

Eminent Domain and the Environment

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EMINENT DOMAIN AND THE ENVIRONMENT

In society you will not find health, but in nature. Unless our feet at least stood in the midst of nature, all our faces would be pale and livid. Society is always diseased, and the best is the most so. There is no scent in it so wholesome as that of the pines, nor any fragrance so penetrating and restorative as the life-everlasting in high pastures.

—Henry David Thoreau¹

Since Thoreau wrote those words in 1842 that portion of the nation's land remaining "in nature" has steadily diminished. Old cities have expanded, and new ones have been created. Vast networks of highways, utilized by millions of automobiles, wind their way across the country. Complex systems of utility lines and pipelines, which provide needed electricity, natural gas, oil, and communication, crisscross America. These developments, however, have not been without costs. As Justice William O. Douglas has remarked: "Virgin stands of timber are virtually gone. . . . The wilderness disappears each year under the ravages of bulldozers, highway builders, and men in search of metals that will make them rich."²

As the wilderness retreats, its lands are often appropriated without due regard for maintaining environmental quality;³ the condemnation

1 Thoreau, *Natural History of Massachusetts*, 3 DIAL 19, 20-21 (1842).

2 W. DOUGLAS, POINTS OF REBELLION 50-51 (1970).

3 Highway planning exemplifies this disregard of environmental quality. A noted environmental architect, Ian McHarg, has remarked:

In highway design, the problem is reduced to the simplest and most commonplace terms: traffic, volume, design speed, capacity, pavements, structures, horizontal and vertical alignment. These considerations are married to a thoroughly spurious cost-benefit formula and the consequences of this institutionalized myopia are seen in the scars upon the land and in the cities.

Who are as arrogant, as unmoved by public values and concerns as highway commissions and engineers? . . . Give us your beautiful rivers and valleys, and we will destroy them: Jones Falls in Baltimore, the Schuylkill River in Philadelphia, Rock Creek in Washington, the best beauty of Staten Island, the Stony Brook-Millstone Valley near Princeton.

I. MCHARG, DESIGN WITH NATURE 31 (1969).

There seems to be little debate as to the existence of this problem; rather, argument concerns where to place the blame. McHarg has nominated the highway commissions as the most oblivious to environmental considerations:

If one seeks a single example of an assertion of simple-minded single purpose, the analytical rather than the synthetic view and indifference to natural process—indeed an anti-ecological view—then the highway and its creators leap to mind. There are other aspirants who vie to deface shrines and desecrate sacred cows, but surely it is the highway commissioner and engineer who most passionately embrace insensitivity and philistinism as way of life and profession.

Id.

Justice Douglas, while conceding that "[t]he Public Roads Administration has few

of land for highways,⁴ utility lines,⁵ and pipelines⁶ presents vivid evidence of this lack of concern. Changes in the law of eminent domain, however, would do much to make environmental needs a determinative factor in condemnation proceedings.

I

THE STATUS OF THE LAW

A. *Eminent Domain in General*

Eminent domain is the power to take private property for public use.⁷ Although the United States Constitution does not expressly grant this power to either the federal or state governments, the Supreme Court has held that the power of eminent domain is inherent in sovereignty and requires no constitutional recognition.⁸ The Court

conservation standards," has selected "[t]he Army Corps of Engineers [as] public enemy number one." Douglas, *The Public Be Damned*, 16 PLAYBOY, July 1969, at 143, 182, 143. He comments, however, that "[i]t is not easy to pick out public enemy number one from among our Federal agencies, for many of them are notorious despoilers and the competition is great for that position." *Id.* at 143.

⁴ "Hundreds of trout streams have been destroyed by highway engineers and their faulty plans." W. DOUGLAS, *supra* note 2, at 51. "The design of a highway, as well as its location, may be ruinous to economic, aesthetic, scenic, recreational, or health interests." *Id.* at 85.

For a recent example of the disregard of environmental considerations by highway planners—in this instance in derogation of a statutory duty, see *Citizens To Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287 (U.S. March 2, 1971). Writing in a concurring opinion, Justice Black stated: "I regret that I am compelled to conclude . . . this record contains not one word to indicate that the Secretary raised even a finger to comply with the command of Congress." *Id.* at 4293.

⁵ Concern for the aesthetic environment no doubt prompted a subcommittee of the House Committee on Government Operations to recommend to the Department of the Interior that in granting rights of way for utility lines it should require all applicants to prove affirmatively (1) that the proposed right of way is in accord with the public interest, and (2) that in the event the right of way is harmful to the environment, there is no feasible and prudent alternative and all possible measures to minimize the resulting harm have been taken or are planned. See H.R. REP. NO. 1083, 91st Cong., 2d Sess. 21 (1970).

⁶ An example of the disregard for environmental quality occurred in New Jersey in 1967, when a utility company succeeded in condemning wildlife refuge and conservation land for the construction of a pipeline. *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 49 N.J. 403, 230 A.2d 505 (1967). Experts had characterized the land as "the finest inland, natural fresh water wetland in the entire Northeastern United States and its accessibility to the Metropolitan Area makes it even more valuable." *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 270, 225 A.2d 130, 135 (1966). The land was condemned despite expert testimony that it would result in damage to the best groves of trees, subsoils, springs, and streams. *Id.*

⁷ BLACK'S LAW DICTIONARY 616 (4th rev. ed. 1968).

⁸ "The right of eminent domain, that is, the right to take private property for public

has also found an implied grant of eminent domain within the fifth amendment.⁹ This power to take private property for public use rests in both the state and federal governments,¹⁰ which may exercise it directly or delegate it.¹¹

The exercise of eminent domain, however, is not without restraint. The fifth and fourteenth amendments preclude the deprivation of

uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). See also *United States v. Carmack*, 329 U.S. 230, 236 (1946); *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924).

American scholars have traditionally regarded eminent domain as inherent in sovereignty. Chancellor Kent, for example, wrote in 1827 that "[t]he right of eminent domain, or inherent sovereign power, it is admitted by all publicists, gives to the legislature the control of private property for public uses . . ." 2 J. KENT, COMMENTARIES 275 (1827). See also T. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS 524 (1868). International legal scholars have reached the same conclusion. See, e.g., E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 96 (C. Fenwick transl. 1916); cf. 1 H. GROTIUS, DE JURE BELLI AC PACIS 102 (F. Kelsey transl. 1925); 2 C. VAN BYNKERSHOEK, QUÆSTIONUM JURIS PUBLICI 218-24 (T. Frank transl. 1930).

⁹ The Constitution itself contains an implied recognition of [eminent domain] beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?

Kohl v. United States, 91 U.S. 367, 372-73 (1875).

¹⁰ [T]he right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions. It is a power not surrendered to the United States

Cincinnati v. Louisville & N.R.R., 223 U.S. 390, 400 (1912). See also *Kohl v. United States*, 91 U.S. 367, 371 (1875).

The federal government may also take property by eminent domain. "The right of eminent domain inheres in the Federal Government by virtue of its sovereignty . . ." *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937). "[T]he United States may exercise the right of eminent domain, even within the limits of the several States, for purposes necessary to the execution of the powers granted to the general government by the Constitution." *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 656 (1890).

¹¹ Today, statutes commonly authorize the delegation of the power of eminent domain. This delegation is not limited to governmental agencies, political subdivisions, and municipalities, but may also be extended to private persons and corporations. E.g., 15 U.S.C. § 717f(h) (1964) provides:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way . . . it may acquire the same by the exercise of the right of eminent domain

Such delegations of the power of eminent domain have been held constitutional. "The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested." *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

property without due process of law.¹² It is thus possible for the owner of property to defeat condemnation in eminent domain proceedings. To do so, the owner must prove the taking of his property arbitrary and capricious.¹³ This is extremely difficult because the condemnee has the burden of demonstrating to the satisfaction of the court that the taking is arbitrary. A showing that there exists a viable alternative to the taking will not suffice.¹⁴ Indeed, the condemnee must often prove fraud, bad faith, or manifest abuse to defeat a proposed taking.¹⁵ Absent a showing of such palpable arbitrariness, the condemnee is afforded little relief.

B. *The "Prior Public Use" Doctrine—An Exception*

As a general rule, property already devoted to a public use cannot be condemned for another public use without express legislative authorization,¹⁶ although in many jurisdictions property devoted to one

¹² "No person shall . . . be deprived of . . . property, without due process of law . . ." U.S. CONST. amend. V.

"No State shall . . . deprive any person of . . . property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

¹³ *Southern Pac. Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030 (1967); *United States ex rel. TVA v. 0.08 Acre of Land*, 246 F. Supp. 408, 410 (E.D. Tenn. 1965); *Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 200 So. 2d 428, 433-34 (La. Ct. App. 1967); *Housing & Redev. Authority v. Minneapolis Metropolitan Co.*, 259 Minn. 1, 14-15, 104 N.W.2d 864, 874 (1960); *Vance County v. Royster*, 271 N.C. 53, 60, 155 S.E.2d 790, 795 (1967); *State v. Horner*, 121 W. Va. 75, 81, 1 S.E.2d 486, 489 (1939).

¹⁴ "The mere fact that another location would be equally as feasible, practicable, and desirable would not of itself be sufficient to force the company to change to such location and abandon the location selected." *Miller v. Georgia Power Co.*, 222 Ga. 239, 241, 149 S.E.2d 479, 481 (1966), *quoting* *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 133-34, 62 S.E. 52, 54 (1908). *See also* *Williams v. Transcontinental Gas Pipeline Corp.*, 89 F. Supp. 485, 489 (W.D.S.C. 1950); *United States v. 11.355 Acres of Land*, 51 F. Supp. 752, 754 (N.D. Tex. 1943); *Southwest La. Elec. Membership Corp. v. Simon*, 207 So. 2d 546, 552 (La. Ct. App. 1967), *appeal denied*, 252 La. 104, 209 So. 2d 37 (1968).

¹⁵ "[T]he general rule is that the courts will not disturb [eminent domain] in the absence of fraud, bad faith, or gross abuse of discretion." *Swenson v. Milwaukee County*, 266 Wis. 129, 132, 63 N.W.2d 103, 105 (1954), *quoting* 18 AM. JUR. *Eminent Domain* § 108, at 735 (1938). *See also* *Wilson v. United States*, 350 F.2d 901, 907 (10th Cir. 1965); *United States v. 64.88 Acres of Land*, 244 F.2d 534, 536 (3d Cir. 1957); *Simmonds v. United States*, 199 F.2d 305, 306-07 (9th Cir. 1952); *United States v. Meyer*, 113 F.2d 387, 392 (7th Cir. 1940); *Cemetery Co. v. Warren School Township*, 236 Ind. 171, 188, 139 N.E.2d 538, 546 (1957); *Moore Mill & Lumber Co. v. Foster*, 216 Ore. 204, 244, 336 P.2d 39, 57 (1959); *Bookhart v. Central Elec. Power Cooperative*, 222 S.C. 289, 294, 72 S.E.2d 576, 578 (1952).

¹⁶ "The general rule is that property already devoted to a public use cannot be taken for another public use under the power of eminent domain, where the latter taking will totally destroy or materially interfere with the first use." *Clarke v. Boysen*, 39 F.2d 800, 816 (10th Cir.), *cert. denied*, 282 U.S. 869 (1930). *See also* *United States v. Certain Parcels of Land*, 196 F.2d 657, 661 (4th Cir. 1952), *rev'd on other grounds*, 345 U.S. 344 (1953); *United States v. Southern Power Co.*, 31 F.2d 852, 856 (4th Cir. 1929).

public use may be condemned for another public use of superior rank.¹⁷ A condemnee who is able to establish that his land is devoted to a prior public use may thus be immune from condemnation. Even if his jurisdiction allows the condemnation of one public use for a superior use, the condemnee will not have to meet the difficult burden of proving arbitrariness or capriciousness on the part of the condemnor, but may be able to invoke a balancing test to determine whether the proposed taking is more necessary to the public good than the retention of the existing public use.¹⁸

For property to be held for a public use, however, there must be a legal obligation to maintain it as such; a voluntary assumption of

¹⁷ The fact that the land sought to be condemned is now being used for public purposes does not as a matter of law exempt the property from condemnation for another public purpose. If the purpose for which the site is sought is of superior rank with respect to public necessity to the public use now being made of it, the [condemnor] should prevail.

United States v. Certain Land, 55 F. Supp. 555, 557 (D. Mo. 1944), *aff'd*, 151 F.2d 881 (8th Cir. 1945), *rev'd on other grounds*, 329 U.S. 230 (1946). See also State Highway Comm'n v. Elizabeth, 102 N.J. Eq. 221, 224, 140 A. 335, 336 (Ch. 1928); Fry v. Jackson, 264 S.W. 612, 614 (Tex. Civ. App. 1924); Tacoma v. Nisqually Power Co., 57 Wash. 420, 430-31, 107 P. 199, 202-03 (1910).

A superior use is one by which the public interest would be better served. See 2 J. LEWIS, TREATISE ON THE LAW OF EMINENT DOMAIN § 440 (3d ed. 1909); note 18 *infra*.

That property already devoted to a public use may be condemned for a superior public use clearly appears to be the more accepted rule today. For an analysis of recent cases on this point, see ABA, REPORT OF THE COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE 9-10 (1970); ABA, REPORT OF THE COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE 17-18 (1969); ABA, REPORT OF THE COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE 23-26 (1968).

¹⁸ See note 17 and accompanying text *supra*; cf. 2 J. LEWIS, *supra* note 17, § 440, at 794-96 (emphasis added) (footnotes omitted):

[T]he presumption [when authority to condemn property for any purpose is given in general terms] is against the right to take property which is already devoted to public use. This presumption may be overcome by showing a reasonable necessity for the property desired, as compared with its necessity and importance to the use to which it is already devoted. . . . As to the degree of necessity which must exist . . . the better opinion is that it must be a reasonable one. Whether any general rule can be laid down as to what will constitute a reasonable necessity, may be doubted. But we should say that there was a reasonable necessity for the taking *where the public interests would be better subserved thereby*

Some jurisdictions forbid the condemnation of land already devoted to public use unless the condemnation will create a more necessary public use. See, e.g., ARIZ. REV. STAT. ANN. § 12-1112 (1956):

Before property may be taken, it shall appear that:

- (1) The use to which the property is to be applied is a use authorized by law.
- (2) The taking is necessary to such use.
- (3) If the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use.

For a similar provision see IDAHO CODE § 7-704(3) (1948). Cf. CAL. CIV. PRO. CODE § 1240(3) (West Supp. 1971).

public service that may be abandoned at any time is not exempted.¹⁹ Therefore, only government-owned lands²⁰ or lands held by private persons²¹ under enforceable trusts for the benefit of the public are able to qualify under the prior public use doctrine.

The doctrine is important in reducing takings of environmentally significant land when the land is held as a public trust, but there is a large amount of such land owned by private persons under circumstances that do not qualify as a prior public use. These landowners must meet the difficult burden of proving that the condemnation of their land is arbitrary or capricious.

II

SOME PROPOSALS

A. *Legislative Enactment*

Absent fraud, manifest abuse, or bad faith, land with environmental significance may be condemned as readily as other land. Such areas may be afforded some protection from condemnation by legislation. Two approaches are possible.

First, the prior public use doctrine may be extended to owners of environmentally significant land by legislation. If the condemnee is able to establish the environmental significance of his land,²² and further, that significant environmental damage will result from the proposed taking, the law would extend the benefits of the doctrine to the condemnee.

A second approach is to require the condemnor to prove either that no adverse environmental effect is likely to result from the project or that there exists no feasible and prudent alternative to the proposed

¹⁹ "To exempt property from condemnation under a general grant of the power of eminent domain, it is not enough that it has been voluntarily devoted by its owner to a public or semi-public use. If the use by the public is permissive and may be abandoned at any time, the property is not so held as to be exempt. The test of whether or not property has been devoted to public use is what the owner must do, not what he may choose to do."

Bailey v. Anderson, 182 Va. 70, 74, 27 S.E.2d 914, 915-16, *cert. denied*, 321 U.S. 799 (1943), quoting 18 AM. JUR. *Eminent Domain* § 94, at 720 (1938). See also *Diamond Jo Line Steamers v. Davenport*, 114 Iowa 432, 434, 87 N.W. 399, 400 (1901); *Vermont Hydro-Elec. Corp. v. Dunn*, 95 Vt. 144, 149, 112 A. 223, 225-26 (1921).

²⁰ This would include lands held by the sovereign (*i.e.*, state or federal land), by government subdivisions (*e.g.*, counties), and by municipalities.

²¹ This would include not only land owned by individuals but also lands owned by associations, corporations, and other business enterprises.

²² See note 38 and accompanying text *infra*.

taking, and that all reasonable steps have been taken to minimize ill effects.²³ A variation of this approach is suggested by the Michigan Environmental Protection Act of 1970,²⁴ under which a plaintiff may halt an activity of a defendant, including condemnation of land, by tendering evidence that the activity is likely to be hazardous to the environment.²⁵ The defendant may contest the issue of environmental damage or may establish an affirmative defense by demonstrating that there is no feasible alternative available and that the activity is "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources" ²⁶ The initial burden of proof, however, is on the plaintiff.

Although the Michigan legislation is quite significant in safeguarding environmental interests, it is preferable to place the burden of proving the absence of environmental damage on the condemnor. Thus, a presumption of environmental damage would be created in the absence of proof to the contrary. The imposition of the burden of

²³ See, e.g., Federal Aid-Highway Act, 23 U.S.C. § 138 (Supp. V, 1970); Department of Transportation Act, 49 U.S.C. § 1653(f) (Supp. V, 1970). This approach has been incorporated into several proposed laws and regulations that would safeguard environmental quality. See, e.g., H.R. 19732, 91st Cong., 2d Sess. (1970). Section 101(d)(2) of the bill, entitled the "Corps of Engineers Environmental Policy Act of 1970," would forbid the Secretary of the Army to approve any application for a public works project involving the Corps unless, *inter alia*, "either no adverse environmental effect is likely to result from such project, or there exists no feasible and prudent alternative to such effect and all reasonable steps have been taken to minimize such effect." H.R. REP. NO. 1083, 91st Cong., 2d Sess. 21 (1970), recommends to the Secretary of the Interior that he require all applicants for rights of way to prove affirmatively that (1) the proposed right of way is in accord with the public interest, and (2) if there will be harm to the environment, there is no feasible and prudent alternative.

²⁴ MICH. STAT. ANN. §§ 14.528(201)-(207) (Current Material 1970). For an analysis of this act, see Note, *Michigan Environmental Protection Act of 1970*, 4 J. LAW REFORM 121 (1970).

²⁵ [A]ny person . . . may maintain an action . . . for declaratory and equitable relief against the state, any political subdivision thereof, . . . any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

MICH. STAT. ANN. § 14.528(202)(1) (Current Material 1970).

²⁶ When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.

Id. § 14.528(203)(1).

proof on the condemnor would be dispositive if neither the condemnor nor condemnee were able to prove the absence or probability of environmental damage. More important, the condemnor would be forced to view all projects in environmental terms from their inception—always cognizant that he might have to prove the absence of environmental damage.

B. *The Role of the Judiciary*

Although the problem is amenable to solution by legislation, it is unrealistic to expect the federal government and the governments of the fifty states to enact the necessary laws in the near future.²⁷ Inquiry into possible ways for the courts to deal with this environmental issue is therefore warranted.²⁸

The courts could enlarge the scope of the prior public use doctrine to encompass land held by private parties, notwithstanding the absence of an enforceable trust, when the landholder can prove that the land is environmentally significant and that environmental damage will probably result from the condemnation.²⁹ Courts have heretofore refused to

²⁷ While environmental protection legislation, such as the Michigan Environmental Protection Act of 1970, is necessary and to be encouraged, the absence of any significant environmental protection legislation in most states is indicative that the solution cannot be left to the legislatures. See note 28 *infra*.

A possible drawback to legislation as the sole remedy for environmental problems has been noted:

[T]here is another danger inherent in continuing to attack the problem solely through legislation. Widely publicized new legislation gives the appearance of action without the substance. It lulls the public into a false confidence that something is being done.

Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666, 671 (1970).

²⁸ Attention is increasingly being focused on the judiciary as a mode of combatting the decay of the environment. As one commentator has recently noted:

Public concern about environmental quality is beginning to be felt in the courtroom. Private citizens, no longer willing to accede to the efforts of administrative agencies to protect the public interest, have begun to take the initiative themselves. One dramatic result is a proliferation of lawsuits in which citizens, demanding judicial recognition of their rights as members of the public, sue the very governmental agencies which are supposed to be protecting the public interest.

Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970). Another has announced that "'environmental' litigation [has] come into its own." Krier, *Environmental Litigation and the Burden of Proof*, in *LAW AND THE ENVIRONMENT* 105 (M. Baldwin & J. Page eds. 1970). Moreover, "[t]he number of environmental lawsuits will undoubtedly multiply rapidly over the course of the next few years." *Id.*

²⁹ Of course, the efficacy of this remedy depends upon the willingness of private landholders to challenge condemnation proceedings when their environmentally significant land is threatened. In some situations, however, third parties may be able to challenge

allow condemnees the benefit of the prior public use doctrine unless the use is one "to which the public . . . is legally entitled and to which the owner is legally bound."³⁰ The extension of the prior public use doctrine, however, is not as radical a departure from the case law as it might at first seem.³¹ Present law does not require the public employment of the land in the sense of access or direct use; it is sufficient if the land is devoted to the advantage or benefit of the public.³² Just as the public is harmed by the destruction of environmentally significant land regardless of whether it is owned by a private or public landholder, the public benefits from the continued existence of environmentally significant land regardless of ownership. Biotic communities and ecosystems—the terrestrial jurisdictions of the ecologist—owe no allegiance to the "metes and bounds" of deeds.³³ The environmentally important

condemnation proceedings that threaten the integrity of the environment. See note 40 *infra*.

³⁰ *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 89 N.J. Super. 1, 4, 213 A.2d 193, 195 (1965), *rev'd on other grounds*, 48 N.J. 261, 225 A.2d 130 (1966). See also note 19 and accompanying text *supra*.

³¹ A few courts have allowed private owners, not bound to maintain a public use, the defense of prior public use. See, e.g., *Evergreen Cemetery Ass'n v. New Haven*, 43 Conn. 234 (1875) (private cemetery); *County Bd. of Comm'rs v. Holliday*, 182 S.C. 510, 189 S.E. 885 (1937) (church cemetery); cf. *President & Fellows of Middlebury College v. Central Power Corp.*, 101 Vt. 325, 143 A. 384 (1928) (private college). See also Brief for Appellant at 9-10, *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966), where the appellant argued (unsuccessfully) for the availability of the defense of prior public use to a private landholder. For a discussion of that aspect of the case by one of appellant's attorneys, see McCarter, *The Case That Almost Was*, 54 A.B.A.J. 1076 (1968).

³² Cf. *Katz v. Brandon*, 156 Conn. 521, 532-33, 245 A.2d 579, 586 (1968); *Spahn v. Stewart*, 268 Ky. 97, 104, 103 S.W.2d 651, 655 (1937); *Kansas City v. Liebi*, 298 Mo. 569, 592-94, 252 S.W. 404, 407-08 (1923); *State v. Totowa Lumber & Supply Co.*, 96 N.J. Super. 115, 119-23, 232 A.2d 655, 658-59 (1967); *State ex rel. Allerton Parking Corp. v. Cleveland*, 4 Ohio App. 2d 57, 64-67, 211 N.E.2d 203, 208-09 (1965), *aff'd*, 6 Ohio St. 2d 165, 216 N.E.2d 876 (1966).

The courts have held, moreover, that what constitutes a public use will vary with the changing conceptions of the scope and functions of government. As one court has noted, "[w]hat constitutes a proper use will depend largely on the social needs of the times and may change from generation to generation." *City of Trenton v. Lenzner*, 16 N.J. 465, 470, 109 A.2d 409, 411 (1954), *cert. denied*, 348 U.S. 972 (1955). See also *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); *Clendaniel v. Conrad*, 26 Del. 549, 581-82, 83 A. 1036, 1046 (1912), *error dismissed*, 235 U.S. 712 (1914); *Fountain Park Co. v. Hensler*, 199 Ind. 95, 116-17, 155 N.E. 465, 472 (1927); *State ex rel. Smith v. Kemp*, 124 Kan. 716, 719-21, 261 P. 556, 557-58 (1927), *error dismissed*, 278 U.S. 191 (1929); *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 144 Minn. 1, 16-17, 176 N.W. 159, 161 (1920); *Bowman v. Kansas City*, 361 Mo. 14, 24-25, 233 S.W.2d 26, 32-33 (1950); *New York City Housing Authority v. Muller*, 270 N.Y. 333, 340-41, 1 N.E.2d 153, 155 (1936); *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 221, 200 A. 834, 840 (1938); *State ex rel. Chelan Elec. Co. v. Superior Ct.*, 142 Wash. 270, 276, 253 P. 115, 117 (1927).

³³ As one ecologist has noted, "[t]he terrestrial ecosystem is not always presented in

features of certain lands, such as forest or marsh, may be crucial to the continued environmental "health" of other lands despite their legal separateness and diverse ownership. When the interdependence of many tracts of land within an ecological system is recognized, it is quite obvious that the public may gain significant environmental benefits from land even though it is privately owned.

The environmental significance of land and the likelihood that a proposed condemnation will cause ecological damage are questions that can only be answered on an ad hoc basis.³⁴ Nevertheless, the governing principle should be that the best route or location is the one that provides the maximum social benefit and the least social cost.³⁵ It is clear, however, that the condemnation process has failed to consider the ecological and social costs associated with the destruction of the environment.³⁶ To be accurate, the cost-benefit analysis of planners and developers must include *all* of the costs,³⁷ not just the expense of purchase and construction. The appraisal of non-economic costs, especially environmental destruction, need not employ an altogether subjective methodology. Several methods have been proposed for objectively evaluating the relative environmental significance of an area,³⁸ and the availability of such methods indicates that the courts will be able to consider the viability of alternative locations for condemnation.

An objection certain to be raised to the extension of the prior

so neat a package . . ." Rowe, *The Level-of-Integration Concept and Ecology*, 42 *ECOLOGY* 420, 422 (1961). Rowe describes the boundaries that do delineate ecosystems as biota, soil, and physiography. *Id.* at 425.

³⁴ Cf. D. Lacate, *The Role of Resource Inventories and Landscape Ecology in the Highway Route Selection Process—A Case Study Using the Proposed Relocation of New York State Route 13*, Sept. 1, 1970 (unpublished thesis in the Cornell University Library). The author notes that "[t]he development of a universally applicable set of criteria for highway route selections" would not be feasible or realistic. *Id.* at 3.

³⁵ I. McHARG, *supra* note 3, at 32.

³⁶ *Id.* See also Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 *CORNELL L. REV.* 707, 709 (1970). For further criticism of the cost-benefit analysis as applied to environmental considerations, see Hammond, *Convention and Limitation in Benefit-Cost Analysis*, 6 *NATURAL RESOURCES J.* 195 (1966).

³⁷ Some of the frequently ignored social costs that are nevertheless important are losses in (1) community values, (2) institutional values, (3) residential values, (4) scenic values, (5) historic values, (6) recreational values, (7) surface water resources, (8) groundwater resources, (9) forest resources, and (10) wildlife resources. I. McHARG, *supra* note 3, at 33.

³⁸ McHarg has proposed a method by which one superimposes transparent overlays on a map of the area, with each overlay shaded with respect to one environmental value, such as forest resources. For a list of the values that McHarg includes, see note 37 *supra*. McHarg uses three different shades to indicate the relative importance of the value; e.g., an excellent forest would be shaded the darkest shade, while a poor forest would be shaded the lightest shade. D. Lacate, *supra* note 34, at 159.

public use doctrine, either by legislation or court decision, to persons who voluntarily devote their land to public use is that they are not bound to maintain that devotion. An owner may defeat condemnation of environmentally significant land one day, only to abandon the public use the next. This shortcoming could be remedied if the courts (or the legislatures) would create an enforceable public trust of the environmentally significant land after successful invocation of the prior public use doctrine by the condemnee. A landholder's previous invocation of the prior public use doctrine in order to save his land from condemnation would estop him from asserting his absolute ownership and control of the land. Having successfully asserted the prior public use doctrine to defeat the condemnation of his land, the landholder (and subsequent holders of title to the land) would hold the land in trust for the benefit of the public.

An alternative to the creation of an enforceable public trust would be the creation of a conservation easement on the owner's property in favor of the public after the owner's successful implementation of the prior public use doctrine to defeat condemnation.³⁹

Of course, the owner, knowing that he may defeat condemnation by invoking the prior public use doctrine, might elect to exploit his position by offering to sell his land to the condemnor at a higher price than he would normally obtain through eminent domain. Yet this is not a serious problem. Should a landholder decide to take advantage of his position in this manner, the condemning agency will come to appreciate the increased costs of taking environmentally significant land and may well be prompted to consider other alternatives.⁴⁰ In terms of cost-benefit analysis, there would be a more realistic appraisal of the costs associated with environmental destruction.

A second approach, short of expanding the prior public use doctrine, is suggested by the New Jersey Supreme Court in *Texas Eastern*

³⁹ In much the same manner that an easement of light or air precludes the owner of a servient estate from erecting a structure that would interfere with the enjoyment of that right, the easement in this case would preclude the servient owner from hindering the environmental significance of the estate.

It cannot be argued that the landholder is thus denied his property rights by either the trust or easement doctrines. In either case the state had the power to take by eminent domain; it is only because the property owner himself has declared the trust or created the easement that the restriction arises.

⁴⁰ Legislation such as the Michigan Environmental Protection Act of 1970 would diminish the importance of either the public trust or easement proposals as methods of ensuring the retention of environmentally significant land since a third party could bring suit to enjoin environmentally destructive activity without the aid or assistance of the landholder. MICH. STAT. ANN. § 14.528(202)(1) (Current Material 1970). Thus, the landholder's bargaining position would be weakened.

*Transmission Corp. v. Wildlife Preserves, Inc.*⁴¹ Although the condemnee did not prevail, the court did suggest a standard that may be useful in the future. In refusing to allow the condemnee to invoke the prior public use doctrine because of the voluntary nature of its assumption of public service, the court found that the preserve's dedication of its land to conservation and wildlife did "invest it with a special and unique status."⁴² The court concluded that "the *quantum* of proof required of [the condemnee] to show arbitrariness against it should not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses."⁴³ Under this standard, in order to establish a taking as *prima facie* arbitrary the condemnee must introduce reasonable proof that (1) there will be serious damage to the environment resulting from the taking, and (2) there exists a reasonable alternative that would avoid the damage.⁴⁴ Thus, the court significantly reduced the burden of proof necessary to defeat condemnation and in so doing facilitated environmental protection.

CONCLUSION

The proposals reviewed above reflect an allocation and reallocation of the burden of proof in both of its aspects—the burden of producing evidence and the burden of persuasion—to the benefit of the environment. First, the extension of the prior public use doctrine by either the

⁴¹ 48 N.J. 261, 225 A.2d 130 (1966). For discussions of the case, see McCarter, *supra* note 31; Tarlock, *Eminent Domain—Review of Route Selection Made by Public Utility Through Private Wildlife Refuge*, 8 NATURAL RESOURCES J. 1 (1968).

Texas Eastern Transmission Corporation, a public utility holding a certificate of public necessity and convenience issued by the Federal Power Commission, and therefore possessing the power to exercise eminent domain (15 U.S.C. § 717f(h) (1964)), desired to acquire land for a pipeline on the property of Wildlife Preserves, Inc., a private non-profit corporation dedicated to the acquisition and preservation of land for conservation purposes. The preserve sought to stop condemnation by invoking the prior public use doctrine. The New Jersey lower court, however, refused to extend the benefits of that doctrine to the preserve because of the voluntary nature of its public service. *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 89 N.J. Super. 1, 213 A.2d 193 (1965), *rev'd on other grounds*, 48 N.J. 261, 225 A.2d 130 (1966).

⁴² 48 N.J. at 268, 225 A.2d at 134.

⁴³ *Id.* at 273, 225 A.2d at 137.

⁴⁴ *Id.* at 275, 225 A.2d at 138.

The New Jersey court noted further that although cost was a factor in determining whether there was a reasonable alternative, it was a relative and not an absolute factor. *Id.* at 276, 225 A.2d at 138-39. See also *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 624 (2d Cir. 1965), *cert. denied*, 384 U.S. 91 (1966), where the court held that "in our affluent society, the cost of a project is only one of several factors."

courts or the legislatures to private owners of environmentally significant land would involve transferring the burden of producing evidence from the condemnee to the condemnor (assuming that prior public use was not an absolute bar to condemnation). Second, requiring the condemnor to prove either no adverse environmental effect or no feasible alternative places the burden in both aspects on the condemnor.⁴⁵ Third, the Michigan Environmental Protection Act of 1970 and the New Jersey rule announced in *Texas Eastern Transmission* transfer the burden of producing evidence to the condemnor if their requirements are met.

Allocation of the burden of proof affords the courts a legitimate and very effective means of protecting environmental interests in condemnation proceedings. Moreover, such an allocation is not an infringement of a legislative function, but an exercise of a traditional judicial mechanism.⁴⁶ The courts,⁴⁷ as well as the commentators,⁴⁸ have often recognized that one of the important bases for shifting the burden of proof is public policy. The present allocation of the burden reflects an outmoded policy of development and industrialization that is no longer in harmony with today's environmental concerns.⁴⁹ Its reallocation would make such environmental concerns a significant factor in condemnation proceedings. Furthermore, this method of judicial legislation enables courts to advance important public policies with a

⁴⁵ H.R. REP. No. 1083, 91st Cong., 2d Sess. 21 (1970); see H.R. 19732, 91st Cong., 2d Sess. (1970).

⁴⁶ Krier, *supra* note 28, at 108-09.

⁴⁷ "Where the burden of proof should rest 'is merely a question of policy and fairness based on experience in the different situations.'" *Rustad v. Great N. Ry.*, 122 Minn. 453, 456, 142 N.W. 727, 728 (1913), quoting 4 J. WIGMORE, TREATISE ON EVIDENCE § 2486, at 3524-25 (1st ed. 1905). (In *Rustad*, the court created a presumption of negligence where goods are lost or damaged in the hands of a bailee, thus manipulating the respective burdens of proof.) See also *Denning Warehouse Co. v. Widener*, 172 F.2d 910, 913 (10th Cir. 1949); *Paul v. Ribicoff*, 206 F. Supp. 606, 610 (D. Colo. 1962).

⁴⁸ See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 309, at 641 (1954); 9 J. WIGMORE, TREATISE ON EVIDENCE § 2486, at 275 (3d ed. 1940); Morgan, *Federal Constitutional Limitations upon Presumptions Created by State Legislation*, in HARVARD LEGAL ESSAYS 323, 341 (1934); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11-12 (1959); James, *Burdens of Proof*, 47 VA. L. REV. 51, 60 (1961). See also *Barrett v. Otis Elevator Co.*, 431 Pa. 446, 452-58, 246 A.2d 668, 672-74 (1968); C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 96, at 610 (2d ed. 1947).

⁴⁹ This common-law preference [for economic productivity] reflected a broad policy favoring industrial expansion and economic growth at the expense of natural resource conservation. . . .

Today, however, conditions are radically different. Yet the burden rule, the justifications for its existence largely dead and gone, lives on

Krier, *supra* note 28, at 107-08.

minimum of controversy.⁵⁰ The courts may therefore manipulate the burden of proof as the needs of society change⁵¹—indeed, the rationale underlying imposing such a burden compels them to do so.⁵²

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⁵⁰ *Id.* at 108.

⁵¹ The common law is a living process. Like all things that have the principle of life in them, its evolution is marked by trial and error. It is moulded and adapted to an ultimate end. That end is justice, imperfect by the limitations of human-kind yet lighted by the divine spark of creative thinking. Struggling ever forward, the common law like nature finds many decisions no longer in consonance with its needs and ruthlessly overrules or differentiates them *until like a species no longer in harmony with its environment* the decisions tested by the needs of the times and found wanting are declared dead.

Schneider, *The Presumptive Rule of Negligence or When Do the Facts Speak*, 13 B.U.L. REV. 50 (1933) (emphasis added) (footnote omitted). See also O.W. HOLMES, THE COMMON LAW 5 (M. Howe ed. 1963), where the author notes that “[t]he life of the law has not been logic: it has been experience. The felt necessities of the time”

For a good discussion of nuisance law relating to pollution, with attendant manipulations of the burden of proof, see Katz, *The Function of Tort Liability in Technology, Assessment*, 38 U. CIN. L. REV. 587, 616-20 (1969).

⁵² If public policy and the needs of the times are to continue to allocate the burden of proof, then the preservation of environmental quality requires a change in condemnation procedure now.

When times were different, the march of progress, as progress was *then* understood, demanded that industrial and commercial development take precedence over conservation, as that term is *now* understood. . . .

. . . .
 . . . Our ancestors fought the wilderness. We are, belatedly, fighting for it. Brief for Appellant at 22-23, *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966) (emphasis in original).