

**Public Benefits and Private
Rights: Countervailing
Principles of Eminent Domain**

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Public Comment

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Legislative Environmental Quality Council
Eminent Domain Subcommittee

Public Benefits and Private Rights: Countervailing Principles of Eminent Domain

Public Comment

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PART I : PUBLIC HEARINGS

The Eminent Domain Subcommittee (Subcommittee) received public comment throughout the interim study. The Subcommittee made a concerted effort to ensure that the citizens of Montana had an opportunity to voice their concerns with regard to Montana's eminent domain laws. EQC and Subcommittee meetings are always open to the public. The Subcommittee also scheduled three public hearings around the state. These hearings were held in Helena, Missoula, and Billings.

There were many comments received during meetings with regard to the specific issue being discussed. Outlined below is the information received from interested parties during the public hearing process. There were also members of the public that chose to provide written comment on Montana's eminent domain laws. Copies of these written comments begin on page 60.

Comments related to the Subcommittee's draft findings and recommendations begin on page 19.

X Helena Public Hearing, December 1, 1999

Jeff Barber, Montana Environmental Information Center, remarked that there are two major issues that can be resolved by the study of eminent domain laws. The first issue is the public versus private use of eminent domain and the second issue relates to how the process is weighted. Is the process in balance or is it tilted towards either the condemnor or condemnee? He noted that pipelines less than 17 inches in diameter are not reviewed in a comprehensive manner. Public utilities originally were given the power of eminent domain because they were highly regulated. This is no longer the situation today. The study should review whether or not the state is appropriately designating its authority to these private entities.

He raised a concern about the power of eminent domain being used for hard-rock mining projects. This is wholly inappropriate. There is no other industry in this state that is so blatantly given eminent domain powers for its own benefit. Farmers are not allowed to condemn their neighbor's land because they want a larger wheat crop. The mining industry's ability to use eminent domain on behalf of the state should be removed.

He believes that the eminent domain laws are tilted in the favor of the condemnor. Once an entity decides to build a project, all the property owner has left to argue about is the price of the land that is being acquired. This has a number of consequences. The landowners feel helpless because they cannot say no to a project or move it to a portion of their property where it will be less intrusive on their operation. Condemnors

should be more creative about their chosen route. Under current statutes, condemnors do not need to negotiate to any degree. They cannot offer an unusually low sum of money for the property they want to take but they know that eventually they will be able to obtain what they want. The landowner is left with no cards to play. They do have the threat of legal fees on their side if they want to go through the legal process.

One of the points behind REP. LINDEEN'S legislation last session was not allowing the condemnor to take the actual property until the legal process was completed. This would force the condemnor to negotiate because they would not be able to obtain the property for a period of years. There is some validity in this idea.

REP. SHOCKLEY questioned whether there were any specific examples of a 16-inch pipeline being used to avoid comprehensive review. **Mr. Barber** did not have specific examples but took note of comments made by the Montana Power Company at the Eminent Domain Subcommittee meeting earlier in the day. It was interesting to him that a number of the pipelines they mentioned were 16-inch pipelines.

Mark Fix, Northern Plains Resource Council (NPRC), commented that the NPRC is committed to land stewardship and social justice principles that ensure that Montana's air, land, water, and unique quality of life are maintained and improved to ensure future generations a healthy, quality homeland. They believe that the urban, rural, and tribal communities of this region can prosper and thrive without destroying the last best place.

He requested that the study information be provided on the EQC internet site. They would also appreciate an e-mail address for commenting. He noted that the historical use document prepared by the Subcommittee reflects the condemnor's perspective. He requested that some landowner perspective be added to the document.

He further commented that in regard to reversion of property to the original landowner, there were several cases in Illinois where a railroad actually sold the landowner his abandoned right-of-way and it was only given as an easement. He offered to provide the Subcommittee copies of the cases. He also noted that it is his understanding that in regard to the Milwaukee Railroad matter in Montana, the land went to the highest bidder.

The eminent domain laws were created to condemn property for public use, but this is not true today. If the land was truly condemned for public use, there would not be income derived from it and it would not be taxed. Entities that condemn today condemn for profit. They can turn around and sell the use of the land for more than they paid for it. An example would be the current situation with pipelines and railroads. The land can be acquired at a low cost and then the right to place a fiber-optic line on the property can be sold for a price higher than the original acquisition.

The location of the right-of-way often interferes with the operation of the landowner. The condemnation proceeding does not consider whether the location of the right-of-way can be changed to accommodate the landowner, but only settles the monetary damages of the situation. If the location of the right-of-way was considered, many problems could be averted.

The right-of-way should be given only for one use. If the property is being used for more than one easement, the landowner should be paid for all the easements and not just the first easement. The original landowner should also be able to get his land back when the right-of-way is abandoned. Condemnation should not be used for fee title. When the land is given by fee title, the condemnation is a taking instead of condemning for use. Only easements are granted for state and federal land, and private landowners should be able to do the same. The eminent domain laws are being used to circumvent good faith negotiations. Condemnation should be used as a last resort only.

Barbara Ranf, US West, maintained that one of the challenges telecommunications companies face is that they need to deploy next generation telecommunications facilities. The challenge is to deploy these facilities in a geographically large and low-density state like Montana and make that investment economically feasible. The current laws are working for US West and their customers. If the laws are changed, there may be roadblocks and barriers to their ability to bring those facilities into Montana.

The Subcommittee has used the term "multiple use" quite often. She is concerned about the definition being associated with the term. US West has very little exclusive right-of-way in Montana. Most of their right-of-way is multiple use. A utility corridor consists of a trench that contains electricity, telecommunications, and perhaps natural gas. Landowners seem to like multiple use. They receive calls from customers asking that utilities be placed in the same trench. She requested that the Subcommittee pay special attention to defining terms and to make sure that the terms mean the same thing to everyone.

Don Allen, Western Environmental Trade Association (WETA), stressed the importance of the educational aspect of the eminent domain issue. There is very little real understanding of how eminent domain works. The law is set up so that the rights of everyone involved will be protected and everyone will have an opportunity to be well served by the present law. There are some legitimate concerns regarding communication problems that have occurred. Everyone needs to work very hard to improve this situation. He noted that it would be helpful to provide landowners with an educational brochure that would help them understand the law and their rights under the law. WETA has great expertise in this field and would like to help the process in terms of how to understand this important issue.

Lorna Karn, Montana Farm Bureau, commented that they are not convinced that the statutes need significant changes. Their main concern is that the process not be opened to allow everyone to use eminent domain powers. It should be limited to those uses that are truly public uses. They would like the Subcommittee to consider requiring public bodies proposing acquisition of property for public purposes to send written notices at least 60 days prior to formal public hearing and also that public hearings be held before any land is optioned or purchased. Local communities and states could be required to be given prior knowledge of a pending utility permit before a proposed utility right-of-way is granted. Property owners should have the right to judicial review of the need and location of the proposed taking. The landowner should have at least 5 years, from the time of the original settlement, in which to negotiate claims for damages that may not have been confirmed at the time of the initial settlement.

X Missoula Public Hearing, January 20, 2000

Reed Smith, Valley Preservation Council, remarked that they are concerned about the Yellowstone Pipeline. An Environmental Impact Statement (EIS) has been prepared for forest service land on this project, however, it is not required for private property. The state is not required to prepare an EA unless the pipeline is 17 inches in diameter or larger. He is not aware of any pipelines that are over 17 inches in diameter. Pipelines have an extreme potential to leak and get into the ground water. The landowner is sitting on land that could be a hazardous waste site. Near Missoula, 230,000 gallons of unleaded gasoline spilled in 1982, and the land is still contaminated. His understanding of negotiations by a condemner is simply that a landowner is handed a standard form. When the landowner asks for changes, it is necessary for him to hire a lawyer and go to court.

The Subcommittee needs to focus on the problems occurring in the eminent domain process and then address the problems with the current law. The pipeline is for a private use and does not benefit anyone in Montana. Fairness is a big issue. How does an individual landowner stand up to a company such as Exxon, Conoco, or a large railroad company? Ranchers are just trying to make a living and do not have time to go to court. They cannot afford to hire an attorney. Also, landowners cannot sell their land once it has been contaminated.

Mary Alexander, Farmer, stated that her farm has been a family farm for 120 years. Revision of the eminent domain laws is necessary to include more protection for the private landowner. Approximately 6 years ago a representative of Yellowstone Pipeline contacted her. He stated that they were going to place a pipeline through their land and that they did not need the landowner's permission to do so. He explained that he was just being polite in informing them that he was going on their

land to locate the pipeline. She advised him that it would be necessary to first go through condemnation proceedings.

Farmland has been ruined by product spills. Petroleum products spilled on land render it unproductive for many years. The ultimate clean up is the responsibility of the landowner. Oversight is necessary for those who use the eminent domain privilege. This must be included in the law. Citizens have a right to a safe and healthful environment. This right needs to be protected by making corporations more responsible for the care of our land.

Ressa Charter, Student, remarked that a high voltage powerline was built on his parent's land. The people in charge of building the powerline were not concerned about the eyesore and were only concerned about profit. Eminent domain is a socialist taking of property. If an entity has the power to take our land, it is very important that they be a responsible steward of the public use of that land.

Roger Lund, Paradise, explained that Yellowstone Pipeline has plans to place the pipeline on his land. They plan to cross the river by directional drilling, which would involve a huge pit being dug on his land. This includes machinery and valves that could become a hazardous situation. The pipeline would be approximately 500 feet from his well. He raised concerns about special precautions being taken by the company regarding the pipeline. The Forest Service can require precautions such as double-walled pipe, etc. The private landowner cannot demand the same precautions. Everything he has owned is invested in his home. With a pipeline across his land, his home will no longer have the same value. If there was a leak, his property value would be severely diminished. The private landowner needs protection.

Karen Knudsen, Clark Fork Coalition, stated that Montana's eminent domain law is not a friend of the state's waters or private landowners. It appears to be a trump card that allows private companies to take land without proper regard for the waters that flow through it. For the health of state river systems, the eminent domain laws need to be revised. They suggest four modifications to the eminent domain statutes.

(1) Require industries to minimize and mitigate environmental damage to condemned property. Approximately two-thirds of the route that Yellowstone Pipeline proposes to use would cross private lands in the sensitive Clark Fork Watershed. Mitigation measures that would protect streams, wetlands, and groundwater do not apply. The state needs to make sure that the environmental protections and state of the art technologies required on public lands extend to private lands.

(2) A stricter definition of public interest is needed. The key concept behind the eminent domain process is that a public interest requires the taking of private land. Is

a petroleum pipeline that cuts through Montana's backyards to carry products to Eastern Washington in this public's best interest?

(3) Bonding requirements and indemnification provisions need to be extended to private landowners. Landowners should not be liable for another party's mishaps on condemned property. If a spill happens, cleanup costs are high and for most landowners the costs would be prohibitive. Landowner liability needs to be removed.

(4) Clean water needs to be recognized as a public use. Despite the fact that clean water is vital to public health, it does not figure into the laws of public use comparisons or compensation determinations. Is petroleum more valuable than a clean Missoula aquifer? Under current law, this question cannot be asked.

Caroline Walker, Missoula, remarked that farmers, ranchers, and landowners cannot pay huge campaign contributions and hire expensive attorneys. Money makes the laws and decides which laws stay on the books or leave the books. Money decides what is in the public interest. In the 1970s, the issue of coal mines was addressed by private citizens. Public interest needs to be decided by genuinely public interest. Her daughters are taking good care of the land and water and preserving the value for a future generation.

Mr. Smith added that pipeline regulations are a disaster. The industry has been successful in preventing new regulations. Recommendations are made on improving pipelines, but rules are not promulgated. Enforcement of the regulations that are in place is nonexistent.

SEN. STANG stated that he has heard concerns about using railroad cars and tankers to ship petroleum instead of the pipeline. This would create a public safety hazard. There have been two train derailments next to the Clark Fork River in the last 5 years. He questioned whether a pipeline may not be a safer way to transport petroleum. **Ms. Knudsen** remarked that an accident which caused tanker trucks to spill petroleum into surface waters would cause immediate and acute problems to water quality, aquatic species, and fish habitat. A train accident would involve spills being immediately apparent and clean up response is always immediate. The Yellowstone Pipeline has a very bad track record with respect to oozing petroleum into the environment and not cleaning up the spill.

SEN. STANG questioned whether any other states had implemented bonding requirements on private land. **Ms. Knudsen** believed that California has done so.

SEN. STANG asked **Ms. Knudsen** if she was aware of any cases in other states where pipelines were determined not to be in the public interest. **Ms. Knudsen** stated that for the most part states consider pipelines to be in the public use. She added that

in a case in Illinois a pipeline was denied the power to use eminent domain. The commission denied in favor of the landowner and determined that the petroleum pipeline actually had business interests but was not in the public interest.

MR. HIGGINS asked for clarification of **Ms. Knudsen's** remark that liability for damages falls on the landowners in regard to a spill or rupture. **Ms. Knudsen** stated that was her understanding. Ultimately, the landowner is liable.

MR. SORENSEN asked if there were examples of different technologies being used for pipelines crossing private land. **Ms. Knudsen** stated that because the pipeline crosses Forest Service land, an environmental review is necessary. The Forest Service came up with a list of mitigation measures and technologies that were to be used when crossing their land. The Forest Service has made it clear that they have no authority to enforce any mitigation measures on private land. The majority of the pipeline crosses private lands, not public lands. The Forest Service has spoken to Yellowstone Pipeline Company (YPL) to try to persuade them to adopt the same level of protections on private lands. In reviewing the draft EIS, it appeared that YPL had agreed to all of the Forest Service's mitigation measures, but only half would be adopted on private lands. Private lands and the waters that run through private lands are being put at greater risk than public lands.

Mike Stahly, Cenex Pipelines, explained that pipelines require various state and federal permits in addition to MEPA review. In order to obtain a storm water permit, they needed to commit to following all mitigation measures in the MEPA review process. Any permitted action is tied to mitigation measures. Permits are needed for road, stream, and wetlands crossings. Much of this applies to private land. There are extensive design and operating requirements for pipelines that are overseen by the federal Department of Transportation. This would include requirements for hydrostatic testing, pipe strength, lock wells at rivers, and coating systems to prevent corrosion.

SEN. STANG questioned whether bonding had ever been required. **Mr. Stahly** was not aware that bonding had been required. The Oil Pollution Act of 1990 requires extensive oil spill response planning and a demonstration that resources are adequate to respond to the worst case spill. This is reviewed by various agencies.

SEN. STANG further inquired whether the statutes required an oil company to clean up a spill. **Mr. Stahly** maintained that there are a lot of assurances in place. The landowner, if the landowner is not the operator, would only be liable in cases of gross negligence.

REP. TASH questioned the time factor before the detection equipment would determine that a spill had occurred. **Mr. Stahly** explained that this would be system

specific and would depend on where the leak occurred, size of the leak, and location of computer monitoring equipment.

REP. SHOCKLEY questioned whether permits were required before or after the land was condemned. **Mr. Alke** maintained that there were no requirements that the permit had to be obtained before condemnation. Construction cannot begin before the permit is issued. If the permit is not received, the condemnor would pay the landowner for an interest they are not able to use.

REP. SHOCKLEY further questioned the pipeline company's liability to the landowner in the case of a spill. **Mr. Alke** knew of no principle of law that would make the landowner liable for a leak caused by the pipeline. A pipeline leak is a trespass onto the landowner's property.

MS. PAGE asked where in the process the evaluation of public good versus private harm would be addressed. **Mr. Petesch** explained that for eminent domain purposes, if the use is listed as a public use, the entity has the right to take the property. The evaluation is extraneous to the condemnation action. Public use is a statutory determination.

REP. LINDEEN questioned whether the Supreme Court had ruled on whether pipelines are a public use. **Mr. Petesch** stated that pipelines are enumerated as a public use. Electrical lines were challenged as a public use in 1917. The decision was that the Legislature makes that determination. Mining was challenged as a public use, and the Court also held that the Legislature had determined mining to be a public use. Coal mining was determined not to be a public use although copper mining was determined to be a public use. The Court held that the Legislature had adequately articulated a reasonable distinction for saying that coal mining was not a public use and that was all that was required in the case.

Mr. Smith remarked that if a spill went onto an adjacent landowner's property, the landowner could be sued. Under CERCLA, the procedure is to view the landowner as a potentially responsible person. That person then needs to seek defense.

Mr. Petesch maintained that the spill from a pipeline is the pipeline's responsibility unless the landowner caused the spill.

Mr. Alke explained that CERCLA had an expressed exemption for pipelines because they did not want the landowner to be liable in typical Superfund situations.

Steven Wade, Burlington Northern, added that the state Superfund law contained a complete defense for an innocent landowner. The liability runs to the owner of the pipeline unless the landowner expressly acted or contributed to the spill.

REP. MCGEE questioned who would pay for the attorney that the landowner would need to hire for his or her defense. **Mr. Wade** stated that the Montana Department of Environmental Quality or the U.S. Environmental Protection Agency would have to affirmatively name and file a lawsuit against the landowner to make them a liable party.

Aaron Browning, Northern Plains Resource Council, remarked that HB 355 changed the law to state that the plaintiff in a condemnation proceeding needed to prove that they needed an interest greater than an easement by clear and convincing evidence for fee title. The arguments against the bill were that it would be unwise to have that provision because if the landowner retained title and did not give the easement to a pipeline company, they would then be liable.

Betty Thistad, Huson, requested that the Subcommittee review the historical record of Yellowstone Pipeline Company and how they handled lawsuits. Money will not tell the whole story. We need to be concerned about Montana. The law is old and needs reform.

X Billings Public Hearing, March 23, 2000

VIA METNET - MILES CITY

Mark Fix, Rancher, remarked that the Tongue River Railroad is proposed to cross his land. Many people feel that if there is a public need, it is alright to take property for the greater good. In theory this sounds good, but if the project needs to cross your land it becomes a totally different prospect. When an entity wants to take your best ground or cut off parts of your ranch, one thinks about the tremendous power the corporations enjoy. The determination of public need should be proven to the State Land Board before a project can begin. We work hard to improve our ranches and we have seen the damages that occur due to a condemnation effort. The Tongue River Railroad wants to cross his ranch by going through the middle of his calving pasture, cutting his cattle off from water, going through a dam, and crossing ground he may want to irrigate some day. They want to build on the Tongue River Flood Plain. He has offered an alternative route that would alleviate some of these problems, but the Railroad is unwilling to consider his requests. He has reached the end of his negotiation process with Tongue River Railroad. He will not sign an agreement that will allow them to ruin his ranch. The only means he has to protect his ranch will be through the courts.

Condemnation laws currently only discuss what damages will be paid for the route chosen by the condemnor. The route he provided was straighter than their existing route and eliminated crossing his neighbor's land and going through their dam. Part of the eminent domain law should include a consideration of the location of the route. This should be settled before any other part of the condemnation process can occur.

Using the Tongue River Railroad as an example, they can only obtain an easement across state and federal lands. As a landowner, he only wants to grant an easement as well. Tongue River Railroad wants fee title to a right-of-way across all private land and the existing law allows them to obtain it. As the Railroad's legal representative stated at the February EQC meeting in Helena, owning the land would help them obtain financing. The law should be changed to make it more difficult to obtain fee title to private property.

There should also be a provision in the law to review the work done on a right-of-way for 1 year after it is completed. There could be erosion in unexpected areas, or the modification designed to help the landowner may not function as anticipated. This would allow corrections to be made without going through a court battle.

Larry Morgan, Wibaux, stated that gas pipelines are required by the federal government to inspect their lines by air and a physical ground inspection each year. Electrical lines are under the same requirement. This involves trespassing every year without compensation. This needs to be addressed.

Jerry Sikorski, Willard, stated that the true public use needs to be determined. The law should not presume that every pipeline, railroad, or powerline serves a public purpose that justifies the taking of private property. When a developer wants to take private property, the developer should have to show clear and convincing evidence that the developer is taking the property for a true public use. Public use should be determined on a case-by-case basis using criteria established in law. If a project is not a legitimate public use, the developer should not be given the power to threaten condemnation when negotiating with landowners. Specifically, hard-rock mines should not receive special treatment under the law. Current Montana law does not grant the power of eminent domain for any other kind of mine.

Wally Day, Former Legislator - Glendive, stated that in the 1970s bills were introduced to amend the eminent domain laws. The bills were unsuccessful. Those who seek to condemn someone else's land should be required to prove that the project is a truly public purpose. Those who condemn someone's land should be required to minimize damage to private property and also should be required to meet certain standards. Landowners should have the option of leasing rather than deeding land. Those who condemn someone's land should pay stiff legal damages for harming private property. An entity should not be allowed to take possession of the property until court proceedings are concluded. Using the power of eminent domain should not be allowed for monetary purposes only.

There was no one present for public comment at the Glasgow MetNet location.

PUBLIC COMMENT - BILLINGS

Dena Hoff, Northern Plains Resource Council (NPRC), presented her written testimony.

Kae McCloy, Pompeys Pillar, remarked that Cenex Pipeline provided a blanket easement over their entire ranch. A survey was to be completed, and a plat was to be added. This was an undisputed public need. The pipeline needed to be moved away from the Yellowstone River. Their concern was that it should not be routed through the water needed to operate their ranch. When the survey was completed, the route was 1/8 of a mile from Lost Boy Creek, which runs the length of the ranch and provides water for the town of Pompeys Pillar. They wanted the route to be placed 2 miles from the survey placement. In court, the judge granted the easement and also allowed fiber optics to be placed in the easement. If the fiber optics needed to be repaired, they would be dealing with an entity that did not have an easement with the landowner. The fiber optics entity told them that they usually follow the railroad but do offer a \$40,000 a mile lump-sum payment or \$5,000 a mile per year. They were not offered any compensation, nor did the judge grant any compensation. The judge also granted the right to use ranch roads or to make new roads, if needed. When there is a spill, the pipeline will not be able to get to the easement on the ranch roads. There should have been more consideration to the routing.

The law states that the entity condemning should use a licensed surveyor. Cenex Pipeline used an unlicensed survey. The BLM requires a monitoring fee and a yearly rental fee. It should be unconstitutional for the state of Montana to grant private industry condemnation rights and not afford the landowner the same protection that the state demands. The playing field needs to be more fair.

Wally McRae, Rancher - Forsyth, presented his written testimony. This written testimony is summarized below. In researching other states, states outside of the Rocky Mountain West should be studied because they have updated their laws and are not favored as heavily towards the condemner. The landowners' rights handbook is a waste of time, and the Subcommittee should not be wasting its time on this effort. Landowners who have faced condemnation know what our so-called rights are. The booklet is merely a distraction from the real issue. The present situation where the condemner can insist upon taking fee title, as opposed to the taking of an easement, and construct and operate their facility prior to a settlement of the value of the property is patently unfair. The state of Montana should require an assessment of need for a project prior to condemnation being undertaken. The Governor, the Legislature, or some other appropriate Montana entity should be allowed to question speculative, private entities when they are granted a certificate of "public convenience and necessity" and have the ability to concur in or veto these speculative ventures when granted by agencies in Washington, D.C.

Kay O'Donnell, Landowner, stated that in 1951, Cenex took a large portion of their land. At that time, the laws didn't provide for reclamation. The areas the pipeline used are very washed out with pipe showing over the top of canyons. In the early 1960s, the interstate highway was built. This is the third time the eminent domain issue has come up. They did not fight the process this time. They have gone through a lot with the entities condemning for eminent domain purposes. Changes need to be made to the eminent domain laws.

Jeanne Charter, Rancher, presented her written testimony.

Nellie Israel, NPRC, presented her written testimony.

Jackie Crandall, Rancher, remarked that two of her neighbors would have lost property due to the building of an airport. The issue is public need versus public want. An airport is being proposed in Carbon County, outside of Red Lodge. There are four airports within 60 miles of Red Lodge. Many of the sites considered for the new airport would condemn ranch land that has been in families for generations. Real public need should be proven before someone's land can be taken against their will. The burden of proof should be on the developer and not on the property owner.

Clint McRae, Rancher - Forsyth, presented his written testimony.

Art Hayes, Jr., Rancher - Birney, stated that it was important to have a mechanism for review. When does a project lose its viability? Some people on the lower Tongue River have been held hostage with a cloud on their title for over 20 years. The law needs to contain a mechanism for reviewing eminent domain projects.

Sid Menical, Miles City, remarked that recently the voters of Montana voted on an issue condemning cyanide use in gold mining. An entity is now threatening to sue the state for millions of dollars because they lost a property right. The taxpayers and citizens of the Tongue River Valley are also going to lose their property rights. The issue is one of fairness. What's fair for a gold mining company ought to be fair for the ranchers and farmers of the Tongue River Valley.

Al Schmitz, Brockton, stated that he has heard from his neighbors in the northern counties that when the pipeline project went through, it was necessary for the landowners to organize to protect their rights. The law should be more fair so that people do not have to organize to keep their rights intact.

Ryan Miles, Billings, stated that he earns a living by building pipelines. He has seen an abuse of the eminent domain process in that there was no accountability as far as proper construction techniques implemented on a pipeline job. Only after the mistakes were caught, did the pipeline make the proper changes. The entities that

use the power of eminent domain should be held accountable and do their work in a proper manner. Given today's technologies, there is no excuse for the lack of quality involved in building pipelines.

Gary Hedges, Park City, remarked that they have had a pipeline go through their property. He is also a board member of an agency of county government. It is necessary to have some provision for condemnation.

Sen. Bill Glaser, SD 8, stated that a lot of the people testifying today are people who built this country and they have no rights under the existing law on the issue of eminent domain. Several bills were introduced during the last legislative session attempting to address the problems with the eminent domain laws. The privileges that private business have on private land must be changed. As the law is now written, his neighbors are being raped.

Dan Teigan, Teigan, remarked that there are those who believe that a long history of family ranching somehow bolsters credibility. However, what is most important is how long a family can continue ranching. Currently there are too many ways to lose a family ranch. Condemnation, by way of eminent domain, should not be one of those ways. They would have been better off if they had more input before the highway was replaced through the middle of their hay meadows, the most vital part of any ranch. With more landowner input and legal standing, they could have avoided having the highway and railroad go right between two barns and corrals in their front yard. Additionally, if the railroad had been given a lease, rather than title ownership to their ranch, they would not have had to buy back their land when the railroad left. Only under the strictest guidelines should title ownership be taken from private landowners.

The process of having their farms and ranches taken by eminent domain is challenging enough. It is not unreasonable to expect an entity, such as a railroad, to have all their ducks in a row before they take a bulldozer to the land. A family should be given enough respect whereby all relevant legal, financial, and practical considerations are clear and resolved before a ranch is impacted.

Drury G. Phebus, Retired Postmaster and Rancher - Baker, presented his written testimony.

Rep. Lila Taylor, HD 5, stated that she introduced one of the eminent domain bills in the last legislative session. If nothing else, a procedure was started that has been long overdue in this state. She thanked REP. MCGEE for the liability issue proposal. This is one step in the process. As people start to understand the problem, the two opposing sides can come together on this issue. She is not anti-development but is pro private property rights. It is very necessary that the two sides come together on the issue at hand. She is a landowner who is affected by the Tongue River Railroad.

If the railroad only needs an easement, the landowner ought to have the right to negotiate on that basis. When the Tongue River Dam was completed, the state wanted to take land around the reservoir for high water purposes. They had land around the reservoir and did not want the state to have ownership because they did not want cabins to be built on the site. They negotiated with the state for an easement. The land is still in their ownership and the state received what they wanted. This can happen without having to use condemnation and eminent domain proceedings. The reason an easement is important to a landowner is very obvious when one travels to Roundup and Harlowton. When the railroad left, some of the ranchers had a chance to buy back their property but others did not. There are weeds, broken down fences, trailer houses in front of ranches, etc. The landowner who was condemned to give up his land does not have a right to have the land back. This is as wrong as it can be in Montana.

She is very interested in the burden of proof of "clear and convincing" evidence as opposed to the "preponderance" of evidence. The bills introduced in the last legislative session can be used as examples. She commended the Subcommittee for all their work and noted that they have a lot of work ahead of them.

William F. Gillin, Forsyth, presented written testimony.

Bob Stevens, Jr., Helena, presented written testimony.

Christine Valentine, Birney, presented written testimony.

REP. GUTSCHE asked **Mr. Miles** for more information regarding the lack of accountability on the pipeline project. **Mr. Miles** stated that there are numerous governmental agencies who provide standards and specifications for pipelines. They found that the inspectors either did not have the necessary knowledge needed or were simply overlooking the standards to which the company should have been adhering. There was approximately 130 miles constructed before he became involved in the project. There was probably less quality control prior to their work on the project.

X Helena Eminent Domain Subcommittee Meeting, May 4, 2000

Mr. McRae presented his written statement.

Ms. Alderson stated that they reviewed the proposed maps that came out in the draft, supplemental, and final EIS. They commented under MEPA and NEPA about the route. Following publishing of the EIS, they received a 30-day notice that their land would be surveyed. The map provided showed that the route had been changed and went through a meadow and a pass. This was not included in the EIS. They asked the Service Transportation Board what could be done about a route change. There

were no answers provided. The Legislature needs to address the eminent domain law and provide some recourse for landowners.

Mark Fix stated that he also received a 30-day notice from the Tongue River Railroad. The route had changed by over a half mile on his land. This was not included in the EIS. He has also received information from **Bill McKinney** who also received a 30-day notice from the Tongue River Railroad. In this notice, they wished to survey a route known as the western alignment, which is still unapproved by the Transportation Board. It states that there may have been some misunderstanding considering the surveying of more than one route for the railroad. The Service Transportation Board has approved one routing, and the Tongue River Railroad is in the process of obtaining approval of a slightly more direct route across several ranches. There are Montana statutes authorizing the survey, and there is a right to survey not only the route that has been approved but also other possibilities to determine the most acceptable route.

Steve Gilbert, Helena, presented his written statement.

Terry Punt, Birney, remarked that section 69-14-515, MCA, states that before any railroad corporation organized under the laws of any other state or territory of the United States shall be permitted to avail itself of the benefits of this section, such corporations shall file with the secretary of state a true copy of its charter or articles of incorporation. On July 30, 1998, he received a condemnation notice from the Tongue River Railroad, a limited liability company, not a corporation as stated in the law. The threat states that he was notified that the Tongue River Railroad Company, after having given the 30-day written notice, intended to enter upon the land set forth on Exhibit A. He does not own all the land in Exhibit A and could not sign away the rights to the land. The notice was sent out in 1998 and nothing has been done since that time. How long can this threat hang over their heads? The condemnor also has rights to sand, gravel, timber, etc. This is not adequately dealt with in the condemnation process.

X Helena Eminent Domain Subcommittee Meeting, July 26, 2000

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

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

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

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

Geoff Feiss, Montana Telecommunications Association, presented his written testimony.

MS. PAGE remarked that since the telecommunications industry maintains that it is a necessary and important industry and is not part of the eminent domain problem, it should be easy to meet the requirements of public interest. **Mr. Feiss** agreed that the telecommunications industry meets the public interest criteria. He added that public interest does not need to be further defined in law. He further noted that in the cooperative environment in Montana, an easement is granted as a part of gaining membership of the cooperative.

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

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

telecommunication lines, and railroads. These interests are not pursued by the government.

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

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

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

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

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

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

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

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

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

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

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

PART 2: WRITTEN PUBLIC COMMENT

EMINENT DOMAIN DRAFT STUDY REPORT PUBLIC COMMENT SUMMARIZED BY FINDINGS AND RECOMMENDATIONS MATRIX ITEM

Entities Authorized to Exercise the Right of Eminent Domain

- The entities authorized to condemn come from a list that the judge reviews. Tongue River Railroad (TRR) can be taken from the list because railroads are on it. However TRR does not operate trains and are not a railroad. They are only building the railroad. BNSF will operate the trains. If I call myself a railroad should I automatically gain condemnation authority because it is on the list? (Fix)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)

Federal State Relationship

- TRR tried to assert that they had federal condemnation authority and were prepared at one point to condemn State land without getting the necessary permits required by the State. Thanks to the state attorneys this was not allowed to happen. This project is totally contained within the state of Montana and the State should have control of projects within its boundaries. Once the Federal Government decides a project is warranted it is up to the State to use its Eminent Domain Statutes to promote the project. If the State is doing the condemning it should have rights to review any decisions made by the Federal Agencies it proceeds. (Fix)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)

- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)

Reversion of Property

- I understand that reversion of property for railroads does not take place when the lines are abandoned. Some are converted into hiking and biking trails. I even read recently that one that was a hiking and biking trail may be converted back into a railroad. Once the land is taken by Fee it is very difficult to get reversion back to the original landowner. Some are abandoned and then it is up to the State and Counties to control weeds and deal with problems associated with abandonment. In some cases taxes are no longer paid on the abandoned line as well. (Fix)
- We support the Draft Recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- Landowners should get the land back when the project is done. Our land has been crossed by a highway that was straightened out, and the Highway Department gave the land back to us after it was done. Private condemners should be required to do this as well. (Boulware)
- The law should include a "due diligence" provision, requiring that easements automatically revert to the original landowners, or their successors, if project construction does not begin within three years after the easement is taken. (Northern Plains Resource Council)

Mitigation Measures

- Mitigation measures definitely need to be clarified. We should have the same ability to mitigate as State and Federal Lands. Entities are required to meet

certain criteria for State and Federal Lands and they should be required to meet these criteria for private land as well. (Fix)

- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Hosford)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Leveille)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Draper)
- We support eminent domain reform and suggest that the committee immediately draft legislation that does the following things:
 - Landowners need to be involved in the routing of projects across their lands and have the same rights of mitigation as the government does on state and federal lands. (Musgrave)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Kyro)
- Items of needed reform are as follows:
 - If condemnation proceedings begin, a landowner should automatically have the same mitigation rights as on state or federal land. The current law is grossly inadequate. (McRae)
- Throughout the subcommittee's study, issues have been raised regarding bonding or mitigation measures. The Subcommittee should take care to keep

eminent domain laws separate and distinct from other substantive environmental laws (i.e. MEPA, Clean Water Act, Major Facility Citing Act, etc.). Projects that involve eminent domain are not easily lumped together. It is impracticable to address mitigation measures or bonding for environmental issues in eminent domain laws. Eminent domain principles and laws are specific to obtaining the property for a given project, while the substantive environmental laws go to the specifics of a given type of project. It must be remembered that eminent domain laws are designed to resolve property acquisition issues and not environment mitigation or remediation. To put such provisions in eminent domain proceedings would often duplicate or be inconsistent with the substantive environmental statutes. It must also be remembered that eminent domain is used relatively infrequently and then most often by the Department of Transportation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)

- We support the Draft Recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- This comment is related to a proposed motion at the last meeting -- Mitigation Measures #1 (MEPA). Mitigation Measures #1 (MEPA) seeks to stay condemnation until an EA or EIS is completed. This proposal ignores the fact that in order to fully assess potential environmental impacts, one must know where the project is to be located. It is inappropriate to require an assessment on property where the possession of property is not clear. A condemnor must already minimize the impacts a project will have, and an EA or EIS, if required, will address the specific issues presented by a given tract of property. Thus, we urge the Subcommittee to reject this proposed change. (Burlington Northern and Railway Company, Conoco, and the Montana Power Company)
- This comment is related to a proposed motion at the last meeting -- Mitigation Measures #2 (State and Federal). Some have urged that a distinction should be made between private and governmental condemnation powers. It appears that those urging such, want to make it more difficult for private or corporate entities to condemn property. The underlying issues should not be the characteristics of the entity condemning it, but should remain whether the public will be benefitted. It is hard to argue that the public is not benefitted by transportation systems (highways, railroads, etc.), utilities (power, gas, telephone, fiber optics, etc.) and pipelines. Given the relatively minimal use of eminent domain by private entities, changes to the eminent domain laws are unwarranted. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)

- Exhibit 6 from last meeting -- Requirement for completion of EIS or EA
 1. This proposal is likely to have negative unintended consequences for landowners and it seems to misunderstand typical mitigation measures. The federal government, in order to fulfill its public trust, voluntarily imposes restrictions on the use of its land that private landowners are not required to impose on theirs. Many of the NEPA and MEPA standards may be incompatible with private land holdings. For example, a typical EIS is careful to identify potential impacts of proposed projects on fish, wildlife, and native vegetation, and is particularly concerned with nesting, spawning, and other sensitive areas.

When private land is condemned, the issues to be addressed are whether the siting of the proposed project accomplishes the greatest public good with the least private injury (70-30-110), and whether the use is authorized by law and the taking is necessary to the use (70-30-111). Private landowners would not be well-served to invite additional scrutiny. Imposing NEPA mitigation measures on private lands could result in burdens on the land beyond those entailed in the granting of an easement.
 2. The EIS process is the procedural equivalent of the private property condemnation process. Prohibiting these two procedures from occurring simultaneously will extend unnecessarily the time required to proceed with a project that requires the condemnation of both public and private property.
 3. The condemnor already has to establish that the use it seeks to make of the property is authorized by law (70-30-111 (1)).
 4. The provision would overrule the Montana Supreme Court decisions in *Cenex Pipeline LC v. Fly Creek Angus, Inc.* and *Shara v. Anaconda Co.*, both of which rejected the argument that condemnation could not occur until necessary governmental approvals were obtained. *Shara*, which considered whether the condemnor should first be required to obtain a mining permit states that such a requirement would be "contrary to the public policy of providing expediency in eminent domain proceedings." (Express Pipeline)
- Exhibit 7 from last meeting -- Mitigation Measures

As with Exhibit 6, this seems to misunderstand typical mitigation measures. Some MEPA/NEPA mitigation measures may be compatible with private property, but some clearly will not be. There is already a requirement that condemnation be for a use authorized by law. All this proposal does is to potentially require inapplicable and wasteful (possibly even counterproductive)

public land mitigation measures to be the default requirement for private land. (Express Pipeline)

- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- I understand a proposal was submitted suggesting that possession of the property by the condemnor be postponed until a final environmental assessment or environmental impact statement has been completed. Such a change would open the process to the possibility of interminable delay. Because of the structure of both MEPA and NEPA, one person or organization can effectively postpone an environmental assessment or an environmental impact statement for months, and sometimes even years. In those circumstances the question is not whether it will be issued but when and with what conditions. There is no reason to subject the condemnation process which is entirely separate from the determinations made in the environmental review, to the time schedule of the environmental review which can as indicated above be manipulated by one or two persons almost indefinitely. (Holland & Hart)
- I understand there has also been a suggestion to add language requiring a condemnor to apply the same mitigation measures to private land that are applied on public land included in the project. First of all, I have some question whether such a requirement would even be legal in that it gives more rights to a landowner whose property is being taken in a project involving public and private land than the landowner whose land is being taken in a project involving no public land. It also ignores the fact that different lands require different types of mitigation -- dry land does not require the same type of mitigation as wet land, and it would make no sense to require the same type of mitigation on different types of land. This distinction is particularly important in projects which extend over long distances. Is the intent of the proposed amendment that a landowner be able to force the same mitigation measures on the condemnor that the state or federal government obtained for federal land fifty or sixty miles distant from the landowner? Mitigation can be and is addressed in the negotiations between the landowner and the condemnor, and if the landowner is not satisfied with the offers made by the condemnor, the landowner can address mitigation in the formal condemnation proceeding. In that proceeding, the landowner can certainly point to the mitigation measures taken on federal land as evidence of what is necessary on private land, and depending upon the similarity of the situations may or may not be successful. However, it does not make sense to say that the mitigation measures on public land are the minimum necessary for private land absent any showing of similarity in the

circumstances, which is exactly what the proposed change would do. (Holland & Hart)

- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- The current eminent domain law does not allow landowners enough say in establishing the mitigation measures for projects that threaten their land and livelihood. The draft recommendation to "Address the fact that the landowner has the responsibility and legal recourse to negotiate settlement and mitigation measures in the Eminent Domain Handbook" is ridiculous. We need the eminent domain law to state clearly that the damage created to private property by a project will be minimized and companies have to negotiate surface damage agreements with landowners. The law should clarify that private landowners have a right to all of the surface damage mitigation provisions that federal and state governments require on public lands if the landowner requests them. (Punt/Alderson)
- A common complaint by land owners is the type of "mitigation" that is required for a condemnation project. Many of the projects require a MEPA or NEPA analysis before being licensed. It only makes sense to require such an analysis occur before the condemnation process starts. The project proponent should be required to layout, in an EA or EIS, what mitigation measures are to be used for the project as a whole, before the condemnation process starts. (Strause)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damages to private property that eminent domain causes.
 - Landowners must be more involved in the routing of projects across their lands and should have the right to require the same mitigations the government includes on state and federal lands. If we would have been able to work in this phase of the project it would have made a huge difference in how the land could have been reclaimed and our land put back to our benefit for our use not to please Cenex. Come in, rip up the ground, cover it, throw some seed on it and call it finished. This is not good enough for government lands, it should not be good enough for private landowners. (O'Donnell)

- Several amendments to findings and current law have also been introduced for consideration by the subcommittee. These amendments are dated May 4, 2000 and marked as Exhibits 6,7,8,9,and 10. Apparently they were offered on behalf of the Northern Plains Resource Council by subcommittee member Julia Page. The current statute has proven to work well and the offered amendments should be rejected as explained herein.

Exhibit 6 offers an amendment for consideration that would amend 70-30, MCA and require that condemnation cannot occur until a final environmental assessment or environmental impact statement has been completed if one is required under MEPA or NEPA. This unrealistic provision would merely allow project opponents to hold up projects in the MEPA or NEPA process indefinitely. In addition, the ability to enter the property for finalizing the alignment, survey and engineering efforts would be stymied.

Exhibit 7 offers an amendment to 70-30 MCA that states that a condemnee who is unable to negotiate mitigation measures satisfactory to the condemnee may require the condemnor to apply the same mitigation measures that are applied on public lands for that project in that region. This is totally open-ended and places all mitigation in the hands of the landowner, who will naturally say no just to stall the project and attempt to find public land mitigation measures that would be satisfactory. This ignores the fact that sometimes state and federal lands have different mitigation in that compensation in the form of cash is not paid and extra mitigation measures are added in lieu of cash. Applying the "same" mitigation measures to different parcels would be difficult, as not all parcels would have the same characteristics. (Tongue River Railroad)

- Companies and landowners should confer, possibly with a third party to help arbitrate. There should be a consensus as to how to minimize surface damage and what compensation is adequate and fair to both parties. (A. Charter)
- Protect private lands from environmental damage by extending mitigation measures required of industries on public lands to condemned lands. (Clark Fork Pend Oreille Coalition)
- Expand the rights available to landowners by empowering them to secure from condemning companies a cleanup bond, as is done on public lands. (Clark Fork Pend Oreille Coalition)
- These companies should have to negotiate surface damage agreements with the landowner, to include routing, siting, etc. As landowners we should have a

right to all of the surface damage provisions applying to Federal and State government lands. (Radue)

- Landowners must be protected and fairly paid for surface rights, damage, and loss of use. (Orr)
- I support the following change to the eminent domain.
 - Mitigates the damage to private property that eminent domain causes. Landowners must have more rights to be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Marcure)
- I support eminent domain reform. I suggest the subcommittee immediately draft legislation which does the following:
 - Mitigates the damage to private property that eminent domain causes. Landowners must be more involved in the routing of projects across their land and should have the same right to require the same mitigations the gov't includes on state and federal land.

Requires the company putting in the project to repair and do all reclamation work completely before using the pipeline, power line, etc. In our case once the pipe was laid Cenex showed little desire to properly repair the right-of-way.

Requires that the company be required by law to notify the landowner immediately (within 24 hours) of any damage to the landowners property, crops, livestock, etc. On our ranch a power line fell down at our summer pasture (20 miles away) killing a cow and starting a range fire. The power company knew about it right a way, but we would probably not know about it for a few days if a neighbor had not phoned us. Other times utility crews have severely rutted up grain and hay fields without notifying us.

Requires that the company pay full restitution within 30 days for any damage due to their project.

Requires that the company or gov't entity control all weeds on the right-of-way forever. On our ranch we probably spend more in a year or 2 controlling weeds on the 4 missile lines through our ranch than we received total for them coming through.

Requires that the company make a yearly payment to the landowner to pay for loss of production. The missile lines came through approx. 40 years ago and there are still places where there is zero production. (Dawson)

- Public land cannot be condemned. (By public land, I mean BLM, State Land, and USFS). These agencies have a much stronger mitigation policy to rely on. A mitigation policy is only as good as the weakest link. As an example, if the BLM can negotiate a strict weed plan, and the neighboring landowner is not a good negotiator, the BLM eventually will have weeds that originated on the ground of the private land owner. It is only fair that a baseline mitigation plan be standard on all land effected. As I have testified earlier, our mitigation plan for the TRR is 36 pages long and uses the word "should" 174 times. In contrast, the FWP Fish Hatchery, BLM, State Land, the Livestock Experiment Station all have very strong mitigation plans. Landowners must have the right to the same protection the public lands enjoy, IF the landowner so desires. (McRae)
- Something has to be done to mitigate the problems that occur from the construction, operation and maintenance of pipelines, railroads, power lines, and other developments. Weeds, dust, trespass, destruction of fences and other property are all common abuses that accompany projects that have the power of eminent domain. It's not right that a landowner not only gets to "host" a project for which he or she will not benefit, but then has a life time of hassles from careless contractors or employees who just want to construct, repair or operate without regard to the needs and concerns of the property owner. Right now, this mitigation is solely determined by the negotiating skill of the landowner, which probably means the negotiating skill of their lawyer. But when you know that the developer can take your land anyway, most likely has a fleet of lawyers you are in a very weak position to win mitigation much less enforcing it. Reform in the law desperately needs to address this problem. I know that state and federal land require mitigation measures and rights of ways go through that land all the time. Private property owners should have the same standards. (Crandall)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Gabrian)

- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must have more rights to be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Dye)

- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must have more rights to be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (Mangus)

- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Mitigates the damage to private property that eminent domain causes.
 - Landowners must be more involved in the routing of projects across their land and should have the right to require the same mitigations the government includes on state and federal lands. (I. Alderson)

- In addition to the requirement that a project be located in a manner that minimizes private injury, the eminent domain law must also require that damage to private property be minimized by development of a mitigation plan. The process for developing this mitigation plan must provide opportunities for landowners to have input into routing decisions, and into decisions pertaining to specific mitigation measures. (Northern Plains Resource Council)

- The state should monitor mitigation plans and publish annual monitoring reports. If the State fails to enforce a mitigation plan, citizens must have the right to go to court to require enforcement. (Northern Plains Resource Council)

- Private landowners must have the right to be covered by the same land, water, and property protections and mitigation measures that apply on state and federal public lands. (Northern Plains Resource Council)

- Prior to the start of any environmental review process or other permitting process, any company or government agency seeking to use eminent domain to take land must mail a notice of their proposed project to all potentially affected landowners explaining opportunities for public input. (Northern Plains Resource Council)

- If the Montana or National Environmental Policy Acts (MEPA/NEPA) require an environmental assessment or environmental impact statement, that environmental review must be completed before condemnation is allowed. (Northern Plains Resource Council)
- For-profit companies using the power of eminent domain must be required to post bonds to ensure full reclamation of private land. (Northern Plains Resource Council)

Standards and Specifications

- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)

Possession of Property

- Possession of the property by the condemnor is also a problem. If the possession is given too early in the proceeding the project will be completed before the legal process and then it is too late to change routes or modify the project to try to accommodate the landowner. (Fix)
- The possession of property is an area that should definitely be revised. I think that the land will be taken prior to substantial issues being settled (i.e. route for instance). (Fix)
- We support eminent domain reform and suggest that the committee immediately draft legislation that does the following things:
 private companies should not be allowed to take possession or begin construction along rights of way until all court cases with the landowners are settled. (Musgrave)
- We support the Recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- This comment is related to a proposed motion at the last meeting -- Possession of Property. The Motion to Amend Draft Recommendation entitled "Possession

of Property" should also be rejected. This proposal would result in delays in planning and preparing projects that have been determined by a district court to be in the public interest. If a non-monetary appeal is frivolous, this provision would allow a landowner to delay a project for no basis. If this provision is adopted, a change should be made to the attorney's fees law, and allow all prevailing parties to recover costs and attorneys' fees to prevent frivolous appeals, intended to delay and antagonize. It is important to remember that it is the public that is harmed when a project having availability to eminent domain powers is delayed. Furthermore, a review of the Montana Constitution, and the Constitutional Convention transcripts do not support such a change. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)

- Exhibit 8 from last meeting -- No Possession Pending Appeal
70-30-312 permits an appeal of any condemnation order to the Supreme Court and allows the District Court to issue a stay. This proposal, however, would take the power to decide the appropriateness of a stay out of the court's hands and permit a condemnee to pursue a frivolous appeal and possibly disrupt a major construction project that, the district court already has ruled, is in the public interest. This would also essentially vitiate the Court's powers to issue a preliminary condemnation order (70-30-206). The Supreme Court has already recognized that expediency in condemnation proceedings serves an important public policy function. *Shara v. Anaconda Co.*

This proposal also appears to be based on an incorrect premise. Rule 7 of the Montana Rules of Appellate Procedure (25-21-7) requires an appellant to post a bond to stay enforcement of a judgement on appeal. The bond must include an amount for delay damages. Exhibit 8 would elevate condemnation defendants to a status superior to other appellants by allowing condemnation appellants to stay the effectiveness of a judgement without even posting a bond. (Express Pipeline)

- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- A proposal has also apparently been made to amend the eminent domain laws to provide that the condemnor cannot take possession of the property until all appeals are exhausted. Apparently some people felt that plaintiffs in eminent domain proceedings get preferred treatment because in other civil cases an award may be withheld pending appeal. First of all, I am not aware of any "abuses" which have resulted from the existing procedure. Because the uses for which eminent domain may be exercised are clearly spelled out in statute, typically any appeals have to do only with value and not whether the property may be taken. Furthermore, it is not accurate to say, without qualification, that

in other civil cases an award may be withheld on appeal. In cases in which a plaintiff has been successful in obtaining a money judgement, for example, the defendant may appeal but only if a bond is posted to guarantee payment of the judgment. To make the suggested change truly comparable to other civil cases, the legislature would have to provide that a land owner who wishes to appeal the question of whether the property is subject to eminent domain should be required to put up a bond to indemnify the condemnor for damages caused by the delay. (Holland & Hart)

- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- The next issue I address also involves a philosophical point. If a District Court decides in favor of the condemnor, the condemnor is presently allowed to immediately take possession of the property. That is true even if the land owner appeals the decision of the District Court to the Supreme Court. If the condemnor proceeds with the project, but the decision is then overturned by the Supreme Court, the land owner may not have an adequate remedy. There simply may be no way to undue the damage to the land. It should be remembered that many times the dispute is not over money, but over something with a much greater intrinsic value. Therefore, the statute should be changed allowing the condemnor to take possession only after an appeal to the Supreme Court (in cases in which the amount of compensation is not the only issue). In order to alleviate problems to the condemnor, the statute should also have a provision for an expedited appeal. (Strause)
- Several amendments to findings and current law have also been introduced for consideration by the subcommittee. These amendments are dated May 4, 2000 and marked as Exhibits 6,7,8,9,and 10. Apparently they were offered on behalf of the Northern Plains Resource Council by subcommittee member Julia Page. The current statute has proven to work well and the offered amendments should be rejected as explained herein.
 - Exhibit 8 proposes amending 70-30 MCA to provide that a condemnor may only take possession after an appeal to the Montana Supreme Court, unless the only issue on appeal is the monetary value of just compensation. This would provide for projects to be held up indefinitely pending approval by the courts and preclude access for engineering and survey efforts. The facts which must be proven before a property can be taken are clear and known to all. The statutes provide for a distinct remedy for a unique process and should remain that. It is a known fact

that only a very few condemnations occur each year and the process is not being abused. (Tongue River Railroad)

- This simply asks for the company not to take possession of property until all appeals are exhausted. I do not believe it is fair for a company to take over property and negotiate compensation afterwards. Industry representatives claim that is not done. Let's see it in writing. (McRae)
- Landowners should have the right to keep control of their land until all court proceedings are concluded. (Northern Plains Resource Council)

Liability

- If the condemner is a limited liability partnership will they still be held liable under LC7031? (Fix)
- LC7031 -- We agree with LC7031 that a landowner should not be liable unless he or she caused, contributed to, or exacerbated the damages or problem. The principles of LC7031 are already contained in the law, but if clarification is needed LC7031 would fulfill that goal. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- LC7031 would create a different liability standard for property owners whose property was condemned versus those property owners who reached agreement with the condemner. This does not make good policy sense. (Express Pipeline)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- We support the draft recommendations contained in Chapter 7, although we are concerned about the need for LC7031, draft legislation dealing with liability. (Montana Electric Cooperatives' Association)
- All liability of damage to land or water must lie with developers and operators, regardless of whether the landowner retains title. (Northern Plains Resource Council)

Use of Interest Taken

- I agree with the statement under use of interest taken that the land should be taken for one use only and the law should be changed to produce this result. (Fix)
- We support eminent domain reform and suggest that the committee immediately draft legislation that does the following things:
 - if a private company has an easement across private property, they should not have the right to resell an interest in that easement to another private company without additional compensation to the landowner. (Musgrave)
- Items of needed reform are as follows:
 - Only 1 use per right of way. Additional uses of right of way need to be re-negotiated with the landowner. (McRae)
- We support the Recommendation, subject to the comments provided on LC7033: We believe the concepts contained in LC7033 dealing with the multiple use of condemned property are already adequately covered in the law, as the law already states that the property taken is to be used for the purpose for which it was taken. Therefore LC7033 is not necessary. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Cenex is also concerned about the potential effects of bill draft LC7033. LC7033 has been described as a bill that would limit the multiple use of easements for purposes beyond what is outlined in a condemnation order. First, Cenex finds that LC7033 is also redundant. Section 70-30-309, MCA already requires a reviewing court to describe the property to be condemned and the purpose for the condemnation. However, our concern is that the bill, as written is ambiguous, and could be construed as contradictory by implying that if the public use is subject to 70-30-111(3), then the property condemned could be used for other purposes. Because LC7033 is not clear, enactment of such legislation could call into question a large body of case law that has been used to interpret the use of eminent domain in Montana. (Cenex)
- We agree with the findings and draft recommendations as outlined in this report with the exception of LC 7033, which, as written is a problem. We are concerned that in Section 1, the language stating that "the condemnor may not use the property condemned for any purpose that is not specified in the condemnation order" assumes that the purpose specified in the order would match the appropriate public use listed in the statute. In order to make sure that a judge would not inadvertently leave out an essential and legislative

approved use, the bill should require that the wording in the court order refer to a specific public use (or uses).

The bill would also appear to be contradictory by implying that if the public use is subject to 70-30-111(3), the property condemned could be used for other purposes.

While we understand that LC 7033 is intended to clarify that only the public use specified in the court order will be the only purpose for the condemnation, we believe the current 70-30-309 adequately addresses this issue. (WETA)

- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- Overall, the Department of Transportation supports the work product that the Subcommittee has produced. However, in the second draft recommendations on page 121, "use of interest taken" it is confusing or not clear exactly what the statement is dealing with as far as interest taken. There could be potential problem in situations where a condemnor takes a piece of ground and then is required by Montana law to allow utilities to locate their lines within the new right-of-way. While the condemnor may take the property only for that public use, then the utility gets free use of the right-of-way for a whole totally different and separate purpose. (Montana Department of Transportation)
- We are concerned about the language contained in LC7033 that may be subject to different interpretations. For example, the Tongue River Railroad will be needing a communications system to direct traffic along the line and without clear authority to place fiber optic or other state of the art technology in the right of way could adversely impact the project. Should the court's condemnation order not state a specific purpose for the project, the condemnor is at risk. (Tongue River Railroad)
- We strongly oppose LC7033 as it would be detrimental to the deployment of telecommunications services in Montana.

LC7033 is being described as a bill that would limit the multiple use of easements for purposes beyond what is outlined in a condemnation order. The language of the draft bill goes far beyond that and has the potential for serious negative implications.

LC7033 is redundant. The current statute is sufficient as written. Section 70-30-309 directs a reviewing court to describe the property to be condemned and the purpose for the condemnation. The statute clearly indicates that the

property described by the court shall vest in the plaintiff for the purpose specified in the court order. If we have an easement today, we cannot use it for any other use not negotiated with the landowner.

LC7033 creates ambiguity. The bill language is not clear and may promote litigation in the future. If the intent is to ensure that a condemnor is limited to specific uses on condemned land, the bill fails. The proposed language may have the opposite effect and provide enough ambiguity so that a condemnor could claim the right to ALL uses despite those listed in the condemnation order. The bill states, "Unless the public use is subject to 70-30-311(3), the condemnor may not use the property for any purpose that is not specified in the condemnation order." Doesn't this then mean that if the public use IS subject to 70-30-311(3) that the condemnor may use the property for other purposes?

LC7033 takes a step backward. If enacted, this bill may have the effect of frustrating the maintenance and expansion of telecommunications networks that would delay deployment of advanced telecommunications service to Montanans. The draft does not say that the property can only be used for the public use specified in the condemnation order -- it says that the property can only be used for purposes specified in the condemnation order. A court order would likely identify the purpose in the condemnation order to track with the public use, i.e. "telephone lines." Because the bill is now prospective, the courts will not have a hundred plus years of history to interpret what "telephone or telegraph lines" mean. This may now be interpreted (and the courts will get to decide) to exclude data, Internet, video services and anything new that might be developed in the future. Video (such as video streaming over the internet) and the internet have been interpreted in some venues as not being telecommunications services at the same time they have become an integral component of services people expect to receive over their telephone lines.

Another area of concern is if the courts, since this is prospective, will interpret the statute to only apply to easements as you intend or if they would apply this to fee simple condemnation actions. We can imagine a situation where it will be impossible to provide telecommunications services to Montana citizens if a court determines that a public road servicing a community or neighborhood could only be used as a roadway because a section of it was acquired in fee simple through condemnation. Where will all the water, sewer, electric, natural gas and telephone lines go and how will people in Montana get those services? From a public policy perspective, is it more important for a single landowner to be empowered to impede service to his or her neighbors or that those neighbors have speedy access to necessary utilities during Montana's short construction season?

While we don't believe this legislation is needed, we offer several suggestions to LC7033 should you decide to pursue it and trust you will give them serious consideration.

1. Specify that this applies only to easements.
2. Specify that this section is not intended to in any way hinder or stop the deployment of any telecommunications or other service delivered over any telecommunications facility. (Although we're not sure that addresses some applications, such as internet services that are now being transmitted over existing electric lines.)
3. Delete the prospective clause to avoid undoing 100 plus years of court orders and starting all over again to define what a telephone or telegraph line means.
4. Clear up the ambiguous reference to 70-30-111(3)

(US West)

- If a project is approved (railroad, pipeline, power line, etc) that permit should only be for the single use it was intended. It is not right for company to use a right of way for something else without negotiation with the original landowner. An example would be laying fiber optic cable in an existing right of way. The fiber optic company would negotiate with the original landowner, not the holder of the current right of way. (McRae)
- We support the draft recommendations contained in Chapter 7, although we are concerned about the need for LC7033, draft legislation dealing with use of condemned property for other uses. (Montana Electric Cooperatives' Association)
- The power of eminent domain should be limited to the taking of a single-use easement. If the holder of the easement wants to use or lease the land for additional projects (adding a pipeline to a railroad easement for example), the landowner must have the right to require the holder to renegotiate the easement. This right exists under Wyoming law. (Northern Plains Resource Council)

Due Process

- We support the recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)

- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)

Burden of Proof

- The burden of proof should be changed or the type of interest taken should be limited to easements. (Fix)
- We support the recommendation.(Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- This comment is related to a proposed motion at the last meeting. As was thoroughly discussed at the Committee meeting, there is no need to change any of the evidencing standard or "burden of proof." The current burden of proof levels provide workable frame work to address concerns in eminent domain proceedings. By changing the burden of proof, the costs of condemnation proceedings would significantly increase, and the plethora of eminent domain precedents would be changed. This would result in more cases needing to be appealed to have the law clarified by the Montana Supreme Court in order for there to be precedent established under any new statutes.

In the event the Subcommittee elects to recommend changes to the burden of proof, it should also recommend changes to the statute awarding attorney's fees to the prevailing landowner. Thereby creating a situation where both sides would need to be reasonable, or run the risk of paying the other side's costs.

As currently provided in law, a condemnor must show, in the event eminent domain proceedings are commenced, that the public interest requires the taking and the taking is necessary. See Mont. Code Ann. §§70-30-111 and 70-30-206(2). Whether a proposed project is in the public interest and is necessary, will be met upon a showing that the condemnation is reasonable, requisite and necessary. See MPC v. Bokma, 457 P.2d 769 (Mont. 1969). By changing the burden of proof, while each condemnation is fact specific to that project, it appears that the logical result will not be different outcomes, but will significantly increase the cost to all parties, and increase the work load of already overburdened courts. By increasing the burden of proof, the scene will be set for a disgruntled property owner to delay and interfere with projects that by definition are implemented to benefit the public. If costs are increased and

projects delayed it is the citizens who rely on the services provided to bear that additional expense, through higher fees and prices. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)

- Exhibit 9 from last meeting -- Burden of Proof

The distinction between condemnation by a public entity and condemnation by a private entity is illusory. In all cases of condemnation, property is being taken because the public interest requires the taking (7030-11), and the property is being taken to fulfill that public interest. This change would elevate the interests of a single private individual above those of the public in general. This would completely gut the powers of eminent domain.

This change in the burden of proof is also poorly conceived. For example, the current burden as it pertains to the greatest public good/least private injury requirement is that the condemnor's decision about the location of the project will not be overturned except "on clear and convincing proof that the taking has been excessive or arbitrary," Shara, 610 P.2d at 137 citing *Montana Power Co. v. Bokma* 457 P.2d 769, 774-75. The proposal is to raise the burden of proof on the condemnor without changing the burden on the landowner. This presumably would require the condemnor to establish the greatest public good/least private injury requirement by clear and convincing evidence, but require the landowner to carry the same burden to defeat the showing. That makes no sense. It is also contrary to the court's view that a condemnor's choice of location is to be given great weight because it has the expertise and detailed knowledge necessary to make the determination.

Furthermore, while the right to hold property is highly valued, the right to acquire property by eminent domain is also recognized in the Montana Constitution (Article II, Section 29). As discussed in the Draft Final Report the power to condemn is "inherent in all sovereign governments and, if not checked by constitutional and statutory provisions, is limitless." Draft Final Report, p. 47. The justification for changing the burden of proof presumes that the power to condemn abridges landowner's rights; in fact, condemnation statutes abridge and limit the state's otherwise limitless and paramount power to condemn for the public good. Finally as discussed at the recent hearing, logic would require an even higher burden of proof on the landowner than clear and convincing. Since there is no higher burden of proof then the court is left with the dilemma. (Express Pipeline)

- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)

- Apparently the proposal has been made to change the burden of proof to require proof by a non-governmental condemnor to clear and convincing evidence. I have already commented on the "clear and convincing" standard in my earlier letter in which I point out that contrary to what the Subcommittee has been told, it is not a middle ground but rather the highest standard in a civil action. Apparently the new wrinkle in the proposal is that the standard be clear and convincing for private condemnors but a preponderance of the evidence for public condemnors. It seems to me that if a project is for a use permitted by statute, it should make no difference who the condemnor is. Indeed certain projects can be undertaken either by public or private condemnors and the burden of proof should be the same for each. The Subcommittee has already considered this matter and I believe voted rather decisively not to change the burden of proof requirement, and I suggest that determination not be modified. (Holland & Hart)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- From a philosophical standpoint, I believe that when a non-governmental entity attempts to use the power of eminent domain to take the private property rights of Montana citizens, the law should be weighed in favor of private property rights. As it stands now, the condemnor only need tip the scales ever so slightly in its favor in order to prevail in a condemnation action. Since a condemnation action involves such an important right, i.e., private property ownership, I believe the private condemnor should be required to tip the scales heavily in its favor before being able to take another citizen's property. I suggest the burden of proof should be one of "clear and convincing evidence." (Strause)
- Several amendments to findings and current law have also been introduced for consideration by the subcommittee. These amendments are dated May 4, 2000 and marked as Exhibits 6, 7, 8, 9, and 10. Apparently they were offered on behalf of the Northern Plains Resource Council by subcommittee member Julia Page. The current statute has proven to work well and the offered amendments should be rejected as explained herein.
 - Exhibit 9 suggests adding to the statute in 70-30 MCA to raise the burden of proof for a non-governmental condemnor to a clear and convincing evidence standard and explicitly state that a defendant property owner not meet a higher standard. The comments submitted to

the subcommittee have been clear that the standard for governmental and non-governmental should not be split and that the burden of clear and convincing evidence is too high. The statute should not be revised and the proposed amendment should be rejected. (Tongue River Railroad)

- Regarding burden of proof standards, we reiterate our previous comments presented at the March 23-subcommittee meeting in Billings. Our Association is concerned about the proposal to raise the burden of proof standard to "clear and convincing evidence." From a legal standpoint, we believe this change could have a chilling effect on a cooperative's ability to extend power lines and build substations to adequately serve customers and communities. Such an impact, of course, would be seriously detrimental to economic development in our state and in local communities. (Montana Electric Cooperative's Association)

The "clear and convincing standard" could create a hurdle significant enough that it would be very difficult to prove continued construction of infrastructure is in the public interest. (Montana Electric Cooperatives' Association)

- For-profit companies seeking to condemn property should only be granted the power of eminent domain if they can show clear and convincing evidence that, on balance, their project will primarily serve the public interest rather than private gain. (Northern Plains Resource Council)

Rights of Reentry

- We support the Recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)

Type of Interest Taken

- My understanding is that the Judges generally rule in favor of fee title for the condemnor even though they should have convincing evidence proving the need for fee title. This is why an easement should only be allowed. If the landowner wants the land to be sold by fee title he should be able to do so. It should not be up to a judge to decide if fee title is warranted. (Fix)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. (Hosford)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. (Leveille)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. (Draper)
- We support eminent domain reform and suggest that the committee immediately draft legislation that does the following things:
 - landowners should have the option of giving an easement rather than a deed to any right of way subject to eminent domain. (Musgrave)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. (Kyro)
- Items of needed reform are as follows:
 - The landowner, not industry, should have the right to choose between an easement or giving fee title. Industry representatives have stated this exists now. I want to see it in writing. (McRae)
- We support the recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- This comment is related to a proposed motion at the last meeting. As this Subcommittee is aware, current law already provides that a condemnor must take only the minimum interest necessary and the district court has inherent power to limit the type of interest. See Mont. Code Ann. §§70-30-203(6) and 70-30-206(1)(b). Therefore, this proposal is not necessary. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)

- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- There has also apparently been a suggestion that limits the interest taken by a condemnor to an easement unless the condemnor proves in court that a great interest is necessary. I do not see any need for such a change. Existing law (Mont. Code Ann. §70-30-206) allows the judge in a condemnation proceeding to limit the interest in real property sought to be appropriated if in the opinion of the court the interest sought is not necessary. Under present law the condemnor must allege and prove the interest required, which may range from a mere license to fee simple title, and I do not see any advantage in starting with the presumption of an easement. (Holland & Hart)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- Why shouldn't private property owners have the same rights under the eminent domain laws as state and federal landowners crossed by the same projects? Federal and state landowners have the right to grant an easement instead of a fee title when projects cross their land. Shouldn't the landowner crossed by a project have this same choice? (Punt/Alderson)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. If in an allotted time period a project is abandoned or lays dormant the project would be discussed with the landowner as to how to return the land to said landowner and mitigation agreements made under contract. We have the other Cenex pipeline on our property that in the future they tell us will probably be abandoned. It crosses two deep coulees above ground, what becomes of non-use pipe? Will it crumble and fall into the coulees, leaving oil, pipe, etc. residue exposed? I have asked but answers have not been addressed. (O'Donnell)
- Laws are urgently needed to give landowners due process including the right to maintain ownership of their land with a simple easement granted for a stated purpose. (M. Alderson)
- Several amendments to findings and current law have also been introduced for consideration by the subcommittee. These amendments are dated May 4,

2000 and marked as Exhibits 6, 7, 8, 9, and 10. Apparently they were offered on behalf of the Northern Plains Resource Council by subcommittee member Julia Page. The current statute has proven to work well and the offered amendments should be rejected as explained herein.

Exhibit 10 offers an amendment to 70-30 MCA to clarify that the type of interest taken in an eminent domain proceeding is an easement and that a condemnor must prove a greater interest is necessary if one is sought.

The current law is clear that a lesser interest is granted unless it can be shown that fee title is necessary. The proposed amendment should be rejected. (Tongue River Railroad)

- As with highway right-of-ways, landowners should give easements, not fee title. (A. Charter)
- As landowners, we should have the right to give up only an easement rather than fee title to our property. (Radue)
- Landowners must have the right to due process including the right to maintain ownership of their land with a simple easement which would be granted only for the stated use. (Orr)
- I support the following change to the eminent domain.
Let's landowners give an easement, rather than deed. (Marcure)
- I support eminent domain reform. I suggest the subcommittee immediately draft legislation which does the following:
Let's landowners give an easement, rather than deed. (Dawson)
- If the state can grant easements rather than fee title, the same should apply to private landowners. We would not want to consider giving title to a strip of our property. There are too many contingencies that would make such a transaction unacceptable to us. (Carrell)
- Private landowners should have the right to choose between an easement or signing over fee title. An example, the TRR has publicly stated that they are not interested in easements. They seek fee title because they use it as collateral for their investors. If we asked the TRR for an easement, and they deny us, that is not negotiating. The companies are not required to accept easements. This needs to change, it needs to be in writing. The industry reps at the meetings claim that a private landowner has the right to request and grant easements. Great. Let's put it in writing. (McRae)
- Easements should be limited to a single purpose, not a multiple purpose, like pipelines and fiber optic cables when landowners aren't compensated for this

up front. State and federal governments do not give fee title to public land for the railroad. The railroad doesn't get to own public land, but they want to own our private property by taking fee title through eminent domain. They want this so the railroad can have equity to borrow money to finance their operations. This is wrong. Financing should never be a reason why someone can get fee title. (Boulware)

- Eminent domain laws should not in any way allow a condemnor to take title to property unless the landowner is willing to do this. There are other ways to grant rights of ways than giving a title -- such as leases, which could include yearly royalty payments. This is much more fair than a one time payment for property. (Crandall)
- Under the present system, one easement or fee title taking opens up the land for every other possible taking, and creates no recourse for landowners to deal with additional uses from other parties. (McKinney)
- Montana's private landowners should have the same rights as those granted to the State, Federal and Tribal governments. This should include the ability to negotiate easements and adequate mitigations. (Hayes)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. (Gabrian)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. We would feel terrible if the airport was abandoned and we would have a hole in our land that belonged to someone else. (Dye)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. We would feel terrible if the airport was abandoned and we would have a hole in our land that belonged to someone else. (Mangus)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Lets landowners give an easement, rather than deed. (In. Alderson)
- The law must explicitly give landowners the right to choose whether to sell an easement rather than title for the land that is used. A condemnor wishing to

take title must prove that an easement will not be adequate for the project.
(Norther Plains Resource Council)

Public Uses

- We agree with this Finding and Recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- A review of what became known during the subcommittee meetings as "the list" reveals many private entities that are authorized to use the state's power of eminent domain. Mining companies, railroads, logging companies and others are allowed to take another person or company's private property for their own benefit.

Clearly the testimony from the subcommittee's many meetings revealed that this is not always appropriate. On many occasions the subcommittee was urged to revisit "the list" and remove eminent domain authority for private companies but chose not to do so. We think this is a mistake and that the committee needs to revisit this issue. (Montana Environmental Information Center)

- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- Fully consider the benefits of clean water by formally recognizing this natural resource as a "public use." (Clark Fork Pend Oreille Coalition)
- Railroads are poor neighbors. They always have been and they always will be. They don't contribute to our community. We should not reward them by letting them take private property at bargain prices. (Boulware)

Just Compensation

- We support the Recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)

- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- The money they pay compared to the money they receive for their services going through our land is a joke. What price do you put on destruction, land acres lost in resale value in the future, we still get taxed the same for this out of our control land, and the mitigation is far from ever complete. (O'Donnell)
- There was no recourse or choice of just compensation. It was either take what we give you now or take nothing. The law as it stands now does not give fair market value for property. They can mandate the price they are going to give you for your land. We believe there should be a better arbitrary system to adequately determine valuation. (McKinney)
- Landowners must be compensated, and the Legislature must establish a fair process for calculating the devaluation of a landowner's remaining property after an easement or right-of-way is taken. Recognizing that it is nearly impossible to quantify the loss of quality of life as well as other costs (such as time invested in the process and permanently disrupted agricultural operations), the compensation paid to the landowner should equal the calculated devaluation plus a percentage established by the Legislature. (Northern Plains Resource Council)
- Compensation for damages should be readjusted for up to one year after construction has been completed to ensure landowners just compensation if damage is greater than originally projected. (Northern Plains Resource Council)
- Landowners should have the right to choose amortized annual payments instead of a one-time payment. (Northern Plains Resource Council)
- Landowners must have the same rights as government agencies to seek compensation for damages such as train-caused fires and pipeline leaks which occur in the course of a project's operation. (Northern Plains Resource Council)

Necessity/Public Interest

- I believe that you have missed an opportunity to take a closer look at some ways the State of Montana might ameliorate the sometimes disruptive and disheartening effects of the exercise of eminent domain on the property rights and daily lives of private landowners.

My particular concern relates to the determination of public interest and necessity for any project that involves the exercise of eminent domain.

Historically, I believe, the requirements for demonstrating that a project is in the public interest, and is in fact "needed" have been ill-defined or undefined. As a result, some project proponents seem to have devised a way of creating a perception of need to fit a given circumstance, then creating a new justification when circumstances change. This approach trivializes the notion of private property rights which we otherwise treat with almost sacred reverence in this State.

Public necessity and the public interest as far as the TRR goes seem to evaporate and materialize on demand with the shuffle of a few meaningless documents.

I would submit that a stronger State role in addressing the question of public interest and necessity would have served everyone better from the start. A policy defining public interest and need and requiring substantive State review and participation in the process would have gone a long way toward settling this issue years ago. (Tollefson)

- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest.
(Hosford)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest.
(Leveille)
- I support eminent domain reform. I suggest that the subcommittee immediately

draft legislation, which does the following things:

Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest.

(Draper)

- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest. (Kyro)
- We support eminent domain reform and suggest that the committee immediately draft legislation that does the following things:
When a private company wants to use eminent domain, it must prove that its project is in the public interest. (Musgrave)
- The taking of private property should only be used when there is no question that a project is for the public good -- that is not the situation here. With the current eminent domain law -- we believe that this speculative project will be granted the power to take our land. We believe this must change. (Kyro)
- The taking of private property should only be used when there is no question that a project is for the public good -- that is not the situation here. With the current eminent domain law -- we believe that this speculative project will be granted the power to take our land. We believe this must change. (Draper)
- Items of needed reform are as follows:
Public need needs to be proven to the state before eminent domain can be used. This would screen unneeded projects. (McRae)
- We support the Recommendation. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- This letter is in response to the solicitation of comments concerning the final report of the eminent domain subcommittee. I have previously commented by letter on April 11, 2000 and attended one of your hearings in Helena. I understand that new proposals were presented at the last meeting of the Subcommittee and will limit my comments to those proposals.

LC 7034: This proposal apparently requires a condemnor to show by a preponderance of the evidence that the project is in the public interest. Presently under Montana law the allowed uses for condemnation are specified in statute. If condemnation is sought for one of the permitted uses then it is allowed assuming the condemnor can satisfy the other requirements of the statute. I believe the existing procedure is satisfactory and in fact superior to the suggested change.

A significant advantage of the existing procedure is certainty. The statute spells out exactly what public uses qualify under the Eminent Domain statutes. LC 7034 would eliminate that certainty, and leave the determination of what projects qualify for eminent domain to a judge or jury made on a case by case or ad hoc basis. Allowing a jury or a judge to determine whether a project is in the public interest will result in inconsistencies in application of the law. For example, a jury in one location may think a mine, a road, or a highway is in the public interest whereas in another location where the project was more controversial, a different jury presented with similar facts may disagree. Compounding the uncertainty is the fact that public interest is not defined. While it may be possible to craft a definition of public interest, it would have to be so broad and therefore vague it would be virtually meaningless insofar as providing any reliable standards.

The suggested change also fails to address which court would have the authority to make the determination that a project is in the public interest. Many projects such as highways, power lines or railroads stretch over several judicial districts. Obviously a condemnor should not be required to obtain a determination that the project is in the public need from each of the judges in the judicial districts affected by the project, yet I see no basis to arbitrarily designate a particular judge to make that determination. There is no such problem with respect to determination of just compensation, because each parcel of property has its own unique characteristics which affect value, and those characteristics can be recognized in determining just compensation. Finally, under the suggested change, the decision of whether the project is in the public interest would presumably be subject to review by an appellate court thereby delaying planning and increasing the cost of the project. (Holland & Hart)

- We agree with the finding and draft recommendation as outlined in the report. (WETA)
- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)

- The "Necessity/Public Interest" is one of the most important tasks before this committee. The lack of definition of "public use" is where much of the abuse of the eminent domain law takes place. Demanding that companies wishing to exercise the law prove that a project is truly in the public interest could minimize this abuse. This section of the law seriously needs to be revised. It is abundantly clear that many of the so-called "public uses" are not a benefit to Montanans but to a few corporate shareholders. Not to recommend changes to this portion of the law is irresponsible. (Punt/Alderson)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
 - Makes sure projects are in the public interest before private companies use eminent domain, it should have to prove its project is in the public interest. No project should be allowed to just decide what they can and can't do on private property without just cause. (O'Donnell)
- Very strong public need must exist before any company should be allowed to condemn private lands. (M. Alderson)
- The proposed legislation LC7034 raises similar concerns. As proposed, LC7034 would require the plaintiff to show by a preponderance of the evidence that the project is in the public interest, in addition, to a showing that the public interest requires the taking. LC7034 would create undue burden on judges to make a determination of public interest, which is not defined in the statute, and changes their role considerably. The offered legislation ignores the tremendous burden undertaken by a project to receive the necessary approvals to construct the project in the first place. This review burden should not be placed on the court system and the proposed legislation should be rejected. (Tongue River Railroad)
- Companies must first prove that what they propose to do is in the public interest and that the state will benefit from it. (A. Charter)
- Strictly define public interest and ensure that business interests, such as profit margins and market niche, do not take precedence over the community good. (Clark Fork Pend Oreille Coalition)
- Companies should have to prove that their project is really in the public interest, not simply in the interest of their shareholders. (Radue)
- At the very least, great care should be exercised before eminent domain is allowed. A very strong public need must be established. (Orr)

- The taking of private property should only be used when there is no question that a project is for the public good -- we don't believe the pipeline is for the public good. Yellowstone Pipeline has not proven to us that they are a safe entity, yet they get the power of eminent domain. (Marcure)
- I support the following change to eminent domain:
 - Make sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest. (Marcure)
- I support eminent domain reform. I suggest the subcommittee immediately draft legislation which does the following:
 - Makes sure projects are in the public interest before private companies use eminent domain. Private companies should have to prove their project is in the public interest and not just for profit. (Dawson)
- Public Interest
 - The committee discussed this, and from what I could gather, decided by a vote that the definition of public use was vague and needed clarification. In addition, Public Convenience and Necessity, or need, needs to be proven by the company either to the Federal Government or to the state, or both. The TRR was granted a permit by the Surface Transportation Board under the guise of Public Convenience and Necessity. At no time did TRR ever prove this project was convenient (to the public) or necessary. If a company has the power of Eminent Domain, they should at least be required to prove it is in the best interest of the public. (McRae)
- The condemnation laws should be changed so that private companies must prove that their project is in the public interest before they get the power of eminent domain. (Boulware)
- Design a method by which public need is determined -- which would include public hearings on the topic of public need -- not just merits of the proposal. This idea would certainly help to weed out the speculators who torment property owners with propped up proposals. Speculators waste government resources and should not be encouraged. (Crandall)
- I urge you and other members of the Eminent Domain Subcommittee to support legislation which requires proof that a project truly is in the public interest before eminent domain is granted. Likewise, a company should prove having financial backing for the complete project before the right of eminent domain is granted. (Hayes)

- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest.
(Gabian)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest. (Dye)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest.
(Mangus)
- I support eminent domain reform. I suggest that the subcommittee immediately draft legislation, which does the following things:
Makes sure projects are in the public interest before private companies use eminent domain. When a private company wants to use eminent domain, it should have to prove its project is in the public interest. Under current eminent domain laws, companies can come on our land and prospect for clay, gravel, and "other materials," which might include water. This is wrong and should be changed. (In. Alderson)

Eminent Domain Statutes in General

- We support the Subcommittee's attempt in LC7032 to modernize the language. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Cenex supports the findings and recommendations of the study, as presented in Chapter 7 of the draft Report. (Cenex)
- We agree with the finding and draft recommendation as outlined in the report. (WETA)

- Montana Petroleum Association believes the Subcommittee's "Findings" and "Draft Recommendations" fairly represent and balance the evidence presented to the Subcommittee. (MPA)
- Further, the LC Draft 7030 of the proposed legislation, there are several concerns. The Department's legal staff is still analyzing the various pieces of legislation and is concerned that what the Code Commissioner draft may consider as only-changes in style and grammar may not exactly equate to what has been happening in the courts over the last several years and thus be more substantive. The Department will reserve the right to submit more specific comments on the proposed legislation as it develops. (Montana Department of Transportation)
- The Tongue River Railroad Company is in the process of obtaining all necessary permits, easements and right-of-way approvals. We have examined the existing eminent domain statutes and have followed the Subcommittee deliberations with interest. The cleaning up and clarification of ambiguous and dated language makes sense and we support the language contained in LC 7032. (Tongue River Railroad)
- We support the draft legislation LC 7032, which seeks to modernize language of Montana eminent domain law. LC 7032 represents a significant, positive step toward fostering a clearer understanding of these statutes. (Montana Electric Cooperatives' Association)

Handbook

- As I have commented before, landowners do not need a slick brochure to educate them of their rights. I find this idea (by industry) insulting. Landowners are at a disadvantage in condemnation proceedings, as statewide public comment has shown. We know our rights, or the lack of, and that is why this subcommittee exists. (McRae)
- We believe that a handbook on eminent domain will be a great benefit to the State and its citizens. As the Subcommittee is aware, eminent domain is highly technical and confusing, therefore dissemination of information to the public will most achieve the goal of HJR 34. (Burlington Northern and Sante Fe Railway Company, Conoco, and the Montana Power Company)
- Finally, we notice that the "Handbook" row of the Findings and Draft Recommendations matrix (Chapter 7, Figure 7) has been left blank. We support the development of a handbook that is factual, objective, and that can

be used as a guide to better understand how the eminent domain process works. (Cenex)

- Finally, there is the landowner's handbook. This could have been a helpful document to those facing condemnation. But, because some of the interests represented on the subcommittee believe that a true explanatory handbook may actually shine some light on how the eminent domain statutes work to the disadvantage of the condemnee, this potentially helpful document has been hamstrung to simple recitations of existing law. (Montana Environmental Information Center)
- The Eminent Domain Handbook, which is yet to be finalized, will be one of the most important accomplishments of this study. It should be objective, easy to read, and serve as a factual guide to all parties who may be involved in the eminent domain process. Hopefully it will help everyone know how the law is supposed to work. (WETA)
- MPA believes the recommended Right-of-Way/Eminent Domain Handbook could diffuse much misinformation and exaggerations by providing facts and guidance to those unfamiliar with the right-of-way acquisition process. (Montana Petroleum Association)
- We do not need a handbook to tell us that we are going to have to spend a fortune in legal fees to beg for mitigation that we may or may not get. We know where we stand from the experiences we have already had with this law. We have already seen in the case of the Tongue River Railroad that when a company has unlimited time, and the law of eminent domain, it can choose and change its route with no input from landowners. (Punt/Alderson)
- We also applaud the recommendation to develop an Eminent Domain Handbook. An objective handbook will greatly help toward erasing confusion and misunderstandings about landowner rights and responsibilities. (Montana Electric Cooperatives' Association)

Report in General

- The questionnaire results from the Forestvale Interchange Project were slanted. I cannot think of a better example of public use than an interstate interchange. It serves a public use or need and is beneficial to many. A project like this needs to be weighted against projects that are not needed, such as the Tongue River Railroad. The results of this survey are interesting, however. Almost all of the respondents were told of possible condemnation before or during negotiations, (Chapter 5, p. 97). From the rest of the numbers, I have a

feeling these bully tactics worked. It is very intimidating for a citizen to challenge eminent domain laws, and industry knows it. An industry comment elsewhere in the draft stated that they use the threat of eminent domain to bring landowners to the table. This comment is exactly why this subcommittee exists. (McRae)

- The subcommittee also looked at eminent domain laws in other western states, and of course, found that Montana was no different than any other state. In fairness, the subcommittee should also compare Montana to a cross section of eastern states that have reformed their laws, and then asked why. Again this is a lopsided comparison.(McRae)
- We would, however, like to see more in-depth information in Chapter 3, Subsection C, dealing with a comparison of eminent domain statutes in Montana and other western states. The information in Chapter 3, C, is too brief to draw a solid comparison. (Montana Electric Cooperatives' Association)

Other

- I was also interested in what triggers condemnation. In chapter 4, page 61, #4, states that a taking can be triggered by ". . . a written offer that was refused by the property owner." It doesn't say "realistic offer" or "reasonable offer." Yet, according to this language a ridiculously low offer could be presented and when refused by the landowner, condemnation proceedings would begin. This is outrageous and extremely unfair. Granted, most companies wouldn't use this tactic. Some would and the subcommittee needs to recommend changing the language to keep this from occurring. (McRae)
- Get these unknowns taken care of. Check into non profit brotherhood communities. Hutter Right Colonies - they use child labor.

You had better think this one over. Do we want a socialistic movement to run our country. They at present don't vote. But they're right there to take our government handouts. I understand they pay property taxes at present according to their filed corporation they don't have too. They're classed as a church organization. (Duncan)

- Cenex opposes the five proposed amendments to the Subcommittee's findings and draft recommendations signed by Ms. Julia Page, and shown as Exhibits 6 through 10 in Appendix 4 of the draft Report. These proposed amendments would appear to ultimately cause lengthy and expensive delays, which are not offset by an increase in benefit to the public. (Cenex)

- MEIC's testimony at the December 1, 1999 subcommittee meeting identified two major areas that we believe need resolved in the eminent domain statutes. First, a distinction needed to be made between public and private use of eminent domain. Second, an inherent bias in the statutes towards the condemnor during the condemnation process should be removed. Unfortunately the subcommittee did little to fix either of these problems. (Montana Environmental Information Center)
- After nearly two years of examination, this subcommittee has accomplished nothing more than to whitewash Montana's existing eminent domain statutes. There are essentially only three things coming out of the subcommittee, none of which will relieve the frustration of property owners that led to the multitude of bills in the last session of the legislature and ultimately House Joint Resolution 34.

The first is a consolidation bill for all the eminent domain statutes. While useful and even perhaps helpful, this bill does not change anything in existing law. The second is the change in the liability language which will help property owners but, again, does nothing to change the eminent domain process. (Montana Environmental Information Center)

- WETA strongly opposes the five amendments that were proposed to the Findings and Draft Recommendations at the May 4 Subcommittee meeting. All of the amendments would result in lengthy and expensive delays in the eminent domain process and would paralyze efforts to provide necessary goods and services to Montana's citizens. At a time when there is a much needed focus on improving the state's lagging economy, we do not need more roadblocks. Some of the proposed amendments could allow one landowner to hold up a project for months or years even if the delay may have a negative impact on others who might be waiting for the goods and/or services that cannot be delivered. (WETA)
- MPA does not agree with the "Findings" and "Recommendations" changes proposed by Northern Plains Resource Council through EQC member Julia Page. The changes rehash issues previously examined, found superfluous, or refuted by practitioners in the field of right-of-way acquisition and by entities that have constructed facilities and mitigated construction surface disturbances. Proponents of the changes have cherry picked statements from testimony to validate their proposed changes. (Montana Petroleum Association)
- Eminent domain laws that are rational, workable, and consistent with neighboring states are critical for distribution systems. (Montana Petroleum Association)

- As a general comment, we hope the subcommittee does not lose sight of our needs in the new technology age and while we are vigorously recruiting high technology firms to Montana and continue to urge Montana companies to expand, that we are not throwing roadblocks in their way by changing a statute in order to slow down or stop two projects which have been in process for a number of years. (Tongue River Railroad)
- I understand that your committee is studying this law and looking at ways to improve it. I urge you to reform this law so that my private property rights will be protected. Under the current law, we have very little protections. (Marcure)
- The other issue we would like to comment on is five amendments to your findings that were offered at the May meeting. We respect the intent and sincerity of those amendments, but some of them do potentially concern us. However, not knowing if or how these would be written up into draft legislation, it is impossible to fully understand what implications they may or may not contain to our ability to get telecommunications services to Montanans in a timely and affordable manner. We respectfully request that should these be developed into draft legislation, that there be an opportunity to analyze and fully debate them so that we all understand how they will affect the ability of getting services to Montanans. (US West)
- I believe it is time for Eminent Domain reform and I support the three conditions proposed by the Northern Plains Resource Council. (Overturf)
- We would like the right to have the railroad and other projects using eminent domain bonded so we can be sure damage to our property is minimized. (Boulware)
- We believe the eminent domain law as it stands now to be unconstitutional. (McKinney)

COMMENTING ENTITIES

- Northern Plains Resource Council
- Mark Fix
- Dick Hosford, Diamond Cross Ranch
- Robert and Betty Leveille, Thompson Ranch
- Edwin and Beverly Draper, Draper Ranch
- Linda Kyro
- Gregory M. Tollefson
- Clint McRae
- William and Judith Musgrave, Musgrave Ranch
- John Duncan
- Montana Environmental Information Center
- Terry Punt and Jeanie Alderson
- Howard F. Strause
- Kay O'Donnell, WE3 Ranch, O'Donnell Land and Livestock Corp.
- Mary Alderson
- Anne Charter
- Clark Fork Pend Oreille Coalition
- Kelly and Cindy Radue
- Alice Orr
- Eileen Marcure, Marcure Ranch
- Martin Dawson, Dawson Ranch Inc.
- Nan Carrel, FL Ranch
- Sidne Overturf
- Bill and Marge Boulware
- Jacqueline L. Crandall
- Bill and Anne McKinney
- Art Hayes Jr., The Brown Cattle Company
- Bev Gabrian
- Marci and Mike Dye
- Mary Ellen and Doyle Mangus
- Irv Alderson, Bones Brothers Ranch
- Burlington Northern and Sante Fe Railway Company
- Conoco
- Montana Power Company
- Express Pipeline
- Cenex Harvest States Cooperatives
- Holland & Hart, LLP
- WETA
- Montana Petroleum Association, Inc.
- Tongue River Railroad
- US West
- Montana Electric Cooperatives Association
- Montana Department of Transportation

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April 11, 2000

MEMO TO
NORTHERN PLAINS RESOURCE COUNCIL
&
ENVIRONMENTAL QUALITY COUNCIL SUBCOMMITTEE
ON EMINENT DOMAIN

I have been asked to write a memo on behalf of the Northern Plains Resource Council in regard to state deliberations concerning eminent domain. I base this memo on my experience as an attorney in real property matters as a whole and specifically in my experience in eminent domain cases specifically.

There are two issues which are of particular concern to Northern Plains. The first is whether a condemnor should be restricted to an Easement interest only unless some heightened burden of proof is met. The second is whether or not condemnor should be restricted from transferring use interests in the condemned property to third parties. These issues will be discussed individually after presentation of an irrefutable and compelling public policy consideration.

By presenting this public policy consideration, I hope that the intelligence of the Environmental Quality Counsel members won't be insulted. However, it is so basic and so compelling that all considerations hereunder turn on it. Therefore, I must go into it. Simply put, eminent domain is a necessary but extraordinary power. It allows the government and other private third parties to take a person's property against the person's will. It doesn't matter a wit that the person is justly compensated. The extraordinary part is the taking against his will. When the government authorizes such an extraordinary taking, rules of fairness, equity, good conscience and the constitutional guarantee of "acquiring, possessing and protecting property" found in The Constitution of the State of Montana Article II, Section 3. dictate that the taking be the least limited taking possible which allows the condemnor to reasonably fulfill its needs.

1. All condemnors should be restricted to the taking of an easement only, unless it is proven in court that the special need of the condemnor requires a taking of fee

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simple title.

The vast majority of eminent domain matters are handled through private negotiations. Most of those are done by land owners who don't even consult their lawyers. Simply put, fee simple title is normally given up without even considering the consequences. In litigation many of condemnation cases are result in a fee simple title taking. The Condemnors file their cases seeking fee simple title and support their claims with simple proof of their needs to use the land being taken, as a pipe line for example. At this point the burden shifts to the Condemnee to prove that there is no need for a fee simple taking and that an easement interest is sufficient. The courts then make their decisions, under the power conferred under Section 70-30-206, MCA which allows courts to "limit the interest in real property sought to be appropriated if in the opinion of the court the interest sought is not necessary." There is nothing in this statute is which creates a presumption that the taking be the most limited taking possible which will still allow condemnors to reasonably fulfill their needs. There is nothing in this statute which mandates that condemnors, who privately negotiate takings, do so as easements, unless they get a court order which allows them to do otherwise.

There are practical reasons why the more limited easement taking should be required unless a court finds that a fee simple taking is required:

- A. Easements by their vary nature revert to the owner of the fee when they are abandoned;
- B. Easements through non use are be deemed abandoned;
- C. Easement uses are spelled out in the written easement and through rules of construction are restrictively interpreted against the grantee;
- D. Easements don't restrict the fee owner from using the easement area, as long as such use does not unreasonably burden the use of the grantee;
- E. Easements which bifurcates a land owner's property by a ribbon of land, create less of a question as to the land owner's right to cohesively use his property as a whole; and
- F. Easements which separate the land owner's property by a ribbon from adjoining leasehold interests, water sources and from points of access, create less questions at to the land owners continued rights of access.

In each of the considerations A. through F. the burdens through easements are less onerous and are fraught with less legal questions than fee simple takings.

For all of these reasons, Section 70-30-206, MCA and the related statutes should require that all takings, should be by easement, unless a court order allowing that fee simple be previously entered. This would not in any way restrict potential condemnors from obtaining what they need and would in fact place any inconvenience caused upon the party who should shoulder it- - the condemnor.

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2. Condemnors should be restricted from transferring use interests in condemned property to third parties for any other uses which are beyond the primary use for which the condemnors' interests were acquired.

This particular concern has arisen because condemnors have acquired the right to lay fiber optic cables, ostensibly for their own use, and then have sold the rights to third party cable companies to install additional fiber optic lines or use the fiber optic lines installed by the condemnors. When confronted by this, condemnors, which have acquired fee simple title to a ribbon of land through ranch and farm land or an unrestricted easement, take the position that it is nobody's business, if third parties are allowed to use the condemned land. Many of these condemnors have received handsome fees from third parties without any remuneration to the underlying land owner.

It goes without saying that underlying land owners have not been told that third parties will also burden their land. The only things underlying land owners or courts, for that matter, are normally told about, are the needs of condemnors. To expand the use, beyond that which has been represented to the underlying landowners, is an added burden to the underlying land owner's property. This added burden exists whether the taking is in fee or by easement - - as an example, the more use made of a fiber optic cable by third parties the sooner that cable will need to be replaced or a new one placed along side it. That site work will necessarily impact the underlying land owners' property. Another example is the situation, where a third party is given independent rights of maintenance and replacement side by side with the same rights, retained by the condemnor. In this last example multiple companies could be performing maintenance and replacement work during the same periods of time. Land owners should not be subjected to these added third party uses, unless prior to the taking, these uses are specifically addressed as condemnor's primary needs.

The law needs to be clarified so that condemned property may only be used for the primary purpose for which it acquired and no other. If the condemnor sells all or part of its primary business, requiring the use of the condemned property, the assignee should be allowed to acquire rights in the condemned property. To allow the condemnor to do anything more than that would not be in keeping with the public policy that the condemnor only be allowed the least definable taking which will still allow the condemnor to reasonably fulfill its needs. The needs of third parties aren't the needs of the condemnor.

The limitation on transfers for third party use should be required by a separate statute which covers both court decisions and negotiated takings. It should be made clear that a taking by the federal government or the state and local governments for highway purpose have no such limitation in order to assure the continued use of the highway systems for use by various beneficial utilities.

Page 4
April 11, 2000

For all of the foregoing reasons, it is urged that, subject to the exceptions above expressed, legislation should be initiated to limit eminent domain takings to easements, unless the condemnor proves a specific need for a fee simple taking. Finally, with the exceptions note above, it urged that legislation should be initiated to restrict right of way uses to the condemnor only.

Sincerely,

Joe Gerbase

2394 Fly Creek Road
Pompeys Pillar, MT 59064
March 31, 2000

ENVIRONMENTAL
QUALITY COUNCIL

APR 03 2000

Environmental Quality Council
Att: Krista Lee
P.O. Box 201706
Helena, MT 59620-1706

RE: Burden of Proof Standards - Eminent Domain

Dear Krista:

In reference to your letter of March 27, 2000, I believe "clear and convincing evidence" is much better language than "preponderance of the evidence". However, that is the mere tip of the iceberg for necessary changes in the law.

I am of the very strong opinion that there are no longer "needs" in the State of Montana only "wants". Yes it is good to have wider roads; new roads; new pipelines; new, new, new but NECESSARY, hardly. For example, the new proposed Red Lodge Airport. Of course it would be nice for plane owners to have their own airport but for there to be condemnation laws in place that would take those people's property away is unbelievable. You cannot possibly be compensated properly for that loss.

Other issues that are extremely important are:

1. Routing: After Cenex won in both District and Supreme Court, they came back and said now if you want the pipeline to be where you wanted, we will do that but are offering \$15,000.00 less because you cost us a lot of money lobbying in Helena. There should have been a State Agency that had some say in the routing before during and after condemnation. Routing is absolutely imperative to the landowner and may not have nearly so much impact on the company. Many, many of our neighbors told us not to fight because you cannot win against a big company - we had no choice but to try to protect the ranch water.

And one easement. The Judge granted Cenex fiber optic communication cable. The fiber optic people said they usually follow the railroad but nationwide they offer \$40,000 per mile lump sum payment or \$5,000 per year per mile for fiber. Cenex was granted the right to include that and pay the landowner nothing. Then when there is a problem with the fiber line, a company you do NOT have an easement with comes in makes repairs and pays nothing for damages. It has happened on the Front Range Pipeline Cenex put in. They included a 36 fiber line in that pipeline route and paid the landowners nothing. There was nothing to stop the use of the line for telecommunication purposes. Nor was there any language in the agreement to protect us from liability of either Cenex or a fiber optic company.

2. State land and BLM: Cenex told us they were not crossing any State or Federal land because there were too many regulations. Every single requirement should have had to be met for our land and perhaps, if anything, more requirements. If you are the BLM, State Lands Department, State Highway Department, telephone company, or most any other entity, you have written guidelines that have to be followed, i.e., depth of line; construction methods; reclamation requirement, etc. but not a landowner. I had to beg Cenex's lawyer to put in our papers that the depth would be at least 30 inches so I could tell the volunteer firemen because we have so many range fires. Then my husband made them dig it up three times because it was less than a foot of depth. Again, someone besides Cenex's environmental person should have been on the job. Companies are basically self monitoring and it does NOT work because they are untruthful

3. Yearly fee and monitoring fee. BLM charges both. When a company is three months crossing your land, if you care anything at all about your land, you better be monitoring the construction!

Along with the yearly fee, I have this thought. For a pipeline it must be proven that it is a common carrier pipeline. That means then that Cenex, Conoco and Exxon share this line but only one easement is paid the landowner. Because three large companies profit from the line, it would not be unreasonable to pay a yearly rental to the landowner who is expected to be happy to have this line for 50 years.

4. The Major Facility Siting Act needs to be put back in place. If all pipelines, not just 16" or larger, had to meet the criteria of the Act, it would be much more environmentally effective.
5. A State Agency needs to be the watch dog on the entire project. Another instance, the law specifically states that a state licensed surveyor will be used. On the 72 miles of this project, only about 5 miles are surveyed by a state licensed surveyor. The surveyor testified in court that he was not licensed in Montana. Our part of the line has now been surveyed by a licensed surveyor but was not during condemnation. One other disputed tract was surveyed with a licensed surveyor so Cenex was aware of the law, just did not follow it. The landowners should NOT have to hire a lawyer to have a proper survey. There simply must be someone a landowner could call to verify the steps being followed by a company.

On our ranch Cenex crossed through a spring. They told the State that it was only a damp spot. We have pictures of the water running down the pipe trench over 70 feet. They said they put in bentonite and the spring will be fine. My husband, who has dug many springs, says they went through the point of diversion and it will never be the same. Time will tell. However, it was a spring that watered our cattle and why should the burden be on us as to use. I'd like someone to tell me why the companies are more believable than the landowners. It was a SPRING it was NOT a damp spot!!!!

There are so many problems with the eminent domain law. I could go on for about three days and not finish! If just the ones mentioned herein could be changed or improved, it would be a great help. As I stated at the meeting in Billings, I would welcome any or all of you on my ranch. I know it would be interesting to you to see where we wanted the route and why; the route that was condemned and then where the pipeline was actually laid.

These are not just problems that happened to one landowner with one company. For every person condemned there are another thousand that won't come forward because they feel defeated by big business. Landowners don't have money to lobby in Helena; hire lawyers for defense of their land, and/or try to find someone in an agency that will look after their interests. Yet the first time big business comes through your door, they make it plain condemnation is an option they will use.

Thank you for your time and attention.

Sincerely,

Kae McCloy
KAE McCLOY

RECEIVED

MAR 13 2000



Ms. Charlotte Easter Kress
2535 Gilbert Ave.
Missoula, MT 59802-3207

**ENVIRONMENTAL
QUALITY COUNCIL**

Montana Environmental Quality Council
Helena, Montana

Dear sir:

It is high time to reform
Montana's unfair and exploitive
eminent domain law.

When a developer wants to
take private property under the
eminent domain law, he should
have to prove that it is truly
for public purpose. Anyone
seeking to develop a project must
be required to show financial
solvency to the Secy of State. Land-
owners should have the right to
keep control of their land until all
court proceedings are concluded.

Possession is nine-tenths of the
law and landowner is protected
that way.

Charlotte Easter Kress

Montana Environmental Quality Council
P.O. Box 201704
Helena, MT 59620

March 19, 2000

Attn: Eminent Domain Subcommittee

The Eminent Domain Issue: Taking It Personally

Farmers and ranchers are fighting for their lives in the eminent domain controversy, and I believe they are fighting for my life too. My husband, Perry, and I are determined to support the ranchers and farmers who have been the protectors and caretakers of the lands from which our values have grown. Values like--dropping our own tasks to help a neighbor, working tirelessly for what we believe, trusting God's processes in nature, leaving our space in better shape than when we found it, sacrificing to preserve an historic lifestyle for future generations, playing fair, being grateful and living in the seasons of faith, hope and love

I am grateful for NPRC's role in the battle to reform Montana's eminent domain laws because it gives me a voice that I did not have as a child. From a very young age my heart's desire has been to have land and a horse to love. During my pre-teen years I'd expressed this dream to my grandmother for the thousandth time and I think my pleas wore her out.

She herself had homesteaded on the Hi-Line and married a farmer. Predictably, she suggested that I too needed to "marry a farmer or rancher." I took her tongue-in-cheek advice with a grain of salt. But I took into my adulthood, her empathy for my serious drive to be rooted in the land and the rural life I loved.

Some forty years later I did marry. My husband, Perry, is not a farmer. But he is a native Montanan and an artist who understands and shares my passion for the land and rural life style

that are enmeshed with our value systems. Our grandparents homesteaded in Montana and we've lived within communities shaped by ranching and farming all of our lives. You might say that Perry and I are residuals of ranching and farming.

Together, Perry and I still hold out the dream that we'll have a place on which we can live, work and run a horse. But the eminent domain laws that affect farmers and ranchers will also affect us. Perry and I consider our selves to be part of "the public" for whom these laws were meant to provide "good." Ranchers and farmers have preserved the "public good" for a longer period of time than Montana's 123-year-old eminent domain laws.

As they now stand eminent domain laws unfairly give private and public corporations permission to override our "public good." Today's legislature is defining the "public good" as being synonymous with the "corporate good." We want to challenge this association. If "public use" is, as the representative of Northern Border Pipeline and Montana-Dakota Utilities, attorney John Alke has stated, "anything that the Legislature says it is," then we need to let the legislature know how public opinion defines the "public good" that our legislators have sworn they'd represent.

We, who are not farmers and ranchers, reap cultural and historical benefits from those who do live with the land. Those of us who do not work the land need to voice our opinions because we are part of the "public good." We need to strongly support ranchers and farmers, especially, because companies can move onto, change and destroy lands that have not yet been legally condemned. Our voices should promote the rights of private landowners, rather than the self-aggrandizing private big "corporate good." Private landowners should be able to maintain and use their property, right up until the time their land has finally and absolutely been determined necessary for the true "public good."

The five eminent domain reform bills introduced during the 1999 legislature are very reasonable and practical. They respect the rights of property owners who have put in whole lifetimes of dedicated work for and on their lands. As a voting member of “the public,” I want the legislature to know that the private lands owned and cared for by farmers and ranchers have been just as formative for the lives of many rural Montanans as have the public lands set aside in parks, preserves and on Forest Service Land. Private lands need to be treated with the same respect and fairness that public lands have deserved.

Farmers and ranchers know how to apply consistent and effective pressure for reform of the eminent domain laws. Because the farmers and ranchers have been trained-up by the seasons, they have been taught the very powerful and unique quality of tenacity. They lose track of day and night in heroic efforts to provide food for the “public good.” They plant crops even though droughts are predicted. They care for calves when this year’s bottom may very well drop out of the cattle market. Learning that ranching and farming is a gamble against nature ranchers have learned a love for the game and its players (certainly not the cash income) that will keep the calves and crops coming, for the “public good.”

All of these cyclical occurrences make the faith and resolve of ranchers and farmers resilient and strong enough to withstand and overcome legislation that threatens to jeopardize and even destroy their land, animals and lifestyle.

I may not have followed my Grandma’s advice to marry a “rancher or farmer” but the fire still burns within me to support farm and ranch families whose property rights are being trampled by eminent domain laws as they now stand. We must have eminent domain reform that truly promotes and preserves “our” public good.

Sheila Vosen-Shorten
Perry Shorten
418 No. Bozeman
Bozeman, MT 59715-3663
(406) 586-4964
pers@in-tch.com

Lee, Krista

From: Reed Smith [reedsm@montana.com]
Sent: Wednesday, February 09, 2000 10:49 AM
To: klee@state.mt.us
Subject: Jan. 20, 2000 ED Subcommittee meeting minutes

Thank you for sending me the subject meeting minutes. I gather the minutes were made from notes someone was taking during the meeting. Overall I think they did a pretty good job but there were some important points that did not get in the minutes. Some of these I covered in my comments I sent to you by mail. Please let me know if you did not receive those comments. I read my e-mail frequently so that would be a good way to contact me.

I would appreciate it if you would see that all the comments get into the final minutes.

One comment that I made that is not in the minutes had to do with how often the companies use the Eminent Domain process. I told you that we asked YPL that same question when they first applied for a permit to build a new pipeline. Their first answer was never. Several months latter the admitted to a few times and finally I believe they settled on 3 or five times. Their explanation for these discrepancies was that they were referring to taking the proses to fruition (I assume this means final court decision etc.). The companies only tell you what they think you already know. The reality is they use eminent domain every time, as partially witnessed by Mary Alexander's testimony. They use Eminent Domain as a threat to intimidate the land owner from the very first contact. I understand that on the Flathead Reservation they initiated the process by sending out numerous letters to numerous individuals that owned their land which, of course, had the desired effect on the land owners from the Co. perspective. A good contact on the reservation would be Joe Hovencoter an attorney or Bill Swaney their Environmental Coordinator. There have been numerous articles in the Missoulian news paper containing Company executive statements like ...they will prevail... and with their answers to the question on how many times they have used eminent domain.

Another comment by Rep. MCGEE in reference to land owner liability for spills or accidents on the easement that caused damage to adjacent land owners. He stated that attorneys for the damaged parties would automatically list the land owner as a defendand in a lawsuit. Hence, the land owner has to hire an attorney to defend himself.

Your notes are certainly far better than mine but some important points were missed. I suggest that in the future you use an electronic recording system with microphones etc. The discussions tend to get very detailed on this issue, particularly with the attorneys present and the complexity of the subject.

One suggestion that might be helpful to understand how the process of eminent domain actually works from the perspective of the land owners and the companies is to get on the Internet and go to the various news paper web sites archives and search for eminent domain, condemnation etc.. The Missoulian has many articles about what is happening in this area with Yellowstone pipeline. Unfortunately the archives do not go back past 1997 when we were just getting started on the YPL project. You would probably have to go to the news paper or the libraries to get that information.

As you can see, I am very interested in this subject probably because I have a lot of first hand experience in dealing with Companies like Yellowstone Pipeline which is nothing but a paper company since it has no employees. This company was created by Conoco, Exxon, and one other much smaller co. to limit their liability in case of accidents etc.. They will say anything and do just about anything to get their way. Once they get the easement, they are on their own.

We live in the Nine Mile Valley - our home sits on a bench. The water for our well comes from the draw across the road. The pipeline would be about a mile away from us - not on our land - on U.S. land.

In the spring of a heavy run-off year we inevitably have had water in our basement. The last two times up to $4\frac{1}{2}$ feet. The water level gets that high through the bench on which we live.

If there were to be a spill on our drainage we could end up with gasoline in our basement - actually - given a spark from an electrical site (water pump, heater, etc.) we could literally

Blow up!!

Consequently we are very worried about the pipeline coming thru our valley. Also our worry for the health of the creek, the wildlife that could be forced to drink contaminated water, etc. It could be a disaster.

Also - the trench from the pipeline is only about 5 + feet below the surface - see the trench from the Pond area. + if well contaminated - a disaster waiting to happen.

Shirley & Fred Heger
29695 Nine Mile Road
Huson, MT 59846

mits

Montana Independent Telecommunications Systems

January 19, 2000

Environmental Quality Council
Eminent Domain Subcommittee Chairman, Senator Cole
P. O. Box 201704
Helena, MT 59620-1704

Re: January 20, 2000 Eminent Domain Subcommittee Meeting

Dear Senator Cole,

I apologize for being unable to attend your subcommittee meeting scheduled for January 20th. I have a preciously scheduled Board of Directors meeting in another state.

My organization represents rural telephone cooperatives and independent telephone companies operating across rural Montana. I would like to briefly outline a few of our concerns so that they can be considered by your subcommittee as part of their deliberations.

With the growth of the Internet and the increasing importance of data in our information-based economy, we have experienced dramatically increased pressures to expand and upgrade our telecommunications network. In particular, there is growing demand for fiber optics and the services that can be carried over fiber optics networks

Because these networks are placed underground and because the placement causes very little disturbance to the use or appearance of the land, we have rarely had to resort to condemnation proceedings involving our friends and neighbors residing in Montana. Our problems have primarily been with folks whose primary residence is out-of-state but own land in Montana for recreational or other proposes.

In an increasing number of cases these folks have hindered our efforts to bring high speed Internet and data access to the schools, libraries and businesses of the small and very small communities in Montana. These folks either absolutely refuse to allow our facilities or demand such exorbitant amounts for right-of-way that we could never hope to recover the costs of building our network because we would have to charge more than they could pay.

2021 11th Avenue, Suite 12 • P. O. Box 5237 • Helena, MT 59604
(406) 443-1940 (Voice) • (406) 443-2880 (Fax) • mits@ixi.net (e-mail)

In these cases, condemnation proceedings are important to us. If, however, such proceedings become significantly more burdensome, time-consuming, and costly, we are back to square one. We have to recover those costs from our customers, and if this causes prices to become unaffordable, we simply cannot construct the networks. The affected communities then become the information "have nots" we see increasingly discussed in the media. They are at an economic, educated, medical, and ultimately social disadvantage to folks in more urban areas.

I hope that you will bare these concerns in mind as you deliberate these very important issues. I greatly appreciate the time and hard work you, the members of your subcommittee, and your staff have devoted. If I can be of any assistance please let me know.

Sincerely,

Michael C. Strand

Michael C. Strand
Executive Vice President
And General Counsel

*By
Valena Baker*

MS:db



RECEIVED

January 24, 2000

JAN 25 2000

ENVIRONMENTAL
QUALITY COUNCIL

Dear Members of the Interim Committee on Eminent Domain:

On behalf of the Clark Fork Coalition, thank you for the opportunity to submit the following comments on eminent domain reform. The Coalition is a member-supported conservation group of citizens, scientists, business people, and recreationists dedicated to protecting and restoring water quality throughout the Clark Fork River basin.

Because the statutes allow all sorts of private companies to take land, without proper regard for the waters that flow through them, the Coalition's 1,000 members have a keen interest in reforming eminent domain law. The following modifications, in particular, would go a long way toward protecting Montana's waters while balancing its other public policy goals.

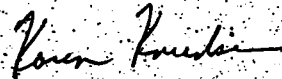
- 1) **Require industries to minimize and mitigate environmental damage on condemned property.** Our experience monitoring the Yellowstone Pipe Line's reroute project taught us many lessons about eminent domain. Under the company's proposal, two-thirds of the route crosses private lands in the sensitive Clark Fork watershed, yet for the most part, mitigation measures to protect streams, groundwater, and wetlands do not apply. The state should ensure that the environmental protections and state-of-the-art technologies required of industries on public lands are extended to private lands, as well.
- 2) **Strictly define public interest.** The key concept behind eminent domain is that the public interest requires the taking of private property. Our YPL experience doesn't bear this out—particularly if we ask the question: "Is a petroleum pipeline that cuts through Montanans' backyards to service eastern Washington markets in this public's interest?" The concept needs to be better defined.
- 3) **Extend bonding requirements and indemnification provisions to private property owners.** Landowners should not be liable for another party's mishaps on seized property. As the law currently reads, there are no assurances that they're not. To draw from the YPL case again: petroleum spills *do* happen, and cleanup is costly—for most landowners, prohibitively costly. The state should fix this bias. It should protect against any possible landowner liability and require bonds for cleanup, as is done on public lands.
- 4) **Recognize clean water as a public use.** Despite the fact that clean water is vital to public health, it does not figure into the law's "public use" comparisons or compensation determinations. Is petroleum more valuable to the public than a clean Missoula aquifer? The way the law is written, we can't even ask the question.

P.O. Box 7593
Missoula, MT 59807
406/542-0539
(fax) 406/542-5632
www.clarkfork.org

It's clear that over the years, Montana's eminent domain law has taken the state down many wrong paths. And unfortunately because of that, our rivers, lakes, and streams have suffered. The Coalition urges the State Legislature to put an end to these problems by adopting statutory changes that: protect condemned lands from environmental damage, that clarify what projects qualify as being in the public's interest, that protect landowners from liabilities, and that fully consider the benefits of clean water.

Again, thank you for the opportunity to comment. If the Coalition can assist your efforts in any way, please contact me at 406/542-0539.

Sincerely,



Karen Knudsen
Program Director

February 7, 2000

From: Reed Smith
P.O. Box 346
Frenchtown, MT
59834

To: Krista Y. Lee
Resource Policy Analyst
Montana Legislative Services Division
Legislative Environmental Policy Office

Subject: Comments for Environmental Quality Council and the Eminent Domain Study Committee concerning needed changes to the Montana Eminent Domain Laws.

First, at the Missoula hearing on January 20 I was unsure about your plans, probably because this was my first exposure to your project. From what I understood, you are planning a comprehensive review of all the eminent domain laws, in detail, and will produce a detailed comprehensive handbook. While I think this is a good project, I think these efforts alone may consume most of your time and funding at the expense of focusing on the problems we are having right now. My recommendation would be to start by finding out exactly what the problems are by interviewing people and examining the records on both sides (industry and private property owners) of the issue. Then decide what portions of the law are in need of change now. Focus on those portions of the law and prepare your recommendations for review by all interested persons. Then incorporate the comments and make your recommendations to the legislature. If time and funds allow, the handbook would be a good project and a service to the people of Montana.

I consider the issue to be a "private property rights" issue, however, it is very difficult to separate it from an "environmental issue" because our private land is where we live and for most people it represents a large portion of our life savings. To me, as a land owner, it is both a private property right and environmental issue and I can't separate the two. A big issue related to the use of eminent domain is the determination of the value of the easement or fee title to be conveyed (Fair Market Value). Fair market value is determined by what a willing and

knowledgeable buyer will pay and a willing and knowledgeable seller will sell for. In the case of an easement, both parties must know exactly how the property will be used, what the impacts of that use will have on the easement and on the adjacent or remainder properties. This has to include knowledge of what potential impacts of leaks or other accidents etc. could be from the proposed use. Accidents and the risk of accidents as perceived by the land owners in the area or potential buyers can severely reduce the value of the easement land, remainder land and other adjacent lands. Hence, value of the easement land cannot be determined until both parties know what the potential and expected impacts to lands would be. Without an analysis, which should be done under MEPA or NEPA, knowledgeable parties can not exist and no "Fair Market Value" can be determined. Very few land owners have the resources to do this analysis. It is done by either the State or the Federal Government on State and Federal lands at the expense of taxpayers and/or the entity proposing the easement. My understanding is that under the existing laws, private land owners would not even have an opportunity to conduct or have the information from this type of analysis considered by the courts under the current system. Also, there is no mechanism to require the entity condemning the land to present detailed information, to the private land owner, sufficient for an analysis of impacts of the proposal. On private land, all condemnations should have an environmental analysis preformed under MEPA or NEPA just like on Federal or State Land. It is unfair, and unjust for a private land owner to have to absorb the cost and risk to his interest in the easement lands and the remainder lands of a condemnation for a so called "Public Use." Usually the condemnation action is nothing more than a private company wanting the use of private land. At the time the State eminent domain laws were written the need for condemnation really was for the "public use" but it isn't any more. The State should conduct the MEPA or NEPA analysis for a condemnation of private land and charge it back to the entity condemning the land. No possession of the proposed easement lands should take place until a Fair Market Value is determined with "all the information available to both parties."

The use of the term Negotiation with regard to eminent domain as it is used currently is a misnomer. There is not really any negotiation that must take place. My understanding of the current system is that the company will present their standard contract form to the person whose property is to be condemned and tell them to review it and they will return to discuss the terms later. If after the land owners review the standard form, they have significant disagreement, the company can just say no and that is the end of the "negotiations." Land owners

must be in an equal negotiating position with the company. Disagreements should be heard by a judge or, at the option of the land owner, heard by a jury of his/her peers. On State and Federal lands the Government has the authority to demand any mitigation measure they deem necessary to protect the land and all its resources. This is as it should be and it should also be the same way on private land. If the State and Federal lands are worth protecting, so are the private lands and the costs for the project analysis (MEPA and NEPA) should be born by the public or by the industry wanting the easement since it is for a "public use."

The answer to the question "how often is condemnation used" is "every time there is a desire for an easement and the person wanting the easement has the right of eminent domain," because there is always the threat even if it is never verbally or otherwise explicitly expressed. The companies should be asked how often they have initiated the process and how many times they have carried it through to a final court decision. Searches should be done of court cases by company name or government agency etc. to verify this information.

Regarding the issue of liability to private land owners, I believe land owners would have to hire a lawyer to protect themselves from law suits initiated by adjacent property owners damaged by a spill or other accident. Attorneys would automatically list the owner of the land as a defendant, in a case where their clients properties were damaged. Land owners would also have to defend themselves from the State or Federal Government under the superfund laws in the process of determining responsible parties. This would occur as a matter of process even though there was no obvious evidence of negligence on the part of the property owner.

It is important to realize that all pipelines or mines etc. are not the same in terms of potential impacts to easement lands, remainder lands, or adjacent lands. For example, when the legislature listed pipelines in the eminent domain laws they may not have anticipated gasoline lines that carry millions of gallons per day through private lands along with the accompanying potential for destroying the land and its water resources (in the Billingham, WA spill 270,000 gallons of gasoline spilled in 12 minutes). In the early nineteen hundreds, these pipelines were probably not in existence. Another example, coal strip mines the size of today's mines were apparently not anticipated by the legislators. The Montana Supreme Court has determined that the term "coal mines" did not cover today's coal strip mines. I doubt seriously if the legislature was thinking about high

volume gasoline pipelines at the time they listed pipelines as a public use.

The Major Facilities Siting Act (MFSA) exempts gasoline lines that are less than 17 inches in diameter from MEPA review. Hence, the State is not required to conduct a MEPA review on private lands for these pipelines. According to the Yellowstone Pipeline Lawyer who testified at last years hearings on this issue, "that provision of the law was very carefully thought out." I agree, because I do not think there are any 17 inch gasoline lines in Montana, nor are there any proposed. The intent was to eliminate any risk of having to do a MEPA analysis for gasoline pipelines. The MFSA should be revised so that all hazardous fluids pipelines are included in the major facilities siting act, thereby, triggering the MEPA review requirement to be conducted by the state, even on private land which is proposed to be condemned for a "public use."

On the issue of what can be put into the easement by the easement owner, it should be made clear that if it is not in the contract it can't be installed. In the case mentioned during the Missoula hearing (I believe it was White Creek in Eastern Montana) the company was going to put in a fiber optics cable and the Supreme Court of Montana upheld the lower court on that issue saying it was an integral part of the pipeline operation. Hence, the land owner received no compensation nor did the land owner have any say, what so ever, concerning what would go in the easement (the cable was not mentioned in the easement contract). I am not familiar with that decision or the specifics of the cable. However, if that cable was to be used for anything other than the pipeline operation, the Supreme Court made a serious mistake. I suspect that fiber optics cable will be a major trunk line for a fiber optics company. Fiber optics companies pay large amounts of money to get their cable put in and I suspect Cenex was using that to defray their costs of the pipeline installation. It may be interesting to know, that Yellowstone pipeline company is probably not going to get their choice of routs for their pipeline up the Nine Mile Valley and now there is a fiber optics company that wants to use the Nine Mile route for a major fiber optics cable. I understand that cable would also go right through the Conoco/ YPL pump station in Missoula. If they want the cable in the same trench as the pipeline, it should be in the easement contract.

The Mineral Leasing Act of 1920 as amended requires pipeline easements to be renewed at intervals of not more than 30 years. This allows Federal agencies to review the easement at the end of these periods (usually 20 years) to determine

wether changes in the easement conditions are needed. The law does not allow termination of the easement at the end of the intervals, just adjustment of terms and conditions. I believe this provision protects both easement holder and the land owner and makes reasonable provisions for adjustment over time without subjecting the easement holder to the threat of loss of their easement. It does, however, require the easement holder to keep up with the technology and adjust to environmental changes etc. I believe this is an essential provision and should be included in the Montana eminent domain laws. As it stands now easement holders can let their projects deteriorate and become public hazards. The 20 year adjustments are a reasonable provision that would protect private land owners and the public.

At the Missoula hearing, Senator Stang asked wether the pipelines had to meet the same requirements applied to buried tanks. I don't believe that question was answered. My understanding is that almost none of the requirements for buried tanks apply to pipelines. Pipelines are exempted from those requirements just like they are exempted from many other requirements. If pipelines companies had to meet the same requirements for leak detection, prevention, and spill clean up as the owners of buried tanks, pipelines would be a lot safer and less controversial than they are.

Every project should have an agreed upon reclamation plan for the end of its life span. Often the final reclamation for the land is left until the project is ended and land owners have very little say about the reclamation. This would be a good provision to put in the eminent domain laws of Montana.

Respectfully, Reed Smith



Phone (406) 626-1746

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JAN 26 2000

**ENVIRONMENTAL
QUALITY COUNCIL**

January 23, 2000

Krista Lee
Environmental Quality Council
P.O.Box 201704
Helena, MT 59620-1704

Re: Eminent Domain

There are really three main issues. First is the issue of public interest. Yes, some services or commodities are delivered in the public interest to the public: electric power; gas for heating, cooking, and industry; domestic water supplies; and many railroad lines. The common thread to these examples is that at the receiving terminal, the service or commodity is delivered to the public or to several unrelated parties (related neither to each other nor to the company transporting or developing the service or commodity).

A service or commodity developed or transported by a company at a receiving terminal owned and operated by that same company or closely related company for that company's benefit is an example of a service or commodity that is not provided in the public interest. It is an example of a for-profit business transporting a service or commodity to their company owned and/or operated facility for the purpose of making a profit. Strictly a business proposition. A liquid petroleum pipeline immediately comes to mind as fitting this description.

Since the latter described enterprise does not logically fit in as a public service nor in the public interest, it is not logical that it should be granted the power of eminent domain.

The second issue is that of a public need for the service or commodity. All of the examples of services and commodities given above including liquid petroleum products, are needed by the public. However, some are obtainable from different sources which may have positives and negatives of economy, of environmental consequences, and of degree of satisfaction. In the case of liquid petroleum transport from eastern Montana to Washington State by Yellowstone Pipeline Company, alternative sources exist to provide the company terminals with product at a cost which is competitive with the eastern Montana supplied product. The only positive result of providing the product from eastern Montana by pipeline to eastern Washington is that of providing profit to the refinery, the pipeline company, and the company distributors.

Since the need for the product can adequately be provided without the pipeline across Montana, there really is no public need, thus the Yellowstone Pipeline Company has no legal right to the power of eminent domain.

The use of the power of eminent domain as presently enforced, results in a very unfair situation for the small private landowner. If the landowner doesn't wish a company with this power to gain right of way access through their property, and/or can't come to agreement as to the appropriate monetary settlement, the company can condemn. The landowner would be granted a one-time payment for a narrow strip of land across his property based on the area of land involved and the present value per unit measure of land area at the land's present use.

Even though the land may have a much higher potential value as a truck garden, ornamental nursery, orchard, residential subdivision, or commercial development, the land would still be valued at its present use, and the great encumbrance, and/or potential degradation of the landowner's property from disturbance, pollution, and obstruction to development of surrounding property is completely ignored.

Liquid petroleum pipelines often cross major rivers. Crossings may be by ditching, by overhead pipe (like a suspension bridge) or by directional drilling under the river. In the latter two cases, the company must make a major investment, and the impact on the land is great. The presence of an overhead structure is obviously a great source of visual pollution, while the directional drilling approach requires a great deal of soil and land disturbance, and if a pipe rupture should ever occur, a great source of pollution to the ground and the aquifer.

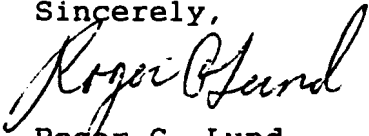
Once a company has been granted the power of eminent domain, as applied to a liquid fuel pipeline company, the law must provide for landowner rights to:

1. Assure that he/she can require the best "state of the art" environmental and safety requirements such as the latest in leak detection technology; double walled pipe constructed of 1/2" steel plate; closely spaced block valves; internal pipeline inspection at least every 2 years; hydrostatic testing for pipeline integrity over any and all aquifers and wet areas every 2 years; and regular visual inspections - aerial and walking every 2 weeks.;
2. The company post a bond sufficient to return the land to its full productive capacity and visual and/or aesthetic qualities both at the completion of the installation and for the life of the facility and beyond through abandonment.

3. The land value be based on whatever the landowner may have foreseen as a potential use of the land, and the additional loss in value of the adjacent land resulting from the encumbrance of the facility.

4. Consideration should be given to provide for annual payments as is the case of a U.S. Government permit for the right of way, rather than a one-time payment, and the renegotiation of the annual payment every 10 years.

Sincerely,

A handwritten signature in cursive script, appearing to read "Roger C. Lund".

Roger C. Lund
Marion I. Lund
P.O.Box 250
Paradise, MT 59856

Northern Plains Resource Council

Memorandum

TO: Representative Monica Lindeen
Environmental Quality Council

CC: Krista Lee
Legislative Environmental Policy Office

FROM: Aaron Browning
aaron.browning@nprcmt.org

DATE: Monday, January 31, 2000

RE: Liability Issues Related to Easements Acquired through the Power of Eminent Domain

Per your request I am submitting this memo, which outlines some of NPRC's concerns regarding landowner liability when a condemning authority acquires private property through the power of eminent domain.

As you know, the 1999 Legislature debated the merits of HB 355, by Taylor, Lindeen, Raney, Jabs, Bookout-Reineke, Hanson and others, "AN ACT PROVIDING THAT IN AN EMINENT DOMAIN PROCEEDING... A PRIVATE PERSON OR ENTITY CLAIMING THAT A GREATER INTEREST THAN AN EASEMENT IS NECESSARY TO ACCOMPLISH THE USE SHALL SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE GREATER INTEREST SOUGHT IS NECESSARY..." The House Committee on Business and Labor tabled the bill.

During the public hearing on HB 355 and subsequent deliberation by the Committee, issues related to liability were raised. In general, opponents of the bill argued that property interests acquired through eminent domain should not be limited to easements because landowners would be held liable, especially under federal Superfund law, if they retained title and a spill occurred. Supporters of the bill, including NPRC, Montana Farmers Union and Montana Farm Bureau, argued that the type of interest taken was irrelevant with regards to liability. Supporters also argued that even if landowners might be held liable, it should be their choice, not the State's, as whether to incur that liability.

However, we were also concerned about liability, and wanted to be sure landowners were indemnified and held harmless by condemning authorities. Because of the points raised by opponents we added a new Section 1 to HB 355 during drafting which read:

2401 Montana Avenue • Suite # 200 • Billings, Montana 59101-2336
Phone: (406) 248-1154 • Fax: (406) 248-2110 • E-mail: info@nprcmt.org • Web:
<http://www.nprcmt.org>

NEW SECTION. Section 1. Limitation of condemnee's tort liability. A condemnee is not liable in tort for the actions or omissions of the condemnor or the condemnor's employees, agents, or licensees in regard to their use of the property.

Before tabling HB 355, the Committee further amended Section 1 to read:

NEW SECTION. Section 1. Limitation of condemnee's tort liability. A condemnee is not liable in ~~tort~~ for the actions or omissions of the condemnor or the condemnor's employees, agents, or licensees in regard to their use of the property. A condemnee is not liable for damages that result from or are caused by the improvement or work even if the condemnor no longer owns or operates the improvement.¹

The Committee felt that landowners should not be held liable under any circumstances, and the new language above was drafted to get at that concern.

The Committee tabled the bill, in part, because of a story related by Representative Paul Sliter about his personal experience with railroad liability. From what I can recall from observing the debate, Rep. Sliter maintained that a railroad that crosses Sliter family property was transporting Kreosote, a deleterious and hazardous substance, and there was a derailment. He stated that the federal Environmental Protection Agency tried to hold the Sliters liable as potentially responsible party under Superfund. He did not indicate whether or not the family was eventually found liable.

On January 27, 1999, NPRC attorney Michael Reisner (mike.reisner@nprcmt.org) provided Rep. Sliter with a legal analysis indicating it would be unlikely that landowners would be held liable for Superfund situations. The analysis also indicated the fact that fee title was acquired through eminent domain, rather than an easement, was irrelevant for purposes of establishing liability.ⁱⁱ Rep. Sliter did not agree with our rationale, and stated that he did not think changing the state law by enacting Section 1 of the bill made any difference because federal law would prevail, holding landowners liable.

Further confusion occurred last week, when landowners potentially crossed by the Yellowstone Pipeline expressed fears to EQC members that they would be held liable for pipeline spills if their land is taken through eminent domain. Yet pipeline and railroad attorneys, who in the Legislature stated that a taking of fee title was necessary to avoid landowner liability, were now saying that they know of no provision of law that would hold the landowner liable for a spill if an easement is given, as is common in the case of pipelines.ⁱⁱⁱ

In any case, it has become clear that landowners, attorneys, and others have widely differing interpretations of what the law currently says, and what the current practice is in court.

I believe it would be helpful for EQC, in its final report to the Legislature on eminent domain, to settle this issue by making a finding as to whether the type of interest taken (easement or fee title) has any bearing on liability.

Another important question to be settled is: what, if anything, could be done to change state law to clarify that the landowner should never be held liable for the actions or omissions of the condemning authority if their land is taken through eminent domain? It would be helpful for the final report to the Legislature to include a recommendation in that regard. If the landowner is truly not liable under current law, it could not hurt to codify this principle in Title 70, chapter 30. If there is any chance the landowner could be held liable for spills and the like, we believe it is appropriate for the Legislature to remedy the situation.

We continue to believe that the amended provisions of HB 355 detailed above provide a good start toward limiting landowner liability. But we want to be sure the law is as strong as possible in favor of the landowner, and would welcome any suggestions to improve the language in Section 1.

We also echo the concerns of Representatives Shockley and McGee, who inquired during the hearing whether landowners are burdened with having to pay attorney fees to defend themselves when liability for spills from railroads, pipelines, and the like is trying to be established in administrative or judicial proceedings. These and other liability concerns are unrelated to the type of interest taken. However, we would encourage EQC to make a finding as to whether they should be remedied as well.

I hope this clarifies the point I was trying to make at the EQC meeting last week. If you or the staff have any questions, or if I can provide additional information, please do not hesitate to contact me.

ⁱ See Amendments to House Bill No. 355, 1st Reading Copy, Requested by Rep. Lila Taylor, For the House Business and Labor Committee, Prepared by Gregory Petesch, January 26, 1999. Adopted February 3, 1999.

ⁱⁱ See Memo from Michael Reisner to Aaron Browning, January 27, 1999 in Re: CERCLA Liability as Related to Eminent Domain Reform Legislation (attached).

ⁱⁱⁱ I specifically refer to the comments of John Alke, Northern Border Pipeline, and Steve Wade, Browning Law Firm, before the EQC Eminent Domain Subcommittee on January 20, 2000.

Memorandum

TO: Aaron Browning
FROM: Michael Reisner, Attorney at Law
RE: CERCLA liability as related to eminent domain reform legislation.
DATE: January 27, 1999

The following discussion is based on a discussion I had with Grant Parker and some independent research I conducted. The question is what is a condemned landowner's liability under CERCLA (Superfund) if the condemnor is limited to acquiring an easement rather than fee title.

If a condemnor acquires an easement rather than fee title in the eminent domain proceeding, the condemned landowner would be a potentially responsible party (PRP) under Section 107 (a) of CERCLA (potentially responsible parties include "present owners of the site" and "past owners at the time of disposal of the hazardous substances"). When Congress enacted CERCLA it created this extremely broad net to capture as many potentially responsible parties as possible to insure that PRPs paid for the cleanup costs rather than society as a whole.

However, being a potentially responsible party is very different from being **liable for the cleanup costs**. First, the TRR attorney is using the CERCLA liability issue as a smoke screen. The condemned landowners will be adjacent to the right-of-way regardless of whether the condemnor acquires an easement or fee title for the right-of-way. Under CERCLA, adjacent landowners will likely be PRPs because the contamination will in all likelihood spread beyond the boundaries of the right-of-way onto adjacent property. Consequently, whether the condemnor has an easement or fee title is irrelevant.

In the event that a landowner is named a PRP under CERCLA, the landowner has several avenues of recourse and/or defenses available to them under the statute and regulations.

1. Under Section 113, PRPs have the right to file a contribution action to recover costs from other PRPs (including the owners of the right-of-way). Under this section, courts must allocate these costs equitably. If the condemnor dumped all the hazardous wastes, it should pay all the costs.
2. Under Section 107(b)(3), the landowner can raise the third party defense that provides that a PRP is not liable if the release of the hazardous substances is caused solely by the act or omission of a third party. This is the most common defense when an adjacent landowner's practices cause contamination that seeps onto someone's property or when there is a midnight dumper.
3. Under Section 122(g), the EPA is required to enter into settlement agreements with de minimis PRPs as promptly as possible and when such settlements are practicable and in the public interest. Landowners would qualify as a de minimis party because they did not conduct or permit any activities related to the hazardous substances on the right-of-way, and did not contribute to the release by any act or omission.
4. Section 107(e), allows parties to contractually limit their CERCLA liability through insurance agreements or risk allocation devices such as indemnification clauses, releases, and warranties.

Thus, landowners can limit their liability through contractual arrangements. Note that these solutions would not be a valid defense in EPA enforcement actions and would only be effective between the contracting parties.

MONTANA DEPARTMENT OF TRANSPORTATION
Helena, Montana 59620-1001

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DEC 06 1999

ENVIRONMENTAL
QUALITY COUNCIL

MEMORANDUM

TO: Krista Lee, Resource Policy Analyst
Environmental Quality Council

FROM: Nick A. Rotering, Attorney
Legal Services

Nick A. Rotering

DATE: December 3, 1999

SUBJECT: HJR 34 Study

At the December 1, 1999, meeting of the Eminent Domain Subcommittee, there was some discussion on particular statutes that the Department of Transportation followed when selling or exchanging excess land that it had obtained either by condemnation or other acquisition. I believe that you had cited them to Mont. Code Ann. §§ 70-30-321 and 70-30-322 as the pertinent statutes in question. However, the Department of Transportation has been following the statutes contained in Mont. Code Ann. §§ 60-4-201 through 60-4-209. The recent amendments to those statutes occurred in the 1995 Session in Chapter 232 which amended Mont. Code Ann. §§ 60-4-202, 60-4-203 and 60-4-204 (repealed). I believe that is the particular legislation that Senator Cole and I were discussing.

As you are aware, the Department of Transportation is vitally concerned and interested in the work of the Subcommittee on Eminent Domain. We are more than willing to work with you in assisting and providing information as needed. You and Gordy Higgins as staff to the Subcommittee have an awesome task in providing information to this group. At any time that the Legal Services unit of the Department can give any assistance, please feel free to contact me or Tim Reardon, the Chief Counsel.

DENNY'S COPY STOP

"CORNER OF SOUTH AND HIGGINS"

2330 SOUTH HIGGINS

MISSOULA, MT 59801

PHONE: 406-728-3363 • FAX: 406-728-7159

FAX COVER SHEET

TO: Krista Lee

FIRM: State of Montana - Legislative Environmental Policy

CITY: Helena, MT

FAX PHONE: 406-444-3036

PHONE: 406-444-3957

DATE: 9/27/99

TIME: 1:15

NO. OF PAGES: 2

...

FROM: Betsy Shuted

FIRM: _____

CITY: Helena MT 59846

PHONE: 406-5693

...

COMMENTS: Krista - This editorial was in Sunday's paper - certainly I believe it represents the consensus of thoughts regarding this pipeline in western Montana - Certainly the highest and best eminent domain will be used. This pipeline would not be in the best interest for the public good!

IF YOU HAVE ANY PROBLEMS WITH THIS TRANSMISSION, PLEASE CONTACT US IMMEDIATELY AT 406-728-3363



Sept. 26th '99

Preferable, maybe. Desirable? Hardly.

The U.S. Forest Service this week declared a route paralleling Interstate 90 from Missoula to Kingston, Idaho, the "preferred" route of Yellowstone Pipe Line Co. to build a new pipeline to carry gasoline and other fuels.

The pipeline company doesn't like this, because this is one of the most expensive possible routes through western Montana. But the Forest

Service says this route is preferred because it appears to be the route creating the least impact on people and the environment.

Preferable to what, though? Preferable to running the pipeline along YPL's desired route up through the Ninemile Valley? Maybe.

But preferable to even worse alternatives isn't the same as saying the accident-prone YPL pipeline is particularly desirable along any route through western Montana.

Even along the Missoula-Kingston route that the Forest Service prefers as having the least likely impact on people and the environment, this is an unpalatable proposal. How so? Turn to the Forest Service's analysis of the preferred route and let us count the ways:

- Number of pipeline spills and leaks experienced since 1954: 71.
- Number of fuel spills of 100,000 gallons or more: 14.
- Number of spills of 50,000 gallons or more: 20.
- Total gallons of fuel leaked by YPL to date: 3.5 million.
- Miles of proposed construction on very steep slopes: 14.6.

- failure potential: 39.4.
- Miles of high soil-liquefaction potential: 52.
- Acres of poor reclamation potential after construction: 154.
- Water courses crossed: 107.
- Water quality-limited streams affected by construction: 32.
- Sediment production within first year of construction: 72 tons.
- Number of new Clark Fork River crossings: 5.
- Number of new Clark Fork crossings on existing bridges: 2.
- Miles of highly sensitive aquifer susceptible to spills: 112.
- Public water supply wells susceptible to contamination: 28.
- Number of miles with more than 10 wells per mile: 13.
- Number of homes, within 100 feet, vulnerable to fire: 116.
- Number of perennial stream crossings: 69.
- Bull trout and cutthroat stream segments affected: 77.
- Miles of stream potentially affected by spills: 145.2.
- Miles of right of way within 300 feet of perennial streams: 53.6.
- Construction work force: 798;
- number of non-local workers: 655.
- Tax revenues: \$94,000.
- Acres of potential agricultural land disrupted: 254.
- Miles of pipeline outside existing transportation corridors: 11.
- Acres of upland forest cleared: 380.
- Number of residences within 1,000 feet of pipeline: 1,800.
- Number of schools within 1,000 feet of pipeline: 7.
- Recreation areas potentially affected: 12 sites; 9.6 miles of trails.
- Number of significant new road crossings: 16.
- Miles of new roads: 12.
- New rail crossings: 10.
- Miles of parallel encroachment on rails: 18.
- YPL is looking to reroute its



through the Flathead Indian Reservation. The Confederated Salish and Kootenai Tribes got their fill of YPL's fuel-spilling accidents and unresponsive management, and told YPL to get lost.

Since then, Billings refineries have used trucks and rail cars to keep the fuel flowing to eastern Washington markets.

Trucks and railroads are, statistically speaking, riskier than pipelines. Then again, there hasn't been a major fuel spill in western Montana since the tribes shut down their portion of the pipeline

uninterrupted pipeline linking refineries in Billings with markets in eastern Washington is understandable. YPL's more recent safety record is much improved, and the company appears sincere in trying to be a better corporate citizen.

What's not entirely clear is what reason anyone in western Montana has for accommodating the pipeline. Spokane will get competitively priced fuel, while western Montanans assume all the environmental risks.

At the risk of seeming a bit selfish here, we just have to ask: What's in this

27-SEP-99 13:13:13 FROM: DENNIS COPY STOP ID: 10672828155

Missoulian online

Preferable, maybe. Desirable? Hardly.

Sunday, Sept. 26, 1999

Missoulian Editorial

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What's not entirely clear is what reason anyone in western Montana has for accommodating the pipeline. Spokane will get competitively priced fuel, while western Montanans assume all the environmental risks.

At the risk of seeming a bit selfish here, we just have to ask: What's in this for us - besides

the potential for environmental disaster?

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Lee, Krista

From: Alan Rolston [alan.rolston@nprcmt.org]
Sent: Friday, September 03, 1999 4:08 PM
To: gohiggins@state.mt.us; klee@state.mt.us
Subject: Comments on Draft Workplan for HJR 34 Study

September 3, 1999

The Honorable Sen. Mack Cole
Eminent Domain Subcommittee Chair
Montana Environmental Quality Council
Box 201704
Helena, MT 59620-1704

**Re: HJR 34 Interim Study of Eminent Domain
Comments on Draft Workplan**

Dear Senator Cole:

Thank you for the opportunity afforded Northern Plains Resource Council to comment on the draft workplan for the EQC's interim study of eminent domain. As you know, NPRC was deeply involved in the 56th Legislature's debate over reform of Montana's current eminent domain law. Our organization took a lead role in supporting passage, ranking and assignment of House Joint Resolution 34, which enabled the study.

NPRC appreciates the hard work EQC members and staff have and will contribute to this interim study. EQC has a well-deserved reputation for producing balanced, informed policy studies and I am sure this study will preserve the tradition. We would like to commend the staff, especially Krista Lee and Gordy Higgins, for their professionalism and diligence in performing the tasks necessary for this effort.

This letter describes our suggestions on the draft workplan, including items that merit focus, additional topics that we feel should be studied and the timeline and process for the study.

I. TOPICS THAT MERIT FOCUS AND FURTHER STUDY

1. Whether the condemnor should receive possession until all issues of a particular condemnation case are decided. This issue was debated in HB 354 (Lindeen, 1999) and continues to be of interest to private property owners.

9/7/1999

2. Whether landowners should be taxed on industrial or other improvements placed on the condemned land.
3. Whether condemnation orders should require condemnor's property interest to be limited to only the specific use of the land for which they petitioned condemnation.
4. Whether condemnees should have the right to a jury trial and the jury the power to make a determination of the public need for the condemnation.
5. Whether private land should have the same protections and mitigation measures afforded public land when easements are sought.
6. Whether gravel, timber, clay, or other building materials needed for construction of a project should be allowed to be condemned.
7. Whether condemnation should require an environmental review under the Montana Environmental Policy Act.
8. Whether public need for condemnation should be determined by local government entities, the Board of Land Commissioners and/or the Public Service Commission instead of the current statutory presumption of public need. All of these entities would need to concur before condemnation can occur. This might allow some local input.
9. In order to prove need, whether the condemnor must first prove there is no capacity in other common carriers to transport the products the condemnor will transport. This was debated in SB 461 (Glaser, 1999) and is still of concern to landowners.
10. Whether condemnors should ever be able to acquire a fee title interest in property.
11. Whether a condemnor should prove his/her financial solvency to implement the proposed use as a condition of being granted the power of eminent domain.
12. In cases of abandonment or discontinuance of a use by a condemnor, whether there should be automatic reversion of the right-of-way to the condemnee or his/her successors in interest.
13. Whether condemnation should ever be used for private gain. The condemnor would need to conclusively prove, via rigorous judicial standard, that there is no private gain from the taking of someone else's property.

9/7/1999

14. Whether a condemning corporation or entity should be allowed to assign, transfer or sell its interest in the condemned property to a limited liability entity of any kind.
15. How the condemnee and the public can have input into the process of determining what is a safe, convenient location for the right-of-way.
16. Whether the current burden of proof in a condemnation proceeding should always be on the condemnor.
17. Whether the condemnor should be required to confine its activities to the right-of-way obtained.
18. Whether compensation for the land condemned should be a multiple of the fair market value as determined by a jury in order to abate the failing of lump sum payments as fair compensation for future injury.
19. Whether the condemnor should assume all liability for the land condemned; and whether the condemnee should have to assume any.
20. Whether the condemnee should automatically receive access across the condemned property when his/her property is bisected.
21. Whether the condemnee should be reimbursed for property damages incurred by establishment *and* continuing operations of a right-of-way.
22. Whether condemnation should be allowed on any property that contains sites listed or proposed to be listed in the National Historic Register.
23. Whether written notice should be provided to affected landowners of a need determination request or hearing by government officials.

II. WORKPLAN AND TIMELINE.

A. Comparison of Statutes from Other States

The comparable study should be expanded to include representative state laws from the major geographic areas of the U.S. In particular, NPRC suggests EQC study the Constitution and eminent domain statute in Alabama, which prohibits the use of eminent domain by private entities except in certain instances. In any case, we believe limiting the review of statutes to only western states may dismiss constructive solutions to the problems of eminent domain utilized by other, more populous, regions of the country.

9/7/1999

B. Public Hearings.

Many of our members requested that the interim committee hold a morning and evening session at the two proposed public hearings. This would ease the distance problem for some of them.

Thank you for the opportunity to submit our concerns. NPRC staff and members look forward to working with the EQC on this study. If you have any questions, please contact Alan Rolston in our office at 406-248-1154.

Sincerely,

NORTHERN PLAINS RESOURCE COUNCIL

/s/

Dena Hoff
NPRC Legislative Task Force Chair

DH:ar

cc: EQC Eminent Domain Subcommittee Members

Gordy Higgins

Krista Lee

Hon. Sen. William Crismore

Hon. Rep. Kim Gillan

NPRC Legislative Task Force, Eminent Domain Subcommittee

9/7/1999

BULL MOUNTAIN LANDOWNERS ASSOCIATION
13838 HWY 87 NORTH, SHEPHERD MT, 59079
(406) 947-2151, FAX (406) 947-2152

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SEP 08 1999
ENVIRONMENTAL
QUALITY COUNCIL

September 5, 1999

Eminent Domain Subcommittee
Environmental Quality Council


Dear Subcommittee members,

Your meeting in Libby on September 22 is too far away for our members to attend personally; but we wanted to be sure you knew our strong support for Montana's eminent domain laws being reformed to better protect individual landowners' interests.

At a minimum, the following ten "landowners' rights" issues need to be addressed:

1. Third party arbitration of disputed routing.
2. Clearly defined easment center line.
3. Permanently monumented fiber optic rights of way.
4. Grantee is responsible for noxious weed control and reseeding easment as required by landowner.
5. Landowner not liable for accidental cable cuts by landowner or third parties or Acts of God.
6. Grantee holds landowner harmless for hazardous waste problems arising from grantee's installations on easement, etc.
7. Establishment of a maintenance escrow fund to which the landowner has reasonable access.
8. Grantee is responsible to clean up easement to the landowner's satisfaction at the end of construction or the landowner can seek payment from the maintenance escrow fund created in no. 7 above.
9. A fiber optic cable right of way is granted for only one cable and does not grant the right to install additional cables as the grantee desires.
10. Landowner's option on easement vs. fee title eminent domain acquisition.

Sincerely,



Anne G Charter, Chair
Bull Mountain Landowners Association

FAX: 406-444-3036

April 3, 2000

EQC Eminent Domain Subcommittee
Attn: Krista Lee, Resource Policy Analyst
P.O.Box 201704
Helena, MT 59620

Re: Burden of Proof Standards

Our letter of January 23, 2000 describes the standards we believe must be met to determine if an activity or service is truly in the public interest, thus should be granted the eminent domain status, or if rather, the activity or service is profit motivated, serving a company or small group of companies but not directly serving the public. We feel that liquid fuel pipelines transporting fuel from one terminal to another terminal owned by the same company or group of companies is an example of a profit motivated activity or service not directly serving the public, thus should not have the power of eminent domain!

The eminent domain subcommittee meeting this month will consider replacing a "preponderance of the evidence" as providing the right to a "taking" of property, by standards that consider "clear and convincing evidence" that the taking will be in the public interest. We wish to cite our situation in this regard as an example of the points for consideration.

If the YPL Company (Yellowstone Pipeline Company) were granted a permit to connect it's pipeline from Missoula to Thompson Falls, MT via the 9-Mile Valley (any of three 9-Mile Alternatives) thence down Siegal Mountain, along the Clark Fork River, and west along Highway 200, the proposed route along Hwy 200 east of Paradise is on the NE side of the highway. As the proposed route nears the westernmost bridge about 1/4 mile east of the town of Paradise, it is proposed that the pipeline cross under Highway 200 and the Montana Rail Line right of way, thence onto our property. Directional drilling would take place on our land whereby the pipeline would be pulled under the river. Above ground facilities would be quite visible from our living and dining room windows, and the pipeline would be within 300 yards of our 34 foot deep domestic use well - our drinking water!

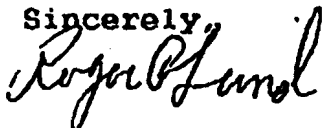
Rather than routing the pipeline under Highway 200 and the Railroad right of way, we have asked YPL engineers and officials to plan the route to continue along the NE side of Highway 200 to the point where directional drilling would take place under the river. The route would then continue

westward through the Paradise railway yards and along the north side of the river towards Plains where it would reconnect with the existing pipeline.

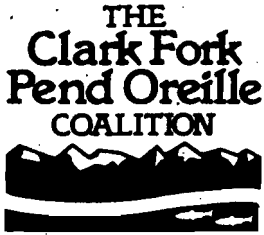
The route we favor, described above, would remain on the NE side of Highway 200 on the same ownership it had been on for around a mile. This portion of the property has no homes nor other buildings, nor does the property where the pipeline would emerge on the north side of the river. This route would have far less negative social implications than the route that crosses onto our land with it's associated safety implications and potential for polluting our drinking water. YPL favors the route through our land only because the river is narrower here than the route we advocate.

Were YPL required to present "clear and convincing evidence" showing why the property to be "taken" from us is the best route, perhaps our case may receive a more humane approach in a condemnation hearing. YPL company's proposed route, it appears, is based only on the cost of directional drilling under the river. The company has not concerned itself with the impact this pipeline route would have upon our property and our lives as may be the case if the company had to present "clear and convincing evidence" that it must take our land rather than continuing along the more straightforward alignment across the river.

Sincerely,



Roger C. and Marion I. Lund
P.O.Box 250
Paradise, MT 59856
(406) 826-4534



March 31, 2000

APR 05 2000

ENVIRONMENTAL
QUALITY COUNCIL

Eminent Domain Subcommittee Members
Environmental Quality Council
PO Box 201704
Helena, MT. 59620-1704

Dear Members of the Eminent Domain Subcommittee:

On behalf of the Clark Fork Coalition, thank you for the opportunity to comment on the proposal to replace the evidentiary standard on establishing that a taking is in the public interest.

By using the weakest burden of proof standard in its eminent domain law, the State of Montana sets itself up for ecologically detrimental and socially inequitable industrial projects. This needs to change. The Coalition urges the subcommittee to recommend raising the burden of proof standard to "clear and convincing evidence" for tax-supported projects and to "beyond a reasonable doubt" for privately-funded projects. By tightening the evidentiary standard thusly, lawmakers will:

- 1) Ensure that business interests do not take precedence over public interests: In the case of YPL's pipeline reroute proposal, the company's purpose and need statement focused on increased capacity and cost savings. At the same time, project documents said that consumers in the affected area would not benefit from these lower operating costs. The project, then, was more about profit margins for YPL than it was about community good. A higher evidentiary standard would bring such critical facts to light.
- 2) Give a more appropriate amount of weight to complex public policy goals, such as providing for clean drinking water: Again, in the case of YPL, the Forest Service's preferred alternative would have put a hazardous liquid pipeline across Missoula's sole-source aquifer, near 28 public water supply wells, and through 13 miles of densely-placed private wells. One could argue that this route is already appropriated to a public use—e.g., high-quality drinking water. A stronger evidentiary standard would allow such arguments to be heard and considered.
- 3) Uphold the constitutional mandate to provide for a clean and healthful environment. As a result of the Supreme Court's October '99 ruling, *MEIC v. DEQ*, any action that could degrade water quality—e.g., a 138-mile petroleum pipeline project—is subject to a strict scrutiny test. That means there must be a compelling state interest for a permit to be issued. Higher evidentiary standards in eminent domain statutes would support such a test.

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Missoula, MT 59807
406/542-0539
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www.clarkfork.org

Again, the Coalition urges subcommittee members to strengthen the evidentiary standard that establishes that a taking is in the public interest. The two-tiered standard we recommend—"clear and convincing evidence" for public entities, and the stricter "beyond a reasonable doubt" for private enterprises—addresses the fact that private companies are driven to maximize profits and are accountable only to their boards or their shareholders.

A final note: Strengthening the burden of proof standard is an important step, but it should not be the only step taken in the work to reform Montana's eminent domain statutes. The Coalition encourages subcommittee members to recommend more substantive statutory changes that: protect condemned lands from environmental damage, that clarify what projects qualify as being in the public's interest, that protect landowners from liabilities, and that fully consider the benefits of clean water.

Thank you for the opportunity to comment. If the Coalition can clarify its position or assist your efforts in any way, please contact me at 406/542-0539.

Sincerely,



Karen Knudsen
Program Director

GUNDERSON LAW FIRM

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APR 03 2000

**ENVIRONMENTAL
QUALITY COUNCIL**

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TELEPHONE 252-2177
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AREA CODE 406

ALLEN D. GUNDERSON
TODD D. GUNDERSON
gundylaw@wtp.net

March 31, 2000

VIA Facsimile and Regular Mail
406-444-3036

Environmental Quality Council
P.O. Box 201704
Helena, MT 59620-1704

ATTN: Eminent Domain Subcommittee

RE: Burden of Proof Standards

Dear Subcommittee Members:

The subcommittee has expressed a desire to receive written comments on the issue of replacing the evidentiary standard necessary to establish that a taking is in the public interest, by replacing the burden of proof of "preponderance of the evidence" with the "clear and convincing" standard. The preponderance standard is simply the greater weight of the evidence. In other words, the evidence supporting the propositions which a party has the burden of proving, must outweigh the evidence opposed to it.

In a parental rights case, the Montana Supreme Court defined a clear and convincing evidence as simply a requirement that a preponderance of the evidence be definite, clear and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure -- that is, it must be more than a mere preponderance, but not beyond a reasonable doubt. *Matter of J.L.* (1996), 277 Mont. 284, 922 P.2d 459.

The "clear and convincing" standard does not lend itself to the issues involved in an eminent domain case. The condemnor walks a fine line balancing the greatest public good, the least private injury and the desires of the landowners. In addition, the route chosen must take into consideration environmental concerns such as wetlands, erosion control, sediment control, weed control, revegetation, reclamation, feasibility of construction, safety, and a host of other issues.

For example, an electric transmission line must get from point A to point B. There are an infinite number of routes to follow in achieving this goal. A preliminary route is picked and then landowners are contacted. Landowner input is critical because the landowners are a fountain of knowledge on where such a line could be placed on their land. Most are extremely helpful in this regard. But many landowners have a preference as to where to locate the utility across his or her land. However, a landowner's preference may not match that of his neighbors.

Consequently, there is a lot of negotiating between the utility company, environmental experts, engineers and the various landowners concerning where to best route the line, and whether it is feasible. As you might guess, the proposed route may come down to picking one coulee over another. If coulee "A" is picked, it may upset the landowner who owns that specific coulee. However, that choice may be the most buildable and environmentally sound route to follow and will tie in with the neighboring landowners' desires.

Routing a line involves engineering and environmental sciences, certainly. However, those sciences are used to reach compromise. The clear and convincing standard is not applicable in this type of situation. There may not be a clear and convincing choice in terms of the environment or engineering. However, it may be a reasonable, requisite and proper route when all of the factors are considered, including the desires of adjacent neighbors. It is all too easy for a condemnee to stand up in court and point to an alternate route because there are always a number of routes that can possibly be used to get from point A to point B.

Under the current law, we do know this:

1. A condemnor must prove that the public interest requires the taking. § 70-30-206(2).
2. It must prove that the use is authorized by law. § 70-30-111(1).
3. It must prove that the taking is necessary (reasonable, requisite and proper). § 70-30-111(2). *Montana Power v. Bokma* (1969), 153 Mont. 390, 399, 457 P.2d 769, 775.
4. If the land is already appropriated to a public use, the condemnor must prove that this is a more necessary one. § 70-30-111(3).
5. The condemnor must prove that it made a written offer that was rejected. § 70-30-111(4).
6. If a condemnor fails to consider alternate routes, the greatest public good and the least private injury then this action is arbitrary and amounts to an abuse of discretion. *Shara v. Anaconda Co.* (1980), 198 Mont. 377, 386, 610 P.2d 132, 137; *Montana Power Co. v. Bokma* (1969), 153 Mont. 390, 399, 457 P.2d 769.
7. The condemnor must take only the minimum necessary interest and the court has the power to limit that interest. §§ 70-30-203(6) and 70-30-206(1)(b), MCA.

Environmental Quality Council
March 31, 2000
3 of 3 Pages

Speaking as an attorney who has represented condemnees and one condemnor, in my opinion, the eminent domain laws do not require change. They are fair in terms of the procedures used, the ability to appeal any issue and in the award of just compensation and attorney fees to the landowner. Applying the clear and convincing standard does not work in a case where a desired route may have been picked as a result of compromise between such competing interests as regulatory requirements, landowners, environmental considerations, specialists, adjacent landowners and the condemnor.

Very truly yours,

GUNDERSON LAW FIRM

By



Todd D. Gunderson

TDG:jl

cc: Mike Stahly

Northern Plains Resource Council

RECEIVED

APR 03 2000

ENVIRONMENTAL
QUALITY COUNCIL

March 30, 2000

Ms. Krista Lee, Resource Policy Analyst
Montana Environmental Quality Council
P.O. Box 201704
Helena, Montana 59620-1704

Re: Request for Comment on Standard for Burdens of Proof Pertaining to
Eminent Domain – HJR 34 Interim Study

Dear Ms. Lee:

Thank you for the opportunity to comment on the issue of the standard for burdens of proof in eminent domain proceedings. As you know, NPRC represents landowners across Montana who have been condemned, threatened with condemnation, or otherwise directly affected in an adverse manner by eminent domain.

Two standards for burdens of proof generally exist in civil court cases. Using the lesser standard, assertions must be proven by “a preponderance of the evidence.” This standard is usually interpreted to mean “that the existence of a contested fact is *more probable than its non-existence*.” *Cleary et al, McCormick on Evidence* (3rd Ed. 1984) at 957. Using the higher standard, assertions must be proved by “clear and convincing evidence.” It has been argued that to meet this standard, the fact must be shown to be “highly probable.” *Id* at 960. Despite statements by industry to the contrary, the higher standard is *not* akin to a standard of “beyond a reasonable doubt,” which is the highest evidentiary standard, and reserved for criminal cases. *Id* at 963. Currently the eminent domain law provides that both parties, the plaintiff (condemnor) and the defendant (the landowner) need only prove their assertions in court by the lowest standard. The EQC Eminent Domain Subcommittee is discussing whether the standard for burdens of proof should be changed from a preponderance of the evidence to clear and convincing evidence.

NPRC continues to recommend that the standard be raised to clear and convincing evidence for assertions by the *condemnor* in an eminent domain proceeding. We specifically suggest that: (a) Section 70-30-111, MCA be amended to require condemnors to show that the public interest requires the taking by clear and convincing evidence; (b) that another provision of law be enacted so that if a condemnor seeks an interest in a landowner’s property greater than an easement, the condemnor proves the greater interest is necessary by clear and convincing evidence; and (c) that the law be changed so that determinations of public use must be proven by clear and convincing evidence.

Because Montana’s eminent domain law is so slanted toward the condemnor, landowners should not be required to meet a clear and convincing standard when the burden shifts to the defendant in an eminent domain proceeding. As Subcommittee members discussed in Missoula, landowners frequently do not have access to the vast legal resources of large corporations and the State. Landowners have testified they feel they have no options but to sign an agreement with the condemnor. Telling landowners they must meet the same evidentiary requirements to defend their

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own property as multi-billion-dollar international corporations or a vast government bureaucracy must meet to seize their property is simply another nail in the landowner's coffin.

Raising the bar for condemnors in eminent domain proceedings is a small step in the right direction. Montana's eminent domain law is nearly 125 years old, and pre-dates statehood. It has remained largely unchanged since that time, and is as good as it gets for big business and big government. It was designed to facilitate westward expansion and the settlement of Montana Territory. Montana needs a new eminent domain law to deal with the needs of the 21st century.

Why should condemnors be held to a higher evidentiary standard than condemnees? Because the right to possess and protect one's own property is an enumerated inalienable right, and guaranteed by Article II, section 3 of Montana's Constitution (1972). Property cannot be taken without due process (Art. II, sec. 17) and cannot be taken or damaged without just compensation (Art. II, sec. 29). While eminent domain is a necessary component to our society, it is appropriate that the bar be raised so that a higher burden is met before depriving landowners of their fundamental rights.

Your memo dated March 27, 2000, asked specifically how raising the standard for burdens of proof might impact business. From an economic perspective, raising the bar to protect landowners makes sense. Time and time again, agriculture has ranked as Montana's number one industry. Yet agricultural people are more often than not the target of eminent domain actions. As landowners have testified in Helena and Billings, the threat of condemnation hangs over farmers' and ranchers' heads, depressing the value of perhaps their most necessary asset — their land. Landowners, unlike some large utilities with the power of eminent domain, are here to stay.

Raising the standard for burdens of proof for condemnors will not unduly harm either big business or big government. Throughout the code, the legislature requires a showing of clear and convincing evidence in civil court cases. Examples include:

- The State must show clear and convincing evidence to get an injunction against someone who violates Montana's gambling laws. Section 23-5-136(1)(a), MCA.
- A plaintiff in a fraud case must prove his/her claim for punitive damages by clear and convincing evidence. Section 27-1-221(5), MCA.
- Securities brokers are not liable for fraud claims unless the claims are proven by clear and convincing evidence. Section 30-10-310(3), MCA.
- Employees may only recover punitive damages for wrongful discharge if they prove their case with clear and convincing evidence. Section 39-2-905(2), MCA.
- In order to gain child support above and beyond Dept. of Public Health and Human Services guidelines, a parent must prove their case with clear and convincing evidence. Section 40-4-204(3)(a), MCA.
- Landlords must prove tenants damaged rental property, with clear and convincing evidence, if they seek to recover monetary damages and failed to provide the tenant with a written statement of the prior condition of the property. Section 70-25-206(3), MCA.
- Wills can only be revoked by prior wills using clear and convincing evidence. Section 72-2-527(3)-(4), MCA.
- To prove an infraction of a municipal ordinance, a city must prove its case by clear and convincing evidence. Section 7-1-4151(1)(b), MCA.

These examples illustrate that clear and convincing evidence should be required before depriving citizens of their property. It is wrong that owners of real property are not protected by the same evidentiary standard. *It is currently easier to deprive landowners of their fundamental right to own property than it is to prove someone broke a city parking code.*

Further, Montana's environmental statutes hold plaintiffs to standards of clear and convincing evidence. The Environmental Policy Act requires citizens to prove that agency actions in approving environmental impact statements were arbitrary and capricious with this higher standard. Section 75-1-201, MCA. Megalandfill Siting Act and Major Facility Siting Act proceedings require applicants to prove their certificates of environmental compatibility should be approved by clear and convincing evidence. Section 75-10-928(3), MCA.

Considering the wide number of civil court cases requiring clear and convincing evidence, industry's unsubstantiated argument that raising the standard for burden of proof will somehow harm business or slow the economy does not withstand scrutiny. To the contrary, the evidentiary standard for condemnation will improve the position of Montana's largest industry – agriculture.

NPRC wants to stress to the Subcommittee that raising the standard for the condemnor's burden of proof must only be done in conjunction with other, more substantive reforms of the eminent domain law. As they testified in Helena, Missoula, and in Billings, landowners want reforms that:

- Make condemnors minimize damage to private property;
- Ensure that only *true* public uses get the power of eminent domain;
- Provide for just compensation which covers damages to the remainder of the property not taken;
- Allows landowners to retain possession of their property while the case is on appeal; and
- Makes eminent domain for private companies a privilege, not a right, by requiring condemnors to: (a) prove they have adequate financial resources; (b) use the land only for one particular project; (c) limit their interest taken to an easement when requested by the landowner; and (d) give back the land if they don't build their project with due diligence or if they cease using the land for five years.

We ask the Subcommittee to vote at its April 12 meeting to draft legislation enacting the recommendations above.

Again, thank you for the opportunity to comment. If you have any questions, please feel free to contact our office.

Sincerely,



DENA HOFF
NPRC Chair

MONTANA DEPARTMENT OF TRANSPORTATION
Helena, Montana 59620-1001

MEMORANDUM

TO: Krista Lee
Eminent Domain Subcommittee
Environmental Quality Council

FROM: Montana Department of Transportation
Legal Services *Christina*

DATE: March 30, 2000

SUBJECT: Standard of Proof/Public Interest

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APR 03 2000
**ENVIRONMENTAL
QUALITY COUNCIL**

At the outset, this Department (MDT) urges the Subcommittee not to change the evidentiary standard of proof regarding "public necessity." The reasons for this position will be explained in more detail in the following discussion.

Technically speaking, the current standard of proof is not "preponderance of the evidence." In the usual condemnation case, if the landowner does not admit public necessity, MDT makes a motion in District Court for a Preliminary Condemnation Order. Mont. Code Ann. § 70-30-206(2) states that such an Order must be entered by the Court if the evidence presented shows "that the public interest requires the taking of such interest in real property and that the plaintiff has met his burden of proof under 70-30-111." Mont. Code Ann. § 70-30-111 requires a showing:

- (1) that the use to which it is to be applied is a use authorized by law;
- (2) that the taking is necessary to such use;
- (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use;
- (4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected.

When the issue is a public road or highway, there is no question that a public road use is authorized by law. Mont. Code Ann. §§ 60-4-103 and 70-30-102. Also, in most cases, the land being condemned

is not already appropriated to some public use, such as another road. As a result, Mont. Code Ann. § 70-30-111(3) does not apply. Further, before a condemnation action is filed by MDT, there has been an effort to obtain the interest sought by submission of a written offer and the offer was rejected. In the normal case, therefore, the only issue left to decide is whether the taking is necessary to the proposed use, which is another way of saying "public necessity." The necessity issue has not been extensively litigated, but the statutes and the Courts have clarified the issues involved, especially those of burden of proof and the standard of proof required in this type of action.

THE POWER OF EMINENT DOMAIN

The power of eminent domain is an "inherent" power of government which has always been recognized by the courts. The power resides in the Legislature, but has been delegated by express statutory authority to agencies of the State, or even to private parties.

MDT has a statutory grant of authority to acquire property. "Whenever the department cannot acquire lands ... or property at a price or cost which it considers reasonable, it may ... procure the interests by proceedings...." Mont. Code Ann. § 60-4-104(1). *See also* Mont. Code Ann. § 60-4-102. To exercise its power of eminent domain, the Department adopts an Order (commonly referred to as the "condemnation order") declaring that:

- (a) public interest and necessity require the construction or completion by the state of the highway or improvement for one of the purposes set forth in 60-4-103;
- (b) the interest described in the order and sought to be condemned is necessary for the highway or improvement;
- (c) the highway or improvement is planned and located in a manner which will be compatible with the greatest public good and least private injury.

Mont. Code Ann. § 60-4-104(2).

Such an Order is adopted prior to all condemnation cases by the Department and is incorporated into a condemnation complaint.

In regard to the condemnation order, Mont. Code Ann. § 60-4-104(3) further provides that:

- (3) The order creates and *establishes a disputable presumption*:
 - (a) of the public necessity of the proposed highway improvement;
 - (b) that the taking of the interest sought is necessary therefor;
 - (c) that the proposed highway or improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury. (Emphasis Added)

Absent adequate rebuttal evidence by the landowner on the issue of "necessity," MDT is entitled to a Preliminary Order of Condemnation that the taking is necessary to a public use and that the proposed improvement is planned in a manner compatible with the greatest public good and least private injury.

The powers of the Court regarding the preliminary order of condemnation are set forth in Mont. Code Ann. § 70-30-206(2):

- (2) If the court finds and concludes from the evidence presented that the public interest requires the taking of such interest in real property and that the Plaintiff has met his burden of proof under 70-30-111, it must forthwith make and enter a preliminary condemnation order that the condemnation of the interest in real property may proceed in accordance with the provisions of this chapter.

This statute thus determines the scope of the necessity hearing.

DISPUTABLE PRESUMPTIONS

Montana statutes recognize some conclusive presumptions (Mont. Code Ann. § 26-1-601), and provide that all other presumptions are “disputable presumptions” which may be controverted by other evidence. Mont. Code Ann. § 26-1-602. The issue then is the amount of proof required to overcome a disputable presumption.

The Montana Supreme Court stated the burden of proof on a party protesting necessity in *State Highway Comm'n v. Danielsen*, 146 Mont. 539, 409 P.2d 443, 445 (1965). That decision stated that the property owner must, by clear and convincing proof, “show fraud, abuse of discretion, or arbitrary action” by the Department.

This makes it clear that once a disputable presumption is before the Court, as it is in all necessity cases, the burden is upon the Defendants to come forward with the clear and convincing proof to overcome the presumption. This burden of production does not shift to the Landowners the burden of proof, but it does mean that they must produce proof sufficient to overcome the presumption before there is any need for the State to produce any affirmative evidence on the issue. Thus, commonly, in a necessity hearing the State will call the Court’s attention to the existence of the Order and the presumption and then rest. If the Defendants produce sufficient evidence to overcome the presumption, then the State will produce rebuttal evidence.

THE BURDEN OF PRODUCTION

The ultimate burden of proving necessity rests with MDT, but it has the benefit of statutory affirmative proof on the issue of necessity unless and until the presumption has been overcome by evidence introduced by the Defendants. The Montana Supreme Court has addressed this issue in a number of necessity cases, expressing both the burden which the condemnee (landowner) must bear and the standard of proof which they must meet.

With regard to whether the taking is necessary, this Court has consistently held that the necessity need not be absolute. Instead the test is “reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case.”

Schara v. Anaconda Co., 187 Mont. 377, 385, 610 P.2d 132, 136-7 (1980). citing *Montana Power Co. v. Bokma*, 153 Mont. 390, 398, 457 P.2d 769, 774 (1969); *State Highway Comm'n v. Yost Farm Co.*, 142 Mont. 239, 384 P.2d 277 (1963); *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 41 P. 232 (1895). See also *State ex rel. Livingston v. District Court*, 90 Mont. 191, 196, 300 P. 916, 918 (1931).

When the plaintiff [MDT] selected its route, it did not lie in the mouth of the defendant to say that another possible route could have been selected. The plaintiff had the right to select a particular route which it deemed most advantageous.

State v. Whitcomb, 94 Mont. 415, 429, 22 P.2d 823, 826 (1933).

When the Highway Commission exercised its discretion and proposed to bypass Harlem, it became incumbent upon the defendant to show fraud, abuse of discretion, or arbitrary action in order to defeat the action of the Commission. Whereas it was only necessary for the Highway Commission to establish that the taking of the property of Crossen-Nissen was reasonably necessary for the rebuilding of U.S. Highway No. 2 in order to be free from interference by the courts.

...[I]n regard to selecting the particular land to be condemned, it is the view of this court that even when necessity has been challenged on the ground of arbitrariness or excessiveness of the taking, there is left largely to the discretion of the condemnor the location, route and area of the land to be taken. There rests upon the shoulders of one seeking to show that the taking has been excessive or arbitrary, a heavy burden of proof in the attempt to persuade the court to substitute its judgment for that of the condemnor. (Nichols, Eminent Domain, § 4.11(2), p. 558 (3d ed.))

State Highway Comm'n v. Crossen-Nissen, 145 Mont. 251, 255, 400 P.2d 283, 285 (1965).

[T]he adoption of a resolution by the State Highway Commission declaring that a project is necessary to an authorized use and compatible with the greatest public good and least private harm creates a disputable presumption of the same. R.C.M. 1947, § 32-1615 [now Mont. Code Ann. § 60-4-104(3)]. This presumption is overcome when the defendant property owners show fraud, abuse of discretion, or arbitrary action. This requires clear and convincing proof.

State Highway Comm'n v. Danielsen, 146 Mont. 539, 544, 409 P.2d 443, 445 (1965).

Nonetheless, private injury is but one of the considerations present in a condemnation. ... Avoidance of increased costs as an element of the public good has been recognized by the Court.... Given these economic and ecological factors, we cannot find clear and convincing proof that the Highway Commission abused its discretion or acted arbitrarily.

State v. Higgins, 166 Mont. 90, 95, 530 P.2d 776, 779 (1975).

Consequently, it can be argued that the proof required of a protesting party (landowner) in necessity cases is much stronger than a mere preponderance of the evidence. This is because of the deference which courts have traditionally shown to decision-making by agencies which possess much expertise and much discretion, and as required by the separation of powers. Mont. Const. Art. III, § 1.

In any event, this process, as well as the standards of proof and shifting of the burdens of proof, has been a part of Montana statutory and case law for over 100 years. It has, for the most part, served the state well in attempting to provide adequate roads and highways for the people of the state, while protecting private property. To change the standard, as proposed, would not only increase the amount of proof required, it would destroy the presumption that has existed for over a century. This would mean, in essence, that the road authorities would no longer be the ultimate designer of the roads. Rather, that task would be shifted to a significant degree to the Courts, because in every case where a landowner contested necessity, the Court could not rely on the presumption, and would be asked to decide whether a certain road design was necessary.

The process and the burdens of proof should be left the way they have been established. That is, the road designers would be presumed to have done their job, unless the landowner can show an abuse of discretion.

In turn, this shifting of discretion from the road designers to the Courts would be very expensive for the taxpaying public and potentially devastating to the efforts of the public agencies attempting to upgrade Montana's infrastructure. It would only take one landowner who opposed a ten million dollar road building project, for example, to contest necessity, and thereby delay a much needed improvement. This, in turn, puts peoples lives at risk. Even on less costly projects, a landowner could hold the project hostage, and make exorbitant monetary demands upon the public's money. these are demands which the agencies could well feel compelled to meet, because of the need for the project. There is in the real world always someone who wants to stop projects for a wide variety of reasons. Both the NEPA and MEPA processes generally provide citizens a forum to express opinions and offer suggestions regarding a project. To make the proposed change in the standard of proof would provide yet another forum for these grievances, with the likely outcome that state's road building program would be crippled, if not halted altogether.

The standard of "clear and convincing evidence" is somewhat similar to the standard used in criminal cases. To require such a standard in favor of the person opposing a project would be a drain on MDT's resources every time it had to convince a Court that the road improvement was necessary. At this point no one knows what type of proof the new standard would mean. There is no precedent in this context to look at for guidance. No one knows what type of engineers, or other experts, would have to take the stand to convince a judge of the necessity. Would MDT be required to put on a wide array of evidence from traffic, design, safety and construction engineers? No one knows how many more lawyers and engineers MDT would have to hire to shoulder the extra burden. Would the new standard mean that one person had to die in a car wreck on that stretch of road? Would it mean that a large truck carrying hazardous waste had to go through a bridge railing into a river or stream before the bridge could be replaced? Would these circumstances be "clear and convincing evidence?" Nobody knows. The point is, however, that the people who study and design the roads are the proper parties to make these decisions. If they abuse that discretion, then the present balance and standards of proof provide an avenue to remedy

the abuse. But the changes being contemplated will shift that decision making to the judges, who are much less qualified in making decisions pertaining to the sciences involved in designing and building roads.

CONCLUSION

In conclusion, MDT strongly urges that the subcommittee not take the proposed action for the reasons given above, that is:

- (1) Montana cases and statutes have establish a procedure which allows needed projects to go forward;
- (1) the road building authorities have considerable expertise and should be allowed to exercise their discretion in the design and location of public improvements;
- (2) the Landowners have a process to overcome the presumption that this discretion was not properly exercised;
- (3) a change in the standard, and a shifting of the party who must produce the proof, would overturn a hundred years of established law, with unknown, but potentially devastating results to the state's attempts to upgrade its roads and bridges;

HOLLAND & HART LLP

ATTORNEYS AT LAW



PARTNERING LAW AND TECHNOLOGY TO MEET YOUR NEEDS
401 NORTH 31ST STREET, SUITE 1500, BILLINGS, MONTANA 59101-1200
MAILING ADDRESS: P.O. BOX 639 BILLINGS, MONTANA 59103-0639

Tuesday, April 11, 2000

To: Krista Lee

Fax: (406) 444-3036
Phone:

From: Paul D. Miller

Fax: (406) 252-1669
Phone: (406) 252-2166

Message:

Attached is a letter containing my comments regarding the committee's study of eminent domain laws. Please distribute the letter to the members of the committee. Thank you for your assistance.

Billing: 19636.0102

Original will NOT follow.

Number of pages including cover sheet: 6

Note: If this fax is illegible or incomplete please call us. This fax may contain confidential information protected by the attorney-client privilege. If you are not the named recipient, you may not use, distribute or otherwise disclose this information without our consent. Instead, please call (406) 252-2166; we will arrange for its destruction or return.

Attorney Number: 0918 Client/Matter Number: 19636.0102 Time Deadline: _____
Operator Initials: _____ Date Transmitted: _____ Time: _____

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TELEPHONE (406) 252-2166
FACSIMILE (406) 252-1669

PAUL D. MILLER
pmiller@hollandhart.com

April 11, 2000

Environmental Quality Council
Eminent Domain Subcommittee

Re: Amendment of Eminent Domain Laws

Ladies and Gentlemen:

I have been asked by the Stillwater Mining Company to submit comments to the committee regarding its study of eminent domain laws. I am a Billings attorney with a practice concentrated in commercial litigation. Over the course of my 30+ years of practice I have handled condemnation matters, representing both condemners and condemnees.

Initially I would like to comment on what appears to be a justification advanced for amendment of eminent domain law - that is, the suggestion it is antiquated and has no place in the 21st century. A purpose of the eminent domain law is to enable governments and other entities to provide needed infrastructure. That need has not diminished over the years, and indeed it may well have expanded in terms of the types of infrastructure needed, from railroads and highways, which are still necessary, to transportation systems for such things as energy and electrical transmission, fiber optics and pipelines for all types of uses. Likewise, as science and technology have advanced, the impact on property rights of others has become less rather than more intrusive. Finally, I think it is worthwhile to keep in mind that eminent domain is a right created by the legislature for the benefit of the public in general, and which contains both statutory and constitutional safeguards for the protection of the property owner. Turning to some of the more specific proposals, I would appreciate it if you would consider the following remarks.

The first item upon which I will comment is the suggestion that hard rock mining be removed from the list of public uses for which the right of eminent domain may be exercised. The justification suggested for that proposal is that eminent domain may not be exercised for coal mining, and hard rock mining should not be treated more favorably. That statement is not accurate. Montana law states that eminent domain may not be exercised for surface coal mining, but

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ATTORNEYS AT LAW

Environmental Quality Council
April 11, 2000
Page 2

the statute does not apply to underground coal mining. The prohibition applicable to surface coal mining was enacted in the early 1970s when surface coal mining was a controversial issue in Montana, based in part on the fact that surface coal mining disturbs a large surface area, which is perhaps some reason for making the distinction between surface and underground mining, which needs much less of the surface. Elimination of hard rock mining from the list of permitted uses for condemnation would result in owners of minerals being deprived of their property. Although it sounds simplistic, an ore body must be mined where it exists; it cannot be moved. If the mining company does not have the power to take portions of the surface – in every instance paying just compensation – for location of mills, smelters, tailing ponds and other necessary adjuncts to the mining process, then it would be impossible to mine. I respectfully suggest to the subcommittee that elimination of hard rock mining in Montana is something that should not occur at all, and certainly should not occur under the guise of a rewriting of the eminent domain laws.

I likewise disagree with the proposal to change the burden of proof in eminent domain proceedings from “a preponderance of the evidence” to “clear and convincing.” While there are instances under Montana law in which clear and convincing evidence is required in a civil action, they are distinguishable from most civil actions such as condemnation. For example, a plaintiff must prove entitlement to punitive damages by clear and convincing evidence, however, the state recognizes that punitive damages are extraordinary and require a higher burden of proof for that reason. Likewise, certain actions involving the welfare of children require a higher degree of proof for obvious reasons. Further, none of the civil actions which requires a showing of “clear and convincing” evidence involves actions by or on behalf of the State in the public interest, and for uses which have specifically been approved by the legislature.

Furthermore, to suggest that “clear and convincing” is a compromise or middle ground “between preponderance of the evidence,” and “beyond a reasonable doubt” is inaccurate and misleading. “Beyond a reasonable doubt” is the standard for burden of proof in criminal cases, and has no relevancy to civil litigation. Instead of being a middle ground, “clear and convincing” is the highest standard of proof required in civil actions, and is inappropriate in eminent domain actions. None of the reasons supporting the exercise of eminent domain has changed, and as pointed out earlier in this letter, the exercise of eminent domain has become less intrusive over time. In fact, no justification is

HOLLAND & HART^{LLP}
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Page 3

advanced for changing the burden other than that "clear and convincing" is a middle ground which, as we have pointed out, is not accurate as far as civil litigation is concerned. Like many of the proposals before the subcommittee, this type of change would make the exercise of eminent domain more difficult without any objective justification.

To the extent we can take guidance from other jurisdictions, it is significant that all of the western states surrounding Montana (Wyoming, Utah, Colorado, Idaho, and North Dakota) do not require the higher standard.

It has been proposed that a jury rather than the judge make the determination of necessity, that is whether the taking is necessary for the intended public use. MCA 70-30-111(2). That decision has been made by the court (judge) for years and it should not be changed. Having a judge determine the issue of necessity lends consistency and predictability to the process. Necessity is not defined in the eminent domain statutes, but there is case law in Montana which sets standards for that determination. Those standards are better understood and applied by a judge who has legal training, rather than a jury of laypersons who do not have access to the case law, and more importantly are not trained in the law. To the extent possible, interpretations of what is necessary should be consistent, and lack of consistency or predictability on this issue benefits neither the landowner nor the condemnor.

There is precedent in other areas for the judge to make the decision on necessity. Quiet title actions and partition of real property are two areas in which a judge, not a jury, is the trier of fact. Again, this is an area in which Montana law is compatible with the surrounding states. Of course the condemnee is entitled to have a jury determine fair or just compensation, and in fact is entitled to present that issue to a panel of three commissioners prior to a trial in district court. Either party may appeal the award made by the commissioners to the district court and have a jury set compensation.

I also disagree with the proposal that possession be postponed until all appeals are exhausted. Unfortunately, our court dockets are very crowded and the judicial process does not move with the speed that we might wish. Criminal cases take precedence over civil actions, and postponement of possession by the condemnor could delay commencement of a project for many months, if not years.

HOLLAND & HART LLP
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Page 4

Another proposal before the subcommittee deals with the interests which can be acquired by the condemnor. Frankly, I am not sure whether the proposal seeks to limit that interest to an easement, or merely instead suggests that the interest which the condemnor can acquire be limited to something less than fee simple title if fee simple title is not necessary for the intended use. Under existing law, the court has the power to limit the interest sought if in the court's opinion the interest sought, such as fee simple title, is not necessary. Mont. Code Ann. § 70-30-206(1)(b). It seems to me this is the appropriate approach because it allows the judge to tailor the interest to fit the circumstances of each case. In addition, it does not restrict the judge to one or two alternatives such as fee simple title or an easement, but rather broadens the possibilities to other interests, such as a fee simple with an automatic reverter to the condemnee or the condemnee's successor, when the property is no longer being used for the purpose for which it was taken. As noted, the decision of what type of interest the condemnor may obtain is presently determined by the judge, which is appropriate because of the judge's background and legal training. That decision would be made by a jury if the law is amended to permit the jury to determine the issue of necessity.

Finally, I would like to comment on the draft copy of a proposed bill dealing with the liability of a property owner whose property is taken by eminent domain. The intent of the bill seems to be to apportion liability between the condemnor and the condemnee for damages resulting from the construction, use or maintenance of a project.

The bill provides in subsection (2) that a condemnee may be held liable only for damages caused by his or her gross negligence or intentional conduct. I do not understand the justification for relieving anyone, including condemnees, from the consequences of his or her negligence. Under Montana law, a person is responsible for damages caused by his or her negligence, and I see no justification for enacting legislation which relieves a person of that duty. Subsection (3) of the draft bill which attempts to place the burden of defense on the condemnor, unless the damages claim results from the condemnee's gross negligence or intentional conduct, is objectionable for the same reasons. A person should be responsible for his or her negligence, and that responsibility ought to include defense of an action for damages.

HOLLAND & HART LLP
ATTORNEYS AT LAW

Environmental Quality Council
April 11, 2000
Page 5

I appreciate your consideration of my remarks and thank you for contributing your time to this endeavor.

Sincerely yours,



Paul D. Miller
of Holland & Hart LLP

PDM:vlh

2647990_1.DOC

Krista, comments from ExxonMobil Pipeline Law follow. Contact me with any questions. Thanks, Laura

Laura K. Sleevi
Operations Integrity Group
ExxonMobil Pipeline Company
Ph: 713.656.3801 // Fax: 713.656.3033

> Without examining the Montana eminent domain statute(s) prescribing the standard of proof, or reading the Montana cases interpreting those statutes, it is not possible to specifically describe how the change would affect our business. "Clear and convincing" requires a greater degree of proof than "preponderance of the evidence". Obviously, as a potential condemnor, we are opposed to any greater standard of proof.

> Nevertheless, if a change in burden of proof standard is to be made, applying it to the project as a whole is preferable to application on a tract-by-tract basis. The appropriate question should be whether the project is in the public interest, rather than whether the taking on a particular tract is in the public interest. If the more stringent "clear and convincing" standard is applied on a tract by tract analysis, the likelihood of inconsistent results along the right-of-way is greater; i.e. on some tracts the taking of the particular tract may be found to be in the public interest, and on other tracts the particular taking may not be found in the public interest. Asking a judge or jury to determine that a project is in the public interest is preferable to asking the same judge or jury whether the taking on that particular tract (as opposed to some other tract) is in the public interest. Needless to say, a continuous pipeline cannot be constructed on a patchwork of inconsistent eminent domain results. Neither public interest nor judicial economy will be served.

>



PO BOX 201704
 HELENA, MONTANA 59620-1704
 (406) 444-3742

GOVERNOR MARC RACICOT
 DESIGNATED REPRESENTATIVE
 Julie Lapeyre

HOUSE MEMBERS
 Paul Clark
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LEGISLATIVE
 ENVIRONMENTAL
 ANALYST
 Todd Everts

Memorandum

To: Eminent Domain Interested Persons
 From: Krista Lee, Resource Policy Analyst, EQC *klf*
 RE: Burden of Proof Standards
 Date: March 27, 2000

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APR 10 2000

ENVIRONMENTAL
 QUALITY COUNCIL

At the March 23, 2000 eminent domain subcommittee meeting, the subcommittee discussed replacing the evidentiary standard necessary to establish that a taking is in the public interest. The subcommittee has discussed replacing a "preponderance of the evidence" with a "clear and convincing evidence" standard. The subcommittee needs more information on this prior to making a decision on any recommendation.

Before making a draft recommendation, the subcommittee would like to receive comment with regard to raising the burden of proof standard to "clear and convincing evidence." Please provide written comment on how or if changing the burden of proof standard would affect you or your business.

If you have comments or questions, please do not hesitate to contact me at 444-3957 or klee@state.mt.us

Please send written comment to the address below, prior to April 3, 2000. I apologize for the short time frame. The subcommittee will be meeting again on April 12, 2000 and will need time to review your comments.

Environmental Quality Council
 Att: Krista Lee
 PO Box 201706
 Helena, MT 59620-1706

4/7/00
YES TO CLEAR & CONVINCING EVIDENCE. YOU HAVE MY BRIEF THAT'S ENOUGH EXPLANATION FROM ME
BOB STEVENS
PO BOX 1510
HELENA MT 59624
442-9424

CHRISTOFFERSEN & KNIERIM, P.C.
Attorneys at Law

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Culbertson, MT 59218
Telephone: (406) 787-5700
E-mail: 2laurac@nemontel.net

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APR 07 2000

ENVIRONMENTAL
QUALITY COUNCIL

March 30, 2000

Environmental Quality Council
Attn: Krista Lee
P.O. Box 201706
Helena, MT 59620

Subject: Burden of Proof Standards

Dear Krista:

We are attorneys for Project Telephone, Valley Telecommunications, Inc., and Nemont Telephone Cooperative, Inc., as well as several electrical cooperatives serving a large portion of eastern Montana.

It is our recommendation that changing the present evidentiary standard for a "taking in the public interest" from preponderance to a "clear and convincing" standard is not helpful. While the evidentiary standard is clearly higher than a preponderance, the "clear and convincing" standard itself is not well defined in the law and would spawn considerable court litigation and lawyer time to further determine it in the courts.

We recommend that the Council and its subcommittee leave the existing evidentiary standard for a taking in the "public interest" as it is.

Sincerely yours,



MATTHEW W. KNIERIM

MWK/ke

cc: Nemont Telephone Cooperative, Inc.

Y

WALLACE D. McRAE

ROCKER SIX CATTLE CO.
HC 84 BOX 2055
FORSYTH, MONTANA 59327

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APR 06 2000

ENVIRONMENTAL
QUALITY COUNCIL

April 1, 2000

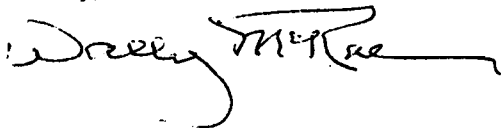
Krista Lee
Resource Policy Analyst
Environmental Quality Council
P. O. Box 20174
Helena, Montana 59620-i704

Dear Krista:

I believe that I can predict the results of your poll of interested parties concerning the replacing "a preponderance of evidence" with the standard of "clear and convincing evidence." Those landowners who have experienced condemnation of their property by eminent domain will respond that the burden of proof needs to be raised to a higher standard while the condemnors will take a "Chicken Little" approach predicting that not only will the sky fall in if the test bar is raised, but that all progress and projects that employ condemnation will grind to an agonizing halt.

Instead of a poll of interested parties, I would suggest that the Council members consider the information that they heard at the recent public meeting in Billings. If the Council considers the public comments concerning the abuses related by landowners, it will be obvious that the standard should be raised. What is also significant, I believe, was that there was a complete lack of criticism concerning governmental agencies treating landowners unfairly. The problems arise from activities by private entities that use the governments' right to condemn. This should lead the Council members to the conclusion that landowners, and courts, recognize, and accept, projects that truly represent "public convenience and necessity" and that various governments use of eminent domain would have no trouble with a higher standard prior to the taking of lands.

Sincerely,





The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

REPRESENTATIVE SYLVIA BOOKOUT-REINICKE
HOUSE DISTRICT 71

HELENA ADDRESS:
CAPITOL BUILDING
HELENA, MONTANA 59620-0400
PHONE: (406) 444-4800

HOME ADDRESS:
PO BOX 327
ALBERTON, MONTANA 59820
PHONE: (406) 722-3344

COMMITTEES:
TRANSPORTATION
LOCAL GOVERNMENT
BUSINESS & LABOR

March 30, 2000

Ms. Krista Lee
Environmental Quality Council
P O Box 201706
Helena, MT 59620-1706

Re: **Burden of Proof Standards**

Dear Ms. Lee:

As a strong proponent of Property Rights, I am in favor of changing the wording from "preponderance of the evidence" to "clear and convincing evidence".

Sincerely,

A handwritten signature in cursive script that reads "Sylvia".

Sylvia Bookout-Reinicke
Representative HD 71

Hi Krista,

This letter is in regard to your memo discussing "clear and convincing evidence".

The Tongue River Railroad (TRR) is a shortcut for Wyoming coal to the midwest markets. There is rail service available for all of the shippers. The Montco Mine lost its permit and therefore there is no need for service to that mine. The original TRR went from Miles City to the Montco Mine and the Montco Mine was never developed. Then the route was extended to Decker that provided a shortcut for Decker and the Wyoming mines. It appears to me that the permit granted by the Surface Transportation Board was the only proof that this was a public need. This permit was granted because that is what the Surface Transportation Board is supposed to do- grant permits. Somewhat like going to license your vehicle. They made no determination as to public need. I feel that the State Land Board should determine whether there is "clear and convincing evidence" that there is a public need.

If there was no longer a TRR across my property it would lift the cloud on my title for any potential investors. I wouldn't have to stop and consider that if I build this improvement will the TRR go through the middle of it? I wouldn't have to worry about grade crossings, cattle crossings, water for the cattle, liability at crossings, railroad use of my personal bridge, weeds spreading, fires caused by trains, track in the middle of my calving pasture, railroad grade on the floodplain etc. In other words I could actually ranch for a living.

Thanks for the opportunity to comment.

Mark Fix

Lee, Krista

From: Montana Farm Bureau Federation [mtfarmb@in-tch.com]
Sent: Monday, April 03, 2000 2:22 PM
To: Krista Lee
Subject: Eminent Doman

TO: Krista Lee
FROM: Lorna Karn, Montana Farm Bureau

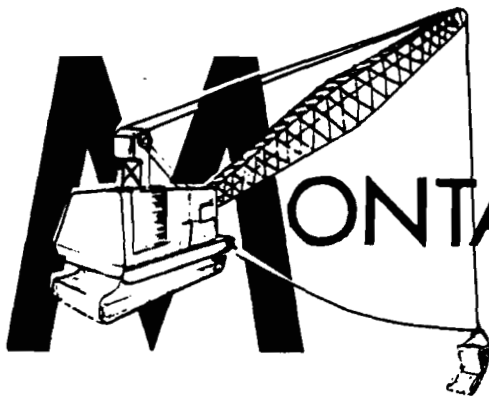
We sent your inquiry about replacing the evidentiary standard to our board of directors along with an explanation of what would happen if the language was changed. We received comments both for changing and to not change the language, therefore we do not have a recommendation for the committee at this time.

The last person I talked to this morning didn't think it was necessary to change the rules because the eminent domain laws are not the problem. The problem lies with the bureaucratic rule making process, they are doing more to take private property than anything else.

Some of the concern is with farmers ability to use eminent domain to get an irrigation easement across someones property, by changing the rules it would make it tougher for them to get the easement. Several of the board thought this was a double edged sword.

We were wondering about the surrounding state laws, what do they have on the books and is it causing them to look at their laws? Perhaps you could do some research into this.

See you on the 12th.



MONTANA COAL COUNCIL

2301 COLONIAL DRIVE • HELENA, MONTANA 59601
(406) 442-6223 FAX: (406) 449-6628 EMAIL: MTCOAL@AOL.COM


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APR 06 2000

**ENVIRONMENTAL
QUALITY COUNCIL**

April 5, 2000

To: Environmental Quality Council

From: Jim Mockler, Executive Director 

Re: Eminent Domain

Coal mining does not enjoy the right of eminent domain. The Surface Mining Control and Reclamation Act (PL 95-87) requires that surface owner consent be obtained prior to the granting of a reclamation permit.

However the development of any new coal mine would need a rail spur, access roads and a power line in order to become a viable coal mining operation. All of these activities are allowed the use of eminent domain to obtain rights-of-way to the mine site. Without these rights, it would likely be impossible to ever build another new coal mine.

We urge the Environmental Quality Council to retain these powers over essential entities necessary for the development of any major new coal mine.

Alice H. Austin
4741 Sundown Road
Missoula, MT 59804

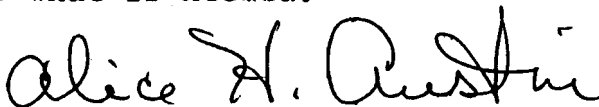
March 31, 2000.

Environmental Quality Council
Att: Krista Lee
P.O. Box 201706
Helena, MT 59620

RE: Burden of Proof Standards

Comment: This voter supports the proposed new standard of "clear and convincing evidence" to establish that a taking is in the public interest. For private entities the highest standard is what is needed.

Sincerely,



Alice H. Austin

RECEIVED
APR 03 2000
ENVIRONMENTAL
QUALITY COUNCIL

FAX COVER SHEET

Address (line 1)
 Address (line 2)
 City, State or Province ZIP or Postal Code
 Phone number:
 Fax number:

Send to: Krista Lee	From: Gary Wiens, Assistant Manager, Montana Electric Cooperatives' Association
Attention:	Date: 03/31/00
Office location: 444-3742	Office location:
Fax number: (406) 444-3036	Phone number: (406) 761-8333

Urgent Reply ASAP Please comment Please review For your information

Total pages, including cover: 6

Comments:

Krista:
 Please accept the attached comments as our response to your memorandum regarding change in burden of proof standard

Sincerely,

Gary Wiens





Montana Electric Cooperatives' Association

Allen Thiessen
President

Donald Jones
Vice President

Richard Stahl
Secretary/Treasurer

David M. Wheelhan
Executive Vice President
General Manager

COMMENTS OF THE MONTANA ELECTRIC COOPERATIVES' ASSOCIATION REGARDING PROPOSED CHANGE IN BURDEN OF PROOF STANDARD ON EMINENT DOMAIN

Presented to the Montana Environmental Quality Council
Subcommittee on Eminent Domain
March 31, 2000

Thank you for providing Montana Electric Cooperatives' Association the opportunity to provide input regarding the proposal to replace "preponderance of the evidence" with a "clear and convincing evidence" standard in determining whether a condemnation proceeding involving use of eminent domain is in the public interest.

As our Association reported in its testimony to the subcommittee at its meeting in Billings on March 23, Montana's electric cooperatives' rarely, if ever, have used eminent domain law in the half century or more that co-ops have been in existence in Montana. However, as we stated, we believe the power of eminent domain is a necessary tool to have available.

Our Association is concerned about the proposal to raise the burden of proof standard as outlined by the Environmental Quality Council in its March 27 memorandum. From a legal standpoint, we believe this change could have a chilling effect on a cooperative's ability to extend power lines and build substations to adequately serve customers and communities. Such an impact, of course, would be seriously detrimental to economic development in our state and in local communities.

The "clear and convincing standard" could create a hurdle significant enough that it would be very difficult to prove continued construction of infrastructure is in the public interest.

501 Bay Drive

P.O. Box 1306

Great Falls, MT

59403

Phone (406) 761-8333 • Fax: (406) 761-8339 • mtcoop@mcn.net

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

ATTORNEYS AT LAW

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KIMBERLY A. BEATTY
LEO BERRY
R. STEPHEN BROWNING
ROBERT CAMERON
KATHARINE S. DONNELLEY
MARK D. ETCHART
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MEMORANDUM

TO: EQC – Eminent Domain Subcommittee
FROM: Steven T. Wade *STW*
DATE: April 7, 2000
RE: Burden of Proof in Eminent Domain Matters

RECEIVED

APR 13 2000

**ENVIRONMENTAL
QUALITY COUNCIL**

We are writing in response to the Subcommittee's request for comments on changing the burden of proof in Eminent Domain cases from a preponderance of the evidence to a clear and convincing evidence standard. We strongly urge the Subcommittee to maintain the burden of proof as a preponderance of the evidence. The current burden presents a fair and equitable framework for establishing the need for a condemnor to condemn property if the statutory and case law requirements are met.

At the Billings meeting there were discussions that the Montana Environmental Policy Act (MEPA) and the National Environmental Policy Act (NEPA) have established some precedent that can be applied to Eminent Domain. There was some discussion that the standard of proof in MEPA and NEPA cases is that of clear and convincing evidence. Under NEPA, "an agency's decision must be supported by a preponderance of the evidence." *See NEPA Law and Litigation*, § 8.07, p. 19. In challenging an agency decision under NEPA, "a Plaintiff must prove by a preponderance of the evidence that the EIS is inadequate and that the agency's decision to proceed is arbitrary and capricious." *See Guide to the National Environmental Policy Act*, p. 137. In other words, the plaintiff in NEPA cases must show the agency was arbitrary and capricious by a preponderance of the evidence in order to successfully challenge an agency's decision.

With respect to MEPA, Montana Courts look to federal NEPA cases for guidance since MEPA is patterned after its federal counterpart. While MEPA specifically provides that an agency's decision may not be set aside unless the court finds "clear and convincing" evidence that the decision was arbitrary or capricious or not in compliance with the law, it appears that such a burden of proof has not been applied by the Montana Supreme Court. The Montana Supreme Court has adopted the Ninth Circuit rule for challenging an agency decision that an EIS will not be prepared. In spite of the statutory guidance, the Montana Supreme Court has established a significantly lower standard than "clear and convincing" evidence. In addressing an agency's decision under MEPA not to

conduct an EIS, the Montana Supreme Court held that "the Plaintiff need not show the significant effects will in fact occur, but if the Plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." Ravalli County Fish & Game Association, Inc. v. Montana Department of State Lands, 903 P.2d 1362, 1368 (Mont. 1995) citing LaFlamme v. Federal Energy Regulatory Commission, 852 F.2d 389, 397 (9th Circuit 1988). As is clearly evident, "raising a substantial question" is a much lower threshold than showing significant effects, or arbitrary and capricious conduct, by clear and convincing evidence.

In addition, it is important to distinguish Eminent Domain from MEPA, NEPA and other environmental statutes. The basis for using Eminent Domain is that a project is being constructed or installed because it is in the public interest. It is unfortunate that some entities are seeking to change the Eminent Domain laws for the benefit of a few, while the basic principles of Eminent Domain ensure that the public as a whole is the most primary concern.

We note that there have been some arguments made that Eminent Domain statutes should be attached to environmental and other substantive laws. We would argue that it is within the province of those environmental laws to regulate the various projects that may require Eminent Domain. There is no basis for making the Eminent Domain laws part of those statutes as the legal principles are different.

In addition, the Subcommittee should be aware that any increase in a burden of proof will certainly result in increased litigation and attorney's fees being incurred by all parties. Under the Eminent Domain statutes a prevailing landowner is entitled to recover his attorney fees. However, if he or she does not prevail they are not entitled to such fees. Increasing the standard even a small amount will result in additional discovery and trial time. Thus, the Subcommittee would be placing the parties in a situation where the trials would be extended as the condemning party would need to supply additional and most likely redundant evidence in order to ensure that it meets the clear and convincing standard. This, in turn, will increase the landowners costs, which may or may not be recovered.

Given the relatively few times eminent domain is used, there simply is no need for the burden of proof in Eminent Domain proceedings to be changed from a preponderance of the evidence to clear and convincing evidence. Furthermore, it should be pointed out that any change in the burden of proof would necessarily throw into question the plethora of precedent and case law already established not only in the State of Montana, but in the country. If precedents needed to be redefined under the new standards, it is entirely foreseeable that more Eminent Domain cases would result in appeals. Once again, significantly increasing the cost to all parties involved.

We again urge the Subcommittee to be cautious when attempting to revise the Eminent Domain Statutes. As Eminent Domain is a very complex area of law, any change that appears to be minor in nature may have severe unforeseen consequences.

We appreciate the opportunity to submit these comments. If you have any questions or would like to discuss this matter further, please feel free to contact us.

**STATEMENT OF DENA HOFF
NORTHERN PLAINS RESOURCE COUNCIL**

**TESTIMONY BEFORE
THE JOINT SUBCOMMITTEE ON EMINENT DOMAIN
ENVIRONMENTAL QUALITY COUNCIL AND
LAW, JUSTICE, AND INDIAN AFFAIRS INTERIM COMMITTEE
56TH MONTANA LEGISLATURE**

**THURSDAY, MARCH 23, 2000
BILLINGS, MONTANA**

Northern Plains Resource Council

Good evening, Chairman Cole and members of the Joint Subcommittee. My name is Dena Hoff, and I am speaking to you tonight on behalf of the Northern Plains Resource Council, a three thousand-member organization of farmers, ranchers, and townspeople working to conserve Montana's precious natural resources and promote family-based agriculture.

First, on behalf of the members of NPRC, I would like to thank each one of you, Chairman Cole, Vice Chairwoman Gutsche, Representatives Lindeen, Shockley, McGee, Tash, and Gillan, Senator Stang, Mr. Ebzery, Mr. Sorenson and Ms. Page, for the hard work each of you have put into this study. We appreciate your support and work on behalf of ordinary Montanans across the state.

My husband Alvin and I farm near Glendive on the Yellowstone River, where we raise beans, corn, sheep and alfalfa. For twenty years, we have put our heart and souls into our land, and like many people across Montana, we don't like the idea that a big corporation can take our private property under the laws of this state, destroying everything that we have worked for so that some out-of-state profiteer can make a few bucks by building their pipeline, railroad, powerline, or other so-called "public use."

As you can tell from the stickers you see on everyone's shirts, we are here this evening with one simple message: reform eminent domain – make it more fair.

It is not enough to continue to study this outdated, antiquated statute without proposing meaningful reforms to help Montana's rural landowners. It is not enough to only produce a booklet informing private property owners that, as we suspected, we have very little rights under the law. It is not enough to continue down this road to nowhere that opponents of private property rights protection would have us go.

The eminent domain law is largely unchanged since it was written in 1877, before Montana was even a state, and it must go. Now is the time to make a decision between private property owners and the large corporations that would take our land.

You have the opportunity today to do something remarkable. You can, in this economically depressed state, where personal income is 51st, say to our number one industry, agriculture: "We will protect your number one asset – your land. We will not let eminent domain be abused, and we will close loopholes that threaten rural people."

I want to speak directly about some of the eminent domain reforms we believe are most important.

First and most important, is a redefinition of what currently constitutes the definition of public use. Section 70-30-102 of the code says that many things, including pipelines, railroads, mines, wharves, docks, telegraph lines, and sewage are public uses.

No matter what. No criteria is applied to proposals by private companies, largely unregulated by the state and accountable to no one but their own investors, to build these projects using our land. Ted Turner could propose to build a railroad across Rep. Tash's property to haul his buffalo to market and it would be considered a public use under eminent domain. I can mine vermiculite or gold next door to Sen. Stang's property, and take his property under eminent domain for my waste dump. By virtue of being in the list it is, on its face, a public use.

Ladies and gentlemen, this is absurd! Please, we ask you to restore some common sense to the definition of public use. We encourage you to change the law and enact some criteria so that only those projects truly in the public interest and necessity have eminent domain power. These criteria may either be applied by the court when adjudging a preliminary order of condemnation, or, more appropriately, be a finding by elected officials accountable to the voters, such as the Board of Land Commissioners, that the proposal is indeed a public use.

We support the proposal to remove hard rock mining from the list of public uses for which eminent domain may be used. The state does not allow coal mines to use eminent domain, and hard rock mines should not be treated any differently.

There must be a higher standard for taking private property. As the population grows and the demands for true public uses are greater, there will be more and more pressure to confine rights of ways to corridors. The unlucky landowners who happen to be on the corridor deserve careful and thorough protection.

Also important to landowners is the issue of getting the land back after it has been taken. While some highways may last forever, many pipelines, powerlines, and railroads will become abandoned or replaced by other uses. The eminent domain law currently says that this land is supposed to revert back to the original landowner or their successor in interest. We are concerned that there is no mechanism in the law that triggers this reversion. The land could sit idle for years, not being used by the condemnor, when it should be returned to the condemnee. To solve this, we propose you do two things:

- First, enact the provision like Wyoming's, which would revert the taken land to the condemnee after five years of non-use. And we suggest you go farther, and give the landowner standing to bring an action in court to get their land back if it has been abandoned.
- Second, enact a due diligence clause so that no one may take private property for a project, and then never build it. There are due diligence clauses in the state and federal coal mining laws, and we suggest you look at that language for guidance. It isn't fair that speculators can virtually depress the value of land by indefinitely hanging a proposed development over the title of property.

One major concern for private property rights supporters is that the eminent domain law doesn't require that damage to our land be mitigated. The law says that the act of taking private property should be the least private injury for the greatest public

good. But there is no mechanism by which the condemnor must lay out its plan for minimizing damage to our land. Every eminent domain taking has as its end result some kind of project – whether it is a canal, a bridge, a powerline, railroad, or highway. The construction, maintenance and use of these things can damage our property value and hurt our land.

As you heard in Missoula, we have created in this state two tiers of property rights. State and federal public land has a lot of protection. They have large governments, with multi-billion dollar budgets, attorneys, and other experts watching over them. Projects that cross public land go through environmental review. Alternatives are evaluated, and measures are proposed which mitigate and minimize the impact these projects have on land. But as industry will testify, condemnors would much rather take our private land because it has no such protections. We don't have the resources of the federal and state government, and we don't have the negotiating strength of government.

So what is the solution? This committee should end the second-class status private land has under eminent domain in Montana. Require condemnors to implement on private land, at a minimum, the mitigation measures required by state and federal agencies when the exact same project crosses public land. If no public land is crossed, make condemnors file a mitigation plan to the satisfaction of the court. In both cases, involve the landowner in the development of solutions to on-the-ground problems these so-called public uses create on their property.

Further, to ensure mitigation really does occur, enact a statute, similar to Colorado's which requires that pipeline companies post a bond to ensure that the land is returned to as good a condition as possible after the project is up and running. Expand Colorado's pipeline bonding requirement to all private corporations exercising eminent domain. To take care of unforeseen damage to landowner property which isn't mitigated, let the court readjust the amount of just compensation the landowner gets one year after construction of the project for public use.

As we explained in Missoula, we and our friends in other agricultural groups continue to support changes to the eminent domain law that delay putting the condemnor in possession until the exhaustion of legal appeals. Representative Lindeen's House Bill 354 in 1999 provides a good framework for protecting landowners' rights, and I hope you will recommend its passage in 2001. It is not fair to let the condemnor in an eminent domain proceeding get special treatment above every other civil litigant, and take the award while the case is on appeal.

On the issue of liability, we support the passage of the bill draft requested at the last meeting by Representative McGee. It is important to clarify, once and for all, that there should be no question that the landowner should not be liable for what happens on land that is taken from them. We want to be sure that the bill draft is expanded so that landowners who were forced to give up a fee title interest in a strip of their land are also limited in their liability, and as I read the bill now, it only applies when an easement is taken.

On the issue of the use of taken land for uses not originally covered under the condemnation order, we support your passage of Wyoming 1-26-515, which would require that the landowner be compensated for each and every use of their taken land.

We support Rep. McGee and Shockley's efforts to improve due process protections for landowners.

As an organization of landowners we are very concerned about the issue of the burden of proof. It should never be the landowner who has to prove that the condemnor's taking of their land is excessive. The legislature has deferred to the condemnor for too long, and we need to respect private property rights. In nearly all instances, we should correct the law so that the condemnor must have the burden of proof. After all, he has tremendous legal leverage at his disposal – the power to take private property. We specifically suggest amending 70-30-111 subsection (2) so that the condemnor has to prove by a standard of *clear and convincing evidence* that the taking of a particular piece of property is necessary. The current standard of a preponderance of the evidence is too low. The condemnor should have to prove public need or true public use through clear and convincing evidence, and we hope you will make this important change.

One of our largest concerns is in the type of interest that may be taken by a condemnor. I will be honest with you. We believe that the state should limit the of property rights that can be taken from a landowner through eminent domain. Right now, fee title may be taken, and if so, the burden is on the landowner to prove that a fee title interest is too much of an interest to take. When a project, such as a railroad, can be accomplished with an easement, and the landowner wants only to give an easement, the state should respect private property rights and limit the interest taken to an easement. It is not the state's place to second guess what is best for the landowner. The state should presume that an easement will satisfy the need of a right-of-way, and it would be the burden of the condemnor to prove fee title was necessary. We don't believe that taking fee title should be approved if the reason is so that the condemnor can get financing. Private property owners should not have to subsidize the financing of a private corporation's project. Eminent domain should not be a money making enterprise for condemnors!

Finally, but not least important, is the issue of just compensation. We have long been concerned that the eminent domain law doesn't really take into account the devaluation of the remainder of a piece of property if only a strip is taken. That is, if I am a condemnor and I take only a strip of your land, depending on the location of the strip, I may have seriously devalued and damaged the remainder of your property. Because of this, and because the power of eminent domain is so extreme, we propose that you amend the law so that the landowner is compensated for the difference between the value of the property without development and the value with development. This should be determined by evaluating comparable sales of like property NOT on the route or vicinity of the proposed condemnation.

March 23, 2000

We also need to help landowners account for the fact that rarely does a one-lump-sum payment cover the long-term cost of dealing with the railroad, pipeline, or powerline that crosses your property. Another change that would help solve the problem of unforeseen future damages is letting the landowner have, at his option, an annual payment indexed at the rate of inflation, rather than a lump-sum payment (editors note: right now there is a provision for an annual payment but it is not indexed at the rate of inflation).

We generally agree that the eminent domain statute is hard to read and understand, and would support Rep. McGee's bill to modernize the language of it. We would also like to see all of the references to eminent domain in one section of the code, Title 70, chapter 30, rather than scattered throughout the code.

Again, we appreciate your consideration of our comments and hope you will act swiftly to reform eminent domain. Your choice in the coming weeks is clear – side with private property rights and Montana's number one industry, agriculture, or side with big companies and big government.



Mr. Chairman, Members of the Committee:

My name is Wallace D. McRae. My address is Rocker Six Cattle Co., HC 84, Box 2055, Forsyth, Montana 59327

I have attended two previous meetings of the Eminent Domain Subcommittee, and first of all wish to express my appreciation for members of the public being allowed to express their views at these meetings. Further I am pleased that the subcommittee has agreed to hold this hearing in Billings with input allowed from Glasgow and Miles City.

I have previously stated that I would hope that these hearings do not degenerate into a referendum on specific projects that involve the condemnation of private lands. I would encourage the members of the subcommittee to consider the frustrations encountered in specific projects to be examples of all past, present and future uses of condemnation and understand that the relating of specifics tend to exemplify the unfairness that landowners suffer under existing laws.

At past meetings there have been some issues and instances arise that I wish to address:

1. The staff was instructed to investigate laws involving condemnation in other states. This was done. However, only laws in states of the Rocky Mountain West were investigated despite recommendations that other, more progressive laws in other states have been updated. Other states outside the West have come to recognize that their laws unduly favored the condemnor and have made a distinction between private speculative uses of condemnation, and the use of eminent domain by governmental agencies ~~the~~ truly represent the public good.

^{that}
2. I feel that the effort expended on producing a "booklet of landowners' rights" is a complete waste of time. The legislative charge to the EQC only mentioned landowners' supposed lack of information in the "whereas" section of the resolution and nowhere in the instructions of the Legislative Resolution was a landowner booklet mentioned. We landowners that have been faced with condemnation know full well what our minimal, so called, "rights" are. That is the problem. The laws need changed. The booklet is merely a distraction from the real issue, and hopefully if the laws are changed, as they should be, the booklet will have to be extensively rewritten to reflect a leveling of the playing field for landowners.

3. The present situation where the condemnor can insist upon taking fee title, as opposed to the taking of an easement, and construct and operate their facility prior to a settlement of the value of the property is patently unfair. Despite what the private entities that use condemnation will tell you, they are not required to, nor are they willing to accept an easement. They want to own the land. There are several reasons why they are so insistent: a. They can sell portions to their condemned land to other entities without even contacting the previous landowner. b. They are in a much stronger position to preclude the crossing of their right of way by the previous landowner for facilities such as livestock water lines, irrigation ditches, access roads, etc. and perhaps most importantly, they can condemn a right of way and use that as collateral to attract financial investors for their speculative project.

4. I believe that the State of Montana should require an assessment of need for a project prior to condemnation being undertaken. The Governor, the Legislature, or some other appropriate Montana

entity should be allowed to question speculative, private entities when they are granted a certificate of "public convenience and necessity" and have the ability to concur, or veto these speculative ventures when granted by agencies in Washington, D. C.

Thank you for the opportunity to express my views. The landowners of Montana will be watching.



WALLACE D. MCRAE

ROCKER SIX CATTLE CO.
HC 84 BOX 2055
FORSYTH, MONTANA 59327

Jan 12, 2000

I understand that some of the state agencies are being consulted and are being invited to participate in developing conditions under which the Tongue River Railroad will be built and operated. This is an opportunity for the State of Montana to do some positive things that during the whole history of the Tongue River Railroad have been denied to the affected landowners and the State of Montana by the TRR, the ICC and the STB. The involvement of the state represents an opportunity to incorporate some minimum standards, over the entire route, that in the past have been left to individual landowners to "negotiate" during the process of condemnation. In fact, the proposed mitigation plan states: "Much of the mitigation that will occur for the anticipated impacts will result from (Right of Way) negotiations between the Applicant and private landowners....." Subsequent to the issuance of the mitigation proposal, a Mitigation Task Force was initiated. In order to have landowner involvement in this task force, the Northern Plains Resource Council petitioned the STB to include landowners on the task force. This request was denied and only government agencies were included. To the best of my knowledge this mitigation task force has never met. Perhaps the STB felt that "public agencies" of the government could represent the individual landowners. Except for the handful of landowner proponents of the railroad, it was immediately evident that any landowner with valid reservations, or opposition to the TRR would be ignored. Let me tell you why. The entire Montana congressional delegation was in favor of the TRR, yet not one of the delegation acknowledged that there would be any problems faced by the landowners that they could not negotiate to a fair settlement under condemnation proceedings. That is ludicrous! Further, the governor of the state also was a public proponent of the railroad, and it seemed that there was a concerted effort to stifle any effort at mitigation that might be considered an obstacle, or an added expense to the railroad even if it benefitted the condemned landowners.

I would like anyone that is interested in the fairness to take a look at the "Proposed Master Mitigation Policy and Plan" Document prepared, and circulated, by the STB in 1985. Then compare this document with the very specific and stringent requirements for mitigation on the Livestock Agricultural Experiment Station--LARS-- at Ft. Keough. It is immediately obvious that the detailed mitigation requirements on the LARS are not replicated in the requirements that will be required on private, or even state, lands. Rather, in reading the mitigation measure on lands other than the LARS, the requirements are not requirements at all but are merely a shopping list of "suggestions" that include the word "should" more than one hundred and eighty times in a tiresome repetition. There also are a number of "coulds" and a "perhaps" or two sprinkled throughout the text.

Next, I wish to dispel any faith in landowners' ability to "negotiate mitigation." The first written opportunity for negotiation that our ranch received from the TRR was in a letter requesting access on our lands for "exploration and surveying." The TRR offered a blanket sum of \$1000 per landowner and a price that they would be willing to pay for core holes and excavated test pits. In a series of meetings and an exchange of letters with various agents and principals of the TRR we pointed out that a flat fee of \$1000 for access represented .03% of the projected per-mile cost of construction and also neglected to consider the varying amounts of land that the railroad wished to access. We also felt that the access fee should be variable, dependent upon how much access and for how long a period of time was required. We were informed that the TRR would not even consider moving away from their "one size (or

per landowner and a price that they would be willing to pay for core holes and excavated test pits. In a series of meetings and an exchange of letters with various agents and principals of the TRR we pointed out that a flat fee of \$1000 for access neglected to consider the varying amounts of land that the railroad wished to access, and that it seemed that the access fee should be variable, dependent upon how much access and for how long a period of time should be taken into account. We were informed that the TRR would not even consider moving away from their "one size (or payment) fits all" position. The TRR was also adamant that it would be "unfair to all landowners" if they negotiated the core hole or test pit price that they had offered. There was always the constant and almost gleeful threat of condemnation lurking in the background in any dealings with railroad agents.

There are other areas in which the landowners have been rebuffed. Those of us who own, lease, and work the lands that will be affected by the TRR have a special insight into some areas of concern that are admittedly, in some cases, nonprofessional but on the other hand, likely to be overlooked in the preparation of mitigation requirements. We have not been consulted, or interviewed on areas of historic, or cultural concern. Our attempts to explain and therefore ease animal--both domestic and wild--movements across the ROW have been ignored in the name of "economic considerations" for the railroad. Let me give you an example of this: Rosebud County had a road that crosses a state section that we lease. The road was situated above a high cut bank along Tongue River that was constantly eroding and threatened the road. There were a couple of options available to the county. One was to riprap the bank of the river to prevent further erosion; the second, and the one chosen, was to relocate the road further away from the river. There was a road bridge on the road to handle the runoff from floods on a side creek, Roe and Cooper. The county commissioners were aware that a flood in July of 1958 washed out a smaller bridge, so that they increased the size of the replacement bridge. Our ranch also used the bridge for a cattle pass from our summer pasture to the river, and the commissioners replaced the bridge with another even larger one. The configuration of the TRR ROW will require that the road be moved once again placing the road closer to the river. The county or the Department of Transportation will be expected to bear the cost of moving the road, I assume, and I will be forced to negotiate with the DOT, or some state agency that the existing bridge be replaced with another new bridge. I have less faith in a culvert handling the amount of water that has historically come down Roe & Cooper Creek; I doubt that our cattle, or deer, or antelope or any other wild animals will as willingly enter a long, dark culvert to get access to the river for water. I have no way to negotiate with the TRR for the bridge especially since I don't even own the land where one is required. But is the Department of Fish, Wildlife and Parks aware of how important that bridge is to the operation of this ranch, or to the safe movement of the public's wildlife? A plea for sterilized ballast on the entire route to prevent weed invasions has fallen on deaf ears. Even if individual ranchers were successful in somehow getting a concession for sterile ballast on their properties, the effort would be futile if their neighbors were unconcerned, or unsuccessful in the negotiation process.

This letter has been much longer than I intended, but I hope that it has illustrated the frustration that one affected landowner along the proposed TRR ROW has experienced over the twenty years. We landowners are not only powerless, but have been ignored during this whole sorry process. I would plead with the State Legislators or State Departments that have any influence in getting stringent, consistent and meaningful legislation and mitigation measures as a requirement for the construction and operation of the Tongue River Railroad.

Sincerely,

CHARTER LIVESTOCK
Steve & Jeanne Charter
13838 Hwy 87 N, Shepherd, MT 59079
1-406-947-2151, Fax 1-406-947-2152

Thursday, March 23, 2000

Eminent Domain Subcommittee
Montana Environmental Quality Council

My name is Jeanne Charter. Part of our ranch borders Highway 87 North towards Roundup about 15 miles out of Billings. The two big high voltage powerlines from Colstrip 3 & 4 cross us.

We went through condemnation proceedings over the damage compensation award for this right-of-way in the late 1970's. MPC really low-balled us on their offer, proposing only large tract grazing land prices. We ended up being awarded 10 TIMES what the company offered by the 3-man condemnation panel. The panel recognized both our concerns that 1) the right-of-way involved only a small tract and 2) that the big power lines damaged property values for subdivision to the adjoining property.

Most landowners are very reluctant to go to court; condemning companies use that to their unfair advantage. We believe EQC should recommend that the eminent domain law be amended to grant landowners the right to third party arbitration of both monetary damages and also individual tract right-of-way centerline routing prior to condemnation in court. Judging from our experience, condemning companies would be much more reasonable about routing and price if they had to explain the fairness of their offer to a neutral third party. The cost of arbitration should be paid by the party seeking to condemn property.

One other proposal we made in court that we did not prevail on was to be awarded annual right-of-way payments at industrial lease rates. We feel this option should be amended into the eminent domain statute as well. If industrial use is made of property, industrial rental rates should be paid. If this raises consumer costs somewhat, so be it. Private landowners should not be expected to subsidize other businesses' profits or consumer prices.

Jeanne Charter

March 23 Hearing by the Montana Environmental Quality Council
Montana State University - Billings
Special Education Building, Room 159

My name is Nellie Israel. I live in Joliet, Montana, and am representing the Northern Plains Resource Council. My first concern with the eminent domain laws began when the Stillwater Mining Company began plans for running a slurry pipe-line to a new settling pond through a historic Indian buffalo jump on my son-in-law's ranch.

I would remind you that Montana has no laws regulating pipeline safety, installation or operation, nor is there authority to require insurance or bonding for spills, breaks, or leaks. Any gas or oil pipeline under 17 inches in diameter is not subject to Montana's Major Facility Siting Act and thus does not receive a comprehensive review and certification. Any entity installing such a pipeline needs no approval of the route, and need only get permits in piecemeal fashion from various State agencies.

The existing eminent domain laws need to be reformed in order to ensure that landowners have reasonable rights when a company attempts to seize private property for their own gain. The key reforms needed are:

- 1) It should be required to prove that it is being done for a truly public purpose.
- 2) Minimizing the damage to private property should be required.
- 3) Certain standards should be met, and landowners should have the option of leasing rather than deeding the land.
- 4) Stiff legal damages for harming private property should be required.
- 5) Those who condemn someone else's land should not be allowed to take possession until court proceedings are concluded.

Thank you for allowing me to express my concerns.



Nellie Israel
PO Box 76
Joliet, Montana 59041
(406) 962 3520

Mr. Chairman, members of the council, for the record, my name is Clint McRae. I reside at Rocker Six Cattle Co., Box 2056, Forsyth MT, 59327. I have had first hand experience with the inadequacies of the laws of eminent domain. That is why I stand in front of you today.

It is time for the eminent domain laws in the state of Montana to be reformed. This law is over 100 years old and has served its purpose as it is written. The purpose of this law was to build infrastructure and serve the public at every remote area of the country. At that time there was a need for the awesome power of eminent domain.

In this new millennium, that has changed. There are projects in this state that have been permitted under the thinly veiled disguise of need. The first change in the law needs to place responsibility on the permit holders to prove that the public is being served, and that a need exists. Private companies who seek profits at the expense of landowners are abusing eminent domain laws.

The second change to the law needs to be the addition of an easement as opposed to signing away fee title. It is common for companies to seek fee title to private land. Fee title can be used as collateral to the company's creditors. The Bureau of Land Management, Forest Service, and the Department of Natural Resources and Conservation all require easements across land they control. There is no reason why a private landowner should be held to a different standard. The decision of fee title or easement should be left to the landowner.

The third change has to do with the actual taking of the property. Possession of private land should not occur until all formal proceedings have been exhausted. It is not right for a company to take land and settle later.

The fourth change needs to explicitly state that a right of way permit is granted for only one specific use. Any additional proposed right of way uses needs to be re-negotiated with the private landowner.

It has come to my attention that the committee has been discussing the possibility of creating a pamphlet to distribute to landowners educating them of their rights of eminent domain. I, for one, do not need to be informed of my rights. This committee was formed to explore the possibility of changing the laws of eminent domain, not to educate landowners. The committee needs to focus their energy on the real issues at hand, and to reform, not inform.

To: Environmental Quality Council
Eminent Domain Sub-Committee Meeting
Montana State University - Billings
March 23, 2000

From: Bob Stevens, Jr., P. O. Box 1510, Helena, MT 59624

Subjects: I. Reshaping Eminent Domain to Synchronize it with New Technologies Not
So Dependent on Major Utility Rights-of-way
II. Our Competence to Testify Before this Hearing
III. Addressing the Problem of the Tongue River R.R.

We begin with a very well founded omen, which, if ignored, will postpone the reduction of emissions necessary for the stabilization of the world's atmosphere.

The Stone Age did not end because the world ran out of stones, and the oil age will not end because we run out of oil.

(Shell Hydrogen Division, Royal Dutch Shell)

I.

This paper presents an important departure from standard 20th Century Eminent Domain utility corridor permitting procedures, which were mainly confined to the corridor itself. The departure we recommend would add consideration of the suitability of the activities at receiving and delivery points whether at the mine, terminal, or wellhead, at the combustion facility down line, and at points beyond — closer to the consumer.

The main focus would be on that facility which expels emissions into the atmosphere. This will not, as the reader will find, be an overall addition of bureaucracy to any given comprehensive project because, as we move along in the 21st Century, the scale of, and need for, Eminent Domain will diminish. The rationale for co-mingling responsibility for a utility corridor with the rest of a project is as follows:

Entirely new systems of energy production and delivery, some under development for decades (including by NASA), are coming on line and will replace the traditional polluting industry of the 20th Century with new environmentally benign alternatives. It is unfortunate to report that the U.S.A. still lags behind most of the rest of the world in the introduction of these alternatives, that being, in part, for lack of financial incentives here, and in part, due to the status quo mentality of corporate America.

These new systems usually combine the following features:

1. Energy Conservation. (Using less energy to accomplish similar purposes, which involves architecture, product design, and interface with adjacent but dis-similar enterprises, etc.)
2. Wind Generation. (Denmark is the world's leading manufacturer of megawatt wind turbines and is presently erecting a major system in North Dakota.)
3. Photovoltaic Solar. (Converting sunlight directly into electrical energy, a world wide rapidly growing phenomenon.)
4. Natural Gas, Hydrogen and Fuel Cells. (We are presently in an intermediate period between the oil and coal era and the hydrogen/fuel cell era, the fuel of choice now being natural gas, which is less polluting than oil or coal. Not only that, but the new power plants burning natural gas are rarely on the grand scale of their predecessors and are convertible to hydrogen when economically feasible to do so. Meanwhile, world consumption of coal is two years into a modest decline which could become permanent.)

II.

To dispel any suspicion that the author may have plagiarized the above from somebody's textbook, consider the following:

In 1993, the author and his wife relocated from Gallatin County to Lewis and Clark County and built a new two level 2400 sq. ft. south facing home incorporating numerous energy conservation features as in #1 above. We also located off the utility grid, meaning we were obliged to generate all our electrical requirements on site, as per #2 and #3 above.

In that process, we have retraced the American experience with electricity, which began locally, with each community generating its own power. Then the U.S.A. and communist Russia, opted for the economy of scale available in super systems, very large hydro, fossil and nuclear fuel generation complexes intertwined with giant transmission lines. Russia put facilities wherever it suited communist purposes. Our country did the same, but "democratized" the process by interposing the concept of Eminent Domain.

But now we, personally, have gone back to ground zero — basically traveling from maximum to minimum scale, which in much of the third world is a triumph of irony because some of it went from oil lamps directly to photovoltaic, omitting super systems altogether and the pollution accompanying them. So our family, like that sector of the third world, has no need for any electrical transmission lines (nor buried telephone cable either — we use a combination of cellular and private microwave).

Set next to our home are 25 south facing solar panels on a fixed array which also includes two small wind generators. The D.C. current produced is converted in our lower level to both 120 and 240 volt A.C. When more energy is created than is being used, the extra flows into a bank of batteries until needed.

Such facilities are still quite expensive, so we had to gauge our electrical needs carefully. We soon learned that most American appliances, even if made in Asia or Mexico, are energy hogs. Thus, we found ourselves with a super efficient refrigerator/freezer crafted in Denmark, with the best home heating and domestic hot water system coming from Germany, another clue about which developed nation is still in the backwaters.

Our goal is to divest ourselves totally from dependence on any fossil fuel. We are not yet there. We are still in the intermediate stage noted in #4 above, depending on propane for some of our requirements. The main thrust of the hydrogen/fuel cells era is currently in transportation where it certainly needs to be, so we expect to wait several years before residential scale, safe hydrogen generation kits become available.

Meanwhile, we watch with envy as the new systems go on line for other purposes. The foregoing notwithstanding, we are using about half the energy of conventional homes of the same size, but there is not a single amenity that we really want that we can't or don't have as a consequence of going off-the-grid. More important, six years of hands on experience with nearly all aspects of the new energy era, except hydrogen, which will come along soon, has provided us all the training we need to speak as authoritatively as any promoter, lobbyist, or professional engineer pushing an Eminent Domain project. Indeed, we are better qualified because we do not suffer from tunnel vision.

III.

It is most regrettable that the proposed Tongue River R.R. in eastern Montana ever received a permit. Here is why: The rationale of the promoters was that the new railroad would enable coal to be transported for a few cents less cost per ton to upper Midwest fossil fuel burning power plants, thereby, by simplistic logic, supposedly benefitting the people of that region, not to mention the promoters themselves.

In the first instance, it is a fact that the Burlington Northern Santa Fe R.R. absolutely does not require the T.R.R.R. to maintain the financial integrity of its existing coal transportation infrastructure. But what made the whole argument so spurious (meaning not genuine or true, counterfeit, not authentic, pretended) is the following: The delivery of coal to burn in the upper Midwest, even low sulphur coal, at slightly less cost is not in the public interest because it will postpone the day when less environmentally damaging systems will be retrofitted into the generating process there. There is voluminous evidence, mounting daily, that power plant emissions are an important part of the disturbed atmospheric condition which confronts the world today.

Nobody knows when the threshold of irreversible climate change could be reached. With such a danger looming, The Precautionary Principle should take precedence over waiting for absolute certainty. That, pure and simple, is the most important reason why the Tongue River R.R. should never be built. That so much pristine territory in southeast Montana could be punctured by a facility which at best has a viable life of perhaps three decades is bad enough; the two reasons together ought to be considered overpowering by all concerned.

In conclusion, it is important to recognize the connection between power plant emissions and Eminent Domain:

1. Eminent Domain must become a party to the pollution control of the facilities which are accessed by the utility corridor; the function cannot be negated even when another regulatory body's responsibilities are encountered.

2. The new technology will generally involve many new much smaller power plants, at the same time, old polluting facilities are being decommissioned, in effect re-localizing the distribution dynamics. This suggests that future permitting will mainly not be on the grand scale characteristic of the 20th Century; in other words, Eminent Domain will start to wind down because it will be bypassed by innovative factors beyond its control.

POSTSCRIPT

From time to time we do receive visitors to our home who have serious interest in the above described new technologies. Let us know the circumstances. We will try to oblige. For authoritative professional advice, we recommend interested parties consult Planetary Systems, Box 340, Ennis, MT 59729, phone 406-682-5646.

Hill House
Box 547
Birney, MT. 59012

Date: March 23rd, 2000

To: EQC Eminent Domain Sub-Committee members
From: Christine Valentine
Re: Eminent Domain Law Reform

Over twenty years ago Senator Mike Mansfield said in a message to Congress,
"Montana must do several things...first....repeal the Eminent Domain Law
which permits large corporations holding sub-surface rights, to condemn surface
ownership."

Former Senator Lee Metcalf said that same year,

"Ranchers and farmers and residents of Montana find their land and whole future in
jeopardy because of Montana's Eminent Domain law."

Former Rosebud County William Meisburger also wrote to me that same year,

"Of course condemnation, as you know, CONTEMPLATES a fair recompense to the
owner, but as you also know, THE END RESULT OF CONDEMNATION
PROCEEDINGS FREQUENTLY LEAVE THE LANDOWNERS UNHAPPY"

Why have we not listened to these well-respected Montana Citizens? Another twenty
years have gone by and landowners' rights under condemnation procedures have not been

changed. Those who seek to condemn our land need to be required to prove that it is for a TRULY public purpose not just to make more profits for a privately owned company.

Also :

1. Laws need to be enacted to protect suffice from damage by the corporation which has condemned the property.
2. This law will need to have stiff fines for any corporation harming the property. Otherwise it will be meaningless.
3. The Corporation condemning property must not be allowed to take possession until all court proceedings have been completed.

I urge you to listen to Senator Mansfield, Senator Metcalf and County Attorney Meisburger. Too many years have passed and little or nothing has been done. Please restore my rights to me as a landowner.

A handwritten signature in cursive script that reads "Christine Valentine". The signature is written in black ink and is positioned above the printed name.

Christine Valentine

Montana Environmental Quality Council
Re: Eminent Domain
March 23, 2000

Having had personal experience with right-of-way negotiation, I would like to take this opportunity to relate how those negotiations were handled. We have one interstate gas line, one REA line, a phone line, and a county road on our property. All of these were constructed with easements only. *Also two fiber optic lines.*


The use of eminent domain could have been invoked, but as long as these entities did not demand fee title to my land, I was more willing to agree to the crossing of my property, thereby avoiding legal expenses for both parties.

My experience has convinced me that easements can and should be more than adequate for any right-of-way, with the exception of interstate highways... In the event of right-of-way abandonment in the future, there would not be a question of title to the land, as occurred when the Milwaukee Road was abandoned.

There are numerous lawsuits in the U.S. at present, attempting to establish true ownership of abandoned railroad right-of-ways. There is also a very real possibility of a corporation taking full title to a right-of-way, then selling easements to utilities, and receiving more for the easements than they paid to the original landowner. This ridiculous situation would be avoided with easements only.

The landowner should be protected in every case. – whether eminent domain is invoked or negotiations are successful – with a hold-blameless agreement as part of the contract. The landowner should be properly compensated for loss of production and any inconvenience or nuisance caused by the right-of-way on an annual basis, periodically adjusted for inflation.

Thank you,



William F. Gillin
Forsyth, Montana

Summary

Violations Cited by DEQ & Landowners' Concerns with the CENEX Pipeline Construction

On paper, the eminent domain law requires that project construction must do the "least private injury for the most public good." In practice, however, landowners crossed by the CENEX Billings-to-Hysham Pipeline found they had to constantly fight for responsible construction, and even then, they were often unable to prevent unnecessary damaged to their lands. Only one family risked the substantial expense of taking their concerns to court where they lost their appeal for fair treatment, With limited time and resources, landowners were forces to police the project themselves and when the state finally stepped in it was only after the damage had been done.

Water Quality Act (Storm Water Runoff Permit) Violations: (listed in the order they are discussed in the DEQ violation letter)

- Insufficient care in salvaging topsoil.
- Mixing of topsoil and subsoil.
- Burial of brush and timber in fill slopes.
- Inadequate silt fencing.
- Reclamation lagging far behind construction.
- Inadequate planning and supervision of construction activities, (note violations concerning sanitary conditions and portable bathrooms on page 8).
- Incomplete inspection, documentation, and reporting.

Landowner Concerns:

No notice given and fence gates left open- Landowners were rarely, if ever notified when construction crews would be working on their land, And, construction crews often left gates open, allowing livestock to get out.

Unlicensed surveyor- CENEX used a surveyor who was unlicensed in Montana to survey the route on several ranches.

No restoration of topography- On several ranches, little or no effort was made to restore the topography that existed before the pipeline was installed.

No notice of opportunities for public comment - Although there was an environmental review for the project, landowners were never personally notified of opportunities for public comment. A legal notice in the back of the paper was the only way to learn that an Environmental Impact Statement process was underway. CENEX landmen were meeting with landowners and leasing up rights-of-way at the same time the EIS process was underway, but never mentioned to landowners that there was a public process they could participate in.

Routing- The McCloys and O'Donnells repeatedly confronted CENEX over serious problems with the company's proposed routing across their properties and the company's refusal to consider alternative routes that would cause less damage and pose fewer long term risks to land and water. Unlike the McCloys and the O'Donnells, the Siewerts trusted CENEX, only to have the company route the pipeline over the waterline for their house. The McCloys took their concerns all the way to the Montana Supreme Court,

In the McCloy's and O'Donnell's cases, the rout was changed because the landowners' proposed alternative proved more logical in the end, but not because either family had any legal rights to have a say in the routing (the McCloys lost their Supreme Court appeal). The Siewerts were unsuccessful in their attempts to convince CENEX to alter it's proposed route.

Other than the eminent domain law, the Major Facilities Siting Act is the only other Montana law that could potentially have given these landowners the right to have a say in the pipeline route. However, the legislature had exempted smaller diameter pipelines from the Act.

Inadequate reclamation- The success of the reclamation efforts is threatened by the company's failure to restore topsoil; the burying of debris in the cuts and fills which will cause settling over time; and by inadequate reseeding. Landowners say they were unable to find out from CENEX what kind of seed was used and over the winter, most of the seed has blown off.

Use of private roads- Heavy equipment can severely damage private ranch roads, and constant construction traffic can seriously disrupt ranch operations. However, landowners had to fight to get CENEX to restrict crews to using only the 75-foot-wide right-of-way during construction. On the Siewert's property, there was constant heavy machinery traffic, often at high speeds, over private roads and a small private bridge.

Fiber optic cable easement included – Though the eminent domain law does not grant the power of condemnation for fiber optic cable rights-of-way, landowners were forced to accept a fiber optic easement as part of the pipeline contract. Fiber optic cables are highly lucrative, but landowners are being forced to accept the liability for accidentally cutting cables while receiving no share in any of the profit. Additionally, there is a very real risk that crews working on fiber optic cables could cause damage to the pipeline. (no fiber optics have been installed to date)

Inconsistent construction standards – On some landowners' property, the pipeline was wrapped where it crossed steep rocky ground but on others' property it was not.

Landowners had to enforce the law themselves- Landowners reported that they had to aggressively watchdog construction crews, but had inadequate knowledge to identify all the problems and inadequate time to catch all the problems they could identify. Officially, the project was self-monitored by an inspector hired by CENEX. Landowners say no inspections by the state took place until many landowners had complained to the state.

Inconsistent and unfair compensation - Compensation was agreed on with each landowner long before construction was complete and thus did not account for much of the damage that has occurred. Moreover, compensation has varied widely from one landowner to the next.

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**EQC Eminent Domain
Subcommittee-Public Hearing
March 23, 2000**

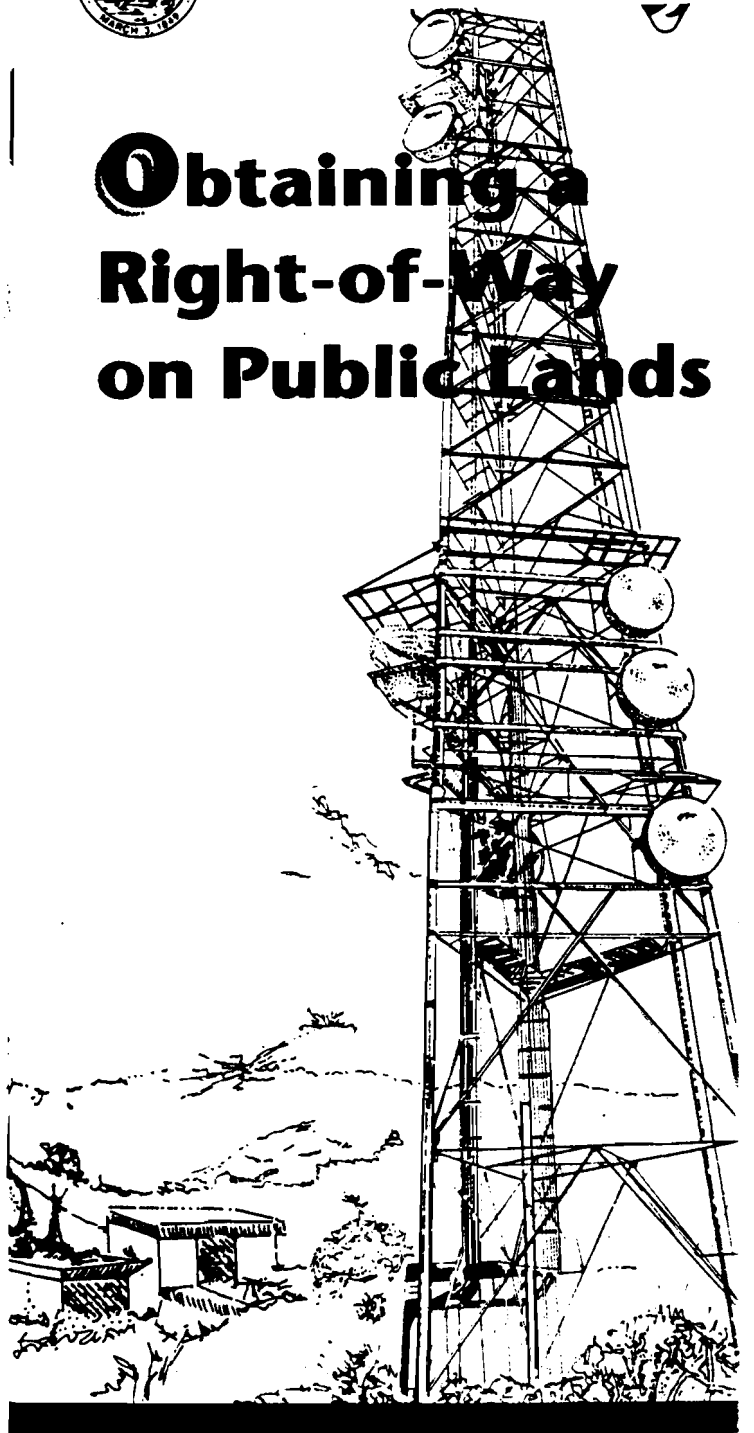


**U.S. D
Bureau**

Exhibit 12



Obtaining a Right-of-Way on Public Lands



Bureau of Land Management Right-of-Way Program

Each year, thousands of individuals and companies apply to the Bureau of Land Management (BLM) to obtain a right-of-way. A right-of-way grant is an authorization to use a specific piece of public land for certain projects, such as roads, pipelines, transmission lines, and communication sites. The grant authorizes rights and privileges for a specific use of the land for a specific period of time.

The BLM places a high priority on working with applicants on proposed rights-of-way to provide for the protection of resource values and to process applications expeditiously. This brochure is designed to acquaint you with this process. A more complete explanation of the BLM right-of-way program is found in Title 43 of the Code of Federal Regulations, Parts 2800 and 2880. Copies of these regulations are available at all BLM offices.

Careful advance planning with BLM personnel who will be handling your application is the key to success. If they know about your plans early, they can work with you to tailor your project to avoid many problems and costly delays later on in the process.

If you are not familiar with local BLM jurisdictions, the best place to start is by contacting a BLM State Office listed in the back of this brochure. Each State Office oversees a number of Districts, which in turn oversee Resource Areas. Depending on your project, you may be working primarily with personnel at a BLM District Office or, more likely, at a BLM Area Office.

Right-of-Way: A Multiple Use

Authorizing rights-of-way has always been a critical part of public land management. With passage of the Federal Land Policy and Management Act (FLPMA) in 1976, new direction was given for this important function. The principles of multiple use and sustained yield set forth in that Act directed the BLM to manage

rights-of-way along with other uses, such as livestock grazing, fish and wildlife habitat, mineral extraction, timber harvesting, recreation, and other activities.

Goals of the Right-of-Way Program

The BLM right-of-way program is designed to:

- Coordinate the actions of individuals, government, and business.
- Promote the sharing of rights-of-way.
- Protect the quality of our Nation's land resources.
- Prevent unnecessary environmental damage to lands and resources.
- Protect the holder's investments in improvements on the right-of-way.

When You Do--and When You Don't--Need a Right-of-Way

As a general rule, you **do** need a right-of-way whenever you wish to build a project on the public lands. A list of examples is printed below.

You **don't** need a right-of-way for so-called "casual use." What kinds of activities are considered "casual use"? Examples include driving vehicles over existing roads, sampling, surveying, marking routes, traveling on existing roads to private property, collecting data to prepare an application for a right-of-way, and performing certain activities that do not unduly disturb the surface or require extensive removal of vegetation.

Depending on the specifics of your proposed activity, some right-of-way uses on the public lands can be either casual use or use requiring a grant. It's a good idea to contact the BLM and discuss your plans before assuming your use is casual. The Area Manager can then make a judgment on the requirements in your particular case.

Typical Land Uses Requiring Right-of-Way Grants

Here are some examples of land uses requiring right-of-way grants, which must be obtained before construction of any kind may begin.

Water-Related Systems

canals	ditches
flumes	laterals
pipes	pipelines
reservoirs	tunnels

Oil and Gas and Related Systems

conveyor belts
pipelines
storage facilities

Electrical Generation, Transmission, and Distribution Systems

biomass	coal
gas	hydro
nuclear	oil
solar	wind

Transmission and Reception Systems

microwave	radio
telegraph	telephone
television	other electronics

Transportation Systems

airways	canals
highways	roads
trails	tramways
tunnels	

Steps in Applying for a Right-of-Way

1. Contact the BLM office with management responsibility for the land where the right-of-way is needed.
2. Arrange a preapplication meeting with the Area Manager or appropriate staff member. Jointly review the application requirements and form to determine what information is needed.

If you call ahead to set up the meeting, it can often be arranged and held at the site of your proposed use.

3. When you have all the information, bring or mail the application, along with the nonrefundable application processing fee, to the appropriate BLM office.

Preapplication Meeting

The preapplication meeting gives both you and the BLM staff a chance to develop a full understanding of each other's needs. The meeting has the potential of saving both parties time and expense.

For example, in FLPMA, Congress directed that rights-of-way in common be used, to the extent practical, in order to minimize adverse environmental impacts and the proliferation of separate rights-of-way. This is accomplished through a system of designated right-of-way corridors. During the preapplication meeting, the staff may examine the proposed route of your right-of-way to see if it would fit in with existing corridors.

Route changes early in the process are much easier to accomplish for both you and the BLM. The preapplication meeting should also cover fees, safety, work schedules, and other items.

The BLM wants to make the application process as easy as possible. Accordingly, the application form requests a minimum amount of information. (See the sample form in the center of this brochure.) Even so, incomplete information is often the reason application periods are unnecessarily prolonged.

To avoid problems, you should at least review the form or, if possible, fill it out during the preapplication meeting with the BLM. Be sure to bring any information that may be useful during this session. For example, Item 8 requests a map of the project area. You may already have a survey or other adequate map that will satisfy this requirement and provide additional information in processing your application.

Completing the Application Form

Directions for completing the application are included on the form; however, the following supplemental instructions may also assist you.

Item 6—This applies only to oil and gas pipelines. Applicants for oil and gas pipelines must be citizens of the United States. Citizenship is required of all partners in a partnership. Aliens may own or control stock in corporations if the laws of their countries do not deny similar privileges to citizens of the United States.

Item 7—Be as specific as possible in describing the project and its location. Be sure to include the legal description of the land involved.

Item 8—Attach a map (BLM intermediate scale map, 1:100,000; U.S. Geological Survey quadrangle; aerial photo; or equivalent) showing the approximate location of the proposed right-of-way and facilities on public land and existing improvements adjacent to the proposal. Only improvements that may directly affect the proposal need to be shown on the map. Include the township, range, section, and a north arrow.

Item 9—It is not mandatory to submit documentation of other approvals at the time of application. However, if you already have approved documents, reference to that effect or submission of copies of the document may accelerate the processing of the application.

Item 10—Application fee is discussed in the Costs and Fees section.

Item 12—If you have no doubts about your capacity to complete the project, write in "[I am/ We are] technically and financially capable of completing the project described in this application."

(The sample application in the middle of this brochure shows only the first side--Items 1-12-- of the four-page form. Any BLM office can supply you with a complete form.)

APPLICATION FOR TRANSPORTATION AND
 UTILITY SYSTEMS AND FACILITIES
 ON FEDERAL LANDS

FORM APPROVED
 OMB NO. 1004-0060
 Expires: June 30, 1995

NOTE: Before completing and filing the application, the applicant should completely review this package and schedule a preapplication meeting with representatives of the agency responsible for processing the application. Each agency may have specific and unique requirements to be met in preparing and processing the application. Many times, with the help of the agency representative, the application can be completed at the preapplication meeting.

FOR AGENCY USE ONLY

Application Number

Date filed

1. Name and address of applicant (include zip code)	2. Name, title, and address of authorized agent if different from Item 1 (include zip code)	3. TELEPHONE (area code)
		Applicant
		Authorized Agent

<p>4. As applicant are you? (check one)</p> <p>a. <input type="checkbox"/> Individual</p> <p>b. <input type="checkbox"/> Corporation *</p> <p>c. <input type="checkbox"/> Partnership/Association *</p> <p>d. <input type="checkbox"/> State Government/State Agency</p> <p>e. <input type="checkbox"/> Local Government</p> <p>f. <input type="checkbox"/> Federal Agency</p> <p>* If checked, complete supplemental page</p>	<p>5. Specify what application is for: (check one)</p> <p>a. <input type="checkbox"/> New authorization</p> <p>b. <input type="checkbox"/> Renew existing authorization No. _____</p> <p>c. <input type="checkbox"/> Amend existing authorization No. _____</p> <p>d. <input type="checkbox"/> Assign existing authorization No. _____</p> <p>e. <input type="checkbox"/> Existing use for which no authorization has been received *</p> <p>f. <input type="checkbox"/> Other *</p> <p>* If checked, provide details under Item 7</p>
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6. If an individual, or partnership are you a citizen(s) of the United States? Yes No

7. Project description (describe in detail): (a) Type of system or facility, (e.g., canal, pipeline, road); (b) related structures and facilities; (c) physical specifications (length, width, grading, etc.); (d) term of years needed; (e) time of year of use or operation; (f) Volume or amount of product to be transported; (g) duration and timing of construction; and (h) temporary work areas needed for construction. (Attach additional sheets, if additional space is needed.)

8. Attach map covering area and show location of project proposal

9. State or local government approval: Attached Applied for Not required

10. Nonreturnable application fee: Attached Not required

11. Does project cross international boundary or affect international waterways? Yes No (If "yes," indicate on map)

12. Give statement of your technical and financial capability to construct, operate, maintain, and terminate system for which authorization is being requested.

(Continued on reverse)

This form is authorized for local reproduction.

Items 13-19—It is generally not necessary to complete these items, which are not shown in this brochure but which appear on the second page of the complete form. However, if you have made studies that concern these questions, the information should be submitted to accelerate the processing of the application.

Supplemental—The supplemental page is to be completed only when the application is for an oil and gas pipeline. In such cases, fill in only I(g) and either I(e) or III(c). If this information has been previously submitted with another BLM right-of-way application or grant, provide office and file identification numbers.

To sum up, the application form is considered complete when information has been provided for the following items:

Required - Items 1, 3, 4, 5, 7, 8, 10, 12, signature, and date.

Required if applicable - Items 2, 6, 11, 19, and supplemental page.

Optional - Items 9, 13, 14, 15, 16, 17, and 18.

A basic application consists of a completed application form (Standard Form 299), map, and the nonrefundable application fee.

Costs and Fees

There are three different fees involved for a right-of-way grant:

Application fee—The first fee is a nonrefundable application fee to reimburse the United States for the cost of processing the application. Processing fees must be paid when the written application is submitted. The BLM will use the information presented during the preapplication meeting to estimate the application processing fee. The BLM will first designate the project as either major or minor. Fees for minor category projects are charged according to a schedule available at BLM offices. Costs for major category projects depend on whether the project is one authorized under FLPMA or under the Mineral Leasing Act. Major category projects applied for under the authority of FLPMA

require the payment of *reasonable* processing costs for rights-of-way. The *actual* processing costs will be required for rights-of-way applied for under the authority of the Mineral Leasing Act.

Monitoring fee—The second fee is a one-time nonrefundable fee to reimburse the United States for the cost of monitoring compliance with the terms and conditions of the right-of-way grant, including requirements for protection and rehabilitation of the lands involved. The BLM will monitor your construction, operation, and maintenance of the right-of-way and, when the time comes, the shutdown of your activities and the termination of the right-of-way grant. The amount of this fee is also determined according to a schedule available at BLM offices. Again, if the estimated monitoring costs exceed a certain amount, the applicant will be required to reimburse the United States for the actual monitoring costs.

Rental fee—The third fee is the annual rental fee. It is payable in advance and is based on the fair market rental value for the rights authorized. The rental for *linear* rights-of-way on public lands is usually established via an administrative schedule. This schedule, which is based roughly on land values in the project area, is adjusted annually by an economic index. In some cases, an appraisal establishes the rental. A BLM appraiser appraises *site* rights-of-way to determine fair market value.

No application, monitoring, or rental fees are required for:

- State or local government or agencies or instrumentalities thereof (except municipal utilities and cooperatives whose principal source of revenue is customer charges) where the land will be used for governmental purposes and the land resources will continue to serve the public interest.
- Road use agreements or reciprocal road agreements.
- Federal Government agencies.

Other exemptions, waivers, or reductions in the application and/or rental fees may apply and can be explained by BLM officials during the preapplication meeting.

Remember to Plan Ahead

You should arrange for your preapplication meeting well in advance of when you would like to start work on the project. Processing time for an average grant is 60 to 90 days. However, grants for complex projects can take much longer. Try to contact the BLM as soon as possible. The Area Manager and staff are ready to provide information, advice, and assistance to help you prepare an application.

Processing a Right-of-Way Application

Once you have filed an application, the BLM reviews it to make sure all needed information has been included. The application is then evaluated to determine the probable impact of the activity on the social, economic, and physical environments. It is also compared with existing land use plans and any existing rights or previous right-of-way grants.

A right-of-way application may be denied for any one of the following reasons:

- The proposal is inconsistent with the purpose for which the public lands are managed.
- The proposal would not be in the public interest.
- The applicant is not qualified.
- The proposal is inconsistent with Federal, State, or local laws.
- The applicant is not technically or financially capable of accomplishing the project.
- Serious environmental consequences that cannot be mitigated would result.

A preapplication meeting will reduce the possibility of the application being denied.

Appeal Rights

If the application is denied, the official written notice will give the reasons for the denial and information on how to file an appeal, should you so desire.

Liability

The holder of a right-of-way grant is responsible for damage or injuries to the United States Government in connection with the holder's use of the right-of-way.

The holder indemnifies or insures the United States Government harmless for third party liability, damages, or claims arising from the holder's use and occupancy of the right-of-way.

Your Right-of-Way Responsibilities

Once you have a right-of-way grant, you can proceed with your plans. However, there are a number of responsibilities you should keep in mind. The following questions and answers help explain these responsibilities.

- Q.** How do I handle removal of resources like timber?
 - A.** If there are any marketable products (such as timber) that have to be removed before construction can begin, you may be required to purchase them under a separate contract.
- Q.** If I want to substantially change, improve, or add to my project once I have a right-of-way grant, do I have to get BLM's approval?
 - A.** Yes. You must file an application to amend your right-of-way grant and receive prior written approval from the BLM for any substantial change in location or authorized use during

construction, operation, or maintenance of the right-of-way. Contact the Area Manager to determine if your proposed changes are substantial.

- Q.** Will the BLM inspect my project?
- A.** Yes. The BLM may inspect your project for compliance with the terms and conditions of the grant. In addition, the BLM reserves the right of access onto the public lands covered by the right-of-way grant and, with reasonable notice to the holder, the right of access and entry to any facility constructed in connection with the project.
- Q.** If the BLM is not satisfied with the way I use my right-of-way, what can the agency do?
- A.** A right-of-way holder may use the right-of-way for only those purposes permitted in the grant. The BLM may suspend or terminate a right-of-way if the holder does not comply with the applicable laws, regulations, terms, or conditions. The BLM may require an immediate temporary suspension of activities within a right-of-way to protect the public health and safety or the environment.
- Q.** Can I sell or transfer my right-of-way?
- A.** Yes, with BLM approval. A sale or transfer of your right-of-way is called an assignment. You must submit, in writing, the proposed assignment of all or part of a right-of-way to the BLM, along with a nonrefundable payment of \$50. The assignment to the new owner is not legally recognized by the United States until it has been approved in writing by the BLM. If the new owner is qualified and agrees to be bound by all of the requirements of the right-of-way grant, the BLM will approve the assignment.

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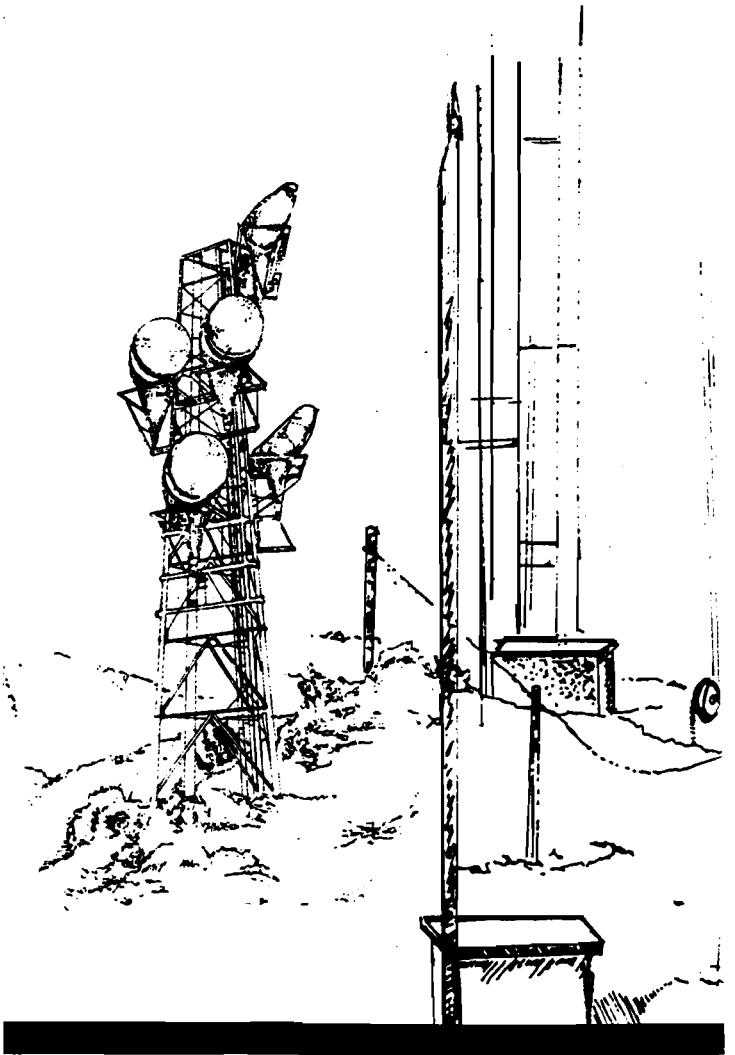
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* U.S. GPO 1994-574-429



**U.S Department of the Interior
Bureau of Land Management
1849 C St., N.W.
Washington D.C. 20240**



Eminent Domain Reforms For Private Property Protection

Summary of Reform Package Proposed by NRPC Before the Environmental Quality Council Billings 3/23/00

For many decades, Montana landowners have been exploited and their land, water and other property unnecessarily damaged under the state's antiquated, 123-year-old eminent domain law. Working with NRPC, landowners from across the state have developed the following platform of eminent domain reforms to ensure fair treatment for landowners whose property is crossed by public or private industrial rights-of-way. Where noted, proposals similar to these have already been enacted into law in other states. Also, where noted, some of the following reforms were proposed in legislation introduced during the 1999 Legislature.

Minimizing damage to private property:

Central to the eminent domain law is the principle that a project must do minimum damage to private property while providing maximum public benefit. However, in reality, under the threat of condemnation landowners find they have little or no say in picking the least damaging route for a right-of-way across their land. Landowners then find they must aggressively watchdog the project to ensure proper construction and reclamation. Even then, reclamation is often highly inadequate, resulting in weed infestations and many other problems.

In contrast to rights-of-way across private lands, developers are held to much higher standards and must comply with much stronger land and water protection requirements on the public lands they cross.

To ensure full and equal protection of land, water and other property, private property should be given the same level of protection required on public lands. For every project, the law should require that a mitigation plan is developed through a process that includes public comment. The state should monitor each plan and publish annual monitoring reports. Most important, if the state fails to enforce a mitigation plan, citizens must have the right to go to court to require enforcement.

As required for pipelines developers under Colorado law, any private industry developing a right-of-way in Montana must post a reclamation bond.

Determining true public use:

The law should not presume that every pipeline, railroad, powerline or mine serves a public purpose that justifies the taking of private property. When a developer wants to take private property under the eminent domain law, they should have to show clear and convincing evidence that they are taking it for a truly public use. Public use should be determined on a case-by-case basis under criteria established in law.

If the project is not a legitimate public use, then the developer should not be given the power to threaten condemnation when negotiating with landowners. They should be required to negotiate with landowners on a level playing field.

Specifically, hard rock mines should not get special treatment under the law. Currently, Montana law does not grant the power of eminent domain to any other kind of mine.

Ensuring just compensation:

In most cases, eminent domain is used to take corridor out of a larger piece of property. The remaining property is usually substantially devalued and may include small, largely useless parcels split off by the right-of-way. A classic example is a railroad right-of-way that blocks access to water.

In recognition of the often permanent disruption of agricultural operations and the loss of quality of life imposed on property owners, (both of which are difficult or impossible to quantify), compensation for devaluation of the remaining property should be greater than the dollar amount of the devaluation. That dollar amount should be doubled or tripled, or increased by some other percentage established by the legislature.

Also, in addition to compensating landowners for the fair market value of the property taken, compensation for damages should be readjusted up to one year after construction has been completed. A similar requirement exists in Colorado law to ensure that landowners receive just compensation if damage turns out to be greater than originally projected.

As provided for under Wyoming law, landowners should have the right to demand amortized annual payments instead of a lump sum payment.

For incidents that may occur in the course of industrial use of the right-of-way, such a train-caused fires or pipeline leaks, landowners must have the same rights to seek compensation as are granted to government in comparable cases of damage to public lands.

Making eminent domain a privilege, not a right:

The power of eminent domain should be a privilege, not a right. The original landowner should retain as many rights and as much control over their land as possible.

Developers should only be given the power of eminent domain if they can prove they have the resources to operate responsibly. Anyone seeking to develop a project on others' property must be required to register with the Secretary of State and disclose their financial solvency. If the developer cannot prove the ability to fully construct the project, mitigate damages and post a performance bond, they should not be granted the power to condemn.

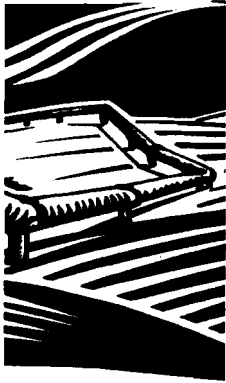
As required under Wyoming Law, when the state grants the power of eminent domain for a particular project (such as a railroad), the developer should not have the right to use the land for other projects (such as a pipeline) without first renegotiating with landowners.

Landowners should have the choice of granting an easement rather than selling title to the right-of-way. As required when industrial right-of-ways cross public lands, all liability for damage to land or water must lie with developers and operators, regardless of whether the landowner retains title. (*HB355, Sponsored by Rep. Taylor, R-Busby 1999*)

A right-of-way should automatically revert to the original owner if project construction does not begin within three years of condemnation. As provided for under Wyoming law, a right-of-way should also revert to the original owner after abandonment or five years of non-use.

Giving landowners the right to retain possession:

When landowners go to court to fight condemnation, or to appeal for changes to a developer's plans, they should have the right to keep control of their land until all court proceedings are concluded. Possession is nine-tenths of the law, and courts are far less likely to restore private property to a landowner once it has been taken and the project is already under construction. (*HB 354, Sponsored by Rep. Lindeen, D-Huntley 1999*)



Crude Oil & Petroleum Product Pipelines in Montana

*A Report to the
Montana Environmental Quality Council
March, 2000*

Crude Oil and Petroleum Products Pipelines in America

- 40% of U.S. energy needs provided by oil
- 97% of U.S. transportation fuels are crude oil based
- 170,000 miles of pipelines bring crude oil to refineries and deliver fuels throughout the United States
- 525 billion gallons of crude oil and fuels are pipeline transported annually
- 65% of all oil and fuels transportation is handled by pipelines.

Citing a Pipeline and Use of Eminent Domain.

What is a Right-of-Way Easement that Pipelines Use?

An easement is a negotiated agreement by which a landowner grants permission to another party, such as a pipeline company, to use part of the land for a specific purpose. It is only a right to use the land - less than full ownership - and is granted in return for payment. It is important to know that with an easement the landowner retains the title to the land. In nearly all cases, buried pipelines do not interfere with a landowner's ability to continue using the land in the same manner as in the past.

How do Pipelines Obtain the Right-of-Way?

With respect to a permanent easement, pipeline companies negotiate agreement terms and

conditions with landowners by signing an easement document for a permanent right-of-way.

Landowners are compensated for this easement. Landowners may also be paid for loss of certain uses of the land during and after construction, loss of any other resources, and any damage to the property.

Obtaining a permanent (or perpetual) right-of-way easement involves a process of good faith negotiation on the part of the pipeline company and the landowner. This means providing the landowner with written information relating to the pipeline route proposed for that property and conducting meaningful meetings to understand landowner interests.

Compensation for the easement is determined. Numerous attempts are made and documented on the part of the parties to reach an agreement. The amount of compensation for the easement is based on fair market value set by local experts and at local rates for similar type property, such as dry land cultivation or grasslands.

Negotiation also takes place with respect to compensation for temporary use of the land for construction. This compensation includes damages to crops, timber cuts, fences and gates and loss of any other resources.

If no agreement with the landowner is reached, the pipeline may acquire the easement under eminent domain. This is a right given to the pipeline

company by statute, in order to obtain access to private land for regulatory authorized use, with a court determining compensation under state law.

What does an Easement Agreement Grant the Pipeline?

The easement agreement permits pipeline companies to construct, operate, maintain and patrol pipelines within certain boundaries on the property through which the easement has been granted. The area of land within these boundaries is referred to as the right-of-way.

Can the Easement be Used for Anything Other Than the Pipeline?

This is subject to negotiation. Easements can be negotiated for what ever purposes the parties mutually desire. A pipeline company can install in the right-of-way the necessary equipment for maintenance and operation of the pipeline, which includes, but is not limited to, fiber optic cables, cathodic protection equipment, test leads, and communications devices for sending and receiving signals, data and information. This is agreed to in the Right-of-Way Easement Agreement with the landowner. If right-of-way easement is obtained through eminent domain, this equipment may only be used for the proposed pipeline and related facilities.

What Type of Interest Can a Pipeline Company Obtain in a Property by Condemnation?

The eminent domain statutes allow for either right-of-way easements or fee simple title to be taken. However, only the minimum necessary interest may be taken. A right-of-way easement is a sufficient interest for the purpose of buried oil pipelines. The Montana Petroleum Association is not aware of a single case in Montana where a crude oil or petroleum products pipeline company has ever condemned for title to the property.

Do Crude Oil or Petroleum Products Pipelines Exercise the Right of Eminent Domain in Montana?

By statute, common carrier crude oil and petroleum

products pipelines have the right of eminent domain in Montana. While the right of eminent domain is necessary to ensure the viability of our energy delivery system, pipeline companies very rarely exercise their statutory right of condemnation. In order to balance public good with least private injury and just compensation, condemnation proceedings are complex and lengthy. Condemnation is used by pipelines only as a last resort, when right-of-way negotiations fail, and there is no other reasonable alternative. About 1000 miles of crude oil and fuel products pipeline were built in Montana in the past decade. There were only two condemnation proceedings associated with all of that construction. Pipeline companies filed a few other condemnation lawsuits during the past decade; however, these were settled prior to trial.

A condemnation proceeding can extend the amount of time required for obtaining approvals by an additional 2 years. If the condemnors are not allowed to obtain possession of the property until after the valuation process and valuation appeals, the time frame would be even longer. This extended time added to the negotiation process is not in the best interest of the public or the pipeline company, and every attempt is made to negotiate with landowners to avoid the use of eminent domain.

The Safety Record of Crude Oil and Petroleum Products Pipelines

U.S. Government statistics show that oil pipelines are the safest, most efficient method of transporting crude oil and petroleum products. Through the decade of the 1990s, the average annual fatality rate associated with crude oil and petroleum products pipeline accidents in the United States was 2.2 lives per year. For comparison, 42,524 people died in motor vehicle accidents in 1997 in the United States.

Government statistics also show that from 1990 through 1999, less than two teaspoons of oil were spilled for each mile that one million gallons of oil traveled by pipeline. Pipelines carry sixty-five percent (65%) of all oil transported in the United

States, yet since 1986, pipelines were responsible for only sixteen percent (16%) of the total volume of oil spilled to waterways by all modes of transportation.

Technological and operational advances continually improve the safety record of pipelines.

How do Oil Pipeline Companies Prevent Pipeline Leaks?

There is a strong system of regulatory requirements aimed directly at both preventing and responding to oil spills from pipelines. In addition to pipeline design and construction requirements, pipelines must be operated according to strict rules. Pipeline companies must maintain a manual of written operating procedures to ensure the safe operation of the pipeline. Damage prevention programs are in place, which include awareness activities involving the public, local government officials, and excavation contractors. All Montana pipelines participate in a "one call" location network ("call before you dig" program), which provides notification to the pipeline of any planned drilling or excavating activities in the vicinity.

By regulation, a pipeline cannot be operated at pressures above those that have been demonstrated to be safe by engineering calculations and pressure testing.

Cathodic protection systems are maintained and inspected at regular intervals to prevent corrosion.

Instrumented internal inspection devices called "smart pigs" are regularly sent through the pipeline to check for weakness or corrosion. Valves and pressure relief systems also are regularly inspected and maintained. Numerous other inspections are routinely made, and extensive documentation of the inspections is kept.

Similar to the requirements for truck drivers and airline pilots, all pipeline employees who perform "safety sensitive" functions participate in a mandatory drug and alcohol-testing program to prevent impairment-induced accidents.

Is There a System in Place to Respond to Pipeline Spills?

Pipeline companies must comply with the requirements of the federal Oil Pollution Act. The Oil Pollution Act is directed at reducing the risk of oil spills, and at mounting a prepared response if one should occur.

Detailed, written oil spill plans are required, which must be approved by governmental agencies, and are reviewed regularly by Department of Transportation. Pipeline operators must demonstrate that adequate spill response and recovery resources (including personnel and equipment) can be mobilized and deployed within certain time periods defined by regulation for three tiers of oil spill sizes, including the worst case scenario. The worst-case scenario involves a maximum spill quantity under worst-case mobilization and response conditions.

Pipeline companies do extensive training and practicing to ensure that their spill response systems stay sharp. Some of the exercises include emergency responders from local, state and federal governmental agencies, which facilitates better understanding of each other's roles and capabilities in the unlikely event of a pipeline incident.

Can a Landowner be Held Liable for Environmental Damage From a Pipeline Oil Spill?

Priorities in the event of a spill are safety of the public and protection of the environment. The spill is contained, repairs are made, environmental restoration occurs, and an investigation into the cause of the release is made. The cleanup and investigation is conducted in conjunction with appropriate regulatory agencies. In the event that the investigating team proves there was damage to the pipe as a result of negligence on the part of a third party, such as a landowner, charges can be made against the third party.

Crude Oil and Petroleum Products Pipeline Construction

How Long Does it Take to Obtain Permission to Build a Pipeline in Montana?

Governmental permitting and the MEPA - environmental review - process, as well as right-of-way acquisition, typically begin at least 2 years prior to construction. The MEPA process takes at least 1 year, and may take up to 5 years, depending upon the identified issues and alternatives.

Are Pipeline Construction Standards Different for Private Lands than for Government Lands?

No. Pipelines are constructed according to strict standards regulated by the U.S. Department of Transportation Office of Pipeline Safety. The

construction standards apply equally to all portions of the pipeline, regardless of whether it traverses public land or private land.

The construction-related standards include minimum burial depth, valve and pipe pressure rating requirements, weld qualification and testing, hydrostatic pressure testing requirements, cathodic protection system requirements to prevent corrosion, external coating requirements, pipe bending specifications, and numerous inspection requirements.

A great deal of attention is also applied to reclamation standards to ensure the land is returned to the previous use in a satisfactory manner.

Should Montana's Eminent Domain Statutes be Modified with Regard to Crude Oil and Petroleum Products Pipelines?

The Montana Petroleum Association does not believe that it would be in the best interest of the citizens of the State of Montana, nor the citizens of the United States of America to make substantive changes to Montana's eminent domain statutes. Changes made to the present eminent domain statutes could unduly burden interstate commerce, and could even be inconsistent with interstate commerce laws.

Eminent domain ensures the vitality of our nations petroleum supply and distribution system. Without the eminent domain procedures to obtain right-of-way, a single individual could deny thousands, or even millions of people a safe, affordable, dependable, and environmentally superior mode of transportation for their petroleum energy needs.

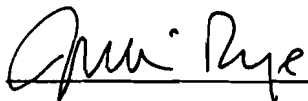
Montana's eminent domain statutes run very deep with history. The statutes are necessarily complex, and there is a large body of case law interpreting them. A balanced, logical process is currently in place, which allows rejection of a written offer, requires demonstration of necessity, and finally, provides for valuation of the property by a commission. There may be opportunities to combine statutory provisions and "modernize" the statutory language, but the functionality and intent of the statutes should not be changed.

*Crude Oil and Petroleum Products Pipeline in Montana
March 2000
Prepared by the Montana Petroleum Association*

Mitigation Measures #1 (MEPA)

Mr. Chairman:

I move to amend the Subcommittee's findings and draft recommendations on mitigation measures.

Signed: 

And that such amendments read as follows:

1. On: Page 115 of the draft report, in the column entitled "Findings" on the row entitled "Mitigation Measures."
Following: Finding "2".
Insert: "3- At Subcommittee meetings, some industry representatives have stated that the Montana Environmental Policy Act and the National Environmental Policy Act are to be used to mitigate damage to private property. Review of MEPA and NEPA indicates that these laws do not currently require an environmental assessment or an environmental impact statement to be completed before condemnation can occur.

"Condemnation orders may include mitigation measures. If MEPA and NEPA are to be used to identify mitigation measures for landowner's private property, EAs and EISs must be completed before condemnation can occur."
2. On: Page 115 of the draft report, in the column entitled "Draft Recommendation" on the row entitled "Mitigation Measures."
Before: "Address the face..."
Insert: "1-"
Following: "Handbook."
Insert: "2- Add language to 70-30, MCA that states that condemnation cannot occur until a final environmental assessment or environmental impact statement has been completed if one is required under MEPA or NEPA for the project seeking condemnation."

-END-

Mitigation Measures #2 (State and Federal v. Priv

Mr. Chairman:

I move to amend the Subcommittee's draft recommendations on mitigation measures.

Signed: John Rye

And that such amendments read as follows:

1. On: Page 115 of the draft report, in the column entitled "**Draft Recommendation**" on the row entitled "**Mitigation Measures.**"
Following: "Handbook."
Insert: "3- Add language to 70-30, MCA that states that a condemnee who is unable to negotiate mitigation measures satisfactory to the condemnee may require the condemnor to apply the same mitigation measures that are applied on public land for that project in that region."

-END-

Possession of Property

Mr. Chairman:

I move to amend the Subcommittee's findings and draft recommendations on possession of property.

Signed: Julie Pye

And that such amendments read as follows:

1. On: Page 116 of the draft report, in the column entitled "Findings" on the row entitled "Possession of Property."
Strike: Finding "2" in its entirety.
Insert: "2 – In testimony and at public hearings, the public has raised a legitimate concern that plaintiffs in eminent domain proceedings (condemnors) get unfair, special treatment compared to plaintiffs in other civil court cases because condemnors may take possession of landowner property before there is an appeal. In other civil cases, the award may be withheld upon appeal.

"While some condemnors may be unlikely to take possession prior to an appeal on public interest or necessity, in order to protect the inalienable right to use and enjoy private property guaranteed by the Montana Constitution, the eminent domain statutes should allow landowners to retain possession of their property as long as possible."
2. On: Page 116 of the draft report, in the column entitled "Draft Recommendation" on the row entitled "Possession of Property."
Strike: "Make no changes in current law."
Insert: "Add language to 70-30, MCA that states a condempnor may only take possession after an appeal to the Montana Supreme Court, unless the only issue on appeal is the monetary value of just compensation."

-END-

Burden of Proof

Mr. Chairman:

I move to amend the Subcommittee's findings and draft recommendations on burden of proof.

Signed: Spili Dye

And that such amendments read as follows:

1. On: Page 118 of the draft report, in the column entitled "Findings" on the row entitled "Burden of Proof"
Strike: the finding in its entirety.
Insert: "At public hearings and in testimony, the public has raised a legitimate concern that the burden of proof for non-governmental condemnors is too low. Non-governmental condemnors are not generally accountable to taxpayers or voters, and as such should have a higher burden of proof. The power of eminent domain abridges Montanans' inalienable right to use and enjoy private property, and a high legal burden should be established before property is taken. The burden of proof for landowners should not be raised."
2. On: Page 118 of the draft report, in the column entitled "Draft Recommendation" on the row entitled "Burden of Proof"
Strike: the recommendation in its entirety.
Insert: "Add language to 70-30, MCA, raising the burden of proof for a non-governmental condemnor to clear and convincing evidence, and explicitly stating that defendant property owners need not meet a higher standard."

-END-

Type of Interest Taken (Easement v. Deed)

Mr. Chairman:

I move to amend the Subcommittee's findings and draft recommendations on type of interest taken.

Signed: Opini Rye

And that such amendments read as follows:

1. On: Page 118 of the draft report, in the column entitled "Findings" on the row entitled "Type of Interest Taken."
Strike: the finding in its entirety.
Insert: "There is dispute among interested parties as to whether current law limits the interest condemnors take to an easement unless the condemnor proves in court that a greater interest is necessary. Landowners have expressed concern during public hearings and in testimony that the law may not limit the interest taken to an easement. Some sections of the code, including Section 70-30-111, MCA and 70-30-206, MCA are unclear on this point."
2. On: Page 118 of the draft report, in the column entitled "Draft Recommendation" on the row entitled "Type of Interest Taken."
Strike: "Make no changes to current law."
Insert: "Add language to 70-30, MCA, such as the language in 1999's House Bill 355, to clarify that, by default, the type of interest taken in an eminent domain proceeding is an easement, and that a condemnor must prove a greater interest is necessary, one is sought."

-END-

May2, 2000

Eminent Domain Subcommittee

Mr. Chairman, members of the committee, my name is Clint McRae. I am vice president of Rocker Six Cattle Company of Forsyth.

I am appalled at the voting record of this committee on the subject of eminent domain reform. The last few meetings have been dominated by paid industry lobbyists and attournys. They have convinced you that there is no need to reform this antiquated law.

As I have testified previously, we have seen first hand the abuse of eminent domain laws by the Tongue River Railroad Co. Our first notice by the TRR was a right of entry agreement to survey and do the geo - technical work along the proposed right of way. This entailed several hollow stem core holes and test pits. This first notice mentioned their power and right of eminent domain. Their offer for damages to 5 sections was a flat fee of \$1000.00. Every landowner received this same offer regardless of the amount of land effected, whether it was a hundred yards or ten miles. We felt that \$1000 was not nearly enough considering the impact and disruption this work would cause. We sent a counter offer of \$5000 per section or \$20,000 for the five sections affected. We waited 3 months for a response. When the TRR finally did respond, they accused us of discontinuing negotiations. Our offer still stood.

On June 18, 1998, we met with a representitive of Dubray Land Services, an agent of the TRRC. The new agreement was an offer of \$5000. The twist was that \$4000 of the total was an advance from the final right of way agreement. This was not acceptable to us either. I explicitly asked the representative if this figure was negotiable. He stated that it was NOT! Five days later, we recieved a ten day notice from Lucas and Tonn, one of the TRRC's attournys, stating that if we did not respond to them, they would send a 2nd notice, enter the land do the work without compensation. None of our concerns such as weeds, fire, off road travel, mud, and dust and road building were ever acknowleged as points of negotiation by the TRR. This failure to respond to our concerns is an outright abuse of the eminent domain laws and is a stark contrast from what you have heard of industry lobbyists at these meetings.

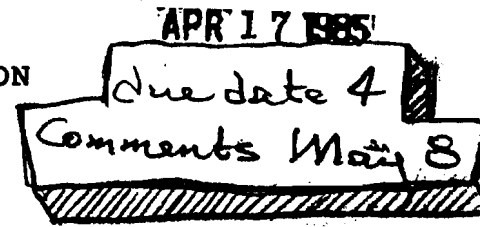
The second item I want to expose is the TRR's mitigation plan. This document is 36 pages long and uses the word "should" 174 times. This is an average of 5.2 "shoudls" per page. This is our "negotiating power" mentioned by industry. Please compare this document with mitigation plans for the BLM, DNRC, FWP fish hatchery, and the Livestock Experiment Station at Miles City. You will be shocked at the difference, yet this committee voted down a resolution that would make private land mitigation equal to state of federal land. This is an outrage.

The last issue I will mention is, last night, I left my six year old daughter in tears because I am going to miss her first kindergarten program. I testified at your last meeting in Billings hoping I wouldn't have to come to Helena and do it again. At that time, I had confidence in this committee to make some needed changes in this law. I have driven 370 miles, I have paid for my own gas, meals, and motel rooms. I am not reimbursed as the paid lobbyists in this room will be. Your obligation is to the PUBLIC represented in this room, NOT to industry. I hope for my daughters sake that I did not take this trip in vain.

Thank you,

Clint McRae

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423



Finance Docket No. 30186

TONGUE RIVER RAILROAD -- CONSTRUCTION AND OPERATION
IN CUSTER, ROSEBUD, AND POWDER RIVER COUNTIES, MONTANA

**PROPOSED MASTER MITIGATION POLICY AND PLAN
FOR THE TONGUE RIVER RAILROAD COMPANY**

NOTICE TO PARTIES:

Here is your copy of the Proposed Master Mitigation Policy and Plan. Written comments addressing the contents of this document are welcomed. In order to meet statutory deadlines for processing this matter, written comments must be received by the Section of Energy and Environment within 3 weeks of service of this document.

Carl Bausch, Room 4143
Office of Transportation Analysis
Section of Energy and Environment
Interstate Commerce Commission
Washington, D.C. 20423.

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PROPOSED MASTER MITIGATION POLICY AND PLAN
FOR THE TONGUE RIVER RAILROAD COMPANY

1.0 INTRODUCTION

Environmental impacts associated with the construction and operation of the Tongue River Railroad are discussed in the environmental documentation prepared for this proceeding. Mitigation measures to be applied to avoid or lessen impacts are presented in the documentation. It was recognized, during preparation of the Draft Environmental Impact Statement (DEIS), that final and more specific mitigative measures would have to await comments on the DEIS and testimony at the proceedings. With these aspects of the proceedings now completed, it is appropriate to consider specific mitigative measures that can be applied in this case. The purpose of this Master Mitigation Plan is to provide a more definitive framework for mitigation planning.

The plan is divided into various sections, conforming to the topics discussed in the environmental documentation. Potential impacts and suggested mitigative measures are discussed for each discipline. It should be noted that many of the topics presented during the proceedings concern issues of convenience rather than environmental impacts. To the extent that these issues relate to environmental matters, they are discussed in this document. However, the Section on Energy and Environment (SEE) recognizes that many of the convenience-related issues will be the topics of negotiation between the Applicant and affected landowners.

2.0 LAND USE IMPACT MITIGATION

Land use impacts can be divided into three groups for mitigation purposes: (1) impacts to agricultural operations; (2) impact to the Livestock and Range Research Station (LARRS); and (3) impacts to the Miles City Fish Hatchery. Many of the procedures and measures implemented under this topic will be useful under other disciplines, as well. As a result, Land Use is considered to be of primary importance in terms of both impact and mitigation. This is underscored by the primacy of agriculture as the regional land use and economic base, not only for the Tongue River/Otter Creek area, but on a regional and statewide basis.

2.1 Agricultural Operations

2.1.1 General

The major goal of all mitigation measures directed at individual agricultural operations will be to minimize the effect of the railroad on day-to-day operations of the existing ranches. The negotiations and planning process should focus on the following objectives:

- ✓ (a) Maintaining the integrity of each operation as an independent agricultural enterprise.
- ✓ (b) Maintaining the economic vitality and productivity of each operation at levels generally approximating the current situation.
- ✓ (c) Developing and implementing measures which will preclude the necessity for significant time/labor increases due to the existence of the railroad.
- ✓ (d) Identifying parcels which will no longer be economically viable for present uses, and developing alternative uses or appropriate compensation.
- (e) Implementing measures to limit or preclude nuisance impacts of the railroad.

With these goals in mind, the Applicant intends to undertake negotiations with individual landowners during acquisition of the right-of-way (ROW). Firm commitments as to the specific measures to be taken to attain the above-stated goals will be made and documented by the parties. Areas of concern that should be addressed include, but are not limited to, the following items.¹

- (1) Direct and Indirect Land Loss. Each agricultural operation that is crossed by the Tongue River Railroad will experience some loss of agricultural land due to inclusion in the ROW. The only mitigation for such loss is direct compensation. This compensation is properly negotiated on an individual basis between each landowner and the Applicant.

¹These areas of concern have been identified through review of the comments on the Draft EIS and supplement thereto, review of testimony delivered at hearings, and consultation with NPRC staff members. NPRC's suggested mitigation recommendations were attached to its post-hearing brief as Appendix 4.

Indirect land loss, due to severance of parcels, will also occur in certain situations. The standards to be used in assessing that indirect loss will differ by landowner, and landowners will be given the opportunity to identify severed parcels in negotiations. It is possible to use some severed parcels for alternate agricultural purposes, thus mitigating to some extent the total loss. The Applicant should assist landowners in identifying and developing such uses where appropriate, and in applying a combination of such assistance and compensation, where necessary and agreed upon during ROW negotiations.

- (2) Displacement of Capital Improvements. Where capital improvements such as fences, wells, corrals, and irrigation systems are displaced, the Applicant should relocate or replace these improvements where possible. Generally, these capital improvements can be replaced. In some instances, it may be necessary to provide compensation for such displacements. Specifically, fences should be reconstructed according to the design specifications previously existing on the ranch. Where parcels have been redesigned, the Applicant should erect new fences to conform to the redesigned pasture parcel. Similarly, corrals, haysheds, etc., should be relocated within the redesigned land parcels.

Where wells and springs are displaced, the Applicant should replace the existing improvements to the current standard. For instance, every effort should be made to assure the continued use of natural springs. Often, this can be accomplished by the installation of culverts of proper design and location. In instances where a well is displaced, the Applicant should construct a new well and insure that there will be no additional cost to the rancher for the operation of that well beyond the cost incurred with the previous well.

Where irrigation systems, whether they be gravity or mechanical, are disrupted or displaced, the first goal of the Applicant should be to assist the landowner in redesigning the system in order to continue its current use. For instance, culverts should be installed and ditches reconstructed for gravity systems. For sprinkler systems and other mechanical devices, all attempts should be made to substitute a redesigned system. Where this is not possible, the Applicant should negotiate with the landowner for a combination

of compensation and reuse of the parcel for some other purpose.

- (3) ROW Fencing. The Applicant should construct ROW fencing along the entire line according to specifications most suitable to the landowners. If special fencing needs or specifications are requested on individual ranches, it will become a matter for negotiation. Likewise, if, in some cases, landowners would prefer to forego fencing of the ROW in order to provide easier access for livestock across the rail line, the Applicant should consider such a request after consultation with other railroads concerning safety, liability, and other requirements.
- (4) Access Restrictions. The Applicant has tentatively identified 77 cattle passes that would be installed along the ROW. These cattle passes would consist of an oval, corrugated metal structure, roughly 12 ft. high and 11.5 ft. wide at the base. The proposed locations for these cattle passes were developed by the engineering consultants, using aerial photography, on-the-ground inspection, and information from individual landowners. The locations of these cattle passes were indicated in second phase engineering plan and profile sheets, which were provided to the individual landowners for comment. The Applicant should work with landowners during third phase engineering and ROW negotiations to identify the locations of any additional cattle passes and to finalize the placement of those previously identified.

In some cases, landowners may prefer a different type of cattle pass than that currently proposed by the Applicant, e.g., box culvert, trestle, etc. Recognizing that different types of cattle passes could be far more costly than those currently proposed, the Applicant should work with the individual landowners to develop an acceptable alternative. For instance, one alternative might be to install a trestle-type structure in lieu of two or three corrugated metal culverts. In such a case, the cost of the trestle could be basically the same as the culverts, and thus an acceptable compromise. In other instances, such as where the placement of a cattle pass is not feasible from an engineering standpoint due to an extensive cut, the Applicant should discuss with the landowner the possibility of a bridge over the railroad to provide access for cattle.

- (5) Impacts During Construction. During third phase engineering, the Applicant should work with individual landowners to discuss construction-related activities. The aim of these discussions should be to avoid unnecessary conflict with major ranching operations, such as moving cattle between pastures during certain seasons of the year. However, it is recognized that inconvenience to the ranchers cannot totally be avoided if a construction schedule is to be maintained. Temporary inconvenience to the rancher should be a part of the compensations negotiated in the ROW for construction-related activities with individual landowners.

All construction-related activities should be confined to the purchased or leased ROW, and to the construction camps located along the rail line. The specific location of construction camps should be solely a matter of negotiation between individual landowners and the Applicant.

Construction of the rail line will require bonding for Applicant's contractors. In the event of contractor-caused damage to a landowner's property, lengthy negotiations between the individual landowner and the contractor's bonding agent could ensue. In order to speed this process of negotiation, the Applicant should require its contractors to place sufficient funds in an escrow account to pay for incidental damages incurred during construction. Payment could be advanced from this fund, pending resolution of any liability on the part of the contractor for the damages incurred.

The Applicant should require its contractors to police construction camps during operation, to control the personnel in camps, and limit those personnel to workers directly involved in the project. Upon completion of construction, the camps should be reclaimed to their previously existing use.

The Applicant should appoint a railroad representative to work with the prime and subcontractors and the landowners to resolve any problems developing during construction. This individual should have direct access to the management of the Tongue River Railroad Company.

- (6) Impacts from Operation. Although every effort has been made to identify impacts from operation of the Tongue

River Railroad, unanticipated problems could develop once the line has been constructed. In order to address these problems, the Applicant ~~should~~ appoint a representative to meet with landowners to discuss these problems within two years of the railroad becoming operational. The Applicant's representative should work with individual landowners to resolve any unforeseen problems that develop and to establish good landowner/railroad relations.

2.2 Impacts to Fort Keogh Livestock and Range Research Station (LARRS)

2.2.1 General

The potential impacts to LARRS have been explored in detail, both by the ICC's consultants and by LARRS personnel. LARRS personnel have taken an active role in development of the proposed route in coordination with the Applicant's engineers. In addition, LARRS personnel have examined the proposed route in detail and have developed a series of mitigation needs and procedures that were submitted to the Applicant. Those measures to which the Applicant has committed itself are included here.

2.2.2 Specific Mitigation Concerns and Resolutions

- (1) LARRS has requested a grade-separated crossing for primary access to the southeast portion of the station. Access is currently obtained through a box-type culvert beneath U.S. Interstate 94. The alignment, as detailed in the proposed Branum Lake Option, calls for crossing under I-94. If this option is utilized, the Applicant will provide a non-blocked, grade-separated crossing from LARRS to insure adequate access to the southeast portion of the station. The Applicant is currently exploring the possibility of bridging over I-94 at this point. If this plan is feasible, then existing access would not be affected or altered by the railroad.
- (2) LARRS has requested that sufficient flood drainage be provided north of the Camel's Back. The Applicant will provide drainage with ~~culverts designated to pass 100-year design floods.~~
- (3) LARRS has requested that a grade-separated crossing be located on the Burlington Northern Railroad (BN) ROW adjacent to the LARRS headquarters facilities. The Applicant has agreed to consult with the BN regarding

the possibility of establishing such a crossing, if it becomes apparent that Tongue River Railroad trains would block this intersection during switching.

- (4) LARRS has requested ~~two electric wells~~ in the No. 3 pasture. One well is located in Section 13 and the other in Section 12. ~~The Applicant has agreed to construct two new wells or one well and a pipeline, whichever is most appropriate.~~
- (5) LARRS has requested two railroad crossings in the No. 3 pasture. Underpasses would be desirable; however, crossings over the track would work. One is located from Section 13 to 18 and the other from Section 12 to 7. A road (all weather) from the Section 12 to 7 crossing along the track to Section 18 would also work. The Applicant has agreed to provide at least one separated grade crossing. The other crossing would be at grade.
- (6) LARRS has requested rip-rapping along the river in Section 6 in the 2C Bend pasture, if necessary. The Applicant plans to provide all necessary rip-rapping to insure the integrity of the railroad embankment.
- (7) LARRS has requested an underpass for cattle movement in Section 6. The Applicant has agreed to provide this underpass.
- (8) LARRS has requested a vehicle pass (18x14 ft.) in Section 36 near the existing road to allow access to Lower 2C Bend. The Applicant has agreed to a cattle underpass and an at-grade crossing for equipment at this location.
- (9) LARRS requests a track crossing for equipment where the track crosses Paddy Fay Creek. This concern should be resolved by Applicant's commitment to construct a bridge at Paddy Fay Creek.
- (10) LARRS requests an access road along the river from Section 23 (Lower Flood) to Section 25, 25 and 36 (2C Bend). The Applicant has agreed to provide a road parallel to the railroad ROW for access.
- (11) LARRS requests that the Applicant relocate the water tank and pipeline in Lower 2C Bend and locate a new tank in the north end of Lower 2C Bend. Applicant has agreed to relocate the existing water tank as well as to locate a new tank in the north end of Lower 2C Bend.

- (12) LARRS requests that the proposed alignment be located as close to the hill between Upper and Lower 2C Bend as possible to eliminate the waste land. The alignment submitted to the ICC in June 1983 incorporates this suggestion and is incorporated as the the Applicant's proposed action.
- (13) LARRS requests rip-rap along the river in the North Tongue River Bend. The Applicant has agreed to rip-rap along the river in the North Tongue River Bend, and has initiated 404 applications for this site with the U.S. Army Corps of Engineers.
- (14) LARRS requests that the TRRC relocate the well in North-South Tongue River fence line to water both pastures. The Applicant has agreed to relocate this well.
- (15) LARRS requests a vehicle underpass 18 ft. wide by 14 ft. high on the road from Lower Flood to North Tongue River Bend. After considerable discussion with LARRS, it was determined that a cattle pass under the tracks with an equipment crossing "at grade" with the tracks could be used in place of the 18 x 14 ft. underpass.
- (16) LARRS requests that the Applicant relocate and electrify the well between Lower Flood and Lower Flood Bend. (Pipeline system to serve Lower Flood, Lower Flood Bend, South Lower Flood Bend, and Middle Flood.) The Applicant has agreed to relocate the well between Lower Flood and Lower Flood Bend.
- (17) LARRS requests that the TRRC relocate the fence between Lower Flood and Lower Flood Bend pastures. The Applicant has agreed to relocate the fence.
- (18) LARRS requests that the Applicant place culverts under the track through Lower Flood to accommodate the flood dike system. Applicant has agreed to place culverts under the trackage through the Lower Flood area which will accommodate the flood dike system.
- (19) LARRS requests a road along the east side of Hill pasture, and a vehicle pass to North Tongue River pasture. The Applicant has agreed to these requests.
- (20) LARRS requests a vehicle pass by old Lone Pine road to access Lower Flood Bend. The Applicant has agreed to construct a vehicle pass adequate for pickups and cattle, with an at-grade crossing for larger equipment.

- 21) LARRS requests that, where the railroad meets and removes the all-weather road in Hill Pasture, provisions for new road be provided. The Applicant has agreed to replace this road.
- (22) LARRS requests that an underpass be provided where the railroad crosses the gravel road in Hill Pasture. The Applicant has agreed to provide a grade-separated crossing.
- (23) LARRS requests that an electric well be located in Hill Pasture to replace pit reservoir. The Applicant has agreed to provide a well.
- (24) LARRS requests that the Applicant relocate the tank between Russian wildrye and Hill Pasture in Section 9. The Applicant has agreed to relocate the tank.
- (25) LARRS requests an 18x14 ft. vehicle underpass for access to highway tube and 3C Bend Pasture. The Applicant has agreed to provide a grade-separated crossing at this location.
- (26) LARRS requests that an electric well for 3C Bend and fish hatchery be provided. The Applicant has agreed to provide a well at this location.
- (27) LARRS staff note that they may need a well relocated if the track is too close in the Nursery area. Should the proposed action be constructed, a relocation of the well would be provided by the Applicant. However, under the Branum Lake option, the Nursery will not be affected or disturbed.

2.3 Impacts to the Miles City Fish Hatchery

The Supplement to the DEIS presents a discussion of potential impacts to the Miles City Fish Hatchery. Since the issuance of that document, the State of Montana has completed further studies related to future development of the hatchery and adjacent lands. It now appears that future expansion of the hatchery could conflict with the proposed routing of the Tongue River Railroad.

- (1) The Applicant should, in coordination with the Montana Department of Fish, Wildlife, and Parks, assist in funding such studies as are deemed necessary to determine the effects on the existing hatchery, should the

proposed action with the Branum Lake Option be built. These studies primarily would focus on such topics as the effects of noise, vibration, airborne contaminants, and potential fuel leaks on the existing operation. These analyses could be undertaken in conjunction with design studies associated with moving parts of the fish hatchery west of the current site.

- (2) The Applicant should continue to confer with the Department of Fish, Wildlife, and Parks in regard to expansion plans for the hatchery. Every effort should be made by both parties to adequately inform the other as to continuing developments.

3.0 SOCIAL AND ECONOMIC IMPACT MITIGATION

3.1 General

The environmental documentation provides detailed information on those social and economic changes that are associated with development of the Tongue River Railroad. The projections contained in the documents cannot be expected to reflect perfectly every possible impact, but the data will serve to provide state and community planning agencies and personnel with the necessary information to meet the demands for increases in public facilities, personnel, and services.

The environmental documentation demonstrates how, in most cases, the increase in tax revenues accruing to local governments will more than offset increases in the costs of providing increased services and new or expanded public facilities. Local government planning agencies will be able to incorporate this information in their short term and long range planning efforts, thus assuring that proper planning and effective mitigation will be in place prior to the incurrence of impact.

In certain cases, local government and, thus, planning capabilities do not exist in any form capable of addressing the problems that could be presented by the construction and operation of a railroad and accompanying mining development. The community of Ashland, in particular, is not prepared to confront the changes and problems that will occur there. Of particular importance to Ashland will be population growth in the community and the corresponding increased demand for community services.

The Applicant, in consultation with the Rosebud County Commissioners, should provide an individual with expertise in community organization and planning, for the purpose of assisting

impacted communities in addressing the problems they face. Among the primary tasks that would be delegated to this individual would be to:

- (1) Assist the community of Ashland in developing a community organization representative of diverse opinion and point of view, for the purpose of addressing and dealing with railroad-related social and economic impacts.
- (2) Assist planning agencies and community groups in interpretation and understanding of the data developed in the environmental documentation. The ultimate goal of this task would be to make the information useful on an individual level for businesses and agencies. As the information is updated, for one reason or another, by state or federal agencies, the new information would be made available to these local groups.
- (3) Assist planning agencies and community groups in identifying those resources available to them to help deal with anticipated impacts, and as a follow-up, to assist these groups in taking advantage of those resources as appropriate. A premier example of such a resource would be monies generated by the Montana Coal Severance Tax, administered by the Montana Coal Board. Numerous other resources and avenues of dealing with problems exist, and the individual would provide guidance in identifying same.

4.0 TRANSPORTATION IMPACT MITIGATION

4.1 General

Impacts to local transportation systems and facilities that will occur as a result of the development of the proposed Tongue River Railroad can be divided into two general categories. The first category is impacts that will occur during construction of the rail line. The second category is impacts that will result from actual train traffic over the line. Much of the mitigation that will occur for the anticipated impacts will result from ROW negotiations between the Applicant and private landowners or governmental agencies. Some of these anticipated impacts are discussed in the Land Use section, already presented. Most important in terms of this discussion are those impacts that will directly affect public roadways and other existing affected public roadways and other existing transportation systems.

4.2 Construction Impacts

Construction-related impacts will generally involve either increases in vehicular traffic on local public roadways, with the attendant likelihood of greater inconvenience and increased likelihood of accidents, or direct disruption of normal traffic patterns due to construction activities across a road or highway.

The Applicant could mitigate the problem of increased vehicular traffic on local public roads and highways by implementing the following measures during construction activities:

- (1) During construction, contractors should be encouraged to provide transportation to the work site from some central location on a daily basis. This central location may be one of the work camps, a point near the northern terminus at Miles City, or some predesignated point elsewhere along the line, selected to prevent an unnecessary traffic on public roads in the area. Details should be worked out with contractors based on final design criteria, specific tasks or phase of construction, numbers of personnel and equipment and work site.
- (2) To the greatest extent possible, all construction-related traffic, including worker transportation as well as equipment movement should be confined to the pioneer road that will be developed within the ROW. In instances where it is not practical to confine all traffic to this road, the Applicant or the individual contractors should make necessary arrangements with the appropriate landowners or agencies to gain access from private or public roadways which will minimize traffic impacts to the greatest extent possible.
- (3) All Applicant vehicles and equipment, and vehicles and equipment owned and operated by contractors working on the project, should strictly adhere to speed limits and other applicable laws and regulations when operating such vehicles and equipment on public roadways.
- (4) In cases where traffic along a public roadway may be disrupted during construction of the railroad, the Applicant should comply with all requirements of the Montana Department of Highways or other

appropriate agency. In the absence of such requirements, the Applicant should endeavor to maintain at least one open lane of traffic at all times. Specific plans should be developed by the Applicant, and adhered to by contractors, to assure the quick passage of emergency vehicles. These plans should be coordinated through appropriate local agencies.

- (5) The Montana Department of Highways will provide various guidelines and stipulations for crossing such highways as Interstate 94 and U.S. 212. Maintaining normal traffic flows on these roadways throughout construction should be the principal goal of mitigation planning. When this is not possible, the Applicant should provide temporary detours and comply with mitigation measures required by state or local agencies.
- (6) In those instances where the disruption of normal traffic patterns or the temporary blockage of important roads or highways is inevitable, the Applicant should work with the Montana Department of Highways or other appropriate agencies and the contractors to develop plans to time construction activities to coincide with periods of least impact. This may include such measures as working through the night time hours, or perhaps around the clock to speed construction in some locations.

4.3 Operational Impacts

A significant impact from operation of trains along the new railroad line will be traffic delays at crossings which are not grade separated. Just as important, but less frequent, is the possibility of accidents involving trains and vehicles or pedestrians. To address that impact, the Applicant should undertake the following:

- (1) All grade crossings of the new rail line by public roadways should be equipped with warning signs and devices in compliance with current state and federal regulations, requirements and suggestions. To determine the appropriate warning devices for each new crossing, the policy for Railroad Crossing Protection of the Montana Department of Highways should be applied to each crossing, and the appropriate measures implemented.

- (2) A combination of Tongue River Railroad and BN traffic immediately downline from the connection at Miles City may require the elimination of certain at-grade crossings and their replacement with grade-separated structures. The Applicant should commit to working with the BN, the Montana Department of Highways, and the Town of Miles City to alleviate any traffic problems in the future. Data developed by the Applicant and the commission on the eventual problem at crossings in Miles City could be used as a starting point in these discussions.
- (3) The Applicant should adhere to all state and federal regulations regarding train operations. Such regulations provide for maximum durations of crossing blockage, speed limits within and outside of incorporated areas, candlepower for train lighting etc.

5.0 AIR QUALITY IMPACT MITIGATION

5.1 General

Impacts to air quality resulting from construction and operation of a new rail line will fall into two general categories. These categories include: (1) the introduction of air pollutants in the form of the products of combustion, generated by construction equipment and railroad engines; (2) the generation of increased quantities of fugitive dust into the air as a result of devegetation, earth moving, general equipment operation, wind; and (3) increased vehicular traffic on unpaved roadways. Simple techniques are available to mitigate these impacts. Since these techniques are universally applicable, and it is not necessary to delineate those that will be used only during construction. The Applicant should commit to the application of the following measures, either as company operational policy or as stipulations for contractors during construction:

- (1) All heavy equipment and vehicles used in the construction, operation, and maintenance of the railroad should be subjected to regular inspection and maintenance to ensure that operation is in compliance with manufacturer's specifications and that equipment is running as cleanly and efficiently as possible.

- (2) Strict speed limits should be established and adhered to on all access roads and within the ROW, to assure that fugitive dust emissions will be minimized.
- (3) The Applicant should recommend to the individual contractors that they provide group transportation (as discussed under transportation impacts) to minimize vehicular traffic on unpaved roads in the area.
- (4) When vegetation is removed from the ROW during the early stages of construction, the cleared areas should be kept to the absolute minimum necessary. This will aide in the mitigation of the problems caused by wind erosion and vehicle borne fugitive dust.
- (5) In areas where devegetation has taken place, revegetation efforts should commence at the earliest possible opportunity. In those areas where immediate revegetation is not possible, alternative stabilization measures should be implemented. These measures could include matting, mulching, and even mulching with seed and fertilizer. (More details on revegetation are presented section 10.3 of this Master Mitigation Plan.)
- (6) Dust suppression at all work areas within the ROW and at work camps, staging areas, etc., should be accomplished with the regular and frequent use of water trucks. Arrangements for the acquisition of water should be made with either local landowners, agencies or associations. It is anticipated that such activities would occur two or more times daily during the driest periods.
- (7) Any open burning required for the purpose of slash disposal or for any other reason during construction or operation of the rail line should be conducted in strict accordance with local regulations. All necessary permits should be obtained and all necessary safety precautions observed.

6.0 NOISE IMPACT MITIGATION

6.1 General

Noise impacts that are likely to occur as a result of construction and operation of a new railroad fall into two distinct categories. The first category is noise associated with construction activities, heavy equipment operation, a variety of vehicular traffic, etc. The second category is the noise that will result from trains operating along the new rail line. Several mitigation strategies listed here can be employed to mitigate construction noise impacts. It should be noted that the level to which construction noise impacts will occur to sensitive receptors is dependent upon route selection and final centerline location. More specific measures will be apparent at that time. Mitigation of noise impacts from train traffic is difficult, and is dependent to some degree upon volume of traffic as well as volume of downline traffic of all types on the BN mainline. As a result, most of the measures suggested here would require negotiations between the Applicant and the BN for any final implementation.

- (1) In general, all major noise-producing activities during construction should be scheduled to occur during the weekday and daylight hours.
- (2) In cases where such activities as the normal schoolday would be interrupted by noise interference, the Applicant should make every attempt to schedule the activities in a manner most acceptable to those impacted. This could include weekend or evening work in some cases.
- (3) The Applicant should require all contractors to use internal combustion equipment only if properly installed mufflers are provided. Further, all equipment used for construction should comply with all applicable federal, state, and local noise regulations which reflect the current feasibility and practicality of equipment and activity noise reduction.
- (4) During operation, Tongue River Railroad trains should observe standard regulations regarding speed limits in incorporated areas to limit noise impacts. The Applicant should observe those same speed limits while trains are passing through the unincorporated community of Ashland.

- (5) A program of noise monitoring should be established at selected locations along the route to determine noise levels during ongoing operation of the railroad. This information would assist in development of new noise abatement strategies as they are needed.
- (6) In special cases, more direct noise abatement measures may be required. For example, the Applicant has agreed to provide a tree buffer between the Spotted Eagle Lake recreation area and the ROW. This buffer would serve the dual purpose of easing the impact of noise upon those pursuing recreational activities and also moderating the visual impact to that area. Similar measures may be required on certain private holdings along the ROW. These would be identified during negotiations between the individual landowners and the Applicant.

7.0 SAFETY IMPACT MITIGATION

7.1 General

The heading Safety Impacts encompasses several broad areas of potential impacts. The first consideration under this heading is the prevention of construction-related accidents. A second consideration is the public safety as it relates to such occurrences as derailments, fuel spills, other toxic material spills, and other catastrophic events. A third general category includes the prevention and suppression of railroad-caused wildfire. Concerns regarding the potential for and response to train/vehicle and train/pedestrian crossing accidents are also topics considered here.

7.2 Construction Safety

Adherence to normal construction safety practices will minimize the potential for construction-related accidents. All contractors should hold safety meetings for their workers and assure that each person is cognizant of the safety measures and procedures expected in each work situation. Other actions which will enhance the overall safety situation include:

- (1) Contractors should be encouraged to provide group transportation to the job site, as discussed under that heading.

- (2) Speed limits for all construction vehicles and equipment, both on and out of the ROW, should be enforced.

7.3 Emergency Situations

A variety of events here classified as "emergency situations" could occur along the ROW, during either construction or operation of the railroad. These include such things as derailments, oil spills, and toxic substance spills. The Applicant should implement a number of general measures that can be used to initiate specific actions in response to emergency situations.

- (1) Planning Framework. The Applicant should develop an internal emergency response plan which includes:
 - a. Emergency notification plan whereby a priority list of agencies and individuals to be notified in a specific emergency is prepared. The plan would include names and phone numbers of individuals to be contacted in case of such events as an herbicide spill, fuel spill, range fire, and medical emergency.
 - b. Procedures to be followed by railroad operation and maintenance personnel in case of such an event, including specific responsibilities by individual.
 - c. Directions for most timely response and fastest emergency vehicular access to any particular section of the rail line.
 - d. Locations and inventories of all emergency equipment, and any standard operational equipment which may be useful in dealing with emergencies.
- (2) Cooperative Planning/Contacts. The Applicant should establish cooperative relationships with all local and state agencies that have responsibilities for disaster/emergency planning and response. The Applicant should provide operation plans and copies of the response plans noted in item (1) above to such agencies for review and suggestions. Comments from these organizations should be incorporated as necessary. These state and local agencies are to include, but are not limited to:
 - a. Fire departments in Miles City, Broadus, Ashland, and other rural units along the route.

- b. Local ambulance and emergency medical services, as well as air evacuation services in Billings.
 - c. Disaster and Emergency Services Division of the Department of Military Affairs, Helena. This is likely the most important contact in case of a major emergency in terms of developing a coordinated response.
 - d. The Montana Department of Health and Environmental Sciences (especially the Water Quality Board).
 - e. The Montana Department of Fish, Wildlife, and Parks.
 - f. The Montana Department of State Lands, Land Administration Bureau.
 - g. The Montana Department of Natural Resources and Conservation, Water Resources Bureau.
 - h. U.S. Department of Agriculture, Fort Keogh Livestock and Range Research Station.
 - i. U.S. Bureau of Land Management (recent reorganization has transferred local segments of the Custer National Forest to the BLM for management).
 - j. Other local agencies or groups which are identified as key to disaster.
- (3) Fire Prevention and Suppression. The Applicant should develop a wildfire suppression and control plan for fires occurring on the ROW as a result of traffic or undetermined causes. The following considerations should be included in the plan.
- a. The plan should be developed after final engineering and overall operation plans are complete. This will afford planners the benefit of special information regarding exact location of centerline, access points, and equipment and personnel which might be of use in case such an event occurs.
 - b. State-of-the-art techniques for fire prevention and suppression should be evaluated and included in the plan as applicable. Where an industry-wide standard exists, it should be adhered to or improved upon.

- c. During third phase engineering, the Applicant should attempt to provide the greatest possible access to all portions of the ROW, in terms of grade crossings and gates, in an effort to minimize response time. Certain areas adjacent to the ROW are more accessible than others. The Applicant should recognize topographic differences in providing access for emergency vehicles crossing the rail line. While there are no industry standards for determining the preferable distance between crossing points, it should be shorter in rougher terrain than it would be in more accessible areas. The Applicant should consult other railroads to ascertain the appropriate distance between access points.
- d. Since the Applicant will be a significant taxpaying entity, it can be assumed that the emergency assistance of the various tax-supported fire districts will be an integral part of this plan [see item (2) above]. It should be noted, however, that many rural fire districts operate on a strictly volunteer, unfunded basis. In such cases, the Applicant should develop relationships with these local organizations for the purpose of implementing funding agreements. A formula should be established, based on criteria applied by other railroads in the region, to determine the amount of funding per group.
- e. The Applicant should commit to all reasonable efforts to protect property, livestock, and the general public from damage due to Tongue River Railroad-caused fires. In addition, the Applicant should make every effort to assure adequate access to all areas on all sides of the ROW. All serious concerns and suggestions should be explored for practicality, usefulness, economic considerations, etc.
- f. The Applicant should observe all applicable operational regulations promulgated by the Federal Railroad Administration. This will also serve to minimize the potential for railroad-caused fires.
- (4) Oil Spill Prevention and Control Plan. The Applicant should develop, in concert with the appropriate agencies and private concerns, plans to prevent spills of oil or other petroleum products, both during construc-

tion and operation and maintenance. The plans developed should include those stipulations that would be imposed on firms involved in construction of the rail line. An aspect of such plans would be the emergency notification procedures, discussed in item (1) above. Other items that would be included are:

- a. Procedures for reporting spills.
- b. Definition of what constitutes a spill.
- c. Methods of containing, recovering, and cleaning up spilled oil.
- d. A list of needed equipment and locations of same.
- e. A list of all agencies and management personnel to be contacted, as in item (2) above.
- f. Assurances that techniques and procedures to be employed in cleanup are representative of the best technology currently available.

In addition to the items listed here, the stipulations to be followed during construction would be developed, in the form of guidelines based on the tasks to be accomplished by the individual contractors. Among the stipulations that could be employed are:

- a. Care during refueling to guard against overflows.
- b. Storage of fuel only in metal storage tanks surrounded by impervious dikes capable of containing greater than the capacity of the tank.
- c. Removal of waste oil to appropriate sites, away from the ROW.
- d. Keeping equipment in good running order and conducting routine maintenance activities at locations removed from the ROW.

Specifics of these plans should be discussed and refined with the appropriate agencies, and the plans should be in force at the start of construction.

- (5) Toxic Materials Spills. It is not anticipated that the Applicant will be involved with the transport of toxic materials. This consideration is included to account

for the possibility that herbicides may be accidentally introduced to other than the designated portions of the ROW. (See vegetation discussion of noxious weed control.) The same general approach discussed under items (3) and (4) above should be taken, with immediate notification of the appropriate agencies and personnel being given priority equal to immediate containment. Procedures should comply with the law, regulatory guidelines, and the best technology currently available. Application of herbicides is a licensed activity and is done under strict supervision, and as such, response should be nearly instantaneous.

8.0 HYDROLOGY AND WATER QUALITY IMPACT MITIGATION

8.1 General

A wide variety of state and federal regulations and permit processes are in place to assure that overall water quantity and quality is not altered or diminished by activities such as the proposed Tongue River Railroad. Detailed permit applications are submitted to various agencies for the purpose of assuring that construction and operational activities on or near any waterways are conducted in such a manner as to provide minimal impact to those areas. Permit processes in which the Applicant is currently involved include:

- (1) U.S. Army Corps of Engineers "404" Permit process for all bridges and other structures occurring on designated streams (perennial). This process is required for each major bridge crossing of the Tongue River and Otter Creek as well as each area where rip-rap is to be installed. This process requires detailed environmental data as well as construction data. Permits are issued with accompanying stipulations to limit environmental impact to the greatest degree possible.
- (2) The "310" Permit process, jointly administered by the local Conservation Districts and the Water Quality Bureau of the Montana Department of Health and Environmental Sciences. This process is very similar to the "404" process previously discussed. Similar procedures for attaching stipulations to a permit also are followed.
- (3) Temporary Discharge or "Turbidity Exemption" permits are being sought from the Water Quality Bureau of the Montana Department of Health and Environmental Sciences.

ces. These permits are required wherever construction activities may cross any stream bed or bank (ephemeral or perennial). As a result, each crossing of a stream bed, dry or not, requires such a permit.

In addition to these very detailed permit processes, a number of other safeguards can be built into the final design of the rail line. Some of these include:

- (1) All culverts and other drainage structures installed at ephemeral and perennial stream crossings will be designed to pass the projected 100-year flood.
- (2) Where possible, the proposed route is designed to avoid the flood plain. Where the railroad grade does infringe upon the flood plain, drainage structures should be installed to assure that the grade does not restrict or re-route the 100-year flood.
- (3) To prevent unnecessary degradation of water quality due to erosion, revegetation efforts should begin as soon as possible after construction is complete in a given area. (See revegetation section, 10.3.)
- (4) Spills of fuel or other toxic or hazardous substances which may affect water quality should be addressed in the manner described in the section on safety.
- (5) Construction of all stream crossings, including bridges and culverts and such activities as require stream bank encroachments (rip-rap, for example), should be timed to occur during periods of low or no flow in the streams affected. The vast majority of stream beds traversed by the railroad are dry most of the year, so such scheduling should not be difficult.

It also should be noted that a study has been conducted to determine the extent to which the Tongue River Railroad would constrict the flood waters from a disaster such as a breach of the Tongue River Dam. The study shows that the railroad grade would, to some extent, alter the inundation pattern, but would not appreciably affect the disaster plans as discussed in the Tongue River Dam Emergency Warning and Evacuation Plan, published by the Montana Department of Natural Resources and Conservation.

9.0 AQUATIC ECOLOGY IMPACT MITIGATION

9.1 General

Impacts to aquatic resources from the proposed Tongue River Railroad are likely to occur only in those areas where the railroad grade directly infringes upon the stream bank or stream bed. Such places include river crossings requiring bridge construction and areas where rip-rap is required for stream bank stabilization. In coordination with state agencies, primarily the Department of Fish, Wildlife, and Parks, the Applicant should proceed with detailed, site-specific inventory work of potential impact sites, upon the completion of third phase engineering. Based upon the results of the work, specific mitigative measures can be determined and applied.

(1) Aquatic Resource Sampling. For those locations where the proposed Tongue River Railroad would cross the Tongue River, or where extensive rip-rapping would occur, a three-part plan of study should be undertaken to identify aquatic resources. The results of the study would be utilized in the development of mitigation plans. The three-part plan of study includes: (a) a stream habitat survey to identify existing habitat features and values; (b) benthic macroinvertebrate sampling to identify community composition and numbers; and (c) fish spawning survey to determine the importance of the area to spawning of game fish.

a. Stream Habitat Survey. The stream habitat survey should utilize methods described in "Methods for Evaluating Stream, Riparian, and Biotic Conditions."² Stream transects would be established in appropriate locations to evaluate existing conditions and to monitor changes during construction. Along each transect, the following variables would be measured:

1. stream width
2. stream shore depth
3. stream average depth
4. pool (ft.)

²William S. Platts, Walter F. Megahan, and G. Wayne Minshall, "Methods for Evaluating Stream, Riparian, and Biotic Conditions," General Technical Report Int-138, Intermountain Forest Range and Research Experiment Station, Ogden, Utah.

- (a) quality
- (b) forming feature
- 5. riffle (ft.)
- 6. run (ft.)
- 7. substrate
 - (a) boulder (greater than 12 inches)
 - (b) cobble (12-2.5 inches)
 - (c) coarse gravel (2.4-.5 inches)
 - (d) fine gravel (.4-.1 inches)
 - (e) sand
 - (f) clay
- 8. stream bank soil alteration rating
- 9. stream vegetative stability rating
- 10. stream bank undercut and angle
- 11. vegetation overhang
- 12. embeddedness

b. Benthic Macroinvertebrates. Quantitative samples of benthic macroinvertebrates should be collected immediately upstream and downstream of each proposed location of disturbance. The collected specimens should then be counted and identified at least to genus and to species where possible. The composition of the community should be described.

c. Fish Spawning Survey. Several species of game fish spawn in the Tongue River, including sauger, walleye, channel catfish, smallmouth bass, and sturgeon. A game fish spawning potential survey should be conducted at each proposed bridge location as well as areas of proposed extensive riprapping. Sampling periods for the spawning survey would be early spring after ice breakup, after peak runoff, and in the fall. Collection methods would include electro-shock, seining, trap netting, and fry sampling.

(2) Mitigation Techniques. Once sampling has been completed and detailed data on the aquatic resource to be affected have been obtained, mitigative measures can be delineated. Some of the measures that could become necessary include:

a. Preparation of a construction schedule which provides for instream work at those times least critical to the specific fishery or aquatic resource occurring at a site, as well as the period least conducive to sediment transport. Such periods differ by stream and species affected.

- b. Developing special procedures for handling of displaced materials and petroleum products to prevent introduction of such materials into the aquatic system. The procedures referred to here would be dictated by site-specific geographic and construction criteria.
- c. Running silty water through settling pond systems when dewatering for footing construction is required.
- d. Assuring that backfill at crossing and rip-rap sites is washed and essentially silt-free.
- e. Double-shifting at crossing sites to minimize the duration of construction activities in or near stream banks.

It should be further noted that all sampling activities would be coordinated with the Montana Department of Fish, Wildlife, and Parks. It is likely that MFWP personnel will be responsible for any electrofishing aspects of the inventory.

10.0 TERRESTRIAL ECOLOGY IMPACT MITIGATION

10.1 General

Two areas of concern are addressed under the overall heading of terrestrial ecology -- wildlife and vegetation. The thrust of the terrestrial mitigation plan will be to provide additional information and options for avoiding unnecessary impacts to vegetation and wildlife.

10.2 Wildlife

The kinds and amounts of habitats that will be lost during construction of the Tongue River Railroad were identified in the environmental documentation. Avoidance by wildlife of normal use areas adjoining the construction site is considered to be a short term impact that will be mitigated by the completion of construction; wildlife will simply reoccupy those areas where their normal use patterns have been disrupted. Mitigation of other impacts, however, requires identification of those sites where impacts may occur. The following methods can be used to identify those sites:

- (1) An aerial survey should be conducted during the winter before construction begins. An aerial survey may iden-

tify new winter ranges, as well as locate any new prairie dog colonies along the route.

- (2) A thorough ground reconnaissance should be conducted between April 15th and May 15th. During this period, grouse leks will be active, raptors will be nesting, and winter ranges may still be identifiable. The entire ROW should be covered, preferably by walking. In some areas it will be possible to cover the ROW by vehicle, but much of the route will be accessibly only on foot.

The purpose of the reconnaissance will be to locate big game winter range based on evidence, such as animal remains, hair, pellet groups, etc.; locate any prairie dog colonies that were not recorded during the aerial survey; locate sage grouse and sharp-tailed grouse leks; and locate raptor nests, particularly golden eagles and prairie falcons. Evidence of threatened or endangered species, such as black-footed ferrets and peregrine falcons, would also be sought during the reconnaissance.

- (4) Any specific use sites that are located during the reconnaissance should be mapped, described in field notes, and photographed. Nesting raptors should not be disturbed, but nests should be described as active or inactive.
- (5) Sage and sharp-tailed grouse leks should be located by listening for displaying males at dawn. Lek locations should be mapped. If possible, a count of the displaying males should be made. If lek sites are discovered later in the day after displaying has ceased and/or birds have left the site, the site should be revisited the following morning or as soon as possible.
- (6) Prairie dog colonies that are intersected by the ROW should be mapped to their approximate size on 1:24,000 USGS topographic maps. Following the field reconnaissance, the size of these colonies should be planimetered and a rough estimate of the existing population should then be made by comparison with results reported in the literature.
- (7) Prairie dog colonies also should be searched for evidence of black-footed ferrets, following the methods outlined in "Handbook of Methods for Locating Black-

footed Ferrets."³ Ferret presence is most easily detected in late summer and during winter (December 1-April 15). The search along the Tongue River Railroad ROW should occur during the winter period, when evidence is most easily discerned.

Colonies affected by the right-of-way should be searched at least once and preferably three times. All colonies should be surveyed on foot, by walking transects spaced approximately 50 m apart back and forth across the colony. Any evidence of ferrets, such as digging, tracks, scats, skulls, etc., should be photographed and, where appropriate, collected. Scats and skulls should be identified following the keys in the "Handbook." If ferret evidence is found, the proper authorities should be notified following procedures of the Endangered Species Act.

- (8) Similarly, although it is highly unlikely that nesting peregrine falcons will be found along the ROW, any occurrence of nesting activity should be properly recorded and reported.

10.2.1 Mitigative Measures

- (1) Construction Timing. The primary method of impact mitigation for wildlife is timing construction activities. All reasonable attempts should be made to avoid construction at big game wintering sites from December through March.
- (2) Fawning Sites. Timing of construction may be less effective in mitigating disturbance at "fawning sites," because this term cannot be consistently applied to a given geographic location. That is, a site where deer or antelope fawns are born in one year may not be used in the following year.

Most fawns are born during the period May 15 - June 30. Late in the reconnaissance period, any single female deer or antelope that are observed should be assumed to be at or near a potential fawning site. The locations

³T.W. Clark, T.M. Campbell III, M.H. Schroeder, and L. Richardson, "Handbook of Methods for Locating Black-footed Ferrets," U.S. Bureau of Land Management, Wildlife Technical Bulletin No. 1 (1983), Cheyenne, Wyoming.

of these individuals should be mapped. On an individual basis, it may be possible for construction activities to avoid these sites during the fawning period. However, if construction cannot be delayed, the resulting impact (displacement of pregnant females to another location) should not significantly affect these species.

- (3) Black-footed Ferrets. If black-footed ferrets or their evidence are found in any affected prairie dog colony, appropriate regulatory authorities should be consulted. It will probably be necessary to examine these sites on several occasions to determine whether or not ferrets are currently present in the colony. If a ferret population is present, the proper authorities should be consulted to determine the probable long term impact to ferrets if construction proceeds through the colony. Since ferrets are primarily nocturnal and may not be particularly disturbed by human presence, it may be possible to time construction activities during the day when ferrets are least active.
- (4) Raptors. It is highly unlikely that eyries of the endangered peregrine falcon or bald eagle will be encountered along the ROW. If such nests are found, the appropriate authorities should be contacted. Any active golden eagle or prairie falcon eyries located during the reconnaissance should be mapped. If the ROW passes adjacent to such eyries, construction should be timed to avoid the critical incubation and early rearing period (April 1-June 30).

10.3 Vegetation

Vegetation concerns related to the Tongue River Railroad are primarily divided into two categories, reclamation and noxious weed control. Reclamation of devegetated areas is important for a variety of reasons, including the prevention of erosion, limitation of air pollution by fugitive dust, contribution to the stability of the railroad grade, and the importance of providing wildlife habitat. Noxious weed control is an area of great concern to local agricultural operations and should be a priority of Applicant operation and maintenance personnel.

- (1) Reclamation. Reclamation or revegetation of the ROW should commence at the earliest possible time after clearing has been completed. In most cases, such revegetation cannot begin until construction is complete. But, wherever possible, it should be expedited. The

following are general concerns and practices that should be employed in the process:

- a. Preconstruction Planning. Successful reclamation begins with thorough preconstruction planning. Elements of such planning should contain the following:
 1. Designation of sensitive areas.
 2. Proposed time schedule of construction activities.
 3. ROW clearing and site preparation plans.
 4. Erosion and sediment control plans.
 5. Waste disposal plan.
 6. Restoration, reclamation, and revegetation plan.

- b. Restoration/Reclamation Plan. Elements of an adequate restoration and reclamation plan include:
 1. Starting reclamation immediately after construction ends, with the goal of rapidly re-establishing ground cover on disturbed soils, with all cut and fill slopes mulched and seeded as they are completed.
 2. Avoiding reclamation when soil moisture is high or ground frozen.
 3. Analyzing site soil requirements and seasonal precipitation patterns to identify planting dates for optimal revegetation success.
 4. Use of rapidly establishing plant species for thorough and rapid ground surface protection.
 5. Providing a reclamation specialist to determine specific procedures for areas with reclamation problems such as on steep slopes or locations near waterways.

- c. Revegetation Success Assurances. To ensure revegetation success, the following measures should be taken:
 1. Determination of type and quantity of seed, kind of fertilizer, and other soil amendments based on soil chemical and physical properties should be made.

2. Topsoil should be segregated from subsoil and stockpiled for later application on the reclaimed ROW.
3. Only seed of registered quality and germination success should be utilized.
4. Appropriate seeding techniques should be used, such as drill seeding on level terrain and broadcast or hydroseeding on slopes to ensure distribution of seed mixture on individual microenvironments.
5. The Applicant should use mulch material, such as straw and woodchips, as a temporary erosion measure and to minimize soil temperature fluctuations and soil moisture loss. Mulch should be applied more heavily on slopes than on level terrain and nitrogen levels adjusted to reflect the increased demand during mulch decomposition.
6. The seeded area should be covered and compacted following seeding.
7. A minimum of 20 lbs./acre of pure live seed should be used throughout the route.
8. For slopes and construction areas near waterways, a variety of methods including sediment raps, berms, slope drains, toeslope ditches, diversion channels, sodding, and mulching should be used.
9. Reclamation should be monitored, and regrading eroded surfaces and revegetating areas not successfully reclaimed should be undertaken.

d. Provisions for Areas of Special Concern

1. Stream Crossings. Banks should be stabilized with naturally occurring trees, shrubs, and grass. Rip-rap or gabions should be used only as a supplement or where such methods would improve fish habitat.
2. Construction Sites. All litter, debris, and soils associated with petroleum spills should be removed prior to reclamation. An approved landfill may be used.

3. Slopes Greater Than 3:1. On cut and fill slopes steeper than 3:1 but less than 2:1, serrations should be made parallel to the slope to act as stable seed beds and sediment traps. Mulching and seeding should be conducted using hydroseeding/mulching equipment. Every attempt should be made to minimize foot traffic on the reclaimed slopes until vegetation is well established.
- (2) Noxious Weed Control. The first step in the control of noxious weeds is reclamation of disturbed land along the railroad construction corridor before use by the railroad. This will limit bare soil required for optimal weed colonization. Following establishment of revegetation species and coincident with the beginning of rail transport, a noxious weed control program should be implemented. This program is intended to control all Montana's designated noxious weeds. It is not intended to control invader grass species.

The program should consist of a spray program using 2-4D at one pound per acre beginning June 1st and at monthly intervals until late September. This formulation should be used on all areas of the ROW except near waterways, where Weedar 64 (a nontoxic form of 2-4D amine) should be substituted. The spray sequence has been chosen to ensure that weed plants do not reach maturity and therefore seed dispersal before being irradiated by the herbicide. All precautions normally used around herbicides should be followed and it is recommended that 2-4D amine, rather than 2-4D ester, be used because of its lower volatility. Records of application dates should be kept and referenced to ensure that program goals are fulfilled.

All activities should be conducted according to applicable regulations and guidelines, and should be coordinated with local weed control districts. In all cases, only trained, licensed, personnel should be involved in applications. Coordination with local ranchers would be an acceptable element of the overall plan, at the request of those individuals.

The Applicant should work with the local weed control districts to establish schedules for herbicide applications. In establishing the schedule, a provision should be made that, if the Applicant does not apply the measures by an agreed date, the weed control

district would have the authority to implement the appropriate measures and to be reimbursed by the Applicant for those efforts.

- (3) Threatened and Endangered Plant Species. As of 1984, a document prepared by the Montana Rare Plant Project and titled Vascular Plants of Limited Distribution in Montana contains listings of plants that are currently or likely to become legally protected.⁴ As a result of this effort, species that might occur in southeastern Montana have been identified. During the course of other activities, biologists will be aware of potential habitats for the species listed in the document cited. If examples of any such species are encountered, appropriate actions will be determined through consultation with governmental authorities.

11.0 CULTURAL RESOURCES IMPACT MITIGATION

11.1 General

Construction of the Tongue River Railroad will have an effect upon cultural resources (historic, prehistoric archeological, and architectural) that may be on or eligible for nomination to the National Register of Historic Places (NRHP). After selecting and surveying an alignment, but prior to the initiation of third phase engineering, a Site Investigation, Inventory, and Action Plan (SIIAP) will be developed in consultation with appropriate authorities.

The SIIAP will detail: (1) the procedures to be followed in conducting an intensive pedestrian survey of the alignment; and (2) the steps to be followed in treating cultural resources that are determined to be eligible for listing on the NRHP and that may be adversely impacted by the construction and operation of the railroad. The SIIAP should take into account, but not be restricted by, the guidelines set forth in Section 106 and 110f of the National Historic Preservation Act (16 U.S.C. 470) and its implementing regulations, "Protection of Historic and Cultural Properties" (36 C.F.R. 800).

⁴P. Lesica, G. Moore, K.M. Peterson, and J.H. Rumely, "Vascular Plants of Limited Distribution in Montana," Monograph No. 2, Montana Academy of Sciences, Supplement to the Proceedings 43(1984):11-12, 18, 21.

During the preparation of the environmental documentation for the proposed railroad, a number of cultural resources were tentatively identified. A preliminary determination of eligibility was made for each site. The pedestrian survey conducted according to the terms of the SIIAP would provide the TRRC with more complete information about the presence of cultural resources in the study area. Utilizing the SIIAP, the Applicant should provide the following information regarding cultural resources:

- (1) Identification. The pedestrian survey should accurately locate all historic, prehistoric, and architectural sites located within the ROW and buffer area. In addition to locating all cultural resources, Applicant should photograph each site, prepare site maps and written descriptions, and document the development of each site, based on records research and oral interviews.
- (2) Evaluation. Each cultural resource site should be assessed using the criteria for evaluation (36 C.F.R. 60.6) to determine whether the site meets the eligibility requirements for listing on the NRHP.
- (3) Impact Assessment. Based on the above evaluations, the Applicant, in consultation with appropriate authorities, should determine whether eligible cultural resource sites will be impacted, directly or indirectly, by construction and/or operation of the railroad.
- (4) Mitigation. The SIIAP should contain a detailed procedure that should be followed if an eligible cultural resource site will be adversely impacted by the construction and/or operation of the railroad. The mitigation measures should include but not be limited to those set forth in the ACHP's "Manual of Mitigation Measures (MOMM)."⁵

The Applicant should prepare a cultural resource technical report that will detail the results of the field survey. The report should contain information on all sites identified, an evaluation of each site, and a recommendation for further work on all eligible sites that may be impacted during construction

⁵Department of the Interior, National Park Service, Advisory Council on Historic Preservation, "Manual of Mitigation Measures (MOMM)," October 12, 1982.

and/or operation of the railroad. The report also should contain recommendations for mitigating impacts to each site.

12.0 SUMMARY

The successful mitigation of impacts associated with the Tongue River Railroad will require cooperation and coordination among a wide variety of individuals, state and federal agencies, and local governments. A complex body of regulations applies to most aspects of construction and operation of such a project. In order to comply with the regulatory requirements imposed upon the Applicant, it may become necessary to adjust non-regulated aspects of the suggested mitigation procedures. It is safe to assume that certain conflicting mitigation concerns will occur. In such cases, it is important that lines of communication be maintained between all parties.

A number of tasks remain to be accomplished in terms of development of the Final Mitigation Plan. Most of these tasks are presently constrained by the permitting process itself, but will be accomplished once a decision to proceed is made. These tasks include, but are not limited to:

- (1) Individual ROW negotiations with landowners, to include site-specific mitigation provisions.
- (2) Easement negotiations with the U.S. Department of Agriculture for the ROW through LARRS, to include detailed mitigation stipulations.
- (3) Easement negotiations with the Montana Department of State Lands, the Montana Department of Fish, Wildlife, and Parks, and the U.S. Bureau of Land Management for ROW across lands under the control of those agencies. It is assumed that numerous site-specific mitigation stipulations will be included in resulting agreements.
- (4) Development of a detailed construction traffic control plan.
- (5) Development of construction mitigation stipulations to be required of all contractors providing services to the Applicant.
- (6) Conduct field studies of impacted aquatic habitat.
- (7) Conduct field wildlife surveys.

(8) Develop site-specific revegetation and weed control plans.

(9) Develop cultural resources preservation plans.

Where the specific requirements of these various planning instruments come into conflict, certain priorities must be established to resolve differences. In all cases, regulatory requirements should take precedence over matters of convenience, either to the Applicant or to other parties. In cases where the public health or welfare is at issue, such concerns should take precedence over matters of economic, spatial, or temporal convenience.

#12

**Miles City Fish Hatchery
Impact Analysis Studies and Proposed Mitigation
Approach
Proposed Tongue River Railroad**

Prepared for: Montana Department of Fish, Wildlife and Parks

January 2000

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Attachment A – Vibration and Impact Studies

Miles City Fish Hatchery Impact Analysis Studies and Proposed Mitigation Approach

1.0 Introduction

Montana Fish, Wildlife and Parks (MT DFWP) has drafted this impact analyses study description and proposed mitigation approach to create a clear, step by step impact evaluation and mitigation process that will be required for Tongue River Railroad Company (TRRC) to obtain an easement to cross the Miles City Fish Hatchery (MCFH). The impact analyses studies consist of pre-construction baseline studies to aid in accurately measuring MCFH production success, vibration and additional studies to determine the potential for impacts due to TRRC operations, and a mitigation plan for identifying and responding to losses attributable to TRRC construction and/or operation.

MT DFWP has included information on current levels of production, fiscal value of the hatchery in terms of its contribution to the state's fish and recreation resources, and annual budget estimates to allow accurate valuation of potential losses. All direct and indirect costs for implementing this mitigation plan, including all aspects from the two pre-construction studies to any actual repairs or replacement of hatchery products (e.g. eggs or fish) or facilities, will be TRRC's responsibility. MT DFWP will not bear responsibility for any increase in operating costs due to any activities associated with data gathering or execution of any mitigation activities. Should any costs of this nature occur, they will be reimbursable by TRRC. The mitigation plan shall be as quantifiable and clear as possible in order to avoid future negotiations that would delay mitigation for such a time sensitive resource.

1.1 History

MCFH was transferred to MT DFWP from the U.S. Fish and Wildlife Service in 1983 for use as a warm-water fish production hatchery to meet the state's needs for game fish such as walleye, pike, bass, channel catfish, and various forage species. MCFH also provides rearing capacity for research species, species of special concern, and endangered species as needs arise within the state and surrounding region. MCFH's importance to the state's recreational fishery cannot be overemphasized as it is the sole source for warm-water game fish for 68 reservoirs, and provides cool and cold water fish for an additional 67 reservoirs in Montana. The mean economical value to the state for the Fort Peck Reservoir alone in 1997 dollars was approximately \$2,601,096, based on 36,309 angler days (G. Bertellotti, MT DFWP, personal communication, 1999). The economic value generated by the hatchery extends to the communities surrounding these reservoirs in the form of jobs and tourism.

1.2 Site Description

MCFH occupies a 242.25 acre site located west of Miles City, Montana. The land is used for hatchery facilities, related residential units, and un-grazed rangelands (MDSL et al. 1989). The land is composed of two parcels obtained from the U.S. Fish and Wildlife Service (USFWS) and the National Park Service via the Land and Water Conservation Fund (LWCF). MT DFWP made an initial investment of \$5 million to upgrade the hatchery for warm-water culture from 1987 to 1989 (MDSL et al. 1989). Since 1989 FWP has made an additional investment of \$1,500,000 to expand the number of rearing ponds at the site and other hatchery facilities. These improvements increased production capacity appreciably, but also brought the production area much closer to the proposed railway centerline. Four more one-acre ponds and a new boiler were added in 1999 at a cost of \$900,000 to enhance bass production to meet current requests (G. Bertellotti, MT DFWP personal communication, 1999). Two supply pipelines provide primary and secondary water sources for the 46 earthen ponds, 8 raceways, 320 incubation jars, 62 early rearing tanks, and other facilities at the MCFH.

1.3 Annual Budget and Revenues

In fiscal year (FY)1999, MCFH had an annual budget of \$ 207,086.60 for all direct costs, a 28% decrease from the previous year (MT DFWP 1999). Approximately 70% of annual funding comes from Federal Dingell-Johnson Restoration Grant funds, with the remaining 30% of funding coming from state license revenues. In February of 1989, Jerry Blackard, Deputy Assistant Regional Director for Federal Aid for the USFWS, expressed concerns regarding any TRR-related damages to hatchery structures built with Federal Aid funds. According to Mr. Blackard, there is real potential for MT DFWP to lose Federal Aid funding if MT DFWP loses control of these facilities including the water supply pipeline. This was confirmed by the Assistant Regional Director for Federal Aid (Mary Gessner) in a letter to MT DFWP on June 3, 1998 (See attached letters). Although it is not clear whether TRR operational impacts would constitute a "loss of control", if construction or operation compromised adequate maintenance, caused declines in production, or prevented MT DFWP from making timely repairs to facilities built with Federal Aid monies, including Dingell-Johnson funds, the MT DFWP could lose the source of a substantial portion of their annual funds. Without appropriate mitigation measures in place to ensure such impacts do not occur and funding is not jeopardized, MT DFWP cannot grant an easement.

Fishing in Montana is a common recreational activity with 45% of residents participating in a fishing activity at least once during the year, 27 % of that participation attributable to non-fly fishing activities, and 5% attributable to ice-fishing (Ellard et al. 1999). Montana's reservoirs attract many out of state visitors as well, and surrounding communities benefit from revenues generated by fishing.

2.0 Current Production Level

MCFH produces fry, fingerling, and catchable size fish for reservoir stocking and research activities. Production has increased significantly over the years, and the hatchery is currently capable of producing approximately 70 million fish per year of various sizes and species. Although MCFH produces mainly walleye, bass, and northern pike, they are also called upon to supplement forage fish supplies, cold water species, and other species as required by MT DFWP regional biologists.

Production success is often defined as the number of fish that are reared to a given size by species compared to the number of eggs or fish with which the hatchery begins each production run (Piper et al. 1982). For example, if the hatchery receives 1000 eggs and rears 900 of them to the first stockable size, then they have achieved 90% production success for that stage. For bass species, production success is measured in terms of the number of fry produced per breeding pair. Fish hatcheries are biological systems and production success can be highly variable. Climate, water quality, egg condition, feed quality and supply, and stock density are just a few of the many factors that can affect how well a year class of fish does at a hatchery (Piper et al. 1982). In addition, MCFH has experienced significant growth and construction since its initial dedication as a warm-water hatchery, and has only recently been able to settle into a consistent routine for its annual production cycle. All of these factors contribute to the wide variation in the number of fish and species produced at MCFH from year to year (Table 1).

Table 1 summarizes total production for some of the more commonly reared species at the hatchery, and is included to illustrate the annual variation in numbers and proportion for each species. Table 1 lists continuous records from 1985 through 1999.

Table 1. Summary of annual production of all life stages reared for walleye, northern pike, bass, and chinook salmon based on records from 1985 to 1999, at the Miles City Fish Hatchery, Montana. Blank cells indicate years where a species was not produced.

Year	1985	1986	1987	1988	1989
Fish Species					
Walleye	13,324,192	12,520,974	2,400	32,864,944	41,908,702
Northern pike	3,725,050	7,151,625		2,675,000	171,752
Largemouth bass		85,454	600,638	518,300	300,910
Smallmouth bass		62,185			248,640
Chinook salmon					

Table 1 (cont.).

Year	1990	1991	1992	1993	1994
Fish Species					
Walleye	16,695,174	15,477,669	27,667,916	33,135,282	35,138,544
Northern pike	741,300	712,200	617,320	339,234	
Largemouth bass	179,279	401,182	196,676	246,940	291,255
Smallmouth bass	101,791	175,260	127,133	152,100	79,555
Chinook salmon		61,425		64,315	72,000

Year	1995	1996	1997	1998	1999
Fish Species					
Walleye	29,792,318	36,642,822	59,686,170	36,075,067	50,816,783
Northern pike	200,000	540,000		1,231,800	9,000
Largemouth bass	110,075	9,865	124,300	73,902	134,272
Smallmouth bass	38,984	94,475	63,000	122,976	88,960
Chinook salmon	17,500	40,647	118,200		26,070

Table 1 shows that walleye comprise the bulk of the production at MCFH. Although most walleye are stocked out at the fry stage, MCFH also produces significant numbers of fingerlings, generally defined as fish from 1 to 3 inches long, and advanced fingerlings from year to year. Fingerlings require considerably more resources and care to rear, but their survival can be much higher than fry once stocked (Piper et al. 1982).

MCFH rears some species from post-hatching stages to a variety of stockable sizes. Northern pike, tiger muskie, and channel catfish are sometimes raised to 8 inches or larger before stocking, but the number of fish, age, and size at stocking may vary from year to year depending upon fisheries managers' needs.

Both small and largemouth bass are raised at MCFH in the earthen ponds on site. Since the bass spawn in the ponds, production success is defined as the number of fry produced per breeding pair. The earthen ponds approximate a more natural setting and can be much more difficult to manage and maintain.

3.0 Proposed Baseline and Vibration Studies

MT DFWP proposes on-site, pre-construction studies conducted by a third party, as described in 3.1.2 Impact Studies, to further quantify production by species and to

identify critical existing factors that may affect production levels. Two separate but simultaneous studies will be conducted to obtain baseline data, to quantify current production, and to evaluate potential impacts or lack of impacts related to TRR construction, operations, and maintenance, including catastrophic events. One study would be done at the hatchery level during normal hatchery operations to determine impacts with all other factors involved. The other study would be considered a laboratory study, which would look at the same issues but would eliminate all unknown factors and test only those conditions that would be directly related to railroad activities.

Since hatchery production success depends upon many different factors, these studies will be used to quantify how each factor contributes to production variation. The end result will be a predictive statistical model, based on a multiple regression or principal components analysis, that can assist MT DFWP in assessing whether annual production success meets expected levels or has been compromised by some external influence.

In order to have adequate data for comparison against production during construction and operation, these initial studies should begin early enough to allow completion of two full hatchery cycles before construction begins. Therefore, it is imperative to begin both studies as soon as possible, preferably with the spring 2000 egg collections. MT DFWP stresses that these studies are included to aid in defining and identifying impacts that may occur which could trigger the need for mitigation. The studies themselves are only the first step in the mitigation process, they are not to be misconstrued as mitigation in and of themselves. MT DFWP also recognizes that, with the possible exception of a catastrophic event, the studies may reveal minor or no impacts from TRR, which would require no additional mitigation.

3.1 Study Descriptions

3.1.1 Baseline Study

The baseline study will take place on-site at the MCFH. MT DFWP personnel will continue to run normal hatchery operations. The baseline study will be conducted by a third party, as described in section 3.1.2, and will be intended to mesh seamlessly into the hatchery operations so that study protocols (data collection, measurement methods, causative factor identification, etc.) can eventually be integrated into hatchery operations at the conclusion of the TRRC funded study. The primary goal of the baseline study will be to quantify production at MCFH and identify and quantify any existing factors that affect annual production variation at all phases of the hatchery's cycle. (e.g. egg collection, incubation, hatching, fry survival and maturation, losses due to disease, zooplankton production, etc). Each critical phase of production will be examined separately and as part of the complete production process. At a minimum, the critical phases will include:

- i) Egg viability once they reach the hatchery
- ii) Hatching success
- iii) Fry survival to initial post-hatching size (<1")

- iv) Zooplankton availability and species composition
- v) Survival to first stockable size (1-2")
- vi) Survival to each successive stockable size (1-2" intervals)

At each phase, key factors will be identified that already affect production variation so that, in the event of a loss, these factors can either be ruled out or attributed as part of the loss evaluation process. These factors will be chosen based on existing hatchery management literature, potential for affecting production, available accuracy of measurement, and their ability to be measured over an extended time range since they will need to be monitored consistently throughout the baseline study, during construction, and during operation to be of value. If additional key factors, concerns, and issues are identified during the study, they would be evaluated by the director of the studies, brought to the mitigation committee (see section 4.1) with recommendations, and a decision would be made as to what action should be taken.

The baseline study will focus on walleye, northern pike, and bass (large and smallmouth) since they comprise more than 95% of annual production. However, the study will also evaluate success rates for other regularly produced game fish such as channel catfish, tiger muskie, and rainbow trout. Additional efforts will be necessary to quantify acceptable production levels for infrequently required species (fathead minnow, sturgeon, cisco, etc.). Some of the information on acceptable production levels for infrequently produced species may be available through data exchanges with similar hatcheries throughout the U.S.

As described previously, the end result of these studies will be a statistically-based model that can aid MT DFWP in discerning which factors affect production success variation at the hatchery. It is the intent that the model will not only determine if construction and operation of the TRR have caused impacts but to also assist in identifying the factors and level of impact that the TRR has caused resulting in an adverse affect or reduced production. The model is expected to predict a range of expected production success given the set of factors for a production cycle. It will be an important tool to determine if variation in production is being caused by hatchery operations or construction and operation of the TRR.

The baseline study related to hatchery operations will be performed on-site at MCFH and will be incorporated into the regular operations of the hatchery. Efforts will be made to minimize adjustments in established hatchery protocols or routines so that the study can be continued once construction and operation of the railway has begun. Current hatchery staff should not be expected to perform work related to data gathering and analysis. However, if additional work tasks or responsibilities are required by MT DFWP employees for studies or mitigation related issues, compensation for additional hours, materials, or equipment should be the responsibility of TRRC.

3.1.2 Impact Studies

The original impact study outlined in the State's comments (May 4, 1999 letter from MT DNRC to TRRC) to the Womack study (1999) has been modified to allow it to take place on-site concurrently with normal production. This study will address potential impacts due to vibration, herbicide application, coal dust, derailment/spills, or any other conditions or situations related to TRRC activity. Responsibility for the study design and execution would be transferred to a third party, such as a graduate student or students under the supervision of a local university professor or other researcher, to ensure independence of findings and impartiality as well as to reduce overall costs. A description of the modified impact study is included as Attachment A (Vibration and Impact Studies) at the end of this document.

The results of this study, combined with information about critical factors affecting hatchery production from the baseline study, should assist MT DFWP, TRRC, and the mitigation committee in distinguishing whether impacts can be attributed to TRR operation or to variations in hatchery conditions.

3.2 Study Period

3.2.1 Baseline Study

It is assumed that the baseline study will be initiated during the two years prior to TRRC's anticipated commencement of construction and will not delay that construction. Ideally, this study will not require alteration of hatchery operations, and additional data collection will be incorporated into the day to day routine. Once started, data collection will be continued through the entire construction period and at least two years into full operation to develop a complete record of changes in circumstances and responses at the hatchery level. Thus, the baseline study and data gathering activities to document changes will span, at a minimum, a six year period. Detailed record keeping will also ensure that impacts will be detected as soon as possible, and that any losses will be kept to a minimum by timely response. Given that construction is slated to begin within the next two to three years, the baseline study should begin this spring (2000). Because currency and continuity of data is important, if the study begins and then TRRC is unable to begin construction as scheduled, MT DFWP assumes that the baseline study will be funded continuously until two years after operation has begun.

3.2.2 Impact Studies

The vibration and impact studies should also take place before construction begins to avoid any confounding effect from TRRC construction activities or operations. However, since these experiments will be highly controlled and more laboratory based, there is no need for these to continue into the construction period. It is anticipated that two to three years will be required for design, set-up, and data gathering for these studies. Additional time may be required for data analysis, but the goal is to have the final results in-hand before construction is complete.

Therefore, it is imperative to begin recruiting a cooperating university and screening prospective students as soon as possible, preferably before the end of April 2000.

4.0 Mitigation of Potential Losses

Acceptable production levels will be established via an examination of historical performance, the results of the baseline studies, and the final design of the statistical model. MT DFWP will identify a range of unacceptable impacts based on comparing current production with the predicted range of production levels from the statistical model developed as part of the proposed studies. The exact amount of reduction in production success required to trigger mitigation will be determined by the mitigation committee (described in 4.1 below), after the baseline studies are completed and the statistical model is developed and tested. This document includes a preliminary set of mitigations outlining how TRRC will compensate the state for losses.

4.1 Mitigation Committee

A five-person mitigation committee will be assembled with # 1 and #3 (identified below) selected by MT DFWP, #2 selected by TRR and #4 and #5 selected by either the Governor's office or a designee of that office. Members #4 and #5 will be compensated for transportation, lodging, and meals related to the committee activities, by TRRC.

1. MT DFWP representative (as a representative of the director and fisheries management at a state wide level).
2. TRRC representative (to represent the interest of TRRC)
3. MCFH (MT DFWP) representative. (A hatchery employee would have knowledge about hatchery operations, fish culture, fish biology, and fish production that would be critical to any decision)
4. University professor with regional experience in fisheries, fish culture, or fish hatchery management, (selected as described above *)
5. Impartial member(selected as described above*), not associated with MT DFWP or TRRC, or anyone who would have a conflict of interest.

This committee will be the final clearing house for any study design, analysis and mitigation decisions regarding MCFH and is separate from the Railroad Task Force described in TRRIII. In order to participate in the study design and ensure that the full two years of pre-construction data is collected, the committee needs to be appointed and activated before the spring 2000 hatchery season commences. It is MT DFWP's position that this mitigation plan should be clear and concise enough to allow most mitigation to proceed without the convening of a committee, but if there is a disagreement as to the magnitude of impact or necessary mitigation, then this committee will have binding jurisdiction. Decisions will be based on a simple majority rule. As stated before, MCFH

produces a time-sensitive resource, and it is in the best interest of MT DFWP and TRRC that all impacts be addressed as quickly as possible to reduce overall cost and losses. When more than one mitigation option is listed, the mitigation committee will decide which best fits the needs and capacities for mitigating any loss or adverse effect.

In addition to losses due to chronic impacts from construction or operation, there may also be one-time or short-term impacts that will need to be addressed immediately such as interruption of water supply, chemical spills, derailments, herbicide contamination, or losses due to a fire attributable to the TRR. It is expected that these short-term impacts will be resolved and mitigated as quickly as possible to avoid moving on to a higher level of loss as described below.

4.2 Level 1 Losses

Level 1 losses may be correctable within a hatchery production cycle, and are the smallest level of impact that will require mitigation. It is assumed that all losses described (Level 1, 2, or 3) have been determined by the mitigation committee, after elimination of other possible factors, to be the result of TRR construction or operations. TRRC would not be responsible for mitigating or compensating losses resulting from other factors. Level 1 losses will be defined as a minimal reduction in the expected level of production success for one species at a given critical phase as predicted by the statistical model. For example, if the MCFH model predicts that walleye fingerling production should fall somewhere from 34% to 40%, and during the first year of TRR operation that hatchery production drops slightly below 34% (as defined and determined by the mitigation committee), then MT DFWP will request proportionate mitigation from TRRC for a Level 1 loss. Acceptable mitigations for a Level 1 loss may include:

- Compensation to purchase fish from other sources chosen by MT DFWP, if they are available;
- Compensation to expand production of current stocks to replace the fish prior to stocking during the same production year (if additional fish are available on-site);
- Replacement or restructuring of facilities, to correct the cause of the loss if it can be identified;
- Adequate funding to expand production for the next production year to make up for the loss. This option may require rearing fish to a larger size to actually "replace" fry or fingerlings that would have been residing and maturing in a reservoir in the interim.

It should be noted that the cost per fish varies by age, size, and species; and replacement values will be calculated for each attributable loss to reflect that variance.

4.3 Level 2 Losses

Level 2 losses may be the result of chronic unforeseen impacts, and the corresponding level of mitigation will include an examination of the causes and perhaps require

modification to the TRR, its operation, or hatchery structures. Level 2 losses will probably not be correctable within the same hatchery production cycle, and are a more substantial level of impact that will require future preventative actions as well as mitigation. Barring the identification of a chronic, unforeseen impact, Level 2 losses should not affect MCFH's capability to produce fish in subsequent years or to accommodate these losses over two or more production years. Level 2 losses would be defined as a substantial reduction in the expected level of production success for one species, or a Level 1 decrease for two or more species at a given critical phase. Acceptable mitigations for a Level 2 loss may include any of the options outlined for Level 1 losses, and, at the discretion of the mitigation committee, these additional measures:

- Detailed examination of the cause or events that led to the loss including an inventory of preventative measures that will be implemented to avoid future losses;
- Assessment of the value of the fish stocks lost or damaged, and replacement funds to compensate MCFH for increasing production or otherwise replacing the fish over the next year(s);
- Evaluation of impacts to destination reservoirs and possible losses to recreational revenues due to gaps in year classes of game fish. Compensation could be accomplished through an increase in production or purchase of fish from outside sources to mitigate for lost year classes of fish;
- Modification (repairs, replacement, or relocation) of hatchery facilities and necessary adaptation of TRRR operations to prevent additional losses; or,
- Any measure that the five member mitigation committee would deem suitable to mitigate for the losses.

4.4 Level 3 Losses

Level 3 losses constitute significant reductions in the expected level of production success for one species, moderate (Level 2) reductions in the expected level of production success for two or more species, or a partial or complete failure of the hatchery facility either for one or more species, a specific structure at the hatchery (e.g. one or more of the earthen ponds, raceways), or for a significant portion of a production cycle. If a Level 3 loss occurs, the mitigation committee will assess whether it was due to a catastrophic event, or to chronic conditions that are likely to impede future hatchery functions. Even a partial hatchery failure could have devastating impacts to the state's warm-water fishery, and it is imperative that rapid action be available to compensate the state and reestablish production as soon as possible to avoid even larger impacts and expenses. It is unlikely that a Level 3 loss could be completely mitigated within a single production cycle; therefore, TRRC will need to address long-term impacts to the state's fishery as part of this level of mitigation. Acceptable mitigations for a Level 3 loss may include any of the options outlined in Level 1 or 2 losses, and:

- Immediate (within 10 days) repair to damaged structures and relocation and/or replacement of any structures found to be contaminated or otherwise no longer useable because of TRR operations;
- Immediate compensation for lost fish production in the form of a payment that will cover increased production, including all associated direct and indirect costs.
- Due to Unknown Conditions and causes for a mitigatable event under Level III, the mitigation committee would need to look at all options and or combination of options (whether identified in this document or not) that would minimize losses and maximize mitigation efforts.
- Development of additional structures, up to and including a complete new hatchery on an alternative site chosen by MT DFWP, to accommodate lower levels of production in existing facilities; and
- It would be the responsibility of TRRC (through the mitigation committee), to design studies to determine the exact cause(s) of any railroad related loss, plan a mitigation strategy, and, if necessary, provide additional man power (specialists, third party consultants and temporary staffing), equipment, and facilities to accomplish this mitigation.

5.0 Mitigation Compensation

The state will require a funding mechanism for year-to-year compensation needs to be established by TRRC and administered by the five-person mitigation committee. When a mitigative event occurs attributable to TRRC, the committee will meet and decide upon appropriate compensation. At that time, MT DFWP will be authorized to draw upon the fund and pursue corrective actions or to be reimbursed from the fund for mitigation actions already taken. The fund can be in the form of a security bond, irrevocable letter of credit, insurance policy with the state listed as an additionally insured, or any other commonly used instrument or combination of instruments, as long as it can accomplish the following mitigation needs:

- The fund has to be readily accessible to MT DFWP, once the committee determines by majority vote a mitigative event occurs, to minimize delay in applying mitigation and to limit impacts that will worsen with delay. MT DFWP costs for using state funds to initiate mitigation will also be reimbursable from the fund, if the committee subsequently determines a mitigative event has occurred.
- The fund must have the flexibility to provide for both partial and total disbursement. Partial disbursement (e.g. a portion of a security bond) may be necessary if required for such things as purchasing replacement stock to compensate for TRR related production losses. Total reimbursement must be available for the unlikely, but possible, loss of the entire hatchery production and/or facilities because of a TRR caused catastrophic event.
- Because mitigation from the fund is not expected to occur until construction and operation begins, the committee will be appointed and meet during the baseline study period to establish the total fund requirement prior to the onset of construction.

- TRRC must meet the mitigation compensation requirements and any subsequent mitigation requirements established by the mitigation committee as a condition of the easement across the MCFH.

6.0 References Cited

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ATTACHMENT A

**VIBRATION AND IMPACT STUDIES
PROPOSED TONGUE RIVER RAILROAD EASEMENT
MILES CITY FISH HATCHERY**

Vibration and Impact Studies

Suggested Study Plan to Evaluate Potential Biological Impacts of Tongue River Railroad to the Miles City Fish Hatchery

Background

Tongue River Railroad Company (TRRC) is proposing to construct and operate a 120 mile railroad (TRR) that links into the existing Burlington Northern Santa Fe (BNSF) railroad at Miles City and extends in a southerly direction along the Tongue River to Decker, Montana. The primary purpose of the link is to transport coal from the Tongue River coal region to electric power plants in the Midwest (Radian, 1998). With full development of mines in this area this will result in at least 12 train movements per day on the rail line (6 round trip coal trains). Every train will have approximately 113 coal cars that each carry 117 tons of coal (13,200 tons per train) (Radian, 1998)

The proposed railroad will pass along the east side of the Miles City Fish Hatchery (MCFH). This hatchery is owned and operated by Montana Department of Fish, Wildlife and Parks (MT DFWP); hence the state of Montana must grant TRRC an easement to cross state lands. As a condition for granting an easement, MT DFWP will require studies to fully identify impacts of the project, and will require full mitigation of these impacts.

TRRC developed a study to assess the potential vibration effects of the TRR on hatchery operations (Womack and Associates- WAI - 1998). This study called for geotechnical analysis of soil types, movement and analysis of vibration, soil chemistry analysis, and evaluation of the potential effects of these factors on fish production. WAI conducted a literature review and consulted with fisheries experts regarding expected impacts. WAI also predicted vibration levels on-site and compared these with "threshold values" associated with adverse effects to fish. This report was received by the state in March of 1999.

MT DFWP does not believe this study addressed all the potential project-related impacts (Bertellotti 1998, Peterson 1999). For example, WAI's literature review contained studies that address avoidance responses of fish to vibrations, rather than the physiological effects on sensitive life stages and spawning and feeding behavior (Popper and Carlson 1998). This is because there is little, if any, existing information on vibration effects to fish in captive (closed system culture) situations where the fish are unable to avoid these conditions. In addition, studies from this review, are not predictive of impacts to MCFH because of differences in species, physical environment, and processes associated with hatchery operations. WAI's study did not address vibration effects to egg/fry survival, forage species (plankton), feeding behavior, fish physiology, cumulative effects of elevated train traffic (Popper, personal communication, 1999); or other potential impacts resulting from herbicide use, coal dust, interruption of water supplies, derailments, or other detrimental conditions that may occur. The lack of biological information beyond anecdotal references weakens the WAI study's applicability to the MCFH situation, and was the impetus for the inclusion of this study request.

As a condition of granting TRRC an easement, considerable additional information must be provided. This information is outlined in the study design below.

Justification

This scope of work suggests more detailed studies to determine potential acute, chronic, and sub-lethal effects of TRR operations on MCFH. Vibration studies pose the greatest challenge because of: 1) a lack of data in the literature, 2) logistics and specialized equipment needed to simulate vibrations *in situ* similar to any expected from the TRR and 3) the complexities involving behavioral studies of fish. By comparison, quantifying the effects of herbicides, incidental coal dust, water shortages, and catastrophic events are straightforward because they draw on a more extensive body of existing data that has direct implications for fish health and survival, and involves calculations of risk assessment using established formulas.

MT DFWP proposes that these studies be conducted by an independent third party, such as one or more graduate student projects through a local university or college or other researchers. The final study plan and data analysis would be performed under the supervision of one or more fisheries professors with expertise in hatchery management and mitigation requirements, fisheries professionals with comparable hatchery background, and a statistician who could evaluate the study design and aid in the data analysis. By subjecting the study design process to outside scrutiny, MT DFWP hopes to ensure that it will be statistically sound, and will provide much-needed information for other fisheries professionals.

Studies

General descriptions and preliminary objectives for each aspect of the proposed studies are provided below. The final study design and scope will be developed by the independent researchers. These studies should cover impacts due to :

- Vibrational and sound effects,
- Herbicide applications,
- Incidental exposure to coal dust, and
- Derailment events and subsequent spills.

Vibrational / Sound Effects.

Most fish species have well developed sensory systems for detecting vibrational signals (Parker 1976; Tavalga 1976). The octavolateralis system (ear and lateral line) uses mechanosensory hair cells as the transducing structure for signal detection (Popper and Carlson 1998). Some species possess ears that detect sound frequencies from below 50 Hz to over 2,000 Hz.

Studies that determine acoustic effects on fish have focused on behavioral responses that affect behavior and movement to help fish avoid potentially dangerous environments such as hydroelectric dams (Popper and Carlson 1998). However, there is little information on immediate and long term effects where fish are unable to escape from low frequency vibrations such as those from a railroad (A. Popper, personal communication, 1999).

A comprehensive study is needed to determine vibration effects of the TRR to MCFH fish. Species of primary concern to hatchery operations include walleye, largemouth bass, smallmouth bass, and northern pike. All life stages of these species will need to be assessed (egg, larval fish, fry, and fingerling). In addition, vibration effects on production of natural forage is desired because plankton are the sole food source for most hatchery fish.

Questions to be addressed in vibration studies should include:

- What is the effect of increased exposure due to TRR on MCFH fish?
- Are there species-specific differences in response (behavior, feeding, spawning, egg survival, fry survival)?
- What will be the effect to hatchery production due to increased railroad traffic?
- What are cumulative effects to spawning success of brood stock (where applicable)?
- How does vibration affect egg hatching success, feeding, growth, behavior, and health?
- How will production of plankton communities be affected?

Objective

The objective of the vibration/sound studies is to determine how increased vibration due to TRR will affect the productivity and quality of fish produced at MCFH. Emphasis will be placed on quantifying the cumulative effects to: 1) spawning behavior of brood stock, 2) survival of egg and fry, 3) feeding behavior of fry and fingerlings, and 4) survival and availability of forage (phytoplankton, zooplankton, and macroinvertebrate communities).

Description

Laboratory experiments should be conducted on-site that simulate vibration frequencies and duration of TRRC proposed operations. These tests would evaluate impacts to critical life stages (egg development, egg and fry) of target fish species as well as phytoplankton and zooplankton populations. The design of the experiments and number of replicates are directly related to the amount of changes that MCFH finds acceptable. For example, detection levels for small differences (e.g., 10%) require a larger number of replicates than that for large differences (e.g., 30%).

Replicates and controls should be included for each species and life stage. The density, water supply, feed ration, and other regular MCFH conditions would need to be mimicked as closely as possible. If there is large variation in the amount of vibration transmitted to various parts of the hatchery, expanding the study to a blocked design, where levels of vibration will define the blocks, may be necessary.

Data should be analyzed to determine the pattern of survival, production, and growth data, and adult fertility/fecundity for species like bass, where adult fish spawn directly in the hatchery ponds, and whether there are statistically significant differences due to the vibration exposure. Experts in fish physiology and statistics should be consulted as part of the data analysis.

Suggested Tasks

Literature Review

- Detection levels of target species

Lab Tests

- Target species
- Life stages
- Duration/level of exposure
- Physiological assessment

Data analysis***Herbicide Application***

As a part of railway maintenance, TRRC may use herbicides to control unwanted vegetation in and around the MCFH. Herbicides work in several different ways (Pike and Hager, circa 1998). Of obvious concern to MCFH is the biological damage that can be inflicted to phytoplankton and periphyton in its forage ponds. Since April 1983, MCFH has used Branum Lake as a forage fish pond. Hatchery operations call for the pond to be flooded early in the year (April) to establish plankton populations that will serve as forage for hatchery fry and fingerlings. Herbicide use may pose a health threat for the phytoplankton that support zooplankton communities used as forage for fish. The implications for the feeding success during the first weeks of life for fish may be critical for survival (DeVries et al. 1998). There is also concern for determining the effects to fish from toxicity levels which may result in stress or mortality. Finally, there should be a determination of the risk of bio-accumulation in the food chain because fish are stocked in reservoirs and lakes that are exploited by predators (other fish, eagles, otters, etc.) and anglers who may consume their catch.

Specific questions that herbicide studies should address include:

- What types of herbicides are to be used by TRR, in what concentration, how often, and in what mode of application?
- What is the potential for contamination into forage and fish ponds?
- What effect will herbicide runoff have on plankton and macroinvertebrate communities?
- What is the effect of herbicide runoff to fish?

Information produced from herbicide studies should include:

- A list of herbicides TRR will use,
- Descriptions of mode of application, concentrations, and time schedule,
- Determination of runoff and concentration potential to ponds,
- Results of bioassay tests that determine lethal concentrations to fish, plankton, and macroinvertebrates, and
- EPA studies on biological effects for each herbicide,

Objectives

The objectives of herbicide studies should be to determine how TRR's application of these chemicals may affect plankton populations and fish health in MCFH ponds.

Description

An herbicide assessment related to MCFH operations is important in determining whether alternatives to vegetation control are warranted. This assessment should involve determining the

potential for herbicide contamination of adjacent forage ponds, i.e., surface runoff, a review of EPA publications on chemical effects to target aquatic organisms (which may include surrogates), and bioassay tests (if necessary) that quantify acute toxicity, chronic toxicity, sublethal effects, and bioaccumulation potential.

A review of the literature on herbicides may provide guidelines to protect fish, zooplankton, and phytoplankton (Folmar and others 1979; Goldsborough and Brown 1988; Servizi and others 1987). Also, the effects of specific herbicides on hatchery species and life stages may be obtained with consultation with the EPA's AQUatic Toxicity Information REtrieval database (AQUIRE). This data base includes information on 6000 chemical substances in 140,000 records. Information to be retrieved may include:

- LC-50's (concentration for 50% mortality),
- LD50 (median lethal dose),
- NR-LETH (concentration for 100% mortality),
- LT50 (mean survival time), and
- BCF (bioconcentration factor).

Species that are not listed in the AQUIRE database would either need to use a surrogate species or bioassay experiments. The experimental design should be similar to that for the vibration experiments, except that concentrations would vary instead of train traffic and additional blocks may be needed to find lethal doses.

Suggested Tasks

- Literature review of herbicides used by TRR
- AQUIRE database retrieval
- Bioassays for unlisted species
- Data analysis

Incidental Coal Dust

The increased trafficking of coal via the TRR rail link may result in significant additions of incidental coal dust to MCFH and its water supply. Although coal is relatively inert in solution, it may pose biological problems in mechanistic ways such as interfering with photosynthetic processes within forage-producing ponds or contributing to suspended sediments that smother fish eggs. Information is needed to determine the cumulative effects of incidental coal dust to hatchery fish.

Specific questions incidental coal dust studies should address include:

- What is the potential for contamination of water supply or ponds from coal dust?
- What concentrations of coal dust in water supply will pose a threat to egg and fry development?
- What is the effect of coal dust to the development of plankton communities in the forage ponds, i.e., does coal dust interfere with photosynthesis?
- What are the effects to MCFH fish at various life stages?

Information needed in order to conduct this study include:

- Accumulation and distribution of incidental coal dust generated by TRR operations as it affects the water supply and ponds of MCFH,
- A review of related studies that describe methodology and provide results,
- Results of bioassays that test the effects of coal dust to fish, plankton, and macroinvertebrates.

Objective

The objective of coal dust studies should be to determine how incidental coal dust from TRR operations will affect production, survival, and condition of plankton, macroinvertebrate, and fish raised in MCFH ponds.

Description

A literature review is necessary to determine effects of coal dust to fish. The Chemical Information Systems (CIS) company specializes in such searches and may be used to retrieve information from the Structural and Nomenclature Search System (SANSS) database. Modeling to simulate conditions around MCFH should be conducted to determine the distribution and pattern of incidental coal dust as well as the potential for contamination.

Suggested Tasks

Literature / SANSS review

Determination of the levels of incidental coal dust (modeling)

Bioassays (if necessary)

Data analysis

Derailment events

Catastrophic events of concern to MT DFWP include train derailments within the vicinity of MCFH and anywhere upstream where the hatchery's secondary water supply from the Tongue River may be contaminated with potentially hazardous chemicals and materials. Although the risk of derailment associated with a single trip may be minuscule, over the course of a year there can be as many as 4,400 train trips that increase the likelihood. This risk also increases as the number of trains and the loads increase throughout the life span of the railroad.

Derailment may result in a spill of petrochemicals, such as diesel fuel and lubricants, which are harmful to aquatic life and pose a threat to the hatchery operations. Current estimates have been provided for defined sections of the railroad that are of interest to TRRC (Radian, 1998). However, there should be an assessment of this event as it may affect MCFH. This may result in recommendations for emergency spill response either on-site or at MCFH's intake on the Tongue River.

Questions that should be addressed in derailment studies include:

- What is the risk of derailment, spillage, and contamination associated with TRR operations as it affects MCFH?

- What specific petrochemicals does the railroad carry?
- Are there specific actions that can contain spills and reduce the risk to the hatchery?

Information needed for this study include:

- Estimate of derailments per train miles for TRR from MCFH and upstream,
- Bioassay results for target species and life stages for TRR petrochemicals, and
- Review of containment procedures.

Objective

The objective of an assessment of derailment events should be to determine the probability, extent of spill, and biological effects associated with TRR operations as it affects MCFH.

Description

A review of the literature would provide supporting materials for assessing the biological risk to hatchery fish. Also, the EPA's Oil and Hazardous Materials Technical Assistance Data System (OHMTADS) database would provide concentrations that are detrimental to the four targeted species for the major petrochemicals associated with the TRR. If a particular hatchery species is not listed, a surrogate species will be used instead.

Suggested Tasks

Literature review on biological effects of petrochemicals & containment techniques

OHMTADS database

Risk assessment

Reference List

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Womack and Associates, Inc. 1998. Miles City warm water fish hatchery investigation to determine potential effects of vibration from the construction and operation of the Tongue River Railroad. Womack and Associates, Inc. May.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

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JUN 08 1998

IN REPLY REFER TO:

FWS/R6/FA
MT 275

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228-1807

FISH, WILDLIFE, & PARKS
DIRECTOR'S OFFICE

JUN 03 1998

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JUN 09 1998

FISHERIES DIV.
DEPT. FISH, WILDLIFE & PARKS

Bobbi Keeler, FA Coordinator
Montana Fish, Wildlife and Parks
1420 East 6th Avenue
Helena, Montana 59620

Dear Bobbi:

I received your letter of May 20, 1998, requesting our opinion on requirements and obligations to Federal Aid relative to granting an easement across the Miles City Hatchery property to Tongue River Railroad company.

This situation was presented and briefly discussed during our March 1998 meeting with you on a variety of issues. We did check with our realty folks concerning restrictions on the deed to the property. Apparently, after the property was turned over to Fish, Wildlife and Parks, they no longer kept a file or any records on the Miles City parcel. The county records would need to be reviewed to determine if there are any restrictions.

Your questions and our opinions are as follows:

What issues do we need to understand when granting an easement?
What do we need to do to protect the obligations of the Federal Aid program?

Federal Aid funds were not used to acquire any parcel of land at the Miles City hatchery. If this would have been the case, a number of Federal Aid requirements would apply--compliance, etc. However, Federal Aid funds were used for various capital developments. Chapter 10 (Facilities Construction), Section 10.7 (A) states that facilities constructed or improved with Federal Aid funds must continue to serve the purpose for which constructed. Accordingly, the purpose of these developments cannot be compromised or impacted by the easement without just compensation to the DJ program or otherwise mitigated to ensure the use and purpose is maintained. I suggest that you identify all the developments funded with Federal Aid and determine which, if any, could be affected by the easement. Routing the easement to avoid Federal Aid facilities is preferable.

If we grant an easement across FWP's hatchery property and there is a mitigation package associated with the assessment, what requirements do we have with respect to Federal Aid?

FWP needs to identify the Federal Aid assets involved before this can be answered. Hopefully, the easement could be routed to avoid impacting ponds, nursery facilities, pumps and water distribution systems, infrastructures etc. that have had Federal Aid funding. If so, the only mitigation needed would be for lands that may have some incidental wildlife value. The State would have to receive fair market value for the easement or the mitigation package would have to be of the same or higher value. If Federal Aid facilities are physically altered or the functionality impaired, the mitigation package would need to include measures to restore the function and purpose of the facility or structure. Otherwise, compensation would be required. It is assumed that the Federal Aid facilities are directly (e.g. rearing ponds) or indirectly (e.g. housing) necessary to sustain the production capabilities of the hatchery. Any impacts to existing facilities, without replacement, would result in decreased production or, perhaps, require significant changes in operations to maintain fish production levels. Maintaining capabilities to operate the hatchery in an effective and efficient manner must be critically considered in a mitigation package and the way in which the easement is written. Also, in this regards, the indirect impacts of the easement on facilities (e.g. vibration, runoff from right-of-way, etc.) need to be fully covered in the easement document.

If resulting operations, construction, or presence of the railroad impacts the operations at the Miles City Hatchery, what are our (FWP) obligations as an agency and/or liabilities under the Federal Aid Program?

There are a number of scenarios. The basic obligations and/or liabilities are addressed in the first two questions. If O&M costs are expected to rise as a result of the easement this should be included as part of the mitigation package. It is critical that the potential indirect impacts (vibration etc.) be fully considered and mitigation for these impacts be included as part of the easement agreement. Federal Aid could not participate in additional O&M costs resulting from any problems associated with the easement or use of the right-of-way.

The degree of impact to operations would be a concern if Federal Aid funds continue to be used to operate and maintain the hatchery. The facility must continue to remain functional, meet production goals, and be cost effective.

Is there any additional advice you would give to our agency as we face this situation?

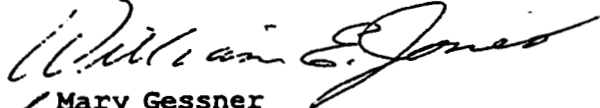
Perhaps of most concern are impacts that are not fully anticipated. Effects of long term vibration on pipelines, local geology, water quality (from runoff-herbicides etc.) that could impact the future operations of the hatchery or result in significant costs to correct. This should be fully covered in the easement document to ensure FWP is not responsible for the additional costs. Would subtle vibration affect egg vitality or other critical life stage?

Bobbi Keeler, FA Coordinator

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Ideally, the railroad will use another route that would avoid the hatchery property. In our opinion, a railroad through a hatchery is not a compatible use, and more so if use of the track is high which is typical for "coal" trains. If granting an easement is unavoidable, the easement route should be one that minimizes physical damages to the property and results in little or no change in the functioning of the facility.

Sincerely,



6 Mary Gessner
Assistant Regional Director
Federal Aid

cc: Pat Graham, Director

FFB 27 1989

FEB 22 1989

CENTRALIZED

FA/MT
15
MAILSTOP 60152

James Flynn, Director
Montana Department of Fish,
Wildlife and Parks
1420 East 6th Avenue
Helena, Montana 59620

Dear Jim:

In response to the request for an easement of the Tongue River Railroad to pass through the Miles City Fish Hatchery site, we recommend that you contact the Montana State office of the Bureau of Land Management about this proposal since the patent for the land was issued to your Department by the Bureau.

The new facilities developed with Federal Aid funds must continue to serve the intended purposes of the project. Otherwise, a loss of control would constitute a diversion of Federal Aid funds. Since the Environmental Impact Statement that was prepared earlier did not cover the new facilities, the impact of the proposed Tongue River Railroad would have to be covered in a supplement.

We have serious concerns about the potential adverse impacts that vibrations from the railroad cars could cause to the facilities and structures on the Hatchery grounds. Severe damage to facilities occurred on the Hotchkiss National Fish Hatchery in Colorado from vibrations caused by trains hauling coal adjacent to the hatchery. Similar structural damages can result from the proposed railroad right-of-way at the Miles City Fish Hatchery. Even if the railroad easement does not cross the hatchery property, it will cross the newly installed water supply pipeline from the Yellowstone River. In addition, data are available that demonstrate that various factors, such as severe vibrations, can stress fish easily. Such stress could affect reproduction of the broodstock and growth of the juvenile fish.

Please contact us if we can be of further assistance on this matter.

Sincerely,

/s/ Jerry J. Blackard

Jerry J. Blackard
Deputy Assistant Regional Director
For Federal Aid
Fisheries and Federal Aid

cc: Bobbi Balaz



MARC RACICOT, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

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P.O. BOX 201601
HELENA, MONTANA 59620-1601

April 5, 1994

BC: Janet Cawlfild

Robert E. Ochsner, Manager
Engineering and Environmental Affairs
MERIDIAN MINERALS COMPANY
P. O. Box 776
1504 4th Street West
Roundup, MT 59072

RE: Applications for Easement
Proposed Bull Mountains Mine No. 1 Rail Spur

Dear Mr. Ochsner:

Subsequent to our meeting in January, the department has reviewed its earlier recommendations and will agree to make some of the changes as requested. Enclosed for your review is a copy of the new proposed Land Board Agenda attachment. This agenda item has yet to be reviewed by staff legal counsel or the Commissioner and therefore may be subject to some change.

Easement Authority - There has been no change in legal opinion from our staff attorney as to this matter.

Duration & Date of Issue - It has been brought to our attention that further environmental review would be required before we could consider granting your request of issuing easements in segments. The EIS and our subsequent analysis which teared off of that document took into account only the total line. Easements issued incrementally which would facilitate the interim loadouts you indicated would then be constructed has never been reviewed. Therefore, we must deny your request to recommend the easements be issued incrementally in segments.

Compensation - A review of property transfers to you for the railroad indicates that the \$400 is the going rate being paid to other land owners for this purpose. While you are acquiring fee title to the lands, we have found instances where the land will revert to the seller should the line be abandoned or cease to be used for the rail road. Also, agreements for fencing, gates, stockpasses and crossings are being made in addition to the dollars being paid. The department has therefore decided not to change its recommendation on the compensation. Settlement with

our surface lessee(s) is a separate issue that you will have to deal with as required by law.

As to the CRP contracts, the department's recommendation will also stay the same. The department feels the contracts should be retained until the land is actually disturbed. At that time, the department will ask for compensation equal to 100% of the remaining amount of payments under the contract. In addition Meridian would be responsible for any and all paybacks, including penalties and interests that may be levied as a result of the cancellation or modification of the CRP contracts.

Environmental Analysis & Other Issues - The department will agree to change its recommendation regarding firebreaks and fire patrols. In place of this, a recommendation that the easement contain stipulations which reference your responsibilities as cited in current law &/or rule.

As to the bridge in Tract #2 - S $\frac{1}{2}$ Section 16, T5N-R25E, Musselshell County, the department will agree to amend its recommendation to allow the placement of a water culvert and a livestock underpass culvert. This recommendation will also contain a requirement that current permits from other agencies such as the Army Corps of Engineers must be secured for this activity.

Because the proposed line will not effect any existing water source on the state lands in Tract #4 - W $\frac{1}{2}$ Section 32, T6N-R26E, Musselshell County, the department will remove its recommendation that you be required to provide a reliable water source. It is felt that the discussion and settlement of this issue should be part of your settlement with our lessee.

The department will not be making any change in its recommendation that a full reclamation plan be developed and an up-front bond be required to insure reclamation in the event the line is ever abandoned or ceases to be used. The whole reason for the bond is to insure that funds are available to the state to do the reclamation in the event Meridian or any other subsequent owner of the line for some reason does not comply with the reclamation stipulation.

We want to set a bond that is reasonable given the amount of materials and disturbance that is anticipated. Therefore, we are asking that you provide us with a detailed construction plan and cost estimate for the line as proposed through the state lands. If similar, plans and estimates which have probably already been prepared by your company or your contractor for the three to four miles of line that you have indicated is ready for construction might be used as a base.

We have set your easement requests for presentation to the Board at their regular meeting on Monday, April 18, 1994. As previous-

Robert Ochsner
April 5, 1994
Page 3

ly notified, these meetings are open to the public. If Meridian wishes to address the Board regarding any of these stipulations or other issues related to your easement request, you should notify Janet Cawlfeld, the Board's secretary by noon Friday, April 15. If there is some reason that you want them withdrawn from the agenda, please contact Janet or me immediately.

Sincerely,



Marylee Norris, Supervisor
Special Uses Section
Surface Management Bureau
Lands Division

Enclosures

c: Bud Clinch, Commissioner
Jeff Hagener, Administrator, Lands Division
Kevin Chappell, Chief, Surface Management Division
Don Kendall, Area Manager, Southern Land Office - Billings
John North, Chief, Staff Legal Counsel
Greg Hallsten, Environmental Coordinator

MERIDIAN MINERALS R/W
Land Board Agenda Attachment

Meridian Minerals wishes to secure easements for the construction, operation, maintenance and use of a rail spur to facilitate the transportation of coal from their Bull Mountains Mine No. 1. During review of their applications, the Department identified certain issues which to date have yet to be fully resolved with Meridian.

EASEMENT AUTHORITY

The first issue is whether or not the Board even has authority to grant this easement request. John North, Chief Legal Counsel, recently investigated the easement authority of the Board and issued an opinion that the Board has limited authority when it comes to granting easements for private purposes. Private rail road purposes are not included in the allowable private uses.

Meridian Minerals successfully argued that it was a private rather than a public rail before the Interstate Commerce Commission (ICC). In a December 18, 1992 decision, the Interstate Commerce Commission (ICC) ruled that this particular rail line is a private carrier, not a common carrier (see copy attached). Because of this, the Department raised the question as to whether or not this meant the easement was for a "private" rather than "public" purpose.

The decision by staff legal counsel is based on the premise that as a private carrier, Meridian may not have eminent domain powers. Settlement of this dispute would come about through successful court action by Meridian.

If the Board decides that it does have authority to issue easements for this purpose, then the following issues arise:

DURATION & DATE OF ISSUE

The use of the rail spur, as currently approved by the ICC, is directly tied to the mine project. As such, the rail spur was also treated as an ancillary facility in the EIS. The Department feels an easement in perpetuity is therefore not necessary. An easement restricted and limited to a specific amount of time, the duration of which could coincide with the life of the mine, seems more appropriate.

In a letter to the Department dated January 27, 1993, Meridian argues that because it controls 1/5th of the coal reserves in the Bull Mountains coal field area, the spur could be used in connec-

tion with its other reserves outside of the immediate project area. Meridian considers the rail spur to be a permanent appurtenance. The Department argues that this is not consistent with the intended purpose as applied for and/or that was reviewed and contained in the environmental impact statement. A provision for review and possible extension of the easement could be considered if the Board so chooses.

Presently, the Department does not have damages settlement statements between Meridian and two of the four surface lessees affected by the proposed easement. These lessees also hold private lands adjoining the state lands and are among some of the private land owners who are not willing to grant easements or sell their lands to Meridian for this rail spur. Meridian has indicated to the Department that it intends to pursue condemnation action against the remaining hold out land owners.

As mentioned above, the Department is not convinced Meridian will be successful in this action and therefore does not feel it would be in the State's best interest to unnecessarily encumber its lands by issuing easements until such time as this matter has been settled through the courts.

If the Board approves the easement request, the Department feels the easements should not be issued until Meridian successfully acquires all of the other lands necessary for the rail corridor. Meridian should be required to provide the Department proof of said acquisitions prior to issuance of any easement or other authorization of entry to begin any construction.

COMPENSATION

This item is related to two issues regarding compensation due the state. First, the majority of the state school trust lands which this easement would affect are enrolled in the Federal Conservation Reserve Program (CRP). If the easement is issued, the affected lands will have to be withdrawn from the existing CRP contracts and funds, possibly plus penalties and interests, will have to be repaid (reference ASCS memo attached). In addition the Department and its lessees will be losing revenues that they otherwise would have received had the contracts not been terminated. The Department feels Meridian should be required to pay all refunds, penalties, interest or damages levied by the U.S. Government as a result of the cancellation or modification of the CRP contracts. In addition Meridian should be required to pay, in advance, in one lump sum all future revenues lost as a result of any CRP contract cancellation or modification.

The second matter is the valuation of the easement itself and whether the compensation for the easement should be based on comparable sales of lands in the area or based on comparable

sales of lands in the area that have sold specifically for the purpose of the rail spur.

An investigation into sales in the area on lands similar to those of the state's tracts, indicated lands for grazing purposes are selling for around \$60-150/acre and CRP lands are selling for around \$165-280/acre. However, Meridian is acquiring lands specifically for the purpose of its rail spur and is paying \$400/acre regardless of whether it is grazing or CRP lands. It is the opinion of the Department and its staff appraiser that Meridian has in effect established a separate market for the sale of lands for this purpose and as such fair market value in this instance should be tied directly to the value lands are being sold for for this specific purpose.

ENVIRONMENTAL ANALYSIS & OTHER ISSUES

There are several issues related to certain other special easement conditions and/or stipulations recommended by the Department. In reviewing the EIS for site specific concerns, the Department feels that some of the mitigation measures are not adequate. It is the Department's opinion that several special stipulations are warranted to mitigate Department concerns and to provide for the long term preservation and protection of the lands and the trust.

In the interest of safety, the Department recommends a stipulation be added to any easement that requires Meridian to comply with ^^^^(need MCA & ARM citations from staff legal counsel) for prevention and control of fires. The Department also feels the installation and maintenance of an approved fence along the easement boundary with gates at designated locations is necessary.

There are some instances where the proposed rail line would split or sever state lands. In these instances, in addition to gates the Department recommends construction and maintenance of appropriate crossings to facilitate the movement of persons, livestock, machinery and equipment. Those areas and crossings of particular concern are as follows --

Tract #2 - S $\frac{1}{2}$ Section 16, T5N-R25E, Musselshell County

The proposed rail spur would cross a drainage in the SW $\frac{1}{4}$. A water culvert and livestock underpass culvert are recommended to protect a spring and facilitate and promote the free movement of livestock under the bridge. The lands in this area have been classified as wetlands, therefore Meridian will need to secure approval from other agencies which may have authorities over actions involving wetlands. Should filling activities related to the installation of said cul-

verts impact the flow, Meridian has said it will agree to provide a replacement water supply such as a well.

Tract #3 - N $\frac{1}{2}$ Section 16, T5N-R25E, Musselshell County

Meridian should construct a livestock underpass culvert in the drainage in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ to accommodate livestock movement. Further, to accommodate vehicle and machinery access, Meridian should provide twenty foot wide gates and a crossing on the North section line.

Tract #4 - W $\frac{1}{2}$ Section 32, T6N-R26E, Musselshell County

To accommodate vehicle and machinery access, Meridian should provide a crossing with twelve foot wide gates at a point near the center of the tract.

We believe that Meridian has no problem generally with any of the above fencing or crossing provisions.

Throughout the state, the past practice of abandoning and not reclaiming rail corridors is evidenced through eroding, barren, weed infested, non-productive strips of lands. The Department believes that the only way to eliminate the potential of significant degradation of the land is to require Meridian to develop an approved reclamation plan and post a bond to insure compliance with the plan. The plan should include both immediate post construction and full complete reclamation/restoration upon expiration or termination of the easement or in the event the rail corridor is ever abandoned. Also, the plan should also include an approved weed control plan that would be in effect throughout the life of the easement and through post reclamation until the area has been satisfactorily revegetated. The amount of bond should then be set based on 100% of the approved plan.

During the Department's preliminary review of the construction design plans it was noted that several existing "roadways" (both public and private) may have to be relocated. However, there was no specific discussion in the EIS regarding the proposed relocation of these roads or their cumulative effects on the state lands. Meridian was asked to provide the Department with more information regarding these roads so that it could ascertain and evaluate potential impacts.

Meridian responded that the relocation of these roads is not its responsibility. Rather it feels securing easements or licenses to relocate these roads is the responsibility of the respective owner/user of the road (i.e. the county, the state, the state's surface lessee, or other persons presently unknown). The Department therefore recommends that no construction be allowed to

begin until all necessary easements are secured for the apparent county and/or private roads that will have to be re-located and/or reconstructed on the state's lands because of the construction of the rail spur.

Last, an archaeological site was identified on Tract #4. Meridian has completed further testing which was required to determine the site's eligibility for listing on the National Register. Based on information submitted as a result of testing, it is the opinion of the DSL staff archaeologist that the site is not significant. Currently the department is awaiting resolution of state/federal jurisdiction regarding cultural resources. Before any easement is finalized, the matter of jurisdiction must be resolved.

FINAL RECOMMENDATION SUMMARY

If the Board decides to approve the easement requests, the Department recommends that in addition to the normal provisions of a non-exclusive easement, documents be issued containing special conditions including, but not limited to, the following:

- Instead of issuing permanent easements, "Limited Term Easements" be issued for a specific amount of time, the duration of which should be made to coincide with life of mine as indicated in the EIS.
- Issuance of said easements be contingent upon Meridian first successfully acquiring all of the other lands involved in the rail corridor. Proof of said acquisitions must be provided to the Department prior to issuance of any easement or other authorization of entry to begin any construction.
- The amount of compensation to the State be based on the \$400/acre value Meridian is paying to other owners for the rail corridor, plus any damages to remaining lands due to the severance of small tracts resulting from the configuration of the corridor.
- Meridian be required to pay all refunds, penalties, interest or damages levied by the U.S. Government as a result of the cancellation or modification of the CRP contracts. In addition Meridian should be required to pay, in advance, in one lump sum all future revenues lost as a result of any CRP contract cancellation or modification.
- Entry or any other activity conducted under authority of the easement also be subject to all rules and regulations imposed by the United States Department of Agriculture, Agricultural Stabilization and Conservation Service (ASCS). This means Meridian must secure the written approval of the

local governing County ASCS Committee prior to any entry or activity for as long as the lands are enrolled in the Federal Conservation Reserve or similar program.

- Meridian be required to comply with ^^^^^(need MCA & ARM citations from legal staff regarding fire prevention and control responsibilities).
- Meridian be required to construct and maintain a four-strand barbed wire fence along the easement boundary with gates at locations designated by the Department. Construction is to be in conformance with pre-approved specifications.
- Meridian be required to install a water culvert and a livestock underpass culvert across the drainage in the SW $\frac{1}{4}$ of S $\frac{1}{2}$ Section 16, T5N-R25E, Musselshell County (Tract #2) to protect the spring and to facilitate and promote the free movement of livestock. In the event installation of either of the culverts results in an obvious disturbance to the water flow, Meridian must provide a water well to the satisfaction of the Department.

Tract #3 - N $\frac{1}{2}$ Section 16, T5N-R25E, Musselshell County
Meridian be required to construct a livestock underpass culvert in the drainage in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ to accommodate livestock movement. Further, to accommodate vehicle and machinery access, it be stipulated that Meridian provide twenty foot wide gates and a crossing on the North section line.

Tract #4 - W $\frac{1}{2}$ Section 32, T6N-R26E, Musselshell County
To accommodate vehicle and machinery access, Meridian be required to provide a crossing with twelve foot wide gates at a point near the center of the tract.

- Meridian be required to develop a pre-approved reclamation plan and file a full reclamation bond in an amount to be set by the Department for post construction reclamation and full complete reclamation/restoration upon expiration or termination of the easement or in the event the rail corridor is ever abandoned. Included in this plan must be a pre-approved weed control plan.
- No construction be allowed to begin until all necessary easements are secured for the apparent county and/or private roads that will have to be re-located and/or reconstructed across state lands because of the construction of the rail spur.
- Before any easement is issued to Meridian on Tract #4, cultural resource jurisdiction be resolved.



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April 13, 1994

MEMORANDUM-*Revised*

TO: Marylee Norris, John North

FROM: Roy Andes, Agency Counsel *RA.*

RE: Meridian mine--condemnation authority for rail spur

ISSUE: Whether Meridian minerals correctly asserts the legal authority to use eminent domain for acquisition of rail spur rights-of-way

Factually I understand that Meridian plans to create a rail spur to be used for hauling coal and otherwise servicing the coal mine. The spur will not otherwise be used for freight or passenger transportation by any other persons or businesses. In other words, it will not be available for hire.

The issue is whether Meridian must buy all the land for the spur from consenting sellers, or whether it may exercise eminent domain powers and compel land sales at judicially determined values.

The power of eminent domain, often called condemnation, is a sovereign function of government exercised on behalf of various public purposes. Nichols on Eminent Domain, §3.11 [1]. The state may by statute delegate the power to public or private entities to carry out designated activities. Ibid. This power to delegate resides exclusively in the legislature. Nichols, § 3.21. The delegation to private corporations "...must be conferred in express terms or by necessary implication.." Nichols, §3.21 [4].

"One of the most firmly established principles of the law of eminent domain is that the burden is on a party seeking to exercise the power of eminent domain to show a warrant from the legislature either in express terms or by necessary implication... The burden is also on the condemnor to show that it is acting within the scope of statutory power." Nichols §3.213.

"Even when the power has been expressly granted, the grant, itself, and the extent thereof will be construed strictly against the grantee. The latter will not be allowed to take the lands of another unless such right comes clearly and

unmistakably within the limits of the authority granted." Nichols, §3.213 [1]. Thus, the question becomes whether either the Congress or the Montana legislature has delegated condemnation authority to Meridian.

the Montana Legislature

I have reviewed all Montana statutes I could find from the Code index. Given the code's imperfect index structure, it remains possible there are other statutes my search did not disclose. If so, my conclusion may be in doubt.

Based on the statutes I found, it seems clear that if Meridian qualifies as a "railroad" under §§70-30-102(4) or 77-2-101(2), it may exercise eminent domain powers and/or be granted an easement to cross state lands. *Id.* or §§69-14-101, 102, MCA.

§69-14-552 directly empowers railroads to condemn land for rights-of-way. In order to qualify as a railroad, however, they must be a "common carrier" as that term is generally understood and they probably become subject to ICC authority, since that chapter of the code applies only to "common carriers." §69-14-102. I have not researched what constitutes a common carrier.

Neither Chapter 30 of Title 70 nor Chapter 2 of Title 77 defines "railroad." Meridian may have an argument that it qualifies as a "railroad" by virtue of the broad, open-ended definitions of §§61-1-317, and 69-12-101, and the maxim that terms once defined in the Code are deemed defined the same way throughout. Those sections, however are both within acts imposing public regulation on "railroads." In light of the strict construction against grants of eminent domain powers, it does not seem plausible to me to assert that disconnected legislative definitions of "railroad" for purposes of imposing state regulation are intended to be synonymous with the granting the public power of eminent domain.

By the same token, §69-14-101 *also* defines "railroad," and could be equally argued to be applicable to other disconnected parts of the Code. By contrast, however §69-14-101's definition includes only "common carriers." §69-14-102. Since this Chapter's provisions are the only one's giving explicit eminent domain powers to railroad-type entities, the absence of any clear, or even implicit intent to do so in other parts of the code suggests this statute covers the issue. Nichols' strict construction argument should prevail. Nichols, §3.213 [1].

Assuming, therefore Meridian will NOT qualify as a "common carrier," I can find no other authority in Montana statutes for it to exercise eminent domain power. Montana law expansively gives that power to hard rock mining activities, including access, refining, smelting, reclamation, and waste disposal activities. §70-30-102, subsections (4) & (5), MCA; see §82-2-221, MCA and *Kipp vs. Davis-Daly Copper*

Company, 41 Mont. 509, 110 P. 237 (1910).¹ But it is clear, and constitutional, that the same powers are denied to coal miners. *Scharam v. Anaconda Co.*, 187 Mont. 377, 610 P2d 132 (1980).

Congress

Once again, I have reviewed all relevant federal statutes I could find from the index to the US Code, or referenced in Nichols on Eminent Domain. As I said above, my conclusion is in doubt if undisclosed code sections turn out to be applicable.

First of all, eminent domain powers are less well established on the part of the federal government than of the states. There is no provision of the US Constitution giving the federal government powers of condemnation. Nichols, §1.24 [4]. Accordingly, for decades, it was either little used by the federal government or it was used only when authorized under state law. Nichols §3.11 [1]. It was judicially recognized for the first time in *Kohl v. US*, 91 US 367, 23 L.Ed 449 (1875), but it is now generally recognized as a legitimate federal implementation of the more specific grants of federal authority in the constitution. Nichols §3.11 [1].

The same rules of "express or necessary implication" construction apply to federal delegation of condemnation power as of state. Nichols, §3.213. The only possibly pertinent references to condemnation powers which I found were those to railroads. 43 USC 942-1, et seq. §43 USC 942-3 specifically provides for condemnation. §42 USC 934-939 constitutes a general railroad right-of-way act and provides for condemnation for railroads, including those accessing mine sites. But, as in the Montana statutes, Meridian probably does not constitute a "railroad" because it is not a common carrier. *Denver & R. Gr Co. v. Bolognese* 45 UT 65, 143 P. 129 (1914).

Summary

In short, I can find no authority thus far to substantiate Meridian's claim to hold eminent domain powers for its rail spur. In the event other statutory authority is turned up, this conclusion is subject to reevaluation.

¹*Kipp* involved a challenge by landowner's adjoining a Butte city street to the city's conveyance of a use permit for hauling ore on a commercial railway down the middle of the street. At issue was whether such a use was a "public purpose" within the contemplation of the street dedication. The court looked at the long history of metal mining as a bedrock of Montana economy in concluding that such a use was acceptable as a public purpose.

I would like to offer my perspective on an aspect of eminent domain I've been involved with for over 20 years. In the late '70s I worked for a biological consulting company gathering baseline data for the Montco Mine permit. Our firm also provided technical input on the northern portion of Tongue River Railroad in the early '80s and the southern portion in the early '90s.

While gathering biological data for the Montco permit, I naively thought that because we were objective, our work could make a difference in the environmental outcome of the project. Our company was fired for refusing to alter or 'color' our data.

We foolishly had the same feelings about our technical reports for TRR to be used by the ICC/STB in their EIS. The light should have gone on for us when there was no time allocated for data collection for either of the segments being considered for permitting. Data available to us was old, anecdotal or non-existent. Lots of extrapolation was used to describe the affected environment and speculations were made to generate a section on potential impacts. There was minimal science involved. There was sad lack of 'proprietary' information gathered. However, that didn't stop TRR from threatening me personally with a law suit claiming I used such information in a letter to U.S. Representative Pat Williams that described my incredible disbelief in the god-like power of the ICC/STB through the eminent domain process.

Early in my involvement with the EIS on the southern portion of the route, I met with the person responsible for the EIS at the STB. I asked her how the EIS intended to represent the interests of the residents of Tongue River Valley. She said the STB did not have to consider the impacts to the few relative to the benefits for the many. She was right. Landowners along the entire length of the Tongue have not been considered in the process. And new EISs continue to 'tier off' the laughably inadequate and nearly 20 year-old EIS that somehow authorizes STB to slap Tongue River Valley residents in the face while their hands are tied behind their backs.

I continue to be stunned at the cavalier and arrogant attitudes of developers and the STB in regard to the lives of Tongue River Valley residents. The woman working for the STB tried to explain to me that there was an economic need for the TRR. There is already a railroad serving the coal industry for all the country that would be served by TRR. How does this translate into 'need' for anyone except the few TRR employees who have milked that system for over 20 years and hope to laugh their ways to the bank in the future. There are no 'common' people in the U.S. who could possibly benefit from this.

I'd like to share the words of a wise Tongue River rancher who lives on East Fork of Hanging Woman Creek. "The use of eminent domain should have gone out during the time we stopped making witches walk on redhot plowshares and stopped hanging horsethieves in the cottonwoods at the forks of Hanging Woman Creek." I assume this was a long time ago.

That the STB can use an ancient EIS to somehow provide flimsy paper justification to usurp private property for the benefit of a few strikes me somehow as an incredible human rights violation. Please help us eliminate the outdated and oppressive use of eminent domain.

Thank you for this opportunity to comment.

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