

GAME AND FISH:  
PURCHASING AGENT:

Purchasing Agent not necessary party  
in condemnation suit under Section  
8220, R. S. 1929.

October 3, 1933



Honorable Wilbur C. Buford  
Commissioner  
Game and Fish Department  
Jefferson City, Missouri

Dear Mr. Buford:

This is to acknowledge your letter of October 2, 1933, which is as follows:

"Section 8220, R. S. Mo. 1929, provides for the condemnation of lands for state park purposes by the Governor, the Attorney-General and the Fish and Game Commissioner in the name of the State. Section 2 of the State Purchasing Agent Act, Pages 410-414, both inclusive, section acts of 1933 provides that the purchasing agent 'for negotiation, all leases and purchase of lands, except for such departments as derive their power to acquire lands from the constitution of the State.'

It is the desire of this department to have instituted condemnation proceedings for certain lands for State Park purposes in Holt County Missouri. Will you kindly advise me whether or not such proceedings shall be instituted in the name of the state purchasing agent as relator or in the names of the Governor, the Attorney-General and the Fish and Game Commissioner as relators."

Section 8220 R. S. 1929, provides in part as follows:

"It is hereby made the duty of the fish and game commissioner to set apart and withhold from the receipts of his office, not less than twenty-five per cent. of all fees and other moneys by him collected in the enforcement of the fish and game law, which shall be

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set apart and dedicated to the purpose of purchasing, improving and maintaining for the state suitable real estate for public parks, for the recreation of the people of Missouri;"

And further,

"The said state fish and game commissioner by and with the consent and approval of the governor and attorney-general is hereby authorized to contract for and purchase real estate, the title of which shall be conveyed to the state of Missouri, for the use as public parks, etc., \* \* \* \* \* And when any real estate is contracted for or purchased as herein provided a full report thereof shall be made to the governor of the state, and a copy thereof filed with the secretary of the state."

And further,

"The governor, attorney-general and fish and game commissioner, in the name of the state, may enforce the right of eminent domain to condemn lands for state park purposes, where necessary, as is now done by railroad corporations for rights-of-ways. Etc."

A reading of the above section shows that lands for state park purposes, for the use of the people of Missouri, may be acquired in two different ways: First; by voluntary purchase, and second; by condemnation. Your inquiry concerns condemnation of land. You inquire if it is necessary to include the purchasing agent as one of the relators in a suit of condemnation.

Laws of Missouri, 1933, page 411, Section 2, in part provides:

"He (purchasing Agent) shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Your attention is directed to the words "and purchase all lands". Referring to Section 8220, supra, we find that when the right of eminent domain to condemn land for state purposes is used that it shall be exercised in the same manner as railroads for rights-of-ways.

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Section 4680, R. S. 1929, provides in part:

"\* \* \*, and if the title thereof cannot be secured by agreement with the owners thereof, or if from any other cause the title cannot be secured, such company may proceed to condemn the same in the same manner and with the same effect as is now provided by law for the condemnation of other lands."

See Section 4655 R. S. 1929, for general and additional powers of railroads relative to lands.

Constitution of Missouri, Vol. 1, R. S. 1929, Article II, Sections 20 and 21, pertain to "eminent domain". We quote Section 21:

"That private property shall not be taken or damages for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Thus, Section 8220, supra, provides the right of eminent domain to condemn, and Section 2, Laws of Missouri, 1933, supra, provides that the Purchasing Agent shall negotiate all purchases of land. The question arises as to whether or not there is any difference between the right of eminent domain to condemn and the right to purchase; or whether or not the word "purchase", as used in the 1933 Laws, is comprehensive enough to include eminent domain. This brings us to a discussion of the words "eminent domain" and "purchase."

Corpus Juris, Vol. 20, page 513, in defining "eminent domain" says this:

"Eminent domain is the right of the nation or the state or of those to whom the power has been lawfully delegated to condemn private property for public use, and to appropriate the ownership and possession of such property for such use upon paying the owner a due compensation to be ascertained according to law."

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And further,

"The prevailing view is that the right of eminent domain is an attribute of sovereignty, inherent therein as a necessary and inseparable part thereof, although a theory in some cases is that it is a reserve right vested in the state, \* \* \*"

And further at page 533:

"The right of eminent domain may be exercised either directly by the legislature or through the medium of corporate bodies, or of individual enterprises, by virtue of a delegation of the power. \* \* \*"

And further, page 538:

"The power to take property for public use may be delegated to private corporations, but such power must be conferred by express words of the statute or by necessary implication therefrom, and statutes claimed to confer such power must be strictly construed. \* \* \*"

In the case of State ex rel. State Highway Commission v. Gordon et al, 36 S. W. (2d) 105, 1. c. 106, Ragland, Chief Justice, in writing the opinion for the Supreme Court of Missouri, in Banc, said:

"The power of eminent domain is inherent in sovereignty and exists in a sovereign state without any recognition of it in the constitution. Constitutional provisions relating to the taking of property are but limitations upon a power which would otherwise be without limit. 10 R. C. L. 11."

And further,

"The right to exercise the power, or to authorize its exercise, is wholly legislative. When an agency of the state asserts that the right to exercise the power has been delegated to it, it must be able to point out a statute which in express terms or by clear implication authorizes such exercise and to the extent claimed. \* \* \* \* \*"

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Under Section 8220, supra, the statute plainly states that the governor, attorney-general and fish and game commissioner, in the name of the state, may enforce the right of eminent domain to condemn lands for state park purposes. We now determine whether or not the word "purchase" used in Section 2, 1933 Laws, embraces the mode of acquiring lands by condemnation.

In Kohl v. United States, 91 U. S. 367, 23 Law Edition 449, 1. c. 452 (Law Ed.), the Supreme Court of the United States said:

"It is true, the words 'to purchase' might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference."

And, we are of the conclusion the word "purchase" used in Section 2, 1933 Laws, means the acquiring of lands by contract as is contemplated by that part of Section 8220, supra, which provides:

"The said state fish and game commissioner by and with the consent and approval of the governor and attorney-general is hereby authorized to contract for and purchase real estate,"

and that the condemnation suit being a judicial one, it is not necessary that the Purchasing Agent be made a relator.

It is our opinion, therefore, that the style of the case shall be "State ex rel. Guy B. Park, Governor; Roy McKittrick, Attorney-General; and Wilbur C. Buford, Fish and Game Commissioner vs. \_\_\_\_\_", it being unnecessary to include the name of the Purchasing Agent as a relator.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK  
Attorney-General