THE MONTANA BATTLE: Litigation/Legislation – Utilities vs. Landowners Property Rights

By: Hertha Lund, LUND LAW, PLLC

1. Overview:

- Why are these issues hot now?
  - Wind Energy
  - Need to update the transmission grid
  - Moving the Bakken Oil and other products south

- 2011 Legislature
  - What happened
  - The debate
  - The politics
  - The outcome

- Due Process Implications

  - Passage of HB 198 has allowed an environmental review process, under MFSA, to result in the granting of condemnation authority to any entity obtaining a MFSA certificate.
  - MFSA, however, was never designed as a tool to grant condemnation authority. The notice provisions in MFSA are much less stringent than condemnation law requires.
  - Passage of retroactive legislation also did not provide due process to landowners.
  - MATL argued that its use was public because Mont. Code Ann. § 70-30-102 stated owners of energy line as an entity that could condemn, which would mean that the issue of "public use" was not an issue that the condemnor had to prove by a preponderance of the evidence before the Court.
  - MATL argued that its use was "necessary" because DEQ found that in the MFSA process, which would mean that the issue of "necessity" was not an issue that the condemnor had to prove by a preponderance of the evidence before the Court.

2. Salois Litigation:

a) Case Background

  - The *Salois* case was the first of the MATL litigation cases. It was also the case that prompted MATL to seek a legislative fix (HB 198) during the 2011 Legislature.

  - The *Salois* property contained a number of teepee rings. The MATL transmission line was sited across some of these rings. These rings had been identified by both MT DEQ and MATL, but the route was still

selected that would interfere with the rings and other identified cultural artifacts.

- In the *Salois* case, MATL admitted that it was not regulated by the Public Service Commission (the entity in Montana charged with regulating public utilities).

- The FEIS on the MATL line stated: "The MATL transmission line would be a merchant line, the primary purpose of which is to financially benefit the owner/ operators."

- MATL repeatedly argued that MFSA provided adequate due process protection for landowners, despite the fact that the route selected for a line was selected without landowner input or consultation.

- Further, MFSA is an environmental statute and was not designed with condemnation in mind; nor did the MFSA statutes have any language related to condemnation.

- At the time of the *Salois* District Court case, there was no specific grant of eminent domain authority for a non-public utility or a merchant line.

- Montana 9th Judicial District Court dismissed MATL's Complaint due to finding that MATL did not have the power to condemn.

- MATL subsequently appealed the decision to the Montana Supreme Court. In addition, and almost simultaneously, it launched a significant lobbying campaign during the 2011 Montana Legislative Session (see MATL Litigation timeline, below).

3. MATL Litigation:

a) Timeline:

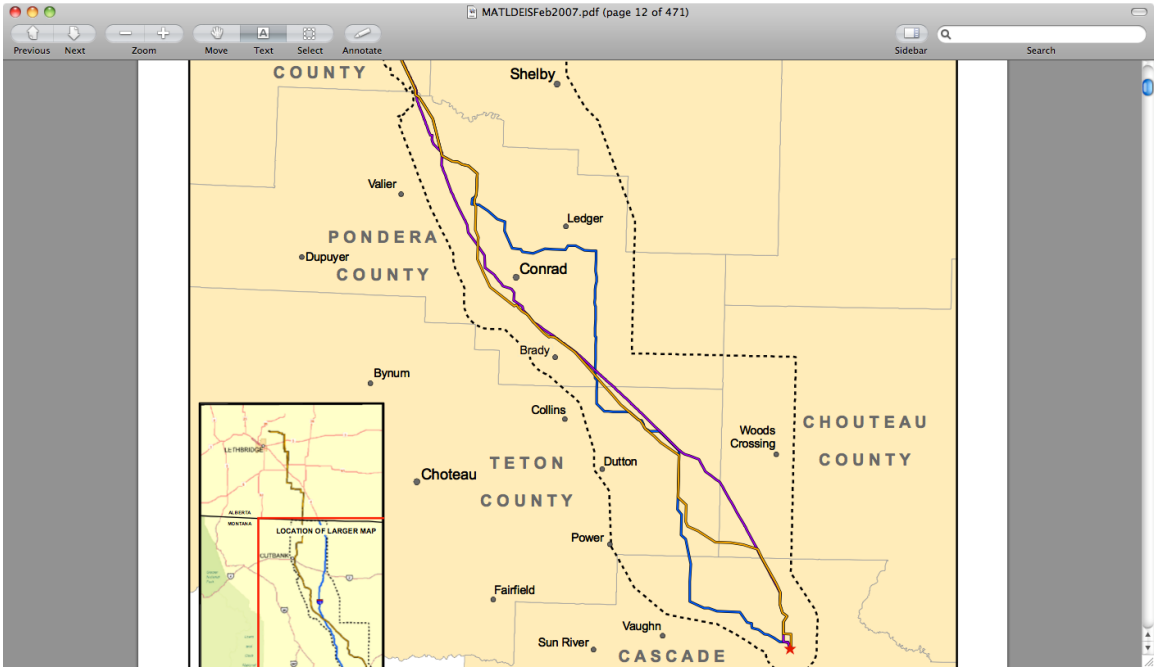
December 1, 2005 -- MATL submitted an application to the Montana Department of Environmental Quality (DEQ) for a MFSA Certificate of Compliance for the construction of a 198-mile "merchant (private non-utility) transmission line."

December 2005 -- DEQ and DOE held three scoping meetings to gather input from landowners in the areas affected by three alternative routes.

June 2006 -- After MATL changed its proposed alignment north of Cut Bank, the DEQ held another scoping meeting.

March 2007 -- The DEQ and DOE issued the DEIS in March 2007. Alternative 1 was the no-action alternative; Alternative 2 was the agencies' proposed action; Alternative 3 was called "MATL B," and was designed to parallel existing utility corridors; and Alternative 4 was called "Agency-Developed," and was proposed by DEQ "to address concerns raised by the public and interested agencies during the scoping period." The DEIS was sent to some of the potentially affected landowners. The Court noted that the DEIS contained hundreds of pages, of

which only a few identified the land across which the powerline would be built. The maps did not include section and township specifications, and looked generally like this:



The DEIS sent to the landowners contained no other indication of the land that would be crossed by the line. The area studied for the MATL project is 1.4 million acres, or 2,260 square miles, which is approximately twice the size of Rhode Island. 43.9% of the land is privately owned; more than 88% is agricultural land.

February 2008 -- The DEQ and DOE issued a state Supplemental Draft Impact Statement (SEIS) and a federal Draft Environmental Impact Statement. DEQ mailed the SEIS to area landowners, again using tax records.

March 2008 – DEQ and DOE held three public meetings which were announced in local newspapers.

September 2008 -- DEQ and DOE jointly issued a Final EIS (FEIS). The FEIS chose Alternative 4 with the addition of the local routing options identified in the SEIS. Alternative 4 was different than any of the other proposed routes.

October 22, 2008 -- Based on the FEIS, the DEQ made its Findings and Determination, and issued a MFSA Certificate of Compliance for the MATL project.

July 19, 2010 -- MATL filed a complaint to condemn the property of Shirley J. Salois. Mrs. Salois moved to dismiss the complaint on the grounds that the legislature had never delegated the power of eminent domain to MATL.

December 12, 2010 -- The Ninth Judicial District Court held that MATL did not possess the power of eminent domain, and dismissed the complaint. Order,

MATL, LLP v. Salois, Ninth Judicial District, Glacier County, Cause No. DV 10-66 (filed December 12, 2010).

Spring 2011 -- MATL appealed the decision to the Montana Supreme Court, and then lobbied the Montana Legislature for a new law delegating it the authority to condemn.

Spring 2011 – MATL's lobbying efforts resulted in the passage of H.B. 198. The Montana Supreme Court then dismissed MATL's appeal because it found that H.B. 198 rendered the appeal moot. The Montana Supreme Court did not decide the underlying issue on appeal, i.e., whether MATL had the power of eminent domain prior to the enactment of H.B. 198.

April 29, 2011 -- The Montana Legislature enacted House Bill 198 in April 2011; the bill was transmitted to Governor Brian Schweitzer on April 29, 2011. The governor neither signed nor vetoed the bill, resulting in its enactment by operation of law on May 6, 2011. 2011 Mont. Laws, Ch. 321, H.B. No. 198. The law became effective on May 9, 2011. *See* MCA § 75-20-113.

May 20, 2011 – Landowners filed a complaint challenging the constitutionality of H.B. 198.

May-June, 2011 – MATL filed actions to condemn property in 9 different cases in three district courts naming more than 60 landowners.

December 18, 2012 – Cases dismissed by Court Order.

b) Constitutional Questions in MATL Suit:

Landowners argued on Summary Judgment: The right to own private property is as fundamental a right as one can find in American law. While that right has always been subject to the sovereign's right to take property for a public purpose, the power of eminent domain is not absolute. Landowners were not challenging MATL's attempt to condemn their property, but the Montana Legislature's delegation of condemnation authority to MATL through retroactive legislation.

There were five Plaintiff-Landowners in the lead case, *Maurer Farms v. State of Montana*. However, in addition to these Landowners, MATL has filed condemnation suits against at least 31 other landowners. These Landowners represented ownership of approximately 36 miles of property through which MATL wanted to run its transmission line. Some of the Landowners' families had been on the property for five generations. Until the MATL project, no landowner in Montana had ever faced a merchant-transmission line project like MATL's to allow a private, non-public utility entity to build 130 miles of line from Great Falls to Canada.

Landowners argued that Section 2 and Section 6 of H.B. 198 were unconstitutional as applied to them because those sections retroactively granted a private entity the sovereign power of eminent domain on the basis of an environmental review process (MFSA) that did not, at the time, confer eminent domain authority on anyone. The retroactive delegation of

eminent domain authority via MFSA, therefore, was a clear violation of Landowners' right to due process of law.

Similarly, the lack of notice to Plaintiff-Landowners that issuance of a MFSA certificate to MATL would result in eminent domain power being vested in MATL violates the Montana Constitution's guarantee of the right to participate in governmental decisions. The Landowners had no opportunity to meaningfully participate in the MFSA process, as they did not know that the issuance of a MFSA certificate would confer condemnation authority on MATL and subject their private property to condemnation by a private company.

Additionally, H.B. 198, Section 6's retroactive application of Section 2 to entities that received MFSA certificates between Sept. 30, 2008 and the effective date of the legislation was unconstitutional special legislation, as it applied to a permanently closed class of which MATL was the only member. This was an arbitrary classification, the lines of which were drawn to benefit only one entity. Such arbitrary favoritism on the part of the Legislature violated basic constitutional principles prohibiting special legislation.

Finally, MCA § 75-20-113 is facially unconstitutional, as it violates Landowners' rights to due process under the Montana and U.S. Constitutions. The only notice provisions in MFSA involve an initial publication of a proposed power line in local newspapers; no other specific notice is required under the statute. Thus, MFSA is facially unable to withstand a due process challenge.

District Court held: That H.B. 198 was not unconstitutional beyond a reasonable doubt because "the record was replete with public hearings and notices being sent to landowners informing them of the MFSA process." Order at pg. 18. Also, at the time of this ruling "no plaintiffs' land or property had been taken. The plaintiffs will receive full due process and a chance to be heard during the condemnation proceedings." Order at pg. 19.

c) Issues left for trial:

4. H.B. 198

Never before MATL had a private merchant transmission line filed actions to condemn more than 36 landowner's property. Never before has the Montana legislature tied condemnation to an environmental permitting statute. This was the first time a private merchant line had attempted to condemn private property without a specific statute granting them authority to condemn.

HB 198 was codified at § 69-3-113, MCA (regarding the section of the Code related to regulation of Public Utilities) and at § 75-20-113, MCA (regarding MFSA):

MCA 75-20-113. Power to exercise eminent domain. A person issued a certificate pursuant to this chapter may acquire by eminent domain any interest in property, as provided in Title 70, chapter 30, for a public use authorized by law to construct a facility in accordance with the certificate.

Landowners' lawsuit challenging HB 198 was one of first impression in many ways; however, there is no doubt that the Montana Supreme Court has found:

i. any interpretation of the eminent domain statutes must favor "the person's fundamental rights." *City of Bozeman v. Vaniman (Vaniman I)*, 264 Mont. 76, 79 (1994).

ii. "The authority to condemn must be expressly given or necessarily implied. . . . All of our decisions have been in accord." *State v. Aitchison*, 96 Mont. 335, 394 (1934).

iii. "The legislature's grant of eminent domain power to governmental bodies must be strictly construed. . . . Private real 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 a person's fundamental rights." *Vaniman I*, 264 Mont. at 79.

iv. "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*, ¶ 8, 320 Mont. 384 (2004).

v. "a unanimous Court stated clearly and without equivocation that 'the legislature's grant of eminent domain power . . . must be strictly construed.' 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." *McCabe Petroleum* at ¶ 14.

5. Outstanding legal issues: Public Use --

A. Public Use Is a Factual Determination, Not a Question of Law –

- MATL argued that under the plain language of M.C. A. § 70-30-111, the only issue for the Court's determination is whether MATL's transmission line is a public use pursuant to § 70-30-102.

- The title of M.C.A. § 70-30-111 is "*Facts* Necessary To Be Found Before Condemnation." While the title of a statute is not conclusive of its meaning, in this instance the text of the statute supports this interpretation, stating, in part:

> Before property can be taken, the condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on the following findings . . . . Mont. Code Ann. § 70-30-111.

- The preponderance of the evidence standard is applied to facts, not law. While "electrical energy lines" are mentioned in M.C.A. § 70-30-102(37) as a public use for which condemnation may be had, this should be viewed as a rebuttable presumption, not a conclusive determination.

- The analysis of the public/private uses in *Vaniman I* illustrates this approach. The Court acknowledged that the rest area and visitor center were authorized by law, which was the statutory standard at the time. *City of Bozeman v. Vaniman (Vaniman I)*, 264 Mont. 76, 80, 869 P.2d 790, 793 (1994). By failing to consider evidence of the private use of the rest area, the District Court violated the landowners' due process rights. *Id.* at 83, 869 P.2d at 794. The Court remanded for further determination by the trial court of whether the private use was *de minimis*. *Id.*

B. Landowners Have a Right to a Hearing.

- Eminent domain is in derogation of the right to acquire and possess property. "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." *McCabe Petroleum Corp. v. Easement and Right-of-Way,* 2004 MT 73, ¶ 14, 320 Mont. 384, 87 P.3d 479.

    - Landowners – whose property rights are imminently threatened with being taken – have rights under both the Montana and U.S. Constitutions to due process of law. Notwithstanding the deference due legislative enactments, it is the function of this Court to protect citizens' inalienable rights guaranteed them by the Montana Constitution.

    - All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. Mont. Const. Art. II, sec. 3 (emphasis added).

    - A right is fundamental under the Montana Constitution if it is found in the Article II Declaration of Rights or is a right "without which other constitutionally guaranteed rights would have little meaning." *Montana Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 1999 MT 248, ¶ 56, 296 Mont. 207, 988 P.2d 1236. The right to acquire, possess and protect property, which is found in the Article II Declaration of Rights, is a fundamental right. *City of Bozeman v. Vaniman (Vaniman I)*, 264 Mont. 76, 79, 869 P.2d 790, 792 (1994).

    - The taking of property invokes fundamental liberty interests, which must be protected by fundamentally fair procedures. *Buhmann v. State*, 2008 MT 465, ¶ 135, 348 Mont. 205, 201 P.3d 70. Fundamental fairness and due process require

that landowners not be placed at an unfair disadvantage during the condemnation of their private property.

- Moreover, "vigorous compliance with procedures for eminent domain is commanded." *Mont. Talc*, 229 Mont. at 498, 748 P.2d at 448 (citing *Helena v. Rogan,* 26 Mont. 452, 68 P. 98 (1902) and *Glass v. Basin Mining and Concentrating Co.*, 22 Mont 151, 55 P. 1047 (1899).

- Judicial determinations of public use and necessity, as well as compensation, are the key landowner protections built into Montana eminent domain statutes. Mont. Code. Ann. § 70-30-111. "The due process rights of the party whose property is taken for public use are protected by statutes providing the procedures for eminent domain and by the constitutional provision for just compensation." *City of Bozeman v. Vaniman (Vaniman I)*, 264 Mont. 76, 79, 869 P.2d 790, 792 (1994).

MATL's Line Was Not a Public Use For Purposes of Condemnation.

- The condemnation statutes are distinct from MFSA. MATL should have had to comply with both. *Fondren*, 226 Mont. at 507, 737 P.2d at 1142. MFSA requires DEQ to determine that "the facility will serve the public interest, convenience, and necessity." Mont. Code Ann. § 75-20-301(1)(f). This determination is distinct from the judicial inquiry into public use for purposes of determining whether a private entity may exercise the power of eminent domain, and transfer title from another private landowner to itself.

C. MATL Is Not the Montana Power Company.

- The MATL line is not a public use and cannot be analogized to any previous condemnation in the state of Montana. Every condemnation case involving the construction of electrical transmission lines in Montana has involved Montana Power Company (MPC). *See, e.g., MPC v. Bokma*, 153 Mont. 390, 457 P.2d 769 (1969); *MPC v. Fondren*, 226 Mont. 500, 737 P.2d 1138 (1987); *MPC v. BN*, 272 Mont. 224, 900 P.2d 888 (1995).

- The Montana Legislature deregulated the electric industry in 1997, which allowed unrelated entities to own only power generation facilities, or only transmission lines, or only distribution facilities. Prior to that time, MPC was responsible for every aspect of power generation, transmission and distribution. It was regulated by the state Public Service Commission (PSC), which had to approve the rates charged by MPC to its customers.

- This is known as "rate-based" regulation; a company like MPC had to balance rates it was allowed to charge consumers against the costs of generation, transmission, and distribution. For better or worse, this is no longer the case in Montana. MPC immediately sold its various facilities – some to Northwestern Energy, some to PP&L

– and it is unlikely that any utility in Montana will ever own all aspects of power generation, transmission and distribution.

- This history is important not because deregulation is necessarily good or bad, but because it provides important context for understanding why MATL is not MPC, and why cases involving condemnation by MPC are not analogous to this case. More importantly, the changes that have occurred in the past 15 years have transformed the electric industry in ways that those of us who simply turn on or off a switch do not pay attention to or fully understand, and deserve deeper understanding in light of MATL's contention that its private transmission line is *in fact* a public use.

- Some of the primary differences between MPC and MATL, as explained by John Etchart, past chairman of MATL, are financial stability and willingness to take risks:

> Well, first of all, an existing utility would have other businesses, right. An existing utility would have its own balance sheet. An existing utility would have a rate-based guarantee to borrow against. . . . . you have two options. You can wait for the utility to do it, which means it's going to do it sort of like when it gets around to it, or you can go where the opportunity is, with a risk taker such as MATL was. Depo. John Etchart 97:17-23, 99:11-15 (Feb. 13, 2012).

- Yet analogizing prior Montana case law involving MPC to this case is fraught with problems. Rather, this case must be viewed as *sui generis*, involving a project not heretofore encountered in the history of eminent domain in Montana. MATL is not MPC, nor is it a Montana "public utility."

D. MATL Is Not a Public Utility Under Montana Law.

- Landowners acknowledged that MATL is regulated by FERC. However, they disputed that MATL is a public utility under Montana law, regardless of whether they seem to fit the definition of M.C.A. § 69-3-101. Title 69, Chapter 3 is entitled, "Regulation of Utilities." The definition of "public utility" in § 69-3-101 is within Part 1, entitled "Role of the Commission." Notably, the PSC is "invested with full power of supervision, regulation, and control of such public utilities." Mont. Code Ann. § 69-3-102.

- Presumably MATL does not wish to cede authority to the PSC to "inquire into the management of [its] business," although that is an explicit power of the commission over public utilities. Mont. Code Ann. § 69-3-106. The PSC also has authority to investigate accidents, M.C.A. § 69-3-107, establish standards for products and services used by public utilities, as well as measurements and testing of those products, enter a public utility's premises at any time to conduct measurements and tests, M.C.A. § 69-3-108, and investigate and ascertain the value of property used by the public utility, M.C.A. § 69-3-109.

- Additionally, if MATL is a Montana public utility, it is required to file an annual report with the PSC. Mont. Code Ann. § 69-3-203. MATL does not appear on the list of utilities that filed annual reports for any year.

- Moreover, MATL's contention that it is a public utility contradicts its description as a merchant line in the MFSA Certificate and the EIS. *See, e.g.,* Final DEIS at 4-1 (describing MATL's project as a merchant line, which is "a line constructed and owned by a private party with no electric service area who own no other electrical facilities); MATL MFSA Certificate at S-3 ("The MATL transmission line would be a merchant line, the primary purpose of which is to financially benefit the owners/operators").

- Landowners pointed out the various powers of the PSC not only to support their contention that MATL was misrepresenting its status as a Montana public utility to the Court, but also to demonstrate the specific oversight exercised by the PSC over public utilities. MATL is not regulated by *any* Montana agency. It is not regulated by the PSC, which is responsible for regulating all public utilities. Therefore, it is not a public utility under Montana law.

E. MATL Does Not Serve Montana Customers.

- The primary reason MATL is not and will not be regulated by the PSC is that its customers are not residential and commercial consumers; it therefore has no consumer rates for the PSC to approve. MATL sells space on its line to those who have power to ship. It is a "user-pay line." Depo. Bob Williams 25:21 (Feb. 7, 2012).

- The only way Montanans could get power directly from the MATL line would be if they built a substation with breakers and transformers to drop the voltage from 230,000 to a voltage that can be used in a home, which is "usually 480 volts." 30(b)(6) Depo. James Kemp 16:18 (Feb. 20, 2012). The cost for this type of interconnection would be "in the neighborhood of half a million to 600,000 type of thing." *Id.* at 17:6-7. "They can't just throw a jumper cable up there and take power. There has to be a whole facility." *Id. at* 18:25-19:1.

- But the purpose of the MATL line is "[a]bsolutely not" to get power to individual landowners. *Id.* at 6:2. "I am not the local utility and I do not supply retail power to any of their customers." *Id.* at 17:23.

F. MATL's Line Will Not Benefit the Public.

- In every case involving condemnation for transmission lines, the Court has noted that electricity is a public good. Even MATL opened its brief by waxing poetic about the need for every farmer and rancher in Montana to have electricity.

- Landowners did not dispute the public good of electricity; they disputed the public good of MATL's line. MATL's line was being built for private gain; that is its *primary* purpose. Landowners were not making this purpose up; it was taken directly from the EIS for the MATL project. According to the EIS, "The MATL transmission line would be a merchant line, the primary purpose of which is to financially benefit the owner/operators." Final EIS (Feb. 2008) at S-3.

- Many MATL witnesses made similar statements in their depositions. For example, when asked why Tonbridge wanted to build the MATL line, former Tonbridge chairman John Etchart said, "Well, it was our belief that we had a solid business case that the two – that connecting the two grids would prove to be a commercial success, so that it was a sensible investment for us and for our shareholders." Depo. John Etchart 25:17-23.

- The MATL line was not a public good with incidental private gain; it is a private vehicle for investors to make money with incidental public benefits.

- MATL asserted that its line conferred a public benefit on Montanans because (1) it would provide transmission capacity to wind farms, (2) it would provide Montanans "as well as others" with energy from a clean, renewable source, and (3) it would increase the stability and reliability of Montana's power grid should the wind farms actually be built. Landowners agreed that the MATL line would allow wind farms to move their energy to markets; however, they disputed that the MATL line would provide Montanans with electricity, or that the MATL line would increase the reliability and stability of the Montana grid.

- In spite of statements in the MFSA Certificate that the MATL line would increase reliability and stability of the power supply in Montana, and in the western power grid, MATL's experts did not uniformly agree. Electrical engineer and siting consultant Jerry Smith stated unequivocally in his deposition, "This project is not being proposed to solve a reliability or stability concern in the grid. It's being proposed to improve movement of resources from one location to load in another location." Depo. Jerry Smith 40:2-6 (March 10, 2012).

- Mr. Smith went on to explain that "by doing that, it improves the market, the price that's available to – within the west for the parties that may be either not able to get access to resources that are cost effective or that are simply not available because there is no path to deliver." *Id.* at 40:6-11.

- In fact, Mr. Smith specifically tied the need for the MATL line to wind energy: "if you have a state that is heavy in providing renewable resources, you need to have transmission that can be able to deliver for those type of resources to the market that has a need for the energy out of those resources." *Id.* at 41:9-13.

- In stark contrast, MATL engineer and project manager James Kemp testified that the public benefit of the MATL line "is that it adds

reliability and stability to the overall power grid in Montana." 30(b)(6) Depo. James Kemp 4:22-24. When asked further about this statement, Mr. Kemp explained that Montana's electrical grid is in in no danger of brown outs or blackouts:

Q: Is the current grid unstable?

A: No. But the phenomena of failure modes still allow for certain windows of when you could brown out or even black out in this region. And by adding another leg in this county, a third leg to it, you now have a triple reliability instead of just a double. *Id.*, at 6:14-20. Upon later questioning by MATL counsel, Mr. Kemp explained stability as light flicker, or early burnout of appliances, and added, "We don't quite have that problem here, but that's what you do for stability." *Id.* at 14:22-24.

As both witnesses acknowledged, Montana's system is neither unstable nor unreliable, nor expected to become so in the foreseeable future:

A: <u>At the current time you have met the base stability criteria for all customers in the market.</u> . . . It's not saying that NorthWestern isn't reliable now. It's saying it will be more reliable when it has another interconnection to its generation supply. . . . It's like another lane on the interstate. It just allows more stuff to flow. *Id.,* at 19:8-10, 19:19-22, 19:25-20:1.

- Montana does not need the MATL line; the interstate operates quite well without an additional lane. Rather, MATL sought to use public money to build a private investment vehicle.

- Moreover, it sought to condemn private property to achieve its private goals.

- An incidental public use is not sufficient to justify exercise of the power of eminent domain.

G. Condemnation for the MATL Line Transferred Ownership of Private Property from One Private Entity to Another Under the Duress of Condemnation.

- MATL proposed to use the sovereign power of eminent domain to force transfer of property ownership from one private party to another.

- Forcing property owners to sell their property, or worse, to enter into long-term easements with a condemnor is justifiable when the public good benefits from the condemnation.

- When the condemnor is the government, the condemnees are at least assured that the purposes for which the taking is made are public purposes, and that power and financial power of the state is backing the project up.

- But when the condemnor is a private entity, the condemnees have no such assurances regarding financial stability or public purposes.

- Moreover, the financial pressure on private entities is significantly greater, as has been seen throughout this process. That pressure in turn leads MATL to sacrifice public good – such as Landowners' due process rights – in order to meet its financial goals. Judicial oversight is crucial under these circumstances.

H. The Real Purpose of the MATL Line is to Make Money for MATL Investors.

- "[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

- "On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example." *Id.*

- However, "where the actual purpose of a condemnation action is to bestow a benefit on a private party, there can be no rational basis for the taking." *County of Hawai'i v. C & J Coupe Fam. Ltd. Partn.*, 198 P.3d 615, 647 (Haw. 2008).

- MATL asserted that it is regulated by FERC, and that the Open Access Transmission Tariff (OATT) proved that it is like a common carrier. Landowners contended that a private toll road between Great Falls and Lethbridge, that would be open to anyone as long as they could pay $500,000, raises significant questions about whether it is a "public use" sufficient to allow condemnation.

- The issue was not whether MATL should be allowed to build the line, or whether the overall costs outweighed the overall benefits. The issue was whether the proposed use of this electrical transmission line was sufficiently "public" to justify forcing private landowners to involuntarily give up their property rights.

I. MATL's MFSA Certificate Was Not Conclusive Evidence of a Public Benefit.

- MATL relied on its MFSA Certificate as conclusive evidence that its line is a public use. At best, the MFSA findings are prima facie evidence, subject to rebuttal by Landowners.

- The MFSA process is designed to assess the environmental impact of major facilities. It is not designed to determine whether the use is sufficiently public to justify exercising the power of eminent domain.

- As stated in the EIS and MFSA certificate, the public interest, convenience and necessity was determined by analyzing whether there could be a future need to move energy by a route where there is currently no line. A.R.M. 17.20.1604. That is the extent of the public use analysis for the MSFA certificate.

- In fact, MFSA relies primarily on MEPA to evaluate those impacts. Determining that a facility meets the MFSA criteria in A.R.M. 17.20.1604 is a distinct inquiry from determining whether the proposed use is a public use that supports taking private property rights.

- MATL conflated the two, as it did throughout the proceedings, insisting that all of the determination made by DEQ suffice to show by a preponderance of the evidence that MATL should be entitled to a preliminary order of condemnation.

- The testimony of DEQ MFSA specialist Tom Ring undermined MATL's position. According to Mr. Ring, who had worked for the state in the major facility siting arena for more than 30 years, in determining whether a proposed project has "public benefits" (as opposed to public use), DEQ looks at tax revenues, employment, and secondary jobs, such as indirect employment benefits at wind farms. Depo. Tom Ring 61:16-24.

- While these kinds of assessments are important to making a cost-benefit analysis of a project, they cannot be used to support a finding of "public use" for condemnation purposes. If they did, every private undertaking would be a public use. Every industrial undertaking creates jobs and adds to the tax base; those are the benefits relied upon to justify adverse impacts to the environment. But that would transform every private undertaking into a public use for which condemnation could be exercised – an outcome that neither history nor the law support.

J. MATL Is Not A Regulated Public Utility, and Its Line Confers No Benefit on the Public.

- In *Bokma*, the Court focused on the potential for future connection to the line and MPC's status as a public utility in finding the proposed line was a public use. *Montana Power Co. v. Bokma*, 153 Mont. 390, 392-393, 457 P.2d 769 (1969).

- 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 (emphasis added).

- 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 396-397. It quoted the Montana federal court's findings in a related case that:

> 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 reasonably 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).

- MATL attempted to position itself as being just like MPC, which of course it is not.

- 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*, 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 M.C.A. § 7-13-2502).

- Until MATL, no private entity, unregulated by the PSC, and with no obligation to provide service to Montanans, had ever sought to condemn private land for a transmission line.

- MATL's MFSA certificate was insufficient to establish that MATL's line is a public use for purposes of condemnation, and the Landowners' rights to due process of law required that they have an opportunity to present the facts to a court for determination.

- Public use is more than an item in M.C.A. § 70-30-102(37).

- It is a bulwark against invasive action against private property owners by a private entity that cares more about its bottom line than it does about Montana generally, or Landowners specifically.

- The unusual nature of MATL's project raises significant questions about whether it is in fact a public use with incidental private gain, or whether it is in fact a private use with incidental public gain.

- Because the determination of those issues requires fact-finding by a court, it should not be decided as a matter of law on summary judgment.

6. Outstanding Legal Issues: Necessity –

A. MATL's Project was Not "Necessary to a Public Use."

- According to Montana's condemnation statutes:

> Before property can be taken, the condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on the following findings:
> (1) the use to which the property is to be applied is a public use pursuant to 70-30-102;
> (2) the taking is necessary to the public use;
> (3) if already being used for a public use, that the public use for which the property is proposed to be used is a more necessary public use;
> (4) an effort to obtain the property interest sought to be taken was made by submission of a written offer and the offer was rejected. Mont. Code Ann. § 70-30-111.

- Thus, necessity is a question of fact to be determined by the Court. Moreover, it must be determined for each landowner. *Montana Power Co. v. Bokma*, 153 Mont. 390, 397, 457 P.2d 769, 774 (1969) ("Before the district court may order condemnation, it must find that the proposed taking is necessary to the public use under the circumstances of the individual case").

- As a general rule, the "condemnor's choice of location is given great weight and will not be overturned except on clear and convincing proof that the decision was excessive or arbitrary." *Park County ex rel. Paradise & Shields Valley TV Districts*, 2004 MT 295, ¶ 20, 323 Mont. 370, 100 P.3d 640. The burden of proof in showing arbitrary action is clear and convincing. *Id.*

- When a condemnor fails to consider the question of the least private injury between alternates equal in terms of public good, its action is arbitrary and amounts to an abuse of discretion. *Bokma,* 153 Mont. at 399-400, 457 P.2d at 775.

B. DEQ and MATL were Not Clear on What the Need for the Line Was.

- DEQ determined that MATL established "public need" for its line based on the purchase of MATL's transmission capacity by four wind farm developers. "Four developers of proposed wind farms, listed on Table 4.1-1 of the Final EIS, purchased all of the transmission line's shipping capacity.

- Based on the purchase of the transmission capacity by the developers of proposed wind farms, DEQ found that there is a need for the proposed transmission line." MATL MFSA Certificate at 2.

- As explained by DEQ's Tom Ring, "In general, we looked at the transfer capacity, or lack thereof, between the end points in the U.S. and Canada. There were no existing transmission lines that had the capacity to handle the loads that were planned at the time of certification." Depo. Tom Ring 25:19-24 (March 8, 2012).

- Additionally, DEQ stated in the EIS that "because the capacity rights are a commodity that may be resold or traded, the original purchasers may not be the power suppliers that use the line. . . . .While the wind farms could be the first users of the line, it is reasonably foreseeable that other shippers would use the MATL line." Final EIS 4-2 (Sept. 2008).

- DEQ did not mention who those other shippers might be, or analyze in any detail the overall transmission capacity in Montana versus the overall generation capacity, especially if wind farms were not ultimately built.

- DEQ also apparently received an "unprecedented" number of calls from the governor's office regarding the project. Depo Tom Ring 112:1-10 (March 8, 2012).

- In other words, Montana's energy supply was just fine; from the perspective of local supply, Montana did not need this line.

- MATL expert Jerry Smith also suggested that "need" is viewed differently from the perspective of FERC's merchant lines than from the perspective of a traditional utility. "When you view this from a FERC perspective, the public need addresses the market that addresses the whole west. When you're talking about need for a local utility, you're talking about the ability to serve load within that utility's service area." Depo. Jerry Smith 40:21-41:1.

- Mr. Smith stated that the public need for the MATL line is not increasing reliability and stability, but rather "addressing the transmission congestion that exists between Montana and the northwest. . . . between Alberta and British Columbia and between British Columbia and Washington." *Id.* at 39:6-11.

- While this more global view of "need" may be appropriate in the context of MFSA, it is hardly appropriate in the context of taking Montanans' private property subject to Montana's condemnation statutes. What MATL's witnesses made clear is that the "need" for the MATL line was murky at best.

- Thus, MATL's own testimony raised genuine issues of material fact that were in dispute. Determining whether the MATL line was "necessary to a public use" would have required significant fact-finding by the court.

C. MATL Cannot Prove By a Preponderance That the Taking of Each Landowner's Property is Necessary to Its Public Use.

- MATL's burden as the condemnor was to prove by a preponderance that the taking of each landowner's property is necessary to the public use. Mont. Code Ann. § 70-30-111.

- "Before property can be taken, the condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on the following findings:
  (5) the use to which the property is to be applied is a public use pursuant to 70-30-102;
  (6) the taking is necessary to the public use . . . ." Mont. Code Ann. § 70-30-111 (emphasis added).

- In other words, "Before the district court may order condemnation, it must find that the proposed taking is necessary to the public use under the circumstances of the individual case." *MPC v. Bokma*, 153 Mont. 390, 397, 457 P.2d 769, 774 (1969) (emphasis added); *accord Lincoln/Lewis & Clark Sewer District v. Bossing,* 215 Mont. 235, 239, 696 P.2d 989, 991 (1985).

- Necessary "means that the particular property taken be 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 (citing *State Hwy. Comm. v. Crossen-Nissen Co.*, 145 Mont. 251, 400 P.2d 283, 284 (1965)).

- Further, "where the location of an improvement is chosen based on the expertise and detailed consideration of the condemnor and the evidence is introduced at the hearing, the choice may be overturned if the opposing party shows the condemnor failed to consider least private injury between routes equal in terms of public good**."** *Lincoln/Lewis & Clark Sewer Dist.*, 215 Mont. at 240, 696 P.2d at 992 (citing *Bokma,* 153 Mont. at 398, 457 P.2d at 775); *State v. Danielsen*, 146 Mont. 539, 543, 409 P.2d 443, 445 (1965) ("Of greater importance is the fact that no comparison was made among the three routes regarding prospective injury to private parties").

- "The question of necessity in a given case involves a consideration of facts which relate to the public and also to the private citizens whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions of fact to be determined in passing upon the question of necessity." *State By and Through State Hwy. Comm. v. Yost Farm*, 142 Mont. 239, 244, 384 P.2d 277, 279 (1963) (quoting *State ex rel. Livingston v. Dist. Ct.*, 90 Mont. 191, 196, 300 P. 916, 918 (1931)).

- Even if DEQ selected the route, MATL still had the duty to show that its route, which is the land it is taking, minimizes injury to private landowners. Mont. Code Ann. § 70-30-110; *Bokma*, 153 Mont. at 399; 457 P.2d at 774.

- MATL contended that its burden of proving necessity and least private injury was met by the Montana DEQ Certificate of Compliance issued in 2008 under the Major Facility Siting Act (MFSA).

- MATL asserted that the *Bokma* finding that the proposed taking is necessary to the public use under the circumstances of each individual case was met by presenting a valid MFSA Certificate to the Court.

- The reason MATL's argument fails is that the standards for taking private property have not changed; the *Bokma* rule is still the rule.

- The court is still charged with determining that the proposed taking is necessary to the public use as to each Landowner whose property is subject to condemnation, and that the condemnor considered the least amount of private injury for the greatest public good.

- Neither MFSA nor *Fondren* changed the condemnor's burden of proof or the judicial findings that must be made prior to issuance of a preliminary condemnation order.

- *Fondren* was based on the statute and administrative procedures that existed in the mid-1980s. The statute and the administrative procedures have changed dramatically since then, and those changes have legal significance.

- Once the condemnor establishes a prima facie case of public use and necessity, the burden shifts to the landowner to show by clear and convincing evidence that the condemnor's action was excessive or arbitrary. *Lincoln/Lewis & Clark Sewer Dist.*, 215 Mont. at 240, 696 P.2d at 992; *Danielsen,* 146 Mont at 543-544, 409 P.2d at 445.

- The best evidence that the condemnor did not act arbitrarily in selecting the route, or locating the poles, is that the condemnor met individually with landowners prior to making its final decision. *See, e.g., Cenex Pipeline LLC v. Fly Creek Angus*, 1998 MT 334, ¶ 39, 292 Mont. 300, 971 P.2d 781.

- Here, the DEQ did not make individual determinations as to the necessity for the MATL line in particular locations on each Landowners' property. The DEQ did not meet with each Landowner to discuss where the line might be located so as to minimize the private injury to the Landowner's property. Depo. Tom Ring 73:6-9; 108:8-9 (March 8, 2012).

- The DEQ did not make determinations of necessity for each parcel of land. *Id.* 125:4-5. Moreover, the DEQ did not determine the least amount of private injury to each Landowner, according to Mr. Ring, "as that's not a finding required under the Major Facility Siting Act." *Id.* 127:22-24.

- The plain facts are that DEQ's initial placement of the 130-mile MATL line was not perfect. This is not a criticism of DEQ; it attempted to weigh all the factors it was required to by statute, and it attempted to determine the best route for the line. But MFSA does not require DEQ to meet with every Landowner, and DEQ did not do so. Depo. Tom 99:25-100:2 (March 8, 2012).

- Not every Landowner participated in the EIS process – nor are they required to do so.

- Landowners contended from the beginning that MFSA is an environmental review statute, and is not designed to provide the factual basis for condemnation.

- Its criteria for a Certificate of Compliance are designed to assess environmental impacts and benefits.

- Its consideration of the "basis of the need for the facility" does not require consideration of potential impacts to specific landowners; in fact, MFSA does not require DEQ or MATL to meet with each landowner about where the line will be placed.

- Instead, MFSA relies on the notice provisions of MEPA. Although DEQ will take into consideration comments from individual landowners, some landowners do not participate in the MFSA process.

- Especially in light of the fact that MATL did not have authority to condemn property at the time its line was being assessed by DEQ, it was fundamentally unfair to hold that Landowners who opted not to participate in an environmental review process are thereafter prohibited from defending the taking of their property by eminent domain, and yet that is exactly what MATL was allowed to do.

D. *Fondren* is Distinguishable From This Case Because the Law and the Facts Were Materially Different.

- In 1987, the Montana Supreme Court held that a MFSA certificate (known then as a certificate of "environmental compatibility and public need") deprived district courts of jurisdiction to determine whether a proposed taking for a MFSA facility was necessary. *Mont. Power Co. v. Fondren*, 226 Mont. 500, 737 P.2d 1138 (1987).

- MATL has insisted throughout this litigation that *Fondren* applies to its proposed condemnations herein, ignoring the substantial amendments to MFSA and the siting process that have occurred since 1987.

- In fact, *Fondren* does not deprive this Court of jurisdiction to determine whether MATL has met its burden under the condemnation statute.

- In *Fondren*, the Court upheld MFSA's preclusion of judicial review of the centerline placement (within a two-mile-wide corridor) on the basis that the administrative proceeding provided by MFSA protected the plaintiffs' due process rights. *Id.* at 513. That process was mandated by M.C.A. § 75-20-205, which was repealed by the 1997 legislature and has not been replaced with an alternative procedure.

- In 1980, plaintiffs Fondren and Cochran bought property in Livingston. Nothing in the public record informed them that a 161 kV powerline was going to be built across their property, although the MFSA certificate had been issued in 1977. Fondren and Cochran did not learn of the powerline until 1981. *Id.* at 503, 737 P.2d at 1140.

- In 1985, eight years after the certificate was issued, and pursuant to a procedure that no longer exists in MFSA, the Board of Natural Resources and Conservation selected the final centerline within the two-mile-wide corridor. At that point, MPC was authorized to begin building the line. It offered to buy easement from landowners, but the plaintiffs refused. The following year, MPC filed actions to condemn plaintiffs' property. *Id.*

- The district court held a hearing and took evidence; however, questions about the court's jurisdiction under M.C.A. § 75-30-407 arose, and the district court ordered briefing on that issue.

- The district court eventually held it did not have jurisdiction because M.C.A. §§ 75-20-103 and 75-20-407 divested it of the power to decide the issue of necessity. The court issued a preliminary order of condemnation, which was stayed pending appeal. *Id.* at 504, 737 P.2d at 1140.

- The Montana Supreme Court recognized the differing purposes of MFSA and the Eminent Domain Act. *Id.* at 506, 737 P.2d at 1142.

- While the condemnation statutes were enacted to authorize the taking of private property for public uses, MFSA "was essentially an environmental law whose policy was to maintain and improve the environment while allowing controlled development of large energy facilities." *Id.*, 737 P.2d at 1142.

- MFSA transferred the authority for deciding where transmission lines should be built from the utilities building them to the state agency delegated that authority by statute. *Id.*, 737 P.2d at 1142.

- After reviewing similar statutes and case law from other states, the Montana Supreme Court noted that "the above cited cases, while granting that the corporation has been legislatively empowered with the initial determination of location for a power line, presupposes that the landowner has the opportunity to be heard and to present evidence of abuse of discretion or bad faith on the part of the condemnor." *Id.* at 508, 737 P.2d at 1143.

- Notably, under the *Fondren* version of MFSA, MPC was not entitled to begin acquiring property and building its line until after the Board had established the

final centerline. *Id*. at 509, 737 P.2d at 1143. Thus, the actual certificate was insufficient to empower the utility to begin building property or condemning land.

- Because foundational law supporting the Court's decision in *Fondren* has been repealed, and because the facts herein are materially different from the facts in *Fondren*, this Court retains jurisdiction to determine public use and necessity under M.C.A. § 70-30-111.

- The Court relied on three MFSA statutes to hold that the district court lacked jurisdiction to determine necessity:

    - M.C.A. § 75-20-103 (stating "[t]his chapter supersedes other laws or regulations");
    - M.C.A.. § 75-20-407 (stating courts do not have jurisdiction over matters that was or could have been determined by the board);
    - and M.C.A. 75-20-205 (stating that "[t]he final centerline location must be determined in a noncontested case proceeding before the board after the submission of a centerline location report by the department"). 226 Mont. at 509-510, 737 P.2d at 1143-1144. Of these, sections 103 and 407 are still in effect, while section 205 was repealed in 1997.

- At the time of *Fondren*, the department was required to consult with both the certificate holder and "the affected landowners" prior to making its final centerline location report to the board. Mont. Code Ann. § 75-20-205(3) (1995).

- When the legislature repealed M.C.A. § 75-20-205, it removed any requirement that landowners be consulted at any time during the MFSA process.

- In fact, the MFSA certification and location processes are significantly different now. As explained by DEQ Tom Ring, the MFSA process used to involve two stages:

> The first stage, they initially determined the need and a route. And a route could be variable with may[be] up to a mile and maybe even two miles wide. So they'd have that. And then the certificate of that holder would know where to concentrate their efforts and come up with a variety of alternative centerlines within whatever that variable route was. And then each of those would be weighed in more detail. Depo. Tom Ring 128:18-129:2 (Mar. 8, 2012).

- Thus, when MPC received its MFSA certificate in 1977, the "need" determined by the department was a general need for a new transmission line.

- This could not have been "need" as that term is used in the eminent domain statutes, because the final corridor had not yet been determined; therefore, the

necessity of taking particular property had not yet been determined, nor had the determination of whether the proposed taking minimized injury to private property.

- Importantly, the *Fondren* MFSA certificate *preceded* the process of talking to landowners and walking the land to determine where the actual line should go.

- The department was required to consult with landowners as well as the applicant during the process of narrowing the corridor down to an actual centerline. Mont. Code Ann. § 75-20-205(3) (1995).

- Once the department had finalized the centerline within the larger corridor, it submitted its report to the board, which held a hearing. Mont. Code Ann. § 75-20-205 (1995). Landowners had an opportunity to be heard at the hearing. Only then was the final centerline established.

- It was this ultimate determination by the Board of Natural Resources and Conservation, made after extensive consultation with affected landowners and after a noncontested case hearing, that the legislature intended should not be subject to judicial review. *Fondren*, 226 Mont. at 510, 737 P.2d at 1144 ("once the specific route of the transmission line has been set by the Board, no court has jurisdiction to hear challenges to the location of the route").

- In contrast, MATL's MFSA certificate established a centerline akin to the final centerline decided by the board under MCA § 75-20-205, but without any requirements that Landowners be consulted before that centerline was established, and without any opportunity for Landowners to appear at a hearing before that centerline was established. Again, as explained by DEQ's Tom Ring, in the current process:

> We approved a centerline, plus or minus 250 feet on either side of that. And then left it to MATL to negotiate with the landowners and give them a little bit of flexibility for pole placement within that. Depo. Tom Ring 131:14-18 (Mar. 8, 2012).

- In Mr. Ring's words, the modern MFSA process establishes a 500-foot-wide corridor, and MATL could then put the actual centerline anywhere within that corridor. *Id.* 131:1-3.

- MATL did not need additional approval, whereas MPC did. MATL was not required to meet individually with landowners, whereas MPC was.

- DEQ did not hold a hearing regarding the final corridor for the MATL line, whereas the Board of Natural Conservation did.

- From a landowner's perspective, this new 'streamlined" process was fundamentally different from the *Fondren* process.

- It new process does not ensure notice or consultation or any flexibility other than within the 500-foot-wide corridor.

- With the new process being used as the basis for establishing that the takings of the Landowners' properties were necessary, this should have been a clear violation of the Landowners' due process rights..

- At the time of *Fondren*, a MFSA certificate was not a ticket to build or to condemn.

- It was a ticket to begin the process of consulting with landowners to ensure that the chosen corridor would result in the greatest public good with the least amount of private injury.

- In *Fondren*, seven years passed from the time the certificate was issued until the board approved the final corridor.

- During that time, the agency and the utility met with landowners on their property to discuss options for the line placement.

- The agency and MPC met with the *Fondren* plaintiffs on at least three separate occasions in 1984 and 1985. 226 Mont. at 512, 737 P.2d at 1145.

- Both the *Fondren* facts and the MATL facts may be roughly subsumed under the "MFSA process" category, but their differences far outweighed their similarities.

- In 1977, the department established a two-mile-wide corridor for MPC's line, then set out to consult with landowners to determine where the actual centerline should go within that corridor.

- The department was required to submit a report to the board, which held a hearing before issuing a final decision.

- MPC could not begin condemning land until the board approved the final centerline, which it did not do until 1985.

- In other words, the *Fondren* landowners were fully informed of the proposed project and had several opportunities to meet with the department and MPC on the landowners' property, and offer their opinions and knowledge about the best location on their property for the line – all before MPC could begin condemning land.

- Fast forward to 2008. After consulting maps, holding public meetings, and mailing environmental review documents to landowners on the tax rolls, the director of the DEQ chooses a 500-foot-wide corridor for the MATL line, and issues MATL a Certificate of Compliance authorizing it to build the line anywhere within that 500-foot-wide corridor.

- Many landowners, at this point, could not be certain whether the final location for the MATL line crossed their property or not; instead, they would have had to have read the final EIS to know for sure.

- In some instances post-2008, DEQ learned that its corridor was not ideal – for landowners, for their neighbors, or even for MATL. However, any changes to a MFSA certificate must go through the amendment process, and MATL resisted changing the line, even for reasons that would have benefited it.

- Instead, MATL filed to condemn the property of over three dozen Landowners who did not wish to sell an easement to MATL for the project. Many of these Landowners did not ever even have an opportunity to speak with MATL prior to condemnation.

E. M.C.A. §§ 75-20-103 and 75-20-407 Do Not Limit The Court's Jurisdiction Under the Condemnation Statutes.

- The Montana Supreme Court has already held in *Fondren* that M.C.A. § 75-20-103, which states that MFSA "supersedes other laws or regulations" does not displace the condemnation statutes. *Fondren*, 226 Mont. at 507, 737 P.2d at 1142 ("MPC must follow both laws in order first to gain approval for a transmission line and second to acquire the property upon which to build the facility).

- Moreover, M.C.A. § 75-20-407, which divests courts of jurisdiction over "any issue, case, or controversy concerning any matter which was or could have been determined in a proceeding before the board under this chapter" is limited by its plain language to issues arising under MFSA, not under the condemnation statutes.

- Nothing in MFSA mandates consideration of the necessity of the public use from the perspective of the landowner, or the determination of whether the facility is compatible with the least private injury. Therefore, these issues could not have been brought before the board.

- Moreover, any issues involving facts to be found for condemnation did not become ripe until MATL filed suit for condemnation, and the appeal time to the board ends 30 days after the certificate is issued.

- Thus, the plain language of MFSA makes clear that issues involving individual landowners' defenses to condemnation could not have been brought before the board.

- The court therefore has jurisdiction over those issues.

- MATL had the burden of proving that the proposed taking of the Landowners' property was necessary to the public use.

- Key to the necessity determination was whether MATL's taking was compatible with the greatest public good and the least private injury.

- Where neither MATL nor DEQ met with every individual Landowner regarding the placement of the line over the Landowner's property, MATLwould not have been able to establish that its taking was compatible with the least private injury; it had no idea what the least amount of injury was for many Landowners.

- MATL's failure to meet with Landowners and make this determination rendered its actions arbitrary.

- Moreover, the underlying necessity for a private merchant line, which would not provide any power to Montanans and would not make Montanans' power supply more reliable or more stable, was premised on the purchase of MATL's transmission capacity by wind farm developers who are themselves facing major obstacles to financing and constructing their projects.

7. **Fair Compensation:**

   a) Are landowners paid fair compensation when their property is condemned for linear projects?

   b) Is there any way to make the process fairer?

THE REST OF THE STORY
A Response to: "Eminent Domain and Power Lines" by John Alke

1. The United States Supreme Court has decided a string of cases that has transformed the "public use" requirement into a "public purpose requirement." *See Berman v. Parker*, 348 U.S. 26, 31-32 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-244 (1984); *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 483-484 (2005). In particular, in "Eminent Domain and Power Lines," *Kelo* is cited for the proposition that "[p]romoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized." Additionally, *Kelo* is quoted for the proposition that "the government's pursuit of a public purpose will often benefit individual private parties."

   However, the Montana state constitutional protections afford Montanan landowners much more protection than what was afforded property owners under the 5th Amendment and Connecticut law in *Kelo*. *See* Michelle Bryan Mudd, *Was the Big Sky Really Falling? Examining Montana's Response to Kelo v. City of New London*, 69 Mont. L. Rev. 79, 99 (2008) (*citing* Montana Constitution, Montana Condemnation Statutes, and *City of Bozeman Bozeman v. Vaniman*, 271 Mont. 514, 898 P.2d 1208 (1995). Even though *Hawaii Housing Authority v. Midkiff* expanded the definition of a "public use," it also provided that "the Constitution forbids even a compensated taking of

property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S. at 244.

2. *Montana Power Co. v. Bokma*, 153 Mont. 390, 394-95, 457 P.2d 769 (1969) is cited for the proposition that the "public use" requirement is met if a "public advantage" or a "public benefit" is conferred on the public. This is referred to as the "broad view" and it was adopted in *Bokma* "presumably to promote general economic development."

   In *Bokma* a "public advantage" or "public benefit" was found even though the power line at issue was built primarily to serve one party. Nevertheless, the power company testified that the power line was built to "supply electric energy at reasonable rates and without discrimination to all persons, firms and companies that desire[d] the power." *Bokma*, 153 Mont. at 395. If the power company refused to serve others from the proposed line, it could be compelled to do so. *Id.*

   Although Montana may subscribe to the "broad view" of what could be determined to be a "public use," Montana case law is well defined in holding that [p]rivate 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*, 320 Mont. 384, 386, 87 P.3d 479 (2004). Furthermore, the power of eminent domain "cannot be implied or inferred from vague or doubtful language, and that the right to exercise that power does not exist when made out only by argument or inference." *Id.* at 387. Thus, it is clear that Montana case law takes "a narrow approach to interpreting the statutorily-delineated public uses."

3. The Salois Decision:

   Not only does the *Montana Power Co. v. Fondren* support the proposition that MATL did not have the right of eminent domain because it did not have an express or implied grant (before HB 198), but other well-established Montana case law also supported that proposition. For example, "[t]he 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 power." *State of Montana v. Crossen-Nissen Company*, 145 Mont. 251, 254, 400 P.2d 283, 284 (1965). Furthermore, "'[t]he legislature's grant of eminent domain power … must be strictly construed.' 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'" *McCabe*, 320 Mont. at ¶ 14 (internal citations omitted).

4. The search for a second statute:

   Section 35-1-108 MCA (1981) provided that corporations shall have the power to "acquire property by proceedings in eminent domain." However, this grant only allowed for corporations to be a party in eminent domain proceedings, it did not give them, without more, the authority to condemn. As it says in *McCabe*, "[p]rivate individuals and corporations, like state agencies, have no inherent power of eminent domain, and their authority to condemn must derive from legislative grant." *McCabe*, 320 Mont. at 386 *citing Montana Talc Co. v. Cyrus Mines Corp.* 229 Mont. 491, 495, 748 P.2d 444, 447

(1987). It is evident from the *Montana Talc Co*. decision, from 1987, that even before Section 35-1-108 was repealed in 1991, that corporations did not have an inherent power of eminent domain.

5. The rest of *City of Bozeman v. Vaniman*, 271 Mont. 514, 522-23, 898 P.2d 1208 (1995).

In *Vaniman II,* the Court adopted a three-tiered standard to analyze when a private use is appropriate within an eminent domain taking, which standard is notably stricter than the standard put forth in *Kelo*. The three prongs are:

1. Will the public use create an "incidental" benefit to private individuals?

2. Is the overall use that of the condemnor?

3. Is the private use insignificant?

In *Vaniman II*, the Chamber of Commerce (a private entity) was attempting to piggy-back on a public works project. The Court found that the Chamber would be occupying approximately forty percent of the proposed building. The court expounded on the three prong test as follows:

> Any analysis of all three elements shows that the Chamber's presence is inappropriate within this public project. First, the Chamber's corporate offices are not incidental to the project. In other words, its presence is not a necessary derivative of the visitor center and highway interchange. Any benefit the Chamber derives from having its offices located at this Interchange is in no way connected to the public use of the highway or the rest area/visitor center. The Chamber's presence may be "convenient" for the Chamber as well as the State, <u>but that is not the test. The test is whether any benefit to the Chamber comes as a necessary corollary to the public purpose.</u> The record indicates no such benefit.
>
> Second, the use for which the land is taken must be that of the State. If the Chamber occupies a major portion of the visitor center, then the use is not that of the State. Finally, the record indicates that the Chamber's presence is not insignificant; it will occupy a major part of the visitor center. Therefore, we conclude that the Chamber's private presence within this otherwise public project cannot stand as the Chamber cannot meet the elements of the above test any way.

75-20-113. Power to exercise eminent domain. A person issued a certificate pursuant to this chapter may acquire by eminent domain any interest in property, as provided in Title 70, chapter 30, for a public use authorized by law to construct a facility in accordance with the certificate.

History: En. Sec. 2, Ch. 321, L. 2011.

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69-3-113. Power of eminent domain. A public utility as defined in 69-3-101 may acquire by eminent domain any interest in property, as provided in Title 70, chapter 30, for a public use authorized by law to provide service to the customers of its regulated service.

History: En. Sec. 1, Ch. 321, L. 2011.