

# Urban Law Annual ; Journal of Urban and Contemporary Law

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Volume 9

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January 1975

## Environmental Protection—Eminent Domain and the Minnesota Environmental Rights Act: A Shift in the Balance of Power?

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### Recommended Citation

*Environmental Protection—Eminent Domain and the Minnesota Environmental Rights Act: A Shift in the Balance of Power?*, 9 URB. L. ANN. 237 (1975)

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## EMINENT DOMAIN AND THE MINNESOTA ENVIRONMENTAL RIGHTS ACT: A SHIFT IN THE BALANCE OF POWER?

Tell an engineer that his dam will destroy a salmon run and he will meet *that* problem with a fish ladder. Tell him that his fish ladder will create another problem, and he will deal with *that*—but never by abandoning the fish ladder and certainly never by questioning the existence of the dam. What he will not do is look at the totality of what he is doing.<sup>1</sup>

Public concern with the destruction of the natural environment has resulted in state legislation granting citizens the right to sue to enjoin environmentally harmful conduct.<sup>2</sup> Because such legislation is recent and varies in scope from state to state,<sup>3</sup> a complete assessment of its impact is not yet available.<sup>4</sup> The decision of the Supreme Court of Minnesota in *County of Freeborn v. Bryson*<sup>5</sup> is the first to affirm that such citizen-suit statutes confer standing to oppose an exercise of the eminent domain power.<sup>6</sup> Should *Bryson* prove a benchmark in the

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1. G. MARINE, *AMERICA THE RAPED: THE ENGINEERING MENTALITY AND THE DEVASTATION OF A CONTINENT* 201 (1969).

2. CONN. GEN. STAT. REV. §§ 22a-14 to -20 (1973); FLA. STAT. ANN. § 403.412 (1973); IND. ANN. STAT. CODE § 13-6-1-1 (Burns 1973); MASS. ANN. LAWS ch. 214, § 10A (Supp. 1973); MICH. STAT. ANN. § 14.528(202) (Supp. 1974); MINN. STAT. ANN. § 116B.03 (Supp. 1974); S.D. COMPILED LAWS ANN. § 21-10A-1 (Supp. 1974).

3. Compare FLA. STAT. ANN. § 403.412 (1973) with MINN. STAT. ANN. § 116B (Supp. 1974).

4. Professor J. L. Sax of the University of Michigan has published two progress reports detailing developments under the Michigan legislation, which was the first of the citizen-suit statutes to be enacted. See Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974).

5. \_\_\_\_\_ Minn. \_\_\_\_\_, 210 N.W.2d 290 (1973). *Bryson* is the first case to be decided under the Minnesota legislation.

6. "Any person residing within the state . . . may maintain a civil action . . . for declaratory or equitable relief . . . against any person, for the protection of . . . natural resources located within the state . . ." MINN. STAT. ANN. § 116B.03(1) (Supp. 1974).

"Person" means any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality, any public or private corporation, any partnership, firm, association, or other or-

environmental citizen-suit field, the possibility of such suits clearly will be a factor for public and private planners to consider in the future.

The *Bryson* case was instituted in response to highway condemnation proceedings initiated by the County.<sup>7</sup> Plaintiffs opposed the taking of marsh land on their farm, which had been privately dedicated for use as a wildlife refuge.<sup>8</sup> Pursuant to the Minnesota Environmental Rights Act (MERA),<sup>9</sup> they sued to enjoin the condemnation on the ground that highway construction across their land would "materially adversely affect" portions of the habitat. Plaintiffs appealed from a dismissal for failure to establish a prima facie case under MERA.<sup>10</sup> The Supreme Court of Minnesota reversed and remanded, holding that MERA "limit[s] the power of governmental subdivisions in eminent domain proceedings."<sup>11</sup> Thus *Bryson* deals with an important question regarding the intended operation of MERA, the answer to which may have far-reaching consequences for the exercise of the eminent domain power in Minnesota and in other jurisdictions having similar legislation.<sup>12</sup>

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ganization, any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing, and any other entity, except a family farm . . . .  
*Id.* § 116B.02(2).

"'Pollution, impairment or destruction' is any conduct by any person . . . which materially adversely affects or is likely to materially adversely affect the environment . . ." *Id.* § 116B.02(5).

7. . . . . Minn. at . . . . ., 210 N.W.2d at 292.

8. *Id.* at . . . . ., 210 N.W.2d at 293.

9. MINN. STAT. ANN. § 116B.02(5) (Supp. 1974). The taking involved a seven-tenths acre portion of the 19 acres designated by the owner as a wildlife area. The area had been developed as a wildlife habitat through excavation of ponds, maintenance of a one-acre unharvested food plot, and fir tree plantings. The proposed highway would divide the marsh area, which contained varied plant and animal life and was part of a larger slough complex. Expert witnesses for the owner testified that the proposed construction would have a detrimental effect upon the marsh area's value as a wildlife habitat because it would eliminate natural assets, destroy the quiet and solitude of the area, increase animal and bird fatalities, and have other adverse effects, . . . . . Minn. at . . . . ., 210 N.W.2d at 292-93.

10. . . . . Minn. at . . . . ., 210 N.W.2d at 292.

11. *Id.* at . . . . ., 210 N.W.2d at 295.

12 In three Michigan cases landowners have challenged the condemnation of transmission line rights-of-way by privately owned utilities. Two are still pending in court; plaintiff accepted a handsome money settlement in the other. In the most interesting of these, the probate court ruled that in condemnation proceedings property owners are precluded from offering any proofs relating to the neces-

Eminent domain is the power of the sovereign to take property for public use without the owner's consent.<sup>13</sup> It is an "attribute of sovereignty"<sup>14</sup> and thus is a power inherent in both the federal<sup>15</sup> and state governments.<sup>16</sup> The exercise of the power of eminent domain is limited by the fifth and fourteenth amendments, which forbid the taking of private property without due process of law.<sup>17</sup> To defeat condemnation in an eminent domain proceeding, an owner must prove that the taking of his property is "arbitrary or unreasonable."<sup>18</sup> In Minnesota an owner could not challenge a taking on the ground that it was unnecessary for a public purpose because the question of *necessity*, being legislative, was not subject to judicial review.<sup>19</sup> Thus absent fraud, bad faith, or abuse of discretion by the condemnor, the barest showing of necessity would ordinarily sustain a condemnation.<sup>20</sup> Tra-

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sity of placing the power lines overhead as opposed to underground. The circuit court overruled this interpretation of the Michigan law and, by an order of superintending control, expanded the proofs in the condemnation proceedings to include questions of the protection of air, water and other natural resources from destruction. *Sax & DiMento, supra* note 4, at 15-21. Although the Michigan eminent domain cases to date are factually distinguishable, *Bryson* may prove to be valuable precedent since the Minnesota law was styled after Michigan's. Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 577 (1972); see note 24 *infra*.

13. 1 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1.11 (3d rev. ed. P. Rohan 1973).

14. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

15. *E.g.*, *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937).

16. *E.g.*, *City of Cincinnati v. Louisville & N.R.R.*, 223 U.S. 390, 400 (1912); *State v. Severson*, 194 Minn. 644, 646, 261 N.W. 469, 470-71 (1935).

17. "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.

18. *County of Freeborn v. Bryson*, ..... Minn. ...., ..... 210 N.W.2d 290, 296 (1973); *accord*, *Southern Pac. Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030 (1967); *Housing & Redevelopment Authority v. Minneapolis Metropolitan Co.*, 159 Minn. 1, 15, 104 N.W.2d 864, 874 (1960).

19. *School Dist. No. 40 v. Bolstad*, 121 Minn. 376, 380, 141 N.W. 801, 802-03 (1913).

20. *See Northern States Power Co. v. Oslund*, 236 Minn. 135, 137, 51 N.W.2d 808, 809 (1952): "Although lands may not be taken by eminent domain unless such taking appears to be necessary, it is well settled in this jurisdiction that there need be no showing of absolute or indispensable necessity, but only that the proposed taking is *reasonably necessary or convenient* for the furtherance of the end in view." *Id.* (emphasis in original).

Some states construe the narrow exceptions to the "no-review" rule more liber-

ditionally, when a condemnation was challenged, the only permissible inquiry was whether the governmental unit had exceeded its statutorily delegated power of eminent domain.<sup>21</sup> Prior to *Bryson* the environmental effects of proposed action had no bearing upon the question of necessity in eminent domain proceedings, with limited exceptions provided by the public trust and prior public use doctrines.<sup>22</sup> *Bryson* has changed this rule.

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ally. See McIntire, "Necessity" in Condemnation Cases—Who Speaks for the People?, 22 HASTINGS L.J. 561, 567-68 (1971). Montana permits full judicial review of the necessity for public works projects in condemnation proceedings. *State Highway Comm'n v. Danielsen*, 146 Mont. 539, 409 P.2d 443 (1965). Vermont requires hearings by the State Highway Board on the necessity of a highway and its proposed location. The board must then seek an order of necessity from the courts prior to condemnation. VT. STAT. ANN. tit. 19, §§ 222-28 (1968), as amended, §§ 226-28 (Supp. 1974).

21. *Reilly Tar & Chemical Corp. v. City of St. Louis Park*, 265 Minn. 295, 300-01, 121 N.W.2d 393, 396-97 (1963). In *Bryson* the statutory grant of authority to the County is broadly worded:

- (1) The several county boards shall have general supervision over county highways, . . . and they may appropriate and expend sums . . . as they deem necessary for the establishment . . . of such highways.
- (2) They may acquire by . . . eminent domain proceedings . . . all necessary right of way for such highways . . .

MINN. STAT. ANN. §§ 163.02(1), (2) (1960).

22. See, e.g., *State v. Christopher*, 284 Minn. 233, 170 N.W.2d 95 (1969), cert. denied, 396 U.S. 1011 (1970); *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359, 15 N.W. 684 (1883); *Milwaukee & St. P. Ry. v. Faribault*, 23 Minn. 167 (1870).

A "public trust" is a property right held by one party for the benefit of the public or a considerable portion thereof. The corpus of the public trust comprises certain natural resources and the scenic, historic and aesthetic values of the environment entrusted to the sovereign for the benefit of the people. See Note, *The Public Trust in Public Waterways*, 7 URBAN L. ANN. 219, 220 n.4 (1974). The public trust doctrine prohibits impairment of the public trust or its appropriation to private use. See *id.* at 243-45.

The "prior public use doctrine" forbids the condemnation for public use of property already devoted to a public use. Such property may at the same time be privately held. For property to be held for a public use, however, an enforceable legal obligation (of the private owner) must exist to maintain it as a public use, i.e. the obligation must form part of the public trust. This doctrine can prevent the taking of environmentally significant land that is held as a public trust, but most land is privately owned under circumstances that do not qualify as a prior public use. These landowners must prove that the condemnation of their land is arbitrary or capricious to prevent a taking. Note, *Eminent Domain and the Environment*, 56 CORNELL L. REV. 651, 655-56 (1971). The author discounts legislative solutions to this problem, such as MERA, because "it is unrealistic to expect the federal government and . . . the fifty states to enact the necessary laws in the near future." *Id.* at 658. He argues instead for judicial extension of the prior public use doctrine. *Id.* at 658-64. See also Howard, *State Constitutions*

The threshold question in *Bryson* was whether a landowner, proceeding under MERA, could oppose the County's exercise of its statutorily delegated eminent domain power. Although MERA is broadly worded,<sup>23</sup> the trial court believed that "the legislature did not intend a limitation on a county's powers absent a specific reference to eminent domain in the act."<sup>24</sup> The supreme court, looking to the broad language and express purpose of the legislation,<sup>25</sup> concluded that "the legislature intended in appropriate cases that the power of eminent domain possessed by governmental subdivisions—including the power of a county to condemn land for a public highway—was to be limited by the provisions of the act."<sup>26</sup>

Since MERA limits the power of eminent domain, it follows that the rule precluding inquiry into the necessity for a taking is also inoperative whenever MERA is successfully invoked to oppose condemnation.<sup>27</sup> The supreme court held that plaintiff need establish only

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*and the Environment*, 58 VA. L. REV. 193 (1972); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

23. See note 6 *supra*.

24. .... Minn. at ....., 210 N.W.2d at 296. The leading work on MERA does not mention eminent domain in its account of the Act's legislative history nor in any of the hypothetical case contexts in which the Act's operation is outlined. See generally Note, *The Minnesota Environmental Rights Act*, *supra* note 12.

MERA was patterned after a Model Act drafted by Professor J. L. Sax of the University of Michigan and a similar act that had recently been enacted in Michigan. Commenting on the Michigan Act, Professor Sax said: "It enlarges the role of courts because it permits a plaintiff to assert that his right to environmental quality has been violated in much the same way that one has always been able to claim that a property or contract right has been violated." Sax & Gonner, *supra* note 4, at 1005. Thus, in limited measure, the same objective sought to be achieved by the extension of the public trust doctrine advocated by Sax will be advanced to the extent that the "uncharacteristically brief and plainspoken" acts patterned after Sax's Model Act are given broad substantive content by the judiciary. See generally Sax, *supra* note 22.

25. The statute states:

[E]ach person is entitled by right to the protection, preservation, and enhancement of . . . natural resources located within the state and . . . each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which man and nature can exist in productive harmony. . . . Accordingly, it is in the public interest to provide an adequate civil remedy to protect . . . natural resources located within the state from pollution, impairment, or destruction.

MINN. STAT. ANN. § 116B.01 (Supp. 1974).

26. .... Minn. at ....., 210 N.W.2d at 296.

27. *Id.* at ....., 210 N.W.2d at 296-97.

two elements to make out a prima facie case under MERA: the existence of a protectable natural resource, and the potential pollution, impairment or destruction of that resource.<sup>28</sup> Having made out a prima facie case, plaintiff prevails if defendant-condemnor does not successfully establish its defenses under MERA.<sup>29</sup>

Once the burden of proof shifts to the condemnor, two affirmative defenses are available. The condemnor "may rebut the prima facie showing by the submission of evidence to the contrary,"<sup>30</sup> or, as will most often be the case, "[t]he defendant may also show . . . that there is *no feasible and prudent alternative* and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its . . . natural resources . . ."<sup>31</sup> The supreme court interpreted this to mean that "there should be a balancing of ecological against technological considerations through the Environ-

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28. *Id.* at \_\_\_\_\_, 210 N.W.2d at 297. Natural resources are defined as follows: "Natural resources shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources. Scenic and aesthetic resources shall also be considered natural resources when owned by any governmental unit or agency." MINN. STAT. ANN. § 116B.02(4) (Supp. 1974).

Plaintiff has the burden of showing that "the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the . . . natural resources located within the state. . . ." *Id.* § 116B.04. It is to be noted that the burden of proof rests initially upon plaintiff. This is uniformly true of the citizen-suit statutes so far enacted and constitutes one of the chief objections to the legislative formulae for court enforced protection of the environment. *See Note, Eminent Domain and the Environment, supra* note 22, at 657-58: "[I]t is preferable to place the burden of proving the absence of environmental damage on the condemnor. . . . The imposition of the burden of proof on the condemnor would be dispositive if neither the condemnor nor condemnee were able to prove the absence or probability of environmental damage."

29. *See* \_\_\_\_\_ Minn. at \_\_\_\_\_, 210 N.W.2d at 297. Because plaintiff under MERA has the initial burden of proof, the condemnor prevails if plaintiff is unable to establish that the condemnor's conduct "is likely to materially adversely affect the environment. . . ." *Id.* at \_\_\_\_\_, 210 N.W.2d at 296 n.2; *see* text at note 6 *supra*; note 28 and accompanying text *supra*. Thus, since the Act can be a useful tool in the eminent domain context only if prospective relief is available, MERA's effectiveness in opposing condemnation will depend upon what degree of certainty of harm the Minnesota courts require plaintiff to show.

30. MINN. STAT. ANN. § 116B.04 (Supp. 1974).

31. *Id.* (emphasis added). The same phrase, "no feasible and prudent alternative," is employed in the Department of Transportation Act, 49 U.S.C. § 1653(f) (1970). It was construed to require that "as a matter of sound engineering it would not be feasible to build the highway along any other route." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971) (emphasis added).

mental Rights Act.”<sup>32</sup> The court’s interpretation suggests that a showing by plaintiff of feasible alternate routes less detrimental to the environment would strengthen his case, especially since under MERA “[e]conomic considerations alone shall not constitute a defense . . .”<sup>33</sup>

After holding that MERA imposes limits on eminent domain proceedings, the supreme court remanded for a determination whether the rule applied to the particular facts in *Bryson*. The supreme court feared that a “travesty of justice would occur if, after the county rerouted the highway at a higher cost resulting in a less desirable highway, the landowner . . . decided to divert the area to other uses.”<sup>34</sup> Specific provision for equitable remedies in the Act<sup>35</sup> suggests a solution that would prevent such an anomalous result—once the Act has been successfully invoked to defeat condemnation, the court might condition relief upon the imposition of an enforceable public trust or a conservation easement on the environmentally significant land.<sup>36</sup>

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32. . . . . Minn. at . . . . ., 210 N.W.2d at 297. It should be noted that the “balancing of ecological against technological considerations” called for in *Bryson* sounds strikingly similar to the approach advanced by the Secretary of Transportation in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-13 (1971). Thus the Minnesota supreme court may have provided a standard different from that applied in *Citizens to Preserve Overton Park*. A balancing approach is not necessarily inconsistent with the *Citizens to Preserve Overton Park* approach, however, if the scale is so weighted as to tip only when there is no alternative “as a matter of sound engineering.” See note 31 *supra*.

33. MINN. STAT. ANN. § 116B.04 (Supp. 1974).

34. . . . . Minn. at . . . . ., 210 N.W.2d at 297 A family farm is exempt from suit under MERA. MINN. STAT. ANN. § 116B.02(2) (Supp. 1974). “When the natural resource is located on land which would be exempt from suit against the landowner . . . the fact that there is no guarantee that it will be preserved by the landowner’s future conduct may be balanced against a prima facie showing that a protectable natural resource presently exists.” . . . . . Minn. at . . . . ., 210 N.W.2d at 298. Consequently, using the balancing test discussed in note 32 *supra*, the supreme court termed *Bryson*’s “the barest of prima facie showings. . . .” . . . . . Minn. at . . . . ., 210 N.W.2d at 297.

35. “The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.” MINN. STAT. ANN. § 116B.07 (Supp. 1974).

36. This solution is suggested as a *quid pro quo* for the extension of the prior public use doctrine to environmentally significant lands. Note, *Eminent Domain and the Environment*, *supra* note 22, at 660-61. Plaintiffs in *Bryson* anticipated and encouraged the adoption of such a solution by “signing an easement by which they will give to the State of Minnesota through its Department of Natural Resources a permanent easement for wild life purposes over the entire marsh located



Whether in such a case the courts will deny the remedy that *Bryson* held to be available under MERA remains to be seen. To do so, however, would appear out of keeping with the supreme court's conception of the legislative intent.<sup>37</sup>

By granting citizens the right to challenge the taking of environmentally significant lands, *Bryson* establishes a new limit upon the power of eminent domain. Equally important is the introduction of another variable, environmental considerations, into the formulation of decisions to exercise the power of eminent domain. Planners, long insulated from judicial review by the "necessity rule," will now encounter more effective opposition.<sup>38</sup> Although *Bryson* is not a total victory for environmentalists,<sup>39</sup> few who have witnessed the devastation caused by ill-considered highway route selection will regret the principle established by the decision.<sup>40</sup> *Bryson* forces those who exercise the power of eminent domain to consider the environmental effects of their conduct. Hopefully, the right granted the people to protect their environment will cause planners to "look at the totality of what they are doing."<sup>41</sup>

*Frederick M. Baker*

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on their farm." Letter from R.O. Slen, Attorney for Plaintiff, to Frederick M. Baker, Feb. 7, 1974, on file with the *Urban Law Annual*.

Should the Minnesota courts accept this solution, interests so conveyed will become part of what Sax broadly terms the public trust, further extending the application of that doctrine to privately owned lands. *See* note 22 *supra*. *See generally* Sax, *supra* note 22. Since such trusts or easements would presumably run with the land, the owner could never alienate the public trust therein, which would conform to the traditional theoretical public trust model. *See id* at 475-77; *cf.* Howard, *supra* note 22.

37. "Where a statute such as this is drafted in broad and comprehensive language, we are not justified in engrafting exceptions upon it." ..... Minn. at .....; 210 N.W.2d at 296.

38. In Michigan, the first state to enact such legislation, "some suggestive, anecdotal evidence [exists] that the statute has caused [governmental] agency behavior to change" and it is "apparently having an impact in the private sector, too." Sax & Conner, *supra* note 4, at 1050, 1053.

39. The eminent domain power of the state itself, as distinguished from the powers delegated by it to state agencies and governmental subdivisions, is pre-eminent and remains unaffected by the decision. *See* *State v. Christopher*, 284 Minn. 233, 170 N.W.2d 95 (1969), *cert. denied*, 396 U.S. 1011 (1970).

40. "If one seeks a single example of an assertion of simple-minded 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." I. McHARG, *DESIGN WITH NATURE* 31 (1969).

41. *See* text at note 1 *supra*. In discussing whether a project should be pursued presently or in the future the Court in *Udall v. FPC*, 387 U.S. 428, 436 (1967), stated: "Beyond that is the question whether any dam should be constructed."