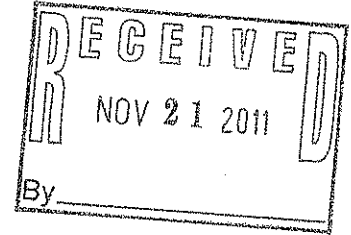


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**MONTANA NINTH JUDICIAL DISTRICT COURT  
TETON COUNTY**

MAURER FARMS, INC.; KYLE  
BURGMAIER; STEVEN DAHLMAN;  
JOHN GOODMUNDSON; ROBERT  
STEPHENS,

Plaintiffs,

v.

STATE OF MONTANA and MATL LLP,

Defendants.

Cause No. DV-11-024

**STATE OF MONTANA'S  
MEMORANDUM IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

**INTRODUCTION**

In their Motion for Summary Judgment, Plaintiffs argue that Mont. Code Ann. § 75-20-113 is unconstitutional regardless of the constitutional safeguards inherent in the eminent domain statutes codified in Mont. Code Ann. tit. 70, ch. 30. Plaintiffs labor under the mistaken premise that House Bill 198 ("HB 198") itself somehow takes their property, and urge the Court to follow their flawed reasoning derived from this fundamental misconception. Plaintiffs ignore crucial distinctions between legislative and judicial roles in the law of eminent domain, and conflate the separate roles of these two

branches of government in a manner that completely ignores the underpinnings of eminent domain law.

Defendant State of Montana filed a Motion for Summary Judgment and Memorandum in Support on November 7, 2011, as did Defendant MATL. The points and authorities raised by Defendants in support of their respective Motions for Summary Judgment are more than sufficient to defeat the Plaintiffs' Motion for Summary Judgment. As further demonstrated herein, Plaintiffs are not entitled to summary judgment.

### **UNDISPUTED FACTS**

On December 1, 2005, MATL submitted an application to the Montana Department of Environmental Quality ("DEQ") under the Major Facility Siting Act ("MFSA"), codified at Mont. Code Ann. §§ 75-20-101, et seq. After nearly three years of public hearings, public comment, and regulatory review, the DEQ issued a Certificate of Compliance to MATL, LLP ("MFSA Certificate") for a 130-mile electrical transmission line on October 22, 2008. See, Ex. A to Pl. Landowners' Summ. J. Br. The MFSA Certificate included a finding of need for the line and determination that the line would serve the public interest. Id., at 2, 11-13. The MATL electrical transmission line will allow transmission of Montana wind-generated electricity to market. Id., at 2; see also Ex. D to Aff. of Thomas Ring ("Ring Aff."), at p. 9, fifth full paragraph. The MATL electrical transmission line will also allow customers in Montana to obtain electricity via the MATL line. Aff. of Harley R. Harris (dated September 27, 2011) at 5, ¶ 10. No Plaintiff sought administrative or judicial review MFSA Certificate.

In the materials filed in support of the State's Motion for Summary Judgment, it is clear that reasonable notice (*actual* notice, in fact) was provided to Plaintiffs (or their vendors/predecessors-in-interest) during the MFSA certification process. Plaintiffs had the opportunity to participate in DEQ's facility siting decision for the MATL project. Plaintiffs also received notice that MATL may employ the power of eminent domain in order to construct the electrical transmission line. HB 198 clarified that a person issued a certificate may acquire by eminent domain any interest in property for a public use to construct the approved facility, and further clarified that a public utility may acquire by eminent domain property for a public use. HB 198 is a proper exercise of legislative power, is consistent with longstanding eminent domain law, and is constitutional.

### ARGUMENT

#### **I. THE EXERCISE OF LEGISLATIVE POWER IN ENACTING HB 198 SATISFIED THE UNITED STATES CONSTITUTION AND THE MONTANA CONSTITUTION.**

The MATL project involves an "electrical energy line" within the clear meaning of § 70-30-102, Mont. Code Ann. Just as electrical energy lines have long been considered a public use under Montana eminent domain law, private entities have long had the power to condemn property for a public use in Montana. See, e.g., McCabe Petroleum v. Easement & Right-of-Way Across Township 12 North . . ., 2004 MT 73, ¶¶ 8-9, 320 Mont. 384, 87 P.3d 479; Montana Talc v. Cypress Mines, 229 Mont. 491, 501, 748 P.2d 444, 450 (1987); Montana Power v. Fondren, 226 Mont. 500, 514, 737 P.2d 1138, 1146 (1987); Schara v. Anaconda, 187 Mont. 377, 385, 610 P.2d 132 (1980). As recognized in Fondren, a private entity that obtained a MFSA

certificate from DEQ may also have the right to acquire property by eminent domain for an electrical transmission line.

Here, DEQ issued the MFSA Certificate to MATL for the transmission line, which expressly included findings of need and public interest. On July 19, 2010, MATL, filed a complaint for condemnation in this judicial district in MATL v. Salois, Glacier County Cause No. DV-10-66. The complaint sought to condemn an easement across the property of Shirley Salois. On December 12, 2010, the District Court issued an order in Salois dismissing the complaint for condemnation because the District Court concluded that MATL did not have the power of eminent domain. See MATL v. Salois, 2011 MT 126, ¶ 2. After HB 198 was passed and expressly clarified existing law, the Montana Supreme Court *reversed* the order dismissing Salois and remanded Salois for further proceedings. Id., ¶ 7. The Salois case was subsequently dismissed upon stipulation of the parties. Therefore, the District Court order of dismissal Salois is a nullity.

Plaintiffs do not allege any irregularity in the legislative procedures employed during consideration and passage of HB 198. There is no claim that anyone was deprived of an opportunity to weigh in during the legislative process. This Court has dismissed Counts III and IX of the Amended Complaint, which alleged HB 198 is illegally retroactive and *void*. This Court has properly ruled that enactment of Mont. Code Ann. § 75-20-113 was the valid exercise of legislative authority. As discussed below, because the Legislature has the power to identify public uses and how these uses may be condemned through eminent domain, the valid exercise of legislative authority in passing

HB 198 forecloses Plaintiffs' claims *because* all their constitutional protections remain intact in the course of any subsequent eminent domain proceedings.

A Certificate of Compliance issued under MFSA does not *take* any property or *deprive* any person of any property right. As recognized by the Montana Supreme Court, any such Certificate includes a determination of public necessity. Fondren, 226 Mont. at 514. This Court has recognized and ruled that the notice and opportunity to be heard provisions in MFSA have not changed since Fondren. See Order Partially Granting MATL's Mot. to Dismiss, at 6.

HB 198 is simply a valid exercise of legislative power clarifying existing law on delegated power of eminent domain and authorized public uses, nothing more. It is not a remarkable concept that an entity that has demonstrated public need in order to obtain a MFSA Certificate to build an electrical transmission line also has the right to exercise the power of eminent domain in order to obtain property for construction of the line. The Montana Supreme Court recognized nearly 25 years ago that public necessity may be established by a private entity for an electrical transmission line for the purpose of condemning land by the power of eminent domain. Fondren, 226 Mont. at 507-08.

The law of eminent domain is a central component of HB 198, and is expressly at the core of Mont. Code Ann. § 75-20-113. Any condemnation proceeding based on the MFSA Certificate must satisfy Mont. Code Ann. tit. 70, ch. 30. The constitutionality of HB 198 is tied to legislative power, in the first instance, to identify public uses and delegate condemnation authority for the purpose of eminent domain. "In Montana, a 'public use' is a use 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.” Park County v. Adams, 2004 MT 295, ¶ 16, 323 Mont. 370, 100 P.3d 640 (citing Montana Power v. Bokma, 153 Mont. 390, 395, 457 P.2d 769, 772 (1969)). The nature of public use is not static and has necessarily evolved with changes in society as reflected in legislative determinations. See, e.g., Kelo v. City of New London, 545 U.S. 469, 480-83 (2005) (recognizing “longstanding policy of deference to legislative judgments” about public use and that needs of society evolve); Schara v. Anaconda, 187 Mont. 377, 389-90, 610 P.2d 132 (1980) (recognizing policy on public uses identified in Mont. Code Ann. § 70-30-102 that distinguished copper mining and coal mining based upon legislative determination of the public interest).

Under MFSA, in order for DEQ to issue the Certificate, there must be a finding and determination “that the facility will serve the public interest, convenience, and necessity.” Mont. Code Ann. § 75-20-301(1)(f); see also, Montana Power v. Fondren, 226 Mont. 500, 514, 737 P.2d 1138, 1146 (1987). In making this determination about the MATL facility, DEQ was required to consider, at a minimum:

1. basis of the need for the facility;
2. nature of the probable environmental impact;
3. benefits to the state resulting from the proposed facility;
4. effects of the economic activity resulting from the proposed facility;
5. effects of the proposed facility on the public health, welfare, and safety; and
6. whether services of the facility meet the need standard for electric transmission lines.

See Mont. Code Ann. §§ 75-20-301(2)(a)-(e); Mont. Admin. R. 17.20.1606. DEQ made the required findings and determinations for the facility, and expressly found that the MATL electric transmission line will serve the public interest, convenience, and necessity. See MFSA Certificate at 2, 11-13.

Passage of HB 198 did not occur in isolation. The Legislature is presumed to have knowledge of Montana Supreme Court decisions interpreting statutes.

Musselshell Ranch v. Seidel-Joukova, 2011 MT 217, ¶ 14, 362 Mont. 1, 261 P.3d 570; Swanson v. Hartford Ins., 2002 MT 81, ¶ 22, 309 Mont. 269, 46 P.3d 584. Therefore, in passing HB 198, the Legislature is presumed to have knowledge of Montana Power v. Fondren, 226 Mont. 500, 514, 737 P.2d 1138, 1146 (1987), and the many cases recognizing that a private entity may exercise the power of eminent domain regarding an established public use. The Legislature is also presumed to have knowledge of the Montana Code, including Mont. Code Ann. §§ 75-20-301(2)(a)-(e), and -105 (granting authority to adopt rules, including Mont. Admin. R. 17.20.1606). Therefore, as applied here, HB 198 simply means: Where DEQ has made the determination of public necessity under MFSA regarding an electrical transmission line, then the MFSA Certificate holder may use the power of eminent domain for a public use under Mont. Code Ann. § 70-30-102(37). HB 198 means nothing more.

The Legislature sets the parameters concerning the use of the power of eminent domain. State v. Aitchison, 96 Mont. 335, 342, 30 P.2d 805, 808 (1934). The United States Supreme Court has been extremely deferential to legislative determinations that private property may be taken for a public use. “[W]here the exercise of the eminent

domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.” Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984). The United States Constitution also allows private entities to receive the property taken by eminent domain. “It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.” Id., 467 U.S. at 244 (quoting Rindge v. Los Angeles, 262 U.S. 700, 707 (1923)).

The United States Supreme Court has long recognized the distinction between legislative determinations about use of eminent domain and due process in determining just compensation for any taking for public use. “That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion . . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.” Joslin v. Providence, 262 U.S. 668, 678 (1923). Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. Bragg v. Weaver, 251 U.S. 57, 58 (1919). “With respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings.” North Laramie Land v. Hoffman, 268 U.S. 276, 285 (1925). This distinction is well-settled law:

The perimeters of the Due Process requirement in eminent domain proceedings have been sharply defined through a series of Supreme Court decisions, however, and the customary ‘due process’ attack has limited chance of success. For example, the Court has repeatedly characterized the condemnor’s decision on the necessity for a taking and the quantity to be

appropriated as legislative and has, therefor, denied to land-owners the right to participate in that decision-making process or to litigate on federal constitutional grounds the decision to condemn private property.

Joiner v. City of Dallas, 380 F. Supp. 754, 764 (N.D.Tex. 1974) (per curiam);

affirmed 419 U.S. 1042 (1974), reh'g denied 419 U.S. 1132 (1975).

The Legislature determines how property may be condemned for a public use. If the procedures used to actually take property provide for due process and payment of just compensation, the legislative determination about who condemns property for a public use is not subject to due process challenge. Plaintiffs do not have a vested right to be free from eminent domain. Moreover, the power of eminent domain evolves with societal change. The statute identifying public uses subject to condemnation, presently codified at Mont. Code Ann. § 70-30-102, has been amended many times since first enacted in 1877. Plaintiffs have cited no case supporting the proposition that the Legislature lacks the power to delegate eminent domain power to a private party as to a long-established public use. Here, the Legislature acted within its constitutional power.

## **II. HB 198 DOES NOT VIOLATE THE “PLAINTIFF LANDOWNERS” RIGHT TO PROCEDURAL DUE PROCESS.**

It is instructive to consider the precise language of the constitutional provisions on condemnation. The power of eminent domain is governed by both the United States Constitution and the Montana Constitution. The U.S. Constitution regulates eminent domain in the Fifth and Fourteenth Amendments. Under the Fifth Amendment “No person shall be held to answer for . . . *nor shall private property be taken for public use without just compensation.* (Emphasis added.) Under the Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

The Montana Constitution provides that “*private property shall not be taken or damaged for public use without just compensation* to the full extent of the loss having been first made to or paid into the court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.” Mont. Const. Art. II, § 29 (emphasis added). The Montana Constitution further provides that “*No person shall be deprived of life, liberty, or property without due process of law.*” Mont. Const. art. II, § 17 (emphasis added).

House Bill 198 does not take any property, nor deprive any person of any property rights. HB 198 simply reflects an exercise of legislative power regarding when and by whom the power of eminent domain may be exercised regarding a public use. Any taking or deprivation occurs during eminent domain proceedings, not during MFSA proceedings. The MATL MFSA process established public use, and authorized construction of electrical transmission lines, but did not take any property.

Plaintiffs, however, argue that they have been deprived of property rights as landowners during the MATL MFSA process. Plaintiffs also erroneously argue that “several landowners had no notice whatsoever of the MFSA process.” See Pl. Landowners’ Summ. J. Br. at 9. Plaintiffs then point to three landowners whom they claim received no notice. This claim is belied by the undisputed facts, as set forth below.

**Maurer Farms, Inc.** Maurer Farms, Inc. (“Maurer Farms”) received the SDEIS and FEIS at the address where it regularly received mail. Newhouse Aff., Exs. 2, 6; Ring Aff. at 4-5, ¶ 10, and Ex. D thereto, at 9-3. An item duly directed and mailed is presumed received in the regular course of the mail. Mont. Code Ann. § 26-1-602(24); Crissey v. State Highway Comm’n, 147 Mont. 374, 378-79, 413 P.2d 308, 310 (1966); General Mills v. Zerbe Bros., 207 Mont. 19, 22, 672 P.2d 1109, 1111 (1984).

Bruce Maurer, the Rule 30(b)(6) designee of the corporation, admitted in deposition testimony that (1) Maurer Farms knew after receiving a February 2007 letter that the routing of the MATL line had not been finalized, (2) Maurer Farms thereafter received and reviewed the DEIS, and (3) Maurer Farms thereafter received and reviewed the FEIS. See Supplemental Found. Aff. of Michael G. Black, Ex. L, at 30-35, 46-47; Found. Aff. of Michael G. Black (Found. Aff.), Ex. H; Aff. of Bruce Maurer (dated November 4, 2011), Ex. D. In spite of this knowledge, Maurer Farms *chose* not to attend MFSA hearings, submit comments to DEQ, or even pay attention.

Maurer Farms clearly had ample notice that, despite any option agreement(s) with MATL, the route of the electrical transmission line could change prior to final DEQ approval. The fact that Maurer Farms chose not to participate in the MFSA process, or timely seek review of the MFSA Certificate issued by DEQ, does not vitiate the undisputed fact that Maurer Farms received actual notice of the MFSA process.

**Burgmaier.** Kyle Burgmaier was not a landowner before the MFSA Certificate was issued. He apparently obtained a contract interest in real property owned by his parents (John Allen and Deanna Burgmaier) in April 2008. Burgmaier recorded an

Abstract of Contract for Deed and Notice of Purchaser's Interest in Teton County on April 16, 2008. Found. Aff., Exs. F and G, at 6-7. He is not a "landowner" as claimed in the Affidavit of Kyle Burgmaier (November 4, 2011) (Burgmaier Aff.), at 2, ¶ 3. In fact, he may never become a fee owner of the property. The precise terms of the Burgmaier contract for deed are not known to Defendants but, at best, he has an installment contract interest in real property that does not equate to actual fee ownership.

A contract for deed is an executory contract and "legal title does not pass until the conveyance is actually made." Dobitz v. Oakland, 172 Mont. 126, 130, 561 P.2d 441, 443 (1977). "It is an agreement by a seller to deliver a deed to the property when certain conditions have been met, usually when the buyer has completed making payments to the seller." Tungsten Holdings v. Olson, 2002 MT 158, ¶ 16, 310 Mont. 374, 50 P.3d 1086. Mr. Burgmaier has not performed his obligations under the contract and does not yet own the real property. Foundational Aff., Ex. G, at 24-25.

Mr. Burgmaier and his parents share the same mailing address. Foundational Aff., Ex. F. His parents (John Allen and Deanna Burgmaier), and vendors under the real estate contract, received actual notice of the SDEIS and FEIS because these documents were mailed to them at the address they share with their son. Newhouse Aff., Exs. 1, 6; Ring Aff. at 4-5, ¶¶ 10-11, and Ex D thereto, at 9-5. It is clear that Kyle Burgmaier's contract vendors received actual notice of the MATL MFSA proceedings.

Kyle Burgmaier also references property he voluntarily purchased in December 2008 from Gordon Grossman. Burgmaier Aff. at 2, ¶ 6. The MFSA Certificate was issued by DEQ to MATL on October 22, 2008. Mr. Burgmaier, therefore,

occupies the same position as Fondren and Cochran in Montana Power v. Fondren, 226 Mont. 500, 513, 737 P.2d 1138, 1146 (1987). Gordon Grossman, Kyle Burgmaier's predecessor-in-interest, was provided actual notice because copies of the SDEIS and FEIS were mailed to him. Newhouse Aff., Exs. 1, 6; Ring Aff. at 4-5, ¶ 10, and Ex D thereto, at 9-6. Any alleged lack of actual notice to Kyle Burgmaier is irrelevant.

**Somerfeld.** Plaintiffs have submitted deposition testimony of Leona Somerfeld, the Rule 30(b)(6) designee of Somerfeld and Sons Land and Livestock, LLC ("Somerfeld"), which is a party in MATL LLP v. Sheffels, Montana Eighth Judicial District Court, Cascade County, Cause No. ADV-11-061. See Ex. C, Pls.' Landowners Summ. J. Br. Somerfeld is not a party here, and the State of Montana is not a party to the Sheffels Cascade County case. Somerfeld has no standing here. The test of standing is that the complaining party must clearly allege past, present or threatened injury to a property or civil right, and the alleged injury must be distinguishable from the injury to the public generally, but it need not be exclusive to the complaining party. Montana Trout Unlimited v. Beaverhead Water, 2011 MT 151, ¶ 27, 361 Mont. 77, 255 P.3d 179 (citations omitted). Somerfeld has no standing here because neither her rights nor her property are at issue. Somerfeld's testimony has no relevance to Plaintiffs' as-applied constitutional claims, and cannot have any bearing on Plaintiffs' facial challenges.

However, assuming for the sake of argument that the Somerfeld testimony could be relevant (which the State does not concede), Somerfeld was provided actual notice of the MATL MFSA proceedings because copies of the SDEIS and FEIS were mailed to Somerfeld. Newhouse Aff., Exs. 1, 6; Ring Aff. at 4-5, ¶ 10, and Ex D thereto, at 9-4.

Somerfeld admitted to receiving the DEIS by mail in March 2007. Plaintiffs' Landowners Summ. J. Br., Ex. C at 14-17. Somerfeld admitted to receiving the SDEIS by mail in February 2008. Id. at 23. Somerfeld admitted to receiving the FEIS by mail in September 2008. Id. at 31-32. As a result of receiving these EIS documents, Somerfeld knew that the proposed MATL electrical transmission line would "probably" cross its property. Id. at 33. Somerfeld clearly received actual notice of the MFSA process.

Plaintiffs had a right to participate in the MFSA process and challenge the issuance of the MFSA Certificate. Plaintiffs were informed in the MFSA process that MATL may exercise the power of eminent domain. Any failure of Plaintiffs to act does not invalidate the MFSA Certificate. Finally, and most importantly, any failure to act during the MFSA process does not deprive them of procedural due process because Plaintiffs will be afforded procedural due process in any eminent domain proceedings where their property is subject to condemnation, and will be entitled to just compensation.

### **III. HB 198 DOES NOT DENY SUBSTANTIVE DUE PROCESS UNDER THE UNITED STATES OR MONTANA CONSTITUTION.**

Substantive due process bars arbitrary government actions. Powell v. State Comp. Ins. Fund, 2000 MT 321, ¶ 28, 302 Mont. 518, 15 P.3d 877. "[A] statute enacted by the legislature must be reasonably related to a permissible legislative objective in order to satisfy guarantees of substantive due process." Id., ¶ 29. By specifying the eminent domain power of public utilities and persons issued a certificate under the MFSA, HB 198 has, in one respect, added to the long list of public uses in Mont. Code Ann.

§ 70-30-102, which already contains similar uses such as certain pipelines (4), (20); telephone or electrical lines (37); and telegraph lines (38). This is rational legislation related to legitimate government concerns.

With respect to substantive due process, the Supreme Court has recently rejected “using Substantive Due Process to do the work of the Takings Clause . . . .” Stop The Beach Renourishment v. Florida Dep’t of Env’tl. Prot., 130 S. Ct. 2592, 2606 (2010) (four-Justice plurality opinion). The fact that one constitutional provision, the Takings Clause, expressly requires just compensation for the taking of property, indicates that the Constitution does not also provide a broader right in the more general Due Process Clause. “Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.’” Albright v. Oliver, 510 U.S. 266, 273 (1994) (four-Justice plurality opinion) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

Federal due process law is no barrier to the retroactive applicability of HB 198 to entities issued MFSA certificates after September 30, 2008. Legislation with retroactive aspects is upheld if not arbitrary and irrational. Usery v. Turner Elkhorn Mining, 428 U.S. 1, 17-19 (1976). The Supreme Court is very deferential to the decisions of state legislatures concerning the exercise of the eminent domain power. E.g., Kelo v. City of New London, 545 U.S. 469, 483 (2005) (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of

the takings power.”) HB 198 does not impose liability for past lawful conduct, nor upset settled transactions, nor deprive persons of legitimate expectations. The real property owned by Plaintiffs has always been susceptible to being taken under the power of eminent domain with just compensation paid.

The State of Montana has a permissible legislative objective in exercising the power of eminent domain for facilities issued a MFSA certificate by DEQ, and requiring the applicant to demonstrate public interest, convenience, and necessity in the MFSA process is a reasonable procedure for determining that a MFSA certificate-holder may be delegated the power of eminent domain for a public use specified in Mont. Code Ann. § 70-30-102. HB 198 cannot be characterized as an arbitrary government action. Plaintiffs have not been denied substantive due process.

**V. HB 198 DOES NOT VIOLATE PLAINTIFF LANDOWNERS' RIGHT TO "PROTECTION OF PROPERTY" UNDER THE MONTANA CONSTITUTION.**

Plaintiffs also seek summary judgment based upon “protection of property” under Mont. Const. art. II, § 3, Plaintiffs offer no argument based upon this constitutional provision. Plaintiffs do not have any vested right to be free from eminent domain, which is an inherent attribute of sovereignty. Landowners are entitled to due process when property is taken for public use. No property has been taken by authority of Mont. Code Ann. § 75-20-113. Nonetheless, while the owners of condemned real property give up all or part of their interests in the property, the owners are made whole by the payment of just compensation. HB 198 in no way changes the requirement to pay just compensation for condemned property, and therefore does not violate Mont. Const. art. II, § 3.

**VI. HB 198 DOES NOT VIOLATE PLAINTIFF LANDOWNERS' RIGHT TO PARTICIPATE UNDER THE MONTANA CONSTITUTION.**

Plaintiffs argue that that HB 198 violates their right to participate in agency decisions, which is essentially an untimely collateral attack on DEQ's approval of the MFSA Certificate. Plaintiffs claim that, during the long public process for consideration of MATL's application for a MFSA certificate, Montana law did not expressly allow an entity with a MFSA certificate to acquire property by eminent domain, therefore they had no idea that MATL may exercise the power of eminent domain. After the MFSA Certificate was issued, HB 198 was enacted to clarify that a MFSA certificate-holder could condemn property for a recognized public use. Thus, this argument seems to be a variation on Plaintiffs' retroactivity argument, which the Court has already rejected.

Plaintiffs were provided actual notice of the MFSA process, the opportunity to be informed of the MFSA process, and the opportunity to participate in that process. The FEIS expressly discussed the possibility MATL could acquire property by eminent domain. Plaintiffs had a right to lobby the Legislature before passage of HB 198. Plaintiffs have the right to defend any eminent domain action. Plaintiffs have not been denied any right to participate.

**VII. HB 198 DOES NOT VIOLATE ANY PROTECTION AGAINST SPECICAL LEGISLATION UNDER THE MONTANA CONSTITUTION.**

Plaintiffs' argument begins with the premise that HB 198 was enacted because of the Court's decision in Salois. Plaintiffs observe that although the Act became law in May 2011, it applies to entities that were issued MFSA certificates after September 30,

2008, and that MATL is the only entity to which the Act applies retroactively. Plaintiffs assert the Act is unconstitutional because, to the extent it purports to apply retroactively, it is special legislation intended for the sole benefit of MATL. Plaintiffs misinterpret the applicable constitutional provision. Mont. Const. art. V, § 12 provides: “The legislature shall not pass a special or local act when a general act is, or can be made, applicable.”

The reason for this provision is to prevent a diversity of laws on the same subject matter.

D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 442, 713 P.2d 977, 980 (1986).

“In the constitutional context, a law is not local or special if it operates in the same manner upon all persons in like circumstances.” Rohlfs v. Klemenhausen, 2009 MT 440, ¶ 12, 354 Mont. 133, 227 P.3d 42. Here, HB 198 applies to all public utilities and all persons issued a MFSA certificate after September 30, 2008. Such entities “may acquire by eminent domain any interest in property . . . .” HB 198, §§ 1, 2. In the sense of the constitutional provision, the statute is general, not special.

A statute allowing specified card games, but not others, was challenged as unconstitutional special legislation in Palmer v. State, 191 Mont. 534, 625 P.2d 550 (1981). The Supreme Court rejected the claim that the statute was unconstitutional special legislation that discriminated against certain card games and gamblers who preferred those games. Id., 191 Mont. at 537-38, 625 P.2d at 552. In Linder v. Smith, 193 Mont. 20, 629 P.2d 1187 (1981), the legislation creating the Medical Legal Panel was challenged as unconstitutional special legislation because doctors received special treatment of malpractice claims against them that was not provided to other tort

defendants, and medical malpractice claimants faced barriers to the judicial system not faced by other tort claimants. The Court rejected this claim. “A law which operates in the same manner upon all persons in like circumstances is not ‘special’ in the constitutional sense.” *Id.*, 193 Mont. at 30, 629 P.2d at 1193.

Similarly, HB 198 operates upon all public utilities and all persons issued a MFSA certificate after September 30, 2008, just as the statute in Linder applied to all malpractice claimants and defendant physicians and the statute in Palmer applied to all persons participating in card games. In these cases each of the challenged statutes applied equally to all within its scope. Therefore, the statutes were not unconstitutional special legislation.

#### **VIII. HB 198 IS NOT FACIALLY UNCONSTITUTIONAL UNDER THE UNITED STATES AND MONTANA CONSTITUTIONS.**

Plaintiffs’ final “facial challenge” makes little sense. HB 198 is clearly written. The Amended Complaint alleges HB 198 is unconstitutional but does not allege that Mont. Code Ann. § 75-20-223 is facially unconstitutional, nor does it reference Mont. Code Ann. § 75-20-223 at all. On its face, HB 198 has a plainly legitimate scope, as recognized by the Court. See Order Partially Granting MATL’s Mot. to Dismiss at 13. The facial challenge argument simply restates Plaintiffs’ due process arguments, and basically asserts that MFSA itself is unconstitutional as applied to electrical transmission lines when the power of eminent domain may be employed. Plaintiffs also misstate the purposes of MFSA, and ignore that a purpose of MFSA is to determine the existence of public need under §§ 75-20-301(1)(f), 75-20-301(2)(a)-(e), and Mont. Admin. R.


17.20.1606. The claim of facial invalidity offers nothing distinct from Plaintiffs' other arguments, and does not provide any basis for granting Plaintiffs summary judgment.

**CONCLUSION**

Based upon the foregoing points and authorities, the State of Montana respectfully submits that HB 198 is constitutional and Plaintiffs are not entitled to declaratory relief. Plaintiffs' Motion for Summary Judgment should be denied.

Respectfully submitted this 10<sup>th</sup> day of November, 2011.

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**CERTIFICATE OF SERVICE**

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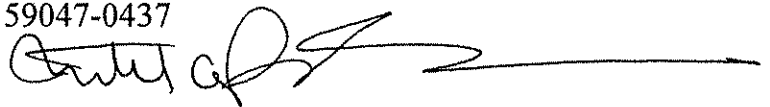
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Cheyenne, Wyoming 82003-0346

Hon. William Nels Swandal  
District Court Judge  
Montana Sixth Judicial District Court  
P.O. Box 437  
Livingston, MT 59047-0437

DATED: 18 November 2011





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COUNSEL FOR DEFENDANT  
STATE OF MONTANA

**MONTANA NINTH JUDICIAL DISTRICT COURT  
TETON COUNTY**

MAURER FARMS, INC.;  
KYLE BURGMAIER;  
STEVEN DAHLMAN;  
JOHN GOODMUNDSON;  
ROBERT STEPHENS,

Plaintiffs,

v.

STATE OF MONTANA and  
MATL LLP,

Defendants.

Cause No. DV-11-024

**SUPPLEMENTAL  
FOUNDATIONAL AFFIDAVIT  
OF MICHAEL G. BLACK**

STATE OF MONTANA            )  
  : ss.  
County of Lewis and Clark    )

MICHAEL G. BLACK, being duly sworn, hereby deposes and says:

1. I am counsel for Defendant State of Montana in the above action. I am over the age of eighteen years, am competent to testify as to the matters set

forth herein, and make this affidavit based upon my own personal knowledge and/or belief. I am generally familiar with the claims, materials, documents, pleadings, deposition exhibits, and public records regarding this matter.

2. The purpose of this affidavit is to provide the foundation and verification of accuracy of nonprivileged communications, pleadings, and/or other documents related to this proceeding, and request the Court to take judicial notice of the exhibits hereto pursuant to Mont. R. Evid. 201.

3. The exhibit attached hereto is a true and correct copy of the following:

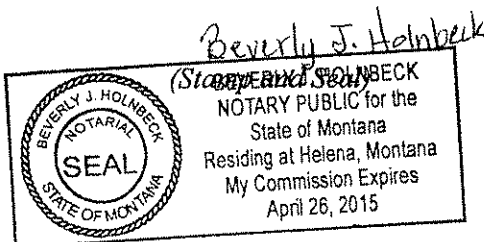
a. On November 2, 2011, a Rule 30(b)(6) deposition of Plaintiff Maurer Farms, Inc., was taken in Bozeman, Montana. Mr. Bruce Maurer was designated to testify as a representative of Maurer Farms, Inc. At the deposition, Mr. Maurer produced a letter that was marked as Exhibit 28 to the deposition. A true and correct copy of portions of the Deposition Transcript is attached hereto as Exhibit L.

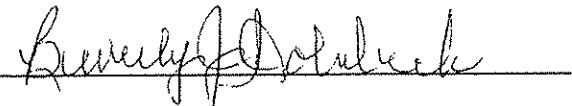
4. Further this affiant sayeth naught.

DATED this 18<sup>th</sup> day of November, 2011.

  
MICHAEL G. BLACK

SUBSCRIBED AND SWORN to before me this 18<sup>th</sup> day of November, 2011.



  
SUPPLEMENTAL FOUNDATIONAL AFFIDAVIT OF MICHAEL G. BLACK  
PAGE 2

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing to be  
mailed to:

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Hon. William Nels Swandal  
District Court Judge  
Montana Sixth Judicial District Court  
P.O. Box 437  
Livingston, MT 59047-0437

DATED: 18 NOVEMBER 2011



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MONTANA NINTH JUDICIAL DISTRICT COURT

TETON COUNTY

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MAURER FARMS; KYLE  
BURGMAIER; STEVEN DAHLMAN;  
JOHN GOODMUNDSON; and ROBERT  
STEPHENS,

Plaintiffs/Counterclaim Defendants,

vs. No. DV-11-024

STATE OF MONTANA,  
Defendant.

and

MATL, LLP,  
Defendant/Counterclaim Plaintiff,

vs.

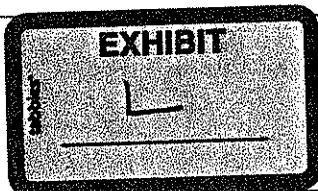
DARRELL GOODMUNDSON; DUTTON  
STATE BANK; and DIAMOND VALLEY  
FARMS, INC.,

Counterclaim Defendants.

---

DEPOSITION UPON ORAL EXAMINATION OF

BRUCE MAURER



**Bruce Maurer**

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BE IT REMEMBERED, that the deposition upon oral examination of BRUCE MAURER, appearing at the instance of Defendant MATL, was taken at the offices of Goetz, Gallik & Baldwin, 35 North Grand, Bozeman, Montana, on Wednesday, 2, 2011, 2011, beginning at the hour of 11:06 a.m., pursuant to the Montana Rules of Civil Procedure, before Yvonne Madsen, Certified Shorthand Reporter, Registered Professional Reporter, Notary Public.

**Bruce Maurer**

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APPEARANCES

ATTORNEY APPEARING ON BEHALF OF THE  
PLAINTIFFS/COUNTERCLAIM DEFENDANTS, MAURER  
FARMS, KYLE BURGMAIER, STEVEN DAHLMAN, JOHN  
GOODMUNDSON AND ROBERT STEPHENS; DUTTON STATE  
BANK AND DIAMOND VALLEY FARMS:

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ATTORNEY APPEARING ON BEHALF OF THE DEFENDANT,  
STATE OF MONTANA:

Michael Black, Esq.  
Assistant Attorney General  
Montana Department of Justice  
P.O. Box 201401  
Helena, Montana 59620-1401  
(Via telephone)

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APPEARANCES CONTINUED

ATTORNEY APPEARING ON BEHALF OF THE DEFENDANT/  
COUNTERCLAIM PLAINTIFF, MATL, LLP:

Benjamin J. Alke, Esq.

James H. Goetz, Esq.

Goetz, Gallik & Baldwin, P.C.

35 North Grand

P.O. Box 6580

Bozeman, Montana 59771-6580

ALSO PRESENT: Cathy Maurer

**Bruce Maurer**

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I N D E X

EXAMINATION OF BRUCE MAURER BY:	PAGE:
Mr. Alke	7
Mr. Black	53
Ms. Lund	58

E X H I B I T S

DEPOSITION EXHIBITS:	PAGE:	
Exhibit 23	Second Notice of 30(b)(6)	8
	Deposition of Maurer Farms	
Exhibit 24	MATL Agenda for Proposed Project	17
Exhibit 25	7/6/07 Option Agreement for Easement	19 24
Exhibit 26	Right-of-Way Easement Agreement	27 28
Exhibit 27	Copy of check paid to Maurer Farms for option	28
Exhibit 28	2/20/07 letter to Maurer Farms from Compton Signatures	30 54
	Re: EIS	
Exhibit 29	Selected pages of Final EIS	45
	September 2008	46
Exhibit 30	MATL Agenda for Proposed Project	48

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DEPOSITION EXHIBITS: (Continued)

Exhibit 31 Copy of Map 5C 58

EXHIBITS REFERRED TO:

Exhibit 13. . . . . 17, 25, 31

Exhibit 14. . . . . 35, 36, 40

Exhibit 15. . . . . 45, 46

Exhibit 19. . . . . 41

Exhibit 22. . . . . 38

**Bruce Maurer**

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WEDNESDAY, NOVEMBER 2, 2011

Thereupon,

BRUCE MAURER,

a witness of lawful age, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified upon his oath as follows:

EXAMINATION

BY MR. ALKE:

Q. Would you please state your name for the record.

A. Bruce Maurer.

Q. Do you mind if I call you "Bruce"?

A. Go ahead.

Q. Bruce, have you ever had your deposition taken before?

A. Yeah.

Q. How many times?

A. Once, I think.

Q. What was that related to?

A. Well, this same thing, but the DEQ -- what do you call it, MFSA?

MS. LUND: The administrative case.

Q. (By Mr. Alke) okay. The MFSA appeal?

Just a brief refresher on the ground

Bruce Maurer

1 Q. And, of course, it wasn't a purchase  
2 agreement, it was an option agreement, so it was  
3 contingent upon something happening in the future?

4 A. I suppose.

5 EXHIBITS:

6 (Deposition Exhibit No. 28 marked for  
7 identification.)

8 Q. (By Mr. Alke) Can you tell me what  
9 Exhibit 28 is?

10 A. Well, I guess it's a letter that Compton  
11 Signatures sent to us, it looks like.

12 Q. And this letter is dated February 20th,  
13 2007?

14 A. Yep.

15 Q. This letter advised you that an  
16 environmental impact statement would be issued  
17 shortly?

18 A. That's what it says.

19 Q. This letter advises you that there could  
20 be some changes to the route of MATL's  
21 transmission line?

22 A. Well, it says, "Although there was some  
23 changes to the routing of the transmission  
24 postulated in that document, it is not clear if  
25 any of these will survive through to the approval<sub>30</sub>

**Bruce Maurer**

1 of the MATL project."

2 Q. What was your understanding of that  
3 sentence?

4 A. Nobody knows anything.

5 Q. Okay. So at that time, MATL was giving  
6 you notice that it didn't know where the final  
7 route or location of the transmission line was  
8 going to be?

9 A. It says it's not clear.

10 Q. Okay. Would you go back to Deposition  
11 Exhibit No. 13. That was the one with the map.

12 A. This one (indicating)?

13 Q. Yes. Deposition Exhibit 13 is a copy of  
14 selected pages from the draft environmental impact  
15 statement. Did you receive a copy of the draft  
16 environmental impact statement?

17 A. My famous inch-and-a-half thick one?

18 Q. I believe so. I believe earlier you  
19 referred to it as a "catalogue"?

20 A. I think I've got it.

21 Q. Do I know when you received this  
22 document?

23 A. No.

24 Q. Did you look at that document when you  
25 received it?

**Bruce Maurer**

1           A.    I leafed through it.  I looked at the  
2 pictures.

3           Q.    Would you look at the map which is the  
4 last page of the exhibit?

5           A.    Okay.

6           Q.    Do you see in this map how there are  
7 three proposed alternative routes?

8           A.    One, two three, there are three colored  
9 lines.

10          Q.    Do you recall reviewing this map at the  
11 time you received the draft environmental impact  
12 statement?

13          A.    I believe there were three of these maps  
14 in that book.  And I remember looking at them and  
15 figuring it's a hell of a mess because you can't  
16 see where anything is.

17          Q.    At the time you received the draft  
18 environmental impact statement, was it your  
19 understanding that there were various proposed  
20 alternative routes under consideration?

21          A.    I probably was.  It says down here, don't  
22 it, alternates one, two, three, four or something  
23 like that.

24          Q.    So were you aware that the final location  
25 of the route may not be in the location that was 32

1 contemplated in your option agreement in 2006?

2 A. I think it says in there something to the  
3 effect that it could be anyplace, except most  
4 likely it's not going to be Alternative 4 because  
5 that one is too expensive.

6 Q. And when you say "in there," what are you  
7 referring to?

8 A. In that book.

9 Q. In the draft EIS?

10 A. I think it's in there.

11 Q. So did you read the draft EIS pretty  
12 carefully?

13 A. I looked it over a little.

14 Q. And did you understand that there were  
15 three routes under consideration?

16 A. I always thought there was four.

17 MS. LUND: I think he's confused about  
18 four alternatives.

19 Q. (By Mr. Alke) Okay. I understand.  
20 There were four alternatives -- I'll represent to  
21 you it's my understanding there were four  
22 alternatives. One alternative was no action.  
23 Does that refresh your recollection at all?

24 A. No. I wouldn't have done it that way,  
25 but if you say so.

**Bruce Maurer**

1 Q. Did you go to any of the public meetings  
2 in March of 2007?

3 A. No.

4 Q. Were you aware of the meetings?

5 A. I doubt it.

6 Q. Why do you say you doubt it?

7 A. I wasn't paying much attention to the  
8 power line business because I had already had my  
9 power line deal figured out, I thought.

10 Q. And by that you mean the option  
11 agreement?

12 A. Yeah.

13 Q. But you understood that there were  
14 multiple routes under consideration?

15 A. I think -- well, let's see. Now, you're  
16 talking about before this thing came out?

17 Q. At the time this came -- well, yes,  
18 before this came out.

19 A. The only two that I knew about was the  
20 one that I gave them the option on the first time  
21 and the one that I gave them the option on the  
22 second time.

23 Q. But then at the time that this document  
24 came out, you understood that there were  
25 multiple --

Bruce Maurer

1 A. It's got more lines on it, yeah.

2 Q. Did you submit any comments on the draft  
3 EIS?

4 A. No.

5 Q. Did you later receive a draft of the  
6 supplemental draft EIS/federal draft EIS?

7 A. Is it about this thick (indicating)?

8 Q. For the record, you're --

9 A. A quarter of an inch?

10 Q. I can't tell you.

11 A. I think I did. I got a thick one and a  
12 thin one.

13 MS. LUND: And, actually, for the record,  
14 I would -- I think that the thicker one is this  
15 one, Ben (indicating). So, you know, just to make  
16 sure that, you know, when he's saying thicknesses  
17 we maybe should get the documents. But this is  
18 the thicker one. The other one -- I guess both  
19 drafts are thick. I don't know how to figure it  
20 out, which one he's talking about.

21 MR. ALKE: Well, we'll just let him sort  
22 that out or to the best he can.

23 Q. (By Mr. Alke) Do you recall --

24 MR. ALKE: Let's mark -- this is  
25 previously marked as Deposition Exhibit 14.

**Bruce Maurer**

1 had at the house. I can tell you exactly what  
2 they are, if that helps this discussion.

3 MR. ALKE: Well, I believe I know what  
4 they are. But, you know, this is his deposition  
5 and he's testified based on his personal  
6 knowledge, so we are where we are.

7 Q. (By Mr. Alke) Let's move forward with  
8 questions.

9 Do you recall receiving a copy of this  
10 cover letter which is labeled Deposition  
11 Exhibit 15?

12 A. Probably not.

13 Q. Do you recall looking at the final  
14 environmental impact statement?

15 A. If it's the quarter-of-an-inch thick  
16 book.

17 Q. Would you look at page 3 of Deposition  
18 Exhibit 29.

19 A. Page what?

20 Q. The third page.

21 A. Another map?

22 Q. Yes.

23 A. Okay.

24 Q. Do you recall looking at this map in the  
25 final environmental impact statement?

**Bruce Maurer**

1           A.    I put those maps that look like this in  
2 those books, yeah.

3           Q.    Do you recall specifically looking at any  
4 maps in the final environmental impact statement?

5           A.    Did we determine that the quarter-inch  
6 book is the final impact statement?

7           Q.    I'll represent to you it's my  
8 understanding that it is.

9           A.    Okay.  If it is, then I looked at the  
10 maps in it.

11          Q.    When the final environmental impact  
12 statement came out, were you aware that MATL's  
13 route crossed your property?

14          A.    Sure.  But I thought it crossed it on the  
15 east edge of 5 and 8.

16          Q.    At what point did you realize that that  
17 wasn't the case?

18          A.    At about the last of May or the 1st of  
19 June in 2009.

20          Q.    How did you realize that?

21          A.    I got a letter in the mail with some maps  
22 that you could read.

23          Q.    Who was that letter from?

24          A.    MATL.

25          Q.    What did the letter say?