review was found to exist. If one accepts the reasoning of the court that the Cooleys had a triable issue of arbitrariness or bad faith, the right to a hearing and appellate review logically follow. If not, the case should not have been heard *ab initio*.

CONCLUSION

In a recent Sixth Circuit decision, *Ledford v. Corps. of Engineers*,[65] the *Cooley* case was mentioned as recognizing a "narrow exception" to the general rule of nonreviewability.[66] But it is an exception nonetheless, and an

300 F.2d 432, 439 (9th Cir. 1962), which distinguishes *Catlin* by stating that if a condemnation case is before an appellate court on an interlocutory order, that court can review the validity of the taking if it's a question which is ripe for review and if it is necessary to dispose of the interlocutory appeal.

63. As far as considering the appeal here as a mandamus, the court probably meant the *effect* of the appeal was the same as a mandamus. The power to issue a writ of mandamus is used sparingly, but is practiced when exceptional circumstances exist. Usually the trial court issues the writ if there is a controlling question of law involved which will "materially advance the ultimate termination of the litigation." (28 U.S.C. § 1292(b) (1948)). However, it remains available for use in extraordinary cases by appellate courts. (WRIGHT, FEDERAL COURTS, 402-03 (1963)).

64. See Brief for Appellee, 478 F.2d 1055 (7th Cir. 1973).

65. 500 F.2d 26, 28 (6th Cir. 1974).

66. This, of course, refers to when bad faith is found. In *Ledford*, a landowner tried to use *Cooley* to prevent condemnation. The court found for the Government and distinguished *Cooley* on two grounds. First, the condemnee had conceded that a public use existed, something the Cooleys did not do, and challenged the *extent* of the taking, an issue which was never raised by the Cooleys (500 F.2d at 28). Second, the court said there was a procedural difference because in *Cooley* the property owners raised their objections to the condemnation action in their answer pursuant to rule 71A(e), while in *Ledford* the landowner launched a collateral attack by filing a complaint under 28 U.S.C. § 1358 (1948) (which provides that the district courts have original jurisdiction in condemnation proceedings for the use of the United States), and did not file an an-

important case because of it. Whether one agrees with the holding or not, it is one of the few cases at the appellate level where a landowner successfully proved the possibility of bad faith existing in what appeared to be an otherwise legitimate taking by the Government. In addition, the case encompasses important issues in the federal condemnation process.

There are often justifiable reasons for the federal Government to acquire land immediately, times of national defense or disaster being the best examples. Just as a landowner might be irreparably damaged if his appeal is not heard, the public welfare might similarly be damaged if the Government could not act quickly in certain situations to condemn lands. But in other instances apart from urgent governmental necessity, it would seem only fair to our sense of justice that a landowner should have the right to a hearing before being evicted by a Government agency, *if* there are legitimate questions as to whether the agency acted arbitrarily or in bad faith. It would follow that he should have a right to appeal if he never received that hearing. These rights have always existed, although they have been buried by acts of Congress and procedural difficulties. The *Cooley* case has brought them back from obscurity.

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swer. The appellate court easily dismissed this complaint because § 1358 was intended to grant district courts jurisdiction only in actions brought *by* the United States, and not by the landowner. Since no answer was filed and § 1358 was the appellant's only claim to jurisdiction, the court would not hear the appeal.