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Review of Route Selections for the Federal Aid Highway Systems

Roger Tippy*

INTRODUCTION

When the highway designated as U.S. 2 in Eastern Montana became too old and narrow for its traffic, the State Highway Commission began planning a replacement. Several alternative routes were studied between Poplar and Brockton. A public hearing was held on one alternative: rebuilding the road partially along the existing route line (the Middle Route). The other alternatives were to rebuild completely along the existing route (the South Route) or to run a new road several miles north of the existing route (the North Route).

After surveys indicated lowest construction costs—by a very slight margin—for the North Route, the Commission passed a resolution declaring the land for the North Route to be necessary for the public use. The Commission then brought eminent domain proceedings against the property needed for the North Route. Several affected landowners denied the public necessity of the taking.

In order to take property, a condemnor must establish necessity. However, in most states, the determination of necessity for major highway construction purposes is assigned to the discretion of the state highway department. A court may find lack of necessity only when the defendant proves that the highway department arrived at its determination of necessity in an arbitrary, capricious, or fraudulent manner, amounting to an abuse of discretion.¹

In Montana, however, public necessity is a question for judicial rather than administrative determination. A resolution of the Highway Commission that certain land is necessary creates in court a disputable presumption.² When a defendant introduces evidence of lack of necessity, the court must decide whether the presumption in favor of the Commission has been overcome.³ As an element of necessity, state law requires that the proposed public use be located in a manner “compatible with the greatest public good and the least private injury.”⁴ A statement to this effect is included in the Commission’s resolution of necessity and enjoys the same disputable presumption of truth.⁵


²Revised Codes of Montana, 1947, § 32-1615. (Hereafter Revised Codes of Montana will be cited R.C.M.)
⁴R.C.M. 1947, § 93-9906.
⁵R.C.M. 1947, § 32-1615.
This element was attacked by the defending property owners between Poplar and Brockton. They introduced evidence that a new highway along the existing route—the South Route—would take little private property, while the North Route would destroy or severely damage much valuable farm land.

The district court held for the property owners, finding that the North Route was not compatible with the greatest public good and the least private injury. The Highway Commission appealed to the supreme court. The most recent decision in that court construing the same statutes, State Highway Commission v. Crossen-Nissen Co., was an encouraging precedent for the Commission. There, as in the instant case, the district court had found no necessity for a new routing of U. S. 2. In Crossen-Nissen the defendants had introduced much evidence to show that a reconstruction along the present route would cause less private injury, but the supreme court reversed and approved the Commission's necessity resolution. The court held that the disputable presumption could be overcome only by clear and convincing proof of abuse of discretion or arbitrary action by the Highway Commission. The court stated that "it was not the function of the judiciary to determine as an engineer the best place for the construction of a highway," and that "even when necessity has been challenged on the ground of arbitrariness or excessiveness of the taking, there is left largely to the discretion of the condemnor the location, route, and area of the land to be taken."7

But in the instant case, State Highway Commission v. Danielsen, the supreme court affirmed the decision of the district court. The Commission's failure to evaluate the degrees of private injury on each route was held to be arbitrary action and abuse of discretion.

In effect, the property owner in Crossen-Nissen was told that his evidence on the comparative merits of the routing alternatives was worth little. The principal issue before the court was one of procedure: was the Commission's act arbitrary and an abuse of discretion? In Danielsen the issue was cost in the same procedural terms but the court really passed on the substantive issue, the comparative merits of the routes. "The conclusion would appear to be," said the court, "that the present route, if it be equal in terms of public good to the other two routes, should be selected because it involves the least private injury."9

The Court in Danielsen attempted to distinguish its Crossen-Nissen precedent in these words:

...
Defendants will be almost totally destroyed. As to the "public good" aspect in Crossen-Nissen, the evidence revealed no reason to consider the existing line equal or superior to the proposed route. In short, there was not the clear and convincing proof of lack of necessity or inconsistency with the greatest public good and least private harm necessary to establish abuse of discretion and arbitrary action.\(^1\)

The distinction is strained. The number of landowners protesting, or the amount of land involved, should not determine the scope of judicial review. The logical extension of such reasoning is to draw an illogical line somewhere: to say, for instance, that five landowners opposing a five-mile highway may introduce evidence on the superiority of another route but that four landowners opposing a four-mile highway may not. The other stated difference in Crossen-Nissen was that the evidence "revealed no reason to consider the existing line equal or superior to the proposed route."\(^1\)\(^1\) The court said this although the facts given in the Crossen-Nissen opinion recount evidence at the trial that rebuilding the existing route would cost less for construction and would take less land off the county tax base.

Danielsen is a better statement of the law. This conclusion is impelled by reading the relevant statutes. "Disputable presumption" is defined in the code as a presumption which "may be controverted by other evidence."\(^1\)\(^2\) The court has defined this clause as follows:

In this jurisdiction civil cases are to be decided according to the greater weight of the evidence, and a bare preponderance in favor of the party holding the affirmative of the issue is sufficient to warrant, and should warrant, a decision in his favor [citing cases]. Therefore, when the evidence preponderates against a disputable presumption, it 'fades away in the face of contrary facts.' [citing cases]\(^1\)\(^3\)

There is nothing here to support a requirement of "clear and convincing" evidence to rebut the presumption; a mere preponderance will suffice. And the defendant's evidence may directly rebut the Commission's case rather than have to rebut it indirectly by proving procedural arbitrariness or abuse of discretion.

The court in Crossen-Nissen was attempting to mark out a very restricted role for the judiciary in highway location controversies. In the great majority of states, the highway department does have the discretion to lay highways where it chooses and the courts may interfere only when there is clearly arbitrary action or an abuse of discretion. But Montana is one of a handful of states which have imposed external checks on and reviews of the actions of its highway department. Besides the judicial determination of necessity\(^1\)\(^4\) which comes into play only when a landowner chooses to resist condemnation, the powers of the Montana Highway Commission are restricted in the following ways:

\(^1\)Ibid.
\(^3\)R.C.M. 1947, § 93-1301-7.
\(^4\)In re Wray's Estate, 93 Mont. 525, 535, 19 P.2d 1051, 1054 (1933), quoted in State Highway Comm'n v. Yost Farm Co., supra note 3, at 282.

This determination is made only when the landowner chooses to resist condemnation by introducing evidence to rebut the presumption of necessity, note 3 supra.
(a) the Commission must secure the approval of the Department of Fish and Game for highway construction which may affect fish or wildlife habitats.15 If the Highway Commission refuses to accept the recommendations of the Fish and Game Department, the Fish and Game Department may demand arbitration;16 (b) highway construction within the limits of an incorporated municipality must have the approval of the local governing body;17 and (c) highway construction bypassing or diverting traffic from an incorporated town must be approved by the town government, except that no such approval is required for the construction of Interstate System highways.18

A brief survey of the federal-aid highway program is necessary to understand why Montana, as opposed to most other states, has imposed such restrictions on its highway department.

THE FEDERAL-AID HIGHWAY ACTS

Federal subsidies for highway construction were first provided by the Federal-Aid Road Act of 1916.19 Under this program up to fifty per cent of the construction costs of primary highways and secondary roads was financed by the federal government. The Interstate Highway System was chartered in 194420 but progressed slowly as long as the same fifty per cent maximum aid was available for the big superhighways. The turning point was the Federal-Aid Highway Act of 1956,21 which raised the federal share of Interstate System highways to ninety per cent. At the same time, the Highway Trust Fund was created22 to collect gasoline and auto excise taxes and other highway user taxes, and to pay out the subsidies as required. The trust fund is a source of great strength for the highway builders, for Congress has little control over the use of the fund. Congress can only vote every year or two on a package appropriation from the fund for all highways during the appropriation period.23 Aid for other public works, such as dams and canals, requires specific project authorization from Congress, but a Congressman can do nothing to influence the location of a particular federal-aid highway in his district except vote against federal aid to highways as a whole.

The Secretary of Commerce, through the Bureau of Public Roads, administers the highway aid program from Washington. As to planning and locating specific routes, the Bureau of Public Roads plays a passive role. All highway construction proposals are to be planned by the state
highway departments, in accordance with state law. The Bureau of Public Roads can withhold approval of a particular state proposal but it cannot directly dictate the location of a highway. The Bureau may indirectly influence state location decisions by refusing to approve route alternates other than the one it favors. The Bureau publishes a map of the Interstate System which appears to have defined the location of routes in that system. But the lines on this map are general guidelines only.

When a state highway department and the Federal Highway Administrator sign a project agreement to build a section of one of the systems, the federal funds must be paid out by the end of the second year after the agreement is signed. Delay beyond this date causes the federal share to lapse and to be reapportioned among the other states. This practice has two effects: state highway departments build highways in small cautious sections; and the threat of losing federal money creates strong pressure to bend state policies and laws in the way that will most quickly build the highway. Congress strengthened the time-pressure element for the Interstate System with a declaration of policy in the 1965 Act hereafter cited as the "urgency clause".

It is hereby declared that the prompt and early completion of the National System of Defense and Interstate Highways . . . is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the fifteen years' appropriations authorized for the purpose of expediting its construction . . . and that the entire System in all States be brought to simultaneous completion.

The unfortunate outcome is that highway engineers frequently propose routing an interstate along the cheapest and straightest of alternative routes. They are under pressure from the Bureau of Public Roads to complete the Interstate System by 1972, the Bureau is under fiscal pressure to prefer the cheapest route, and the federal law contains no mandate to spend extra money to preserve amenities or to seek the greatest public good and least private injury.

Congress has provided some guidelines for the proper use of high-

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29 In State Highway Comm'n v. Yost Farm Co., supra note 3, the Highway Commission signed a project agreement before it asked the district court for a necessity order. When the district court found no necessity, the Commission argued on appeal that Montana law should be tortuously construed in order to protect the project agreement and the federal money. The Supreme Court of Montana rejected the Commission's arguments but courts in other states have strained to keep the highway subsidies from lapsing. See, e.g., Woolley v. State Highway Comm'n, .... Wyo. ...., 387 P.2d 667, 674 (1963); Brown v. McMorran, 23 App. Div. 2d, 661, 257 N.Y.S.2d 74 (1965).
31 By present estimates, the Highway Trust Fund is not going to stretch far enough to finish the system, 112 Cong. Rec. A920 (daily ed. Feb. 24, 1966).
way money. Section 109(a) of Title 23 imposes a duty upon the Secretary of Commerce in these terms.\(^a\)

The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

Section 133(b) of the same title, added in 1962,\(^b\) directs the Secretary to require the state highway departments to give “satisfactory assurance” that relocation advisory assistance will be provided for the resettlement of persons displaced by highway construction. Section 134, also added in 1962,\(^c\) states that the Secretary shall not approve federal-aid highway projects in urban areas of more than fifty thousand population “unless he finds that such projects are based on a continuing comprehensive transportation process” which incorporates various modes of transport.

Section 128\(^d\) requires every project application from a state highway department to include a certification that public hearings have been held or offered when a highway is to pass through or bypass an incorporated city, town, or village. It also requires the state highway department to certify that it has considered the economic effect of its proposed route on the affected community. Hearings must be held or offered, but without the accompanying consideration of economic effects, for all other projects.\(^e\) The Secretary may not pay any subsidies for a project not covered by a project agreement.\(^f\)

These are the principal guidelines by which the federal highway engineers review the decisions of the state highway engineers. The Bureau seeks to discourage any other state authority from having a voice in the operations of the state highway departments. Section 302, provides that each state receiving federal highway aid “shall have a State highway department which shall have adequate powers, and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by this title.” Regulations of the Secretary of Commerce elaborate on this requirement as follows:

Each State highway department, maintained in conformity with 23 U.S.C. 302, shall be authorized, by the laws of the State, to make


\(^e\)A state highway department must keep a transcript of every hearing held under this section and must send the transcript to the Bureau of Public Roads. The certification and transcript are prerequisites to the execution of a formal project agreement between the Secretary of Commerce and the state highway department.

final decisions for the State in all matters relating to, and to enter into, on behalf of the State, all contracts and agreements for projects and to take such other actions on behalf of the State as may be necessary to comply with the Federal laws and the regulations in this part.\textsuperscript{38}

and

Subsequent to authorization by the Administrator to proceed with a project or any undertaking thereunder, no change shall be made which will increase the cost of the project to the Federal Government or alter the termini, character or scope of the work without prior authorization by the Administrator.\textsuperscript{39}

The basic policy here is proper. Highway construction contracts have often been subject to political corruption. An efficient, professional highway department should be free from outside influence in matters of letting contracts and dealing with contractors. But these regulations have the side effect of discouraging legitimate review of location decisions. By virtue of the standing to sue requirements, ordinarily no one can seek judicial review of a location decision until the highway department signs a project agreement.\textsuperscript{40} In order to have enough money on hand for awards, the state highway department usually waits until a project agreement with the Bureau of Public Roads is signed before it brings condemnation suits. A court or other reviewing authority thus risks the responsibility for causing federal aid to be lost to the state if it delays construction or requires a change in a planned route.\textsuperscript{41}

The Bureau can promote a measure of review and cooperative planning through its regulations. Pursuant to the urban transport planning requirement,\textsuperscript{42} the Bureau requires each highway department to execute a memorandum of understanding with local governments in the urban area. This is not intended to create a local veto over location decisions. “If there is an unwillingness on the part of a local political unit within the entire urban area to participate in the transportation planning process in such area,” the Bureau says, “a determination shall be made as to whether the percentage of the urban area affected is such to negate an effective planning process for the whole area.”\textsuperscript{43} The determination is to be made by the Bureau. But local governments which approach highway departments with a determination to drive a good bargain can secure meaningful planning agreements.

\textsuperscript{38}C.F.R. § 1.3 (1964).
\textsuperscript{39}C.F.R. § 1.13 (1964).
\textsuperscript{40}A proper plaintiff, if not a condemnee, must plead some form of irreparable injury, note 57 infra, and the injury is not certain while the highway department is still able to alter its route.
\textsuperscript{41}After the project agreement is signed, the project must be completed in two years and a few months or the federal subsidy will be withdrawn, note 27 supra. An example of this risk was demonstrated in Washington. Washington law provides for arbitration when city or county governments disagree with the state highway commission on freeway location plans. See text at n. 145 et seq. infra. The City of Bellevue obtained arbitration of the location of a proposed freeway in the city after the highway commission had signed a project agreement with the Bureau of Public Roads. The arbitrator ordered the route modified and the Bureau refused to pay the federal share of the added costs of the modification. Letter from Delbert W. Johnson, Asst Atty. Gen'l. of Washington, Jan. 5, 1966.

\textsuperscript{42}Supra note 34.
\textsuperscript{43}Instructional Memorandum 50-2-63, note 34 supra, at 4.
Fish and game values are similarly protected by a memorandum issued to the state highway departments in 1963.\textsuperscript{44} Highway construction dictated solely by engineering considerations has destroyed the fishing values of many streams in the nation. The main causes have been straight-line routes down valleys, borrowing gravel from the stream bed for construction, and channelling streams to avoid eddies under bridge embankments.\textsuperscript{45} For several years, Senator Lee Metcalf introduced bills to authorize the Interior Department to review and comment on federal-aid highway construction plans for the purpose of suggesting routes and designs to protect the fish.\textsuperscript{46}

The Bureau of Public Roads, prodded by these proposals, issued a directive to the state highway departments which required the latter to negotiate coordination agreements with the fish and game agencies in their states.\textsuperscript{47} Under these agreements, highway departments must: (a) submit location and design proposals to the fish and game agency before public hearings are held, (b) give the fish and game agency notice of hearings and receive the comments and recommendations of the fish and game agency, and (c) report to the Bureau of Public Roads the comments of the fish and game agency, the particulars in which the highway department has chosen to disregard the wishes of the fish and game agency, and the reasons by which the highway department justifies its own position. The Bureau considers this information before it signs the project agreement.

Since the thought processes of federal highway engineers are closer to those of state highway engineers than those of state fish and game officials, this procedure would not seem to extend much protection to the fish. However, the Bureau of Sport Fisheries and Wildlife in the Interior Department conducted a survey of the state fish and game officials and found nearly all of them convinced that the agreements had improved matters to the point where highways were no longer a major threat to fish conservation.\textsuperscript{48}

Montana is the only state which has thus far enacted this coordination procedure into law.\textsuperscript{49} The difference in the Montana law is that a neutral arbitrator chosen by the two agencies settles unresolved controversies. The Bureau of Public Roads acts as the arbitrator in other jurisdictions. No cases have gone to arbitration under the Montana statute, now three years old.\textsuperscript{50} In over twenty cases where the Department of

\footnotesize{\textsuperscript{44}Bureau of Public Roads, Instructional Memorandum 21-5-63 (June 12, 1964).}  
\footnotesize{\textsuperscript{45}Hearings on Highway Beautification and Scenic Roads Program Before the Subcommittee on Public Roads of the Senate Committee on Public Works, 89th Cong., 1st Sess. 409-528 (1965).}  
\footnotesize{\textsuperscript{46}S. 2767, 87th Cong., 2nd Sess. (1962); S. 468, 88th Cong., 1st Sess. (1963); S. 1974, 89th Cong., 1st Sess. (1965).}  
\footnotesize{\textsuperscript{47}Supra note 44, reprinted in Hearings, supra note 45, at 459.}  
\footnotesize{\textsuperscript{48}U. S. Dep’t of the Interior, Bureau of Sport Fisheries and Wildlife, Highway-Fish and Wildlife Coordination (April 1965), reprinted in Hearings, supra note 45, at 520.}  
\footnotesize{\textsuperscript{49}R.C.M. 1947, \S 26-1501 ff. (1965 supp.).}  
\footnotesize{\textsuperscript{50}Letter from Richard J. Munro, Chief, Information and Education Division, Department of Fish and Game, Helena, Montana, January 28, 1966.}
Fish and Game had initially objected to the Highway Department's proposals, satisfactory agreements were negotiated.51

APPEALING FROM THE DECISIONS OF HIGHWAY OFFICIALS

Courts are reluctant to enter into areas of engineering technology and political questions. State legislatures are pressured by the conditions of federal aid into committing location decisions to the unreviewable discretion of their highway departments. Against these considerations, what is the case for outside review of the highway engineers' decisions?

There is need for conservation of natural resources and urban environments. The physical requirements of the interstate program alone are staggering. Here is a graphic illustration of the magnitude:

The pavement area of the system, assembled in one huge parking lot, would be 20 miles square and could accommodate two-thirds of all the motor vehicles in the United States. New right-of-way needed amounts to 1½ million acres. Total excavations will move enough material to bury Connecticut knee-deep in dirt. Sand, gravel, and crushed stone for the construction would build a wall 50 feet wide and nine feet high completely around the world. The concrete used would build six sidewalks to the moon; the tar and asphalt would build driveways for 35 million homes. The steel will take 30 million tons of iron ore, 18 million tons of coal, and 6½ million tons of limestone. Lumber and timber requirements would take all the trees from a 400-square-mile forest. Enough culvert and drain pipe is needed to equal the combined water and sewer systems in six cities the size of Chicago.52

When this much of the earth is to be taken, society wants to see it taken carefully. The Danielsen case reflects the desire to conserve good farmland when other land was available, equally good for highways but less valuable for farming. The results of the fish and game coordination show that trout streams can be conserved without bringing highway construction to a halt.

A related consideration is the economic impact of a highway. A new bypass can destroy the economic vitality of a small town dependent on roadside business. The location of interchanges on freeways is a substantial factor in future growth and land use—but highway engineers have located interchanges with little regard for town and city planning.53

Resource management and city planning are not courses in the civil engineering curriculum. Highway engineers are well trained in technical design, building highways with the lowest construction costs, keeping grades and curves gradual to save lives and fuel. For the engineer the technical factors are more meaningful, and of higher relevance, than the social factors. If social factors are to be taken into account, then other

51Letter from John C. Peters, Habitat Evaluation Leader, Department of Fish and Game, Helena, Montana, February 11, 1966.
53See Covey, Freeway Interchanges: A Case Study and an Overview, 45 Marq. L. Rev. 21, 36 (1961).
professions need to be involved in highway planning. One way to have broad-gauge planning is to require the highway department to justify a particular routing. The justification should include a careful consideration of the social factors involved, and should be subject to judicial review.

Another consideration is "due process" in a general sense. "Highway condemnation proceedings of necessity are brutal at best," the Supreme Court of Michigan has said, and "when due appeal is made to the courts for review of such proceedings, it is the plain duty of the latter to see that the requirements of Constitutionally authorized law are strictly observed . . . ." This theory has supported nearly all cases of judicial review of highway planning. Since most state legislatures have not provided for broad "social" planning, the courts have been unable to exercise their reviewing function to promote such planning. Judicial review has been confined to technicalities.

Judicial review of route locations is limited by the requirement that a challenger have standing to sue. The remedies, if any, in eminent domain proceedings are available only to condemns. Where necessity decisions have been left to discretion of the highway department, the property owner may attack necessity only by pleading abuse of discretion by the highway department. As a general rule, no person may intervene in an eminent domain suit unless his property is actually involved. Lacking, therefore, any remedy at law, a party protesting the location of a highway which will not take his property usually seeks an injunction. Acts of highway officials may be enjoined at the behest of a plaintiff who:

1. will suffer irreparable injury,
2. has no adequate remedy at law, and
3. complains that the act of the highway official is illegal or unauthorized.

Irreparable injury may be alleged when the proposed highway would damage nearby property by its nuisance effect. If the noise, fumes, runoff, etc., will depress the value of nearby property, the general rule is that no compensation may be claimed. Thus, there is no adequate remedy at law. Irreparable injury may also be alleged by taxpayers. Although taxpayers' suits against the federal government may not be maintained, such suits against state government officials are allowed in

A firm of landscape architects in Philadelphia has devised a method of analyzing the "social" factors in location planning, using transparent overlay maps. WALLACE, McHARG, ROBERTS AND TODD, A COMPREHENSIVE HIGHWAY ROUTE SELECTION METHOD APPLIED TO I-95 BETWEEN THE DELAWARE AND RARITAN RIVERS, NEW JERSEY (1966).


Supra note 1.


43 C. J. S. Injunctions § 113 (1945); 39 C. J. S. Highways § 89 (1944).

most jurisdictions. Since the states must pay part of the costs of federal-aid highway projects, state taxpayers may hold their highway officials to account for their actions. Taxpayers' suits are class actions—one judgment is res judicata on all taxpayers similarly situated—with the advantage that a highway project can be reviewed in one suit and not be delayed by piecemeal litigation.

Abuse of discretion is illegal or unauthorized action. When the legislature delegated its power to locate highways to the highway department, the legislature assumed that the discretion would be reasonably exercised. But a challenge, based on this theory, to highway department action will not permit the merits of alternative locations to be argued. The few decisions granting relief from a highway department's abuse of discretion involved clear cases of procedural abuse. In a leading decision on this point, United States v. Carmack, the Supreme Court defined an arbitrary and capricious decision as a decision made without adequate determining principle and without reason. The high court dissolved an order enjoining federal officials from condemning a municipal park for a post office site characterizing the arbitrary-and-capricious finding of the lower court to have been, in effect and erroneously, a finding of "the comparative undesirability and lack of necessity for the selection of that site." If the federal requirements impose a duty upon state highway officials, then the legality of the acts of the state officials may be tested against the federal standards. Most of the decision-making standards in

\[\text{Note, Taxpayers' Suits: A Survey and Summary, 69 Yale L. J. 895 (1960).} \]
\[\text{Linnecke v. Dep't of Highways, 76 Nev. 26, 348 P.2d 235 (1960); Weaver v. Ives, 152 Conn. 586, 210 A.2d 661 (1965).} \]
\[\text{Taxpayers' Suits, supra note 60, at 803.} \]
\[\text{See State v. Professional Realty Co., 144 W. Va. 652, 110 S.E.2d 616, 623 (1959).} \]
\[\text{King County v. Thielman, 59 Wash. 2d 586, 369 P.2d 503 (1962) (fraud); Hunt v. Ziegler, 350 Mich. 309, 86 N.W.2d 345 (1957) (bad faith). These were condemnation suits. See Annot., 93 A.L.R.2d 465, 480 (1964).} \]
\[\text{232 U.S. 230 (1946).} \]
\[\text{United States v. Certain Land, 55 F. Supp. 555 (D. Mo. 1944), aff'd on other grounds sub. nom. United States v. Carmack, 151 F.2d 881 (8th Cir. 1945).} \]
\[\text{United States v. Carmack, supra note 65, at 247. The court noted that the determination of location had involved a study of twenty two sites, and that the park site had been favored over the other leading contender in an informal straw vote of the town's citizens.} \]
\[\text{See also Brown v. McMorran, 23 App. Div. 2d 661, 257 N.Y.S.2d 74 (1965), in which the trial court enjoined the state from building a highway because the New York Superintendent of Public Works had abused his discretion by delegating that discretion to the Federal Highway Administrator. Only two route alternatives had been studied; when the Bureau of Public Roads rejected the state's project application for one route it in effect obliged the state to choose the other route. Hearings, supra note 45, at 415-17. The court held that New York law gave the Superintendent final authority to make location decisions and that this authority could not be delegated. 42 Misc. 2d 211, 247 N.Y.S.2d 737 (Sup. Ct. 1963). The appellate court reversed this decision, stating that even if the Superintendent's decision to build on the second-choice route had been coerced,} \]

[8]ection 85 of the Highway Law directs the Superintendent of Public Works to do all acts necessary to comply with the Federal-Aid Highway Acts and the rules and regulations promulgated thereunder. This state statute evinced the clear intent of the Legislature to secure all the funds allotted to the State by the Federal government for the construction of roads in the interstate system. Therefore, unless the State Superintendent of Public Works complied with the conditions imposed by the Federal Highway Administrator and secured the latter's approval, the intention of the Legislature would be defeated. 257 N.Y.S.2d at 75. }
Title 23 of the United States Code impose duties upon the Secretary of Commerce alone. However, the requirement of holding public hearings is, arguably, a reviewable duty of the state highway officials. Some courts have stated that only the Bureau of Public Roads may question the legal sufficiency of the hearings conducted by the state highway department.

Other courts have reviewed the conduct of location hearings without discussing the question of standing. In Binghamton Citizens' Penn-Can Route 17 Committee v. Frederick, the New York Appellate Division treated state law, federal law, and Bureau of Public Roads regulations all as relevant to the legal duties of the state Superintendent of Public Works. The court considered Bureau of Public Roads requirements that hearings be held at a "reasonably convenient time and place." Applying them to the case, the court said, "That a hearing was held at one place rather than another; and that it would be more convenient for citizens interested to attend it here, rather than there, certainly fails to make out a case that the hearing was not at a 'reasonably convenient' time and place. There is no showing here of inconvenience worked to an oppressive degree." So the plaintiffs lost, but on the merits.

Acts of state highway officials may also be illegal or unauthorized when tested against state statutes. Precise procedures may be prescribed for the use of the eminent domain power and courts will enforce by injunctions the observance of such procedures. Michigan law requires an offer to purchase every interest in property prior to condemnation. Nevertheless, the state's highway commission sought to condemn leased property without making any offer to the lessee for his interest. Condemnation was enjoined until an offer was made to the lessee.

Michigan law also directs the commission of highways to "hear and determine" the necessity for a taking and has held that a necessity hearing conducted by a commissioner was not invalid, even though a par-

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*See text supra at notes 30-32.

*Supra note 35.

This view was first expressed in Piekarski v. Smith, 38 Del. Ch. 402, 153 A.2d 587 (1959) and quoted with approval in Hoffman v. Stevens, 177 F. Supp. 808 (M.D. Pa. 1959); Linnecke v. Dep't of Highways, supra note 60, at 237; and Futch v. Greer, 353 S.W.2d 896 (Tex. Ct. Civ. App. 1962), cert. denied 372 U.S. 319 (1963). In Linnecke v. Dep't of Highways, the court said, "if the notice should be insufficient, if the hearing is inadequate, if the required certificate be lacking, then the Bureau of Public Roads must determine that deficiency." But this position was weakened in the Piekarski, Linnecke, and Futch cases when the respective courts went on to find, as a question of fact, that notice and hearings were legally sufficient. In Hoffman v. Stevens, the court dismissed the suit for failure to exhaust state court remedies.


Binghamton Citizens' Penn-Can Route 17 Comm. v. Frederick, supra note 71, at 915.

See also, Town of Clearmont v. State Highway Comm'n, .... Wyo. .... , 357 P.2d 470 (1960).

Lockholder v. Ziegler, supra note 55.

REVIEW OF ROUTE SELECTIONS

A particular route had been proposed by the highway commission. Subsequently, a hearing conducted by one of the commissioner's assistants was held invalid, the court finding the assistant an interested party and disqualified from conducting the hearing. He was interested, the court said, "to the extent of keeping his job by carrying into effect the highway planning of his appointing superior, a part of which planning was the taking of appellant's property."

Another technical limitation sometimes placed upon the eminent domain power of state highway departments concerns property already dedicated to another public use. Urban parkland, in particular, is a tempting site for highway planners, as it offers lower land acquisition costs. But open space, scarce in many cities, has its defenders. A federal district court has held that it can restrain a park authority from turning over a portion of a park for use as a highway. Parties who had granted the land to the United States conditioned upon a permanent dedication to park use, and abutting property owners were found to have status to sue. The court further said that any citizen using a park is a cestui que use with standing to ask equity to protect his rights as a user. The defense of sovereign immunity was rejected on the theory that an illegal act of the sovereign's officer was not an act of the sovereign.

When a park has been created by private grant, with a perpetual park use condition, the public authority controlling the park is a trustee accountable to the grantor or to park users. As a trustee, the authority may not voluntarily convert the park to an inconsistent use. However, the trustee of a park which is certain to be condemned may voluntarily dispose of it.

When the highway department seeks to condemn park property, without the consent of the park authority, the eminent domain power is superior to the public trust, and a park may be taken. But the legislative...
grant of condemnation power will be construed strictly against the taker when property dedicated to another public use is involved. Thus, a grant of eminent domain power, in general terms, to take "property" did not include specific power to take a hospital, a school, or a water or sewer system. But when the eminent domain power is created with reference to all property, private or public, the highway department may take parks and other dedicated lands.

Montana law is an exception to the prevailing rule. When the highway commission seeks a necessity order to take property dedicated to another public use, the court must decide which use—the highway or the existing use—is a "more necessary" public use. Cemeteries, however, are protected against condemnation for any other public use.

Dedicated property may not be protected against the needs of the Interstate System even when state law puts it off limits. Section 107 of Title 23 provides that a state highway department may request the Secretary of Commerce to condemn lands needed for interstate routes. If the Secretary finds that the highway department is either unable to acquire such lands or cannot acquire them with sufficient promptness, the federal eminent domain power may be used to take the necessary lands or interests. The legislative history of this section indicates a Congressional intent to use the procedure only when states were unable to control access to the highways by denying the right of access to abutting property owners. But this procedure has been invoked to take a park and cemeteries which were protected by state law.

REVIEW BY LOCAL GOVERNMENT

The most acerbated location controversies arise in cities and towns. Congress tried to alleviate this situation in 1962 when it added Section 134 to Title 23. This provision requires interstate and other federal-aid projects in metropolitan areas with populations of more than fifty thousand to be based upon a continuous, comprehensive transportation plan. Examples include:

- Dep't of Public Works and Buildings v. Ells, 23 Ill. 2d 619, 179 N.E.2d 679 (1962).
- R.C.M. 1947, § 93-9905.
planning process. This meets part of the problem. But transportation planning is only a part of city planning; the city resident is a traveller for a fraction of his day. He needs land also for work, housing, services, and recreation. When these uses compete for a piece of urban land, the allocation is a political decision which should be made within the municipal government framework. But most state highway departments are authorized to choose routes with as much discretion in cities as in the countryside.

In Montana the state highway commission may exercise its powers in an incorporated town subject to the consent of the municipal government. This limitation is also present in the laws of Pennsylvania and Michigan. In five other states the highway departments are authorized to lay out limited access highways, "provided that within cities and towns such authority shall be subject to such municipal consent as may be provided by law." Other states modified the prerequisite of local consent after the impact of the Interstate System program was felt. An Ohio law repealed municipal control over route locations for the federal primary and Interstate Systems. Municipal governments were given instead the right to argue the merits of location decisions in appeals to the courts.

In Minnesota, municipal consent is necessary for all highways except those in the Interstate System. If the municipal government opposes an interstate route proposal, it may carry the dispute with the highway commission to a neutral arbitrator. Washington also has an arbitration procedure, available to both town and county governments, which affects all limited-access highway locations in the state. The arbitration procedure has never been invoked in Minnesota and only twice in Washington.

Supra note 34.


R.C.M. 1947, § 32-4305 (1965 supp.).


Ark. Stat. Ann. § 76-2203 (1957); Del. Code Ann. tit. 17, § 173 (1965 Supp.); Ky. Rev. Stat. Ann. § 177.230 (1963); Miss. Code Ann. § 8039-03 (1956); N. D. Cent. Code § 24-01-30 (1960). The Supreme Court of Delaware is the only court which has construed this phrase. The court held that where some other statute specifically required the state highway department to obtain the consent of the municipality for some aspect of construction, such as closing off a local street, that consent must be secured. Piekarski v. Smith, supra note 70, at 593.

Ohio Rev. Code § 5521.01 (1965 Supp.).

City of Lakewood v. Thommy, 171 Ohio St. 135, 168 N.E.2d 289 (1960).


See text at notes 119-123 infra.


Letter from Delbert W. Johnson, supra note 41.
Other cities have found a power of municipal consent more indirectly. The famous San Francisco "freeway revolt" is based upon a statute which requires the highway commission to negotiate an agreement with the city council or county supervisors to close off local streets for freeway construction.\(^5\)

Another form of conflict between municipal governments and state highway departments arises when the state proposes to bypass a town. The larger urban areas, already choked with traffic, welcome such proposals, but a bypass is an economic blow to many small towns, especially in the west. Montana requires the highway commission to secure the consent of local governments before diverting traffic from the town by building a new highway.\(^6\) This consent is not required for bypasses in the Interstate System.\(^7\)

In Wyoming, a bypass must be approved by a vote of the citizens of the bypassed town.\(^8\) The state supreme court construed this statute as applying to relocations of existing routes.\(^9\) An interstate highway is a new, not an existing, route, thus a traffic-diverting interstate was held validly located without the approved of the voters.\(^10\) In New Mexico, all bypass routings must be approved by the local government except that Interstate System bypasses require such approval only when the town has a population of at least 500 and no more than 50,000.\(^11\) Utah law duplicates federal requirements by specifying that public hearings be held on bypass routings.\(^12\)

NEW APPROACHES TO HIGHWAY PLANNING

Three states—Vermont, Washington, and California—have revised their highway planning procedures to limit the sole discretion of their highway departments and to increase the influence of other voices in route location decisions. Each legislature has taken a different approach, the common factor in all three being the focus on the \textit{planning} stage of route location.

In Vermont, the state highway board is directed to hold a hearing on the necessity of a new highway and of the location proposed for such highway.\(^13\) After the hearing, the board must petition the local superior court for an order of necessity.\(^14\) The court conducts a hearing on the...
necessity of the board’s route. At the court hearing, “if any person owning or having an interest in the land to be taken or affected appears and objects,” the court orders the highway board to proceed to prove its case. The court is empowered to find necessity or the lack of necessity and may further “modify or alter the proposed taking in such respect as to the court may seem proper. . . . The burden of proof of the necessity of the taking shall be upon the highway board and shall be established by a fair preponderance of the evidence, and the exercise of reasonable discretion upon the part of the highway board shall not be presumed.” The court’s power with regard to the merits of alternate location is broad. The court “may find from the evidence that another route or routes are preferable in which case the board shall proceed in accordance with section 222.” Vermont’s highway planning is set in the adversary rather than the administrative process. Standard trial procedure is applied to highway planning—the state’s engineer may be extensively cross-examined about the cost and design features of the state’s proposal and alternate routes.

In the state of Washington the highway commission must hold public hearings on freeway locations. The hearing is open to individuals as well as to the local governments. An owner of property abutting the proposed route, who will be deprived of access to the route, may appear as a formal party to the hearing and may submit counterproposals for the location of the highway. The commission is directed to give reasonable consideration to such counterproposals. Individuals otherwise situated, whether as condemnees or as interested citizens, may speak at the hearing but are not entitled to reasonable consideration of their testimony.

After the hearing, decision of the commission is subject to two forms of review. If the city or county government objects to the routing it

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115 VT. STAT. ANN. tit. 19, 227 (1965 supp.). Notice of the hearing must be served on all in-path property owners and affected towns. VT. STAT. ANN. tit. 19, § 226 (1965 supp.).

116 Supra note 115.

117 Ibid.


119 The commission must give notice to city and county governments affected by the commission’s proposed route. Such notice must illustrate the physical appearance of the proposed route and must state how the commission has considered local land and transportation planning in determining its route. Laws of Washington 1965, ch. 75, § 3. The legislature in 1965 revised a set of statutes which had been in existence for several years. These appear in WASH. REV. CODE ANN. ch. 47.52 (1965).

120 Laws of Washington 1965, ch. 75, § 33. In Deaconness Hospital v. State Highway Comm’n, .... Wash. 2d ...., 408 P.2d 54 (1965), the state supreme court held that property adjacent to a freeway is not abutting property when the freeway is elevated and the adjacent property would continue to have access to the street underneath the freeway.

121 Id. § 3. “Reasonable consideration” has been construed to require a written statement of the reasons for the rejection of counter-proposals. In State ex rel. Duvall v. City Council of Seattle, 64 Wash. 2d 598, 382 P.2d 1003 (1963), a routing decision of the Council was upset because of the Council’s failure to give “reasonable consideration.”
may demand arbitration. Owners of abutting property who have been parties to the hearing, as defined above, may appeal to the courts for a review as prescribed by the state administrative procedure act. Under this act, a court may reverse an administrative decision upon finding that the commission's findings, inferences, conclusions, or decisions were: "(a) in violation of constitutional provisions; or (b) in excess of the statutory jurisdiction of the agency; or (c) made on unlawful procedure; or (d) affected by other error of law; or (e) unsupported by material and substantive evidence in view of the entire record as submitted; or (f) arbitrary or capricious." The procedures of Vermont and Washington have not resulted in a slowdown of the Interstate program in those states. As of September 30, 1965, Vermont had all its planned mileage classed as "work in progress" or "open to traffic" while Washington had a greater percentage of its mileage open to traffic than the nation as a whole.

In California, the highway department, on request of any city or county affected, must present graphic portrayals of selected route alternatives, illustrating the general appearance of the proposed location and alternative locations. Under prior procedures, the highway department had no duty to describe alternatives to its own proposal.

The unfortunate result ... was that interests affected by a given routing alternative, where they are financially able, are forced to rely upon their own resources to present to the commission an alternative to the recommendation of the engineer, and the expense and seeming futility of this process tends to discourage those lacking the resources for independent analyses. Such a situation would not appear to be in the public interest.

A previous statute requiring that highways should be laid out on the "most direct and practicable" locations as determined by the commission has been repealed; and local planning agencies have been given the right to a hearing on the "most logical segment to be studied for route

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123 Supra note 120, § 5. The neutral chairman of the arbitration panel must be a licensed civil engineer or a recognized city planner. WASH. REV. CODE ANN. § 47.52.150 (1965). The decision of the arbitrator is binding upon both parties. WASH. REV. CODE ANN. § 47.52.180 (1962).
124 Supra note 120, § 6.

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127Cal. Sts. & H'WAYS Code § 75.6 (1965 supp.). (Hereafter this will be cited St. & H. C. A.)
129St. & H. C. A. § 90.
review of route selections before the highway commission begins a route selection study.\textsuperscript{130}

The commission is directed to employ full-time hearing officers and to require such hearing officers to compile full transcripts of hearings.\textsuperscript{131} The commission is also required to prepare a public report with every route selection, discussing the impact of the chosen route.\textsuperscript{132} The report is to include the consideration given to driver benefits, community values, recreational and park values, historical and aesthetic values, property values, state and local public facilities, local street traffic, and total projected regional transportation requirements. The Committee on Natural Resources, Planning, and Public Works voiced “serious questions concerning the agency’s consideration of the total impact of a given route alternative” and recommended the above measure to ensure full and careful consideration of the non-engineering factors in route selection.\textsuperscript{133}

California now has the most detailed selection procedure in the nation, but the highway committee still has sole responsibility for seeing that the law is observed. Courts are forbidden to review the commission on the traditional grounds of fraud, bad faith, or arbitrary or capricious action.\textsuperscript{134} Another statute provides that “failure of the department or the commission to comply with the requirements of this article shall not invalidate any action of the commission as to the adoption of a routing for any state highway, nor shall such failure be admissible evidence in any litigation for the acquisition of rights of way or involving the allocation of funds for the construction of the highway.”\textsuperscript{135}

CONCLUSION

A state that would bring highway planning into an equitable relationship with other social needs may choose from a variety of formulae. There is the adversary system, highway department vs. property owners, with a judge making necessity and location decisions. This is the Vermont approach, and less explicitly, the Montana approach.\textsuperscript{136} There is the California approach, leaving ultimate decisions to the highway commission but spelling out planning, design, and explication procedures in considerable detail. Or there is the arbitration approach of Washington, Minnesota, and Montana (fish and game), where other units of government may argue for their land-use plans against highway departments.

The optimum highway location process would probably combine elements of all three approaches. Detailed decision procedures are excellent, but they do not protect the individual unless he can ask a court to enforce

\textsuperscript{130}St. & H. C. A. § 210.4 (1965 supp.).
\textsuperscript{131}St. & H. C. A. § 210.5 (1965 supp.).
\textsuperscript{132}St. & H. C. A. § 75.7 (1965 supp.).
\textsuperscript{133}Supra note 128.
\textsuperscript{134}Supra note 128.
\textsuperscript{135}St. & H. C. A. § 215.
\textsuperscript{136}The difference being that a Vermont court passes on the merits of the proposed route per se while a Montana court passes on the merits of a route only in the context of a proposed taking as in \textit{Danielsen}. 

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them. Arbitration is probably too time-consuming to be available for every aggrieved individual, so the courts would have to stay in the picture. But it is doubtful that the Vermont adversary approach would be feasible in more populous states. If the sort of review accorded abutting property owners in Washington were available to individuals generally—perhaps as taxpayers, to avoid piecemeal litigation—the courts would not be overburdened. The judicial role would be limited to finding whether decision procedures had been observed and whether sufficient facts supported highway department determinations. Arbitration—the only full review on the merits—would be available when responsible governmental units such as cities and fish and game commissions were convinced that the public interest would be damaged by a particular highway routing.

In conclusion, it must be observed that many criticisms of the highway engineers stem from the wording of the federal statutes. Given the language of the urgency clause, the deadline date of 1972, and the lapsing-funds provision, the highway builders have been forced to build now and ask—or answer—questions later. They have been guilty of responding well to a clear statutory mandate. While Congress wanted to leave location decisions to the states, the effect of federal policy on state highway planning has undeniably been profound.
Tippy: Review of Route Selections for the Federal Aid Highway Systems