Environmental Quality Council

Eminent Domain Subcommittee

1999-2000

Work Plan

December 1999

1. Introduction

The Environmental Quality Council (EQC) is a seventeen member bipartisan interim committee of the Montana Legislature. The 1999 Montana Legislature, through House Joint Resolution 34 (see Appendix A), asked the appropriate subcommittee to study eminent domain (ED) and its use in Montana. The Legislative Council also requested that the Law, Justice, and Indian Affairs Committee and its staff allocate resources to assist the EQC in the study process. In September of 1999, the EQC adopted a 1999-2000 interim work plan that included forming a subcommittee and allocating 1.0 FTE of the EQC's staff time in addition to the .5 FTE of the Law, Justice, and Indian Affairs Committee staff time to study ED. The Law, Justice, and Indian Affairs Committee appointed 3 committee members to serve on the eminent domain subcommittee.

In September of 2000, the eminent domain subcommittee will make recommendations to the full EQC for actions such as proposed legislation, agency action, and/or development of educational materials.

The work plan is a flexible document, which includes a subcommittee timeline. The subcommittee will refine goals and tasks as information is gathered and evaluated. Key decision making points are highlighted in the timeline and under each topic.

Eminent Domain Subcommittee members include:

Senator Mack Cole, EQC
Mr. Tom Ebzery, EQC
Representative Gail Gutsche, LJIAC
Representative Monica Lindeen, EQC
Representative Dan McGee, LJIAC
Ms. Julia Page, EQC
Representative Jim Shockley, LJIAC
Mr. Jerry Sorensen, EQC
Senator Barry "Spook" Stang, EQC
Representative Bill Tash, EQC

Eminent Domain Subcommittee staff include:

Environmental Quality Council
Krista Lee – 444-3957 or klee@state.mt.us

Law, Justice, and Indian Affairs Committee
Gordy Higgins – 444-9280 or gohiggins@state.mt.us

2. HJR 34 Eminent Domain Study Background

The 1999 Legislature was presented with 5 different bills, HB 28, HB 354, HG 355, HB 573, and SB 461 that proposed changes in the eminent domain law. This law has not been significantly changed since its enactment in 1877. There were some changes made in 1983. Because of the potential impact of the use of eminent domain in Montana, the Legislature concluded that in order to better understand the statutes, a careful and deliberate study was in order. As a result, the Legislature enacted HJR 34 requesting the appropriate Interim committee to study the issue with the **goals** of:

1. Studying the **implementation** of existing eminent domain statutes.
2. Studying the **adequacy** of the current statutes.
3. Determining the **need for and potential benefit of revising** the laws related to eminent domain.

The resolution requests that the appropriate interim committee study include the following elements:

- the frequency and distribution of condemnation actions in Montana;
- the types of interest in real property condemned in Montana;
- the extent to which rights-of-way obtained through the use of eminent domain are being resold or re-leased for other uses than the original landowner is compensated for those new uses; and
- if the current statutes are adequate in respect to the following specific aspects:
  - due process,
  - just compensation,
  - burden of proof standards,
  - the abandonment process,
  - rights of reentry,
  - reversions,
  - methods for acquiring property or the use of property, including types of easements and restrictions on easements, and
  - multiple use of easements

HJR 34 also requests that the EQC prepare a report of its findings and conclusions and identify options and make recommendations, including legislation, if appropriate, to the 57th Legislature.

At the end of the legislative session, legislators were polled to determine which studies should receive a higher priority during the interim. The ED study was ranked 2nd out of 24 studies in the legislator poll.

3. Work Plan Process Steps

Each interim study the EQC conducts has five common steps or phases to ensure a successful study process:

1. Subcommittee/EQC Training and Information Gathering

2. Information/Issue Analysis

3. Subcommittee Findings and Conclusions

4. Subcommittee Recommendations

5. Full EQC Adoption or Modification of Recommendations

At heart of any successful EQC study process is a constant and active solicitation by the EQC of public, regulated community, and agency comment and involvement.

4. HJR 34 Work Plan Tasks

An X indicates that this portion of the work plan has been completed.

_X_ 1. Accumulate eminent domain history and background information. How has the power of eminent domain been used specifically? For what purpose is eminent domain exercised? Have those defined purposes changed over time? Who has the power of eminent domain? Can the Legislature remove or alter the types of entities that currently possess the authority to condemn land?

Who: Staff
Time line: Ready for review at September 1999 EQC meeting.

_X_ 2. Define the current eminent domain process to assist in interpreting the statutes.
a. due process
b. just compensation
c. burden of proof standards
d. abandonment and reversion of property taken

Who: Staff
Time line: Ready for review at September 1999 EQC meeting

_X_ 3. Gather information related to court cases addressing eminent domain.
a. Montana cases
b. U.S. Supreme Court cases
c. cases of importance from other states

Who: Staff
Time line: Ready for review at September 1999 EQC meeting

_X_ 4. Compare eminent domain statutes of states around the region.
a. Idaho
b. Nevada
c. North Dakota
d. Oregon
e. South Dakota
f. Utah
g. Washington
h. Wyoming

Who: Staff
Time line: Ready for review at September 1999 EQC meeting

____ 5. Accumulate historical eminent domain use regarding actual condemnation actions broken out by government action and private entity action.

Who: Staff and subcommittee
Timeline: December subcommittee meeting

__X__6. Develop 1 case study of a project that has been completed by an entity that has the authority to exercise eminent domain.

Who: Staff
Timeline: December subcommittee meeting

__X__ 7. Research and provide logistics of other states laws regarding the posting of monetary bonds by entities installing facilities that may result in environmental damage.

Who: Staff
Timeline: December subcommittee meeting

___X__ 8. Define the entities that possess the authority to exercise the right of eminent domain in Alabama, Arizona, California, Colorado, Idaho, and Nevada.

Who: Staff
Timeline: December subcommittee meeting

____ 9. Outline the Federal/State relationship on eminent domain cases. Specifically those that are initiated at the Federal level. Define State's level of concurrence on projects if any.

Who: Staff
Timeline: December subcommittee meeting

__X__ 10. Outline the process that is followed for reversion of property once the property is abandoned.

Who: Staff
Timeline: January subcommittee meeting

__X__ 11. Compare mitigation measures that are used on public land versus private land.

Who: Staff and subcommittee
Timeline: December subcommittee meeting

_X___ 12. Identify and compare the level of science (quality of products used) that is used on public lands versus private land.

Who: Staff and subcommittee
Timeline: December subcommittee meeting

____ 13. Possession of property by plaintiff.
Should the plaintiff be allowed to take possession of property prior to the completion of the court process? If this was changed, how would it affect the condemnor's ability to complete a project?

Who: Staff and subcommittee
Timeline: January subcommittee meeting

____ 14. Liability
Is the landowner who sells the easement liable for accidents associated with the use? Should liability be specifically limited in the eminent domain statutes or does this protection already exist in other areas of law? Is liability for accidental damage to the project by the landowner addressed? Does it need to be addressed if it is not?

Who: Staff and subcommittee
Timeline: January subcommittee meeting

____15. Use of Interest Taken
Can easements be legally resold? Can the use of the easement be changed once the preliminary condemnation order has been given? What happens if an entity wants to change the use of the condemned property?

Who: Staff and subcommittee
Timeline: January subcommittee meeting

____ 16. Due Process
Is the current due process allowed in law adequate?

Who: Staff and Subcommittee
Timeline: January Subcommittee meeting

____ 17. Burden of Proof
Where does the current burden of proof lie? Is this appropriate? Do changes need to be made?

Who: Staff and Subcommittee
Timeline: January Subcommittee Meeting

____ 18. Rights of reentry
How is right of reentry determined? Do rights of reentry need to be defined in statute?

Who: Staff and Subcommittee
Timeline: January Subcommittee Meeting

____ 19. Type of Interest Taken
Are all of the current types being taken, are all necessary? Should there be a method set up for determining what type of interest may be taken?

Who: Staff and subcommittee
Timeline: March Subcommittee meeting

____ 20. Public Uses
Are all the public uses described in this section accurate? Should they still be included as public uses? Are there additional public uses that need to be added?

Who: Staff and subcommittee
Timeline: March Subcommittee meeting

____ 21. Determining just compensation.
Is our current method of using commissioners to determine just compensation adequate and fair? Is there a better method of determining this amount? How is the current appraisal process completed? Is it adequate? Should it be changed?

Who: Staff and Subcommitee
Timeline: March Subcommittee meeting

____ 22. Necessity.
Because a type of project is defined in statue as a public use, does that mean that all projects of this type that are installed are necessary for public good? Is the current process for determining public need adequate? Would a different process work better or more efficiently?

Who: Staff and Subcommittee
Timeline: March Subcommittee meeting

____ 23. Identify specific issues for further study.

Who: Staff and subcommittee
Timeline: Ongoing

____ 24. Conduct public hearings to gather information from interested persons across Montana.

Who: Staff and subcommittee
Timeline: December 1999/January 2000/March 2000

____ 25. Develop eminent domain handbook for public distribution.

Who: Staff and subcommittee
Timeline: July 2000

____ 26. Development of conclusions and recommendations for full EQC membership.

Who: Subcommittee
Timeline: May 2000

5. **Timeline**

The time line in the work plan is based on the EQC meeting time line and a preliminary subcommittee meeting schedule. The time line may change as the need for additional subcommittee meetings is recognized.

1999

Nov. 15 **Press Release for Public Hearings**

Dec. 1 Afternoon: **ED Subcommittee Meeting ---- HELENA**

- Subcommittee review/discussion of:
  - ✓ historical condemnation actions – government and private
  - ✓ 2 case studies
  - ✓ bond posting
  - ✓ authorized entities to use eminent domain
  - ✓ liability issues
  - ✓ federal/state relationship
  - ✓ reversion of property
  - ✓ mitigation measures
  - ✓ science used
  - ✓ court cases
- Work Plan review and discussion
  - ✓ identify possible future areas of study or need for more in-depth information on current study topics

Evening: **Eminent Domain Public Hearing**

Dec. 2 **EQC Meeting**

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Jan 3 **Press Release for public hearings**

Jan. 20 **Eminent Domain Subcommittee Meeting**
Afternoon:

- Subcommittee review and discussion of information related to specific issues identified for further study in the work plan
- Subcommittee review of progress related to specific issues of study.
- Review work plan – make changes if necessary
- Discuss comments from December public hearing
- Discuss December public hearing format - make changes for Jan public meeting if necessary
- Identify specific issues/concerns that may be brought to public meeting
- Subcommittee discussion of public hearing comment incorporation into study.

Evening: Eminent Domain Public Hearing

Jan. 21 **EQC Meeting**

March 6 **Press Release for public hearing**

March 23 **Afternoon: Eminent Domain Subcommittee Meeting**

- Review information received at public hearings
- Review progress on information requested on specific study issues
- Discuss study findings and progress to date
- Review work plan.

Evening: Eminent Domain Public Hearing

March 24 **EQC Meeting**

April 14 **Eminent Domain Subcommittee Meeting**

- Review information received at public hearings
- Discuss study findings and progress to date
- Subcommittee preliminary discussion on findings and conclusions
- Identify specific areas of statutes that need to be changed or modified (if any)

May 4 **ED Subcommittee Meeting**

- Subcommittee decision on findings and conclusions
- Subcommittee discussion and preliminary decision on recommendations
- Subcommittee review of draft report

May 5 **EQC Meeting**

May 6-June 16 **Last dates to revise and distribute draft reports and concepts for proposed legislation for public review and comment, if desired.**

July 14 **Compile and distribute comments on draft documents to subcommittee members**

July 28 **EQC meeting (subcommittee meeting afternoon or evening before)**

- Subcommittee review of public eminent domain handbook
- Final subcommittee decision on any recommendations to the EQC for proposed legislation
- Subcommittee briefs EQC on any potential legislative proposals

Sept. 16-17 **EQC meeting (subcommittee meeting afternoon or evening before)**

- Final decision by the EQC on content of proposed legislation, if any.
- Selection of bill sponsors. Development of strategy.
- Briefing on potential legislative proposals (if any) related to subcommittee topics.

Appendix A: House Joint Resolution 34

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO DESIGNATE AN APPROPRIATE INTERIM COMMITTEE TO STUDY USE OF THE POWER OF EMINENT DOMAIN AND THE EXISTING STATUTES RELATED TO EMINENT DOMAIN AND REQUIRING THAT COMMITTEE TO REPORT ON ITS FINDINGS AND RECOMMENDATIONS
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WHEREAS, eminent domain rights were first granted in 1877 for the development of utilities that served the public interest; and

WHEREAS, use of the power of eminent domain is not well-understood; and

WHEREAS, many landowners believe that their property rights are not protected by Montana's statutes governing eminent domain; and

WHEREAS, there are different rights and responsibilities associated with an easement in gross and an appurtenant easement; and

WHEREAS, options for expanding or limiting rights under easements are not effectively used; and

WHEREAS, the condemnation proceedings undertaken to exercise the power of eminent domain are intended to be a last resort for failed negotiations; and

WHEREAS, there were several proposals to the 56th Legislature to revise laws governing eminent domain.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:
That the Legislative Council be requested to designate an appropriate interim committee to:

(1) study implementation of existing eminent domain statutes, including the following:

(a) the frequency and distribution of condemnation actions in Montana;

(b) the types of interest in real property condemned in Montana; and

(c) the extent to which rights-of-way obtained through the use of eminent domain are being resold or re-leased for other uses than the original purpose for which the land was condemned and the degree to which the original landowner is compensated for those new uses; and

(2) study the adequacy of the current statutes with respect to the following specific aspects of use of the power of eminent domain:

(a) due process;

(b) just compensation;

(c) burden of proof standards;

(d) the abandonment process;

(e) rights of reentry;

(f) reversions;

(g) methods for acquiring property or the use of property, including types of easements and restrictions on easements;

(h) multiple use of easements; and

(3) determine the need for and potential benefit of revising the laws related to eminent domain.

BE IT FURTHER RESOLVED, that the committee is encouraged to:

(1) invite participation by and involvement of interested and knowledgeable persons including property owners, industry representatives, representatives of environmental organizations, and representatives of state and local government entities; and

(2) actively seek participation by citizens from all parts of Montana.

BE IT FURTHER RESOLVED, that the committee assigned to conduct the study shall report to the 57th Legislature, as provided in 5-11-210, on its findings and recommendations, including recommendations for legislation, if appropriate.

Appendix B

Organizations and people contacted for eminent domain issues, suggested improvements, historical ED use information, and company coordination information:

AT&T -- L J Godfrey

Burlington Northern Sante Fe -- Pat Keim

Browning, Kaleczyc, Berry, and Hoven -- Steve Wade

Conoco – John Augustine

MT Electric Cooperatives Assoc. -- Gary Wiens

MT Independent Telecommunications Systems -- Mike Strand

MT Petroleum Assoc. -- Gail Ambercrombie

MT Power Co -- Ed Bartlett

MT Rail Link -- Russ Ritter

MT Telecommunications Assoc. -- Geoff Feiss/Bill Squires

Touch America -- John Fitzpatrick

US West -- Barbara Ranff

Bonneville Power Administration – Gail Kuntz

Department of Natural Resources and Conservation -- Tommy Butler

Department of Transportation -- Tim Reardon

Fish, Wildlife and Parks -- Debbie Dils

MT Assoc. of Counties -- Gordon Morris

MT League of Cities & Towns -- Alec Hansen