

Eminent Domain in Montana

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The *Eminent Domain in Montana* handbook was developed by the legislative Environmental Quality Council (EQC) in an effort to help Montana's citizens better understand our eminent domain laws. The information contained in this handbook is the result of input and review from legislators, industry representatives, and special interest groups. This handbook is not all-inclusive, rather it provides a brief overview of the eminent domain laws in Montana.

DISCLAIMER

This handbook should not be used as a legal reference. This handbook was developed to serve solely as an education tool. When in doubt, always refer to the statutes (Title 70, chapter 30, MCA), case law, or seek legal counsel.

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FOREWORD

Eminent domain has been part of the Montana Constitution and statutes since statehood. As Montana moves forward with technology, the concept remains in place. Most land acquisitions and transactions are negotiated agreements and do not go through the formal eminent domain process. Eminent domain can fundamentally impact private property by allowing the State of Montana and its agents to condemn private property for a public use. It is critically important that Montanans understand the eminent domain process so that they can actively participate in that process.

The 56th Montana Legislature concluded that because legislators and citizens alike were confused or not fully versed on the statutes relating to eminent domain, a careful and deliberate study was warranted. House Joint Resolution No. 34 (HJR 34) was passed. The Legislative Council assigned HJR 34 to the Environmental Quality Council (EQC), an interim, bipartisan, 17-member committee that includes both legislators and public members.

HJR 34 states that the "use of the power of eminent domain is not well-understood". The Subcommittee agreed with this statement, and to resolve the issue, voted to create an easy-to-understand handbook.

As you will note, *Eminent Domain in Montana*, was developed to describe the eminent domain laws in a format that is user-friendly and that answers the most frequently asked questions.

The Premise of Eminent Domain

By virtue of being a government, the **sovereign** has **inherent powers** that are fundamental to the legitimacy and durability of the government. Eminent domain is an inherent right of statehood, similar to the state's police power and the right of the state to tax. The right of eminent domain was given to the 13 original states, and each state thereafter received this same authority. Laws relating to eminent domain do not authorize its existence, but rather place limits on its use and provide for due process in condemnation procedures. Montana's eminent domain laws are, in essence, laws that limit the state's exercise of the power of eminent domain. Without the eminent domain laws, there would be no sideboards or limitations on how the state or its agents could use the power of eminent domain.

Eminent domain is essential to the independent existence of the nation and its sovereign states. It is through eminent domain that the state ensures that it can provide for the needs of its citizens for activities such as transportation, economic development, access to markets, access to services, and many other needs.

EMINENT DOMAIN IN MONTANA

EMINENT DOMAIN IN GENERAL

What is eminent domain?

Eminent domain, as defined in Montana statute is, "**the right of the state to take private property for public use. This right may be exercised in the manner provided in Montana law.**"

Where are the eminent domain laws found?

United States Constitution

Eminent domain laws are located in both the United States Constitution and the Montana Constitution. The U.S. Constitution contains references to eminent domain in the 5th and 14th Amendments. These amendments discuss a person's right to just compensation and **due process of law** when condemnation occurs.

Fifth Amendment

No person shall be held to answer for . . . nor shall private property be taken for public use without **just compensation**.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.** (Emphasis added)

Montana's Constitution and Statutes

Eminent domain is also addressed in the Montana Constitution. Article II,

section 29, of the Montana Constitution states that "**Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into the court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.**" Article II, section 17, of the Montana Constitution further states that "**No person shall be deprived of life, liberty, or property without due process of law.**" (Emphasis added)

Laws relating to the use of eminent domain are located throughout the **Montana Code Annotated**. However, the main body of statutory law regulating the use of eminent domain is Title 70, chapter 30, MCA.

What does all this legal language really mean?

A more comprehensive review of the meaning of these laws is provided later in the handbook. Simply put, these laws state that:

1. The state or its designated agents can take private property through condemnation actions.
2. There are limitations, provided in law, on the exercise of the right of eminent domain.
3. The basic limitations are:
 - a. The property taken must be for a public use as determined by the Legislature.
 - b. Just compensation must be made to the property owner.
 - c. The property owner must be provided due process of law in any eminent domain action.

For what purposes can eminent domain be exercised?

Public Uses

As mentioned earlier, eminent domain may be exercised only if the purpose for which it is being exercised is a public use. Those public uses are identified and listed in statute by the Legislature. As technology and the types of services available continue to be developed, the Legislature may choose to update or change the public uses that are outlined in the law. The power of delineating or listing the public uses lies wholly with the Legislature.

A public use does not have to be a project that directly benefits the entire public or even the landowner whose property is taken through eminent

domain. It may be a project that benefits Montana citizens as a whole through greater economic development or increased access to communications.

Montana's Public Uses In Statute

Section 70-30-102, MCA, outlines the legislatively listed public uses for which eminent domain may be exercised. If you are interested in determining if a certain type of project is a public use, refer to 70-30-102, MCA, which enumerates the specific statutory references under which certain uses, such as highways, are exercised.

The right of eminent domain may be exercised for the following uses:

- all public uses authorized by the government of the United States;
- public buildings and grounds for the use of the state and all other public uses authorized by the Legislature of the state;
- public buildings and grounds for the use of any county, city, town, or school district;
- canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of inhabitants of any county, city, or town;
- projects to raise the banks of streams, remove obstructions from streambanks, and widen, deepen, or straighten stream channels;
- roads, streets, alleys, and all other public uses for the benefit of a county, city, or town or the inhabitants of a county, city, or town;
- wharves, docks, piers, chutes, booms, ferries, bridges, private roads, plank and turnpike roads, and railroads;
- canals, ditches, flumes, aqueducts, and pipes for:
 - supplying mines, mills, and smelters for the reduction of ores;
 - supplying farming neighborhoods with water and drainage;
 - reclaiming lands;
 - floating logs and lumber on streams that are not navigable;
- sites for reservoirs necessary for collecting and storing water. However, reservoir sites must possess a public use demonstrable to the District Court as the highest and best use of the land.

- roads, tunnels, and dumping places for working mines, mills, or smelters for the reduction of ores;
- outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills, and smelters for the reduction of ores;
- an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores and sites for reservoirs necessary for collecting and storing water for the mines, mills, or smelters. However, the reservoir sites must possess a public use demonstrable to the District Court as the highest and best use of the land.
- private roads leading from highways to residences or farms;
- telephone or electrical energy lines;
- telegraph lines;
- sewerage of any:
 - county, city, or town or any subdivision of a county, city, or town, whether incorporated or unincorporated;
 - settlement consisting of not less than 10 families; or
 - public buildings belonging to the state or to any college or university;
- tramway lines;
- logging railways;
- temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways for a time that the court or judge may determine. However, the grounds of state institutions may not be used for this purpose.
- underground reservoirs suitable for storage of natural gas (The laws governing the use of eminent domain to acquire underground reservoirs suitable for the storage of natural gas are very specific. Please refer to Title 70, chapter 30, MCA, for additional information with regard to the use of eminent domain to acquire underground gas storage reservoirs.);
- projects to mine and extract ores, metals, or minerals owned by the **condemnor** located beneath or upon the surface of property where the

title to the surface vests in others. However, the use of the surface of property for strip mining or open-pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use, and eminent domain may not be exercised for this purpose.

- projects to restore and reclaim lands that were strip mined or underground mined for coal and not reclaimed in accordance with state law and to abate or control adverse affects of strip or underground mining on those lands.

What property may be taken through eminent domain actions?

The property that may be taken under the eminent domain laws includes:

- private property belonging to any person;
- land that belongs to this state or to any county, city, or town and that is not appropriated to some public use;
- property appropriated to a public use, but the property may not be taken unless for a more necessary public use than that to which it has already been appropriated;
- franchises for roads, bridges, and ferries and all other franchises; but the franchises may not be taken unless for free highways, free bridges, railroads, or another more necessary public use;
- a **right-of-way** for any public use defined by the Legislature and any structures and improvements on the right-of way. The land held and used in connection with the right-of-way must be subject to being connected with, crossed, or intersected by any other right-of-way improvements or structures on the right-of-way. The improvements or structures must also be subject to a limited use in common with the owner of the improvements or structures when necessary. However, the uses, crossings, intersections, and connections must be made in the manner that is most compatible with the greatest public benefit and least private harm.
- all classes of private property not described above may be taken for public use when law authorizes the **taking**.

What estates and rights in land may be taken?

Below is a classification of the **estates** and **rights in land** that may be taken for public use. The condemnor must prove to the court that the estate or right in land that is being taken is appropriate. An easement is presumed to be a sufficient interest in property for a project for a public use unless the parties agree that a greater interest should be taken or the condemnor shows by a preponderance of the evidence that a greater interest is necessary. The provision that an easement is the preferred interest does not apply to the Department of Transportation in those instances where the Department in acquiring property for present or future highway uses. It falls within the powers of the court to limit the estate or right in land that is taken. This section outlines specific uses for which the Legislature has found it necessary to take a specific type of interest.

Estates and Rights That Are Necessary, up to and Including Fee Simple

Estates and rights that are necessary, up to and including **fee simple**, can be taken when the taking is for:

- public buildings or grounds;
- permanent buildings;
- an outlet or flow or a place for the deposit of debris or tailings of a mine;
- the mining and extracting of ores, metals, or minerals when the ores, metals, or minerals are owned by the condemnor but are located beneath or upon the surface of property where the title to the surface vests in others.

These are uses that the Legislature has determined that fee simple is usually the appropriate interest. This does not preclude a condemnor from taking fee simple for other public uses if the condemnor can prove to the court that fee simple interest is necessary for the project.

Estate or Rights Necessary for a Reservoir or Dam

When property is taken for a reservoir or dam, the condemnor may take the estate or rights in the surface property that are necessary for a reservoir or dam and for the permanent flooding that results from the reservoir or dam, up to the edge of the maximum pool of the reservoir. This would include

fee simple if necessary.

The Legislature has recognized that for the purpose of a reservoir or dam, the property taken must include the property that is affected by the dam or reservoir; i.e., property that will be flooded.

Easement, Leasehold, or Other Interest

An **easement**, **leasehold**, or other interest may be taken in property for as long as the interest is necessary for the purpose described in the condemnation **complaint**.

In this section, the Legislature recognizes that in some instances the condemnation is only for a certain period of time. For those public uses that require the use of the property only for a certain amount of time, an easement, leasehold, or other interest may be acquired.

Right of Entry for Purposes of the Project

The condemnor has the right to enter upon and occupy land and has the right to take from the land any earth, gravel, stones, trees, and timber that may be necessary for some public use. Whether or not the right of reentry is defined in the contract or condemnation order, the condemnor has the right to enter the property to perform maintenance on the installed project.

How is the survey and location of property to be taken conducted?
--

In all cases in which land is required for public use, the state or its agents in charge of the public use may **survey** and locate the land to be used. The location or route of the public use must be chosen in the manner that will be most compatible with the **greatest public good and the least private injury**. The location is subject to provisions in law regarding powers of the court. Section 70-30-206(1)(a), MCA, states that in a condemnation **proceeding**, the court may regulate and determine the place and manner of making the connections and crossings and enjoying the common uses outlined in statute and may regulate occupying canyons, passes, and defiles for railroad purposes, as permitted and regulated by the laws of this state or of the United States.

Prior to or at the time that the condemnee rejects the final written offer, the condemnee may provide the condemnor with the condemnee's claim of appropriate measures that the condemnee considers necessary to: (1) minimize damages to the property directly affected by the project, and (2) minimize damages incurred to any remaining parcel of property.

When is the survey conducted?

The state or its agents in charge of the public use are required to provide written notice to the landowner and persons in possession of the land 30 days prior to entry upon the land. After that 30-day period, the state or its agents in charge of the public use may enter upon the land and make examination, surveys, and maps of the land.

Upon written request of the state or its agents, the owner shall provide the names and addresses of all persons who are in possession of the owner's land within 14 days from receipt of the written notice. The state or its agents shall within 14 days from receipt of that information furnish written notice to the listed persons.

The entry onto the land does not constitute a **cause of action** in favor of the owners of the land except for injuries resulting from **negligence** or **intentional acts**.

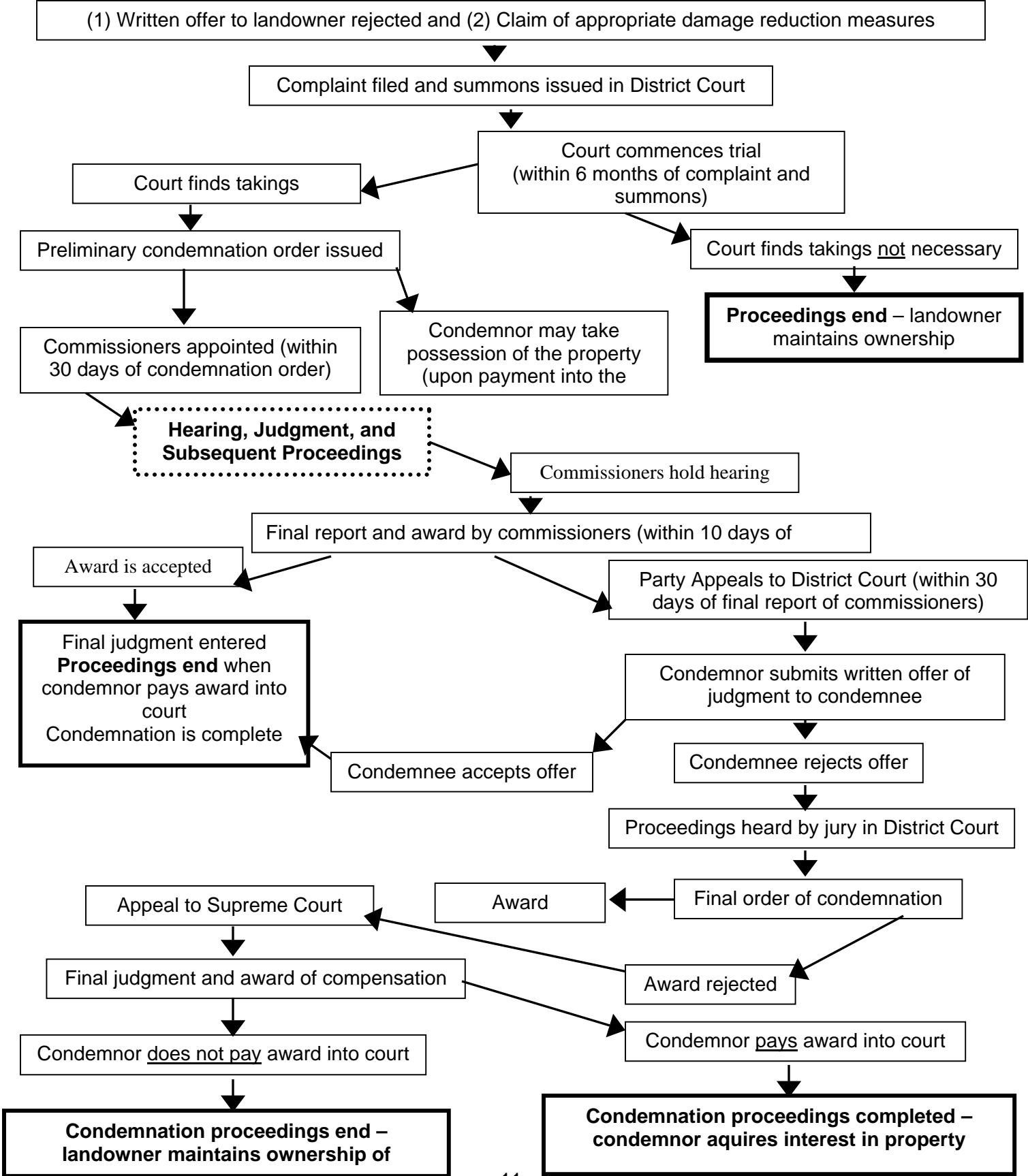
What facts must be found before condemnation can occur?

Before property can be taken, the condemnor shall show by a **preponderance of the evidence** that the public interest requires the taking based on the following findings:

- the use to which the property is to be applied is a use authorized by law;
- the taking is necessary to the use;
- if already being used for a public use, that the public use for which the property is proposed to be used is a more necessary public use;
- an effort to obtain the property interest sought to be taken was made by submission of a written offer and the offer was rejected.

THE EMINENT DOMAIN PROCESS

Preliminary Procedure



The Preliminary Process

What is a preliminary condemnation proceeding?

A preliminary condemnation proceeding takes place after a preliminary condemnation complaint is filed and prior to issuance of the **preliminary condemnation order**. The preliminary proceeding is when the court, sitting without a **jury**, reviews the proof that both sides present in regard to the need of the taking. If the court finds and concludes from the **evidence** presented that the public interest requires the taking of an **interest in real property** and that the condemnor has met the burden of proof established in section 70-30-111, MCA, the court shall enter a preliminary condemnation order. The preliminary condemnation order must provide that the condemnation of the interest in **real property** may proceed in accordance with the provisions outlined in the eminent domain laws. There are other powers that the court may exercise that will be discussed later.

Where are the proceedings for eminent domain cases heard by the court?

All eminent domain proceedings must be brought in the District Court of the county in which the property or some part of the property to be taken is situated. Additional appeals will be held in the appropriate court.

How are the court proceedings started?

A proceeding is started by filing a complaint and issuing a summons. A **summons** served under Title 70, chapter 30, MCA, must contain a notice to the **condemnee** to file and serve an answer. Within 6 months from the date that the summons is served, unless the court shortens or lengthens that time for good cause, the court, sitting without a jury, shall commence a **trial** on the issue of whether a preliminary condemnation order should be issued.

What is a preliminary condemnation order?

The court issues a preliminary condemnation order when the preliminary condemnation hearing finds that the taking is required for the public interest. The preliminary condemnation order states that the condemnation of an interest in real property may proceed in accordance with the provisions of the eminent domain laws, Title 70, chapter 30, MCA.

What powers does a preliminary condemnation order give?

The preliminary condemnation order provides at least two different powers.

The preliminary condemnation order starts the process of determining just compensation. Within 30 days of entry of a preliminary condemnation order, the condemnee shall file a statement of the condemnee's claim of just compensation. If within 20 days of service of the condemnee's claim the condemnor fails to accept the claim, the court will appoint condemnation commissioners.

Once the condemnor has applied for the preliminary condemnation order, the condemnor may take possession of the property. In order to take possession of the property, the condemnor must make application to the court and the court must still retain jurisdiction (i.e., there is no pending appeal and on preliminary issues the case is still in the same court). The court may make an order allowing the condemnor to take possession of the property and use the property while the case is in court and until the final conclusion of the proceedings and litigation. The order may also state that all actions and proceedings against the condemnor on account of the possession are stopped until the conclusion of the proceedings. However before the condemnor can take possession of the property, the condemnor must pay into court the amount of compensation claimed by the condemnee in the condemnee's statement of claim of just compensation.

What information must the condemnor provide in the complaint to meet the burden of proof required to receive a preliminary condemnation order?

The complaint for condemnation must contain the following information:

- the name of the corporation, association, commission, or person in charge of the public use for which the property is sought to be taken, who is the plaintiff;
- the names of all owners, purchasers under contracts for deed, mortgagees, and lienholders of record and any other claimants of record of the property sought to be taken, if known, or a statement that they are unknown, who are the defendants;

- a statement of the right of the plaintiff (condemnor) to take the property for public use;
- **statements with regard to each of the facts necessary to be found under section 70-30-111, MCA:**
 - the use to which the property is to be applied is a use authorized by law;**
 - the taking is necessary to the use;**
 - if already being used for a public use, that the public use for which the property is proposed to be used is a more necessary public use; and**
 - an effort to obtain the property interest sought to be taken was made by submission of a written offer and the offer was rejected.**
- a description of each interest (fee simple title, easement, etc.) in real property sought to be taken and whether the interest includes the whole piece of property or only a part of the entire **parcel** or tract. It must also include a statement that the interest sought is the minimum necessary interest. All parcels lying in the county and required for the same public use may be included in the same or separate court proceedings, at the option of the condemnor. The court may consolidate or separate the proceedings to suit the convenience of the parties.
- a statement of the condemnor's claim of appropriate payment for damages to the property proposed to be taken as well as to any remaining parcel of property.
- if a right-of-way is sought, in addition to the items listed above, the complaint must show the location, general route, and termini. The complaint must also be accompanied with a map of the route, so far as the route is involved in the action or proceeding.

What are the powers of the court with regard to the preliminary condemnation order?

In a condemnation proceeding, the court may:

- regulate and determine the place and manner of:

making the connections and crossings and enjoying the legislatively defined common uses; and

occupying canyons, passes, and defiles for railroad purposes, as permitted and regulated by the laws of this state or of the United States;

- limit the interest in real property sought to be taken if in the opinion of the court the interest sought is not necessary. The court is limited by statutory language in 70-30-104, MCA, which states that an easement is the preferred interest to be taken unless the parties agree otherwise or the condemnor shows by a preponderance of the evidence that a greater interest is necessary. The Department of Transportation is excluded from the easement restriction and the proof required to obtain an interest greater than an easement for highway purposes.

If the court finds and concludes from the evidence presented that (1) the public interest requires the taking of an interest in real property and (2) that the condemnor has met the burden of proof required by law, then the court shall enter a preliminary condemnation order. The preliminary condemnation order shall provide that the condemnation of the interest in real property may proceed in accordance with the provisions of Montana's eminent domain laws, Title 70, chapter 30, MCA.

If the property to be taken is for use as an underground natural gas storage reservoir, there are specific requirements outlined in section 70-30-206, MCA.

After a condemnation complaint is filed and before the issuance of the preliminary condemnation order, all parties shall proceed as quickly as possible, but without prejudicing any party's position, with all aspects of the preliminary condemnation proceeding, including discovery and trial. The court is required to give the proceedings priority consideration. The preliminary condemnation proceeding is tried by the court sitting without a jury.

Hearing and Judgment

Condemnation Commissioners

Who Are the Condemnation Commissioners?

The condemnation commission is a three-member panel that determines the amount of just compensation. Within 30 days of entering a preliminary condemnation order, the condemnee files a statement of the condemnee's claim of just compensation (the amount of compensation the condemnee feels is appropriate). The condemnor has 20 days to file an answer to the condemnee's claim of just compensation. If the condemnor fails to accept the claim within this 20-day time limit, the court will then appoint condemnation commissioners. The commission hearing may be waived by written consent of both parties, in which case the proceeding must be conducted in the District Court as if the case had been appealed from an **award** by the commissioners.

How Are the Condemnation Commissioners Selected?

The court will appoint three qualified disinterested condemnation commissioners, unless appointment of the commissioners has been waived as outlined above. The condemnor nominates one of the commissioners. The condemnee nominates one of the commissioners. The two commissioners previously nominated nominate the third commissioner. This third commissioner serves as the presiding officer of the commission. However, if the two commissioners fail to make the choice at the time of their appointment, then the presiding judge makes the nomination of the third commissioner.

At the time of the meeting and nominations, each nominating party or the judge must file with the court an affidavit of the person nominated. This affidavit must state the following:

- that the person has not formed an unqualified opinion or belief as to the compensation to be awarded in the proceeding or as to the fairness or unfairness of the condemnor's offer for the lands and improvements of the condemnee;
- that the person has no enmity against or bias in favor of any party and has not discussed, communicated, overheard, or read any discussion or communication from any party relating to values of the lands in question

or the compensation offered, demanded, or to be awarded;

- that if selected as a condemnation commissioner, the person is willing to serve and will try the issues of compensation and render a decision according to the evidence and in compliance with the instructions of the court; and
- that the person will not discuss the case with anyone except the other commissioners until a decision has been filed with the court.

Are the Condemnation Commissioners Required to Have Certain Qualifications?

In order to be nominated as a commissioner, each commissioner:

- must have sufficient knowledge of the English language;
- must be a resident of a county within the judicial district in which the action is pending;
- may not be related within the sixth degree of consanguinity to any party (i.e., great, great grandnephew or niece; first cousin twice removed); and
- may not stand in the relation of guardian and ward, master and servant, debtor and creditor, principal and agent, or partner or surety to any party.

<p>In a condemnation hearing, what are the roles of the judge and the condemnation commissioners?</p>
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The condemnation commissioners meet at the time and place stated in the order appointing them. The meeting must take place within 10 days of the order of appointment. The commissioners shall examine the lands sought to be taken. At a time appointed by the judge and within the 10-day period, the commissioners shall hear the allegations and evidence of all persons interested in each parcel of land.

The hearing must be attended by and presided over by the presiding judge, who shall make all necessary rulings upon procedure and the admissibility of evidence.

At the conclusion of the hearing, the judge will instruct the commissioners as to the law applicable to their deliberations. The judge will also instruct them that their duty is to determine the appropriate findings, based solely

upon their examination of lands, the evidence produced at the hearing or hearings, and the instructions of the court.

How is compensation assessed?

The Role of the Condemnation Commissioners

- The commissioners will determine (1) the **current fair market value** of the real property sought to be taken, (2) the current fair market value of all improvements pertaining to the real property, and (3) the current fair market value of each separate estate and interest in the real property and improvements. If the real property consists of different parcels, the current fair market value of each parcel and each estate or interest in the real property must be assessed separately.
- If the property sought to be taken constitutes only a part of a larger parcel, the commissioners will determine the depreciation in current fair market value that will accrue to the remaining parcel. This depreciation can be a result of the condemnation and the construction of the improvements.
- The commissioners shall also determine how much the remaining parcel and each estate or interest in the remaining parcel will be benefited, if at all, by the construction of the improvements proposed by the condemnor. This will determine if the condemnee receives compensation for the remaining parcel in addition to what is received for the land actually taken. If the project decreases the value of the remaining parcel, after the benefit of the project is considered, the condemnee is entitled to compensation for this loss in value in addition to the compensation received for the property that is actually taken.

If the benefit of the project is equal to the amount initially assessed for the remaining parcel, the compensation to the condemnee is limited to the value of the portion taken.

If the benefit of the project is less than the amount assessed for the remaining parcel, the benefit to the condemnee must be deducted from the amount assessed for the remaining parcel, and the resulting number is the amount allowed in addition to the current fair market value.

This provision is included in law to provide compensation to the condemnee if the installation of the project leaves the condemnee with a piece of property that does not have an economically feasible use or a

remnant that is decreased in value because of the project.

- If the property sought to be taken is for a railroad, the commissioners shall also determine the cost of good and sufficient fences along the line of the railroad and the cost of cattle guards where fences may cross the line of the railroad.
- The commissioners also determine the appropriate payment for damages to the property taken, as well as to any remaining parcel of property that may be adversely impacted by the project. This determination will assist the court in making a final determination regarding the final condemnation order which is further explained in 70-30-309, MCA.
- When the piece of property that is sought to be taken has two or more estates or divided interests, the condemnor is entitled to have the amount of the award for the entire property determined first. This determination is conducted between the condemnor and all condemnees claiming any interest in the property (as if all condemnees were one person). After the whole amount of compensation is determined, the respective rights of each of the condemnees in some amount of the whole compensation is determined. Once those who are entitled to some amount of compensation are determined, then the right to a certain percentage of the total compensation must be determined by the commissioners, under supervision and instruction of the court, and the award must be apportioned accordingly.

Assessing Compensation, Date and Measure, and Interest Earned

For the purpose of assessing compensation, the right to compensation is considered to have accrued at the date of the service of the summons. The property's current fair market value as of the date of the summons is the measure of compensation for all property to be actually taken and the basis of depreciation in the current fair market value of property not actually taken but injuriously affected (the remaining parcel).

If an order is made allowing the condemnor to take possession, as provided in section 70-30-311, MCA, the full amount of compensation finally awarded must draw interest at the rate of 10% a year from the date of the service of the summons to the earlier of the following dates:

- the date on which the right to appeal to the Montana Supreme Court expires, or if an appeal is filed, the date of final decision by the Supreme Court; or

- the date on which the condemnee withdraws from the court the full amount finally awarded.

If the condemnee withdraws from the court part of the amount finally awarded, interest on that part ends on the date it is withdrawn. Interest on the remainder of the amount finally awarded continues to the earlier of the dates outlined above, until the full amount is withdrawn from the court.

None of the amount finally awarded draws interest after the date on which the right to appeal to the Montana Supreme Court expires.

Improvements upon the property after the date of the service of summons may not be included in the assessment of compensation or depreciation in current fair market value and may not be used as the basis of computing compensation or depreciation.

What is the final report and award of the commissioners?

The final report and award of the commissioners is the report that the commissioners compile that states the amount of compensation that will be awarded to the condemnee.

The report of the condemnation commissioners must be made on forms that are provided for their use by the court. The report must be filed within 10 days after the completion of the hearing or within any additional time allowed by the judge upon a clear showing of necessity. The report must be filed with the clerk of court. The clerk shall notify the parties that the report has been filed. The notice, together with a copy of the report, must be served upon all the parties in the same manner as a summons.

The report of the commissioners must include a statement of the number of days or portions of days worked by the commissioners in performance of their duties.

What if at least two commissioners can't agree?

A concurrence of two commissioners is necessary before a final report or award can be made with regard to any parcel of property or interest in a parcel of property. If at least two of the commissioners are unable to agree as to the amount of any award, the commissioners shall report the fact to the judge or court within 10 days after the completion of the hearing--the amount of time allotted for the commissioners to file a report. After the court is informed that at least two of the commissioners can not come to an

agreement, the court shall impanel and appoint new commissioners. The new commissioners shall proceed as provided in law to determine any award upon which the previous commissioners failed to agree.

Optional Steps

Can the assessment of the commissioners be appealed?

Any party may appeal from any assessment made by the condemnation commissioners in the court where the report of the commissioners is filed. The appeal must be taken within 30 days after the parties are served notice of the filing of the award. The appealing party shall serve notice of the appeal upon the opposing party or the opposing party's attorney and shall file the notice of appeal in the District Court in which the action is pending. The appeal must be tried upon the same notice and in the same manner as other civil actions. Unless a jury is waived by the consent of all parties to the appeal, a jury must hear the appeal. When the jury hears the appeal, it must reassess the amount that the condemnation commissioners determined was just compensation for the taking of the condemnee's property.

Upon any verdict or assessment by the commissioners becoming final, judgment must be entered declaring that upon payment of the amount of the verdict or assessment, together with the interests and costs allowed by law, if any, the condemnor has the right to construct and maintain the public use project and to take the property described in the verdict or assessment for the use and purposes for which the property has been taken. The rights granted in the verdict or assessment remain in the condemnor and the condemnor's heirs, successors, or assigns forever.

If the party appealing from the award of the commissioners does not succeed in changing to the appellant's advantage the amount finally awarded in the proceeding, the appellant may not recover the costs of the appeal. But all the costs of the appellee in the appeal must be taxed against and recovered from the appellant. However, upon the trial of the appeal, the appellant may contest the right of any party to any of the property mentioned and set forth or involved in the appeal that was located after the preliminary survey of any highway or railroad, seeking to condemn a right-of-way pursuant to the provisions of Title 70, chapter 30, MCA, if the condemnation proceedings are begun within 1 year after the preliminary survey.

Is the condemnor allowed to make a final offer upon appeal?

Within 30 days after an appeal is perfected from the condemnation commissioner's award or report, or not more than 60 days after the waiver of appointment of commissioners, the condemnor shall submit to the condemnee a written final offer of judgment for the property sought to be taken. The offer must also include compensation for the accrued necessary expenses of the condemnee. If at any time prior to 10 days before trial of the appeal, the condemnee serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service of the acceptance, and judgment must be entered. An offer not accepted is considered withdrawn and evidence of the offer is not admissible at the trial except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

Litigation expenses

Litigation begins when the complaint is filed and the summons is issued.

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.

What Are the Necessary Expenses of Litigation?

Necessary expenses of litigation, as authorized by section 70-30-305, MCA, means reasonable and necessary attorney fees, expert witness fees, exhibit costs, and court costs.

Reasonable and necessary attorney fees are the customary hourly rates for an attorney's services in the county in which the trial is held. Reasonable and necessary attorney fees must be computed on an hourly basis and may not be computed on the basis of any contingent fee contract.

Reasonable and necessary expert witness fees may not exceed the customary rate for the services of a witness of that expertise in the county in which the trial is held.

EMINENT DOMAIN IN MONTANA

COMPENSATION

When and how is the payment of compensation made?

Payment may be made to the condemnee, or the money may be deposited in court for the condemnee and may be distributed pursuant to the assessment or judgment. However, at the option of the condemnee, payments may also be made:

- on an annual basis, using the installment contract method; or
- by means of a land exchange between the condemnee and condemnor, if other land is reasonably available and the condemnor consents. A land exchange may occur if the land to be provided by the condemnor in the exchange is of equal or more value than the land being condemned.

If the money is not paid or deposited, the condemnee may file suit against the condemnor in court as in civil cases. If the money cannot be obtained through these court proceedings, the court, upon a showing to that effect, shall set aside and annul the entire proceedings and restore possession of the property to the condemnee if the condemnor has taken possession.

When a taking is for the purpose of a railroad, the condemnation commissioners must assess the amount of compensation required for the building of adequate fences and cattle guards. In a proceeding for condemnation for a railroad, the condemnor shall, within 30 days after **final judgment**, pay the sum of money assessed for building the fences and cattle guards. The condemnor may at the time of or before the payment elect to build any required fences and cattle guards as outlined in section 70-30-301, MCA.

When is a bond necessary?

If a railroad is the public use for which property was taken, a condemnor who elects to build the required fences and cattle guards shall execute to the condemnee a **bond** with sureties to be approved by the court, in double the assessed cost of the fences and cattle guards. The bond must be conditioned upon building the fences and cattle guards within 8 months from the time the railroad is built on the land taken. If the bond is given, the

condemnor is not required to pay the cost of the fences and cattle guards through compensation. In an action on the bond, the condemnee may recover reasonable attorney fees.

What is current fair market value?

Current fair market value is the price that would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

- The highest and best reasonably available use and its value for such use, provided current use may not be presumed to be the highest and best use;
- The machinery, equipment, and fixtures forming part of the real estate taken; and
- Any other relevant factors as to which evidence is offered.

EMINENT DOMAIN IN MONTANA

FINAL CONDEMNATION

What is a final order of condemnation?

The **final order of condemnation** is issued by the court and serves the purpose of transferring the subject property into the name of the condemnor.

When payments have been made and the bond, if appropriate, has been given, the court shall make a final order of condemnation. The order must describe the property condemned and the purposes of the condemnation, and any appropriate payment for damages to the property that is actually taken as well as to any remaining parcel of property that may be adversely affected by the taking. The condemnor may take property only for the public use specified in the condemnation order. The condemnation order can also spell out rights and duties concerning **mitigation measures**, access, etc.

A copy of the order must be filed in the office of the county clerk and recorder, and upon filing, the property described in the order vests in the condemnor for the purposes specified in the order.

If the award of the commissioners is appealed, the court makes the final order of condemnation after the jury decision on the award.

Can the final order of condemnation be appealed?

Any party interested in the proceedings can appeal to the Montana Supreme Court from any finding or judgment made or rendered under Title 70, chapter 30, MCA, as in other cases.

Does an appeal to the Supreme Court prohibit further proceedings?

An appeal to the Supreme Court does not prohibit any further proceedings under Title 70, chapter 30, MCA, except that the District Court, on motion by a party to the proceedings or the judge, may stop the proceedings for a

period of time and under conditions that the court considers proper. However, depending upon the issue appealed, the condemnor would be at risk for proceeding on a project.

When can the condemnor take possession of the condemned property?

The condemnor can make application to the court, at any time after the filing of the preliminary condemnation order and while the court retains jurisdiction, to take possession of the subject property. The court may make an order that the condemnor is authorized:

- if already in possession of the property of the condemnee that is sought to be taken, to continue in possession; or
- if not in possession, to take possession of the property and use the property during the pendency and until the final conclusion of the proceedings and litigation and all actions and proceedings against the condemnee on account of the possession are halted until that time.

However before the condemnor can take possession of the property, the condemnor must pay into court the amount of compensation claimed by the condemnee in the condemnee's statement of claim of just compensation.

If the condemnee fails to file a statement of claim of just compensation within the 30 days allowed by law, the condemnor may obtain an order for possession. The possession is subject to the condition that a condemnor's payment into court must be made within 10 days of receipt of the condemnee's statement of claim.

When an appeal is taken by the condemnee, the court may require the condemnor, before continuing or taking possession, in addition to paying into court the amount assessed, to give a bond or **undertaking**. The bond or undertaking must have sufficient sureties approved by the court in an amount that the court may direct. The bond must be conditioned to pay the condemnee any additional damages and costs above the amount assessed, which is finally determined as the amount that the condemnee is entitled to for the taking of the property. The bond or undertaking must also be sufficient to compensate for all damages that the condemnee may sustain if for any cause the property is not finally taken for public use.

The amount assessed by the commissioners or by the jury on appeal is considered, unless reassessed or changed in further proceedings, as just compensation for the property taken.

The condemnor may pay into court either the amount claimed in the answer or the amount assessed, or the condemnor may give security in the form of a bond or undertaking. The condemnor may not be prevented from appealing from the assessment. If the condemnor chooses to appeal the assessment, the condemnor may do so as if money had not been deposited or security had not been given.

If money is deposited, the condemnee may withdraw money from the amount deposited so long as the condemnor is in possession of the property and there is no dispute as to the ownership of the property. The amount that may be withdrawn is subject to special requirements that are discussed below. A withdrawal or request for withdrawal does not affect the condemnee's right to appeal from the amount of compensation. However, if the amount of compensation is reduced below the amount withdrawn, the condemnee must repay the difference plus interest. If the commissioners' award is appealed to a jury, the jury may award any amount that it considers appropriate fair market value.

The court may not order the delivery to any condemnee of more than 75% of the money deposited on the condemnee's account except upon posting of bond by the condemnee equal to the amount in excess of 75%. The bond must include sureties to be approved by the court to repay to the condemnor amounts withdrawn that are in excess of the condemnee's final award in the proceedings.

Is there a limit on property owner liability?

A condemnee or a condemnee's successor in interest is not liable for damages that result from the construction, use, or maintenance of a project on property in which they have an interest, unless the negligence or intentional conduct of the condemnee or the condemnee's successor in interest is a cause of the damages.

If a condemnee or condemnee's successor in interest is found to be liable because their intentional conduct or negligence was a cause of the damages, the condemnee or condemnee's successor in interest is only liable for that portion of the damages which they caused.

The project owner or operator is liable for costs and attorney fees if the condemnee or condemnee's successor in interest is joined in an action for damages that are alleged to result from the construction, use, or maintenance of a project on property in which the condemnee or the

condemnee's successor in interest has an interest. The project owner or operator is not responsible for costs and attorney fees if the condemnee or condemnee's successor is found liable for damages as result of the condemnee's negligence or intentional conduct.

Who is responsible for the control of weeds on condemned property?

The condemnor, upon taking possession of the land, is responsible for the control and destruction of noxious weeds on the land until natural grasses have taken over the property and noxious weeds have ceased to exist.

How are the taxes calculated for property taken?

The condemnor must be assessed the condemnor's prorated share of taxes for the land being taken as of the date of possession or summons, whichever occurs first. The condemnor must be assessed for all taxes accruing after the date of possession or summons, whichever occurs first.

EMINENT DOMAIN IN MONTANA

ABANDONMENT OF USE

When a use is abandoned on property taken through condemnation, how is the property disposed of?

When an interest other than a fee simple interest in property, which has been acquired for a public purpose by right of eminent domain, is abandoned or the purpose for which it was acquired is terminated, the property reverts to the original owner or the original owner's **successor in interest**.

Except as provided above, whenever a person who has acquired a real property interest for a public use, whether by right of eminent domain or otherwise, abandons the public use and places the property interest for sale, the seller may sell the interest to the highest bidder at public auction.

If the seller decides to sell an interest in real property as set forth above, the seller shall publish notice of the public sale in a newspaper published in the county in which the real property is located once a week for 4 successive weeks. The sale must be held in the county where the real property is located. The notice of sale must contain the information required by law.

What rights does the original landowner or successor in interest have when a use is abandoned?

Outlined below are the guidelines for disposing of property acquired through eminent domain to the original owner or the owner's successor in interest if there is a successor in interest.

When an interest other than a fee simple interest in property is abandoned or the purpose for which it was acquired is terminated, the property reverts to the original owner or the original owner's successor in interest.

Except as provided above, the owner from whom the real property interest was originally acquired, or the owner's successor in interest must be notified of the sale by the seller by certified mail of the sale. The original owner or successor in interest has a 30-day option from the date of a sale

provided for in section 70-30-321, MCA, to purchase the interest by offering an amount of money equal to the highest bid received for the interest at the sale. If more than one person claims an equal entitlement, the option may not be exercised.

If bids are not received by the seller and the optionholder indicates in writing to the seller that the optionholder wishes to exercise the option, the seller shall have the real property interest appraised and sell the interest at that price to the optionholder.

EMINENT DOMAIN IN MONTANA

CONCLUSION

As stated earlier, eminent domain is essential to the independent existence of the nation and its sovereign states. It is through eminent domain that the state ensures that it can provide for the needs of its citizens, such as transportation corridors and economic development. Montana's eminent domain laws have evolved since the first laws relating to eminent domain in Montana were passed in 1877. It has taken more than 120 years for the laws to become what they are today. As the needs of Montana's citizens have changed, the Legislature has made deliberate efforts to address these needs and structure the eminent domain laws accordingly. Because of this increased exposure and concern, the 56th Legislature of the State of Montana established the study committee that developed this handbook.

This handbook is merely an overview of Montana's eminent domain laws. There are volumes of court cases that have established precedent in eminent domain cases and that provide a better understanding of the court's interpretation of the eminent domain statutes. A majority of land acquisitions for projects that could potentially use the power of eminent domain are handled through private negotiations. It has been the Eminent Domain Subcommittee's feeling that it is not the place of the state or the Legislature to provide limits to or impede these private negotiations. The Subcommittee felt that it was very important that landowners understand, as stated in its draft recommendations, that "the landowner has the responsibility and legal recourse to negotiate a settlement and mitigation measures".

Some issues that have been discussed with regard to eminent domain do not relate directly to eminent domain, but rather to potential impacts of projects that can use the power of eminent domain to acquire property. One example is mitigation measures. Mitigation measures are not addressed in the eminent domain statutes themselves. It is recommended that landowners who are concerned about mitigation measures work with the regulatory entity that grants permits and any mitigation measures associated with those permits to ensure that their concerns are adequately addressed. The landowner may also negotiate to include mitigation measures related to various phases of the project in the contract or settlement agreement.

It was the intention of the Eminent Domain Subcommittee of the EQC that this handbook be a stepping stone to better understanding of Montana's eminent domain laws.

EMINENT DOMAIN IN MONTANA

GLOSSARY

This handbook and these glossary terms should not be used as a legal reference. This handbook was developed to serve solely as an educational tool. When in doubt, always refer to the statutes (Title 70, chapter 30, MCA) or case law or seek legal counsel.

Glossary definitions obtained from the following sources:

Black's Law Dictionary, Special Deluxe, Fifth Edition, West Publishing Company, 1979.

Dictionary of Selected Legal Terms, Margaret C. Jasper, Oceana Publications, Inc., 1996.

Law Dictionary for Laymen, John Cotton Howell, Citizens Law Library, Inc., 1980

Award -- To grant, concede, or adjudge to. To give or assign by judicial determination after careful weighing of evidence. Thus, a jury awards damages.

Bond -- In law, any written and sealed obligation, especially one requiring payment of a stipulated amount of money on or before a given date. A sum of money paid as bail or surety.

Cause of action -- The factual basis for bringing a lawsuit. The basis upon which a right to judicial relief is claimed. It is the right a party has to institute a judicial proceeding. In common terms a cause of action is frequently referred to as an action, suit, cause, proceeding, or lawsuit.

Complaint -- The first pleading on the part of the plaintiff in a civil action. Its purpose is to give the defendant information of all material facts on which the plaintiff relies to support his demand or case.

Condemnee -- An entity whose property has been taken or is being taken through the use of eminent domain.

Condemnor -- An entity who has been granted the right to use the power of eminent domain to take private property for public use.

Current fair market value -- The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. The price in cash, or its equivalent, that the property would have brought at the time of taking, considering its highest and most profitable use, if at that time it was offered for sale in the open market, in competition with other similar properties at or near the location of the property taken, with a reasonable time allowed to find a purchaser.

Due process of law -- Law in its regular course of administration through courts of law.

Easement -- The right to use or control the use of another's land. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property in the owner. An example of an easement would be a right-of-way.

Eminent domain -- The power of the state or its designated agents to take private property for a public use.

Estate(s) -- The degree, quantity, nature, and extent of interest that a person has in real and personal property.

Evidence -- Any type of proof or probative matter legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to each party's contention.

Fee simple -- An absolute or fee simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during the owner's life, and descending to the owner's heirs and legal representatives upon the owner's death. This estate is unlimited as to duration, disposition, and descendibility.

Final judgment -- A judgment that finally disposes of rights of parties, either involving the entire controversy or some definite and separate branch of the controversy. Judgment is considered "final" only if it determines the rights of the parties and disposes of all the issues involved so that no future action by the court will be necessary in order to settle and determine the controversy.

Final order of condemnation -- The order that terminates the litigation between the parties and merits of the case and leaves nothing to be done but to enforce what has been determined by the court.

Inherent powers -- An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another. Powers originating from the nature of government.

Intentional acts -- Something done purposely as opposed to negligently.

Interest in real property -- The most general term that can be employed to denote a right, claim, title, or legal share in property.

Jury -- A group of individuals summoned to decide the facts in issue in a lawsuit. A certain number of men and women selected according to law and sworn to inquire of certain matters of fact and declare the truth upon evidence presented to them.

Just compensation -- Compensation that is fair to both the owner and the public when property is taken for public use through condemnation. Consideration is taken of such criteria as the cost of reproducing the property, its market value, and the resulting damage to the remaining property of the owner.

Leasehold -- An estate in property held under a lease.

Mitigation measures -- The actions or steps that must be taken for the alleviation, reduction, abatement, or diminution of an impact.

Montana Code Annotated -- The volume of books containing the official version of Montana's statutes.

Negligence -- The failure to exercise the degree of care that a reasonable person would exercise given the same circumstances.

Parcel -- A piece of real property the description of which is formally set forth in a conveyance, including the boundaries, in order to allow its easy identification.

Preliminary condemnation order -- An order issued by the court sitting without a jury after reviewing the condemnation complaint and hearing evidence in the preliminary hearing allowing condemnation to proceed based upon a finding that the public interest requires the taking of the

specific property.

Preponderance of the evidence -- Evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it. Evidence that as a whole shows that the fact sought to be proved is more probable than not.

Proceeding -- In a general sense, the form and manner of conducting business before a court or judicial officer.

Real property -- Land and generally whatever is erected or growing upon or affixed to the land. Property that passes to the owner's heir on the death of the owner.

Right of entry -- The right of taking or resuming possession of land by entering on it in a peaceable manner. With regard to eminent domain, right of entry refers to the right of the condemnor to enter upon the land to conduct maintenance, project improvements, etc.

Right-of-way -- As used with reference to eminent domain, the right to pass over another's land. It is only an easement, and the grantee acquires only the right to a reasonable and usual enjoyment of the right-of-way with the owner of the property still retaining the rights and benefits of ownership consistent with the easement. When it is the result of a contract, its extent and the mode of use is regulated by the contract.

Rights in land -- Rights associated with the type of interest held.

Sovereign -- A person, body, or state in which independent and supreme authority is vested.

Successor in interest -- One who follows another in ownership or control of property. In order to be a "successor in interest", a party must continue to retain the same rights as the original owner without change in ownership.

Summons -- A written instrument used to commence a civil action or special proceeding. It is a means of acquiring jurisdiction over a party.

Survey -- To survey land is to ascertain corners, boundaries, and divisions, with distances and directions, and not necessarily to compute areas included within defined boundaries. The term can also mean to appraise as to value or condition.

Takings -- The transfer of possession, dominion, or control without just compensation.

Trial -- The judicial procedure whereby disputes are determined based on the presentation of issues of law and fact. Issues of fact are decided by the trier of fact, either the judge or jury, and issues of law are decided by the judge.

Undertaking -- A promise, engagement, or stipulation.

EMINENT DOMAIN IN MONTANA

INFORMATION RESOURCES

In an effort to make information on eminent domain more available, a list of information resources is provided below. Please refer to the resources outlined below if you have questions on eminent domain in general or on a specific project.

Written Resources

MONTANA CODE ANNOTATED
Title 70, chapter 30

NICHOLS ON EMINENT DOMAIN, Revised 3rd Ed., J. Sackman, 1999.

Agency Resources

STATE AGENCIES

Eminent domain laws

Environmental Quality Council --- (406) 444-3742

Issues regarding school trust lands:

Department of Natural Resources and Conservation --- (406) 444-2074

Issues regarding state highway or road projects:

Montana Department of Transportation --- (406) 444-6090

Issues regarding compliance and enforcement on private lands:

Montana Department of Environmental Quality --- (406) 444-2544

FEDERAL AGENCIES

United States Department of Interior, Bureau of Land Management
Montana State Office (Billings) --- (406) 896-5000

United States Department of Agriculture, Forest Service
Regional Office (Missoula) --- (406) 329-3511