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TO: Environmental Quality Council
FROM: Sonja Nowakowski and Helen Thigpen, EQC staff
DATE: February 17, 2012
RE: Eminent domain and public use case law

During the January Environmental Quality Council (EQC) meeting, staff was instructed to conduct additional review of public uses in Montana and the entities granted the authority to condemn private property in Montana for a public use. As requested, staff's review focuses on specific public uses and Montana court cases that address the power of condemnation. This information builds from information provided to the EQC in January.

A table provided to the EQC in January outlined public uses and specific grants of power for eminent domain. The table was created in response to a 2010 district court decision. The district court held that there must be a separate statutory delegation -- or that a specific type of corporation, individual, or entity would need a specific grant of power to exercise eminent domain. While that case was dismissed, questions remain about Montana's eminent domain statutes.

The table showed those entities that are specifically designated in the Montana Code Annotated as being able to exercise the power of eminent domain and the entities authorized to exercise the right of eminent domain. There are examples of public uses that are enumerated in state law, while no entity is granted specific authority to condemn for that use. In the reverse, there are examples in current law in which entities are granted the right to condemn, but there is no corresponding public use enumerated. Staff was asked to look at case law that relates to some of those public uses.

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

1. Does the condemnor have the legal authority to initiate eminent domain proceedings and is the project a public use authorized by law?

2. Is the taking necessary and who has the burden to prove necessity?
3. Is the process governing the award of compensation valid and appropriate; and
4. Is the process in line with the due process provision of the Montana Constitution?

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

Private roads

70-30-102(36), MCA

"Subject to the provisions of this chapter, the right of eminent domain may be exercised for the following public uses:

(36) private roads leading from highways to residences or farms;"

70-30-107, MCA

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

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

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

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

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

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

***Richter v. Rose*, 1998 MT 165, 289 Mont. 379, 962 P.2d 583**

A Flathead County landowner appealed a District Court decision, contending that the District Court erred in concluding that another landowner's property was a farm for eminent domain purposes and erred in issuing a preliminary condemnation order. The primary question was whether the District Court correctly concluded that a lot was a "farm" for the purposes of 70-30-102. The Court concluded that the property was not a farm for purposes of eminent domain and that the Plaintiffs had failed to demonstrate a public use upon which eminent domain could be exercised because it was not a farm.

***Komposh v. Powers*, 1926 MT 75 Mont. 493, 244 P. 298**

While the statutes have changed considerably since 1926, at that time private roads leading from highways to residences or farms were listed as public uses. The Court ruled that the statute was Constitutional and noted that the taking of private roads was constitutional because the Legislature designated it as a public use.

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

"Subject to the provisions of this chapter, the right of eminent domain may be exercised for the following public uses:

(33) roads, tunnels, and dumping places for working mines, mills, or smelters for the reduction of ores;

(34) outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills, and smelters for the reduction of ores;

(35) an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores and sites for reservoirs necessary for collecting and storing water for the mines, mills, or smelters. However, the reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

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

***Mont. Talc Co. v. Cyprus Mines Corp.*, 1987 MT 229 Mont. 491, 748 P.2d 444**

Montana Talc Company sought to condemn property owned by Cyprus Mines Corporation for open-pit excavation necessary to "backslope" the mining of an ore body. The Court found that

the Montana Legislature intended to "encourage the development of the mining industry." The Court goes on to state that this encouragement is illustrated in granting mines the right to condemn for projects to mine and extract ores, metals, or minerals owned by the condemnor located beneath or upon the surface of property where the title to the surface vests in others. "So it is that in addition to the power of condemnation for the mine itself . . . there is further power for the construction of roads, tunnels, ditches, and other appurtenances necessary to the mining effort." It is also noteworthy that the Court found that private individuals and corporations do not have an inherent power of eminent domain. The Court, however, then focused on the public uses enumerated in statute.

Kipp v. Davis-Daly Copper Co., 1910, MT 41 Mont. 509, 110 P 237

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

Conclusions and Questions

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

As the EQC focuses on what is a public use and eminent domain authority, the Law and Justice Interim Committee (LJIC) is beginning its discussion of the legal procedures for condemnation, including the process for the condemnation, how negotiations and mediation are conducted, and appeals. The LJIC is meeting Friday, February 24, and will discuss eminent domain. At the March meeting, staff will update the EQC on the LJIC's discussion.

At the March meeting staff also will receive an update on the status of legal challenges to House Bill No. 198. In May 2011, several landowners in Pondera and Teton counties filed a lawsuit contending that HB 198 is unconstitutional. In January 2012, District Judge Nels

Swandal ruled that HB 198 is constitutional. The related condemnation proceedings are expected to move forward later this spring.

Eminent domain law and related studies in Montana largely focus on condemnation procedures. EQC staff will be seeking direction from EQC members on the underlying policy issue of "public use" and who can exercise eminent domain for a public use. Staff would like the council to consider:

- ✓ **Does the EQC need staff to conduct additional research, or is the EQC's review of eminent domain complete?**
- ✓ **If additional research is needed, what would the EQC like to see on its May meeting agenda?**
- ✓ **Does the EQC wish to pursue findings or recommendations, a report, or related legislation on this topic?**
- ✓ **If so, should the EQC revisit public uses and public entities in Montana law as enumerated 70-30-102, MCA?**

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