EQC/LJIAC EMINENT DOMAIN SUBCOMMITTEE
January 20, 2000
Final Minutes

SUBCOMMITTEE MEMBERS PRESENT

Sen. Mack Cole, Chair
Rep. Kim Gillan
Rep. Gail Gutsche
Rep. Monica Lindeen
Rep. Dan McGee
Rep. Jim Shockley
Sen. Spook Stang
Rep. Bill Tash
Mr. Tom Ebzery
Ms. Julia Page
Mr. Jerry Sorensen

STAFF MEMBERS PRESENT

Krista Lee, EQC
Gordy Higgins, LJIAC
Judy Keintz, Secretary

VISITORS' LIST

Attachment #1

SUBCOMMITTEE ACTION

- Approved minutes of the December 1, 1999, Eminent Domain Subcommittee Meeting held in Helena.
- Reviewed and discussed work plan topics.
- Approved appointment of Handbook Subcommittee.
- Set the next meeting date for February 24th in Helena.

I CALL TO ORDER AND ROLL CALL

CHAIRMAN COLE called the meeting to order at 11:00 a.m. Roll call was noted; all members were present **(Attachment #2.)**

▸ Adoption of Minutes

Motion/Vote: MR. EBZERY MOVED THAT THE MINUTES OF THE DECEMBER 1, 1999, EMINENT DOMAIN SUBCOMMITTEE MEETING BE APPROVED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.

II ADMINISTRATIVE ITEMS

- **Email Addresses and Web Site**

MS. LEE explained that Subcommittee member's email addresses would not be added to the web site without approval from individual members. She added that there is an Eminent Domain Subcommittee section on the web site which includes agendas, minutes, the work plan and other documents.

- **MetNet for Billings Meeting**

The Billings meeting will include the use of the MetNet to gain more public comment. The cost of this item has been considered in the budget and includes sites at Billings, Glasgow, and Miles City for a two-hour time period. Additional sites could be added but the cost is $20 per hour per site. The Subcommittee decided to have Senator Cole work with Ms. Lee on options for additional MetNet sites and to limit the time on the MetNet to one hour. The importance of advertising was noted.

III STUDY EXPECTATIONS

- **Study Timeline**

MS. LEE remarked that time is limited for the Subcommittee to arrive at findings, conclusions, and draft recommendations to be sent out for public comment. The EQC requires a one-month public comment period for these draft documents. Preliminary decisions on recommendations need to be made in a timely manner so that the draft documents are completed in May. Final decisions on recommendations and a presentation to the EQC will need to be made in July. (Eminent Domain Study Time Line, **Exhibit 1**.)

- **Findings and Recommendations**

REP. GUTSCHE remarked that it is important for the Subcommittee to address findings and recommendations at this meeting. The final report and handbook will be useful as educational tools for both the legislators and the public. She added that it is necessary for the Subcommittee to start considering whether draft legislation will be necessary.

MS. LEE provided a sample document which had been used by the Governor's Blue Ribbon Task Force on Telecommunications, **Exhibit 2**. MR. HIGGINS added that the sample provided included a variety of findings and conclusions as well as recommendations. Specific recommendations to statutes were made as well as general policy statements which did not require any action. The Subcommittee may wish to make general statements if it is not prepared to recommend statutory changes.

MS. PAGE maintained that it was her expectation that the Subcommittee would be reviewing the eminent domain statutes with an eye toward responding to some of the issues that were raised during the last legislative session. It is important to identify the sections of law where changes may be necessary. She emphasized the need to focus on specific issues.

- **Final Report**

MS. LEE provided a draft copy of the first chapter to the final report, **Exhibit 3**. She added that the draft was provided to facilitate discussion by the Subcommittee. The table of contents has also been revised since the last meeting. The final report would be used primarily by legislators and the handbook would be an overview of the final report.

Chapter one explains the study process and lists Subcommittee members. Concepts and definitions are included in this chapter. Chapter two sets out the historic use and statutory changes. Chapters three, four, five, and six set out the current eminent domain process. Chapter seven includes the findings and recommendations. The findings and conclusions may also be set out at the end of each section of the final report. The appendices could include the public comment received, any proposed legislation and the information handbook.

Starting on page 8 of the handout, the goals in the study resolution and the EQC responses are set out. This is followed by the tasks specified in the study resolution and the EQC responses. Additional study tasks are also set out.

- **Handbook**

MS. LEE provided a draft table of contents of the Eminent Domain Handbook, **Exhibit 4**. She asked for guidance on the type of audience the Subcommittee was seeking to address. Comments were made by Subcommittee members that the audience should include general landowners in Montana as well as legislators.

MS. PAGE remarked that the handbook would be a summation of present law, but there is the possibility that changes will be made to the eminent domain statutes.

CHAIRMAN COLE stated that it might be advantageous to have a Subcommittee work on the handbook.
The Subcommittee noted that the handbook needed to be an educational tool for a variety of audiences.

IV CONCEPTS DISCUSSION

MR. HIGGINS remarked that the concepts and definitions related to eminent domain were included in chapter one of the draft final report. He added that law dictionary definitions were set out first. Specific references in statute and court cases were also noted.

"Burden of proof" will be detailed to include where it is found in the codes, who has the burden, and whether or not that burden shifts as the process moves forward.

"Clear and Convincing Evidence" is one of the tests under burden of proof. This standard is applied in most civil actions. In Montana, the statute requires that the burden be a "preponderance of the evidence" which is the lowest test on a three-tiered level.

There have been questions regarding the use of "easements" for purposes other than which they were originally negotiated. Under the legal definition of "easement", an easement could not be taken for one purpose and then used for another purpose unless the contract stipulated the opportunity for the easement to be used for another purpose. The land to which an easement is attached is called the "dominant tenement". The person who holds the easement is the dominant tenement and the person who owns the land, not the right to cross, is the "servient tenement". The dominant tenement is liable for damage or injury to the servient tenement.

The "multiple use of easements" does not have a legal definition. This is a policy question which the Subcommittee may wish to discuss.

"Necessity or Necessary" has been interpreted differently by the courts. The Subcommittee and/or Legislature may consider providing more guidance or legislative intent. This is another policy questions. There may be conditions that make something a necessity that are not in statute.

"Public use" may extend to the public receiving some benefit if a particular project went into effect. Projects that run through the state may be a public use. The Subcommittee may make a general statement that "public use" is that which benefits people in Montana. A test authored by the Legislature may be required to determine whether or not a particular project is a public benefit or necessary to the public welfare. Public use is not defined in statute. The public use concept was developed when the country was expanding and there was a need for electricity, water, telegraphs, etc.

Greg Petesch, Legislative Services Division, remarked that "public use" in Montana would be those uses enumerated by the legislature until a court determines that they should not be

included. The list of enumerated public uses in the statute includes specifically private uses by definition. A private road leading to a farm or residence is included as an enumerated public use. A 1920 court decision held that a private use, by definition, can never be a public use. There are cases where the private roadway to a farm or residence is being used in Montana.

An alternative way of obtaining access to property is specifically related to prescriptive easements. Prescriptive easements in Montana are popular in the amount of current litigation. This has been brought about by the changes in land use patterns. Prescriptive easements are a form of adverse possession, which is a way for one person to take away another person's property. To acquire a prescriptive easement it is necessary to have open, notorious, exclusive, adverse, and continuous possession or use of another's property for five years. The open and notorious element requires that there is a positive assertion of a right hostile to the landowner. This needs to be brought to the attention of the landowner. If a trespass is committed over the same location for a long enough period of time and the landowner does nothing to stop the use of the land, the right to do so in the future is acquired. The exclusive use means that the right to use the land is not dependent on that same right residing in some other party. In one case, several people were using an access road and sued to gain a prescriptive easement after the property owner blocked the road. Several witnesses testified that they too had used the road. The district court judge granted the prescriptive easement to the person who had brought the lawsuit and also granted it to the other people who had been using the road. The Supreme Court overturned this decision holding that a benefit could not be granted to a person who is not a party to the suit.

A permissive use cannot ripen into an adverse use. The five-year period must be continuous and uninterrupted. The use must be often enough for the landowner to know that it is being used. If all the other tests are met, adversity is presumed.

In Montana, there were two separate lines of decision articulating the necessary burden of proof for a person trying to establish a prescriptive easement. One line was that a simple preponderance of the evidence was sufficient because that is the normal burden in civil cases. The Supreme Court then held that clear and convincing evidence was necessary. Because property is taken from the landowner and there is no compensation, the burden of proof needed to be clear and convincing evidence.

A person who has his property subjected to a prescriptive easement cannot interfere with the use of the same. Once the prescriptive easement is established, the right to use the property continues in effect even if the servient tenement is later sold. Once the easement is established, the location cannot be changed even if the parties agree. It is possible for a landowner whose

property is subjected to a prescriptive easement to extinguish a prescriptive easement by blocking it off for the statutory period of time.

The stream access law defines a prescriptive easement but also states that a prescriptive easement cannot be acquired through recreational use of another's property. Recreational use is not considered a positive assertion of a hostile right to the landowner.

A way of necessity is a form of an easement by implication and is created when a landowner divides property. At the time the property was divided, there needs to be access to a public road through the property that no longer has the access. At some point in the time, the property had to be owned by the same person and there needs to be strict necessity to go through the other person's property to access your property. Ways of necessity are very rarely granted because there is usually another route.

MR. SORENSEN questioned whether an individual would be able to acquire a prescriptive easement over government land. **Mr. Petesch** believed that could happen but there may be a constitutional impediment involved with state land.

John Alke, Northern Border Pipeline, disagreed with the definition of public use presented earlier. The Fifth Amendment to the U. S. Constitution contains a provision stating that no property may be taken except for public use and just compensation. A case in Hawaii is a classic case to define what is or is not a public use. The majority of the Hawaiian Islands were owned by ten families and no one had a fee simple. A house would be built on a leasehold interest. The millions of people who lived in Hawaii were paying for leaseholds far more than was justified. The Hawaiian Legislature passed a law that stated that under certain circumstances, the State would condemn the private land holdings of the landlords to give it to the tenants. This was appealed to the U.S. Supreme Court on a challenge that taking private property could not be public. The only beneficiaries were the tenants. The Supreme Court held that the meaning of public use was that a public body, the Legislature, determines when condemnation will be permitted to occur. The decision isn't a substantive standard but that a public body determines what should be allowed for a purpose of condemnation.

Mr. Petesch pointed out that in l926 the Montana Supreme Court held that the taking of private property for private use of another violates the Fourteenth Amendment and the Legislature did not have the power to declare that a private use shall be a public one. The question of whether a particular use is a private or public use was to be determined by the courts.

V POSSESSION OF PROPERTY BY PLAINTIFF - PANEL DISCUSSION

MS. LEE remarked that the panel would be discussing the following points:

1) Is the current process for possession of property adequate for you or those that you represent? If so, why? If not so, why?
2) Do you think that the current process is as far as the process can get?
3) Do you think that changes could be made to make this process better for all involved? If so, what changes?
4) How would it affect you or those that you represent if the plaintiff was not allowed to take possession of the property until all court proceedings were exhausted?
5) Any additional comments.

- **Ms. Jeanie Alderson, Northern Plains Resource Council**

Ms. Alderson stated that she is a rancher and adult education instructor. The current process of putting plaintiffs into possession is not adequate for farmers and ranchers primarily because of the imbalance in the system. The state and large companies with very deep pockets are usually the entities that condemn. Montana's farmers and ranchers are the ones most likely to be condemned. Landowners are never on a level playing field in this process. Property rights are taken away from landowners too soon. Possession can occur before a judge's appointed condemnation commissioners have examined the property and given a recommendation to the court on the issue of compensation. This also occurs before a trial is completed and a jury composed of the landowner's peers has determined just compensation. The taking of property should not take place until the entire condemnation process is complete. What other civil or criminal trials are there where the judgment of the award is given to the plaintiff before the completion of a jury trial?

The current eminent domain process is as good as is possible for the condemnor. The process is designed to facilitate the taking of private property. The process needs to be as fair as possible. Changes that need to be considered include: 1) Preventing possession until all legal avenues are exhausted or at least further along in the condemnation process. 2) A jury trial should be required on the preliminary condemnation order. 3) All Montana Environmental Policy Act (MEPA) proceedings should be completed before possession. What good is an environmental impact statement (EIS) or environmental assessment (EA) that evaluates alternatives or mitigations after the project is under construction?

If the plaintiff was not allowed to take possession until after all court appeals were exhausted, the rights of landowners to use and enjoy private property would be recognized. This would put landowners on a more equal footing and allow for a position of strength instead of the current

position of weakness. Currently the landowner knows that their property will be taken and there is nothing that can be done about it.

- **Mr. Leo Berry, Private Entity with Condemnation Authority**

Mr. Berry maintained that eminent domain and private property ownership are part of our governmental process. There are certain inherent rights that the government retains and one of those is eminent domain. Our ability to own private property is subject to that inherent governmental authority to act on behalf of the public good. This is a public policy decision to be made by the Legislature. The principle of eminent domain is necessary for us to exist as a society. Due process and compensation need to be provided. The law could be made more readable without changing the law.

The eminent domain process is not unfair because the condemnation process cannot begin until negotiations have been held with the landowner. Proof needs to be submitted in the complaint that an offer was made to secure the easement across the property. The landowner needs to reject the offer before the condemnation process can begin. After the complaint is filed, the judge reviews whether the condemnation meets the public purpose criteria. The only thing remaining to be determined is the amount of compensation for the property. There is no real reason to stop the possession of the property at that point. The appeals process can take many years. This would place the landowner in a superior position in terms of bargaining with the project proponent. Contrary to public interest, one landowner may be able to hold up a project.

The code does not address the situation when an appeal is made to the Supreme Court and the Supreme Court determines that the District Court erred in determining that the public purpose criteria had not been met. The District Court may require a bond or that the amount of money be placed in an account for the landowner.

- **Mr. Mike Meuli, Montana Stockgrowers Association**

Mr. Meuli stated that from an agricultural landownership perspective, land is not viewed as only a possession to be sold for just compensation, it is a personal possession to be valued and passed onto future generations. This attachment to the land is often overlooked by the rest of our society. A division of the property can seriously affect the business operation and cause problems not considered in the compensation issue. If there was consideration of the property rights, the compensation issue could be settled much easier. Property rights are the foundational basis for every freedom enjoyed in this country. Often changes burden the agricultural operation in ways the landowner was unaware of during the process. Just compensation is usually not equal to “x” number of acres times a fair market value. There are

new fences to maintain, irrigation systems that do not fit on a divided property, etc. These situations may affect an operation forever. Compensation should be based on the cost of living with the changes.

The law is necessary and addresses the goal of meeting the needs of the public. The law is often applied unfairly from the landowners point of view. Oftentimes the compensation and consideration of the rights of the landowner are not considered.

When possession is taken prior to the conclusion of the process, the landowner is placed in a much weaker position. Landowners may be willing to forego the condemnation battle if they trusted that the commissioners would take into consideration the items that have previously been overlooked.

Any look at eminent domain needs to place the private property rights as the highest consideration in any of the decisions that are made.

- **Mr. Nick Rottering, Montana Department of Transportation (MDOT)**

Mr. Rottering maintained that the MDOT is only interested in acquiring land for highway purposes. Procedures have been adopted to work with the cumbersome statutes. Public policy questions should be left to the Legislature.

He provided a handout prepared by James Lewis, a staff attorney for the MDOT, regarding possession of property by the condemning authority, **Exhibit 5**. Six elements must be used by the court to arrive at necessity if the process is contested. The present process is a legal determination by the court. The MDOT operates under specific statutes found in Title 60. The administrative order issued by the Department creates a presumption in their favor that they have necessity. This presumption is rebuttable by the landowner. He provided another hand out, **Exhibit 6**, which sets out a highway condemnation time line. After the six elements are proved to arrive at necessity, a preliminary order of condemnation must be addressed. In order to arrive at a preliminary order, either the landowner needs to stipulate to the order or the last written offer of the amount of compensation is deposited with the court. If the landowner objects, a value commission will be set up to arrive at value before the preliminary order of condemnation is obtained. If a case of just compensation needs to be tried to a jury, the MDOT does not have a preliminary order of condemnation.

The process is as fair as it can be. The statutes are cumbersome and require a tremendous amount of due process. The due process is geared to the private landowner who has the constitutional protection that his or her property cannot be taken without due process.

REP. SCHOCKLEY questioned whether a private condemnor should be able to take immediate possession of property before the appeals process has been exhausted. This is a benefit not available to parties in most lawsuits. This presumes that the private condemnor is not going to lose the lawsuit. **Mr. Berry** maintained that it is not unusual in a civil proceeding to have a separation between determination of liability and determination of damages. This is quite often decided at separate times by separate juries. There is an outside possibility that the Supreme Court could reverse a district court decision. This happens very infrequently. This risk needs to be compared to the probability that substantial delay will take place because one individual landowner places himself in a superior position to the public good. The Legislature has already made the determination as to which projects are for the public good.

REP. SHOCKLEY maintained that in most civil proceedings the winning party is not given possession of the property until the case is resolved on appeal. In the first nine months of l999, the Supreme Court reversed in part or remanded to the district court 52% of the cases. **Mr. Berry** emphasized that the distinction is that this process has been established as the state's power. Other civil cases would not have a public policy determined by the Legislature as a public use.

REP. SHOCKLEY saw a distinction between a governmental entity and a private entity in the eminent domain process. **Mr. Berry** maintained that this decision was made by the Legislature.

Mr. Alke remarked that the necessity hearing does not determine the necessity of the underlying project because that is taken from the list created by the Legislature. The necessity hearing determines whether it is necessary to take that particular piece of property for the underlying project. He represented a client against the MDOT and won the case. They proved that the landowner's property was not necessary for the highway project. The district judge makes a factual determination as to whether the property is necessary for the project.

REP. MCGEE asked **Mr. Meuli** his view on how the process could be more fair. **Mr. Meuli** remarked that once possession is taken the landowner is left in a much weaker position regarding issues that were not considered in the original offer.

REP. MCGEE asked **Ms. Alderson** if issues other than compensation had been negotiated in her case. **Ms. Alderson** explained that they have not entered into negotiations at this time. She add that the burden of proof is always placed on the landowner. There are some things for which the landowner cannot be compensated.

REP. MCGEE questioned whether monies were paid to the individual before possession was taken. **Mr. Berry** clarified that the funds are placed in an account or paid to the condemnee prior to taking possession.

V PUBLIC HEARING

Reed Smith, Valley Preservation Council, remarked that they are concerned about the Yellowstone Pipeline. An EIS has been prepared for forest service land on this project, however, it is not required for private property. The state is not required to prepare an EA unless the pipeline is 17 inches in diameter or larger. He is not aware of any pipelines that are over 17 inches in diameter. Pipelines have an extreme potential to leak and get into the groundwater. The landowner is sitting on land that could be a hazardous waste site. Near Missoula, 230,000 gallons of unleaded gasoline spilled in l982 and the land is still contaminated. His understanding of negotiations by a condemnor is simply that a landowner is handed a standard form. When the landowner asks for changes, it is necessary for him to hire a lawyer and go to court.

The Subcommittee needs to focus on the problems occurring in the eminent domain process and then address the problems with the current law. The pipeline is for a private use and does not benefit anyone in Montana. Fairness is a big issue. How does an individual landowner stand up to a company such as Exxon, Conoco, or a large railroad company? Ranchers are just trying to make a living and do not have time to go to court. They cannot afford to hire an attorney. Also, landowners cannot sell their land once it has been contaminated.

Mary Alexander, Farmer, stated that her farm has been a family farm for 120 years. Revision of the eminent domain laws is necessary to include more protection for the private landowner. Approximately six years ago a representative of Yellowstone Pipeline contacted her. He stated that they were going to place a pipeline through their land and that they did not need the landowner's permission to do so. He explained that he was just being polite in informing them that he was going on their land to locate the pipeline. She advised him that it would be necessary to first go through condemnation proceedings.

Farmland has been ruined by product spills. Petroleum products spilled on land render it unproductive for many years. The ultimate clean up is the responsibility of the landowner. Oversight is necessary for those who use the eminent domain privilege. This must be included in the law. Citizens have a right to a safe and healthful environment. This right needs to be protected by making corporations more responsible for the care of our land.

Ressa Charter, Student, remarked that a high voltage power line was built on his parent's land. The people in charge of building the power line were not concerned about the eyesore and were only concerned about profit. Eminent domain is a socialist taking of property. If an entity has the

power to take our land, it is very important that they be a responsible steward of the public use of that land.

Roger Lund, Paradise, explained that Yellowstone Pipeline has plans to place the pipeline on his land. They plan to cross the river by directional drilling which would involve a huge pit being dug on his land. This includes machinery and valves which could become a hazardous situation. The pipeline would be approximately 500 feet from his well. He raised concerns about special precautions being taken by the company regarding the pipeline. The Forest Service can require precautions such as double-walled pipe, etc. The private landowner cannot demand the same precautions. Everything he has owned is invested in his home. With a pipeline across his land, his home will no longer have the same value. If there was a leak, his property value would be severely diminished. The private landowner needs protection.

Karen Knudsen, Clark Fork Coalition, stated that Montana's eminent domain law is not a friend of the state's waters or private landowners. It appears to be a trump card that allows private companies to take land without proper regard for the waters that flow through it. For the health of state river systems, the eminent domain laws need to be revised. They suggest four modifications to the eminent domain statutes.

1) Require industries to minimize and mitigate environmental damage to condemned property. Approximately two-thirds of the route that Yellowstone Pipeline proposes to use would cross private lands in the sensitive Clark Fork Watershed. Mitigation measures that would protect streams, wetlands, and groundwater do not apply. The state needs to make sure that the environmental protections and state of the art technologies required on public lands extend to private lands.

2) A stricter definition of public interest is needed. The key concept behind the eminent domain process is that a public interest requires the taking of private land. Is a petroleum pipeline, that cuts through Montana's backyards to carry products to Eastern Washington, in this public's best interest?

3) Bonding requirements and indemnification provisions need to be extended to private landowners. Landowners should not be liable for another party's mishaps on condemned property. If a spill happens, clean up costs are high and for most landowners the costs would be prohibitive. Landowner liability needs to be removed.

4) Clean water needs to be recognized as a public use. Despite the fact that clean water is vital to public health, it does not figure into the laws of public use comparisons or compensation determinations. Is petroleum more valuable than a clean Missoula aquifer? Under current law, this question cannot be asked.

Caroline Walker, Missoula, remarked that farmers, ranchers, and landowners cannot pay huge campaign contributions and hire expensive attorneys. Money makes the laws and decides which laws stay on the books or leave the books. Money decides what is in the public interest. In the 1970s, the issue of coal mines were addressed by private citizens. Public interest needs to be decided by genuinely public interest. Her daughters are taking good care of the land and water and preserving the value for a future generation.

Mr. Smith added that pipeline regulations are a disaster. The industry has been successful in preventing new regulations. Recommendations are made on improving pipelines, but rules are not promulgated. Enforcement of the regulations that are in place is nonexistent.

SEN. STANG stated that he has heard concerns about using railroad cars and tankers to ship petroleum instead of the pipeline. This would create a public safety hazard. There have been two train derailments next to the Clark Fork River in the last five years. He questioned whether a pipeline may not be a safer way to transport petroleum. **Ms. Knudsen** remarked that an accident which caused tanker trucks to spill petroleum into surface waters would cause immediate and acute problems to water quality, aquatic species, and fish habitat. A train accident would involve spills being immediately apparent and clean up response is always immediate. The Yellowstone Pipeline has a very bad track record with respect to oozing petroleum into the environment and not cleaning up the spill.

SEN. STANG questioned whether any other states had implemented bonding requirements on private land. **Ms. Knudsen** believed that California has done so.

SEN. STANG asked **Ms. Knudsen** if she was aware of any cases in other states where pipelines were determined not to be in the public interest. **Ms. Knudsen** stated that for the most part states consider pipelines to be in the public use. She added that in a case in Illinois a pipeline was denied the power to use eminent domain. The commission denied in favor of the landowner and determined that the petroleum pipeline actually had business interests but was not in the public interest.

MR. HIGGINS asked for clarification of **Ms. Knudsen's** remark that liability for damages falls on the landowners in regard to a spill or rupture. **Ms. Knudsen** stated that was her understanding. Ultimately, the landowner is liable.

MR. SORENSEN asked if there were examples of different technologies being used for pipelines crossing private land. **Ms. Knudsen** stated that because the pipeline crosses Forest Service land, an environmental review is necessary. The Forest Service came up with a list of mitigation measures and technologies that were to be used when crossing their land. The Forest Service has made it clear that they have no authority to enforce any mitigation measures

on private land. The majority of the pipeline crosses private lands, not public lands. The Forest Service has spoken to Yellowstone Pipeline Company to try to persuade them to adopt the same level of protections on private lands. In reviewing the draft EIS, it appeared that YPL had agreed to all of the Forest Service's mitigation measures, but only half would be adopted on private lands. Private lands and the waters that run through private lands are being put at greater risk than public lands.

Mike Stahly, Cenex Pipelines, explained that pipelines require various state and federal permits in addition to MEPA review. In order to obtain a storm water permit, they needed to commit to following all mitigation measures in the MEPA review process. Any permitted action is tied to mitigation measures. Permits are needed for road, stream and wetlands crossings. Much of this applies to private land. There are extensive design and operating requirements for pipelines that are overseen by the Federal Department of Transportation. This would include requirements for hydrostatic testing, pipe strength, lock wells at rivers, and coating systems to prevent corrosion.

SEN. STANG questioned whether bonding had ever been required. **Mr. Stahly** was not aware that bonding had been required. The Oil Pollution Act of l990 requires extensive oil spill response planning and a demonstration that resources are adequate to respond to the worst case spill. This is reviewed by various agencies.

SEN. STANG further inquired whether the statutes required an oil company to clean up a spill. **Mr. Stahly** maintained that there are a lot of assurances in place. The landowner, if they are not the operator, would only be liable in cases of gross negligence.

REP. TASH questioned the time factor before the detection equipment would determine a spill had occurred. **Mr. Stahly** explained that this would be system specific and would depend on where the leak occurred, size of the leak, and location of computer monitoring equipment.

REP. SHOCKLEY questioned whether permits were required before or after the land was condemned. **Mr. Alke** maintained that there were no requirements that the permit had to be obtained before condemnation. Construction cannot begin before the permit is issued. If the permit is not received, the condemnor would pay the landowner for an interest they are not able to use.

REP. SHOCKLEY further questioned the pipeline company's liability to the landowner in the case of a spill. **Mr. Alke** knew of no principle of law that would make the landowner liable for a leak caused by the pipeline. A pipeline leak is a trespass onto the landowner's property.

MS. PAGE asked where in the process the evaluation of public good versus private harm would be addressed. **Mr. Petesch** explained that for eminent domain purposes, if the use is listed as a public use, the entity has the right to take the property. The evaluation is extraneous to the condemnation action. Public use is a statutory determination.

REP. LINDEEN questioned whether the Supreme Court had ruled on whether pipelines are a public use. **Mr. Petesch** stated that pipelines are enumerated as a public use. Electrical lines were challenged as a public use in l9l7. The decision was that the legislature makes that determination. Mining was challenged as a public use and the Court also held that the legislature had determined mining to be a public use. Coal mining was determined not to be a public use although copper mining was determined to be a public use. The Court held that the legislature had adequately articulated a reasonable distinction for saying that coal mining was not a public use and that was all that was required in the case.

Mr. Smith remarked that if a spill went onto an adjacent landowner's property, the landowner could be sued. Under CERCLA, the procedure is to view the landowner as a potentially responsible person. That person then needs to seek defense.

Mr. Petesch maintained that the spill from a pipeline is the pipeline's responsibility unless the landowner caused the spill.

Mr. Alke explained that CERCLA had an expressed exemption for pipelines because they did not want the landowner to be liable in typical Superfund situations.

Steven Wade, Burlington Northern, added that the state Superfund law contained a complete defense for an innocent landowner. The liability runs to the owner of the pipeline unless the landowner expressly acted or contributed to the spill.

REP. MCGEE questioned who would pay for the attorney the landowner would need to hire for his or her defense. **Mr. Wade** stated that the Department of Environmental Quality or the Environmental Protection Agency would have to affirmatively name and file a lawsuit against the landowner to make them a liable party.

Aaron Browning, Northern Plains Resource Council, remarked that HB 355 changed the law to state that the plaintiff in a condemnation proceeding needed to prove that they needed an interest greater than an easement by clear and convincing evidence for fee title. The arguments against the bill were that it would be unwise to have that provision because if the landowner retained title and did not give the easement to a pipeline company, they would then be liable.

Betty Thistad, Huson, requested that the Subcommittee review the historical record of Yellowstone Pipeline Company and how they handled lawsuits. Money will not tell the whole story. We need to be concerned about Montana. The law is old and needs reform.

VI OTHER STATES AUTHORITY AND PUBLIC USES UPDATE

MR. SORENSEN requested information from other states in the area of conflict between private property and public interest. MS. LEE remarked that staff could research court cases in other states specific to necessity.

REP. SHOCKLEY asked if staff could provide information on the track record of the Yellowstone Pipeline in regard to spills and litigation. CHAIRMAN COLE believed that would be beyond the scope of the Subcommittee.

REP. GUTSCHE requested more information on whether mitigation would be the same on public land as on private land. MS. LEE remarked that the Federal Office of Pipeline Safety Standards apply on both public and private land. There could be higher standards used on public land than there is on private land due to the permitting process of the federal land management agencies. Montana's standards are not higher than the federal standards. Some states do have higher standards.

REP. GUTSCHE questioned whether Montana or other states would have this in statute. MS. LEE affirmed that other states do address this issue in statute. Copies of the California statutes will be provided to Subcommittee members.

MS. LEE asked for direction on the topic of "Possession of Property by Plaintiff". CHAIRMAN COLE requested a breakdown of current law and a recap of today's comments.

MR. EBZERY requested more information regarding the practice of a "quick take" in other states. MR. HIGGINS reported that the MDOT has a utility task force and one of the topics they are looking into is investigating a "quick take". This may be recommended legislation from the MDOT. He further noted that the MDOT had spoken to the Revenue and Taxation Interim Committee.

MR. EBZERY remarked that it was his understanding that they should be working with this Subcommittee on any potential legislation.

MS. LEE stated that she will be attending the utility task force meeting and will provide a summary for Subcommittee members.

VII INSTRUCTIONS TO STAFF, NEXT MEETING DATE

The next meeting will be held on February 24th in Helena. It will be necessary to start finalizing items for the handbook.

VIII ADJOURNMENT

There being no further business, the meeting adjourned at 6:00 p.m.

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SEN. COLE, Chairman