ENVIRONMENTAL QUALITY COUNCIL

July 2012

Public Uses and Eminent Domain

A review of Montana's eminent domain laws, public uses, and the entities with condemnation authority

A Report to the 63rd Montana Legislature

ENVIRONMENTAL QUALITY COUNCIL

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DRAFT
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Legislative Services Division

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* This information is included in order to comply with Senate Bill No. 120 (Chapter 236, Laws of 2011).

This report is a summary of the work of the Environmental Quality Council, specific to the EQC's 2011-2012 eminent domain review as outlined in the EQC's 2011-2012 work plan. Members received additional information and public testimony on the subject, and this report is an effort to highlight key information. To review additional information, including written minutes, exhibits, and audio minutes, visit the EQC website:
www.leg.mt.gov/eqc

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Introduction

The eminent domain debate in Montana for the last 2 years has focused on building new electric transmission lines. The implications of the debate, however, pit property rights, economic 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, the 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 includes eminent domain. Members indicated that a policy discussion was needed about what constitutes a public use, along with a review of how other states are grappling with new concerns about eminent domain authority. The Law and Justice Interim Committee (LJIC) also reviewed eminent domain during the interim. That committee's discussion focused 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. In March and May 2012, the LJIC provided the EQC with an update on the LJIC's review of eminent domain procedures and potential draft legislation that the LJIC considered. A letter from LJIC to EQC is included in **Appendix A**.

The LJIC discussed eminent domain during its February 2012 and April 2012 meetings. At the LJIC's April meeting, the committee unanimously voted to bring a bill draft before the 2013 Legislature that requires complaints filed for condemnation to include a copy of the EQC's "Eminent Domain in Montana" handbook. The draft legislation is included in **Appendix B**. A background report provided to the committee that includes a brief overview of eminent domain and certain notice requirements is included in **Appendix C**.

In its work plan, the EQC allocated .05 FTE to:

1. Track pending eminent domain litigation and provide legal analysis of issues related to public uses and the enumeration of the authority to exercise the power of eminent domain in response to the outcome of the litigation.
   ✔ Completed during January, March, and May 2012 meetings.

2. Review eminent domain discussions in other western states and related statutes.
   ✔ Completed during January 2012 meeting.

3. Host a panel discussion on eminent domain issues.
   ✔Completed during January 2012 meeting.

The Montana Legislature has wrestled with eminent domain for years. In 1999, the Montana Legislature concluded that because legislators and citizens alike were confused by 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 that the Law, Justice, and Indian Affairs Interim Committee and its staff assist the EQC. A subcommittee was 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 passed. 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. The EQC looked at 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. In its findings, the subcommittee 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. The Montana Department of Transportation, for example, reports that they settle about 83% 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 the Montana Code Annotated, grants the State of Montana and its agents the right to condemn private property for a public use. 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 domain laws, there would be no sideboards or limitations on how the state or its agents exercise the power of 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] E-mail correspondence with Ed Beaudette, Department of Transportation, April 2011.

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. During a presentation to the EQC in January 2012, two national eminent domain experts discussed the policy issues related to eminent domain and merchant transmission lines. John Echeverria with the Vermont Law School and Scott Hempling, an expert witness, legal adviser and teacher focusing on excellence in public utility regulation, spoke to the EQC. Their biographies are included in **Appendix D**. Mr. Hempling also provided information about eminent domain use in the public utility sector. His presentation is included in **Appendix E**.

In 2010 District Judge Laurie McKinnon found that the developer of a merchant transmission

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

line could not invoke any legislative grant of eminent domain authority and did not have the authority to condemn land (*MATL, LLP v. Salois, Cause No. DV-10-66, Dec. 12, 2010*). The District Court held that 70-30-102, MCA, which provides for "public uses," 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 (Chapter 321, Laws of 2011). HB 198 sought to clarify that a regulated utility has 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 that are 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 **Appendix F** 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. 108*). Within 2 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."[4] 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 Supreme Court held, in *Spratt v. Helena Power Transmission Co., 37 Mont. 60*, that the Legislature's action empowering foreign corporations to exercise the right of eminent domain was not in violation of Article V, section 25, of the 1889 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.

[4] Chapter 23, Laws of 1907.

There have been various 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 (section 143, Chapter 300, Laws of 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 (section 23, Chapter 368, Laws of 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 stated 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 according to testimony given on the bill, was adopted in at least 35 states. 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 corporation's 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 foreign corporations have more recently 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 aware of only four pipelines that have opted for common carrier status.

The federal 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 if 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 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 in *MATL, LLP v. Salois, Cause No. DV-10-66*, the Montana Legislature passed and approved HB 198. Since that bill was passed and approved, the Montana Supreme Court remanded the 2010 decision to the District Court (*MATL, LLP v. Salois, 2011 MT 126, 360 Mont. 510*). 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 property 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. Judge William Nels Swandal of the Sixth Judicial District Court is the judge in the HB 198 case (*Maurer Farms, Inc. v. State, Cause No. DV-11-024*), and in MATL's countersuit for condemnation of the property of the 11 plaintiffs in the HB 198 case. The two cases have been consolidated.

On January 11, 2012, Judge Swandal awarded summary judgement in favor of MATL and concluded that HB 198 did not violate procedural or substantive due process guarantees or the prohibition on special legislation. Judge Swandal stated that the construction of an electric transmission line has long been expressly included in Montana law as an exercise of a legitimate governmental objective. The issues of "public use" and "necessity" were to be considered in related condemnation proceedings. Those hearings were canceled in April 2012 after MATL was able to reach easement agreements with landowners that were necessary to complete the project. The agreements resolved outstanding issues related to pole locations and a variety of construction practices. At the time of this publication, construction has resumed on the northen portion of the transmission line. A closer look at the legal challenge to HB 198 has been provided by EQC staff attorney Helen Thigpen. It is included in **Appendix G**.

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 fate of HB 198 and the related condemnation proceedings 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. Whether HB 198 is upheld or overturned in the future, it remains unclear whether an entity must expressly be granted the authority to condemn in Montana since that was not the question raised in the HB 198 court case.

Case Law

Eminent domain allows the State of Montana and its agents the right to condemn private property for a public use. Currently, there are 45 public uses enumerated in 70-30-102, MCA. Entities are granted the authority of eminent domain throughout statute, 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. There are hundreds of Montana court cases that address eminent domain. The cases can be summarized, in general terms, with a focus on the following issues:

1. Does the condemnor have the legal authority to initiate eminent domain proceedings and is the project a public use authorized by law?
2. Is the taking necessary and who has the burden to prove necessity?
3. Is the process governing the award of compensation valid and appropriate?
4. Is the process in line with the due process provision of the Montana Constitution?

The EQC's review of eminent domain has focused on the first of the four questions. Staff selected two public uses for which no specific entity is granted the right to condemn and examined related court cases.

Private roads

70-30-102(36), MCA

> Subject to the provisions of this chapter, the right of eminent domain may be exercised for the following public uses. . .
> (36) private roads leading from highways to residences or farms;

70-30-107, MCA

> Private roads may be opened in the manner prescribed by this chapter, but in every case the necessity of the road and the amount of all damage to be sustained by the opening of the road must be first determined by a jury, and the amount of damages, together with the expenses of the proceeding, must be paid by the person to be benefited.

These statutes allow eminent domain to be used for private roads. The statutes do not specifically state which persons or entities have the ability to condemn. A review of Montana court cases provides a look at how this public use has been exercised.

***Myers v. Dee*, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054**

A Lewis and Clark County landowner sought to condemn a strip of land owned by another person to allow for private access to the landowner's property. The question in *Myers* was whether 70-30-102(36), MCA, required proof of an existing farm or residence, but it was also noted that under Montana's eminent domain laws, "a private right exists to create a road leading from a highway to landlocked property containing a residence or farm".

***Heller v. Gremaux*, 2006 Mont. Dist. LEXIS 467**

A Fergus County landowner argued that 70-30-107, MCA, unconstitutionally permits a private party to take private property for private use. The landowner argued that a taking for private use is prohibited by the U.S. and Montana Constitutions. The District Court upheld the constitutionality of the statute. The Court noted, "the only reasonable conclusion is that private parties have standing to pursue condemnation for a 'private road'". The case was not

appealed.

***Richter v. Rose*, 1998 MT 165, 289 Mont. 379, 962 P.2d 583**
A Flathead County landowner appealed a District Court decision, contending that the District Court erred in concluding that another landowner's property was a farm for eminent domain purposes and erred in issuing a preliminary condemnation order. The primary question was whether the District Court correctly concluded that a lot was a "farm" for the purposes of 70-30-102. The Court concluded that the property was not a farm for purposes of eminent domain and that the plaintiffs had failed to demonstrate a public use upon which eminent domain could be exercised because it was not a farm.

***Komposh v. Powers*, 75 Mont. 493, 244 P. 298 (1926)**
While the statutes have changed considerably since 1926, at that time private roads leading from highways to residences or farms were listed as public uses. The Court ruled that the statute was constitutional and noted that the taking of private roads was constitutional because the Legislature designated it as a public use.

Outlets, roads, tunnels for mines, mills, and reduction of ores
70-30-102(33), (34), and (35), MCA

> Subject to the provisions of this chapter, the right of eminent domain may be exercised for the following public uses. . .
> (33) roads, tunnels, and dumping places for working mines, mills, or smelters for the reduction of ores;
> (34) 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;
> (35) 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.

These statutes allow eminent domain to be used for roads, tunnels, outlets, reservoirs, etc., related to the mining industry. Owners of mining claims have the right to acquire estates and rights in land for the purpose of open-pit mining of the ores, metals, or minerals owned by the condemnor, not including coal, in accordance with 82-2-221, MCA. The statutes, however, do not specifically state which persons or entities have the ability to condemn for those related public uses. A review of Montana court cases provides a look at how this public use has been exercised.

***Mont. Talc Co. v. Cyprus Mines Corp*., 229 Mont. 491, 748 P.2d 444 (1987)**
Montana Talc Company sought to condemn property owned by Cyprus Mines Corporation for open-pit excavation necessary to "backslope" the mining of an ore body. The Court found that the Montana Legislature intended to "encourage the development of the mining industry." The Court goes on to state that this encouragement is illustrated in granting mines the right to condemn for 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. The Court stated: "So it is that in addition to the power of

condemnation for the mine itself. . . there is further power for the construction of roads, tunnels, ditches, and other appurtenances necessary to the mining effort." It is also noteworthy that the Court found that private individuals and corporations do not have an inherent power of eminent domain. The Court, however, then focused on the public uses enumerated in statute.

***Kipp v. Davis-Daly Copper Co*.,41 Mont. 509, 110 P 237 (1910)**
The Davis-Daly Copper Company planned to construct a railway in the streets of the city of Butte to haul supplies and ores to and from the company's mine. A property owner sought an injunction to restrain the mining company from building the railway, although the city had approved the project. The railway deprived private property owners access to their abutting property, raising the eminent domain question. The Court determined that the railway was not a commercial railroad, but the Court deemed the railway to be a public use. The Court noted that it was the policy of the state to encourage the development of mineral resources. "It has favored the industry of mining in the matter of the taxation of mining property. . . and has included among the public uses for which private property may be taken by the exercise of the right of eminent domain, roads, tunnels, ditches, flumes, pipes and dumping places for working mines, mills, or smelters for the reduction of ores, etc."

The cases discussed above provide examples of the mining industry and other private entities exercising the power of eminent domain in Montana. In some instances, the discussion has focused on demonstrating whether a public use upon which eminent domain could be exercised existed. While these cases may not specifically address questions about the condemnor having the legal authority to initiate eminent domain actions, they do illustrate that private entities, while not specifically granted the right in statute, have exercised the power of eminent domain.

2011 Legislation

Eminent domain and the condemnation process was the subject of much discussion during the 2011 Legislative Session. There were at least four pieces of legislation contemplated that relate to eminent domain:

- **HB 198** sought to clarify that a regulated utility has 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. The bill was passed and approved.

- **HB 240** sought to establish a mandatory appraisal and negotiation and other condemnation policies, clarify the rejection process of a condemnor's final written offer, clarify the facts necessary for condemnation, and clarify the process for awarding litigation expenses. It was subject to multiple amendments throughout the process and ultimately did not pass.

- **HB 583** sought to require a condemnor to make a deposit with the court before continuing with proceedings and to allow the condemnee to access the deposit. It also established criteria for an appraisal process. That bill also did not pass.

- **SJ 21** requested that the appropriate interim committee study the issue of eminent domain and just compensation. That study was to focus on public uses and the

condemnation process. The resolution did not pass.

- **SB 381 and SB 391** were not eminent domain bills, but both did seek to change how landowners are compensated when transmission lines are located on their property. Neither of the bills passed.

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.[5] "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."[6] Wyoming law identifies a "public use" and establishes that eminent domain can be exercised only 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 another state or federal regulator also can establish public use.

Private entities with condemnation authority include:

- a railroad company organized under the laws of the state or the laws of the United States;
- corporations authorized to do business in the state for the purpose of constructing, maintaining, and operating a public utility; and
- any person, association, company, or corporation authorized to do business in the 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

[5] Wyoming Statutes, 1-26-501 through 1-26-817.

[6] "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, WY.

the transportation of oil and gas from any well."[7]

In Wyoming there is no eminent domain authority for the "siting, construction, operation, or maintenance of wind turbines or wind farms."[8] 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."[9] 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 conductor infrastructure, including conductors, towers, substations, switchgear and other components necessary to deliver power from any commercial facility generating electricity from wind up to but not including electric substations or interconnections facilities associated with existing or proposed transmission lines that serve load or that export energy from Wyoming."[10] In 2010, then-Governor Dave Freudenthal proposed, and state lawmakers approved, a 1-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 the Task Force on Wind Energy, first created in 2009, the project of 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.[11] They examined the definition of "wind collector systems", the appropriate use of eminent domain for collector systems, proper compensation for landowners who host collector systems, and

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[7] Wyoming Statutes, 1-26-815(a), Wyoming Statutes.

[8] 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, WY.

[9] Ibid, page 3.

[10] Wyoming Statutes, 1-26-815(d).

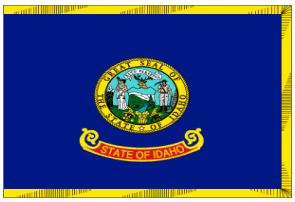
[11] http://trib.com/news/state-and-regional/article_17b8a5d8-15d0-52f3-a6b9-5f38ba493ad5.html.

severance of the wind estate. [12]

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:

- grant eminent domain authority for collector systems to public utilities but prohibit private entities from exercising such power; or[13]
- grant eminent domain authority to private entities, but only if developers obtain land-use agreements from owners of a certain percentage of the total acreage of land needed for the project.

The Task Force recommended the first option 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. Another bill was introduced based on the second option. Based on that bill, House Bill No. 70, developers needed to reach agreement with landowners representing 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.[14]



Idaho

Public uses are enumerated in Idaho law 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."[15] The law goes on to address electric transmission lines with a capacity grater 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 line's 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 interests of the citizens of Idaho." The bill did not pass. House Bill No. 168 and House Bill No. 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

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[12] "2010 Wind Energy Task Force: Report to the Legislature and Governor" http://legisweb.state.wy.us/lsoweb/Wind%20Energy/Documents/WETF%20Final%20Report.pdf.

[13] Ibid, page 14.

[14] http://legisweb.state.wy.us/2011/status/status.pdf.

[15] Idaho Statutes, 7-701(11).

"taking directly serves the interests of the residents of Idaho." Those bills also failed.[16]

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.[17]

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 the state.[18] 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.[19]

The Oklahoma Legislature responded by passing and approving Senate Bill No. 124 in 2011.[20] The legislation prohibits the use of the power of eminent domain for the development of wind farms or wind turbines on private property.

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 v. City of New London* 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 laws since the 2005 decision.

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[16] http://legislature.idaho.gov/legislation/2011/minidata.htm.

[17] Kansas Statutes, 26-501 through 26-518.

[18] Oklahoma Statutes, 27-7.

[19] http://www.longacreinc.com/11May14wind_OK.html.

[20] http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%20124.

The voter-led initiative 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.[21]

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.[22]

Other examples

Other states have passed laws that ease eminent domain rules to help electric suppliers build projects under certain 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."[23]

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

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[21] http://law.justia.com/cases/mississippi/supreme-court/2011/2011-ca-01106-sct.html.

[22] http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Eminent%20Domain-PW%20Revised.pdf.

[23] http://www.neo.ne.gov/reports/LB1048_Wind.pdf.

project in addition to notice being made through the local newspaper. The utility also must conduct public workshops in the area to discuss the project.[24] In 2010 Utah also enacted House Bill No. 324, Public Lands Litigation, and House Bill No. 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.[25] The stakeholders are discussing the use of compacts to help facilitate transmission line siting. The stakeholder 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, predetermined 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 identify two contentious decisions. The first is whether the transmission line is needed or necessary and the second is 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."[26]

The interstate compact stakeholders identified 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 that 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.

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[24] Utah Code Annotated, 54-18-301(2) through (5) and 54-18-302.

[25] http://www.csg.org/NCIC/about.aspx.

[26] http://www.csg.org/programs/policyprograms/NCIC/documents/CSGTransmissionCompactWhitepaperDraft11-08-10.pdf.

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."[27]

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 federal 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. 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 that a project should be fast-tracked and sited unless states had been appropriately consulted. The outcome of that required consultation remains to be seen.

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 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*, *545 U.S. 469*, a 2005 U.S. Supreme Court decision. The Court 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 329 was introduced expressing that: (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 of eminent domain by state and local governments in light of the 2005 Supreme Court decision.[28]

[27] Ibid.

[28] http://thomas.loc.gov/cgi-bin/query/z?c112:h.res.329:.

Conclusions

The information provided in this report comes with a caveat. This report was not developed as a legal reference. It is intended to serve solely as an educational tool. The question of "Is Montana's current eminent domain law broken as it relates to public uses?" is a question not easily answered. It's also a question that may be addressed by the Judicial Branch as the courts deal with future condemnation proceedings. It may be difficult for the Montana Legislature to move forward with future legislation when the courts have not yet provided clear direction concerning flaws in the existing law. Eminent domain law and related studies in Montana largely focus on condemnation procedures. There continues to be an ongoing discussion about those procedures and whether change is needed. This report attempts to provide a broad overview of the eminent domain debate with a focus on public uses and the entities able to exercise the power of eminent domain in Montana, in other states, and at the federal level.

Appendix A

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Law and Justice Interim Committee
62nd Montana Legislature

February 29, 2012

Chairman Keane and Environmental Quality Council members,

On behalf of the 2011-2012 Law and Justice Interim Committee (LJIC), I would like to update the Environmental Quality Council (EQC) on the LJIC's review of eminent domain procedures and potential draft legislation that the LJIC intends to review in April.

During the LJIC's February 24 meeting, committee members began their examination and discussion of eminent domain. The LJIC's discussion is focused on the legal procedures for condemnation; including the process for condemnations, how negotiations and mediation are conducted, just compensation, and appeals. The LJIC heard from staff about condemnation procedures in Montana and also accepted public testimony on the subject.

The LJIC discussed opportunities for amending condemnation procedures in Montana to address concerns raised during the 2011 Legislative session and during the February 24 LJIC meeting. At the conclusion of the meeting, the LJIC agreed to explore options ensuring that a landowner involved in a condemnation proceeding is aware of his or her rights in an eminent domain action. To that end, the LJIC has requested draft legislation that would require a condemnor in an eminent domain action provide the condemnee with a statement of the condemnee's rights in an eminent domain action. The draft is to be modeled after legislation brought before the 2001 Legislature and requirements in the North Dakota Century Code. Staff will prepare the draft legislation in advance of the LJIC's April 19-20 meeting. The LJIC will accept public comment on the draft and decide whether to proceed.

Because the EQC is also examining eminent domain, with a focus on public uses, the LJIC wanted to make sure the council is aware of the LJIC's proposal. We look forward to hearing EQC members' thoughts on the draft legislation.

Chairman Jim Shockley

Cl0429 2059slxa.

Unofficial Draft Copy
As of: May 23, 2012 (10:30am)

LClj11

**** Bill No. ****

Introduced By **********

By Request of the Law and Justice Interim Committee

A Bill for an Act entitled: "An Act requiring that a complaint for condemnation include a copy of the environmental quality council's 'Eminent Domain in Montana' handbook; amending section 70-30-203, MCA; and providing an applicability date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 70-30-203, MCA, is amended to read:

"70-30-203. Contents of complaint. (1) The complaint for condemnation must contain:

(a) 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;

(b) 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;

(c) a statement of the right of the plaintiff to take the property for public use;

(d) statements of each of the facts necessary to be found in 70-30-111;

(e) a description of each interest in real property sought to be taken, a statement of whether the property sought to be

taken includes the whole or only a part of the entire parcel or tract, and 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 proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties.

(f) 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.

(2) In addition to the items listed in subsection (1), the current publication produced by the environmental quality council entitled "Eminent Domain In Montana" must be attached to the complaint as an exhibit.

~~(2)~~ (3) If a right-of-way is sought, in addition to the items listed in subsection (1), the complaint must show the location, general route, and termini and must be accompanied with a map of the route, so far as the route is involved in the action or proceeding.

~~(3)~~ (4) (a) If a sand, stratum, or formation suitable for use as an underground natural gas storage reservoir is sought to be taken, in addition to the items listed in subsection (1), the complaint must include a description of the reservoir and of the land in which the reservoir is alleged to be contained and a description of all other property and rights sought to be taken for use in connection with the right to store natural gas in and withdraw natural gas from the reservoir.

(b) In addition, the complaint must state facts showing that:

(i) the reservoir is subject to being taken by the plaintiff;

(ii) the underground storage of natural gas in the land sought to be taken is in the public interest;

(iii) the reservoir is suitable and practicable for natural gas storage;

(iv) the plaintiff in good faith has been unable to acquire the rights sought to be taken; and

(v) a statement that the rights and property sought to be taken are not prohibited by law from being taken.

(c) The complaint must be accompanied by a certificate from the board of oil and gas conservation as provided in 82-10-304."

{*Internal References to 70-30-203:*
60-4-104 *70-30-206* }

NEW SECTION. **Section 2. {standard} Applicability.** [This act] applies to complaints filed on or after [the effective date of this act].

- END -

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April 5, 2012

To: Law and Justice Interim Committee (LJIC) members
Fr: Sonja Nowakowski, Research Analyst
Re: Eminent domain discussion

At the close of the Law and Justice Interim Committee's February discussion of eminent domain, staff was directed to develop draft legislation requiring a condemnee be provided with a statement of the condemnee's rights during an eminent domain action. The LJIC also asked that a letter be sent to the Environmental Quality Council (EQC) apprising the Council of the LJIC's request for draft legislation. Staff worked with Chairman Shockley on the letter to the EQC, and it was delivered during the EQC's March 7-8 meeting in Helena.

During the EQC's March meeting, the Council did not provide any formal feedback concerning the LJIC proposal. Chairman Keane, however, invited Council members to offer their personal feedback to the LJIC members.

Staff is including three documents along with this memo:

- **LClj11** -- a rough draft of the bill requested by the LJIC in February;
- **House Bill No. 420 as introduced** during the 2001 Legislature;
- **House Bill No. 420 as amended** by the House during the 2001 Legislature; and
- **Letter to the EQC** concerning LJIC's eminent domain work.

The LJIC draft was to be modeled after legislation brought before the 2001 Legislature and requirements in the North Dakota Century Code. Attached is a copy of the 2001 legislation, House Bill No. 420. The 2001 draft required a condemnor provide the information and it added the requirement to the facts necessary to be found before condemnation in 70-30-111, MCA. The 2001 draft also expanded instances in which a condemnee is entitled to attorney fees and defined "necessary expenses" and when those expenses accrue.

During the February LJIC meeting, committee members only requested legislation that would require a condemnee be provided with a statement of his or her rights in an eminent domain action. The LJIC did not indicate that the requirement should be incorporated into the facts necessary for condemnation. The LJIC also did not indicate what entity should provide the statement of rights, however, the 2001 legislation required a condemnor to make the disclosure, and staff used that legislation as a model.

As drafted, LClj11 requires the delivery of the statement of rights by certified mail to the condemnee. HB 420 contemplated the condemnor or the condemnee signing the statement of rights and having the statement recorded with the clerk and recorder. HB 420 was significantly amended as it made its way through the House in 2001. Staff incorporated the amendments into the draft for the LJIC. Committee members may wish to discuss that aspect of the draft and provide additional direction to staff on how best to proceed with the drafting of LClj11.

Staff also completed a legislative history for HB 420. The bill was not a request made by the Environmental Quality Council based on their study of eminent domain during the 1999-2000 interim. According to committee meeting minutes, the EQC discussed the concept but instead agreed to develop the eminent domain handbook. LJIC members were provided with an updated copy of that handbook in advance of the February meeting. Chairman Shockley was on the eminent domain subcommittee that studied the issue in 1999-2000, and Chairman Shockley brought the legislation forward in 2001. The bill passed the House and was tabled in the Senate Natural Resources committee.

The North Dakota Century Code doesn't specifically reference a landowner bill of rights. However, 54-12-01.1 of the North Dakota Century Code requires the Attorney General's Office to prepare pamphlets describing eminent domain laws. Copies of the pamphlets must be available to all condemnors who are "charged a price for the pamphlets sufficient to recover the costs of production." A condemnor is required to present the pamphlet to a property owner prior to making an offer to purchase and initiating a condemnation action. The North Dakota Attorney General's Office publishes several pieces of information, including the "Landowner Rights under North Dakota's Eminent Domain Law". The fact sheet describes how state agencies, local governments, and some private entities use the condemnation process in North Dakota. The information is also posted on the Attorney General's website.

Wyoming doesn't require a bill of rights, but it does require written notice outlining a condemnees' rights. Wyoming Statutes Annotated 1-26-509 require: "a written notice that the condmnee is under no obligation to accept the initial written offer but if the condemnee fails to respond to the initial written offer the right to object to the good faith of the condemnor may be waived, that the condemnor and the condemnee are obligated to negotiate in good faith for the purchase of the property sought, that formal legal proceedings may be initiated if negotiations fail and that the condemnee has a right to seek advice from an attorney, real estate appraiser, or any other person of his choice during the negotiations and any subsequent legal proceedings."

Texas requires a landowner bill of rights in eminent domain proceedings. The Texas Government Code, Sec. 402.031. directs the Texas Attorney General to prepare a written statement that includes a bill of rights for a property owner whose real property may be acquired by a governmental or private entity through the use of the entity's eminent domain authority under Chapter 21, Property Code. The statement must inform a property owner of his or her right to:

- notice of the proposed acquisition of the owner's property;
- a bona fide good faith effort to negotiate by the entity proposing to acquire the property;
- an assessment of damages to the owner that will result from the taking of the property;
- a hearing under Chapter 21, Property Code, including a hearing on the assessment of damages; and

- an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages.

The Attorney General's Office is directed to write the statement in "plain language" and make the information available on the Attorney General's Website. The statement must include the title, "Landowner's Bill of Rights" and a description of:

- the condemnation procedure provided by Chapter 21, Property Code;
- the condemning entity's obligations to the property owner; and
- the property owner's options during a condemnation, including the property owner's right to object to and appeal an amount of damages awarded.

Texas eminent domain law requires a condemnor to provide the statement to a condemnee not later than the seventh day before the date a governmental or private entity with eminent domain authority makes a final offer to a property owner to acquire real property.

As the LJIC reviews the requested draft, it may be useful for committee members to discuss and consider:

- Should a state entity be required to develop the information? If so, how should the cost be addressed?
- Should the statement of rights requirement be incorporated into 70-30-111, MCA?
- Should the requirements for inclusion in the statement of rights be further developed?
- Should requirements for signing the statement or filing it with the clerk and recorder be included?
- When in the process should the information be provided?
- Should the entities be referred to as condemnors and condemnees or agents and property owners?
- Should a condemnee be able to waive the 30 day waiting period?
- What additional changes should be made in the draft?

Staff will be seeking direction on how best to proceed on the draft. I look forward to working with you. Please feel free to contact me any time.

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Unofficial Draft Copy
As of: March 15, 2012 (8:51am)

LClj11

**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act requiring that a condemnor in an eminent domain action provide the condemnee with a statement of the condemnee's rights in an eminent domain action; and providing an applicability date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Condemnee's rights in eminent domain action.** (1) Prior to undertaking a condemnation action in accordance with this chapter, the condemnor shall send the owner of the property sought to be taken a written statement of the condemnee's rights in an eminent domain action. The statement must be sent to the property owner's property tax address and delivered by certified mail.

(2) The statement must contain information describing:

(a) the condemnee's right to not accept the offer submitted by the condemnor;

(b) the location of eminent domain laws in the Montana Code Annotated; and

(c) the rights granted to a condemnee under Article II, section 29, of the Montana constitution.

(3) Additional documents regarding the eminent domain action may not be recorded and a sale may not be made until 30 days

after the eminent domain statement of rights has been provided to the condemnee, unless the condemnee waives the 30-day waiting period in writing.

NEW SECTION. **Section 2. {standard} Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 70, chapter 30, part 1, and the provisions of Title 70, chapter 30, part 1, apply to [section 1].

NEW SECTION. **Section 3. {standard} Applicability.** [This act] applies to eminent domain actions initiated on or after [the effective date of this act].

- END -

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2001 Montana Legislature

About Bill -- Links

HOUSE BILL NO. 420

INTRODUCED BY J. SHOCKLEY

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT A ~~CONDEMNOR~~ ~~PERSON~~ CONDEMNOR IN AN EMINENT DOMAIN ACTION PROVIDE THE ~~CONDEMNEE~~ ~~PROPERTY OWNER~~ CONDEMNEE WITH A STATEMENT OF THE ~~CONDEMNEE'S~~ ~~PROPERTY OWNER'S~~ CONDEMNEE'S RIGHTS IN AN EMINENT DOMAIN ACTION; REQUIRING THAT THE CONDEMNOR SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE CONDEMNOR INFORMED THE CONDEMNEE OF THE CONDEMNEE'S RIGHTS THROUGH AN EMINENT DOMAIN STATEMENT OF RIGHTS; ~~EXPANDING THE INSTANCES IN WHICH THE CONDEMNEE IS ENTITLED TO ATTORNEY FEES; DEFINING "NECESSARY EXPENSES" AND WHEN NECESSARY EXPENSES ACCRUE;~~ AMENDING ~~SECTIONS~~ SECTION 70-30-111, ~~70-30-305, AND 70-30-306,~~ MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Condemnee's rights in eminent domain action.** (1) ~~The condemnor in an eminent domain action is required to provide the condemnee with a statement of the condemnee's rights in an eminent domain action.~~ ~~A PERSON AUTHORIZED BY LAW TO ACQUIRE A PROPERTY INTEREST THROUGH THE RIGHT OF EMINENT DOMAIN IS REQUIRED TO PROVIDE THE PROPERTY OWNER WITH A STATEMENT OF THE PROPERTY OWNER'S RIGHTS IF AN EMINENT DOMAIN ACTION OCCURS~~ THE CONDEMNOR IN AN EMINENT DOMAIN ACTION IS REQUIRED TO PROVIDE THE CONDEMNEE WITH A STATEMENT OF THE CONDEMNEE'S RIGHTS IN AN EMINENT DOMAIN ACTION.

(2) The eminent domain statement of rights must:

(a) be in writing;

(b) be signed by the condemnee or the person who provided the condemnee with the eminent domain statement of rights;

~~(c) be recorded with the clerk and recorder of the county within which the property subject to condemnation is located;~~ and

~~(d)~~(C) include but is not limited to the following information:

(i) the condemnee's right to not accept the offer submitted by the condemnor;

~~(ii) the condemnee's entitlement to attorney fees if the condemnee prevails, as provided in Article II, section 29, of the Montana constitution and 70-30-305;~~

~~(iii)~~(II) the location of eminent domain laws in the Montana Code Annotated; AND

~~(iv)~~(III) the rights granted to a condemnee under Article II, section 29, of the Montana constitution~~; and~~.

~~(v) sources of information related to eminent domain on state and federal levels.~~

(3) Additional documents regarding the eminent domain action may not be recorded and a sale may not be made until 30 DAYS AFTER the eminent domain statement of rights has been ~~recorded for 30 days~~ PROVIDED TO THE CONDEMNEE.

Section 2. Section 70-30-111, MCA, is amended to read:

"70-30-111. Facts necessary to be found before condemnation. Before property ~~can~~ may be taken, the ~~plaintiff must~~ condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on all of the following findings:

(1) ~~that the~~ The use to which ~~it~~ the property is to be applied is a use authorized by law~~;~~.

(2) ~~that the~~ The taking is necessary to ~~such~~ the use~~;~~.

(3) ~~if~~ If already ~~appropriated to some~~ being used for a public use, ~~that~~ the public use ~~to~~ for which ~~it~~ the property is proposed to be ~~applied~~ used is a more necessary public use~~;~~.

(4) ~~that an~~ An effort to obtain the property interest sought to be ~~condemned~~ taken was made by submission of a written offer, and ~~that such~~ the offer was rejected.

(5) The condemnor informed the condemnee of the condemnee's rights through the eminent domain statement of rights provided for in [section 1]."

~~**Section 3.** Section 70-30-305, MCA, is amended to read:~~

~~**"70-30-305. Condemnor to make offer upon appeal -- award of necessary expenses of litigation.** (1) The condemnor shall, 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 condemnation commissioners, submit to the condemnee a written final offer of judgment for the property sought to be condemned taken, together with the accrued necessary expenses of the condemnee then accrued as provided in 70-30-306. If at any time prior to 10 days before trial 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 thereof of the acceptance, and thereupon judgment shall must be entered. An offer not accepted shall be deemed is considered withdrawn, and evidence thereof 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.~~

~~(2) In the event of litigation, the court shall award necessary expenses to the condemnee, as provided in 70-30-306, and when the private property owner condemnee prevails by:~~

~~(a) receiving an award in excess of the final offer of the condemnor;~~

~~(b) decreasing the amount of property that the condemnor is allowed to take;~~

~~(c) requiring that the condemnor take a different interest in property than was originally sought; or~~

~~(d) requiring the condemnor to follow a different route than proposed in the preliminary condemnation order the court shall award necessary expenses of litigation to the condemnee."~~

~~**Section 4.** Section 70-30-306, MCA, is amended to read:~~

~~"**70-30-306. Necessary expenses of litigation defined.** (1) Necessary expenses of litigation "Necessary expenses", as authorized by 70-30-305, mean means reasonable and necessary attorney fees, expert witness fees, exhibit costs expenses incurred in anticipation of litigation or as a result of litigation, and court costs.~~

~~(2) 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 shall must be computed on an hourly basis and may not be computed on the basis of any contingent fee contract entered into after July 1, 1977.~~

~~(3) Reasonable and necessary expert witness fees may not exceed the customary rate for the services of a witness of such that expertise in the county in which the trial is held.~~

~~(4) Necessary expenses accrue after the first offer of purchase by the condemnor."~~

NEW SECTION. **Section 3. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 70, chapter 30, part 1, and the provisions of Title 70, chapter 30, part 1, apply to [section 1].

NEW SECTION. **Section 4. Applicability.** [This act] applies to eminent domain actions initiated on or after [the effective date of this act].

- END -

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INTRODUCED BY

(Primary Sponsor)

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(2) 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 ~~shall~~ must be computed on an hourly basis and may not be computed on the basis of any contingent fee contract ~~entered into after July 1, 1977~~.

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NEW SECTION. **Section 5. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 70, chapter 30, part 1, and the provisions of Title 70, chapter 30, part 1, apply to [section 1].

NEW SECTION. **Section 6. Applicability.** [This act] applies to eminent domain actions initiated on or after [the effective date of this act].

- END -

Speakers Appearing at the January 2012 Environmental Quality Council Meeting

John Echeverria
Echeverria joined the Vermont Law School faculty in 2009. He previously served for twelve years as Executive Director of the Georgetown Environmental Law & Policy Institute at Georgetown University Law Center. Prior to that he was General Counsel of the National Audubon Society and General Counsel and Conservation Director of American Rivers, Inc.

Echeverria also was an associate for four years in the Washington, D.C. office of Hughes, Hubbard & Reed. Immediately after graduating with joint degrees from Yale Law School and the Yale School of Forestry and Environmental Studies, Echeverria served for one year as law clerk to the Honorable Gerhard Gesell of the U.S. District Court in the District of Columbia. Echeverria has written extensively on the takings issue and other aspects of environmental and natural resource law.

He has frequently represented state and local governments, environmental organizations, planning groups and others in regulatory takings cases and other environmental litigation at all levels of the federal and state court systems. In 2007, Echeverria received the Jefferson Fordham Advocacy Award to recognize outstanding excellence within the area of state and local government law over a lifetime of achievement.

Scott Hempling
Hempling is an expert witness, legal advisor and teacher focusing on excellence in public utility regulation. From 2006 to 2011, Hempling was the Executive Director of the National Regulatory Research Institute. His legal and policy research has included mergers and acquisitions, the introduction of competition into formerly monopolistic markets, corporate restructuring, ratemaking, utility investments in nonutility businesses, and state-federal jurisdictional issues.

He has taught, advised, and represented utility regulators and practitioners throughout the United States and in Canada, Central America, India, Jamaica and Nigeria. Hempling has appeared numerous times before committees of the U.S. Congress and before state legislative committees in Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia.

Hempling received a B.A. *cum laude* in Economics and Political Science and Music from Yale University, where he was a recipient of a Continental Grain Fellowship and a Patterson research grant. He received a J.D. *magna cum laude* from Georgetown University Law Center, where he was the recipient of an American Jurisprudence award for Constitutional Law. In 2011, he was appointed Adjunct Professor at the Georgetown University Law Center.

Eminent Domain in the Public Utility Space: General Concepts

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I. General principles

A. Eminent power is the governmental power to take private property for a public use, subject to paying the owner just compensation. State statutes typically grant this power to public utilities, who can exercise it directly, or after obtaining commission permission to do so.

B. An example is Rhode Island's provision, Section 39-1-31:

> "Before exercising any power of condemnation a company shall present a petition to the commission describing the land, right of way, easement or other interest in property it proposes to acquire and setting forth why it is necessary to acquire it by eminent domain . . . If the commission shall determine that the proposed taking is for the benefit of the people of the state, and that it is necessary in order that the petitioner may render adequate service to the public, and that the use to which the property taken will be put, will not unduly interfere with the orderly development of the region and scenic development, it shall issue a certificate authorizing the company to proceed with condemnation."

C. The case of *Narragansett Electric Company*, 65 PUR4th 198 (1985), *cert. denied*, 544 A.2d 121 (1988) illustrates the eminent domain principles typically used in the public utility context. Narragansett, a Rhode Island utility, sought to construct a 345 kV transmission line. Applying its statute, the Rhode Island Public Utilities Commission declared that the utility has burden of proof to satisfy three criteria:

1. *Benefit to the public:* The utility must use the eminent domain power to provide necessary services to its utility customers, not to advance its private business interests. "[P]romotion of the production, supply and

[1] This handout was prepared in January 2012 for a meeting of the Montana Environmental Quality Council. It is part of a larger work in progress, and thus has not been checked fully for accuracy. Please send any comments or corrections to me at shempling@scotthemplinglaw.com.

reliability of electric power," the Commission found, is an appropriate public purpose; and the transmission line was "the most viable means of meeting the company's future growth needs."

2. *Necessary for adequate service:* There must be a "clear necessity" for the specific property to provide adequate service to the public. The need must "materialize in the reasonably foreseeable future." Immediate need was not necessary, if the need was "reasonably foreseeable" or "fairly anticipated." The issue is not timing, but relative certainty. The Commission found that as consumer demand was reaching utility system's physical limits, there was a risk to reliability. The need was not speculative, even though the utility had twice revised the projected need date. That the line would function as a backup rather than as a primary supply line did not weaken the argument for "necessity." What mattered was that the line "will contribute" to reliability in Rhode Island.

3. *No undue interference:* The use cannot not unduly interfere with the "orderly development and the scenic development" of the region. The Commission interpreted this criterion as requiring the utility to select "a route designed to best develop the natural area intruded upon and to minimize the harm which might come to the scenic beauty of such area."

D. If the utility meets these three criteria, the Commission will defer to its routing decision, unless the decision is arbitrary, capricious, an abuse of discretion or in bad faith.

II. Mixed use: Can a utility use eminent domain powers for non-utility purposes?

An awkwardness arises when a utility using eminent domain powers is engaged in both public service and private merchant activities. This was the problem in *Consumers Power Co*., 140 PUR4th 332 (1993).

A. Consumers Power, a franchised utility serving in Michigan, sought to condemn property for a long distance, high voltage transmission line. The line would interconnect Consumers Power's Michigan transmission system with that of an Indiana utility (then called Public Service of Indiana), at the Michigan-Indiana border. The new line, in conjunction with one to be built by PSI in Indiana, would, according to the Commission, "form a 116-mile pathway over which Consumers and PSI could exchange up to 500 megawatts (Mw) of electricity."

B. Consumers Power was a subsidiary of a holding company called CMS Energy. CMS Energy, in turn, owned a wholesale generation affiliate; that is, a company

that had no retail franchise obligation to serve but had unused generation capacity in a large power plant, "MCV." This MCV affiliate was seeking to sell its surplus output as a merchant in wholesale competitive markets.

C. To prevail in its Circuit Court condemnation action, Consumers had to prove that its proposed line was (a) for a public purpose and (b) necessary. The court referred the case, by agreement, to the state utility commission for fact-finding."

D. The evidence before the Commission indicated that line would have two effects. It would (1) help Consumers' parent, CMS, acquire or "pool with" Indiana utility;[2] and (2) allow the MCV affiliate to transmit power to the Indiana utility.

E. Concerned about possible dual purpose of the line, the Michigan Commission applied a 'heightened scrutiny test'" (although it stated the test was not legally required). That is, because the line could serve both a public use (carrying out Consumers' franchise obligation to serve its retail load efficiently) and a private use (advancing CMS Energy's merchant strategy of serving wholesale markets in Indiana), special attention was necessary so that the public eminent power was not used for a private purpose. Opponents presented internal company documents tending to show that the line's origins lay in CMS-PSI communications about MCV delivering power to PSI.

F. In overlapping opinions, two of the three commission members held that the line was *useful* for a public purpose. These benefits included additional capacity, ability to sell excess power to new markets, and enhanced competition. Two found, however, that it was not *necessary* to that purpose. One commissioner found that it was neither useful nor necessary. The effect of the decision was to allow the line costs to be recovered in retail rates (because the line was useful), but to advise the Circuit Court that the condemnation standard was unmet because the line was not "necessary."

G. The Commission also warned (noting that "Consumers has, on occasion, misinformed the Commission and attempted to circumvent its orders") that "if the assertions in the record regarding the intended use of the line or the magnitude of its expected public benefits later prove to be untrue, the Commission will take

[2] Pooling is category of power sales transactions, in which two or more utilities exchange power to suit their individual needs. Exchanges of capacity between a winter peaking utility and a summer peaking utility, for example, allow each utility to avoid owning extra capacity to serve its peak. Other forms include "economy exchanges" (sometimes called "split-savings exchanges" where, for a specific hour, the utility with lower operating costs sells its power to a utility with higher operating costs, with the two utilities splitting the savings), and maintenance exchanges, where the two utilities stagger their maintenance outages so that each can rely on the other's surplus.

appropriate action. This includes, but is not limited to, denying recovery of the ... line's costs in future rate cases and compensating rate-payers through the power supply cost recovery process for any failure to use the line in a manner that produces the lowest possible costs for Consumers' customers."

H. Three weeks after receiving the Commission's views, the state court ruled against Consumers (not on the grounds of public vs. private use but on the grounds that the line was not necessary). Condemnation was not unavailable, and the line was never built.

III. Effective competition: What if eminent domain statutes distinguish types of sellers or types of technologies?

The problem of public vs. private use arises under traditional utility statutes enacted long before the possibility of generation competition entered the electric industry. With generation competition, two related problem have emerged. First, what if a traditional utility and a non-utility both seek to build generation, in competition to serve retail or wholesale customers, but the statutes grant eminent domain power only to the utility? Second, what if the eminent domain power is available only for some technologies but not others? Do these differential treatments distort competition, harming consumers by impeding entry by new sellers who might bring lower-cost service?

A. Types of technologies

1. Since 1917, Section 27-7 of the Oklahoma statutes had this language:

> "Except as otherwise provided in this section, any person, firm or corporation organized under the laws of this state, or authorized to do business in this 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 shall have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations by laws of this state."

2. The 2011 General Assembly added this sentence:

> "The power of eminent domain shall not be used for the siting or building of wind turbines on private property."

3. Supporters justified the new sentence as protection for landowners from land rushes and bad faith dealing. One cannot escape the fact, however, that the statute unbalances the competition between wind and other energy sources.

4. Similar examples have arisen in Wyoming, Utah and other states.

B. Types of sellers

1. The connection between eminent domain and evenhanded competition among different sellers is well-illustrated by FERC's orders on transmission "interconnection." In 1996, FERC issued its landmark *Order No. 888* on nondiscriminatory transmission access. The Order requires each investor-owned, transmission-owning utility to make its transmission facilities available to others, including its competitors, on terms comparable to how the utility uses the facilities for its own customers. In a sequel to *Order No. 888*, FERC issued *Order No. 2003*, identifying "interconnection" as a distinct service requiring the same nondiscriminatory treatment.

2. Interconnection service involves designing, constructing and connecting the line that connects a generator to the main transmission system, sometimes over large distances. Access to private land may be necessary. Recognizing that some states make eminent domain power available only to traditional utilities (and not to the new, non-utility "merchant" generators whose market entry FERC sought to assist), FERC's interconnection rule included a provision described by the Court of Appeals as "forbidding [transmission owners] from discriminating in the exercise of eminent domain powers to the detriment of independent generators and to the advantage of affiliates."[3]

3. The utilities attacked FERC's requirement as "commandeering states' eminent domain authority." The Court of Appeals disagreed:

> "We recognize that a state's authority to exercise the eminent domain power, and to license public utilities to do so, is an important state power. But FERC has done nothing more than impose a non-discrimination provision on public utilities. The orders explicitly leave state law untouched, specifying that any exercise of eminent domain by a public utility pursuant to the orders'

[3] *National Association of Regulatory Utility Commissioners, et al. v. Federal Energy Regulatory Commission,* [insert cite] (D.C. Cir. 2007).

> non-discrimination mandate be "consistent with state law." [citations to FERC's orders omitted] Thus the states remain completely free to continue licensing public utilities to exercise eminent domain, or to discontinue that practice. To be sure, if hitherto a utility would not have exercised eminent domain to enable interconnection with an independent generator, the orders, conditionally, compel the utility either to broaden its use of the state-provided authority for the benefit of independents, or to drop the use for its own and its affiliates' power. But the modifier conditionally is critical. Nothing in the federal rule compels either continued state retention of the license, or public utilities' continued employment of eminent domain. ... [T]he orders here leave state law completely undisturbed and bind only utilities-not state officials."

4. Given that state law eminent domain power is often not available to non-utilities, FERC told the utilities that if they were using for their own or affiliates' generation, they had to use it for their competitors too.

5. Another approach is to expand the class of entities authorized to use the power. This Massachusetts statute makes eminent domain powers available to both utilities and non-utilities:

> "Any electric or gas company, generation company, or wholesale generation company may petition the department for the right to exercise the power of eminent domain with respect to the facility or facilities specified and contained in a petition submitted in accordance with section 69J or a bulk power supply substation if such electric or gas company is unable to reach agreement with the owners of land for the acquisition of any necessary estate or interest in land. The applicant shall forward, at the time of filing such petition, a copy thereof to each city, town, and property owner affected...."

Mass. Gen Laws ch. 164 sec. 69R. [need to check this cite]

6. Yet another approach, where the statute grants the eminent domain power only to public utilities, is to interpret the "public utility" term to include entities other than traditional utilities. In Pennsylvania, discoveries of shale gas in the Marcellus region has attracted businesses seeking to build pipelines to move the gas to markets. Some of these businesses have sought public utility status, so as to gain the eminent domain power

available only to public utilities. In granting one such request, the Pennsylvania Public Utilities Commission applied a four-part test, finding that the applicant, as summarized by one commentator:

a. "will be transporting or conveying natural or artificial gas by pipeline or conduit for compensation;

b. will serve any and all potential customers needing to move gas through the pipeline system;

c. intends to utilize negotiated contracts to secure customers; contracts are not meant to be exclusionary, but rather to establish technical requirements, delivery points, and other terms and conditions of service; [and]

d. has made a commitment to expand its capacity, as needed, to meet increased customer demand."

D.A. Tice, "Eminent Domain for Pennsylvania Pipelines?" http://www.marcellusshalelawmonitor.com/marcellus-development/eminent-domain-for-pennsylvania-pipelines (last checked Jan. 9, 2012).

IV. Federal roles

This discussion has focused on the traditional public utility whose obligation to serve, and eminent domain powers, arise from state law. There are also federal statutes that have granted eminent domain powers to entities that might not otherwise have them under state law.

A. Section 7(h) of the Natural Gas Act, 15 U.S.C. sec. 717F(h), grants the right of eminent domain to an entity that has received from FERC a certificate of public convenience and necessity under Section 7(c). The eminent domain power is available when the certificate holder "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way ... and the necessary land or other property...."

B. Section 216 of the Federal Power Act, 16 U.S.C. sec. 824P, authorizes FERC to grant a "construction permit" to an applicant for the "construction or modification of electric transmission facilities in a national interest electric transmission corridor." The applicant must work through a multi-steps process.

C. First, the U.S. Department of Energy must have designated the area crossed by the transmission facilities to be a "national interest electric transmission corridor." To

designate a corridor, DOE must find that the area is "experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers," based on a consideration of five factors.[4]

D. Second, assuming the facility is located within a DOE-designated corridor, FERC can grant the permit if it makes all of five findings set forth in Section 216(b). The first finding has stirred controversy. FERC must find the State in which the facility will be built has not approved, or cannot approve the siting of the facility, because, to paraphrase: it lacks authority to approve or to consider interstate benefits; or does not recognize the applicant as the type of entity eligible to site a project because it does not serve end-use customers; or, the state has "withheld approval for more than a year" or conditioned its approval "in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." In other words, FERC's jurisdiction to issue a permit is triggered only if the state cannot act or does not act.[5]

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[4] The five factors that the DOE "may consider" are set forth in Section 216(a)(4):

"(A)the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;

(B) (i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and (ii) a diversification of supply is warranted;

(C) the energy independence of the United States would be served by the designation;

(D) the designation would be in the interest of national energy policy; and

(E) the designation would enhance national defense and homeland security."

In *California Wilderness Coalition v. U.S. Department of Energy* (9th Cir. 2011) the U.S. Court of Appeals vacated the Congestion Study required of DOE by Section 216(a)(1), for failure to consult with states sufficiently, and also vacated DOE's designation of particular corridors because it did not consider properly the environmental consequences under the National Environmental Protection Act ("NEPA").

[5] The meaning of the phrase "withheld approval" was addressed by the Court of Appeals in *Piedmont Environmental Council v. FERC*, (4th Cir. 2009). FERC had interpreted the phrase to include a state saying "no," i.e., rejecting an application. The Court disagreed: "Withheld" means only not acting; it does not mean acting negatively. A state's rejection thus ousts FERC's jurisdiction to issue a construction permit.

E. If FERC's jurisdiction is triggered for one of the reasons listed in Section 216(b)(1), the FERC can grant the permit, if it first makes all of five other findings that relate to the public interest.[6]

F. The permit holder's rights are similar to those stated in the Natural Gas Act. Section 216(e) of the Federal Power Act grants a permit holder the right of eminent domain if the permit holder "cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities...."

[6] Those five findings, stated in Section 216(b)(2)-(6), are:

"(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and

(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures."

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)

Montana Legislative Services Division

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TO: Law and Justice Interim Committee
FROM: Helen Thigpen, Staff Attorney
DATE: January 27, 2011
RE: House Bill 198 (2011) Litigation Update

In May 2011, a group of landowners in Pondera and Teton Counties initiated a lawsuit challenging the constitutionality of House Bill 198 (2011). This lawsuit is separate from litigation that occurred in 2010, in which the 9th Judicial District Court (Pondera and Teton Counties) concluded that MATL LLP could not condemn certain property for the construction of the Montana-Alberta Tie-Line (MATL) because Montana law did not expressly provide it with the power of eminent domain.[1]

The lawsuit against HB 198, known as *Maurer Farms Inc. v. State,* (Cause No. DV 11-024), was filed by 11 landowners (Plaintiffs) who own property within the corridor for the MATL project, a private merchant transmission line that will run approximately 130 miles from Great Falls, Montana, to Lethbridge, Canada.[2] HB 198 provides that a public utility as defined in § 69-3-101, MCA, or a person issued a certificate under the Major Facility Siting Act (MFSA), Title 75, chapter 20, MCA, may acquire property through eminent domain. MATL received a MFSA certificate in October 2008.

In *Maurer Farms* the Plaintiffs allege that the MATL project will harm the use and enjoyment of their property, including their farming operations. Thus far, the Plaintiffs have refused to grant easements for the transmission line and are seeking to invalidate HB 198. The Plaintiffs requested a declaration from the Court that HB 198 violates several of the Plaintiffs' constitutional rights. The Plaintiffs raised nine specific claims against HB 198:

1. Denial of Due Process Rights under the U.S. Constitution (U.S. Const. 5th and 14th Amends.)
2. Denial of Due Process Rights under the Montana Constitution (Mont. Const. Art. II, § 17)
3. Violation of prohibition on retroactive legislation (Mont. Const. Art. II, § 31)*
4. Violation of prohibition on special legislation (Mont. Const. Art. V, § 12)
5. Denial of inalienable rights (property rights) (Mont. Const. Art. II, § 3)
6. Denial of the right to participate (Mont. Const. Art. II, § 8)

[1]In 2010, MATL LLP sought to condemn private property to facilitate the construction of the MATL project. Judge McKinnon dismissed MATL's complaint, and MATL appealed. The Montana Supreme Court held that HB 198 applied retroactively to the MATL project and provided MATL with condemnation authority. The case, *MATL LLP v. Salois*, 2011 MT 126, 360 Mont. 510, 255 P.3d 158, was remanded to the District Court for further proceedings and was ultimately dismissed.

[2] Enbridge, an energy company based in Alberta, Canada, assumed ownership of the MATL project in October 2011.

7. Denial of equal protection (Mont. Const. Art. II, § 4)*
8. Denial of equal protection (U.S. Const. 14th Amend.)*
9. HB 198 is void due to passage of Senate Bill 233 and Senate Bill 320*

(* indicates the counts that have been dismissed)

MATL moved to dismiss the Plaintiffs' complaint for failure to state a claim. MATL also filed a counterclaim to condemn the Plaintiffs' property. On October 4, 2011, the District Court dismissed several of the Plaintiffs' claims, but did not dismiss the due process, special legislation, property rights, or right to participate claims. In dismissing several of the claims, the Court concluded that the Plaintiffs failed to establish an equal protection claim because HB 198 did not create a separate class of people or treat that class differently. With respect to the Plaintiffs' retroactive legislation claim, the Court concluded that because the retroactive applicability date in HB 198 was explicit, it did not violate § 1-2-109, MCA. The Plaintiffs' voidness argument was also dismissed. The other claims raised by the Plaintiffs remain active as of the date of this memo.

In October, the Court also issued a separate order addressing MATL's counterclaim for condemnation. In this order, the Court agreed with MATL and concluded that the condemnation claims could be brought as a counterclaim to the Plaintiffs' challenge against HB 198, but that the issue of whether HB 198 is constitutional should be addressed first. However, the Court agreed with the Plaintiffs that specific amounts offered by MATL to purchase the Plaintiffs' property included in the counterclaim should be removed.

In early November, MATL and the State, through the Attorney General's Office,[3] filed separate motions for summary judgment to dismiss the case without proceeding to trial. The Plaintiffs also filed a motion for summary judgment. In disputing the Plaintiffs' motion for summary judgment, the State argued that HB 198 is a "valid exercise of legislative power clarifying existing law on delegated power of eminent domain and authorized public uses . . . ."[4]

On January 11, 2012, Judge Swandal (Park and Sweet Grass Counties) awarded summary judgment in favor of MATL and concluded that HB 198 did not violate procedural or substantive due process guarantees or the prohibition on special legislation. Judge Swandal stated that the construction of an electrical transmission line has long been expressly included in Montana law as an exercise of a legitimate governmental objective. The issues of "public use" and "necessity" still need to be considered. Those issues will be addressed in the condemnation proceedings in the coming months, which are tentatively scheduled for early April.

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[3]The Attorney General's Office is defending the constitutionality of HB 198.

[4]State of Montana's Memo. in Opposition to Plaintiffs' Motion for Summary Judgment (Nov. 21, 2011).