

1 HOUSE BILL NO. 327  
2 INTRODUCED BY B. WADDILL  
3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAWS RELATING TO PRIVATE CONDEMNATION  
5 PROCEEDINGS FOR THE OPENING OF PRIVATE ROADS OVER PRIVATE LANDS; PROVIDING THAT THE  
6 PUBLIC USES ON BEHALF OF WHICH THE RIGHT OF EMINENT DOMAIN MAY BE EXERCISED INCLUDE  
7 PRIVATE ROADS THAT ARE NECESSARY FOR ACCESS TO PRIVATE PROPERTY; AMENDING SECTIONS  
8 70-30-102 AND 70-30-107, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A  
9 RETROACTIVE APPLICABILITY DATE."

10

11 WHEREAS, many owners of landlocked property in the State of Montana lack legal access to that  
12 property although there has been historical access across other private property, and their property is not  
13 marketable as a result; and

14 WHEREAS, many of these owners have not established prescriptive rights to access because, as  
15 the Montana Supreme Court has held, the use of a neighbor's land based on mere neighborly  
16 accommodation or courtesy cannot ripen into a prescriptive easement (see Public Lands Access  
17 Association, Inc. v. Boone & Crockett Club Foundation, Inc., 259 Mont. 279, 856 P. 2d 525 (1993)); and

18 WHEREAS, such owners do not have an easement by necessity over a neighbor's land unless there  
19 was previously a common ownership with the neighbor's land and a severance giving rise to the necessity  
20 (see Schmid v. McDowell, 199 Mont. 233, 649 P.2d 431 (1982)); and

21 WHEREAS, pursuant to section 70-30-102, MCA, such owners cannot condemn and pay for a  
22 private road unless it leads from highways to residences or farms, regardless of the value of the access  
23 and regardless of the amount that the landlocked owner offers to pay; and

24 WHEREAS, the Montana Supreme Court has limited rights of private condemnation of access roads  
25 to cases in which the owner's land is presently being used as a farm or residence (see Groundwater v.  
26 Wright, 180 Mont. 27, 588 P.2d 1003 (1979)), and the Montana Supreme Court has further limited  
27 condemnation rights by defining "farm" as land cultivated for purposes of agricultural production (see  
28 Richter v. Rose, 1998 MT 165, 289 Mont. 379, 962 P.2d 583 (1998)); and

29 WHEREAS, the owner seeking to establish the road by condemnation is responsible to pay a  
30 neighboring landowner's necessary expenses of litigation, including attorney fees and expert witness fees,

1 whether the road is opened or not (see Callant v. Federal Land Bank of Spokane, 181 Mont. 400, 593  
2 P.2d 1036 (1979)); and

3 WHEREAS, as a result, current law narrowly limits the availability of legal access over roads to  
4 landlocked properties even when there is a history of use of the road and assesses all litigation expenses  
5 to owners who are willing to pay fair market value for necessary access regardless of who prevails in the  
6 litigation; and

7 WHEREAS, the Legislature of the State of Montana finds it appropriate to provide for private  
8 condemnation of necessary access roads to landlocked property when the use of such roads is historical,  
9 but not prescriptive, and to provide a procedure that encourages payment of fair market value for access  
10 without resort to litigation.

11

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

13

14 **Section 1.** Section 70-30-102, MCA, is amended to read:

15 **"70-30-102. Public uses enumerated.** Subject to the provisions of this chapter, the right of  
16 eminent domain may be exercised ~~in behalf of~~ for the following public uses:

17 (1) all public uses authorized by the government of the United States;

18 (2) public buildings and grounds for the use of the state and all other public uses authorized by  
19 the legislature of the state;

20 (3) public buildings and grounds for the use of any county, city, ~~or~~ town, or school district;

21 (4) canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the  
22 inhabitants of any county, city, or town;

23 (5) ~~raising projects to raise~~ the banks of streams, ~~removing~~ remove obstructions ~~therefrom~~ from  
24 streambanks, and ~~widening, deepening, or straightening their~~ widen, deepen, or straighten stream  
25 channels;

26 (6) roads, streets, ~~and~~ alleys, controlled-access facilities, and all other public uses for the benefit  
27 of any a county, city, or town or the inhabitants thereof, ~~which may be authorized by the legislature; but~~  
28 ~~the mode of apportioning and collecting the costs of such improvements shall be such as may be provided~~  
29 ~~in the statutes or ordinances by which the same may be authorized~~ of a county, city, or town;

30 ~~(4)(7)~~ wharves, docks, piers, chutes, booms, ferries, bridges, ~~of all kinds~~, private roads, plank and

- 1 turnpike roads, and railroads;<sub>2</sub>
- 2 ~~(8)~~ canals, ditches, flumes, aqueducts, and pipes for ~~public transportation~~;<sub>2</sub>
- 3 ~~(a)~~ supplying mines, mills, and smelters for the reduction of ores; ~~and~~
- 4 ~~(b)~~ supplying farming neighborhoods with water and drainage; ~~and~~
- 5 ~~(c)~~ reclaiming lands; ~~and for~~
- 6 ~~(d)~~ floating logs and lumber on streams that are not navigable; ~~and~~
- 7 ~~(9)~~ sites for reservoirs necessary for collecting and storing water. However, ~~such~~ reservoir sites
- 8 must possess a public use demonstrable to the district court as the highest and best use of the land.
- 9 ~~(5)(10)~~ roads, tunnels, ~~ditches, flumes, pipes,~~ and dumping places for working mines, mills, or
- 10 smelters for the reduction of ores;
- 11 ~~(11)~~ ~~also~~ outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter
- 12 from mines, mills, and smelters for the reduction of ores;
- 13 ~~(12)~~ ~~also~~ an occupancy in common by the owners or the possessors of different mines of any place
- 14 for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters
- 15 for reduction of ores and sites for reservoirs necessary for collecting and storing water for the mines, mills,
- 16 or smelters. However, ~~such~~ the reservoir sites must possess a public use demonstrable to the district court
- 17 as the highest and best use of the land.
- 18 ~~(6)(13)~~ ~~(a)~~ private roads leading from highways to residences or farms; and
- 19 ~~(b)~~ private roads that are necessary to provide access to private property for which other access
- 20 does not exist;
- 21 ~~(7)(14)~~ telephone or ~~electric light~~ electrical energy lines;
- 22 ~~(8)(15)~~ telegraph lines;
- 23 ~~(9)(16)~~ sewerage of any;
- 24 ~~(a)~~ county, city, county, or town or any subdivision ~~thereof~~ of a county, city, or town, whether
- 25 incorporated or unincorporated, ~~or of~~;
- 26 ~~(b)~~ any settlement consisting of not less than 10 families; ~~or~~
- 27 ~~(c)~~ of any public buildings belonging to the state or to any college or university;
- 28 ~~(10)(17)~~ tramway lines;
- 29 ~~(11)~~ ~~electric power lines~~;
- 30 ~~(12)~~ ~~(18)~~ logging railways;

1           ~~(13)~~(19) temporary logging roads and banking grounds for the transportation of logs and timber  
 2 products to public streams, lakes, mills, railroads, or highways for ~~such a time as that~~ the court or judge  
 3 may determine; ~~provided~~ However, the grounds of state institutions ~~be excepted~~; may not be used for  
 4 this purpose.

5           ~~(14)~~(20) underground reservoirs suitable for storage of natural gas;

6           ~~(15)~~(21) projects to mine and extract ores, metals, or minerals owned by the ~~plaintiff~~ condemnor  
 7 located beneath or upon the surface of property where the title to ~~said~~ the surface vests in others.  
 8 However, the use of the surface of property for strip mining or open-pit mining of coal (i.e., any mining  
 9 method or process in which the strata or overburden is removed or displaced in order to extract the coal)  
 10 is not a public use, and eminent domain may not be exercised for this purpose;

11           ~~(16)~~(22) projects to restore and reclaim lands ~~strip or underground-mined~~ that were strip-mined  
 12 or underground-mined for coal and not reclaimed in accordance with Title 82, chapter 4, part 2, and to  
 13 abate or control adverse affects of strip or underground mining on those lands."

14

15           **Section 2.** Section 70-30-107, MCA, is amended to read:

16           **"70-30-107. Private roads.** (1) Private roads may be opened in the manner prescribed by this  
 17 chapter, ~~but in every case the~~. The necessity of the road and the amount of all damage to be sustained  
 18 by the opening thereof ~~shall~~ of the road must be first determined by a court sitting with or without a jury.  
 19 ~~and such~~ The amount of all damages, together with the expenses of the proceeding, shall must be paid  
 20 by the ~~person to be benefited~~ condemnor. If the condemnee prevails, the condemnor shall also pay the  
 21 condemnee's necessary expenses of litigation.

22           (2) Before a condemnor may commence a condemnation action under this section, the condemnor  
 23 shall, in writing, offer to the condemnee an amount equal to or greater than the current fair market value  
 24 of the easement, as determined by a certified real estate appraiser, as an offer of payment for the  
 25 easement."

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27           NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

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29           NEW SECTION. **Section 4. Retroactive applicability.** [This act] applies retroactively, within the  
 30 meaning of 1-2-109, to parcels of private land for which access does not exist, regardless of the time that

1 the parcel was created.

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