EXHIBIT 8
DATE 03/22/13
HB SB 180

MONTANA LEGISLATURE - 63RD SESSION

Testimony on Behalf of Concerned Citizens Montana in Support of SB 180

My name is Peter Scott. I am a partner with the Montana law firm of Gough Shanahan Johnson and Waterman, PLLP. My office is in Bozeman. I practice law in Montana, Idaho, Washington and Oregon. In my practice I represent municipalities, corporations, and private citizens throughout the Columbia Basin. My government clients include cities, counties, special districts and municipal utilities. My corporate clients include utilities, mining companies, manufacturers, and non-profit organizations—ranging from homeowner associations to conservation organizations. I also represent numerous ranchers and other private citizens. I've been on both sides of condemnation actions and view it as a necessary function of government that must be tightly controlled in order to protect private property.

I'm here on behalf of Concerned Citizens Montana, which is a grass roots association of nearly 3,000 Montana land owners. Concerned Citizens Montana formed about three years ago when a couple of corporations proposed some of the biggest electrical transmission lines that it's possible to build.

The problem that brings us here today began when, MATL, LLP, tried to take Larry Salois' property by eminent domain, only to discover that it did not have authority to condemn land. A lot was said about the judge's decision. But, Justice McKinnon got it right. I did the work and would be happy to share the legal research with anyone that wants it.

HB 198 passed so that MATL could build its power line. That bill was not enacted to counter a bad court decision. It was enacted to avoid the state's massive legal exposure created when the state issued a permit to construct a merchant line to a company that did not have the necessary authority to complete the project. Like most emergency measures passed in haste, it was done without due consideration.

The rest of my remarks will summarize information presented in the questions and answers that in the materials I provided to the committee.

SB 180 FAQ – PREPARED BY CONCERNED CITIZENS MONTANA

Question: What is Eminent Domain?

Answer: Eminent domain is the sovereign's power to take private property that is necessary for a public use. The power of eminent domain is held by the State Montana. The Federal Government also holds the sovereign power of eminent domain.

Question: Who can use Montana's power of eminent domain?

Answer: The "capability to exercise the power of eminent domain is the exclusive dominion of the Legislative Branch." In addition, "The Legislature may delegate it to the Executive Branch, municipalities, private corporations, and individuals, so long as the property taken is for a public use." *Public Benefits and Private Rights: Countervailing Principles of Eminent Domain* at page 25, Report to the 57th Legislature on HJR 34 (September, 2000). Private individuals and corporations, like state agencies, have no inherent power of eminent domain, and their authority to condemn must derive from legislative grant. *Montana Talc v. Cyprus Mines Corp.* (1987) 229 Mont. 491, 495, 748 P.2d 444, 447. The power to condemn must be 'expressly given or necessarily implied.' *McCabe Petroleum Corp. v. Easement & Right of Way*, 2000 MT 73, ¶8, 320 Mont. 384, 87 P.3d 479. Without delegated authority no entity can take private property. *Helana P.T. Co. v. Spratt et al.*, 35 Mont. 108, 130 (1907) (the eminent domain law "simply enumerates the uses in behalf of which the right of eminent domain may be exercised; but nowhere declares by whom such right can or shall be exercised.").

Question: Has the Legislature delegated the power of eminent domain?

Answer: Yes. "In Montana, this authority has been granted to various entities. <u>These entities act as agents of the state</u> in providing a public use." *See Report on HJR 34* at page 76. Prior to passage of HB 198, those with delegated power to condemn land were public entities and corporations that are regulated by the state. A list of the entities with delegated power to condemn property is found in the legislative *Report on HJR 34* at page 77 (Figure 4).

Question: What is HB 198?

Answer: House Bill (HB) 198 was the Legislature's response to a court decision made prior to the last legislative session. A company called Montana Alberta Tie Line, LLP (MATL), was given a permit by the Montana Department of Environmental Quality (DEQ) to construct a large electrical transmission line. The company filed condemnation actions in Teton County district court. The court ruled against the company because it could find no legislative grant of authority that cover entities like MATL. HB 198 delegated eminent domain to two types of entities. The first are "public utilities" codified at §69-3-113, MCA. The second are persons holding a permit issued under the Major Facility Siting Act (MFSA) codified at §75-20-113, MCA.

Question: Did HB 198 change what is meant by "public use"?

Answer: No. The public uses found in statute were unchanged by HB 198. §70-30-102, MCA. Those uses serve that Montana citizens and include things like telephone service, roads, schools,

airports, etc. The public uses that are most pertinent here are electrical energy lines, §70-30-102 (37), MCA and pipelines that are owned by common carriers, §70-30-102 (20), MCA.

Question: Is something wrong with giving eminent domain to public utilities?

Answer: No. "Public utilities" are defined as entities that own or operate any equipment "within the state" including those that deliver power. §69-3-101, MCA. Entitites that fall within this definition are regulated by the Montana Public Service Commission (MPSC). §69-3-102, MCA. "Public Utilities" as defined in statute is the classic example of an agent of the state having the power of eminent domain to take private property for a public use. What is important to know is that utilities that are not regulated by the PSC are not "public utilities" within the meaning of state law. The opponents will claim that they are public utilities. If that is true then they should have no issue with Sen. Barrett's bill as amended because it retains the delegation of power to utilities that are subject to the jurisdiction of the PSC.

Question: What is the Montana Facility Siting Act (MFSA)?

Answer: MFSA is an environmental statute. MFSA certification is required to construct large electrical transmission lines, certain pipelines, and specified generation facilities that use hydro, geothermal, or nuclear power. §75-20-201 and -104(8), MCA. <u>The important point is that MFSA is not specific to any type entity and does not require that the entity that will operate the project to be accountable to the state</u>. Note that generation facilities are not among the public uses listed in the eminent domain chapter and pipelines already have the power of eminent domain. Pipelines are considered "Common Carriers," which are subject to regulation by the MPSC (§69-13-101, MCA) and already have delegated authority to use the state's power of eminent domain (§69-13-104, MCA).

Question: Is something wrong with granting eminent domain to MFSA permitees?

Answer: Yes, which is not surprising because HB 198 was applied as a tourniquet to save the body politic from massive legal exposure created when DEQ issued a MFSA Certificate to an entity (MATL) that did not have any right to condemn Montana property. By acting in haste and under duress, the Legislature sacrificed its responsibility to protect Montana citizens from government action. Until HB 198, the state's power of eminent domain had only been granted to entities that are accountable to the state. For example, public utilities are accountable to the people through the MPSC. In this way, a balance was struck between public need and private property in the state of Montana.

MATL, and other power lines like it, commonly referred to as "merchant lines," are regulated by the Federal Energy Regulatory Commission (FERC), **not the MPSC**. §75-20-113, MCA, makes it possible for corporations serving as agents of the federal government to wield the state's power of eminent domain against Montana citizens. Projects built by corporations that act as agents of the federal government, that are accountable only to federal officials, and that serve the national (and international) public should use the federal power of eminent domain using the process in the Federal Energy Policy Act of 2005 for using the federal government's power of eminent domain, thus §75-20-113, MCA is unnecessary and intrusive. If they don't want to go that route—and they probably don't—they should be subjected to the jurisdiction of the PSC. There is no urgency, MSTI is tabled, there is time to address the issue during the next interim.

Public Benefits and Private Rights: Countervailing Principles of Eminent Domain

House Joint Resolution No. 34

Report to th 57th Legislature of the State of Montana

Volume I

Legislative Environmental Quality Council
Eminent Domain Subcommittee

Public Benefits and Private Rights: Countervailing Principles of Eminent Domain

Final Report to the 57th Montana Legislature
September 2000

Environmental Quality Council Members

House Members
Representative Paul Clark
Representative Kim Gillan, Vice-Chair
*Representative Monica Lindeen**
Representative Doug Mood
Representative Bill Tash
Representative Cindy Younkin

Senate Members
Senator Mack Cole
Senator William Crismore, Chair
Senator Bea McCarthy
Senator Ken Mesaros
Senator Barry "Spook" Stang
Senator Jon Tester

Public Members
Mr. Tom Ebzery
Ms. Julia Page
Mr. Jerry Sorensen
Mr. Howard F. Strause

Governor's Representative
Ms. Julie Lapeyre

Law, Justice, and Indian Affairs Committee Members on Eminent Domain Subcommittee
Representative Gail Gutsche
Representative Dan McGee
Representative Jim Shockley

*Eminent Domain Subcommittee members are noted in italics

Legislative Environmental Policy Office Staff

Todd Everts, Legislative Environmental Analyst; Larry Mitchell, Resource Policy Analyst; Mary Vandenbosch, Resource Policy Analyst; Krista Lee, Resource Policy Analyst; Maureen Theisen, Publications Coordinator; *State Capitol, P.O. Box 201704, Helena, MT 59620-1704; (406) 444-3742; http://leg.state.mt.us*

Eminent Domain Study Staff

Krista Lee, Resource Policy Analyst, Legislative Environmental Policy Office; Gordon Higgins, Research Analyst, Legislative Services Division; Greg Petesch, Chief Legal Counsel, Legislative Services Division

Chapter 5: The Use of Eminent Domain

HJR 34 requested that the use of eminent domain be a portion of the study on eminent domain. In an effort to fully understand how eminent domain is being exercised in Montana, the Subcommittee reviewed the information that was received from entities that have been granted the authority to exercise the right of eminent domain on behalf of the state (see Chapter 2, Historical Use of Eminent Domain in Montana).

The information on the numbers of condemnations, which was received from the companies or agencies with the right to exercise eminent domain, was helpful, but the Subcommittee felt that the numbers only told part of a bigger story. After reviewing the information, there were still questions. Who has the authority to exercise the right of eminent domain in other states? How does this compare with Montana? How do those affected by a project that could be installed through the use of eminent domain feel the process works?

This chapter will discuss the information that the Subcommittee gathered in an attempt to answer these questions.

Authority to Exercise the Power of Eminent Domain

Montana -- Who Has the Authority?

The authority to use the power of eminent domain rests with the state, with "state" meaning all levels of government. The right of eminent domain may be exercised in the manner provided in Title 70, chapter 30, MCA. In Montana, this authority has been granted to various entities. These entities act as agents of the state in providing a public use. The rules of eminent domain apply no matter which entity is exercising the right--a government entity or a private entity. Below is a list of those entities that are specifically designated in the Montana Code Annotated as being able to exercise the power of eminent domain and the specific statute that gives them this power. Many of these entities have specific situations and/or conditions under which they can exercise eminent domain and are mentioned in numerous sections, which apply to the public use being addressed. The referenced statute should be reviewed to ensure understanding of their authority.

Even though an entity may be granted the authority to exercise the right of eminent domain, that entity is still restricted by 70-30-102, MCA, to the specific public uses enumerated by the Legislature.

Figure 4. Entities Authorized to Exercise the Right of Eminent Domain

Entity	MCA Section
Cities and Towns	7-5-4106; 7-13-4404; 7-13-4406; 7-14-4501; 7-14-4622; 7-14-4801; 7-16-4106; 67-2-301; 67-5-202; 67-6-301; 67-10-102; 76-5-1108
Municipalities	7-1-4124; 7-15-4258; 7-15-4259; 67-6-301; 67-10-201
Counties	7-14-2123; 7-14-2621; 7-14-2803; 7-14-2804; 7-14-2829; 7-16-2105; 7-35-2201; 67-6-301; 67-10-102; 76-5-1108
County Water and Sewer Districts	7-13-2218
Consolidated Local Government Water Supply and Sewer Districts	7-13-3041
Irrigation Districts	85-7-1904
Conservancy Districts	85-9-410
Highway Authorities	7-14-101; 60-5-104
Railroad Authorities	7-14-1625
Municipal Housing Authorities	7-15-4460; 7-15-4461; 7-15-4462
Airport Authorities	67-11-201
Regional Water and Wastewater Authorities	75-6-313
Parking Commission	7-14-4622
Joint Airport Board	67-10-205
Adjoining States	67-11-401
Public Utilities and Carriers	69-13-104
Rural Cooperative Utilities	35-18-106
Natural Gas Public Utilities	82-10-303

Entity	MCA Section
Mining Companies	82-2-221
Railroad Corporations from Other States	69-14-513; 69-14-536
Montana Railroad Corporations	69-14-552
Cemetery Associations	35-20-104
Department of Fish, Wildlife, and Parks	23-1-102; 87-1-209
Department of Public Health and Human Services	53-2-201
Department of Transportation	60-4-104; 60-4-111; 67-2-301; 67-6-301; 75-15-123; 75-15-223
Department of Environmental Quality	75-10-720; 82-4-239; 82-4-371; 82-4-445
Department of Natural Resources and Conservation	85-1-209; 85-1-204
Board of Land Commissioners	76-12-108

Entities Authorized to Exercise Eminent Domain in Other States

This matrix gives an overview of those entities authorized to exercise the right of eminent domain in each state. Under each heading, the number of entities that fall into that group is given.

Figure 5. Entities Authorized to Exercise the Right of Eminent Domain – by State

	Government State, County, City, Town, Municipalities	Agency	Associations	Authorities	Boards	Commissions	Conservancies
Montana	9		1	5	2	1	
Alabama	14	4	2	28	6	2	
Arizona	17			4			
California	22	4		7	5		3
Colorado	20			7	6		
Idaho	10			3	5		
Nevada	6	2		1	3		

Table of Contents

TITLE 69. PUBLIC UTILITIES AND CARRIERS

CHAPTER 13. PIPELINE CARRIERS

Back Up One Level in Table of Contents

Part 1. General Provisions
Part 2. Role of Commission
Part 3. Requirements for Pipeline Carriers

69-13-104. Use of power of eminent domain. Every person, firm, corporation, limited partnership, joint-stock association, or association of any kind mentioned in this chapter that has filed with the commission its acceptance of the provisions of this chapter has the power of eminent domain. In the exercise of the power of eminent domain, the entity may enter upon and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or authorization of the entity's common carrier pipeline. The power of eminent domain must be exercised as provided in Title 70, chapter 30.

History: En. Sec. 3, Ch. 8, Ex. L. 1921; re-en. Sec. 3850, R.C.M. 1921; re-en. Sec. 3850, R.C.M. 1935; amd. Sec. 20, Ch. 315, L. 1974; R.C.M. 1947, 8-203(part); amd. Sec. 48, Ch. 125, L. 2001.

Provided by Montana Legislative Services