

**FILED**

HON. Wm. NELS SWANDAL  
District Judge  
Sixth Judicial District  
414 East Callender Street  
Livingston, Montana 59047  
406-22-4130

1-11-13 Date  
[Signature] Clerk  
by \_\_\_\_\_ Deputy

**MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY**

MAURER FARMS, INC.; KYLE BURGMAIER; STEVEN DAHLMAN; JOHN GOODMUNDSON; and ROBERT STEPHENS,	)	Cause No. DV-11-024
	)	Hon. Wm. Nels Swandal
Plaintiffs/Counterclaim Defendants,	)	
vs.	)	<b><u>COURT'S</u></b>
STATE OF MONTANA,	)	<b><u>FINDINGS OF FACT</u></b>
Defendant,	)	<b><u>CONCLUSIONS OF LAW</u></b>
and	)	<b><u>AND ORDER</u></b>
MATL LLP,	)	
Defendant/Counterclaim Plaintiff,	)	
vs.	)	
DARRELL GOODMUNDSON; DUTTON STATE BANK; and DIAMOND VALLEY FARMS, INC.,	)	
Counterclaim Defendants.	)	

The Plaintiffs, Defendant State of Montana ("State"), and Defendant MATL LLP ("MATL") have filed motions for summary judgment regarding the constitutionality of HB 198.

The Court heard oral argument on December 22, 2011. Present for the Plaintiffs were Hertha

Lund (argued) and Alanah Griffith. Present for State of Montana was Michael Black (argued). Present for MATL, LLP were James Goetz (argues), Benjamin Alke and Harley Harris. The parties presented arguments and further documentation in support of their motions, and the Court took the motions under advisement. The parties indicated they do not believe there are genuine issues of material fact and that summary judgment is appropriate.

In issuing this Order, the Court relies upon the documents in the record. Most of these documents originate from state or federal agencies. The Court took judicial notice of certain documents of the Federal Energy Regulatory Commission ("FERC"). *See Order Granting MATL's Request for Judicial Notice* (December 23, 2011). In addition, the record reflects the following documents that are pertinent to this Order:

- The Findings Necessary for Certification and Certification Determination dated October 22, 2008, with attachments ("MFSA Certificate").
- The various environmental impact statements and related documents prepared by the Montana Department of Environmental Quality and United States Department of Energy. Complete copies of these documents are available online at [www.deq.mt.gov/MFS/MATL.mcp](http://www.deq.mt.gov/MFS/MATL.mcp).
- Affidavit of Amanda Miller (DEQ employee) dated September 21, 2011 with attached legal notices.
- Affidavit of Amanda Miller (DEQ employee) dated September 21, 2011 with attached meeting sign in sheets.
- Affidavit of Lorraine Karwaski (former DEQ employee) dated October 15, 2010 with attached legal notices.
- Montana DEQ 30(b)(6) Deposition on September 21, 2011.
- Affidavit of Dave Newhouse dated October 27, 2011 with attached mailing lists.

Based upon the facts in the record and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law regarding the constitutionality of HB 198.

## FINDINGS OF FACT

1. This is an order on summary judgment. The parties have moved and cross-moved for summary judgment on the constitutionality of HB 198. All parties agree that there are no genuine issues of material fact. But because of the procedural complexity of this matter, the Court provides the following uncontested background.

2. Plaintiffs in this action are landowners. MATL is a privately held company organized under the laws of Montana and is constructing a 198 mile electrical transmission line (“Line”) between Great Falls, Montana and Lethbridge, Alberta, Canada. The route of MATL’s transmission line crosses property owned by Plaintiffs.

3. The route of the Line was selected by the Montana Department of Environmental Quality (“DEQ”) pursuant to the Major Facility Siting Act (“MFSA”). See §§ 75-20-101, et seq, MCA.

4. The MFSA process began on December 1, 2005, when MATL submitted an application to the DEQ for a MFSA Certificate of Compliance. *MFSA Certificate*, p. 1. MATL also applied to the U. S. Department of Energy (“DOE”) for a Presidential Permit that would allow it to build, operate and maintain a transmission line that crossed the border between the United States and Canada. *DEIS*, p. 1-1.

5. The DEQ conducted a comprehensive review as part of the MFSA process. *DEIS*, p. 1-1. Public scoping meetings were held in December of 2005 and June of 2006 to allow members of the public to comment on the proposed project. *Id.* at 5-2. DEQ published notices of the meetings. See *id.*; see also *Miller Affidavits and Karwaski Affidavit*. DOE also published a Notice of Intent to Prepare an Environmental Assessment and to Conduct Public Scoping Meetings in the

Federal Register. *See* 70 Fed.Reg. 69962 (Friday, November 18, 2005). A copy of that notice was mailed to landowners in the study area. *DEIS*, p. 5-2. It appears that landowners were identified by tax records.

6. In March of 2007, DEQ and DOE issued a Draft Environmental Impact Statement (“DEIS”) which served as a draft environmental impact statement for DEQ and an environmental assessment for DOE. *See DEIS*. The DEIS contained several maps which showed the proposed alternative routes of the Line being considered by DEQ. *See e.g. id.*, Figure 2.3-4. Three public hearings on the DEIS were held in March of 2007. *See SDEIS*, p. S-7; *see also Miller Affidavits and Karwaski Affidavit*. DEQ received comments on the DEIS. *See SDEIS, Vol. 2 – Responses to Comments*.

7. The DEIS stated that eminent domain could be used to acquire the easements necessary to build the Line. *DEIS*, pp. 1-14, 2-9. Among other things, it stated that “MATL could exercise the right of eminent domain to obtain easements.” *Id.* at 2-9.

8. In February of 2008, the agencies issued a joint state Supplemental Draft Impact Statement and federal Draft Environmental Impact Statement (“SDEIS”). *See SDEIS*. DEQ endeavored to mail a copy of the SDEIS to each landowner who, according to property records, owned property that could have been affected by MATL’s line. *Montana DEQ 30(b)(6) Deposition*, pp. 23-29; *see also Affidavit of Dave Newhouse*. Three public hearings on the SDEIS were held in March of 2008. *FEIS*, p. S-9; *see also Miller Affidavits and Karwaski Affidavit*. DEQ received comments on the SDEIS. *See FEIS, Vol. 2 – Comment Response Document*.

9. Like the DEIS, the SDEIS contained a discussion about eminent domain and indicated that MATL could exercise eminent domain in order to obtain the easements necessary to build the Line. *SDEIS*, pp. 1-16, 2-9. Various landowners commented on MATL’s ability to exercise eminent

domain. *See e.g. FEIS, Vol. 2*, pp. 10-11, 74-75, 320. DEQ considered those comments and responded. *Id.*

10. In September of 2008, DEQ and DOE issued the Final Environmental Impact Statement (“FEIS”). *See FEIS*. The FEIS contains a description of the route selected by DEQ and a description of the alternatives that were considered. *Id.* DEQ endeavored to mail a copy of the FEIS to each landowner who, according to property records, owned property that could have been affected by MATL’s line. *Montana DEQ 30(b)(6) Deposition*, pp. 23-29; *see also Affidavit of Dave Newhouse*.

11. DEQ issued a MFSA Certificate of Compliance to MATL on October 22, 2008. *See MFSA Certificate*. The MFSA Certificate authorized MATL to construct the Line along the route selected in the FEIS. *Id.* The Certificate contains conditions that require MATL to consult with landowners on issues like final pole placement and the location of access roads. *Id.* at Attachment 2.

12. MATL is regulated by the Federal Energy Regulatory Commission (“FERC”). FERC authorized MATL to operate a transmission line between the United States and Canada. *See MATL’s Request for Judicial Notice* (September 27, 2011).

13. On July 19, 2010, MATL filed an action against a single landowner in Glacier County to obtain an easement. *See MATL LLP v. Salois* (Cause No. DV 10-86).

14. Judge McKinnon presided over the *Salois* case. On December 12, 2008, she issued an *Order Dismissing Complaint for Condemnation*. The order stated that MATL did not possess the power to exercise eminent domain. *Id.* Judge McKinnon reasoned that legislation which had previously granted public utilities and other companies to exercise the right of eminent domain “has been repealed and MATL could cite no legislative authority for its pursuit of land acquisitions by

eminent domain, either expressly or by necessary implication.” *Id.* at p. 6.

15. MATL appealed to the Montana Supreme Court. MATL contended that it was authorized to exercise the right of eminent domain in order to build the Line, because constructing an electrical transmission line is listed as a “public use” under the Montana eminent domain statutes.

16. The Legislature passed HB 198 in response to Judge McKinnon’s decision. The preamble to HB 198 states that it is a bill “clarifying” that certain entities have the right to exercise eminent domain. *See HB 198*. HB 198 states that public utilities or entities that have received a MFSA certificate can exercise eminent domain in accordance Title 70, chapter 30 of the Montana Code. *See* § 69-3-113, MCA; § 75-20-113, MCA.

17. As a result of the passage of HB 198, the Montana Supreme Court reversed Judge McKinnon’s decision dismissing MATL’s complaint for condemnation in *MATL LLP v. Larry Salois*, 2011 MT 126, ¶¶ 4 & 6, 360 Mont. 510, 255 P.3d 158, and remanded for further proceedings. The Montana Supreme Court did not address the question raised in MATL’s appeal: whether MATL could exercise the right of eminent domain in the absence of HB 198. *See id.*

18. Plaintiffs brought this action under the Montana Uniform Declaratory Judgment Act (§ 27-8-101, *et seq.*, MCA) challenging the constitutionality of HB 198. Plaintiffs filed suit shortly after the enactment of HB 198.

19. MATL filed counterclaims against the Plaintiffs seeking condemnation. MATL also filed condemnation actions against the remaining landowners in Teton, Pondera, and Cascade Counties.

20. MATL moved to dismiss Plaintiffs’ constitutional claims. The Court granted MATL’s motion to dismiss Counts III, VII, VIII and IX of Plaintiffs’ Complaint in its *Order Partially Granting MATL LLP’s Motion to Dismiss* (September 30, 2011). Five claims remain:

denial of due process under the U.S. Constitution (Count I); denial of due process under the Montana Constitution (Count II); violation of prohibition against special legislation (Count IV); denial of property protection (Count V); and denial of the right to participate under the Montana Constitution (Count VI).

21. On September 2, 2011, this Court held an omnibus scheduling conference to govern the cases pending in Teton and Pondera Counties. The parties agreed to designate this matter as a lead case and settled on a summary judgment briefing schedule to address the constitutionality of HB 198.

22. By its *Order Regarding Deadlines* of October 7, 2011, the Court clarified that it would first consider the issue of the constitutionality of HB 198. The issues regarding § 70-30-111, MCA, have been deferred. In this connection, the Court notes that MATL takes the position that the issues of public use and necessity are common to all landowners on the entire line and moved for summary judgment on public use on September 27, 2011, and on the question of necessity on August 30, 2011. Plaintiffs have not responded to those briefs because the resolution of those issues has been deferred. Those issues will be addressed at a later time during eminent domain proceedings.

### **CONCLUSIONS OF LAW**

1. The sole issue before the Court is the constitutionality of HB 198. This Order does not address issues that will arise during the condemnation proceedings, such as the questions of “public use” or “necessity” under § 70-30-111, MCA.

2. A number of constitutional claims have already been resolved against the Plaintiffs in the Court’s *Order Partially Granting MATL LLP’s Motion to Dismiss*. In particular, Count III,

which alleged that HB 198 is unconstitutionally retroactive, has been dismissed. The Legislature acted within its authority by explicitly declaring that HB 198 is retroactive. This Order will not reconsider that claim, or any other claims that have already been dismissed.

3. “[A] party challenging the constitutionality of a statute bears the heavy burden of proving it to be unconstitutional beyond a reasonable doubt.” *Estate of McCarthy v. Second Jud. Dist.*, 1999 MT 309, & 13, 297 Mont. 212, 994 P.2d 1090. The court has a duty to interpret the statute in a manner that upholds a constitutional interpretation. *Id.* Every objective in favor of the constitutionality of a state statute must be presumed by this Court.

4. Plaintiffs’ claims of right to participate and the denial of property protection are subsumed in the due process component of a right to a meaningful hearing. Accordingly, these Conclusions of Law are organized into sections addressing due process (procedural and substantive) and a section addressing special legislation.

#### **I. PROCEDURAL DUE PROCESS**

5. Procedural due process has to do with what procedures must be afforded in certain contexts. Life, liberty, or property can be taken only after due process of law is afforded. *Wiser v. State Dept. of Commerce*, 2006 MT 20, ¶ 29, 331 Mont. 28, 129 P.3d 133. In the case of the taking of property, “just compensation” must be afforded. Art. II, Section 29, Mont. Const.

6. The precise contours of procedural due process are somewhat flexible and are adapted by the courts to meet particular circumstances. Essentially, procedural due process requires notice and a meaningful hearing opportunity to be heard appropriate to the nature of the case. *Montanans for Justice v. McGrath*, 2006 MT 277, ¶ 30, 334 Mont. 237, 146 P.3d 759; *see also Dohaney v. Rogers*, 281 U.S. 362, 368 (1930).

7. Plaintiffs contend that HB 198 violates their right to procedural due process. They

contend that because HB 198 delegates the authority to exercise eminent domain to entities that have received MFSA certificates, and MATL has already obtained a MFSA certificate, they were deprived of a meaningful opportunity to be heard.

8. Defendants argue that HB 198 merely authorizes MATL (and other entities) to exercise eminent domain. Before any property can be taken, there must be condemnation proceedings pursuant to Title 70, Chapter 30. Plaintiffs will have a meaningful opportunity to be heard during the condemnation proceedings.

9. The Court agrees with Defendants. The due process clause of the state and federal constitutions come into play when a person is deprived of life, liberty, or property. Art. II, Section 17, Mont. Const., provides: “No person shall be deprived of life, liberty, or property without due process of law.” In *Emery v. State Dept. of Public Health and Human Services*, 286 Mont. 376, 384, 950 P.2d 764, 769 (1997), the court, after quoting the above language from Art. II, Section 17, stated:

Procedural due process concerns, and the concomitant right to notice and a hearing, do not arise unless there is an actual or threatened deprivation of a person’s life, liberty or property. *See, e.g., State ex rel. Dept. of Health v. Reese* (1993), 260 Mont. 24, 27, 858 P.2d 357, 359.

*Id.*; *see also Dowell v. Mont. Dept. of Public Health and Human Services*, 2006 MT 55, ¶ 23, 331 Mont. 305, 132 P.3d 520.

10. HB 198 does not deprive Plaintiffs of their property without a meaningful opportunity to be heard. HB 198 merely codifies eminent domain authority into the major facility siting act. In other words, it authorizes MATL to initiate condemnation proceedings, but does not in and of itself have any impact on Plaintiffs’ property rights. Before any property can be condemned, Plaintiffs will have a meaningful opportunity to be heard during the condemnation proceedings. *See* §§ 70-30-101, et seq, MCA. Further, Plaintiffs and other similarly-situated landowners do not have a protectable

right to be immune or otherwise free from the exercise of eminent domain for a public purpose by an entity determined by the Legislature; rather their protectable right is to just compensation for any property taken, and the due process associated with that protectable right is provided in the eminent domain proceedings themselves.

11. The Montana Supreme Court has held that the procedures in the Montana eminent domain statute satisfy due process:

The right to due process guarantees that no person shall be deprived of property pursuant to eminent domain proceedings without adequate notice, a hearing and just compensation. *See Housing Authority v. Bjork* (1940), 109 Mont. 552, .... Ronan's compliance with the eminent domain procedures contained within Title 70, Ch. 30, MCA, clearly satisfies those requirements.

*Lake v. Lake Co.*, 233 Mont. 126, 133, 759 P.2d 161, 165 (1988); *see also Montana Talc Co. v. Cyprus Mines Corp.*, 229 Mont. 491, 501, 748 P.2d 444, 450-51 (1987) and *Montana Power Co. v. Bokma*, 153 Mont. 390, 457 P.2d 769 (1969).

12. HB 198 does not change the procedures or requirements of Title 70, Chapter 30. It expressly incorporates the existing process, stating that the enumerated persons "may acquire by eminent domain any interest in property, as provided in Title 70, chapter 30, for a public use authorized by law ...." Section 69-3-113, MCA; § 75-20-113, MCA.

13. The Legislature can pass a law in response to a specific ruling with a retroactive application. It is fully within the province of the Legislature to enact legislation calculated to correct a court decision which the Legislature believes is errant and it may make the application retroactive if it so declares. The court stated in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995):

It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. *See United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-80 ... 1994.

*Id.*; see also *Ecology Center v. Castaneda*, 426 F.3d 1144 (9th Cir. 2005). “Congress clearly has the power to amend a statute and to make that change applicable to pending cases.” *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (1993); and *Ecology Center* at 1149-50.

14. Plaintiffs contend that HB 198 is unconstitutional because eminent domain was not at issue when DEQ granted MATL a MFSA certificate. That is not the issue before the Court. It was the Legislature that granted MATL the capacity to bring suit, not DEQ. Plaintiffs do not allege, and the Court does not find, that any of the Plaintiffs were denied the right to participate in the Legislative process leading to the enactment of HB 198. Further, it is clear that the Legislature was aware of the MATL project and the associated MFSA process in its deliberations over HB 198. The Legislature looked at that process and determined that it provided a sufficient basis for its decision to clarify MATL's capacity to condemn property necessary for the enumerated public use of an electric energy line. That decision was within the Legislature's powers.

15. As noted above, full due process will ultimately be provided in the Eminent Domain Act proceedings when the preliminary condemnation issue is heard. In this sense, the notice and participation procedures of MFSA have provided redundant due process protection.

16. Contrary to Plaintiffs' claim that eminent domain was not at issue during the MFSA process, the record is replete with references to eminent domain during the MFSA process. Each environmental impact statement contained a discussion about eminent domain. See *DEIS*, *SDEIS*, and *FEIS*. The first *DEIS* specifically stated that MATL could exercise the right of eminent domain. *DEIS*, p. 2-9. The subsequent *SDEIS* and *FEIS* contained similar statements. See *SDEIS* and *FEIS*. The DEQ received comments from landowners regarding eminent domain -- including landowners that are involved in this litigation -- and responded to those comments. See *FEIS*, Vol 2., p. 320. Further, Plaintiffs do not provide any indication of what, if anything, they would have done

differently in the MFSA process if HB 198 were then the law. HB 198 did not change any of the substantive decision-making criteria under MFSA, and so there is no basis to conclude that the ultimate result would have been any different with or without HB 198.

17. DEQ provided adequate notice to landowners regarding the line. It held three different sets of public hearings. DEQ published adequate notice of each hearing. Each landowner that could have been affected by the line was mailed a copy of the SDEIS and FEIS. Plaintiffs had the opportunity to appeal the issuance of the MFSA Certificate. *See* § 75-20-406, MCA. Further, if MATL fails to follow the conditions set forth in its MFSA Certificate, such as the requirement that it work with landowners regarding pole placement and location of access roads, a landowner may seek redress through a writ of mandamus. *See* § 75-20-404, MCA.

18. Regardless of the MFSA process, it is the prerogative of the Legislature to delegate the authority of eminent domain. The Legislature may do so in any manner that it sees fit. The Legislature could have clarified that all corporations and partnerships can exercise eminent domain. Such an authorization, which would have been much broader than HB 198, would have been permissible. It also would have no practical effect on the condemnation proceedings in this case. No matter how MATL is authorized to exercise eminent domain, it must build the Line in accordance with its MFSA Certificate.

19. HB 198 (§ 69-3-113, MCA) also clarified that public utilities, “as defined in 69-3-101” can exercise eminent domain. MATL meets the broad definition of a public utility in § 69-3-101, MCA, even though it is federally - regulated by FERC, as opposed to the Montana Public

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Service Commission.<sup>1</sup>

20. The MFSA process provided landowners with an additional opportunity to participate in the administrative approval process; it cannot reasonably be contended that it somehow *reduced* the amount of public input on siting MATL's line. One of the purposes of MFSA is to "provide citizens with the opportunity to participate in facility siting decisions." Section 75-20-102(6)(c), MCA. Prior to MFSA, the landowners had virtually no say in the location decision—the choice of the condemnor was given "great weight" because of condemnor's "expertise and detailed knowledge." *See Montana Power Co. v. Bokma*, 153 Mont. 390, 399, 457 P.2d 769 (1969). This pre-MFSA process, along with the other procedural protections of the Eminent Domain Act, were found consistent with due process. *Id.* at 400-01. Now, landowners have the additional opportunity to comment on the proposed location of the line to DEQ, and those comments may influence the DEQ's determination of the line. *See generally FEIS*.

21. The Court observes that this Order does not resolve issues that will be addressed in condemnation proceedings, such as public use and necessity. Nor does it address the import of *Montana Power Co. v. Fondren*, 226 Mont. 500, 737 P.2d 1138 (1987). Those issues will be addressed by the Court in future proceedings.

## II. SUBSTANTIVE DUE PROCESS

22. "Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action." *Englin v. Bd. of Co. Com'rs.*, 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39. The test as articulated

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<sup>1</sup>MATL is also a "public utility" as defined by the Federal Power Act, 16 U.S.C. §824(e), "Public utility ... means any person who owns or operates facilities subject to the jurisdiction of [FERC]." Because MATL proposes to transport electrical power interstate, it is subject to the regulations of FERC. *See, e.g., New England Power Co. v. New Hampshire*, 445 U.S. 331, 340 (1982).

in *Englin* is an “examination of whether a person’s substantive due process rights have been violated requires that we decide whether the challenged governmental act is reasonably related to a legitimate governmental objective.” *Id.*

23. Eminent domain is inherent in sovereignty. *State of Ga. v. City of Chattanooga*, 264 U.S. 472, 480 (1924). Indeed, the Montana Constitution’s Declaration of Rights, Art. II, Section 29, specifically provides for eminent domain as long as there is “just compensation.”

24. Under Montana’s Eminent Domain Act, condemnation for the purpose of an “electrical energy line” is a public purpose. Section 70-30-102(37); *see also Bokma*, 153 Mont. at 394 (emphasis added).

25. HB 198 meets the *Englin* test as an act reasonably related to a legitimate government objective. First, construction of an electrical transmission line has long been expressly included in Montana statutes as an exercise of a legitimate governmental objective. *Bokma, supra*. Moreover, HB 198, which merely clarifies that public utilities and persons receiving certificates under MFSA may exercise that condemnation authority, is reasonably related to that legitimate governmental objective.

26. Moreover, as pointed out by the State, the United States Supreme Court 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). 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” (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The reasoning in *Beach Renourishment* applies here. The generalized protections of substantive due process do not add anything to the specific constitutional protections that apply in this case.

### **III. SPECIAL LEGISLATION**

27. HB 198 provides that persons (1) who have received a MFSA certificate after October 1, 2008; or (2) are a public utility, have eminent domain power.

28. Plaintiffs contend that HB 198 is special legislation because MATL is the only entity that has received a MFSA certificate since October 1, 2008. Defendants contend that HB 198 is not special legislation because HB 198 does not improperly exclude anyone (it will apply to the next entity that receives a MFSA certificate) and that Plaintiffs ignore that MATL is a public utility.

29. The Montana Supreme Court has explained that “[t]he test of a special law is the appropriateness of its provisions and the objects that it excludes. It is not, therefore, what a law includes, but what it excludes, that determines whether it is special.” *State v. Meyers*, 65 Mont. 124, 210 P. 1064, 1066 (1922). Even legislation that affects only a single entity is not “special” if it does not improperly exclude other entities:

The fact that only one entity that meets the specific provisions of the amendment has been identified does not render the legislation special. ... The point is that no one who should be included has been excluded from the Legislature’s action.

*Phillips v. Curiale*, 128 N.J. 608, 628 (1992); *see also Big Sky Excavating Inc. v. Illinois Bell Telephone Co.*, 217 Ill.2d 221, 235 (2005) (“The mere fact that a law may affect only a single entity does not, however, render the law invalid under the special legislation clause.”).

30. HB 198 does not improperly exclude anyone. The cases cited by Plaintiffs involving “closed classes” are not applicable here. *See Roberts v. Hosking*, 28 P.2d 199, 201 (Mont. 1933);

*Haman v. Marsh*, 467 N.W.2d 836, 844-845 (Neb. 1991). The next person to receive a MFSA certificate will be authorized to exercise eminent domain. Because HB 198 operates uniformly, and in the same manner, upon all public utilities and upon all persons, issued a MFSA certificate, it is not special legislation. See *Rohlf's v. Klemenhausen, LLC*, 2009 MT 440, ¶ 12, 354 Mont. 133, 227 P.3d 42:

In the constitutional context, a law is not local or special if it operates in the same manner upon all persons in like circumstances. If a law operates uniformly and equally upon all brought within the circumstances for which it provides, it is not a local or special law.

*Id.*, ¶ 12 (citing *Lowery v. Garfield County*, 122 Mont. 571, 586, 208 P.2d 478, 486 (1949)).

31. Further, MATL falls within the very broad definition of public utility under Montana law. This definition includes any person or entity that operates any equipment for the production or delivery of “power in any form.” Section 69-3-101(d), MCA. MATL falls within this definition, and HB 198 “operates uniformly and is the same manner for all public utilities.”

32. HB 198 does not exclude any person or entity which should otherwise be included. The bill does not except any public utilities as defined by § 69-3-101, MCA. It does not except any person issued an applicable certificate. HB 198 does not constitute special legislation.

33. For the foregoing reasons, the Court concludes that HB 198 and its delegation of condemnation power to Defendant MATL, is constitutional.

From the foregoing findings of fact and conclusions of law, the Court now makes the following:

### **ORDER**

1. Since the Court has upheld the constitutionality of HB 198, the issues of “public use” and “necessity”, as already briefed by Defendant MATL need to be considered. The Plaintiffs shall file their responses by February 3, 2012 and the Defendants may reply by February 24, 2012.

2. The Court will hear oral arguments on these issues on **Friday, March 2, 2012 at 1:30 p.m.** in the courtroom in Teton County, Choteau, Montana.

DATED this 11th day of January, 2012.

  
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Wm. Nels Swandal, District Judge

### EXPLANATORY COMMENT

The findings and conclusions proposed by Defendant MATL closely mirrored the Court's findings in this matter, so were adopted with a few changes.

During the hearing, counsel for MATL posed the question: "HB 198 is unconstitutional because \_\_\_\_\_?" The question should have been posed as: "HB 198 is unconstitutional, beyond a reasonable doubt, because \_\_\_\_\_?" It is the Court's obligation, in reviewing the constitutionality of state laws, to give deference to the legislature's policy choices unless they are shown to be constitutionally defective beyond a reasonable doubt. While this Court believes that the standard should be much lower (or that no presumption should exist), when applying the standard to legislation affecting fundamental and inalienable rights, this Court, unlike others, is not allowed to ignore precedent from controlling courts.

The plaintiffs contend that HB 198 is unconstitutional because their clients were deprived of both substantive and procedural due process. However, the record is replete with public hearings and notices being sent to landowners informing them of the MFSA process. Further, while the plaintiffs claim that HB 198 added a new element to the MFSA process because it now allows a utility to exercise condemnation authority, it appears that the notice and public hearings provided under MFSA would, under current law, satisfy the plaintiff's constitutional due process rights.

While it may be good policy for the legislature to amend HB 198 to allow for greater notice to landowners, that is the legislature's prerogative and not the Court's.

At this time, no plaintiffs' land or property has been taken. The plaintiffs will receive full due process and a chance to be heard during condemnation proceedings. The MFSA approval also requires MATL to cooperate with landowners in placement of the line and access roads. If MATL is unreasonable or refuses to cooperate, mandamus and other actions are available to the plaintiffs. It is during the condemnation proceedings that landowners can object to MATL's terms and conduct and avail themselves of their right to contest the offers made and the suggested placement of the line and access roads. HB 198, as passed, does not adversely affect the property rights plaintiffs are guaranteed under the Montana Constitution.

cc: Counsel of Record  
Judge Swandal c/o W. McClellan

Counsel:

Hertha Lund/Alanah Griffith - lead case (DV-11-024)

Michael Black - lead case (DV-11-024)

James Gertz, Trent Gardner, Ben Hicks (DV-11-024)

Justin Lee (DV-11-030)

Mark Stornitz (DV-11-030)

Cynthia Faria (DV-11-036)

Stephen R. Brown, Jr. (DV-11-034)

Thomas Bruner/Karen Budd Felen - Concerned Citizens Mont

Elda Nichols - Admin Asst. in charge of Court Admin

Bob Groszky - Court Reporter

CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing document by:  mailing  faxing  hand-delivering it to the following person(s) in accordance with the Montana Rules of Civil Procedure and Uniform District Court Rules:

All parties listed above

On the 11<sup>th</sup> day of Jan. 2012  
Clerk of Court

(Court Seal)

Teton County, Montana  
By: [Signature]  
Deputy Clerk