THE NEW YORK WILD, SCENIC AND RECREATIONAL RIVERS SYSTEM ACT

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New York's recently enacted Wild, Scenic and Recreational Rivers System Act[1] names 18 stretches of river, approximating 165 miles, for immediate special measures of preservation and enhancement of natural values, and orders study of a more extensive network of streams for possible addition to the system. Over 80 per cent of the lands bordering the named rivers are state-owned; as to them, the Act is principally interesting as an imaginative conservation effort by a state which traditionally has given its forest lands a high measure of protection.[2] Where private lands border the rivers, however, the statute

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1. N.Y. CONSERV. LAW §§ 429-k to -v (McKinney Supp. 1972) [hereinafter cited as Rivers System Act].

2. Since the turn of the century, article XIV of the New York State constitution has required that state-owned forest lands—including all the state lands thus far affected by the law—be kept "forever wild." But wild-ness is not to be confused with wilderness in this context. *See generally* Note, *Permissible Uses of New York's Forest Preserve Under "Forever Wild,"* 19 SYRACUSE L. REV. 969 (1968). The Rivers System Act imposes substantially more rigorous safeguards. While similar restrictions may be the outcome of a Master Plan for State Lands which has just been submitted to the Governor by the Adirondack Park Agency, that plan lacks the permanence of legislative action, and could be changed at any time. N.Y. EXEC. LAW § 807 (McKinney Supp. 1972). Further, article XIV provides New York no protection against *federal* uses of the lands inconsistent with its dedication as wild forest. *Cf.* United States v. New York, 160 F.2d 479 (2d Cir.), *cert. denied*, 331 U.S. 832 (1947); New York Times, Nov. 28, 1971, § 1, at 68, col. 2. Section 429-s of the Rivers System Act, however, makes it possible to in-

provides for use restrictions so severe in some cases that many might conclude they must be purchased through condemnation proceedings. Yet the Act provides for the payment of "just compensation" only if an *existing* use is to be restricted.[3] Whether this provision is sufficient and, if not, what remedies ought to be given are the central concerns of this comment.

I. The Statute

Like the Federal Wild, Scenic and Recreational Rivers Act,[4] the New York statute defines three types of rivers, subject to varying degrees of control,[5] and names certain rivers in each category.[6] The most stringently regulated are "wild" rivers, which account for 78 of the 165 designated miles of riverway. Wild rivers are wilderness rivers, free-flowing, their banks essentially untouched, remote from the sight and sound of civilization, inaccessible except by water, horse or foot. Ninety per cent of their banks are publicly owned. "Scenic" rivers account for 67 miles of the system. Though free-flowing and far from villages or vacation communities, they are more rural than wilderness, with limited road access and modest farming or forestry activities along their banks. About one-third of their banks are in private hands. "Recreational" rivers account for the remaining 20 miles, all at present in state ownership. These are valued chiefly in terms of the opportunities for water recreation they provide; their banks may be readily accessible and developed with occasional towns or resorts.

Administrative responsibility is placed in the hands of an administrative agency, generally the Commissioner of Environmental Conservation.[7] For each of the designated streams, the agency is instructed to define a "river area" up to one-half mile deep along each

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corporate the designated waterways as part of the national wild and scenic rivers system. Once so designated, they would be substantially protected against federal as well as state uses inconsistent with their present state. 16 U.S.C. § 1271 (Supp. 1972).

3. N.Y. Conserv. Law § 429-o (McKinney Supp. 1972).

4. 16 U.S.C. §§ 1271-87 (Supp. 1972).

5. N.Y. Conserv. Law § 429-n (McKinney Supp. 1972).

6. *Id.* § 429-q.

7. *Id.* § 429-m. Within the Adirondack Park, responsibility for privately owned lands bordering the rivers is given to the Adirondack Park Agency, which has general planning responsibility for that part of the state. N.Y. Exec. Law § 804 (McKinney Supp. 1972).

shore,[8] and then, after an appropriate public hearing,[9] to adopt regulations governing use within such areas. Its freedom to shape these regulations, however, is sharply limited by the statute, which imposes minimum levels of regulation for each type of river area.

In wild river areas, for example, the Act essentially requires the maintenance of wilderness conditions; there may be no intrusive noise, no access by motor vehicles, no structures, improvements, or development of any kind.[10] In scenic river areas, existing agricultural and modest forestry activities may be permitted to continue, but mining, excavation and new public road construction are generally to be prohibited.[11] By implication, residential development is also prohibited, for the Act specifically permits "small communities as well as dispersed or cluster residential developments" in recreational river areas,[12] without mentioning them here. Regulation in recreational river areas, generally, is to be quite permissive: there may be roads, railroads, bridge crossings and "numerous" river access points.[13]

The New York Act's almost complete reliance on regulatory measures, rather than land or easement acquisition, is a striking innovation.[14] In providing for study of possible additions to the system, the legislature seems to have recognized that in some cases the State might have to use its eminent domain power to assure the desired levels of restriction; those studies must report any acquisitions of land or easements necessary to assure a given use-designation and estimate their cost.[15] But as to the named rivers, the legislature apparently felt that

8. N.Y. CONSERV. LAW § 429-p (McKinney Supp. 1972).
9. *Id.* § 429-o.
10. *Id.* § 429-o(1).
11. *Id.* § 429-o(2).
12. *Id.* § 429-o(3).
13. *Id.*
14. The Federal Act generally depends on acquisition of scenic easements or, to a limited extent, fee title to bordering lands. 16 U.S.C. §§ 1277, 1286 (1970); 1968 U.S. CODE CONG. & AD. NEWS 3801, 3803. With the exception of segments passing through urban areas where satisfactory, valid zoning ordinances could be relied on, 16 U.S.C. § 1277(c) (1970), the federal government—lacking general powers of land use control—plainly expected to pay for the use restrictions necessary to assure continuance of the designated rivers in their desired state. For estimates of the costs involved see 1968 U.S. CODE CONG. & AD. NEWS at 3804-07, 3809. *See also* the 1966 Maine statute establishing the Allagash Wilderness Waterway which confers both eminent domain and regulatory powers generally and leaves to the commission administering the waterway the choice of which to use. ME. REV. STAT. ANN. tit. 12, §§ 666-69 (Supp. 1972).
15. N.Y. CONSERV. LAW § 429-r(a) (McKinney Supp. 1972).

problems of "taking" would arise only if presently existing uses were to be restricted. A proviso—said to have been inserted in response to protests by large landholders in the affected areas—expressly permits present uses to be continued at or below their present levels, and requires compensation to be paid if an order for their discontinuance is made.[16] The absence of any other provision for compensation is striking.

II. Confiscation?

There is little doubt that New York can restrict activities in the area bordering designated rivers as a matter of "public" purpose. Enhancement of public opportunities for recreation and aesthetic enjoyment in an increasingly crowded and unaesthetic world is now established as an appropriate base for the exercise of governmental power.[17] The real questions, rather, are whether the state may generally elect regulation over purchase as the means of accomplishing the desired restrictions and, to the extent it cannot, what the consequences of a wrong choice would be.

Confiscatory applications of the statute can readily be imagined. For example, Landowner A owns a one-half acre tract fronting on a "wild river" and an easement to build a private road for access through the lands of the company that sold him the property. Creation of a wild river area will mean that he cannot build his road and cannot construct the summer home—the prospect of which was the sole reason for his purchase of the land. Nor is he likely to find a

16. *Id.* § 429-o. This subsection provides:

> Notwithstanding anything herein contained to the contrary, existing land uses within the respective classified river areas may continue, but may not be altered or expanded except as permitted by the respective classifications, unless the commissioner or agency orders the discontinuance of such existing land use. In the event any land use is so directed to be discontinued, adequate compensation therefore shall be paid by the state of New York either by agreement with the real property owner, or in accordance with condemnation proceedings thereon.

Id.

17. People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965). If the restrictions imposed are so severe as to constitute a "taking," the state may use its powers of condemnation to acquire the desired rights. *Cf.* Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966). If they are not, few any longer argue that the restrictions are inappropriate to the state's police powers. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

purchaser for whom it has substantial value; such destruction of access, use and value would surely be found confiscatory.[18] They force A to bear an economic burden for which he receives no compensating benefit,[19] defeating both his reasonable expectations as to use of the property and his ability to profit from it.

It is characteristic of the areas under consideration, however, that such small landholdings are uncommon. The typical private landholder controlling riverfront property, B, may own a five-mile stretch of riverbank and the lands behind to an average depth of four miles. The land was acquired in connection with a mining enterprise or as forest reserve for a paper mill in an area which for 80 years has been characterized by strict control of public land and non-development of private lands. B's recent interest in subdividing the land for vacation home development more or less coincided with the provision by the state legislature for comprehensive land development planning in the area. B's actual use of the half-mile strip, which may be directly affected by designation of a "wild river area" is virtually nil; a railroad traverses one corner of the strip and a mine tailing pile intrudes one-eighth of a mile into the strip at another point.

Interference with B's present use is specifically dealt with by the proviso to Section 429-o.[20] Whether B will have to stop using the railroad or the waste pile cannot be known at all until the responsible agency formally designates the "wild river area," and to avoid such problems it may exclude those points. But if B is forced to stop, compensation for those values will be paid. Perhaps B has been deprived of his periodic harvest of the timber in the protected area; but even if his present lumbering is in another area, it requires no great imagination, dealing with a continuous tract of forest lands, to construe periodic harvesting as an "existing" use as to which B is entitled to compensation in the event of an order of discontinuance.

Must interference with future uses—in particular, the frustration of B's subdivision plans insofar as they include the half-mile strip—be

18. Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1950); *cf.* Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893), in which the official map of proposed streets effectively covered the plaintiff's lot, and thus, "virtually deprived him of the right to build." *Id.* at 584-85, 32 N.E. at 977. The official map statute was found confiscatory, but only as it applied to the lot in question. *Id.* at 585, 32 N.E. at 977.

19. *Cf.* Armstrong v. United States, 364 U.S. 40 (1960).

20. N.Y. CONSERV. LAW § 429-o (McKinney Supp. 1972).

found confiscatory in every case? This is not the place for an attempt to scribe the complex and elusive line between takings and the police power. That is a mammoth theoretical undertaking.[21] Responding to an effort by the New York Court of Appeals which seems to imperil the State's whole zoning structure,[22] a State Commission on Eminent Domain characterized "the formulation of a simple set of rules" as "simply impossible."[23] What may be possible is to suggest the plausibility of fact settings in which B's lands are not specially harmed by the regulation, or in which any harm to the lands as a whole does not exceed a degree of impairment which has been accepted as non-confiscatory in other settings. A court which found such facts in a particular case would have ample basis for concluding that confiscation had not occurred.[24] Like regulations which require

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21. Michelman, *Property, Fairness and Utility,* 80 HARV. L. REV. 1165 (1967) is especially impressive. *See also* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law,* THE SUPREME COURT REVIEW 63 (P. Kurland ed. 1962); Beuscher, *Some Tentative Notes on the Integration of the Police Power and Eminent Domain by the Courts,* 1968 URBAN L. ANN. 1; Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149 (1971).

22. City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971). The court held that despite a proven calamitous effect on value and saleability, an announcement that the property in question would soon be condemned had not worked a de facto taking because of the absence of any "direct legal restraint." *Contra,* Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970). In dictum, however, the New York court indicated that a taking would be found if a "direct legal restraint" was present—if a law or regulation by its "own force and effect deprive[s] owners of property or materially affect[s] its beneficial use or free enjoyment." 28 N.Y.2d at 256, 269 N.E.2d at 904, 321 N.Y.S.2d at 358. Unless limited to cases in which the law in question acts in aid of a planned or possible condemnation, *e.g.,* Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966), or unless "materially" is the key, *cf.* Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893), the dictum seems to encompass most zoning laws. *See* note 18 *supra.* In a more recent decision, the court of appeals found no constitutional flaw in a township land development plan which restricted subdivision development of entire tracts for as long as eighteen years. Golden v. Planning Board, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). While the court remarked, by way of contrast, that a permanent restriction foreclosing any reasonable use of property would constitute a taking, *id.* at ———, 285 N.E.2d at 303, 334 N.Y.S.2d at 154, the context leaves open the question posed here—whether a taking must be found when use of only a part of the property is foreclosed and the whole is not subject to a "diminution of value . . . such as to be tantamount to a confiscation." *Id.* at ———, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

23. 1971 NEW YORK STATE COMM'N ON EMINENT DOMAIN REP. 114.

24. *Compare* Rochester Bus. Inst., Inc. v. City of Rochester, 25 App. Div. 2d 97, 267 N.Y.S.2d 274 (1966) (in which a six per cent cost increase imposed by

houses to be set so many feet apart or so far back from the road, the new Act unquestionably interferes with the beneficial use and enjoyment of part of B's property; but the impact on the whole may not offend our sense of his proper expectations or exceed a level which we expect all to tolerate.

It is possible, if not entirely likely, that the forced dedication of a half-mile strip will not impair the value of B's property.[25] If any private lands were included in recreational river areas (at present, none are), non-impairment would be virtually certain—responsible development is to be permitted and the availability of a protected recreational site is likely to enhance the value of neighboring lands. For scenic and wild river areas, the equation is more complex. One would have to balance against the loss of development rights on the bordering strip, the possible values gained in selling vacation homes by the assurance of a half-mile deep stretch of wilderness or undeveloped lands and a protected river. In calculating the overall return which B could realistically expect from subdivision of his lands, one might find that development of the river would lower the potential value of interior sites and one would account, as well, for the fact that development of the lands as a whole is subject to general regulation without regard to this Act.[26] Since administration of the river area lands in issue here has been put in the hands of the agency usually responsible for development generally, such matters as permitted density of development in the lands behind the protected region might be adjusted with a view to the entire tract, allowing more sites in the developed area than would ordinarily be the case. Overall, it is not certain that the owner's economic opportunities have been reduced.

Even if creation of these restricted zones has an impact on B's property as a whole, that impact need not be so severe as to constitute

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an official map was not a taking), *with* East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (in which a 45 per cent diminution in value imposed by a forced dedication of park lands was held confiscatory), *and* Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893). *See* note 18 *supra.*

25. The fact of forced dedication alone need not be construed to require a finding of confiscation, even though the statute reflects recreational needs of the community as well as hypothetical lot purchasers in foreclosing the development of designated lands. Associated Home Bldrs. v. City of Walnut Creek, 4 Cal. 3d 633, 637-40, 484 P.2d 606, 610-11, 94 Cal. Rptr. 630, 634-35 (1971).

26. *Supra* note 18. *Cf.* Fonoroff, *Proposed Legislation for Highway Corridor Protection,* 1968 URBAN L. ANN. 128.

a taking. A possibly instructive analogy here is that of historic site preservation. The argument for preservation is much the same—rivers designated as "wild" by the New York legislature are essentially the only such streams remaining and are as irreplaceable to their devotees and as evocative of a fading past as, say, the building housing the Manhattan Club. If the proportions are right, as they seem to be, prohibitions on tampering with the front half-mile seem rather like rules against changing the exterior architecture of an appropriately designated historic building. Questions may arise in particular cases whether the effect of that prohibition on the owner is so burdensome that the State cannot enforce it without payment;[27] but the statute itself is valid and the owner who is able to maintain a reasonably profitable use has no compensation claim even though his return is somewhat less than he could obtain if the restriction did not apply.[28] The general acceptance of such an approach is reflected, *inter alia,* in Sections 2-209 and 2-210 of the Second Tentative Draft (1970) of the American Law Institute's Model Land Development Code.[29] For the protection of special natural areas, if not green space generally, the same approach has much to commend it.

To be sure, this line of argument depends on the proposition that the taking question will be resolved with an eye to the whole of B's property adjacent to the river zone, and that is a proposition which has not always been accepted.[30] But in the absence of a particular reason for differentiation—such as a physical invasion of B's property or bona fide construction, sales or other dedication to use premised particularly on the availability of the half-mile strip—B should have a hard time persuading that only that strip should be considered in passing on the condemnation question. Whether the question is defeat of B's reasonable and sharply defined expectations,[31] or the

27. *See* note 24 *supra.* To the extent that the expectations form part of the assessment of burdensomeness traditions of non-development in this area and the fact of non-development on B's lands make the burden less heavy than it would be, for instance, in the suburbs. Michelman, *supra* note 21, at 1238-42.

28. *See* Trustees of Sailors Snug Harbor v. Platt, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1968); Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966).

29. *See also* Note, *The Police Power, Eminent Domain, and The Preservation of Historic Property,* 63 COLUM. L. REV. 708 (1963).

30. *Compare* Rochester Bus. Inst., Inc. v. City of Rochester, 25 App. Div. 2d 97, 267 N.Y.S.2d 274 (1966), *with* Miller v. City of Beaver Falls, 268 Pa. 189, 82 A.2d 34 (1951).

31. Michelman, *supra* note 21, at 1233.

possible unfairness of his being made to bear burdens which should be borne by the public as a whole,[32] or the extent to which the profit-making capacity of his property has been impaired,[33] it cannot reasonably be answered by considering only the burdens imposed by the State's action, and not its possible benefits. Any benefits the statute has created by preserving an otherwise inaccessible wilderness or undeveloped scenic area next to B's developable lands are quite properly viewed as special to those lands.[34]

III. What Remedy, If Confiscation Is Found?

A court faced with a particular case in which it concludes confiscation has occurred ought to be hesitant about fashioning a remedy which extends beyond the case before it. Plainly, the statute as a whole cannot be struck down. In the case of public lands, the question of confiscation simply does not arise; ordinary application of severability principles would suffice to save the statute as it applies to them. And if one form of regulation—say, the restrictions associated with "recreational river areas"—is in no case confiscatory, that much of the statute, too, may readily be preserved. But even in dealing with private lands and a degree of regulation as to which confiscation might be found, simple invalidation of the statute would be improper.

If the question whether this new statute has "confiscated" interests in the private lands it restricts can only be decided with respect to particular holdings, the relief given should also be limited to those lands.[35] Nor should the relief given as to particular lands be limited to an injunction forbidding enforcement of the statute as to those lands. The designated rivers, like historic buildings, are a dwindling resource, which once developed cannot be replaced. That and the very elusiveness of the distinction between proper exercise of police power and confiscatory regulation argue that any judicial remedy for confiscation which may be found in particular cases should preserve the statute's application to the maximum possible degree.

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32. Armstrong v. United States, 364 U.S. 40 (1960).

33. Sax, *supra* note 21, at 149.

34. Petkus v. State Highway Comm'n, 24 Wis. 2d 643, 130 N.W.2d 253 (1964); Haar & Herring, *The Determination of Benefits in Land Acquisition*, 51 Calif. L. Rev. 833 (1963).

35. *Cf.* Nectow v. City of Cambridge, 277 U.S. 183 (1928); Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893).

Suppose the judgment that while "wild river area" regulation of the lands in question would be confiscatory, regulation of these lands under the less severe restrictions applying to a "scenic river area" or even "recreational river area" would present no such problems. Could a court excuse the landowner only from "wild river" regulation, in effect amending the statutory identification of the river from wild to scenic or recreational? Ruling the area free of any control would be the most substantial frustration of legislative judgment; one may with some confidence venture that if told that the choice was between "scenic river" regulation of private lands in wild river areas or none at all, the legislature would choose the former. Clearly enough from the statutory definitions, any river which qualifies as "wild" is also "scenic."

Some courts might hesitate to do what they conceive as the legislature's work; yet, the categories already exist in the statute and to say that a finding of "confiscation" requires, in effect, striking the particular stream from the statute entirely is an even more forceful form of judicial amendment. Nor does the due process clause compel that drastic a step; what it forbids is a taking without compensation, and if this may be avoided in a manner which preserves the evident legislative scheme to a substantial degree, the due process clause has nothing to say. The extent to which judges may or will engage in reconstruction of statutory schemes is not a matter which can usefully be treated here;[36] the importance of the issue, the effect of simply ending regulation, the court's view of its role in the political structure and its feeling regarding its ability to resolve a dispute decisively, in a single decision, all appear to play a part. But, for a court sometimes willing to do so, this is a relatively simple case: the effect of ending regulation would be calamitous for the values sought to be preserved; the issue is an important one at present; and since the statute already provides standards and procedures regarding all three types of rivers, the judicial involvement would be both minimal and brief.

A different approach would be that sometimes suggested in discussions of inverse condemnation—to permit the state its regulation in all cases, but to require just compensation as a condition of its taking effect where that regulation is found confiscatory. Most often, the

36. *Compare* Blount v. Rizzi, 400 U.S. 410, 419 (1970) *with* United States v. Thirty-Seven Photographs, 402 U.S. 363, 368-73 (1971).

inverse condemnation remedy is put forward as a mandatory remedy, compelling payment in all cases. This approach seems neither warranted nor wise here. As a matter of statutory construction, it would seem strained to conclude that a legislature which required condemnation proceedings only when *present* uses were ordered discontinued had directed compensation to be paid in every case where the restrictions on future use were found confiscatory. And, in the article with which the *Urban Law Annual's* existence began, Professor Beuscher has shown serious policy objections to a mandatory payment remedy:[37] unplanned and possibly overwhelming costs; pressure to use condemnation from the outset, rather than regulation, to avoid uncertainty; and a transfer to the judiciary from the legislature of the function of deciding whether and how much to pay for public programs.

These objections may be largely avoided, however, if the remedy is made conditional, permitting the state to avoid injunctive relief by the payment of just compensation within a stated time. Since the legislature or responsible administrator retains control of the choice whether or not to pay, the conditional remedy avoids the financial and political effects of uncertainty which were said to be the greatest drawbacks of the inverse condemnation remedy. This alternative is discussed in the Report of the New York State Commission on Eminent Domain[38] and questioned there on the ground that it raises its own constitutional problems. It deprives the owner of the use of his property for the interim period while the administrator or legislature is deciding whether or not to pay; if the decision is to permit the injunction (against further regulation) to go into effect, will payment be made for the interim period? And if not, has not the remedy effected its own taking, albeit to a lesser degree?[39]

One response might be to distinguish the cases adopting such reasoning on the basis that there the private parties had already begun a course of development when suspension was imposed. More harm, it might be argued, is done by interruption than by postponement. Second, the need to fix a value for the interim period may never arise. Given the state's commitment to conservation, state officials

37. Beuscher, *Some Tentative Notes on the Integration of the Police Power and Eminent Domain by the Courts,* 1968 URBAN L. ANN. 1.

38. *Supra* note 23, at 111-13.

39. Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966); Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951).

may always decide to proceed by condemnation in cases where the regulation imposed is found to be confiscatory. More to the point, perhaps, is that the statute under consideration here can be construed to avoid this particular problem. It specifically makes any interference with present use a taking, compensable in condemnation proceedings. Given the provision for study of acquisition costs for future additions to the system, that provision may be judicially construed as a commitment to pay the value of the uses foregone during the time taken by the state to reach its decision. As a practical matter, it can be doubted whether such damages will occur. But the evident purpose to make owners whole for takings of present uses could be read to include them, in the service of avoiding a more devastating impact on the statutory scheme.

IV. Conclusion

It is plain that this statute "walk[s] to the brink of [the legislature's] constitutional powers"[40] and, in some circumstances, probably falls over. That is a question of which judicial resolution must and, in all likelihood, will be had. The more serious issue is how much of the statute will survive the fall. As we tend towards increasingly stringent restriction of private land use, it is inevitable that the brink will frequently be encountered. Must the legislature which has misread its location—a tracing which, some have said, "is simply impossible"[41]—pay the price of a complete loss of validity of its regulatory scheme? That result would be surprising. While its possible effect of steering legislatures marginally away from police power projects and into use of condemnation could be defended as a suitable "margin of protection" for individual property rights, "all or nothing" is a harsh stake for which to play. That is especially so where, as here, freeing the lands from regulation, even temporarily, is likely to lead to an irreplaceable resource loss, and private property rights can be completely protected by lesser measures.

40. *Supra* note 37, at 2.

41. *Supra* note 23.