

CONDEMNATION 101: What Every Real Estate Attorney Should Know

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Neither private individuals nor corporations have the inherent power of eminent domain, in fact, no power conferred on either a private or municipal corporation is to be more strictly construed than the power to exercise the right of eminent domain. Montana Talc Co. v. Cyprus Mines Corp. (1987), 229 Mont. 491, 495, 748 P.2d 444, 447.

1. Overview:

- Mont. Code Ann. § 70-30-101, *et. seq.* governs eminent domain. However, to fully understand eminent domain law, one must understand the Montana Constitution and case law. The United States Constitution and federal takings law also play a role in understanding eminent domain law.
- Mont. Const. Art. II, § 29 (1972) – Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include the necessary expenses of litigation to be awarded by the court when the private property owner prevails.
- Mont. Const. Art. II, § 3 (1972) – The right of “possessing and protecting property” is among a person’s “inalienable rights.” Private property ownership is a fundamental right, Art. II, § 3, Mont. Const., and any statute which allows the government to take a person’s property must be given its plain interpretation, favoring the person’s fundamental rights. *See City of Bozeman v. Vaniman (Vaniman I)* (1994), 264 Mont. 76, 79, 869 P.2d 790, 792; *see also* Montana Code Ann. § 1-2-101, 104.

2. Legislative delegation necessary for condemnation powers:

- The police power of the state to take private property for public purposes is limited. The Montana Supreme Court stated: “The power of eminent domain is vested exclusively in the legislature. It can be exercised only by the legislature and those agencies to whom the legislature has delegated the power.” *State Highway Commission v. Crossen-Nissen Co.* (1965), 145 Mont. 251, 254, 400 P.2d 283, 284; *see also*, *Vaniman I*, 264 Mont. at 79, 869 P.2d at 792. Further, “Private individuals and corporations, like state agencies, have no inherent power of eminent domain, and their authority to condemn must derive from legislative grant.” *McCabe Petroleum Corp. v. Easement and Right-of-Way Across Township 12 North, Range 23 East, PMM*, 2004 MT 73, ¶18, 320 Mont. 384, 87 P.3d 479 (*citing Montana Talc Co. v. Cyprus Mines Corp.* (1987), 229 Mont. 491, 495, 748 P.2d 444, 447). The *McCabe* Court also stated:

a unanimous Court stated clearly and without equivocation that “[t]he legislature’s grant of eminent domain power . . . must be strictly construed.” (citation omitted) Because private real property ownership is a fundamental right under the Montana Constitution, “any statute which allows [the taking of] a person’s property must be given its plain interpretation, favoring the person’s fundamental rights.” (citation omitted).

McCabe Petroleum Corp, ¶ 14 (citing *Vaniman I*, 264 Mont. at 79, 869 P.2d at 792).

3. State’s power to condemn:

- Pursuant to the Montana Code, “[e]minent domain is the right of the **state** to take private property for **public use**.” Mont. Code Ann. § 70-30-101 (emphasis added).
- The term “state” includes public, quasi-public, and selected private entities. However, if a private party seeks to condemn, it must have an express legislative grant, which grant is construed strictly in favor of private property. *McCabe Petroleum Corp.*, ¶ 8. The list of “state” entities includes:

- School districts
- Municipalities
- Counties
- State government
- Housing authorities
- Urban renewal agencies
- Cemetery associations
- Regional water or water authorities
- Irrigation districts
- Conservancy districts
- Owners of common carrier pipelines
- Owners of mines, mills and smelters
- Owners of railroads and tramways
- Owners of telephone, telegraph, or energy lines
- Logging operators
- Natural gas operators

See Mont. Code Ann. § 70-30-102.

4. “Public use” requirement:

- Private property can only be taken or damaged for a “public use.” See *Montana Power Co. v. Bokma* (1969), 153 Mont. 390, 457 P.2d 769. In *Bokma*, the Court focused on the potential for future connection to the line and the Montana Power Company’s (“MPC”) status as a public utility in finding the proposed line was a public use. *Id.* At 392-93. MPC put into evidence that the line was necessary to furnish power to a pipeline customer, “to meet the anticipated increasing power needs of the Conrad, Choteau, and Valier areas, arising from normal growth,” and to connect with electrical lines of the Bureau of Reclamation and Glacier Electric Co-operative. *Id.* Notably, the court held a hearing on public use and necessity.

Id. at 393. The Court acknowledged the public use statute, but also noted that the landowners disputed that this particular line was a public use, and proceeded to analyze whether MPC's use was in fact a public use. *Id.*

- “[I]n Montana, a public use is a use which confers some benefit or advantage to the public.” *Id.* at 395. In determining that MPC's power line was a public use, the Court relied on MPC's duty to supply power to anyone who wanted it, and MPC's status as a regulated public utility. *Id.* at 396-97. The *Bokma* Court quoted the Federal Court for the District of Montana's findings in a related case that:

The Montana Power Company, is a **public utility**; it is **subject to regulation by the Montana Public Service Commission**, both as to rates and practices. It is **required to furnish reasonable adequate service at reasonable rates**. (Title 70, R.C.M. 1947) The service and the charges for the energy to be transmitted over the proposed line will be subject to regulation, as will the line itself. (Citing cases) Under these circumstances the use cannot be a private use.’

Id. at 397 (emphasis added) (*quoting Landowners Consideration Ass'n v. Montana Power Co.*, 300 F.Supp. 54, 59, n 12 (D. Mont. 1969)). As *Bokma* demonstrates, the status of the condemnor is a material fact that is relevant to the issue of whether the proposed use is a public use. In *Park County ex rel. Paradise & Shields Valley TV Districts v. Adams*, for instance, the Court noted that a television district has a statutory purpose, which is “to serve the public interest, convenience, and necessity in the construction, maintenance, and operation of television translator stations and any system necessary thereto for television program distribution.” *Park County ex rel.*, 2004 MT 295, ¶ 15, 323 Mont. 370, 100 P.3d 640 (citing Mont. Code Ann. § 7-13-2502 (repealed 2009)).

5. State/ Condemnor must prove:

- Before the “state” can condemn property, the “state” must prove several things by a preponderance of the evidence:
 - That the “state’s” use is a public use. Mont. Code Ann. § 70-30-111(1)(a); *Bokma*, 153 Mont. 390, 393, 457 P.2d 769 (1969).
 - That the “state’s” use is not a private use. *Vaniman I*, 264 Mont. at 79, 869 P.2d at 792; *City of Bozeman v. Vaniman (Vaniman II)* (1995), 271 Mont. 514, 522-23, 898 P.2d 1208, 1214; *Bokma*, 153 Mont. at 393, 457 P.2d at 772-73; *Park County ex rel.*, ¶16; *Landowners Consideration Assoc.*, 300 F. Supp. at 59, n. 12 (D. Mont. 1969).
 - That the public interest requires the “state’s” condemnation of private property. Mont. Code Ann. § 70-30-111(1); *Lincoln/Lewis & Clark County Sewer Dist. at Lincoln v. Bossing* (1985), 215 Mont. 235, 240, 696 P.2d 998, 991-92.

- That the “state’s” condemnation of the private property is necessary to the public use. Mont. Code Ann. § 70-30-111(1)(b); *Bossing*, 215 Mont. at 240, 696 P.2d at 991-92; *State Highway Commission v. Yost Farm Co.* (1963), 142 Mont. 239, 242, 384 P. 2d 277, 279; *Cenex Pipeline LLC v. Fly Creek Angus, Inc.*, 1998 MT 334, ¶¶ 25-26, 292 Mont. 300, 971 P.2d 781; *Park County ex rel.*, ¶¶ 20-22; *Bokma*, 153 Mont. at 393, 457 P. 2d at 772-73.
- That the “state’s” condemnation is the least amount of damages for the greatest good. Mont. Code Ann. § 70-30-110(1); *Bokma*, 153 Mont. at 399, 457 P.2d at 744; *State Highway Commission v. Danielson* (1965), 146 Mont. 539, 544, 409 P.2d 443, 446; *Park County ex rel.*, ¶¶20-22.
- That the “state” offered a final written offer. Mont. Code Ann. § 70-30-111(1)(d).
- That the condemnor has complied with the Fair Treatment of Condemnees Act, Mont. Code Ann. § 70-31-101, *et seq.*
- That the condemnor’s easement is the most limited interest in real property necessary for the project. Mont. Code Ann. § 70-30-206(1)(b).

6. Condemnation Process:

- **(Pre-condemnation) Negotiation** – The “state” will usually meet with the property owner or owner’s agent prior to condemnation to discuss whether there can be negotiated payment for the property being taken.
- **Offer to Purchase** – Before initiating condemnation, the “state” must submit a final written offer. Mont. Code Ann. § 70-30-111(1)(d).
- **Claim of Appropriate Measures** – Prior to, or at the time, the property owner rejects the final written offer, the owner may provide the “state” with the owner’s claim of appropriate measures that the owner considers necessary to minimize the damages to the property. Mont. Code Ann. § 70-30-110(2).
- **Initiation of Litigation** – The “state” initiates suit in the county where the property is located by filing a complaint and issuing a summons. Mont. Code Ann. § 70-30-202.
- **Contents of the Complaint** -- Mont. Code Ann. § 70-30-203 contains a specific list of what has to be in the complaint.
- **Timing** – Once the “state” serves the summons the district court has six months to begin trial unless there is good cause for a different length of time. Mont. Code Ann. § 70-30-202.

- **Rules of Practice** – Unless otherwise specifically provided in the condemnation statute, the Montana Rules of Civil Procedure and Evidence apply to these proceedings. Mont. Code Ann. § 70-30-201.
- **Discovery** – Parties have the right to conduct discovery on the necessity phase and the valuation phase (may want to bifurcate).
- **Necessity Phase of the Trial** – The trial court without a jury determines the facts related to the necessity phase unless the condemnation involves the right-of-way to a residence or private farm. Mont. Code Ann. § 70-30-107, 202. This can be a hearing with evidence and legal argument.
 - **Burden of Proof** –
 - Mont. Code Ann. § 70-30-111(1) “Condemnor shall show by a preponderance of the evidence”.
 - *No power conferred on either a private or municipal corporation is to be more strictly construed than the power to exercise the right of eminent domain. Montana Talc Co. v. Cyprus Mines Corp.* (1987), 229 Mont. 491, 495, 748 P.2d 444, 447.
 - **Preliminary Condemnation Order** – If the “state” meets its burden of proof, the court may issue a preliminary condemnation order. Mont. Code Ann. § 70-30-206(2). The court may limit the interest in real property the “state” is seeking to condemn. Mont. Code Ann. § 70-30-206(1)(b).
- **Compensation Phase of the Trial** –
 - Within 30 days of the district court entering the preliminary condemnation order, the “state” “shall file a statement of the condemnee’s claim of just compensation.” Mont. Code Ann. § 70-30-207(1).
 - If the property owner does not accept the “state’s” claim of just compensation within 20 days of service, then the district court shall appoint the three condemnation commissioners (one nominated by the “state”, one nominated by the property owner, and one commissioner nominated by the other two commissioners). Mont. Code Ann. § 70-30-207(1) – (2). (*See* Mont. Code Ann. § 70-30-207(3) for requirements for the commissioners).
 - Both parties may waive the commission hearing by mutual written consent. Mont. Code Ann. § 70-30-207(1).

- The district court judge presides over the commissioners hearing and rules on procedural and evidentiary matters. Mont. Code Ann. § 70-30-301(2).
 - Two commissioners have to concur on an award and submit it within 10 days of the hearing in order for there to be a determination of compensation. Mont. Code Ann. § 70-30-303(1).
 - Either party may appeal to the district court the commissioners' determination within 30 days of that determination. Mont. Code Ann. § 70-30-304.
 - The "state" has 30 days from the date an appeal to district court is perfected or 60 days from the date both parties waive the commissioners' hearing to make a final offer to the property owner. Mont. Code Ann. § 70-30-305(1).
 - An appeal to district court is to be tried by a jury unless the parties waive their right to a jury. Mont. Code Ann. § 70-30-304(1).
 - The jury can concur with the commissioners' award or determine another value for the property taken or damaged. Then the district court will enter a judgment authorizing the "state" to take the property after it pays the award, plus interest and any allowable costs and fees. Mont. Code Ann. § 70-30-304.
- **Final Order of Condemnation** – Once the "state" makes payment, the "district court shall make a final order of condemnation ... describ[ing] the property condemned, the purposes of the condemnation, and any appropriate payment for damages to property actually taken as well as to any remaining parcel of property that may be adversely affected by the taking." Mont. Code Ann. § 70-30-309(1).
 - **Appeal to the Supreme Court** – "Any party interested in the proceedings can appeal to the supreme court from any finding or judgment made or rendered under this chapter, as in other cases." An appeal does not automatically stay the case; however, the district court may stay the case. Mont. Code Ann. § 70-30-312.

7. MDT Rebuttable Presumption:

- MDT has a rebuttable presumption afforded by Mont. Code Ann. § 60-4-104. In order to establish this presumption, MDT must first issue an 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 that will be compatible with the greatest public good and the least private injury.

Mont. Code Ann. § 60-4-104(2).

- Once the order is issued, it establishes a disputable presumption:
 - (a) of the public necessity of the proposed highway or improvement;
 - (b) that the taking of the interest sought is necessary for the project;
 - (c) that the proposed highway or improvement is planned or located in a manner that will be most compatible with the greatest public good and the least private injury.

Mont. Code Ann. § 60-4-104(3).

- However, the property owners have fundamental property rights protected by the due process clause of the United States and Montana Constitutions. Because § 60-4-104, MCA shifts the burden of proving the statutory elements of condemnation from the MDT to the landowner, there is an argument that it violates the property owner's constitutional rights. *Sandstrom v. Montana*, 442 U.S. 510 (1979), *overruled in part by Boyde v. California*, 494 U.S. 370 (1990).
- Further, MDT still should have to meet the necessary statutory criteria to condemn property under Mont. Code Ann. § 70-30-110; especially when the statute is strictly interpreted to protect property owner's due process and property rights. If MDT is allowed to hide behind the rebuttable presumption, it never has to prove by a preponderance that its taking of property is "reasonably requisite and proper for the accomplishment of the purpose for which it is sought under the peculiar circumstances of each case." *Lincoln/Lewis & Clark Sewer Dist.*, 215 Mont. at 241, 696 P.2d at 992.

8. Attorney fees and costs:

- Section 70-30-305, MCA, provides that the condemnee shall receive its "necessary expenses of litigation" *if* "In the event of litigation and when the condemnee prevails either by the court not allowing condemnation or by the condemnee receiving an award in excess of the final written offer of the condemnor that was rejected pursuant to the facts necessary in 70-30-111(1)(d)."
- Revisions to §70-30-305(2) during the 2013 Legislature (*see* HB417) resulted in now making it clear that if a condemnee is ultimately successful in challenging the condemnor's right to take (e.g. successfully challenges necessity), the condemnee may recover its necessary expenses of litigation. Previously, the law only clearly provided that the condemnee could recover litigation expenses if the final award for the taking exceeded the final written offer amount.

- Section 70-30-306, MCA, defines what constitutes the necessary expenses of litigation and limits them to:
 - Attorney fees,
 - Expert Witness fees,
 - Exhibit costs, and
 - Court costs
- Reasonable attorney fees and expert witness fees are determined based upon the customary rate for an attorney's or expert's services in the county where trial is held. Mont. Code Ann. § 70-30-306(2) and (3).
- "Necessary expenses of litigation" are also still subject to the court's discretion in determining what constitutes necessary and reasonable. *MDT v. McGuckin* (1990), 242 Mont. 81, 788 P.2d 926.

9. Fair Treatment to Landowners Act:

- In addition to the procedural protections of the condemnation statutes, Landowners are also protected by the Fair Treatment of Condemnees Act. Mont. Code. Ann. § 70-31-101 *et seq.* Under the statute's definitions, any entity is an "agency," that "has the authority to acquire property by eminent domain as provided in Title 70, chapter 30." Mont. Code Ann. § 70-31-102(1). Also, any entity that receives federal financial assistance is also an "agency." By the terms of the statute, "This chapter shall apply to all acquisitions of real property by an agency for a program or project for which federal financial assistance is available to pay all or any part of the cost." Mont. Code Ann. § 70-31-103.
- The purpose of the Fair Treatment statute is to:
 - “establish uniform and equitable land acquisition policies for federally assisted programs; and,
 - “comply with the federal Uniform Relocation and Assistance and Real Property Acquisition Policies Act of 1970, as amended.”
 Mont. Code Ann. § 70-31-101.
- The condemnor must comply with the following mandatory requirements:
 - (1) It “shall make every reasonable effort to expeditiously acquire real property by negotiation.” Mont. Code. Ann. 70-31-301(1).
 - (2) “Real property must be appraised before the initiation of negotiations, and the owner or the owner's designated representative must be given an opportunity to accompany the appraiser during the appraiser's inspection of the property. The head of the agency may

prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.” Mont. Code Ann. § 70-31-301(2).

- (3) “Before the initiation of negotiations for real property, an amount must be established that is reasonably believed to be just compensation for the property or interest taken, and that amount must be offered for the property. The amount may not be less than the approved appraisal of the fair market value of the property. . . . The owner of the real property to be acquired must be provided with a written statement of and summary of the basis for the amount established as just compensation. When appropriate, the just compensation for the real property acquired and for damages to remaining real property must be separately stated.” Mont. Code Ann. § 70-31-301(3).
- (4) “An owner may not be required to surrender possession of real property before the agreed purchase price is paid or before there is deposited with the court, in accordance with applicable law, for the benefit of the owner, an amount not less than the approved appraisal of the fair market value of the property or the amount of the award of compensation in the condemnation proceeding of the property.” Mont. Code Ann. § 70-31-301(4).
- (5) “The construction or development of a program or project (for which federal financial assistance will be available to pay all or any part of the cost of the program or project) must be scheduled so that, to the greatest extent practicable, a person lawfully occupying real property is not required to move from a dwelling (assuming a replacement dwelling will be available) or to move the person's business or farm operation without at least 90 days' written notice of the date by which a move is required.” Mont. Code Ann. § 70-31-301(5).
- (6) The time of condemnation may not be advanced, negotiations or condemnation and the deposit of funds in court for the use of the owner may not be deferred, and any other action coercive in nature may not be taken to compel an agreement on the price to be paid for the property.
- (7) If an interest in real property is to be acquired by exercise of the power of eminent domain, formal condemnation proceedings must be instituted as provided in Title 70, chapter 30. The acquiring agency may not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of the owner's real property.
- (8) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the uneconomic remnant must be made.

- (9) A person whose real property is being acquired may, after being fully informed of the person's right to receive just compensation, donate to an agency the property, any interest in the property, or any compensation received for the property. Mont. Code Ann. § 70-31-301.

10. Relocation:

- Relocation assistance is provided to people who are displaced as a result of a taking by a State, Federal or federally assisted program or project. Mont. Code Ann. § 70-31-101. Relocation assistance is not provided if the condemning entity is not receiving any state or federal monies.
- Relocation assistance is also provided to tenants, if the property is tenant occupied.
- The types and amount of relocation assistance available to homeowners and tenants vary based on whether they are a homeowner, whether they are a tenant, and whether they have occupied the property for less than 90 days, more than 90 days or more than 180 days.
- For residential relocations:
 - The homeowner and tenants (if tenant occupied) can be reimbursed for their reasonable moving expenses.
 - The homeowner or tenant are eligible for replacement housing payments for “comparable replacement” housing. However, a “comparable replacement” only means a functional equivalent; i.e., if current home is 3 bed, two baths, then a comparable replacement is a 3 bed, two baths. Upgraded materials, unique parcel features, and custom features of the existing home are not taken into account when finding a “comparable” replacement. The home must also be deemed “decent, safe and sanitary” – no fixer-uppers allowed.
 - There are three types of replacement housing repayments, which can vary based on whether or not the homeowner/ tenant have occupied the property for less than 180 before the condemnor began negotiations for taking the property.
 - Purchase Supplement: Homeowner gets the fair market value of the home, plus a purchase supplement (not to exceed \$22,500) if the comparable replacement home costs more than the fair market value of the home lost to the taking.
 - Rental Assistance: Homeowners or tenants may be eligible for rental assistance if rental of a replacement dwelling (plus utilities) is higher than the homeowner/ tenant were

paying. These payments are limited to a total of 42 months and cannot exceed a total of \$5,040.

- Downpayment: Homeowners who have occupied the property for 90-179 days or tenants who have occupied the property for more than 90 days, may be eligible for a down payment, not to exceed \$5,250, to purchase a replacement dwelling.
- In situations where comparable housing cannot be found, the condemnor can opt to find “Housing of Last Resort” which can take many forms, including purchase and renovation of a comparable property, making additions to a property to make it comparable, or exceeding the maximum payment limits for either the purchase supplement or downpayment.
- For Business, Farm or Non-Profit Organization relocation:
 - The business may be reimbursed for its reasonable moving expenses
 - The business may be reimbursed for direct losses of tangible personal property
 - The business may be reimbursed for its reasonable expenses incurred in searching for replacement property (up to \$2,500)
 - The business may be reimbursed for its reasonable expenses actually incurred in relocating and reestablishing the business (up to \$10,000)
- A condemnee does retain the right to appeal the condemnor’s determination of eligibility for relocation assistance through the condemnor’s own administrative channels. A condemnee is responsible for all of its legal costs incurred in pursuing the appeal and, if at the end of the day, the condemnee is still not satisfied, then it can seek judicial review.
- Full details of Montana’s relocation assistance program are available through MDT’s website at:
http://www.mdt.mt.gov/other/rw/external/brochures/relocation_brochure.pdf

11. Valuation:

- Just compensation is such a sum as would put the condemnee in as good of a position pecuniarily as the condemnee would have been in if his property had not been taken. *Campbell v. U.S.*, 266 U.S. 368, 371 (1924); *U.S. v. Blankenship*, 543 F.2d 1272 (9th Circ.).

- “Just compensation” for a taking is typically quantified as “current fair market value,” with fair market value typically being the price a willing buyer and willing seller would agree upon without the threat of condemnation.
- Montana law provides that a condemnee is paid current fair market value for the real property sought to be taken, plus the loss in current fair market value of the remaining property (i.e. “damages to the remainder”). Mont. Code Ann. §§ 70-30-301 (3) and 70-30-302(1).
- Interest accrues to the condemnee, at a rate of 10% per annum, from the date of the service of summons on the full amount finally awarded. Mont. Code Ann. § 70-30-302(2).
- The right to compensation “is considered to have accrued at the date of the service of summons” and current fair market value is also to be assessed as of the date of the service of summons. Mont. Code Ann. § 70-30-302(1). For those who had high property values during the “housing boom” in the mid-2000s, but who later ended up “under water” or seeing a substantial decline in their property values post-boom, “current fair market value” can be very problematic.
- Determination of fair market value is typically based off of comparable sales. When there are no comparable sales, other methodologies can be used to come to a fair value for the property. *Dept. of Hwys. v. Hy-Grade Auto Court* (1976), 169 Mont. 340, 546 P.2d 1050.
- The valuation stage of condemnation litigation centers heavily on whether or not the condemnor is providing compensation that truly reflects “fair market value.” Valuation determinations are heavily fact dependent and will often require that the condemnee hire their own appraiser or other valuation expert (or experts in unique cases).

12. Quick Take:

- Another unique condemnation power afforded MDT by the Montana statutes, is the power to do a “quick take.”
- Section 60-4-104, MCA, provides:
 - (4) (a) Once the department has acquired at least three-fourths of all the parcels needed to construct a project that has been selected by the commission, it may use the procedures outlined in subsection (5) and this subsection (4) to acquire the remaining parcels required for the project.
 - (b) Not less than 30 days or more than 45 days after service of the summons and complaint provided for in 70-30-203, the department shall deposit into an account and in the manner provided for in 70-30-302 the estimated fair market value of the property that is to be acquired and that is described in the

complaint. Once the funds are deposited, the department may request, by motion filed with the court, an order to show cause why the property should not be placed in the possession of the department as requested in the complaint.

➤(5) (a) If the condemnee does not file an objection to the motion within 10 days, the court shall issue the preliminary condemnation order as provided in 70-30-206 and place the condemnor in possession of the property as provided in 70-30-311.

(b) If the condemnee files an objection to the motion, the court shall schedule a hearing at which the condemnee shall appear and show cause why the property should not be placed in the possession of the department as requested in the complaint. The hearing must take place not less than 20 days or more than 30 days after the objection is filed. The court shall rule on the condemnor's motion as soon after the hearing as possible. However, the time between the hearing and the court's decision may not exceed 30 days.

(c) The motion shall include a notice specifying that the order sought is a final order on the issue of possession of the property described in the complaint.

13. Kelo:

- The Montana legislature passed legislation similar to many other states in response to the 2005, *Kelo v. City of New London*, 545 U.S. 469, case. In 2007, the legislature passed two bills that purport to limit the possibility of a *Kelo*-type taking in Montana. The bills basically addressed blighted property and created a prohibition against condemning blighted property for sale to a private entity. Mont. Code Ann. §§ 7-15-4206 & 4259.
- Unlike the state of Connecticut, Montana never did define “economic development” as a statutory basis for condemnation.

GUEST OPINION

Rural property rights at stake in Helena debate

By HERTHA L. LUND

These are already crazy times at the Legislature in Helena. It seems that some are willing to compromise fundamental rights, such as private property rights, in search of the elusive "jobs, jobs, jobs." At a time when the Republicans in Congress read the Constitution on the floor, and plan a return to limited government, Montana may be willing to ignore basic constitutional protections. How can it be expedient to run over one person's fundamental rights to allow a business a leg up?

Last week, a House hearing addressed whether a Canadian merchant power line that is funded with U.S. stimulus dollars can use the state's power to condemn private property. The sponsor of the bill, House Bill 198, argued that the legislation was needed to create jobs. Rep. Ken Peterson, R-Billings, argued that his bill was necessary for development and that with no development, there would be no new jobs.

HB198 was drafted in response to a court's determination that MATL, a private company, did not have the right to condemn property. MATL is part of a Toronto-based company that is trying to build a 214-mile private electrical transmission line from Lethbridge to Great Falls.

As drafted, the main jobs that HB198 would create are jobs for attorneys who seek to defend landowners' rights. Both Montana and the United States Constitutions prohibit the taking of private property without due process. HB198 would violate these constitutional rights and hold up any pending projects due to litigation.

According to the Environmental Impact Study for the transmission line that MATL is attempting to build, the "expected beneficial effect of this long-term employment on the line would be minor." The CEO



Mike Keenan/DENVERPOST 2008

of the company once told his stockholders that the project would be virtual, meaning few if any employees in Montana. Also, MATL was given a significant tax break in the 2007 special session, which would have significant impact on local government revenues, according to the bill's fiscal note.

Based on the EIS and the tax breaks afforded to MATL, HB198 will create relatively few jobs. I don't think it is worth impinging on basic constitutional rights protecting private property just so MATL can meet its deadline to spend its \$160 million in stimulus dollars.

Montana has been very reluctant to allow condemnation of private property for economic development. In 2007, in response to *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the Legislature passed a law to prevent condemnation for urban development. HB198 would treat rural landowners differently than urban landowners because it would allow eminent domain for purpose of economic development.

Rural landowners should

not be sacrificed for the false choice between "development" or "property rights." MATL can still do what it always should have done: Treat landowners fairly and negotiate to reach an agreement about compensation and placement of the electrical line on their private property. If a private entity, such as MATL, has condemnation authority, it has every incentive to forgo civil, fair negotiations and to instead jump to the threat of eminent domain in order to speed up the process. MATL should be spending its resources and time to work with the landowners instead of lobbying the Legislature to give the company the state's right to condemn property.

The appropriate way to fix the problem, if one exists, is for the Legislature to pass legislation that:

- Only provides condemnation authority for an entity that is regulated by the Public Service Commission.

- Requires the entity to meet with landowners prior to siting the line.

- Requires that any transmission line project fit into a

state plan.

- Prohibits an agency charged with environmental review from making constitutional determinations regarding property rights or whether a transmission line is necessary to upgrade the state's transmission lines; and, requires just compensation for the overall negative impact on property, which includes the fact that a transmission line reaches from the ground into the sky. Current compensation provides for surface damage, and is not equitable for transmission lines.

- Doesn't retroactively seize the property of the landowners in the path of MATL's project.

Legislation with these components would protect private property. Also, it would help ensure that any transmission line that was built was necessary and did not end up being a tool for Enron-like arbitrage in electricity marketing between Canada and America.

Hertha L. Lund practices law in Bozeman and represents landowners against whom MATL sought to condemn property.

14. Regulatory Takings:

- “inverse condemnation” = “regulatory takings”
- Two types of per se takings: 100% diminution in value; and physical invasion.
- Montana Supreme Court has interpreted a flooding as condemnation. *Knight v. Billings*, 642 P.2d 141, 145 (Mont. 1982).
- Montana has “taken or damaged” in Constitution.