



Montana Legislative Services Division
Office of Research and Policy Analysis

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April 5, 2012

To: Law and Justice Interim Committee (LJIC) members
Fr: Sonja Nowakowski, Research Analyst
Re: Eminent domain discussion

At the close of the Law and Justice Interim Committee's February discussion of eminent domain, staff was directed to develop draft legislation requiring a condemnee be provided with a statement of the condemnee's rights during an eminent domain action. The LJIC also asked that a letter be sent to the Environmental Quality Council (EQC) apprising the Council of the LJIC's request for draft legislation. Staff worked with Chairman Shockley on the letter to the EQC, and it was delivered during the EQC's March 7-8 meeting in Helena.

During the EQC's March meeting, the Council did not provide any formal feedback concerning the LJIC proposal. Chairman Keane, however, invited Council members to offer their personal feedback to the LJIC members.

Staff is including three documents along with this memo:

- **LClj11** -- a rough draft of the bill requested by the LJIC in February;
- **House Bill No. 420 as introduced** during the 2001 Legislature;
- **House Bill No. 420 as amended** by the House during the 2001 Legislature; and
- **Letter to the EQC** concerning LJIC's eminent domain work.

The LJIC draft was to be modeled after legislation brought before the 2001 Legislature and requirements in the North Dakota Century Code. Attached is a copy of the 2001 legislation, House Bill No. 420. The 2001 draft required a condemnor provide the information and it added the requirement to the facts necessary to be found before condemnation in 70-30-111, MCA. The 2001 draft also expanded instances in which a condemnee is entitled to attorney fees and defined "necessary expenses" and when those expenses accrue.

During the February LJIC meeting, committee members only requested legislation that would require a condemnee be provided with a statement of his or her rights in an eminent domain action. The LJIC did not indicate that the requirement should be incorporated into the facts necessary for condemnation. The LJIC also did not indicate what entity should provide the statement of rights, however, the 2001 legislation required a condemnor to make the disclosure, and staff used that legislation as a model.

As drafted, LClj11 requires the delivery of the statement of rights by certified mail to the condemnee. HB 420 contemplated the condemnor or the condemnee signing the statement of rights and having the statement recorded with the clerk and recorder. HB 420 was significantly amended as it made its way through the House in 2001. Staff incorporated the amendments into the draft for the LJIC. Committee members may wish to discuss that aspect of the draft and provide additional direction to staff on how best to proceed with the drafting of LClj11.

Staff also completed a legislative history for HB 420. The bill was not a request made by the Environmental Quality Council based on their study of eminent domain during the 1999-2000 interim. According to committee meeting minutes, the EQC discussed the concept but instead agreed to develop the eminent domain handbook. LJIC members were provided with an updated copy of that handbook in advance of the February meeting. Chairman Shockley was on the eminent domain subcommittee that studied the issue in 1999-2000, and Chairman Shockley brought the legislation forward in 2001. The bill passed the House and was tabled in the Senate Natural Resources committee.

The North Dakota Century Code doesn't specifically reference a landowner bill of rights. However, 54-12-01.1 of the North Dakota Century Code requires the Attorney General's Office to prepare pamphlets describing eminent domain laws. Copies of the pamphlets must be available to all condemnors who are "charged a price for the pamphlets sufficient to recover the costs of production." A condemnor is required to present the pamphlet to a property owner prior to making an offer to purchase and initiating a condemnation action. The North Dakota Attorney General's Office publishes several pieces of information, including the "Landowner Rights under North Dakota's Eminent Domain Law". The fact sheet describes how state agencies, local governments, and some private entities use the condemnation process in North Dakota. The information is also posted on the Attorney General's website.

Wyoming doesn't require a bill of rights, but it does require written notice outlining a condemnees' rights. Wyoming Statutes Annotated 1-26-509 require: "a written notice that the condmnee is under no obligation to accept the initial written offer but if the condemnee fails to respond to the initial written offer the right to object to the good faith of the condemnor may be waived, that the condemnor and the condemnee are obligated to negotiate in good faith for the purchase of the property sought, that formal legal proceedings may be initiated if negotiations fail and that the condemnee has a right to seek advice from an attorney, real estate appraiser, or any other person of his choice during the negotiations and any subsequent legal proceedings."

Texas requires a landowner bill of rights in eminent domain proceedings. The Texas Government Code, Sec. 402.031. directs the Texas Attorney General to prepare a written statement that includes a bill of rights for a property owner whose real property may be acquired by a governmental or private entity through the use of the entity's eminent domain authority under Chapter 21, Property Code. The statement must inform a property owner of his or her right to:

- notice of the proposed acquisition of the owner's property;
- a bona fide good faith effort to negotiate by the entity proposing to acquire the property;
- an assessment of damages to the owner that will result from the taking of the property;
- a hearing under Chapter 21, Property Code, including a hearing on the assessment of damages; and

- an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages.

The Attorney General's Office is directed to write the statement in "plain language" and make the information available on the Attorney General's Website. The statement must include the title, "Landowner's Bill of Rights" and a description of:

- the condemnation procedure provided by Chapter 21, Property Code;
- the condemning entity's obligations to the property owner; and
- the property owner's options during a condemnation, including the property owner's right to object to and appeal an amount of damages awarded.

Texas eminent domain law requires a condemnor to provide the statement to a condemnee not later than the seventh day before the date a governmental or private entity with eminent domain authority makes a final offer to a property owner to acquire real property.

As the LJIC reviews the requested draft, it may be useful for committee members to discuss and consider:

- Should a state entity be required to develop the information? If so, how should the cost be addressed?
- Should the statement of rights requirement be incorporated into 70-30-111, MCA?
- Should the requirements for inclusion in the statement of rights be further developed?
- Should requirements for signing the statement or filing it with the clerk and recorder be included?
- When in the process should the information be provided?
- Should the entities be referred to as condemnors and condemnees or agents and property owners?
- Should a condemnee be able to waive the 30 day waiting period?
- What additional changes should be made in the draft?

Staff will be seeking direction on how best to proceed on the draft. I look forward to working with you. Please feel free to contact me any time.

Sonja Nowakowski

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Unofficial Draft Copy

As of: March 15, 2012 (8:51am)

LC1j11

**** Bill No. ****

Introduced By *****

By Request of the *****

A Bill for an Act entitled: "An Act requiring that a condemnor in an eminent domain action provide the condemnee with a statement of the condemnee's rights in an eminent domain action; and providing an applicability date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Condemnee's rights in eminent domain action.** (1) Prior to undertaking a condemnation action in accordance with this chapter, the condemnor shall send the owner of the property sought to be taken a written statement of the condemnee's rights in an eminent domain action. The statement must be sent to the property owner's property tax address and delivered by certified mail.

(2) The statement must contain information describing:

(a) the condemnee's right to not accept the offer submitted by the condemnor;

(b) the location of eminent domain laws in the Montana Code Annotated; and

(c) the rights granted to a condemnee under Article II, section 29, of the Montana constitution.

(3) Additional documents regarding the eminent domain action may not be recorded and a sale may not be made until 30 days

Unofficial Draft Copy

As of: March 15, 2012 (8:51am)

LC1j11

after the eminent domain statement of rights has been provided to the condemnee, unless the condemnee waives the 30-day waiting period in writing.

NEW SECTION. Section 2. {standard} Codification

instruction. [Section 1] is intended to be codified as an integral part of Title 70, chapter 30, part 1, and the provisions of Title 70, chapter 30, part 1, apply to [section 1].

NEW SECTION. Section 3. {standard} Applicability. [This act] applies to eminent domain actions initiated on or after [the effective date of this act].

- END -

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Title : Research Analyst
Agency: LSD LEPO
Phone : 406-444-3078
E-Mail: snowakowski@mt.gov}

2001 Montana Legislature

[About Bill -- Links](#)

HOUSE BILL NO. 420

INTRODUCED BY J. SHOCKLEY

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT A ~~CONDEMNOR PERSON~~ CONDEMNOR IN AN EMINENT DOMAIN ACTION PROVIDE THE ~~CONDEMNOR PROPERTY OWNER~~ CONDEMNOR WITH A STATEMENT OF THE ~~CONDEMNOR'S PROPERTY OWNER'S~~ CONDEMNOR'S RIGHTS IN AN EMINENT DOMAIN ACTION; REQUIRING THAT THE CONDEMNOR SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE CONDEMNOR INFORMED THE CONDEMNOR OF THE CONDEMNOR'S RIGHTS THROUGH AN EMINENT DOMAIN STATEMENT OF RIGHTS; ~~EXPANDING THE INSTANCES IN WHICH THE CONDEMNOR IS ENTITLED TO ATTORNEY FEES; DEFINING "NECESSARY EXPENSES" AND WHEN NECESSARY EXPENSES ACCRUE~~; AMENDING SECTIONS SECTION 70-30-111, 70-30-305, AND 70-30-306, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Condemnee's rights in eminent domain action. (1) ~~The condemnor in an eminent domain action is required to provide the condemnor with a statement of the condemnor's rights in an eminent domain action. A PERSON AUTHORIZED BY LAW TO ACQUIRE A PROPERTY INTEREST THROUGH THE RIGHT OF EMINENT DOMAIN IS REQUIRED TO PROVIDE THE PROPERTY OWNER WITH A STATEMENT OF THE PROPERTY OWNER'S RIGHTS IF AN EMINENT DOMAIN ACTION OCCURS~~ THE CONDEMNOR IN AN EMINENT DOMAIN ACTION IS REQUIRED TO PROVIDE THE CONDEMNOR WITH A STATEMENT OF THE CONDEMNOR'S RIGHTS IN AN EMINENT DOMAIN ACTION.

(2) The eminent domain statement of rights must:

(a) be in writing;

(b) be signed by the condemnor or the person who provided the condemnor with the eminent domain statement of rights;

~~(c) be recorded with the clerk and recorder of the county within which the property subject to condemnation is located; and~~

~~(d)~~ (C) include but is not limited to the following information:

(i) the condemnor's right to not accept the offer submitted by the condemnor;

~~(ii) the condemnee's entitlement to attorney fees if the condemnee prevails, as provided in Article II, section 29, of the Montana constitution and 70-30-305;~~

~~(iii)(II) the location of eminent domain laws in the Montana Code Annotated; AND~~

~~(iv)(III) the rights granted to a condemnee under Article II, section 29, of the Montana constitution; and.~~

~~(v) sources of information related to eminent domain on state and federal levels.~~

(3) Additional documents regarding the eminent domain action may not be recorded and a sale may not be made until 30 DAYS AFTER the eminent domain statement of rights has been recorded for 30 days PROVIDED TO THE CONDEMNEE.

Section 2. Section 70-30-111, MCA, is amended to read:

"70-30-111. Facts necessary to be found before condemnation. Before property ~~can~~ may be taken, the ~~plaintiff must~~ condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on all of the following findings:

(1) ~~that the~~ The use to which ~~it~~ the property is to be applied is a use authorized by law;

(2) ~~that the~~ The taking is necessary to ~~such~~ the use;

(3) ~~if~~ If already ~~appropriated to some~~ being used for a public use, ~~that~~ the public use ~~to~~ for which ~~it~~ the property is ~~proposed~~ to be applied used is a more necessary public use;

(4) ~~that an~~ An effort to obtain the property interest sought to be ~~condemned~~ taken was made by submission of a written offer, and ~~that such~~ the offer was rejected.

(5) The condemnor informed the condemnee of the condemnee's rights through the eminent domain statement of rights provided for in [section 1]."

~~Section 3.~~ Section 70-30-305, MCA, is amended to read:

~~"70-30-305. Condemnor to make offer upon appeal -- award of necessary expenses of litigation.~~ (1) The condemnor shall, within 30 days after an appeal is perfected from the condemnation commissioner's award or report or not more than 60 days after the waiver of appointment of condemnation commissioners, submit to the condemnee a written final offer of judgment for the property sought to be condemned taken, together with the accrued necessary expenses of the condemnee then accrued as provided in 70-30-306. If at any time prior to 10 days before trial the condemnee serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service thereof of the acceptance, and thereupon judgment shall must be entered. ~~An offer not accepted shall be deemed is considered withdrawn, and evidence thereof of the offer is not admissible at the trial except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.~~

~~(2) In the event of litigation, the court shall award necessary expenses to the condemnee, as provided in 70-30-306, and when the private property owner condemnee prevails by:~~

~~(a) receiving an award in excess of the final offer of the condemnor;~~

~~(b) decreasing the amount of property that the condemnor is allowed to take;~~

~~(c) requiring that the condemnor take a different interest in property than was originally sought; or~~

~~(d) requiring the condemnor to follow a different route than proposed in the preliminary condemnation order~~ the court shall award necessary expenses of litigation to the condemnee."

~~Section 4. Section 70-30-306, MCA, is amended to read:~~

~~"70-30-306. Necessary expenses of litigation defined. (1) Necessary expenses of litigation "Necessary expenses", as authorized by 70-30-305, mean means reasonable and necessary attorney fees, expert witness fees, exhibit costs expenses incurred in anticipation of litigation or as a result of litigation, and court costs.~~

~~(2) Reasonable and necessary attorney fees are the customary hourly rates for an attorney's services in the county in which the trial is held. Reasonable and necessary attorney fees shall must be computed on an hourly basis and may not be computed on the basis of any contingent fee contract entered into after July 1, 1977.~~

~~(3) Reasonable and necessary expert witness fees may not exceed the customary rate for the services of a witness of such that expertise in the county in which the trial is held.~~

~~(4) Necessary expenses accrue after the first offer of purchase by the condemnor."~~

NEW SECTION. Section 3. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 70, chapter 30, part 1, and the provisions of Title 70, chapter 30, part 1, apply to [section 1].

NEW SECTION. Section 4. Applicability. [This act] applies to eminent domain actions initiated on or after [the effective date of this act].

- END -

Latest Version of HB 420 (HB0420.03)
Processed for the Web on March 26, 2001 (4:41PM)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted. See the [status of this bill](#) for the bill's primary sponsor.

[Status of this Bill](#) | [2001 Legislature](#) | [Leg. Branch Home](#)
[This bill in WP 5.1](#) | [All versions of all bills in WP 5.1](#)
[Authorized print version w/line numbers \(PDF format\)](#)

Prepared by Montana Legislative Services

(406)444-3064

House BILL NO. 420

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INTRODUCED BY _____
(Primary Sponsor)

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT A CONDEMNOR IN AN EMINENT DOMAIN ACTION PROVIDE THE CONDEMNEE WITH A STATEMENT OF THE CONDEMNEE'S RIGHTS IN AN EMINENT DOMAIN ACTION; REQUIRING THAT THE CONDEMNOR SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE CONDEMNOR INFORMED THE CONDEMNEE OF THE CONDEMNEE'S RIGHTS THROUGH AN EMINENT DOMAIN STATEMENT OF RIGHTS; EXPANDING THE INSTANCES IN WHICH THE CONDEMNEE IS ENTITLED TO ATTORNEY FEES; DEFINING "NECESSARY EXPENSES" AND WHEN NECESSARY EXPENSES ACCRUE; AMENDING SECTIONS 70-30-111, 70-30-305, AND 70-30-306, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Condemnee's rights in eminent domain action.** (1) The condemnor

in an eminent domain action is required to provide the condemnee with a statement of the condemnee's rights in an eminent domain action.

(2) The eminent domain statement of rights must:

- (a) be in writing;
- (b) be signed by the condemnee or the person who provided the condemnee with the eminent domain statement of rights;
- (c) be recorded with the clerk and recorder of the county within which the property subject to condemnation is located; and
- (d) include but is not limited to the following information:
 - (i) the condemnee's right to not accept the offer submitted by the condemnor;
 - (ii) the condemnee's entitlement to attorney fees if the condemnee prevails, as provided in Article II, section 29, of the Montana constitution and 70-30-305;
 - (iii) the location of eminent domain laws in the Montana Code Annotated;
 - (iv) the rights granted to a condemnee under Article II, section 29, of the Montana constitution;

and



HB 420

1 (v) sources of information related to eminent domain on state and federal levels.

2 (3) Additional documents regarding the eminent domain action may not be recorded and a sale
3 may not be made until the eminent domain statement of rights has been recorded for 30 days.

4

5 **Section 2.** Section 70-30-111, MCA, is amended to read:

6 **"70-30-111. Facts necessary to be found before condemnation.** Before property ~~can~~ may be
7 taken, the ~~plaintiff must~~ condemnor shall show by a preponderance of the evidence that the public interest
8 requires the taking based on all of the following findings:

9 (1) ~~that the~~ The use to which ~~it~~ the property is to be applied is a use authorized by law;₁

10 (2) ~~that the~~ The taking is necessary to ~~such~~ the use;₁

11 (3) ~~if~~ If already ~~appropriated to some~~ being used for a public use, ~~that~~ the public use ~~to~~ for which
12 ~~it the property~~ is proposed to be ~~applied~~ used is a more necessary public use;₁

13 (4) ~~that an~~ An effort to obtain the property interest sought to be ~~condemned~~ taken was made by
14 submission of a written offer, ~~and that such~~ the offer was rejected.₁

15 (5) The condemnor informed the condemnee of the condemnee's rights through the eminent
16 domain statement of rights provided for in [section 1]."

17

18 **Section 3.** Section 70-30-305, MCA, is amended to read:

19 **"70-30-305. Condemnor to make offer upon appeal -- award of necessary expenses of litigation.**

20 (1) The condemnor shall, within 30 days after an appeal is perfected from the condemnation
21 commissioner's award or report or not more than 60 days after the waiver of appointment of
22 ~~condemnation~~ commissioners, submit to the condemnee a written final offer of judgment for the property
23 sought to be ~~condemned~~ taken, together with the accrued necessary expenses of the condemnee ~~then~~
24 ~~accrued~~ as provided in 70-30-306. If at any time prior to 10 days before trial the condemnee serves
25 written notice that the offer is accepted, either party may then file the offer and notice of acceptance,
26 together with proof of service ~~thereof~~ of the acceptance, and ~~thereupon~~ judgment ~~shall~~ must be entered.
27 An offer not accepted ~~shall be deemed~~ is considered withdrawn, and evidence ~~thereof~~ of the offer is not
28 admissible at the trial except in a proceeding to determine costs. The fact that an offer is made but not
29 accepted does not preclude a subsequent offer.

30 (2) In the event of litigation, the court shall award necessary expenses to the condemnee, as

1 provided in 70-30-306, and when the ~~private property owner~~ condemnee prevails by:
 2 (a) receiving an award in excess of the final offer of the condemnor;
 3 (b) decreasing the amount of property that the condemnor is allowed to take;
 4 (c) requiring that the condemnor take a different interest in property than was originally sought;
 5 or
 6 (d) requiring the condemnor to follow a different route than proposed in the preliminary
 7 condemnation order ~~the court shall award necessary expenses of litigation to the condemnee.~~"
 8

9 **Section 4.** Section 70-30-306, MCA, is amended to read:

10 **"70-30-306. Necessary expenses of litigation defined.** (1) ~~Necessary expenses of litigation~~
 11 "Necessary expenses", as authorized by 70-30-305, ~~mean~~ means reasonable ~~and necessary~~ attorney fees,
 12 expert witness fees, ~~exhibit costs~~ expenses incurred in anticipation of litigation or as a result of litigation,
 13 and court costs.

14 (2) Reasonable ~~and necessary~~ attorney fees are the customary hourly rates for an attorney's
 15 services in the county in which the trial is held. Reasonable ~~and necessary~~ attorney fees ~~shall~~ must be
 16 computed on an hourly basis and may not be computed on the basis of any contingent fee contract
 17 ~~entered into after July 1, 1977.~~

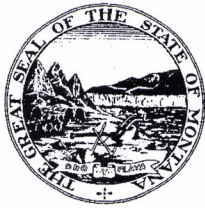
18 (3) Reasonable ~~and necessary~~ expert witness fees may not exceed the customary rate for the
 19 services of a witness of ~~such~~ that expertise in the county in which the trial is held.

20 (4) Necessary expenses accrue after the first offer of purchase by the condemnor."
 21

22 NEW SECTION. Section 5. Codification instruction. [Section 1] is intended to be codified as an
 23 integral part of Title 70, chapter 30, part 1, and the provisions of Title 70, chapter 30, part 1, apply to
 24 [section 1].

25
 26 NEW SECTION. Section 6. Applicability. [This act] applies to eminent domain actions initiated on
 27 or after [the effective date of this act].

28 - END -



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Law and Justice Interim Committee
62nd Montana Legislature

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February 29, 2012

Chairman Keane and Environmental Quality Council members,

On behalf of the 2011-2012 Law and Justice Interim Committee (LJIC), I would like to update the Environmental Quality Council (EQC) on the LJIC's review of eminent domain procedures and potential draft legislation that the LJIC intends to review in April.

During the LJIC's February 24 meeting, committee members began their examination and discussion of eminent domain. The LJIC's discussion is focused on the legal procedures for condemnation; including the process for condemnations, how negotiations and mediation are conducted, just compensation, and appeals. The LJIC heard from staff about condemnation procedures in Montana and also accepted public testimony on the subject.

The LJIC discussed opportunities for amending condemnation procedures in Montana to address concerns raised during the 2011 Legislative session and during the February 24 LJIC meeting. At the conclusion of the meeting, the LJIC agreed to explore options ensuring that a landowner involved in a condemnation proceeding is aware of his or her rights in an eminent domain action. To that end, the LJIC has requested draft legislation that would require a condemnor in an eminent domain action provide the condemnee with a statement of the condemnee's rights in an eminent domain action. The draft is to be modeled after legislation brought before the 2001 Legislature and requirements in the North Dakota Century Code. Staff will prepare the draft legislation in advance of the LJIC's April 19-20 meeting. The LJIC will accept public comment on the draft and decide whether to proceed.

Because the EQC is also examining eminent domain, with a focus on public uses, the LJIC wanted to make sure the council is aware of the LJIC's proposal. We look forward to hearing EQC members' thoughts on the draft legislation.

Chairman Jim Shockley

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LEGISLATIVE ENVIRONMENTAL
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