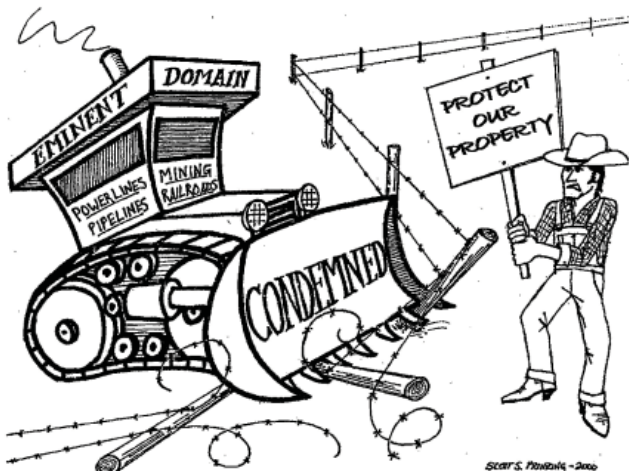


EMINENT DOMAIN

YOUR LAND; YOUR RIGHTS



Northern Plains Resource Council's effort to inform Montana landowners who face condemnation.

Private property rights and eminent domain are hotly contested issues in today's world. Lots of political positions and ideas are discussed in the public debate, but what really is eminent domain? What does the power of eminent domain and the process of condemnation entail?

What is eminent domain?

If you've ever driven on a highway, odds are parts of the road were constructed using the power of eminent domain.

Eminent domain is the right of the state to take private property for public use.¹ In Montana the power of eminent domain is controlled by Article II, Section 29 of the Montana Constitution. "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having first made to or paid into court for the owner."

All states have the power of eminent domain. Most of the laws pertaining to eminent domain limit these powers. Otherwise, the state's power to use eminent domain would be unlimited.

Eminent domain – often thought to be only a power of sovereign states – may be delegated to private entities as well as to governmental entities.

¹ Montana Code Annotated (MCA) 70-30-101

² State of Montana v. Crossen-Nissen Company (1965), 145 Mont. 251, 254, 400 P.2d 283, 284; see also, City of Bozeman v. Vaniman (1994), 264 Mont. 76, 79, 869 P.2d 790, 792

³ Art. II, § 3, Mont. Const

⁴ City of Bozeman, 264 Mont. at 79, 869 P.2d at 792; Montana Code Ann. § 1-2-101 & 104

⁵ MCA 70-30-206, 70-30-111

⁶ Lincoln/Lewis & Clark Sewer Dist. at Lincoln v. Bossing (1985), 215 Mont. 235, 239, 696 P.2d 989, 991 (citing Montana Power Company v. Bokma (1969), 153 Mont. 390, 397, 457 P.2d 769, 774).

⁷ Eminent In Montana, Legislative Environmental Policy Office, 2007

Unlimited power? Not quite

The power of the state to take private property for public purposes is thankfully limited. The Montana Supreme Court has 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."²

Private property ownership is a fundamental right,³ and any law which allows the government to take a person's property must be given a plain interpretation, favoring the person's fundamental rights.⁴

In Montana, the Legislature also has established that a court's power in a preliminary condemnation action includes determining whether the use for which the property is sought is a public use, determining whether the public interests require the taking, and determining that the use is authorized by law and the taking is necessary⁵ to such use. Simply put, the court must determine that "the proposed taking is necessary to public use under the circumstances of the individual case" before ordering condemnation.⁶

The court must interpret the statutes in favor of the landowner's private property rights. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private landowner prevails.⁷

Entities wanting to condemn land have to display three things:

- ☑ Public use
- ☑ Necessity
- ☑ Greatest public good and least private injury

☑ What's a public use?

Eminent domain can only be used to take property for a public use. The Montana Supreme Court has interpreted various legal cases to determine a standard for whether the use is “public” or “private.” In a case involving Montana Power Company, the Court stated:

Thus, in Montana a public use is one which confers some benefit or advantage to the public. Such public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities for which condemnation is sought. As long as the public has the right of use, whether exercised by one or many members of the public, a “public advantage” or “public benefit” accrues sufficient to constitute a public use.⁸

Also, the Court has been very clear that a property cannot be condemned for a private use.

In a Bozeman Chamber of Commerce case, the Court discussed whether a private business could be part of the “public use.” “It is a fundamental law of eminent domain that private property may not be taken without an owner’s consent for the private use of another,” the Court stated.⁹ Further, the Court noted, “both the United States and the Montana Constitutions prohibit a taking by the State for merely private use.”¹⁰

☑ What is necessity?

The next step, if the Court finds that the use is a public use, is for the Court to determine whether public interests require the taking and if the taking is necessary. Regarding necessity, the Court found:

[t]he property rights of the citizen cannot be invaded, even for the public purposes, except upon a substantial showing that the invasion is necessary.... 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.¹¹



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☑ What is greatest public good, least private injury

Where the proposed project is located matters as well. In addition to proving that it is a public utility and that taking property for a public use is necessary, the condemnor must also prove that its condemnation is compatible with the greatest public good and the least private injury.¹² The Montana Supreme Court stated, “[t]he greatest good on the one hand and the least injury on the other are questions of fact to be determined in passing upon the question of necessity.”¹³ Additionally, the Court stated this issue commonly arises in connection with the location of the proposed improvement. Therefore, this is another issue the condemnor must prove by a preponderance of the evidence in order to take property.

⁸ Montana Power Co. v. Bokma (1969), 153 Mont. 390, 457 P.2d 769.

⁹ City of Bozeman II, 271 Mont. at 522, 898 P.2d at 1214 (citing McTaggart v. Montana Power Co. (1979), 184 Mont. 329, 602 P.2d 992).

¹⁰ City of Bozeman II, 271 Mont. at 522, 898 P.2d at 1214 (citing U.S. Const. amend. XIV; Art II, Sec. 17 Mont. Const. (1972)).

¹¹ State by and Through State Highway Commission v. Yost Farm Co. (1963), 142 Mont. 239, 243-44, 384 P.2d 277, 279.

¹² Bokma, 153 Mont. at 399, 457 P.2d at 774.

¹³ Bokma, 153 Mont. at 399, 457 P.2d at 774 (citing State ex. rel. Livingston v. District Court, 90 Mont. 191, 300 P. 916).

What Keystone XL pipeline needs for condemnation

- To be a common carrier (already designated by the Public Service Commission);
- A Major Facilities Siting Act certificate (state permit) from the Montana Department of Environmental Quality (after Final Environmental Impact Statement);
- A federal permit from the Department of State (after Final EIS);
- It has to prove its use is a public use, is necessary, and that it is the greatest good for the least amount of damage.
- It must also follow the process outlined below.



Paul Matthews photo

What Tongue River Railroad needs for condemnation



- A certificate of public need and necessity (Surface Transportation Board);
- Compliance with Montana Environmental Policy Act and the National Environmental Policy Act, if there is any federal action;
- To prove it is a public use, is necessary, and that it is the greatest good for the least amount of damage;
- It must also follow the process outlined below.

Step by step

The surveying process

- When surveying the property, the company is allowed to enter only if it provides written notice to the landowner 30 days in advance.¹⁴
- After providing notice, the company can enter the land to examine, map, and survey the property without compensating the landowner and without trespassing.
- The company, however, is still liable for any injuries or damage resulting from negligent conduct.

The condemnation process

1. The party seeking condemnation (the condemnor) must first make a written offer to the landowner (condemnee);
2. Before condemnation proceedings begin, this offer must be rejected by the condemnee;
3. The condemnor must file a complaint in the district court in the county in which the property or some part of the property lies;¹⁵
4. Within six months from the date of service of the summons, unless the court extends or shortens that time, the court, sitting without a jury, will begin a trial on the issue of whether a preliminary condemnation order should be issued;¹⁶
5. The court must first find that the condemnor has proven the necessary facts (see sections above) before it may issue a preliminary condemnation order;



Grassroots organizing: It's what we do at Northern Plains Resource Council.

What you should do if threatened by eminent domain

1. Call Northern Plains at 406-248-1154;
2. Talk to your neighbors about forming a bloc to negotiate jointly;
3. Know your rights;
4. Document your land condition;
5. Hire a lawyer;
6. Get a property appraisal.

Continued on back page

¹⁴ Montana Code Annotated (MCA) 70-30-110

¹⁵ MCA 70-30-202

¹⁶ MCA 70-30-202

Condemnation process

Continued from previous page

- 6. Within 30 days of the entry of this order, the condemnee must file a claim for just compensation. This is the amount of money that the owner feels he is entitled to for the taking of the property;¹⁷
- 7. If within 20 days the condemnor does not accept this claim, three commissioners may be appointed to decide on the fair amount of compensation. The condemnor will appoint one, the condemnee another, and these two commissioners will appoint a third;¹⁸
- 8. The condemnee is entitled to the fair market value of the property taken and the basis of depreciation in the current fair market value of property not taken but injuriously affected;¹⁹
- 9. Any party may appeal an assessment made by the condemnation commissioners in the court in which the report of the commissioners is filed. The appeal must be taken within 30 days after filing of the award;²⁰
- 10. Once the amount of compensation has been determined, payment may be made in one of three ways: The condemnor may make annual installment payments of which the landowner can choose the duration; a one-time lump sum payment may be made; or, if the parties agree, land of equal or greater value than the land being condemned may be traded for the condemned land. After the payment is made, the court must make a final order of condemnation which is filed in the office of the county clerk and recorder;²¹
- 11. Any party can appeal to the Montana Supreme Court. The district court may request a stay of its ruling until the case is settled;²²

Your lawful rights after condemnation

- **Liability:** A condemnee or condemnee's successor in interest is not liable for damages that result from the construction, use, or maintenance of a project on property in which the condemnee or the condemnee's successor in interest has an interest unless the negligence or intentional conduct of the condemnee or condemnee's successor in interest is the cause of the damages;²⁴
- **Weed control responsibility:** The condemnor, upon taking possession of the land, is responsible for the control and destruction of noxious weeds on the land until natural grasses have taken over the property and noxious weeds have ceased to exist;²⁵
- **Taxes:** The condemnor assumes the tax liability for the condemned property.²⁶

12. If the condemnor abandons the public use and puts the property interest for sale, it may sell the property at public auction. If an interest in property that has been acquired for public use is abandoned, or when the purposes for which it was acquired is terminated, the property reverts back to its original owner.²³

¹⁷ Montana Code Annotated (MCA) 70-30-207

¹⁸ MCA 70-30-207

²¹ MCA 70-30-308

²⁴ MCA 70-30-323

¹⁹ MCA 70-30-302

²² MCA 70-30-312

²⁵ MCA 70-30-314

²⁰ MCA 70-30-304

²³ MCA 70-30-321

²⁶ MCA 70-30-315

Keep informed! Join Northern Plains

Northern Plains Resource Council is a conservation and family agriculture group that organizes Montana citizens to protect our water quality, family farms and ranches, and unique quality of life.

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