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Guest opinion: Rural property rights at stake in Helena debate

By HERTHA L. LUND

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These are already crazy times at the Legislature in Helena. It seems that some are willing to compromise fundamental rights, such as private property rights, in search of the elusive "jobs, jobs, jobs." At a time when the Republicans in Congress read the Constitution on the floor, and plan a return to limited government, Montana may be willing to ignore basic constitutional protections. How can it be expedient to run over one person's fundamental rights to allow a business a leg up?

Last week, a House hearing addressed whether a Canadian merchant power line that is funded with U.S. stimulus dollars can use the state's power to condemn private property. The sponsor of the bill, House Bill 198, argued that the legislation was needed to create jobs. Rep. Ken Peterson, R-Billings, argued that his bill was necessary for development and that with no development, there would be no new jobs.

HB198 was drafted in response to a court's determination that MATL, a private company, did not have the right to condemn property. MATL is part of a Toronto-based company that is trying to build a 214-mile private electrical transmission line from Lethbridge to Great Falls.

As drafted, the main jobs that HB198 would create are jobs for attorneys who seek to defend landowners' rights. Both Montana and the United States Constitutions prohibit the taking of private property without due process. HB198 would violate these constitutional rights and hold up any pending projects due to litigation.

According to the Environmental Impact Study for the transmission line that MATL is attempting to build, the "expected beneficial effect of this long-term employment on the line would be minor." The CEO of the company once told his stockholders that the project would be virtual, meaning few if any employees in Montana. Also, MATL was given a significant tax break in the 2007 special session, which would have significant impact on local government revenues, according to the bill's fiscal note.

Based on the EIS and the tax breaks afforded to MATL, HB198 will create relatively few jobs. I don't think it is worth impinging on basic constitutional rights protecting private property just so MATL can meet its deadline to spend its \$160 million in stimulus dollars.

Montana has been very reluctant to allow condemnation of private property for economic development. In 2007, in response to *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the Legislature passed a law to prevent condemnation for urban development. HB198 would treat rural landowners differently than urban landowners because it would allow eminent domain for purpose of economic development.

Rural landowners should not be sacrificed for the false choice between "development" or "property rights." MATL can still do what it always should have done: Treat landowners fairly and negotiate to reach an agreement about compensation and placement of the electrical line on their private property. If a private entity, such as MATL, has condemnation authority, it has every incentive to forgo civil, fair negotiations and to instead jump to the threat of eminent domain in order to speed up the process. MATL should be spending its resources and time to work with the landowners instead of lobbying the Legislature to give the company the state's right to condemn property.

The appropriate way to fix the problem, if one exists, is for the Legislature to pass legislation that:

Only provides condemnation authority for an entity that is regulated by the Public Service Commission.

Requires the entity to meet with landowners prior to siting the line.

Requires that any transmission line project fit into a state plan.

Prohibits an agency charged with environmental review from making constitutional determinations regarding property rights or whether a transmission line is necessary to upgrade the state's transmission lines; and, requires just compensation for the overall negative impact on property, which includes the fact that a transmission line reaches from the ground into the sky. Current compensation provides for surface damage, and is not equitable for transmission lines.

Doesn't retroactively seize the property of the landowners in the path of MATL's project.

Legislation with these components would protect private property. Also, it would help ensure that any transmission line that was built was necessary and did not end up being a tool for Enron-like arbitrage in electricity marketing between Canada and America.

Hertha L. Lund practices law in Bozeman and represents landowners against whom MATL sought to condemn property.

GUEST OPINION

Correct court ruling kicks MATL's appeal to state Legislature

By **HERTHA L. LUND**

Larry Salois recently won a case against MATL, a Canadian company that unsuccessfully tried to condemn Salois family property for a transmission line.

Salois had asked Montana Alberta Tie Ltd. to move its line to avoid damaging historical Native American tepee rings on his mother's private property. MATL refused and chose condemnation. Having lost, MATL now expects the Legislature to bail it out.

MATL claims it has a deal with Montana's legislators and the governor. As reported in the Lethbridge Herald, that deal will be done by March.

Arrogant? That's what I call it.

MATL's Canadian spokesperson says the Montana judge was wrong. I'm betting a Montana judge understands Montanans' constitutional property rights better than a Canadian public relations man.

The fact is that the United States and Montana constitutions protect property against taking for private purposes.

Montana law provides, "[e]minent domain is the right of the state to take private property for public use." The Legislature may grant eminent domain authority in order to override an individual's private property rights, but only for a public use.

In Salois' case, the court found that the Legislature had not given MATL power to condemn private property. "Landowners seem to have rights in the U.S.," said a Canadian farmer, according to the Lethbridge Herald.

The fix that MATL's Canadian spokesperson wants is to gut these protections, letting MATL and other transmission developers run roughshod over farmers and ranchers. If the Legislature grants MATL the "patch" that MATL's spokesperson bragged about, Salois and other landowners could be damaged. Our elected officials must ensure that any "patch" is surgical and not a wholesale grant to developers to run over Montana landowners.

In MATL's view, a company does not have to reach a deal with the landowner according to willing buyer/willing seller terms. Instead, it uses condemnation to bully the landowner into a deal. "No deal, then we'll see you in court." This has also been NorthWestern Energy's approach on MSTI in western Montana.

We all benefit from public roads. Eminent domain, used property, is needed. But the state builds roads for the public, not for private profits. Transmission lines built by public utilities also benefit the public.

But MATL, a line between Great Falls and Lethbridge, Alberta, will not provide electricity to Montana homes. The line would allow approximately 300 MW of energy to flow to and from Canada. MATL would collect a toll for that energy.

Did you know MATL relies on federal stimulus dollars, and the wind farms it would help to build are a heavy drain on the federal treasury? Free market? Certainly not free to federal taxpayers.

Come January, the corporate lobbyists and lawyers will tell our legislators that we need to develop our natural resources to create more jobs in Montana. They will tell us that all we need to do to

help wind and transmission line developers is to get rid of those pesky environmental laws.

Streamlining permitting and environmental laws is not a bad idea. However, no industry should be allowed to negatively impact farmers and ranchers, who are essential to Montana's No. 1 industry.

Any "patch" needs to have landowners' interests as a top priority. The real issue is fairness. Montana landowners should not be compelled to provide their private property so MATL and other merchant lines can profit from out of state energy sales.

If MATL or MSTI can find willing sellers, then good luck to them. But our Legislature shouldn't hand these corporate interests a hammer with which to begin negotiations.

Salois and the 20 or more landowners who have refused to sell to MATL will now take their case to the Montana Legislature. The MSTI landowners share our interests. We are not against development of Montana's natural resources. Many landowners have leased their property for wind development. Fairness requires that our Canadian friends treat Montanans fairly. Condemning Montanans' land for private profits isn't the Montana way.

Hertha L. Lund practices law at Lund Law PLLC in Bozeman. She represents Salois and more than 20 landowners who are currently in negotiations with MATL.



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