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Property - Eminent Domain - Trespass or Inverse Condemnation: Election of Remedies for Uncompensated Appropriation of Land

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COMMENT

PROPERTY —EMINENT DOMAIN—Trespass or Inverse Condemnation:

Election of Remedies for Uncompensated Appropriation of Land
Ossman v. Mountain States Telephone & Telegraph Co.
520 P.2d 738 (Colo. 1974).

INTRODUCTION

Inverse condemnation is a remedy available to an owner whose property has been appropriated for a public use without condemnation proceedings or the payment of compensation.¹ Initiated by the landowner rather than the condemner, inverse condemnation is treated as if it were an eminent domain proceeding.² Both actions follow statutory rules, but inverse condemnation is commenced after the land is taken while eminent domain proceedings are initiated before the land is appropriated.³ The same rules apply in both actions and the same issues, including whether the taking is necessary and proper, are litigated.⁴

¹ *Ossman v. Mountain States Tel. & Tel. Co.*, 511 P.2d 517 (Colo. Ct. App. 1973), *rev'd on other grounds*, 520 P.2d 738 (Colo. 1974). In *Ossman* the court of appeals defines inverse condemnation as

an action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain. [citations omitted]. It is a remedy peculiar to the property owner, and is exercisable by the property owner where it appears that the taker of the property does not intend to bring eminent domain proceedings. The doctrine rests upon the theory that after property has been devoted to public use by a condemner, and public policy dictates that such use should not be discontinued, the property owner is entitled to compensation.

511 P.2d at 519, *citing* *Breidert v. Southern Pac. Co.*, 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964); *Garden Water Corp. v. Fambrough*, 245 Cal. App. 2d 324, 53 Cal. Rptr. 862 (1966); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964). For a discussion of alternative remedies available to the uncompensated landowner—such as injunction, mandamus, ejectment, tort, implied contract, and constitutional provisions—see Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. U.L.Q. 210.

² *Ossman v. Mountain States Tel. & Tel. Co.*, 520 P.2d 738 (Colo. 1974); *Stuart v. Colorado E.R.R.*, 61 Colo. 58, 156 P. 152 (1916).

³ *Ossman v. Mountain States Tel. & Tel. Co.*, 520 P.2d 738 (Colo. 1974). *See also* *Stalford v. Board of County Comm'rs*, 128 Colo. 441, 263 P.2d 436 (1953); *Boxberger v. Highway Comm.*, 126 Colo. 526, 251 P.2d 920 (1952); *Swift v. Smith*, 119 Colo. 126, 201 P.2d 609 (1948).

⁴ *San Luis Valley Irrigation Dist. v. Noffsinger*, 85 Colo. 202, 274 P. 827 (1929). For a discussion of the elements of an inverse condemnation action and the proper procedures to be followed, see *Feder & Wieland, Inverse Condemnation—A Viable Alternative*, 51 DENVER L.J. 529 (1974).

In Colorado, owners seeking compensation for appropriated land have had little success basing their action on a common law theory.⁵ Actions based on different theories have in the past been treated as if they were actually inverse condemnation suits.⁶ This exclusiveness, however, has rarely worked a hardship. Based on the constitutional provision that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation,"⁷ Colorado statutes⁸ and case law⁹ have usually provided effective relief in the form of inverse condemnation.

The Colorado Supreme Court, however, has recently held that inverse condemnation is not the sole remedy available. In *Ossman v. Mountain States Telephone & Telegraph Co.*,¹⁰ the court sanctioned trespass as an alternative remedy. The landowner may now elect to sue in trespass rather than inverse condemnation when a trespasser having the power of eminent domain refuses to initiate condemnation proceedings. This comment examines the factors to be considered in making an election between the now available remedies and then assesses the impact *Ossman* may have.

I. *Ossman v. Mountain States Telephone & Telegraph Co.*

In July of 1967 while placing a telephone cable alongside a highway right-of-way, defendant Mountain States Telephone & Telegraph Co. laid part of its cable on land owned by the plaintiff Emmett Ossman. In doing so, defendant severed approximately one-half acre from the rest of the plaintiff's tract. In June 1970, when Ossman discovered what had happened, he immediately contacted the defendant and demanded compensation of \$1,000. Subsequent negotiations between the parties as to the amount of compensation proved fruitless when the defendant refused to increase its original offer of \$42 for the land. After unsuccessfully

⁵ See, e.g., *Snowden v. Ft. Lyon Canal Co.*, 238 F. 495 (8th Cir. 1916); *Sanger v. Larson Constr. Co.*, 126 Colo. 479, 251 P.2d 930 (1952); *Stuart v. Colorado E.R.R.*, 61 Colo. 58, 156 P. 152 (1916); *Denver & R.G.R.R. v. Doelz*, 49 Colo. 48, 111 P. 595 (1910); *Edwards v. Roberts*, 26 Colo. App. 538, 114 P. 856 (1914).

⁶ In an early Colorado case the court said that an owner's suit for damages caused by the appropriation of land is "akin to condemnation suits" and is to "be tried like a condemnation suit." *Stuart v. Colorado E.R.R.*, 61 Colo. 58, 70, 156 P. 152, 156 (1916).

⁷ COLO. CONST. art. II, § 15.

⁸ COLO. REV. STAT. ANN. § 38-1-101 (1973).

⁹ *Ossman v. Mountain States Tel. & Tel. Co.*, 520 P.2d 738 (Colo. 1974); *Board of Comm'rs v. Adler*, 16 Colo. 290, 194 P. 621 (1920).

¹⁰ 520 P.2d 738 (Colo. 1974).

requesting the defendant to condemn the land, the plaintiff commenced an action in trespass.

In his complaint, Ossman sought damages for the trespass and exemplary damages for defendant's wanton and reckless disregard of his rights and feelings. Mountain Bell pleaded as an affirmative defense that Ossman was limited to the damages he could recover in inverse condemnation. The trial court combined the two theories by "instructing that a trespass existed as a matter of law, and by awarding the title to the land to Mountain Bell" ¹¹ Ossman received \$1,942 for the easement and damage to the residue of his land and \$2,308 in exemplary damages.

The Colorado Court of Appeals reversed the trial court ¹² by holding that an entity possessed of the powers of eminent domain, "if pursuing a public purpose (Colo. Const. Art. II § 15) cannot be a trespasser." ¹³ The proper remedy, the court said, was to treat the defendant's counterclaim for inverse condemnation as a petition for eminent domain ¹⁴ and, upon request of the parties, the trial court should then have

conducted an *in limine* hearing to determine if the taking was necessary and proper. If the *in limine* hearing resulted in a determination that it was not necessary and proper, then plaintiff's trespass action could be maintained, and trespass damages, not condemnation damages, would be awarded. *No transfer of title to the land taken or easement would result.* ¹⁵

Only if it were determined that the land could not properly be condemned, the court of appeals held, could the plaintiff's trespass action be successfully maintained.

¹¹ 511 P.2d 517, 520 (Colo. Ct. App. 1973).

¹² *Id.*

¹³ *Id.* at 519. The court said that [b]y our ruling, a trespass remedy would be available to [the landowner] only if it were determined that [the condemnor] had no right under the Constitution or eminent domain statutes to take private property, or that the specific taking was unauthorized or unlawful.

Id.

¹⁴ This petition, found in COLO. REV. STAT. ANN. § 38-1-102 (1973) applies, [i]n all cases where the right to take private property for public or private use without the owner's consent or the right to construct or maintain any . . . public or private work which may damage property not actually taken is conferred by general laws or special charter upon any corporate or municipal authority

Mountain Bell is conferred this authority as a "corporation . . . seeking to secure a right-of-way for lines of telegraph, [and] telephone" *Id.* § 38-5-107.

¹⁵ 511 P.2d at 520 (emphasis added).

The Colorado Supreme Court reversed both lower courts.¹⁶ It held that a landowner had the "right to elect to sue in trespass under the circumstances" in this case and that there was "no sound reason why a landowner should be limited to an inverse condemnation remedy *where a trespasser refuses to promptly initiate eminent domain proceedings.*"¹⁷ The court ruled that if the landowner elected to pursue his trespass claim the issue of exemplary damages, as well as any special damages, would be submitted to the jury. The court explicitly held, however, that trespass and inverse condemnation could not be maintained in the same action because the latter, a special statutory remedy, had features inconsistent with a common law action.¹⁸ Therefore, the landowner must elect at the outset either trespass or inverse condemnation.

II. ELECTION OF REMEDIES

The landowner's decision to elect trespass or inverse condemnation depends on factors that bar one remedy—such as sovereign immunity, acquiescence to the entry, or the statute of limitations—and differences between the nature and measure of damages of the two remedies that make one more attractive than the other in a particular situation.

A. *Involuntary Election*

1. Sovereign Immunity

If the appropriating entity is a governmental body, sovereign immunity may bar tort recovery and limit the landowner to inverse condemnation.¹⁹ The Colorado Governmental Immunity Act²⁰ affects suits brought against an entity that is any "kind of

¹⁶ 520 P.2d 738 (Colo. 1974).

¹⁷ *Id.* at 741 (emphasis added). As support for this statement, the supreme court cited, *inter alia*, *Seven Lakes Reservoir Co. v. Majors*, 69 Colo. 590, 196 P. 334 (1921); *Chicago, R.I. & Pac. Ry. v. Hayes*, 49 Colo. 333, 112 P. 315 (1911); *Denver & S.F. Ry. v. School Dist. No. 2*, 14 Colo. 327, 23 P. 978 (1890).

¹⁸ Among the differences the court pointed out in the two actions were the common law origin of trespass and the constitutional origin of inverse condemnation; the award of exemplary damages in trespass under COLO. REV. STAT. ANN. § 13-21-102 (1973) that are not recoverable in inverse condemnation; and the statutory rules, found in COLO. REV. STAT. ANN. §§ 38-1-101 to -7-107 (1973), governing inverse condemnation that are not applicable to trespass. 520 P.2d at 741-42.

¹⁹ This comment is concerned only with appropriations made by state entities and not with federal bodies whose liability is governed by the Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346(b), (c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-80 (1970). See *Feder & Wieland*, *supra* note 4, 537-38.

²⁰ COLO. REV. STAT. ANN. §§ 24-10-101 to -117 (1973).

district, agency, instrumentality, or political subdivision of the state organized pursuant to law"²¹ and this immunity extends to "liability in all claims for injury which are actionable in tort."²² The presence of the eminent domain statute is neither a waiver of this immunity nor a consent to be sued in tort.²³ Thus, sovereign immunity could be asserted as a defense against a landowner bringing an action in trespass.²⁴ In contrast, the right of eminent domain is based on the "takings clause" of the Colorado constitution and as this is the constitutional provision upon which inverse condemnation is based, an action in inverse condemnation is not subject to the defense of sovereign immunity.²⁵

Governmental bodies, however, are not the only entities having the power of eminent domain. The use of public rights-of-ways is given to "[a]ny domestic or foreign telegraph, telephone, electric light power, gas, or pipeline company, authorized to do business under the laws" of Colorado.²⁶ In addition, these companies are "vested with the power of eminent domain, and authorized to proceed to obtain rights-of-way for poles, wires, pipes, regulator stations, substations, and systems for such purposes

²¹ *Id.* § 24-10-103(5).

²² *Id.* § 24-10-106(1).

²³ *Colorado ex rel. Watrous v. District Court of the United States*, 207 F.2d 50 (10th Cir. 1953).

²⁴ The defense of sovereign immunity, however, may be waived by COLO. REV. STAT. ANN. § 24-10-104(1) (1973) which provides waiver

if a public entity provides insurance coverage . . . to insure itself against liability for any injury or to insure any of its employees against his liability for any injury resulting from an act or omission by such employee acting within the scope of his employment

The liability resulting from this waiver is limited to "the amount of the insurance coverage and shall be recovered from the insurer only." *Id.* § 24-10-104(2). See also *id.* § 24-10-116 which provides when the State is required to obtain insurance.

²⁵ COLO. CONST. art. II, § 15. Colorado courts have awarded damages caused by the taking of property not ordinarily compensable in eminent domain proceedings and have based recovery not on tort or common law theories, but rather on the "takings clause." See, e.g., *Roth v. Wilkie*, 143 Colo. 519, 354 P.2d 510 (1960); *Boxberger v. State Highway Dep't*, 126 Colo. 438, 250 P.2d 1007 (1952); *Board of Comm'rs v. Adler*, 69 Colo. 290, 194 P. 621 (1920); *City of Colorado Springs v. Stark*, 57 Colo. 384, 140 P. 794 (1914); cf. *Hayutin v. Colorado State Dep't of Highways*, 175 Colo. 83, 485 P.2d 896, cert. denied, 404 U.S. 991 (1971); *Troiano v. Department of Highways*, 170 Colo. 484, 463 P.2d 448 (1969). See also Comment, *The Colorado Governmental Immunity Act: Prescription for Regression*, 49 DENVER L.J. 567 (1973), which argues that the exceptions to the sovereign immunity barrier in these types of cases are based on the unconstitutionality of the uncompensated taking of the property. For a further discussion of the use of inverse condemnation as a means of avoiding the sovereign immunity barrier, see Oberst & Lewis, *Claims Against the State of Kentucky—Reverse Eminent Domain*, 42 Ky. L.J. 163 (1953).

²⁶ COLO. REV. STAT. ANN. § 38-5-101 (1973).

. . . ."²⁷ These companies, moreover, are liable for their torts and are not protected by any statute.²⁸ Sovereign immunity, then, does not bar common law actions, such as trespass, that a landowner may elect to pursue against nongovernmental entities appropriating land.

2. Acquiescence to the Entry

Acquiescence occurs when a landowner knows an entity with the power of eminent domain has appropriated his land and he does nothing to assert his right to the land.²⁹ If a landowner allows entry without demanding compensation³⁰ or requiring the initiation of condemnation proceedings³¹ or if he simply does not interfere with the entry,³² he will be held to have acquiesced. The effect of acquiescence is to bar tort recovery and limit the damages to the amount recoverable in an eminent domain proceeding.³³ This limitation of damages applies even if the person who acquiesces to the entry was a previous owner rather than the present one.³⁴ Therefore, unless a landowner protests the presence on his land of an entity with the power of eminent domain from the entry, he will have acquiesced and be limited to inverse condemnation.³⁵

3. Statute of Limitations

The statute of limitations bars recovery for actions not commenced within the statutory period after the cause of action accrues. For damages resulting from a permanent trespass, such as the construction of a building or the appropriation of an easement, recovery may be had only "for the injury done up to the commencement of the suit."³⁶ The cause of action accrues when

²⁷ *Id.* § 38-5-105. See also COLO. CONST. art. XVI, § 7 which provides eminent domain powers for the conveyance of water over private land.

²⁸ See, e.g., *Mountain States Tel. & Tel. Co. v. Sanger*, 87 Colo. 369, 287 P. 866 (1930); *Western Union Tel. Co. v. Eyser*, 2 Colo. 141 (1873); *Wertz v. Holy Cross Elec. Ass'n*, 512 P.2d 286 (Colo. Ct. App. 1973).

²⁹ See generally *Stuart v. Colorado E.R.R.*, 61 Colo. 58, 156 P. 152 (1916).

³⁰ *Edwards v. Roberts*, 26 Colo. App. 538, 144 P. 856 (1914).

³¹ *Snowden v. Ft. Lyon Canal Co.*, 238 F. 495 (8th Cir. 1916).

³² *Rogers v. Lower Clear Creek Ditch Co.*, 63 Colo. 216, 165 P. 248 (1917).

³³ See, e.g., cases cited in note 5 *supra*.

³⁴ *Edwards v. Roberts*, 26 Colo. App. 538, 144 P. 856 (1914).

³⁵ For an example of a case in which the landowner was held not to have acquiesced because he protested from the beginning the presence of a trespasser with the powers of eminent domain, see *Denver & S.F. Ry. v. School Dist. No. 2*, 14 Colo. 327, 23 P. 978 (1890).

³⁶ *City & County of Denver v. Bayer*, 7 Colo. 113, 127, 2 P. 6, 15 (1883). In *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434, 21 P. 565 (1889), the court said that

the damage first becomes apparent³⁷ and the injured party's right to bring an action is then limited by the 6-year tort statute of limitations.³⁸ If he fails to bring it within that time he will be forced to use inverse condemnation, which has an 18-year statute of limitations.³⁹

If the landowner fails to claim potential damages in a condemnation suit, then the 6-year tort statute of limitations might bar all actions for additional damage to the land that are not brought within that period. In *Seven Lakes Reservoir Co. v. Majors*,⁴⁰ the defendant condemned land for a canal bed running through plaintiff's property to drain water from its reservoir. One year when doing so it damaged plaintiff's property by letting too much water flow through the canal and plaintiff sought damages for the injury to his land. The court refused to allow him any damages, holding that the original condemnation award had fully compensated him and that the tort

statute of limitations applies to actions for damages where parties, having the power of eminent domain take possession of land and use it, with the knowledge of the owner, and he neglects to enjoin them or fails to bring suit for damages within such statutory period⁴¹

Therefore, the plaintiff was barred from recovering anything for the additional damage to his land.

B. *Voluntary Election*

A landowner whose choice is not precluded by sovereign

as to trespasses and nuisances that are not of a permanent character, damages can only be recovered for the injury sustained up to the time of the commencement of the suit, but as to trespasses and nuisances that are of a permanent character, a single recovery may be had for the whole damage resulting from the act.

12 Colo. at 444, 21 P. at 569 (dictum). See note 53 *infra*.

³⁷ *Seven Lakes Reservoir Co. v. Majors*, 69 Colo. 590, 196 P. 334 (1921); *Middelkamp v. Bessemer Irrigating Co.*, 46 Colo. 102, 103 P. 280 (1909). In *Middelkamp* the court said that "the statute of limitations begins to run from the date the lands were first visibly affected" 46 Colo. at 113, 103 P. at 283.

³⁸ COLO. REV. STAT. ANN. § 13-80-110(e) (1973).

³⁹ *Id.* § 38-41-101(1) provides that after 18 years "[n]o person shall commence or maintain an action for the recovery of the title or possession or to enforce or establish any right or interest of or to real property"

⁴⁰ 69 Colo. 590, 196 P. 334 (1921).

⁴¹ *Id.* at 593, 196 P. at 335, citing *Stuart v. Colorado E.R.R.*, 61 Colo. 58, 156 P. 152 (1916); *Middelkamp v. Bessemer Irrigating Co.*, 46 Colo. 102, 103 P. 280 (1909); *Denver & S.F. Ry. v. Hannegan*, 43 Colo. 122, 95 P. 343 (1908). For further discussion of the use of statute of limitations as a defense to claims for the uncompensated appropriation of land, see *Feder & Wieland*, *supra* note 4, at 541.

immunity, acquiescence, or the running of the statute of limitations is in the position of being able to elect trespass or inverse condemnation. The primary consideration involved in making this decision is the difference in damages the two remedies offer that makes one more advantageous than the other.

1. Inverse Condemnation

In determining the "respective rights of plaintiff and defendant as to property taken, damages and benefits," the same rules apply in inverse condemnation as apply in eminent domain.⁴² The measure of damages is the fair market value of the property⁴³ and, in addition to this amount, the recovery of "damages, if any, to the residue of such property" may be had.⁴⁴ Against this, the defendant may set off any improvements that specifically benefit the land,⁴⁵ although general benefits to the community at large cannot be set off.⁴⁶

2. Trespass

In trespass the measure of damages is the difference in the value of the land immediately before and immediately after the injury.⁴⁷ Where it will not accurately reflect the actual damages suffered, this rule is not invariably applied. In such cases, other evidence may be admitted.⁴⁸ Exemplary damages can also be recovered if the defendant acts in "wanton and reckless disregard

⁴² *San Luis Valley Irrigation Dist. v. Noffsinger*, 85 Colo. 202, 207, 274 P. 827, 829 (1929).

⁴³ The fair market value of the property was described in *Wassenich v. City & County of Denver*, 67 Colo. 456, 466, 186 P. 533, 537 (1919) to be the price the "property would bring if sold in the open market under ordinary and usual circumstances, for cash, assuming the owner is willing to sell and the purchaser willing to buy . . ." This rule has been followed consistently. *See, e.g.*, *Board of County Comm'rs v. Vail Associates*, 171 Colo. 381, 468 P.2d 482 (1970); *Mack v. Board of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963); *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961); *Board of Comm'rs v. Noble*, 117 Colo. 77, 184 P.2d 142 (1947).

⁴⁴ COLO. REV. STAT. ANN. § 38-1-115(c) (1973).

⁴⁵ In *Western Slope Gas Co. v. Lake Eldora Corp.*, 512 P.2d 641, 644 (Colo. Ct. App. 1973), the court described these benefits to be those "which accrue directly to the residue of the tract as a result of the construction of the improvement and which benefit directly and particularly the specific tract . . ."

⁴⁶ *Denver Joint Stock Land Bank v. Board of County Comm'rs*, 105 Colo. 366, 98 P.2d 283 (1940).

⁴⁷ *Freel v. Ozark-Mahoning Co.*, 208 F. Supp. 93 (D. Colo. 1962); *State v. Nicholl*, 150 Colo. 84, 370 P.2d 888 (1962); *Dandrea v. Board of County Comm'rs*, 144 Colo. 343, 356 P.2d 893 (1960); *Mustang Reservoir Canal & Land Co. v. Hissman*, 49 Colo. 308, 112 P. 800 (1910).

⁴⁸ *Big Five Mining Co. v. Left Hand Ditch Co.*, 73 Colo. 545, 216 P. 719 (1923). *See also Fort v. Brighton Ditch Co.*, 79 Colo. 462, 246 P. 786 (1926).

of the injured party's rights and feelings."⁴⁹ Unlike inverse condemnation, intent or lack of intent will influence the measure of damages in a trespass action,⁵⁰ although an unintentional trespass does not preclude exemplary damages.⁵¹

Trespass seems to offer the better remedy because the measure of damages is more flexible, exemplary damages can be awarded, and benefits to the residue of the taken land cannot automatically be set off against the damage to the remaining portion. Under trespass, there is the further advantage of the possibility of damages which will continue accruing even after the commencement of the suit. As was pointed out by the appellate court's decision in *Ossman*, in a trespass award "[n]o title to the land taken or easement would result."⁵² Thus, the injured landowner may be able to maintain a succession of actions as the damages from the original trespass accrued yearly or bring a trespass action and then force condemnation by the trespassing entity.⁵³

⁴⁹ COLO. REV. STAT. ANN. § 13-21-102 (1973).

⁵⁰ Trespass liability arises even if the trespasser does not "intend to invade the other's interest in the exclusive possession of his land. The intention which is required to make the actor liable . . . is an intention to enter upon the particular piece of land in question . . ." RESTATEMENT (SECOND) OF TORTS § 163, comment *b* at 294 (1965).

⁵¹ See, e.g., *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 F. 668 (8th Cir. 1904).

⁵² 511 P.2d at 520. In reversing the court of appeals, the Colorado Supreme Court did not deal with the question of whether title to the land passed or not. Instead it found only that the lower court committed error in holding that a "landowner should be limited to an inverse condemnation remedy" in this situation. 520 P.2d at 741. Because trespass is an action designed to redress the tortious "injury to the person, property, or rights of another," it seems clear that trespass does not pass title. 87 C.J.S. *Trespass* § 1 at 956 (1954).

⁵³ RESTATEMENT (SECOND) OF TORTS § 161(1) (1965) states that "[a] trespass may be committed by the continued presence on the land of a structure . . . which the actor has tortiously placed there, whether or not the actor has the ability to remove it." The Reporter further adds that this "confers on the possessor of the land an option to maintain a succession of actions . . ." *Id.* § 161, comment *b* at 290. However, this statement is modified by a later comment which notes that this "rule as to continuing trespass does not apply if the possessor has been fully compensated by the actor for his tortious conduct . . ." *Id.* § 161, comment *d* at 290 (emphasis added). See also *id.* § 160, comment *l* at 287-88. The *Restatement's* position appears consonant with Colorado case law. See, e.g., *Ft. Lyon Canal Co. v. Bennett*, 61 Colo. 111, 156 P. 604 (1916). In *Beetschen v. Shell Pipeline Corp.*, 363 Mo. 751, 253 S.W.2d 785 (1952), cited with approval in *Ossman*, the Missouri Supreme Court adopted the *Restatement's* position and noted that it would not allow continuous trespass actions where the landowner had been fully compensated. Because a trespass award may fully compensate a landowner for a structure, such as a telephone cable, tortiously placed on the land, he might not be able to maintain successive trespass actions even though he still retains title to the land. See text accompanying notes 53-55 *infra*.

C. Which Remedy Should Be Elected?

Ultimately the election of remedies depends on the factual setting of the appropriation. Trespass is clearly advantageous in that it offers the possibility of exemplary damages and prevents the setting off of benefits against damages to the residue. This advantage, however, is minimal if the defendant has exhibited no conduct warranting the award of exemplary damages and there is either no benefit or no damage to the residue of the property to be set off against each other. Similarly, the more flexible measure of damages in trespass has little advantage over inverse condemnation damages if the difference in the value of the land immediately before and immediately after the injury is the monetary equivalent of the fair market value of the land taken.

Finally, the advantages of trespass are illusory if the trespass action is barred by either the sovereign immunity barrier, the acquiescence of the landowner to the entry, or the running of the statute of limitations.⁵⁴ The choice of a common law remedy when that action is barred for some reason may preclude recovery in inverse condemnation as well.⁵⁵ Therefore, careful consideration

If, however, the Colorado courts would allow maintenance of continuous trespass actions or a trespass action followed by ejectment or inverse condemnation, then trespass would be clearly advantageous to the landowner because it would allow the landowner to collect trespass, exemplary, and condemnation damages.

⁵⁴ See text accompanying notes 19-41 *supra*.

⁵⁵ See, e.g., *Seven Lakes Reservoir Co. v. Majors*, 69 Colo. 590, 196 P. 334 (1921), discussed in the text accompanying notes 40-41 *supra*. See also cases cited note 41 *supra*.

There is also the possibility that collateral estoppel or *res judicata* will be asserted by the appropriating entity if a trespass action is unsuccessfully brought by the landowner who then attempts to relitigate the appropriation under an inverse condemnation theory. In *Waitkus v. Pomeroy*, 517 P.2d 316 (Colo. 1973), the Colorado Supreme Court identified the following tests as being determinative of whether *res judicata* as collateral estoppel barred the relitigation of the issue:

First, was the issue decided in the prior adjudication identical with the one presented in the action in question? Second, was there a final judgment on the merits? Third, was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? And, fourth, did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication?

517 P.2d at 317, citing *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1945). See also *Brennan v. Grover*, 158 Colo. 66, 404 P.2d 544 (1965); *Murphy v. Northern Colo. Grain Co.*, 30 Colo. App. 21, 488 P.2d 103 (1971). Arguably because the issue in trespass is whether there was a tortious entry on land and the issue in inverse condemnation is whether there was an uncompensated condemnation of land, collateral estoppel would not bar an inverse condemnation action by a landowner who had proceeded unsuccessfully under a trespass theory. For a discussion of how a landowner proceeding successfully under a trespass theory might be barred from recovery under inverse condemnation, see discussion and authorities cited in note 53 *supra*.

of the factual pattern in a particular appropriation is required before an election is made.

III. IMPACT OF *Ossman*

The effect of *Ossman* may well be to force entities endowed with the power of eminent domain to promptly initiate condemnation proceedings and to strictly follow statutory requirements. Before *Ossman* an entity that appropriated land could have waited until the uncompensated landowner initiated inverse condemnation proceedings.⁵⁶ It is to the advantage of the condemnor to negotiate and attempt to settle out of court because in an eminent domain action, even if promptly initiated, the condemnor is required to pay the landowner's litigation costs.⁵⁷

The ability of the landowner to now sue in trespass should have the effect of forcing the appropriating body to commence a condemnation action promptly. If it should refuse to do so, it would be liable in trespass and be subject to possible exemplary damages even though its entry on the land was unintentional and in good faith.⁵⁸ Because of the more generous measure of damages and exemplary damages, a landowner would probably elect to pursue trespass rather than inverse condemnation.⁵⁹

A condemnor, even one already on the land, could begin eminent domain proceedings by filing a condemnation petition and thereby avoid trespass liability.⁶⁰ If the condemnor files this petition, it is able to maintain possession of the property in question and all actions against it are stayed.⁶¹ Thus, a trespass action

⁵⁶ COLO. REV. STAT. ANN. § 38-1-101 (1973) provides relief for a landowner whose property has been taken in "all cases in which compensation is not made."

⁵⁷ *Rullo v. Public Serv. Co.*, 163 Colo. 99, 428 P.2d 708 (1967); *Denver Joint Stock Land Bank v. Board of County Comm'rs*, 105 Colo. 366, 98 P.2d 283 (1940); *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1891).

⁵⁸ This intent is not necessarily to trespass, but the intent to do the act that was a trespass. *Ansary v. Boecking-Berry Equip. Co.*, 450 F.2d 433 (10th Cir. 1971); *Little Pittsburg Consol. Mining Co. v. Little Chief Consol. Mining Co.*, 11 Colo. 223, 17 P. 760 (1888); *Engler v. Hatch*, 472 P.2d 680 (Colo. Ct. App. 1970); RESTATEMENT (SECOND) OF TORTS § 158 (1965). See note 50 *supra*.

⁵⁹ See text accompanying notes 47-53 *supra*.

⁶⁰ COLO. REV. STAT. ANN. § 38-5-106 (1973).

⁶¹ The statute provides that "upon the filing of the verified petition" contained in section 38-1-102 (discussed in note 14 *supra*) and a deposit with the clerk of the court of the amount the court in a preliminary hearing "determines to be proper compensation," the court shall authorize

the petitioner to take possession . . . and if already in possession to maintain and keep such possession, and in all cases to use and enjoy such right-of-way during the pendency and until the final conclusion of the condemnation

commenced before the filing of the petition would be stayed until the completion of the condemnation proceedings. The eminent domain award, moreover, might remove the gravamen of the tort claim. The taking of the land would in many cases be completely compensated by the eminent domain award. The prompt initiation of the condemnation action by the filing of the petition might possibly remove the grounds for exemplary damages.⁶²

The impact of *Ossman*, then, would be to force the condemnor to follow statutory requirements rather than to delay action by making the landowner take the initiative. By making trespass available as an alternative, the Colorado Supreme Court is, in effect, encouraging compliance with the present statutory scheme.

CONCLUSION

Ossman raises many questions that will have to be answered by subsequent litigation. It is not clear how closely the court will limit this decision. If the court is simply reacting to the callous treatment of Emmett Ossman by Mountain States Telephone & Telegraph Co., then in the future it might not allow an election where the appropriating body makes a greater effort to settle with the landowner or at least promptly initiate condemnation proceedings.

In allowing the landowner to elect his remedy when his land has been taken without compensation, the court has gone against many of its earlier decisions.⁶³ The impact of this departure, however, may be lessened by future decisions and the fact that trespass, while offering many advantages to the landowner, is limited by several barriers. In electing between trespass and inverse condemnations, these barriers as well as the advantages to tort recovery will have to be carefully weighed to determine which remedy will provide the best relief for the injured landowner.

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proceedings, and the court shall stay all actions and proceedings against such petitioner on account thereof.

Id. § 38-5-106.

⁶² Because the court in *Ossman* so closely links the conduct of the condemnor to both the awarding of exemplary damages and the ability to elect trespass, it is possible that in a situation in which exemplary damages are not awardable the landowner would be unable to elect trespass as a remedy. For example, the court says that "*Ossman* had the right to elect to sue in trespass *under the circumstances here*" and that "*Ossman* alleges conduct which would justify an award of exemplary damages." 520 P.2d at 741 (emphasis added).

⁶³ Cases cited note 5 *supra*.