

Public Uses and Eminent Domain

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Introduction

The eminent domain debate in Montana for the last two years has focused on building new electric transmission lines. The implications of the debate, however, pit property rights, economic development, renewable resource development, and even the three branches of government against one another. A combination of legislation and litigation in response has raised significant questions about Montana's eminent domain laws, their reliance on a long-standing list of "public uses" and just who can condemn private property in Montana.

The Environmental Quality Council (EQC) adopted a 2011-2012 work plan that included eminent domain. Members indicated a policy discussion about what is a public use was needed, along with a review of how other states are grappling with new concerns about eminent domain authority. The Law and Justice Interim Committee also is reviewing eminent domain. That committee's discussion focuses on Title 70, chapter 30, of the Montana Code Annotated, which covers the legal procedures for condemnation, including the process for the condemnation, how negotiations and mediation are conducted, and appeals. The committee also may review just compensation and the award of attorney fees. To-date, the Law and Justice Interim Committee has not begun its eminent domain work.

The Montana Legislature has wrestled with eminent domain for years. In 1999, the 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 EQC and requested the Law, Justice, and Indian Affairs Interim Committee and its staff assist the EQC. A subcommittee formed. The study was partly in response to five bills that were introduced during the 1999 Legislative session that would have made significant changes to the eminent domain statutes. None of those bills were passed or approved. The subcommittee tasked itself with studying the implementation of eminent domain laws, the adequacy of the statutes as they related to the rights of property owners, and whether Montana's eminent domain laws needed revision. The result was three volumes of information, including four bill drafts to revise eminent domain laws. The bill drafts sought to limit landowner liability for condemned property, clarify existing laws, clarify that an easement is the preferred interest to be taken in a condemnation proceeding, and implement damage reduction or mitigation measures.

A discussion of "Who has the authority?" was a very small part of the 1999-2000 study. A chart similar to that shown in **Table 1** was produced as a result of HJR 34. It was provided to show a "a list of those entities that are specifically designated in the Montana Code Annotated as being able to exercise the power of eminent domain". The report does not include a discussion of whether the list is exhaustive. The subcommittee in its findings determined that the current law was adequate and requested no changes related to entities authorized to exercise the right of eminent domain. The subcommittee brought forward, and the 2001 Legislature approved, a bill

that modernized eminent domain language in Montana but didn't change "public uses" or entities granted the power of condemnation.¹

HJR 34 also stated 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. "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 information provided in this report expands on the "Eminent Domain in Montana" handbook and the volumes of information provided by the HJR 34 study provided to the 57th Legislature. It also offers a review of public uses and eminent domain laws in Montana in light of recent court actions.

Background

Eminent domain has been part of the Montana Constitution and statutes since statehood. Most land acquisitions and transactions are negotiated agreements and do not go through the formal eminent domain process. Corporations constructing natural gas pipelines and governmental entities constructing highways have most likely exercised the power of eminent domain more frequently than other entities in Montana. The Montana Department of Transportation, for example, reports that they settle about 83 percent of land acquisition cases without filing in District Court. Between 2006 and 2010, 16 cases were filed out of about 4,400 acquisitions of all types. The department also reported five inverse condemnations filed in that time period where landowners felt they had been damaged by Department of Transportation actions.²

Eminent domain, as outlined in Montana Code Annotated, however, grants the State of Montana and its agents the right to condemn private property for a public use. There are 45 public uses enumerated in 70-30-102, MCA. Entities are granted the authority of eminent domain throughout the code, and current court cases raise the question of whether a specific "agent" must be explicitly granted the power of eminent domain for a public use. Currently, agents of the state are undefined in Title 70, chapter 30, part 1.

By virtue of being a government, the sovereign has inherent powers fundamental to the legitimacy and durability of the government. Eminent domain is considered 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 instead limit its use and provide for due process in condemnation procedures. Montana's eminent domain laws are, in essence, laws that limit the exercise of the power of eminent domain. Without the eminent

¹ "Public Benefits and Private Rights: Countervailing Principles of Eminent Domain," House Joint Resolution No. 34, Report to the 57th Legislature, Volume 1, Environmental Quality Council Eminent Domain Subcommittee, pages 76 and 109.

² Email correspondence with Ed Beaudette, DOT, April 2011.

domain laws, there would be no sideboards or limitations on how the state or its agents exercise the power of eminent domain.³

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.

Eminent domain is addressed in Article II, section 29, of the Montana Constitution. It 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."

The main body of statutory law regulating the use of eminent domain is Title 70, chapter 30, MCA.

Simply put, these laws state that:

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

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.

The EQC's review of public uses and eminent domain is the result of recent court actions involving merchant transmission lines. A merchant transmission line is an electric line that is constructed and operated by a third party that is not a regulated utility in Montana.

In 2010 District Judge Laurie McKinnon found that a merchant transmission line could not invoke any legislative grant of eminent domain authority and did not have the authority to condemn land. The district court held that 70-30-102, MCA, which provides for "public uses,"

³ "Eminent Domain in Montana", Produced by Krista Lee Evans, Legislative Environmental Policy Office, May 2001.

does not, itself, delegate eminent domain authority to a private entity. The court held that there must be a separate statutory delegation -- or that a specific type of corporation, individual, or entity would need a specific grant of power. In late summer 2011 the case was dismissed because the landowner and the developer of the transmission line reached an agreement.

The Montana Legislature, however, had already responded to the 2010 decision by passing and approving House Bill No. 198. HB 198 sought to clarify that regulated utilities have the power of eminent domain for public uses to provide service to the customers of its regulated service. It also clarified that people with a Major Facility Siting Act certificate, issued by the Department of Environmental Quality, have the power of eminent domain for a public use to construct a facility in accordance with that certificate.

With that interpretation of the law and HB 198, private entities explicitly granted the power of eminent domain in Montana include: rural electric and telephone cooperatives, common carrier pipelines that accept Public Service Commission authority, private nonprofit water associations, railroad corporations, open-pit mining corporations – excluding coal corporations, cemetery corporations, ferry owners (largely through local governments), natural gas public utilities, public utilities serving customers of regulated services, and entities with a Major Facility Siting Act certificate. The information provided in **Table 1** attempts to outline public uses and specific grants of power. There are several examples of public uses being enumerated in state law, while no entity is granted the authority to condemn for that use. In the reverse, there are examples in current law where entities are granted the right to condemn, but there is no corresponding public use enumerated.

Foreign Corporations

At the heart of the discussion over who can exercise the power of eminent domain in Montana has been whether "foreign corporations" have that right, or should have that right. In 1907, the Montana Supreme Court ruled that a foreign corporation could not exercise the power of eminent domain (*Helena Power Transmission Co. v. Spratt*, 35 Mont.). Within two weeks of the decision, the Montana Legislature approved House Bill No. 249, "An Act to authorize and empower foreign corporations to exercise the right of eminent domain in Montana." The language enacted by the Legislature said, "Any corporation, organized under the laws of any state of the United States, or the laws of the United States, and authorized to engage in business in this state, and engaged in business in this state, may acquire real property as provided in the Code of Civil Procedure, Title VII, Part III, to the same extent, for the same purposes, and in the same manner, as corporations organized under the laws of this state."

In 1908 the court held that the Legislature's action (Session Laws 1907, Chapter 23, page 38), empowering foreign corporations to exercise the right of eminent domain was not in violation of Article V, section 25 of the Constitution. The Court also held that granting foreign corporations the power to condemn lands for certain purposes was not open to constitutional objections that under the law foreign corporations were granted greater rights or privileges than were accorded to domestic corporations.

There has been a variety of changes to the language contained in HB 249 over the last 100 years, but the intent remained largely intact. The 1967 Legislature repealed the language noted above, which in 1947 had been codified as 15-1201, RCM. (Chapter 300, Section 143, L. 1967). In 1967 the Montana Legislature adopted the “Montana Business Corporation Act” and thoroughly revised laws relating to business corporations. In the 1967 legislation, corporations were granted general powers to “purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property.” The law also established that foreign corporations that acquired a certificate of authority from the Secretary of State shared the same general powers as domestic corporations in Montana.

In 1991 the Montana Legislature again revised Montana business corporation law when it enacted House Bill No. 552 (Chapter 368, Section 23, L. 1991), which was a uniform corporation act. The “general powers” section now shows that the general powers of a corporation are to “purchase, receive, lease, or otherwise acquire and to own, hold, improve, use and otherwise deal with real or personal property”. That is the current law as codified in 35-1-115, MCA. The word “take” is no longer in law. As was the case in 1967, foreign corporations that acquire a certificate of authority from the Secretary of State share the same general powers as domestic corporations in Montana, in accordance with 35-1-1030, MCA.

Committee meeting minutes from 1991 show little discussion of changes to corporate law as proposed in HB 552. The bill's sponsor states that "this act is not to form a new law, but rather to revise the Montana Business Corporation Act . . . It is consistent with existing practice." It was based on the revised model Business Corporation Act prepared by the American Bar Association, which was adopted in at least 35 states, according to testimony given on the bill. The omission of the word "take" raises questions about legislative intent, and whether the word was inadvertently removed from the law or whether the Legislature intended to limit a corporations ability to exercise the power of eminent domain.

That question is a piece of the ongoing litigation surrounding Montana's eminent domain laws.

An inquiry to find out if more recently foreign corporations exercised the power of eminent domain in Montana provided few answers. Since 1985, Burlington Northern Santa Fe Railway has not condemned private property, according to an attorney with the company. Pegasus Gold, when it was operating in Montana, also did not condemn land, but did use the power of eminent domain in negotiating with a landowner near Montana Tunnels, according to a former company representative. The case was settled before going to court, and the landowner’s cabin was relocated.

Corporations constructing natural gas pipelines and governmental entities constructing highways have most likely exercised the power of eminent domain more frequently than other entities in Montana. It is likely that some of those natural gas pipeline corporations were foreign corporations. For a pipeline to have common carrier status in Montana, it must file with the Public Service Commission (PSC). Dating back to 1996, the PSC is only aware of four pipelines that have opted for common carrier status.

The National Gas Act grants the right of eminent domain for natural gas pipelines when a certificate of public convenience and necessity is issued by the Federal Energy Regulatory Commission (FERC). When the FERC finds that a proposed project is in the public convenience and necessity, the pipeline company has the right to acquire the property for that project by eminent domain, if the pipeline cannot acquire the necessary land through a negotiated easement, or where the landowner and the pipeline cannot agree on the compensation to be paid for the land. This use of federal eminent domain authority has likely been used by domestic and foreign corporations constructing pipelines in Montana. Two of nine centrally assessed pipelines in Montana reported that they had exercised the power of eminent domain in the past -- one was a foreign corporation and one was domestic. Both used FERC authority.

House Bill No. 198

As noted above in an effort to address the questions raised by the 2010 district court decision, the Montana Legislature passed and approved HB 198. Since that bill was passed and approved, the Montana Supreme Court remanded the 2010 decision back to the district court. The transmission line developer and the landowner, however, reached an agreement and the case was dismissed. The issue of public uses and whether or not an entity must expressly be granted the authority to condemn in Montana remains murky at best.

On May 20, 2011, 11 plaintiffs in Pondera and Teton counties filed a lawsuit in Teton County District Court contending that HB 198 is unconstitutional. The group seeking to void the law argues the law is unconstitutional. The Montana Attorney General's Office is defending that constitutional challenge. Sixth District Judge William Nels Swandal of Livingston is the judge in the HB 198 case, and in a related case, MATL's countersuit for condemnation of the 11 plaintiffs in the HB 198 case. A closer look at the legal challenge to HB 198 has been provided by EQC staff attorney Helen Thigpen. It is included in your packet.

MATL has filed a motion to dismiss the HB 198 validity case. And, adding to the litigation, a brief has been filed to dismiss MATL's countersuits (the condemnations filed by MATL against the 11 landowners.) The judge has indicated he will make no decision on the pending condemnations until the constitutional questions surrounding HB 198 are addressed by the court.

The Concerned Citizens of Montana, a group of landowners and others, also organized to gather signatures to block HB 198 from taking effect. The group did not gather enough signatures to qualify the referendum for the 2012 ballot, leaving the current fate of HB 198 to the courts.

HB 198 is centered around whether public utilities and entities granted Major Facility Siting Act certificates have the right to condemn property for projects. If HB 198 is upheld or overturned by the courts, it may still remain unclear whether an entity must expressly be granted the authority to condemn in Montana, as that is not the question raised in the pending HB 198 court case.

Other States

The use of eminent domain and compensation to landowners for transmission lines is a hot topic in multiple states. The debate largely centers around utilities -- transmission lines and pipelines.



Wyoming

Wyoming has delegated the power of eminent domain to specific public and private entities, but the taking must be for a public use.⁴ "For example, a well-known application of the taking of private property for a private use in Wyoming is that landowners can get private rights-of-way to their landlocked properties across other landowners under the

Wyoming Private Road Statute. This is because the Legislature has determined that such a taking -- even though for a clearly private use -- is ultimately in the greater public interest."⁵ Wyoming law outlines a "public use" and establishes that eminent domain can only be exercised if the public interest and necessity is authorized by the Wyoming Constitution, the project is most compatible with the greatest public good and the least private injury, and the property sought is necessary for a project. Findings by the Wyoming Public Service Commission or other state or federal regulator also can establish public use.

A brief look at those private entities with condemnation authority includes:

- A railroad company organized under the laws of this state or the laws of the United States;
- Corporations authorized to do business in this state for the purpose of constructing, maintaining, and operating a public utility; and
- Any person, association, company or corporation authorized to do business in this state for the location, construction, maintenance, and use of reservoirs, drains, flumes, ditches including return flow and wastewater ditches, underground water pipelines, pumping stations and other necessary appurtenances, canals, electric power transmission lines and distribution systems, railroad trackage, sidings, spur tracks, tramways, roads or mine truck haul roads required in the course of their business for agricultural, mining, exploration drilling and production of oil and gas, milling, electric power transmission and distribution, domestic, municipal, or sanitary purposes, or for the transportation of coal from any coal mine or railroad line or for the transportation of oil and gas from any well.⁶

⁴ 1-26-501 through 1-26-817, Wyoming Laws

⁵ "Wind Energy Development and Eminent Domain in Wyoming: Who Has the 'Power'?" Abigail M. Jones, associate attorney with Budd-Falen Law Offices, LLC in Cheyenne, Wyoming, June 6, 2011, page 1. Article adapted from speech given by Ms. Jones at the Carbon County Higher Education's Third Annual Celebration of Wind, May 21, 2011 in Rawlins, Wyo.

⁶ 1-26-801, Wyoming Statutes

In Wyoming there is not eminent domain authority for the "siting, construction, operation, or maintenance of wind turbines or wind farms."⁷ Similar to Montana, a wind developer has to negotiate with landowners and get a lease or easement for the development. In Wyoming it is also "clear that there is eminent domain authority for the siting, construction, operation, and maintenance of the transmission lines associated with wind energy development in Wyoming."⁸ Public utilities and private companies have the ability to condemn property for transmission lines. Private entities in Wyoming that are "authorized to do business in the state" have the ability to condemn land for transmission lines. The Wyoming Legislature also has granted public utilities the right to exercise the power of eminent domain. All public utilities must have a "certificate of public necessity and convenience" from the Wyoming Public Service Commission.

Wyoming, however, continues to confront the issue of landowner compensation and merchant transmission. This has manifested itself in discussions of "wind collector systems" -- transmission infrastructure that is not considered a public use. In general terms collector lines are lines that connect generation to intrastate and interstate transmission lines. The statutory definition is; "the electrical transmission infrastructure, including conductors, towers, substations, switchgear, and other components necessary to deliver power from a commercial wind facility to, but not including, electric substations or interconnection facilities associated with existing or proposed transmission lines that serve load or export energy from Wyoming."⁹ In 2010, then-Gov. Dave Freudenthal proposed, and state lawmakers approved, a one-year moratorium on the use of eminent domain for wind power collector lines. The moratorium was to last until June 30, 2011. Along with the moratorium, Wyoming assigned a Wind Energy Task Force, first created in 2009, to consider reforming the state's eminent domain laws related to transmission and wind energy development among several other specific assignments. The task force embarked on a listening tour around the state. The task force collected public comment and conducted a legal analysis of the issues that needed to be reviewed.¹⁰ They examined the definition of "wind collector systems", the appropriate use of eminent domain for collector

⁷ Wind Energy Development and Eminent Domain in Wyoming: Who Has the 'Power'?" Abigail M. Jones, associate attorney with Budd-Falen Law Offices, LLC in Cheyenne, Wyoming, June 6, 2011, page 2. Article adapted from speech given by Ms. Jones at the Carbon County Higher Education's Third Annual Celebration of Wind, May 21, 2011 in Rawlins, Wyo.

⁸ Ibid, page 3.

⁹ 1-26-815(d), Wyoming Statutes

¹⁰ http://trib.com/news/state-and-regional/article_17b8a5d8-15d0-52f3-a6b9-5f38ba493ad5.html

systems, proper compensation for landowners who host collector systems, and severance of the wind estate.¹¹

During the initial moratorium, lawmakers tried to clearly define collector systems and develop appropriate conditions to allow for the exercise of eminent domain for these types of systems. The Task Force developed two options:

1. Grant eminent domain authority for collector systems to public utilities but prohibit private entities from exercising such power.¹²
2. Grant eminent domain authority to private entities, but only if developers obtain land-use agreements from a certain percentage of the total acreage of land needed for the project. The Task Force recommended option 1 to the Wyoming Legislature.

The bill, House Bill No. 25, proposed prohibiting private entities from exercising the power of eminent domain for collector systems. It was defeated. A second bill was introduced based on option 2. Based on that bill, House Bill No. 70, developers needed to reach agreement with landowners representative of 85% of the total land needed for the project. That bill also died. House Bill No. 230 was then introduced. It extended the moratorium for collector systems by private entities until June 30, 2013. It was passed and approved.¹³



Idaho

Public uses are enumerated in Idaho and are very similar to those uses included in Montana law. Uses include, "Electric distribution and transmission lines for the delivery, furnishing, distribution, and transmission of electric current for power, lighting, heating or other purposes; and structures, facilities and equipment for the production, generation, and manufacture of electric current for power, lighting, heating or other purposes."¹⁴ The law goes on to address electric transmission lines with a capacity greater than 230 kV. If the line is constructed over private property devoted to agriculture, a public meeting is required and the developer must accept public comment on the lines location. Public entities that can exercise the power of eminent domain are not outlined in law.

The 2011 Idaho Legislature also grappled with eminent domain. House Bill No. 268 was introduced specifically in response to the development of potential transmission lines. It would have required that entities that were not public utilities or rural cooperatives could not condemn for transmission lines unless the developer showed that the project "materially serves the

¹¹ "2010 Wind Energy Task Force: Report to the Legislature and Governor."
<http://legisweb.state.wy.us/lsoweb/Wind%20Energy/Documents/WETF%20Final%20Report.pdf>

¹² Ibid, page 14.

¹³ <http://legisweb.state.wy.us/2011/status/status.pdf>

¹⁴ Idaho Statutes, 7-701(11)

interests of the citizens of Idaho." The bill did not pass. House Bills 168 and 189 would have done much the same. The second bill would have amended the requirements for exercising the power of eminent domain to include proof that the "taking directly serves the interests of the residents of Idaho." Those bills also failed.¹⁵

The legislation was in response to merchant transmission lines including projects proposed by TransCanada and Great Basin Transmission's Overland Intertie project. The projects are all aimed at reaching energy markets in Arizona, California, and Nevada.

Kansas and Oklahoma



Corporations have the power of eminent domain in Kansas, however, those corporations must first be granted a "certificate of convenience" from the Kansas Corporation Commission.¹⁶

In Oklahoma any person, firm or corporation organized under the laws of the state, or authorized to do business in the state, to furnish light, heat or power by electricity or gas, or any other person, association or firm engaged in furnishing lights, heat or power by electricity or gas can exercise the right of eminent domain in the same manner as provided for railroad corporations by laws of this state.¹⁷ A variety of other entities are granted the power of eminent domain ranging from any private person, firm or corporation for private ways needed for agriculture, mining and sanitary purposes to coal pipelines licensed by the Oklahoma Corporation Commission.



Landowners from Oklahoma and Kansas formed the Southern Great Plains Property Rights Coalition, a group demanding fair compensation as energy development, particularly wind development, increases. The group does not believe utility companies and transmission developers should be able to use eminent domain to seize land if they can't reach agreement with property owners.¹⁸

The Oklahoma Legislature responded by passing and approving Senate Bill No. 124 in 2011.¹⁹ The legislation prohibits the power of eminent domain to be used for the development of wind farms or wind turbines on private property.

¹⁵ <http://legislature.idaho.gov/legislation/2011/minidata.htm>

¹⁶ Kansas Statutes, 26-501 through 26-516.

¹⁷ Oklahoma Statutes, 27-7.

¹⁸ http://www.longacreinc.com/11May14wind_OK.html.

¹⁹ <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%20124>



Mississippi

In November 2011, Mississippi voters approved a constitutional amendment, Initiative 31, limiting governments' ability to seize property for economic development. The initiative effort was in response to a 2005 United States Supreme Court ruling (*Kelo* discussed later in this report) that ruled that a city could condemn property for economic development. Mississippi was one of seven states that hadn't reformed eminent domain since the 2005 decision.

The voter-led initiative also was the third attempt at reform in Mississippi. Legislative attempts to reform initially failed, and in 2009 Mississippi Governor Haley Barbour vetoed an eminent domain reform bill that passed the Legislature. A lawsuit was filed to keep Initiative 31 off the ballot, but in a September 2011 ruling the Mississippi Supreme Court allowed the initiative to remain on the ballot, noting it could be challenged if enacted.²⁰

The Mississippi Farm Bureau was the driving force behind the initiative. As approved, the measure prohibits state and local government from taking private property by eminent domain and then conveying it to other persons or businesses for a period of 10 years. However, the measure allows for an exemption for levee facilities, roads, bridges, ports, airports, common carriers, drainage facilities, public utilities, and other entities used in the generation, transmission, storage or distribution of telephone, telecommunication, gas carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons or other utility products.²¹



Other examples

Other states have passed laws that ease eminent-domain rules to help electric suppliers build projects, with conditions. In 2010 Nebraska approved Legislative Bill 1048, stating, "The exercise of eminent domain to provide needed transmission lines and related facilities for a certified renewable export facility shall be considered a public use. Nothing in this section shall be construed to grant the power of eminent domain to a private entity."²²

Nebraska Gov. Dave Heineman in November 2011 called the Legislature into special session to address growing concerns over the proposed TransCanada's Keystone XL pipeline. Lawmakers discussed the eminent domain authority now granted to pipelines in Nebraska. One proposal

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<http://www.clarionledger.com/article/20111109/NEWS04/111090361/Eminent-domain-limited-ease>

²¹<http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Eminent%20Domain-PW%20Revised.pdf>

²² <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB1048.pdf>.

would have required a pipeline company to have a state or federal permit before contacting landowners and giving notice that property could be taken using eminent domain. That bill, however, did not advance. Two pieces of legislation were approved: one rerouting TransCanada's Keystone XL pipeline around the Sand Hills and the other giving siting authority for all future pipelines to the Public Service Commission.



In 2009 the Utah Legislature approved the Siting of High Voltage Power Line Act. The act outlines how a public utility obtains a land use permit from a local government authority for a transmission line. The utility must file an application at least 90 days before submitting a land use application. Notice also must be given to the landowners within the proposed corridor at least 60 days before the application is filed, and a Website must be set up to provide information on the project -- this is in addition to notice being made through the local newspaper. The utility also must conduct public workshops in the area to discuss the project.²³ In 2010 Utah also enacted House Bill 324, Public Lands Litigation and House Bill 143, Eminent Domain Authority. The laws allow the state to take, using eminent domain, federal property. The Legislature also committed \$3 million to cover legal fees to defend the laws. The laws are expected to be the subject of legal review, however, they could have major implications in terms of eminent domain overall for public uses.

Federal Efforts and Interstate Compacts

Congress in the Energy Policy Act of 2005 granted states the right to create interstate compacts to administer the siting of interstate transmission lines in three or more contiguous states. A collection of state officials, regulators, and transmission developers are now working through the Council of State Governments' National Center for Interstate Compacts to discuss a Transmission Line Siting Compact to share with interested states. Interstate compacts function, legally, as a contract between the states. There are more than 200 interstate compacts.²⁴ The stakeholders are discussing the use of compacts to help facilitate transmission line siting. The advisory panel has met twice to discuss efficient and effective interstate transmission line siting. A transmission compact would be national in scope but would be used regionally. It could outline a siting process, including a common application process, pre-determined timelines, and public hearings and involvement. If determined to be appropriate, the stakeholders will make recommendations to guide the development of a "model" compact.

Stakeholders in the compact discussion first identified a series of challenges related to transmission line siting. They identified: lack of regional planning structure, differences in siting requirements between states, "NIMBY" challenges, lack of consensus among stakeholder groups, aligning regional needs and local interests, and state-federal cooperation. The eminent domain discussion falls in part under the "lack of consensus" discussion. The stakeholders

²³ Utah Code Annotated, 54-18-101 and 54-18-301(2) through (5).

²⁴ <http://www.csg.org/NCIC/about.aspx>

identify two contentious decisions. The first being whether the transmission line is needed or necessary and secondly whether the benefits of the proposed line outweigh the costs. "This often reflects the conflict between those seeking local control of their energy production/consumption patterns and those perceiving a need to bring lower cost energy or renewable energy from generation sources many miles distant from the load center."²⁵

The interstate compact stakeholders identify a series of policies that they believe can help with effective collaboration in overcoming challenges. They recommend that utilities proposing to build transmission lines use an interstate compact to expand the scope of a "needs" finding, considering benefits external to the state and on a national scale. The stakeholders have also agreed a compact would be triggered only when a transmission line is proposed. Only those states that are both members of the compact and impacted by the proposed line would be affected by the individual proposals.

However, the stakeholders clearly label eminent domain as a significant hurdle in any sort of compact development. "Having powers of eminent domain is a necessity to facilitate the siting of transmission lines. However, the addition of eminent domain powers by a regional transmission authority would be problematic for many state legislators. Leaving the authority to designate a transmission company as a public utility by each state's PUC (Public Utility Commission) or other appropriate agency is recommended."²⁶

The compact stakeholders continue to work on potential model legislation. Lawmakers from around the country are involved. Those representing the West include: North Dakota, Washington, Wyoming, and Utah.

In addition to interstate compacts, the federal government has attempted to assert some control of transmission line siting -- an action reserved to most states. The Energy Policy Act of 2005, in addition to allowing for interstate compacts, granted the FERC "backstop authority" to site transmission lines in certain National Interest Electric Transmission Corridors that were designated by the Department of Energy. To simplify, if states took too long to site transmission lines or denied requests in an area where infrastructure improvements were needed and served a national interest, FERC could step in and site the line. The idea of national energy corridors was contested by states and the Ninth Circuit Court of Appeals ruled that the FERC could not decide a project should be fast-tracked and sited unless states had been appropriately consulted. The outcome of that required consultation remains.

Congress also is contemplating eminent domain questions. The 112th Congress was presented with House Resolution 1433 (HR 1433) The Private Property Rights Protection Act. The

²⁵ <http://www.csg.org/programs/policyprograms/NCIC/documents/CSGTransmissionCompactWhitepaperDraft11-08-10.pdf>.

²⁶ Ibid.

proposal would prohibit all states and municipalities from using eminent domain for private development if they have received federal economic development funds. The federal government also would be prohibited from using eminent domain for economic development. The legislation is largely in response to *Kelo v. City of New London*, a 2005 U.S. Supreme Court decision. The Court in 2005 found that the general benefits a community enjoyed from economic development qualified a redevelopment plan as a public use under the Fifth Amendment. The case arose out of a condemnation in New London, Connecticut. Private property was condemned as part of a comprehensive redevelopment plan.

In late 2011, House Resolution 438 was introduced expressing: (1) state and local governments should only exercise eminent domain for the public good; (2) state and local governments must always justly compensate affected individuals in accordance with the Fifth Amendment; (3) eminent domain should never be used to advantage one private party over another; (4) no state or local government should construe *Kelo v. City of New London* as justification to abuse the power of eminent domain; and (5) Congress reserves the right to address, through legislation, any abuses eminent domain by state and local governments in light of the 2005 Supreme Court decision.²⁷

Conclusions and Decisions

The information provided in this report comes with a caveat. To grossly oversimplify, the question of "**Is Montana's current eminent domain law broken?**" must be addressed by the EQC before an adequate solution can be developed. It's also a question that largely is now in the hands of the judicial branch. It may be difficult for the EQC and the Montana Legislature to move forward with a fix, when the courts have not yet provided clear direction concerning flaws to the existing law. This report attempts to provide a broad overview of the eminent domain debate in other states and at the federal level.

Eminent domain law and related studies in Montana largely focus on condemnation procedures. EQC staff will be seeking direction from council members on the underlying policy issue of "public use" and who can exercise eminent domain for a public use:

- ✓ **What additional research is needed in relation to public uses?**
- ✓ **Should the EQC revisit public uses and public entities in Montana law?**
Should an "agent" be defined generally? Should an "agent" be defined in each specific circumstance?
- ✓ **Should the EQC wait for HB 198 to make its way through the court system before further amending Montana law?**

²⁷ <http://thomas.loc.gov/cgi-bin/thomas>

Table 1

Public Uses and Condemnation Authority in Montana			
Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
State Entities			
Montana	70-1-205	The state may acquire or authorize others to acquire title to property, real or personal for a public use.	Yes. 70-30-102
FWP with consent of Commission	23-1-102 and 87-1-209	Lands or structures for the preservation of historical or archaeological sites that are threatened with destruction or alteration.	Yes. 70-30-102(17)
Board of Veterans' Affairs	10-2-604	Property for a veterans' cemetery or place of burial of the dead.	Yes. 70-30-102(16)
Department of Public Health and Human Services	53-2-201	Real or personal property that is necessary to carry out its public assistance functions.	Yes. 70-30-102(18)
State Highway Authorities	60-5-104 and 60-4-111	Private or public property and property rights for controlled-access highways or controlled-access facilities and service roads. The property rights may include rights of access, air, view, and light.	Yes. 70-30-102(7). The facilities must benefit a county, city or town.
Department of Transportation	60-4-103	Lands or other property or interests in the lands or property that cannot be acquired at a price or cost that it considers reasonable.	Yes. 70-30-102(19)
Department of Transportation	75-15-123	Existing outdoor advertising and property rights pertaining to advertising that were lawfully in existence on June 24, 1971 and that are nonconforming.	Yes. 70-30-102(23)
Department of Transportation	75-15-223	Land or interest that may be necessary to provide adequate screening for junkyards, motor vehicle graveyards, motor vehicle wrecking facilities, garbage dumps, and sanitary landfills.	Yes. 70-30-102(24)
Department of Transportation	67-2-301	Real or personal property for the purpose of establishing and constructing airports, restricted landing areas, and other air navigation facilities.	Yes. 70-30-102(11)
Land Board	76-12-108	Interests in land for the purpose of designating natural areas, in specific instances authorized by the Legislature.	Yes. 70-30-102(26)
Department of Environmental Quality	75-10-720	Property to mitigate a release or threatened release of a hazardous or deleterious substance that has occurred and may present an imminent and substantial endangerment to the public health, safety, or welfare.	Yes. 70-30-102(22)
Department of Environmental Quality	82-4-239	Property damaged by strip-or-underground-mining of coal that was not adequately reclaimed in accordance with Title 82, chapter 4, part 2.	Yes. 70-30-102(45)
Board of Environmental Review	82-4-371	Property damaged by metal mining that was not adequately reclaimed in accordance with Title 82, chapter 4, part 3.	No, except as provided in 70-30-102(31)(c)
Board of Environmental Review	82-4-445	Property damaged by opencut mining that was not adequately reclaimed in accordance with Title 82, chapter 4, part 4.	No, except as provided in 70-30-102(31)(c)

Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Department of Natural Resources and Conservation	85-1-204	Property necessary to appropriate and conserve water for the use of the people. The authority of the department extends and applies to rights to the natural flow of the water of this state.	Yes. 70-30-102(27) and 70-30-102(32)
Department of Natural Resources and Conservation	85-1-209	Land, rights, water rights, easements, franchises, and other property considered necessary for the construction, operation, and maintenance of works. "Works" includes all property and rights, easements, and franchises relating to property and considered necessary or convenient for the operation of the works and all water rights acquired or exercised by the department in connection with those works.	Yes. 70-30-102(28)
Local Government Entities			
Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Municipalities with general powers	7-1-4124	Any interest in property for a public use.	Yes. 70-30-102
Cities or town councils	7-5-4106	Private property for any public use.	Yes. 70-30-102
Municipalities using revenue bonds	7-7-4404	Any undertaking and land or rights in land or water rights in connection with the undertaking. "Undertaking" includes water and sewer systems, including but not limited to supply and distribution systems, reservoirs, dams, and sewage treatment and disposal works; public airport construction and public airport building; convention facilities; public recreation facilities; streets and roads; public parking facilities, solid waste management systems, or other revenue-producing facilities and services authorized for cities and towns; and public transportation systems, including passenger buses, trolleys, passenger trains and lines, light rail trains and lines, and the facilities associated with those systems.	Yes. 70-30-102(3), 70-30-102(4), 70-30-102(7), and 70-30-102(39). Public transportation systems are not specifically addressed, however, "roads, streets, and alleys" for public benefit are covered. "Revenue-producing facilities and services" may be limited to other specific enumerated uses.
Municipalities	7-15-4258 and 7-15-4259	Property related to urban renewal.	Yes. 70-30-102(12)
Cities or towns	7-13-4404	A water supply desired by the city or town owned by a person or corporation, if the city or town cannot reach agreement with a person or persons, corporation, or corporations that has been granted the right to establish and maintain the water supply systems or valuable water rights.	Yes. 70-30-102(6)
Cities or towns	7-13-4405	Water rights and property to make an adequate water supply available.	Yes. 70-30-102(4) and 70-30-102(6)
Cities or town council	7-14-4501	Lots or lands for use as parking areas for motor vehicles. An existing parking facility after a public hearing.	Yes. 70-30-102(10)
Cities or town councils	7-14-4801	Lots or lands for landing or parking aircraft, within or outside of the corporate limits of the municipality.	Yes. 70-30-102(11)

Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Cities or towns	7-15-4204	Property for urban renewal projects, only if the property is determined to be a blighted area and is not acquired for the purpose of increasing government tax revenue.	Yes. 70-30-102(12)
Cities or town councils	7-16-4106	Lands for athletic fields and civic stadiums within or outside of the corporate limits of the municipality.	Yes. 70-30-102(15)
County, city, or town highway authorities	7-14-101	Private or public property and property rights for controlled-access highways or controlled-access facilities and service roads. The property rights may include rights of access, air, view, and light.	Yes. 70-30-102(7)
Counties, cities, and towns	67-10-102, 67-10-103, 67-10-201, and 67-10-205.	Property for the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection, and policing of airports and air navigation facilities, including the acquisition or elimination of airport hazards.	Yes. 70-30-102(11)
Cities, towns, and counties	76-5-1108	Private property within the limits of a project that may be necessary to provide an outlet for watercourses, either natural or artificial.	Yes. 70-30-102(25)
County Commissioners	7-14-2107	Right-of-way for county roads over private property.	Yes. 70-30-102(7)
County Commissioners	7-14-2123	Deposits or quarries of suitable road-building material.	Yes. 70-30-102(8)
County	7-14-2621	Road that is a stock lane.	Yes. 70-30-102(9)
County Commissioners	7-14-2803 and 7-14-2804	Public ferry or a wharf at any unfordable stream, lake, estuary, or bay.	Yes. 70-30-102(30)
County	7-16-2105	Lands suitable for public camping, public recreational purposes, civic centers, youth centers, museums, recreational centers, and any combination of the enumerated uses.	Yes. 70-30-102(14)
Political Subdivisions			
Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Regional resource authorities	7-10-115	Any interest in property for a public use authorized by law. A regional resource authority may be created to provide for collaboration and coordination in the conservation of water resources or in the management of water resources for agricultural and recreational uses.	Yes. 70-30-102(2), 70-30-102(5), 70-30-102(31), and 70-30-102(32)
Cemetery districts	7-11-1021	Property for cemetery purposes.	Yes. 70-30-102(16)
Governing body of a consolidated local government water supply and/or sewer district	7-13-3041	A plant, franchise, or water supply.	Yes for sewer. 70-30-102(39). Water supply if governing body is a city or town pursuant to Title 7, chapter 13, part 44

Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Railway authorities	7-14-1625	Property for a public use, in the same manner as a county, except property owned by another authority or by a political subdivision or property owned by a railroad corporation unless the interstate commerce commission or another entity with the power to make the finding has found that the public convenience and necessity permit discontinuance of rail service on the property.	Yes. 70-30-102, if that power is granted to a county.
Parking commissions	7-14-4622	Any property, with city approval. An existing parking facility, after a public hearing. A commission cannot acquire a public entity's property without the entity's consent.	Yes. 70-30-102(10)
Housing authorities	7-15-4460 and 7-15-4462	Real property, including improvements and fixtures on the real property.	Yes. 70-30-102(13)
Political subdivisions where a property or nonconforming use is located or political subdivisions owning an airport or served by an airport	67-7-210	Air rights, aviation easements, or other estates or interests in property or nonconforming structures that are necessary.	Yes. 70-30-102(11)
Airport authorities	67-11-201 and 67-11-231	Property needed to plan, establish, acquire, develop, construct, purchase, enlarge, improve, maintain, equip, operate, regulate, and protect airports and air navigation facilities.	Yes. 70-30-102(11)
Regional water and wastewater authorities	75-6-313	Land and interests in land.	Yes. 70-30-102(21)
Irrigation district boards	85-7-1904	Land and rights in lands for rights-of-way, for reservoirs, for the storage of waters, and for dam sites and necessary appurtenances; and other lands and property that may be necessary for the construction, use, maintenance, repair, improvement, enlargement, and operation of any district or subdistrict system of irrigation works.	Yes. 70-30-102(28) and 70-30-102(32)
Conservancy districts	85-9-410	Property necessary for the purposes of the district. Water rights are not subject to taking but may be taken as an incident to the condemnation of land to which the water rights are appurtenant when the taking of the land is the principal purpose of the condemnation.	Yes. 70-30-102(29)
Private Entities			
Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Ferry owners	7-14-2829	Lands necessary for the construction, erection, or use of a ferry that cannot be procured by agreement between the owner of the ferry and a landowner. (More likely to be a public entity.)	Yes. 70-30-102(30)
Rural electric and telephone cooperatives	35-18-106	Property for constructing or operating electric transmission and distribution lines or systems or telephone lines, facilities, or systems.	Yes. 70-30-102(37)

Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
County water and/or sewer districts that are private, nonprofit water associations incorporated under the laws of this state	7-13-2218	Property from a water association and any type of property referred to in Title 7, chapter 13, part 22.	Yes. 70-30-102(39) and 70-30-102(4)
Cemetery corporations	35-20-104	Property for cemetery purposes.	Yes. 70-30-102(16)
Every person, firm, corporation, limited partnership, joint-stock association, or association that files its acceptance of the provisions of Title 69, chapter 14 with the Public Service Commission	69-13-104	Land, rights-of-way, easements, and property necessary for the construction, maintenance, or authorization of the entity's common carrier pipeline.	Yes. 70-30-102(20)
Any railroad corporation, whether chartered by or organized under the laws of Montana	69-14-513	Real property.	Yes. 70-30-102(30) and 70-30-102(1)
Any railroad corporation chartered by or organized under the laws of the United States	69-14-536	Real property when extending lines into Montana.	Yes. 70-30-102(30) and 70-30-102(1)
Owners of mining claims	82-2-221	Estates and rights in land for the purpose of open-pit mining of the ores, metals, or minerals owned by the miner. This does not include coal.	Yes. 70-30-102(44)
A natural gas public utility with a certificate from the Board of Oil and Gas	82-10-303, 82-10-304, and 82-10-305	An underground reservoir for its use for the underground storage of natural gas.	Yes. 70-30-102(43)
A person issued a certificate pursuant to Title 75, chapter 20	75-20-113 HB 198	Any interest in property for a public use authorized by law to construct a facility in accordance with the certificate.	Yes. 70-30-102(37)
Public utilities	69-3-113 HB 198	Any interest in property for a public use authorized by law to provide service to the customers of its regulated service	Yes. 70-30-102(37)
Remaining Questions			
The state, municipalities with general powers, and cities or town councils have the power of eminent domain for all public uses.			
Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Not expressly stated	70-3-107	Private roads to residences or farms.	Yes. 70-30-102(36)

Entity Granted Authority	Source of Authority	Authority to condemn what?	Included as a public use?
Not expressly stated	70-30-109	Temporary roads used for logging purposes or land used for banking grounds.	Yes. 70-30-102(42)
Not expressly stated		Public buildings and grounds for the use of a school district.	Yes. 70-30-102(3)
Not expressly stated		Public buildings and grounds for the use of a county.	Yes. 70-30-102(3)
Not expressly stated, with the exception of a water district, irrigation district, conservancy district, regional water authority, natural gas public utility, or public utility		Canals aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the inhabitants of a county.	Yes. 70-30-102(4)
Not expressly stated, but assumed to be enumerated by federal government, for example, interstate natural gas lines authorized by FERC		All public uses authorized by the government of the United States.	Yes. 70-30-102(1)
Not expressly stated, but may be addressed in grants to DNRC, regional resource authorities, and irrigation districts		Projects to raise the banks of streams, remove obstructions from streambanks, and widen, deepen or straighten stream channels.	Yes. 70-30-102(5)
Not expressly stated, but private roads may be addressed in grants to DOT, cities and towns and counties		Docks, piers, chutes, booms, bridges, planks, and turnpike roads.	Yes. 70-30-102(30)
Not expressly stated		Canals, ditches, flumes, aqueducts and pipes for supplying mines, mills, and smelters for the reduction of ores.	Yes. 70-30-102(31)
Not expressly stated		Canals, ditches, flumes, aqueducts and pipes for floating logs and lumber on streams that are not navigable.	Yes. 70-30-102(31)
Not expressly stated		Roads, tunnels, and dumping places for working mines, mills, or smelters for the reduction of ores.	Yes. 70-30-102(33)
Not expressly stated		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.	Yes. 70-30-102(34)
Not expressly stated		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.	Yes. 70-30-102(35)
Not expressly stated		Telegraph lines.	Yes. 70-30-102(38)
Not expressly stated		Tramway lines.	Yes. 70-30-102(40)
Not expressly stated		Logging railways.	Yes. 70-30-102(41)

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