

EQC/LJIAC EMINENT DOMAIN SUBCOMMITTEE

July 26 and 27, 2000

Final Minutes

SUBCOMMITTEE MEMBERS PRESENT

Sen. Mack Cole, Chair
Rep. Kim Gillan
Rep. Monica Lindeen
Rep. Dan McGee
Rep. Jim Shockley

Sen. Spook Stang
Rep. Bill Tash
Mr. Tom Ebzery
Ms. Julia Page
Mr. Jerry Sorensen

SUBCOMMITTEE MEMBERS EXCUSED

Rep. Gail Gutsche

STAFF MEMBERS PRESENT

Ms. Krista Lee, EQC
Mr. Gordy Higgins, LSD
Mr. Greg Petesch, LSD
Ms. Judy Keintz, Secretary

VISITORS' LIST

Attachment #1

SUBCOMMITTEE ACTION

- Approved minutes of the May 4, 2000, Eminent Domain Subcommittee Meeting.
- Adopted the Handbook as written.
- Discussed and made final findings and recommendations on the Eminent Domain Subcommittee Final Report.

I CALL TO ORDER AND ROLL CALL

CHAIRMAN COLE called the meeting to order at 1:00 p.m. Roll call was noted; REP. GAIL GUTSCHE was excused. **(Attachment #2.)**

▶ **Adoption of Minutes**

Motion/Vote: REP. LINDEEN MOVED THAT THE MINUTES OF THE MAY 4, 2000, EMINENT DOMAIN SUBCOMMITTEE MEETING BE APPROVED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.

II ADMINISTRATIVE ITEMS

The Subcommittee decided to have public comments summarized in the final report with a note that the full text of the public comments would be on file with the EQC.

III DISCUSSION ON FINAL FINDINGS AND RECOMMENDATIONS TO THE EQC

■ Handbook

MR. EBZERY requested more information regarding the statutory provision allowing for coverage of attorneys fees. MS. LEE noted that necessary expenses of litigation, are authorized by section 70-30-305, MCA. Page 16 of the Handbook provides the information regarding who pays litigation expenses:

"In the event of litigation and when the condemnee prevails by receiving an award **in excess of the final offer** of the condemnor, the court shall award necessary expenses of litigation to the condemnee."

Otherwise, each party bears that party's own costs and attorney fees. The condemnee must receive at least \$1 more than the last amount offered by the condemnor. Then the condemnee receives costs and attorney fees.

REP. MCGEE suggested that the flow chart on page 7 show when entities are allowed to enter the property. He also asked for clarification of the fourth sentence in paragraph 3 on page 25. The Subcommittee suggested that instead of stating that landowners "should work with the regulatory entity . . .", the language could state that "it is recommended that landowners contact the appropriate regulatory entity.

Don Allen, WETA, remarked that on page 25 of the handbook, the second to the last sentence in the first paragraph referred to Montana moving further and further away from an economy based on resource extraction. If Montana is doing less with resources, this would mean that there would be a lessor need for eminent domain.

The Subcommittee agreed to removing the sentence.

IV GENERAL PUBLIC COMMENT FROM AUDIENCE

Mike Foster, Montana Contractor's Association (MCA), provided a copy of a letter from the

MCA to the Eminent Domain Subcommittee, **Exhibit 1**. Discussion have been ongoing between the Montana Department of Transportation (MDOT) and the MCA regarding right-of-way acquisition. They are reviewing the ways in which the statutes affect highway construction. Montana's highway construction funding has been increased by \$100 million per year for six years. The difficulty in acquiring right-of-way has created a bottleneck. If the projects cannot move forward, the state may lose the funding. In the instance of an existing highway being upgraded to meet state or federal standards, proving necessity may be wasteful.

REP. LINDEEN questioned how many projects were being held up for the purpose of proving necessity. She further questioned whether any highway funds have been lost at this time. **Mr. Foster** remarked that approximately 15 projects are being held up do to right-of-way acquisition. No funding has been lost at this time.

Nick Rotering, MDOT, maintained that even though the eminent domain statutes contain a priority statement, they are often at the mercy of the district court calendar. If the funds are not spent under the federal fiscal year end, it is very possible for the funds to be withdrawn from Montana and given to another state.

Gail Abercrombie, Montana Petroleum Association, remarked that under the issue of "use of interest taken", the proposed legislation could affect the use of pipelines for a different product. The pipelines used for transporting crude oil from Texas to California are now being changed over to transporting natural gas or fuel. She raised a concern regarding how this use could be stated in the condemnation order being presented to the judge to allow for the hydrocarbon transportation within a pipeline. She further noted that the judge had discretion to approve or disapprove various portions of the condemnation order.

Geoff Feiss, Montana Telecommunications Association, presented his written testimony, **Exhibit 2**.

MS. PAGE remarked that since the telecommunications industry maintains that it is a necessary and important industry and is not part of the eminent domain problem, it should be easy to meet the requirements of public interest. **Mr. Feiss** agreed that the

telecommunications industry meets the public interest criteria. He added that public interest does not need to be further defined in law. He further noted that in the cooperative environment in Montana, an easement is granted as a part of gaining membership of the cooperative.

Dan Dutton, Rancher, stated that the eminent domain statutes need to be reformed in the area of private entities. His main areas of interest include the type of interest taken, mitigation measures, and assuring that projects seeking the use of eminent domain are truly in the public interest.

Paul Miller, Attorney - Stillwater Mining, agreed with the comments of the Montana Telecommunications Association. Public sentiment has a place in the legislative process but it does not have a place in the judicial process. He agreed with limiting the interest taken to an easement, unless the condemnor can show that a greater interest is necessary. Once the use is terminated, the property should return to the original landowner or successor. Many entities pursue condemnation for a profit interest. This is appropriate for many uses to include telephone lines, pipelines, telecommunication lines, and railroads. These interests are not pursued by the government.

REP. LINDEEN commented that there may be instances where a private project is not in the public interest. Guidelines are necessary to determine public interest. **Mr. Miller** noted that case law contains guidelines to determine public interest.

MS. PAGE questioned whether all enumerated entities were appropriate. **Mr. Miller** stated that entities needed to prove in court that their project is in the public interest.

MS. PAGE added that not all projects by the enumerated entities meet the threshold of being in the public interest. A proposed airport project in Red Lodge has provoked controversy. The public need for the project has been questioned.

Paul Gould, Conoco, stated that they are currently attempting to expand their pipeline to provide for the Billings product reaching the Salt Lake Valley. The pipeline easement is 262 miles long. Approximately 1.3 miles may require eminent domain. The court will allow possession of the property and they will be able to start work on the project. This will save them between eight to twelve months in the total time it will take to complete the project due to seasonal difficulties which could stop the project for a period of time.

Gary Wiens, Montana Electric Cooperatives Association, maintained that the cooperatives have not used the condemnation process but it is an important tool as a last resort. He added that the intent of LC 7034 is well meaning. They have a concern regarding the consequences of the broad criteria in the draft legislation. This would inject an element of uncertainty and subjectivity that will create too great a risk in regard to their ability to serve the public.

Barbara Ranf, Qwest, stated that they agreed with the remarks made by the Montana Telecommunications Association and the Montana Electric Cooperatives Association in regard to LC 7034. She added that LC 7034 and LC 7036 would add another judicial layer to their ability to provide services. The customer pays for these additional expenses.

REP. SYLVIA BOOKOUT-REINICKE, HD 71, stated that the landowner is an innocent party to the eminent domain process. A landowner who hasn't been to court is overwhelmed by the process and should be free of any burden.

Ms. Abercrombie referred to **Mr. Gould's** testimony regarding the 262 mile project with two landowners going to condemnation and questioned the effect of LC 7034 in regard to the agreements negotiated with the other landowners on the project.

REP. LINDEEN believed that LC 7034 would apply to the entire project.

MS. PAGE stated that if the two landowners had substantive objectives and wanted a hearing, they ought to be heard.

Mr. Gould clarified that the landowners did not object to the project but wanted 6.8 times the amount their neighbors were receiving for the property. The public need and necessity has already been determined by an EA.

The meeting was adjourned for the day at 3:30 p.m. The Subcommittee met the following day, Thursday, July 27th at 1:00 p.m.

V DISCUSSION ON FINAL FINDINGS AND RECOMMENDATIONS TO THE EQC
(CONT'D)

CHAIRMAN COLE explained that a minority report could be set out under the "Comments" column of the Eminent Domain Subcommittee Issues Matrix which will be a part of the final report. The Subcommittee members agreed to this format for a minority report.

■ **Handbook**

MS. LEE explained that several changes were made to the handbook at the meeting the preceding day. In regard to the flow chart on page 7, additional language was inserted that stated that after the preliminary order is issued, the condemnor may take possession of the property upon payment to the court. On page 25 of the handbook, the second to the last sentence in the first paragraph was deleted. This language referred to Montana moving further and further away from an economy based on resource extraction. Also on page 25, the fourth sentence of paragraph 3 was reworded in regard to mitigation measures.

Motion: REP. TASH MOVED THAT THE HANDBOOK BE ADOPTED AS WRITTEN.

REP. MCGEE stated that on page 23, it is not clear that the interest being talked about is fee simple. MS. LEE suggested that paragraph 3 become the first paragraph on the page for clarification purposes.

REP. TASH accepted the change as a friendly amendment to his motion.

Vote: THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: MR. EBZERY MOVED THAT CHAPTERS 1 THROUGH 6 OF THE FINAL REPORT BE ADOPTED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.

■ **LC 7032**

MR. EBZERY asked **Greg Petesch, Legislative Services Attorney**, to explain the status of LC 7032, **Exhibit 3. Mr. Petesch** explained that if the draft legislation was adopted by the Subcommittee, the full EQC would then vote on whether or not to make a formal bill request. The bill would be introduced by the request of the EQC and proceed through the process. The title restricts the purpose of the bill to be for the sole purpose of modernizing the language in eminent domain statutes, to include references, and to list all the public uses in one section.

Motion/Vote: REP. MCGEE MOVED THE ADOPTION OF LC 7032 AND RECOMMENDED THAT THE SAME BE SUBMITTED TO THE EQC AND THAT THE EQC REQUEST A BILL DRAFT TO ACCOMPLISH THE ITEMS ENUMERATED IN THE TITLE. THE MOTION CARRIED UNANIMOUSLY.

■ **Eminent Domain Statutes in General**

Motion/Vote: REP. MCGEE MOVED THAT THE SUBCOMMITTEE APPROVE THE EMINENT DOMAIN STATUTES IN THE GENERAL SECTION OF THE MATRIX AS DRAFTED BY

STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Liability and LC 7031 (Exhibit 4).**

Motion/Vote: REP. MCGEE MOVED THE ADOPTION OF LC 7031 AND RECOMMENDED THAT THE SAME BE SUBMITTED TO THE EQC AND THAT THE EQC REQUEST A BILL DRAFT TO ACCOMPLISH THE ITEMS ENUMERATED IN THE TITLE. THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: MR. SORENSEN MOVED THAT THE SUBCOMMITTEE APPROVE THE LIABILITY SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND DRAFT RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Reversion of Property**

Motion/Vote: REP. TASH MOVED THAT THE SUBCOMMITTEE APPROVE THE REVERSION OF PROPERTY SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Entities Authorized to Exercise Right of Eminent Domain**

See Below.

■ **Federal/State Relationship**

Motion: REP. TASH MOVED THAT THE SUBCOMMITTEE APPROVE THE ENTITIES AUTHORIZED TO EXERCISE RIGHT OF EMINENT DOMAIN SECTION OF THE MATRIX AND THE FEDERAL/STATE RELATIONSHIP SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS.

Discussion

REP. GILLAN noted that the finding “no further discussion” was not consistent with the format for other findings in the matrix. The finding could state that the current law is adequate. The recommendation could be to make no changes to current law.

REP. TASH accepted this change as a friendly amendment to his motion.

Vote: THE MOTION CARRIED UNANIMOUSLY.

■ **Mitigation Measures and LC 7036**

REP. MCGEE stated that the Constitution, Article II, Section 29, states that private property shall not be taken or damaged without just compensation to the full extent of the loss. He suggested that the term damage mitigation be placed into statute. The Constitution is clear in the intent to protect private property rights. At the same time, the sovereign power of government reserved, for the public good, the power of eminent domain. The loss includes both the taking and/or the damage. The property owner, whose lands will be taken, is the party which can be damaged. Where public use prevails private property may be taken or damaged under certain conditions. It is incumbent on the legislature of Montana, not the courts, to define and establish 1) the legitimate uses which constitute a public use and which may have the right of and power of eminent domain as agents of the state; 2) the limitations and conditions upon such uses; 3) the procedures through which that process will progress; and 4) the establishment of such guarantees and protections as the legislature deems necessary to protect the property owner and make the owner as whole as possible.

Compensation for damage is not currently clearly articulated in statute. It is the intention of the language of LC 7036, **Exhibit 5**, to clarify existing law so that it more closely conforms to the constitutional provisions enumerated in Article II, Section 29, regarding damage.

On page 2, LC 7036, Section 1(2), in the last line he would strike the words “remaining parcel of” and insert “condemnee’s”. The same change would take place in the following paragraph, Section 2(1). Also, on page 6, (ii), line 6, he would insert the term “damaged” at the beginning of the line. This is the language used in the Constitution. In (e) the term “damaged” would also precede the term “mitigation measures”. The same changes would be made on page 8, (b).

MR. EBZERY believed that the term “damage” referred to parcels of land that were outside the property taken. REP. MCGEE believed the term “damage” referred to private property and not necessarily a remainder of land which was left after a taking. The damage issues need to be clearly addressed in law. Compensation would be for both the damage and the taking.

Mr. Petesch stated that if fee title was taken, there would not be damage. In the case of an easement or a portion of the property being taken in fee, there is a potential for damage to the existing property or the remainder. When an easement is taken, the landowner still has an interest in the property that the easement crosses.

CHAIRMAN COLE reminded the Subcommittee that the draft legislation would not be voted on by the full EQC until the September meeting. There will be time for public comment on the same.

Motion: REP. MCGEE MOVED THE ADOPTION OF LC 7036 AS AMENDED AND RECOMMENDED THAT THE SAME BE SUBMITTED TO THE EQC AND THAT THE EQC ACT ON THE DRAFT LEGISLATION AT THE SEPTEMBER MEETING.

MS. PAGE emphasized that this is an important clarification. Landowners have told the Subcommittee that their ability to negotiate mitigation measures has been very difficult.

MR. SORENSEN noted that mitigation measures could be considered under the existing law. He questioned whether a simple modification referring to just compensation may be a better way to handle the issue.

MS. LEE stated that the subcommittee may choose not to make a final recommendation that includes legislation. The subcommittee could, if it chose to do so, recommend that the EQC develop legislation that addresses mitigation measures with the concepts brought forward in LC 7036.

REP. MCGEE withdrew his motion.

Motion: REP. MCGEE MOVED A SECOND FINAL RECOMMENDATION WHICH STATED THAT THE SUBCOMMITTEE RECOMMENDS TO THE EQC THAT THEY CONSIDER POSSIBLE LEGISLATION TO DEAL WITH THE ISSUE OF MITIGATION TO INCLUDE THE CONCEPTS SET FORTH IN LC 7036 AT THE SEPTEMBER MEETING. HE FURTHER MOVED THE ADOPTION OF THE FINDINGS AND DRAFT RECOMMENDATIONS AS FINAL RECOMMENDATIONS, AS AMENDED.

MS. PAGE suggested another finding to support the concepts embodied in LC 7036.

REP. TASH remarked that this could be clarified without legislative remedy.

REP. MCGEE suggested that a third finding could state that the Montana Constitution provides that in the arena of eminent domain, just compensation to the full extent of the loss covers both the taking and the damage. Article II, Section 29 could be quoted as a finding.

REP. MCGEE summarized that his motion would include the two findings and the recommendation in the matrix under mitigation measures. In addition, there would be a third finding which quoted Article II, Section 29, through "the full extent of the loss". Another final recommendation would recommend to the EQC the consideration of clarifying the issue of mitigation in statute.

Vote: THE MOTION CARRIED with MS. PAGE voting “no”.

MS. PAGE commented that the issue is not just expressed concern with the ability to negotiate. Landowners have told the Subcommittee that they are locked out of many decisions that affect their property. The issues of routing and siting have been brought up a number of times. Compensation is one matter but there is also the matter of preventing the damage. Landowners have stated that there is a double standard in place when the route involves federal or state land.

REP. MCGEE agreed that there is a double standard involving public lands. When crossing public lands, payment is not included. The issue is mitigation of the damages only. The Constitution does not speak to routing or siting.

■ **Standards and Specifications**

Motion: SEN. STANG MOVED THAT THE SUBCOMMITTEE AMEND THE FINDING TO STATE THAT CURRENT LAW IS ADEQUATE AND THE FINAL RECOMMENDATION TO MAKE NO CHANGE TO THE CURRENT LAW.

MS. LEE reminded the Subcommittee that the subcommittee is not required to have findings and recommendations for each issue.

Substitute Motion/Vote: MR. SORENSEN MOVED TO REMOVE THE ISSUE FROM THE MATRIX. THE MOTION CARRIED UNANIMOUSLY.

■ **Possession of Property**

MS. PAGE remarked that there was discussion that it would be inappropriate to take possession of the property while issues were still pending. Once possession is taken, negotiations are meaningless. She suggested a finding that stated that landowners have expressed concern that allowing the condemnor to take possession before the appeals process was completed makes the landowner’s objections meaningless.

REP. SHOCKLEY noted that the second finding disregarded the concerns of the landowners and gave greater credence to industry. The findings need to reflect the fact that there is a conflict in this area.

Motion/Vote: MR. EBZERY MOVED THAT THE SECOND FINDING UNDER POSSESSION OF PROPERTY BE DELETED. THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SEN. STANG MOVED THAT THE SUBCOMMITTEE APPROVE THE POSSESSION OF PROPERTY SECTION OF THE MATRIX AS AMENDED. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Use of Interest Taken and LC 7033 (Exhibit 6)**

REP. MCGEE stated that under current law it is inferred that the condemned property will have a purpose attached to it in the condemnation order. The draft legislation should state that unless the condemned property is subject to 70-30-111(3), the property condemned may not be used for any purpose that is not specified in the condemnation order.

Motion: REP. MCGEE MOVED THAT THE SUBCOMMITTEE RECOMMEND TO THE EQC THAT IT CONSIDER AND APPROVE A BILL DRAFT REQUEST TO ACCOMPLISH THE INTENT SET OUT IN THE TITLE OF LC 7033, AS AMENDED.

REP. SHOCKLEY raised a concern that a pipeline could slip a fiber optic cable into the same hole used for the pipeline. This cable could have nothing to do with the use of the pipeline. After five years, there may be a prescriptive easement in this situation.

Mr. Petesch stated that current law provides that when condemning for pipeline purposes, fiber optic may be included.

MR. EBZERY remarked that the drafts are subject to several interpretations. Following the proceeding, the condemnor's attorney would prepare the condemnation order. The concern is that the judge may delete a public use from the order. He suggested using the complaint instead of the condemnation order.

REP. SHOCKLEY stated the order provided the right to use the land.

MR. EBZERY stated that current law is adequate and the draft legislation is not necessary.

Vote: THE MOTION CARRIED ON ROLL CALL VOTE with MR. EBZERY, MR. SORENSEN, REP. TASH and SEN. COLE voting "no" (Attachment 3).

Motion: SEN. STANG MOVED THAT THE SUBCOMMITTEE APPROVE THE USE OF INTEREST TAKEN SECTION OF THE MATRIX AS AMENDED. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS.

Substitute Motion/Vote: REP. LINDEEN MOVED THAT FINDING 1 BE DELETED. FINDING 1 SHOULD STATE THAT CURRENT LAW NEEDS CLARIFICATION. THE MOTION CARRIED UNANIMOUSLY.

■ **Due Process**

Motion/Vote: SEN. STANG MOVED THAT THE SUBCOMMITTEE APPROVE THE DUE PROCESS SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Burden of Proof**

Motion: SEN. STANG MOVED THAT THE SUBCOMMITTEE APPROVE THE BURDEN OF PROOF SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

Substitute Motion/Vote: MR. SORENSEN MOVED THAT THE SECOND SENTENCE IN THE FINDING BE DELETED AND THE BURDEN OF PROOF SECTION OF THE MATRIX BE ADOPTED AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.

■ **Rights of Reentry**

Motion/Vote: SEN. STANG MOVED THAT THE SUBCOMMITTEE APPROVE THE RIGHTS OF REENTRY SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Public Uses**

Motion/Vote: SEN. STANG MOVED THAT THE SUBCOMMITTEE APPROVE THE PUBLIC USES SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Just Compensation**

Motion/Vote: SEN. STANG MOVED THAT THE SUBCOMMITTEE APPROVE THE JUST COMPENSATION SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND MAKING THE DRAFT RECOMMENDATIONS FINAL RECOMMENDATIONS. THE MOTION CARRIED UNANIMOUSLY.

■ **Type of Interest Taken and LC 7035**

REP. MCGEE presented LC 7035, **Exhibit 7**. The intent of the draft legislation is to clarify that the easement is the presumed interest taken unless a greater interest can be demonstrated as necessary or agreed to by the condemnee.

Motion: REP. MCGEE MOVED THAT THE SUBCOMMITTEE RECOMMEND TO THE EQC THAT IT CONSIDER AND APPROVE A BILL DRAFT REQUEST TO ACCOMPLISH THE INTENT SET OUT IN THE TITLE OF LC 7035.

Discussion:

REP. MCGEE explained that the Subcommittee had heard testimony that the interest taken in a condemnation proceeding should be an easement unless one of two other conditions is met: 1) the condemnee agrees that there should be a higher interest, or 2) the court finds that there should be a higher interest. The condemnor must prove by a preponderance of the evidence that such a higher interest is needed. This is already in code but it is not clearly set out.

MR. SORENSEN commented that Plum Creek gave company land to the Highway Department as an easement for highway purposes. Some of this land included interstate highways with large tracts of ground with large trees between the two lanes. Plum Creek is unable to log the trees because they cannot have access to an interstate highway. Plum Creek owns the land and the trees but is unable to get to the trees. He questioned whether the amendment would remove some of the judgment necessary in a condemnation proceeding.

REP. MCGEE noted that the Montana Department of Transportation (MDOT) would be excluded from the act. The default setting for the taking of land in a condemnation procedure would be an easement unless it can be shown that a higher interest is necessary or has been negotiated.

REP. TASH raised a concern that this may be adding another level for the condemnor, especially in the instance of the MDOT. REP. MCGEE did not believe this would impact highway development. He emphasized that if it takes additional time to take someone's property against their will, this would be appropriate.

MR. EBZERY questioned whether there were inconsistencies in the draft legislation. **Mr. Petesch** explained that the statutes, as amended, would not contain inconsistencies.

MR. EBZERY questioned why the MDOT would be excluded and pipelines would not be excluded. REP. MCGEE stated that it is very clear to him that the interest to the individual owner is better served by having fee simple transferred to the MDOT. Fee simple is in the

public interest for highways. It is less clear that it would be in the public interest to have a fee simple interest for every pipeline.

Vote: THE MOTION CARRIED ON ROLL CALL VOTE (Attachment 4) with MR. SORENSEN and REP. TASH voting “no”.

Motion/Vote: REP. MCGEE MOVED TO AMEND THE SECOND FINDING UNDER THE ISSUE OF TYPE OF INTEREST TAKEN TO STATE THAT THE CURRENT LAW IS ADEQUATE BUT UNCLEAR. DELETE THE DRAFT RECOMMENDATION AND INSERT LANGUAGE STATING THAT THE SUBCOMMITTEE PROPOSES TO THE FULL EQC TO DRAFT LANGUAGE TO HELP CLARIFY EXISTING STATUTES. THE MOTION CARRIED UNANIMOUSLY.

■ **Necessity/Pubic Interest**

REP. LINDEEN presented LC 7034, **Exhibit 8**. The draft legislation requires the public interest finding first. Once the project is found to be in the public interest, the condemnor’s request stands the test of the four enumerated items historically used to determine if the taking is necessary. In determining whether or not the project was in the public interest, the court may consider seven different items. These items are permissive and have been used historically. Many were taken from case law and address many of the concerns brought to the Subcommittee. It has been stated that eminent domain is rarely used but it is clear that there is conflict. The conflict addresses a very small number of projects and people. The majority of the conflict regards whether or not the project is in the public interest.

Motion: REP. LINDEEN MOVED THE ADOPTION OF LC 7034.

MR. EBZERY commented that most of the projects that this legislation would cover would have already gone through an EIS and had other approvals. He questioned the effect of the draft legislation in the instance of 58 out of 60 landowners who had already negotiated a contract with the condemnor. **Mr. Petesch** explained that the draft legislation would not affect contractual arrangements. If the two landowners went to court on the issue of public interest and the judge found the project not to be in the public interest, the project could not use eminent domain to acquire the easement across those properties.

MR. EBZERY emphasized that if this legislation were to be adopted, there would be no incentive for anyone to negotiate with the entity interested in developing the project. He further noted that the criteria used in the draft legislation is very vague.

MS. PAGE maintained that the draft legislation is needed. It is not trying to stop the use of eminent domain, but would clarify the use of eminent domain. Eminent domain should be used appropriately. If projects are truly in the public interest, the recommended threshold would not be difficult to overcome. The criteria used in the draft legislation are helpful to the judge. They have been used in other cases and help weed out the projects that are inappropriate.

MR. SORENSEN was concerned that the seven criteria listed were too vague and could be interpreted in a variety of ways. Any landowner who wanted to stop a project could build a case to stop that project. The Tongue River Railroad has a certificate of need from the federal government and the state would have a huge problem trying to supercede this with public interest criteria.

REP. TASH remarked that there is little incentive for businesses to risk capital. This legislation would add another layer to levels that have proven to be adequate. The companies that want to invest in Montana will look to other areas if we add this encumbrance.

Vote: THE MOTION FAILED ON ROLL CALL VOTE (Attachment 5) with MS. PAGE, REP. LINDEEN and REP. GUTSCHE voting “yes”.

Motion: MS. PAGE MOVED TO ADD A FINDING TO THE NECESSITY/PUBLIC INTEREST SECTION OF THE MATRIX WHICH STATED THAT THE PUBLIC INTEREST NATURE OF A PROJECT IS NOT REQUIRED BEFORE EMINENT DOMAIN CAN BE USED.

MR. SORENSEN disagreed with the finding. The legislature has been given the duty of defining projects that it deems are in the public interest.

Vote: THE MOTION FAILED ON ROLL CALL VOTE (Attachment 6) with MS. PAGE and REP. LINDEEN voting “yes”.

Motion/Vote: MR. EBZERY MOVED THAT THE SUBCOMMITTEE APPROVE THE NECESSITY/PUBLIC INTEREST SECTION OF THE MATRIX AS DRAFTED BY STAFF. THIS INCLUDES THE FINDINGS AND DRAFT RECOMMENDATIONS. THE MOTION CARRIED with MS. PAGE and REP. LINDEEN voting “no”.

VI ADJOURNMENT

There being no further business, the meeting was adjourned.

SEN. COLE, Chairman