



Kelo in the Country... HB 198 and the Taking of Rural Property

By Hertha Lund
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In a Montana Legislative session loaded with controversies, the Republican-led House has now dumped HB 198, the eminent domain "fix," in the lap of the Senate. The House debate saw a vast array of misstatements, untruths, and insane logic. The bill was written to grant MATL or Tonbridge Power, a Canadian company, the power to use eminent domain to take property from Montana's farmers, ranchers, and other rural landowners. It would also grant NorthWestern Energy's MSTI project, a huge line from Townsend into Idaho, the power to take property.

MATL

MATL wants to build a 214-mile transmission line from Lethbridge, Alberta, to Great Falls, Montana, to allow transmission of power between the two markets. Most people thought MATL had the authority under Montana law to condemn property. But then a Glacier County Judge reviewed the law and found that the Legislature had never granted a corporate entity the right to condemn private property for the business of constructing and operating a private (for profit) "merchant" transmission line.

Merchant lines...

Some lobbyists and legislators have said HB 198 would only protect the status quo that has existed in Montana for more than 100 years. But merchant lines are a new phenomenon, and the Montana Legislature has never before allowed a non-public utility to utilize eminent domain authority for private transmission development. The Legislature had granted Montana Power Company the authority to condemn property for the building of transmission lines for the use of Montanans, but now NorthWestern Energy wants to build a huge line to serve out-of-state markets. The status quo would mean allowing a public utility, which MATL is NOT, the authority to condemn property for the development of transmission lines to deliver electricity to Montanans.

Who sued whom?

Another misstatement often repeated in the halls of the Montana Legislature is that the landowner whose property MATL attempted to condemn sued MATL to halt the project. That is NOT what happened. If the State or some entity to which the Legislature has granted the extreme power of eminent domain wants to take private property for a public use, the State or entity files the suit against the landowner. The landowner then must defend his/ her property rights in court.

In the MATL lawsuit, Larry Salois, who is guardian for his mother due to her illness, was sued by MATL. In his court filings, Salois argued that MATL did not have the right to condemn property, that the purpose of transmitting electricity to and from Canada was not a public use, and that the transmission line was not necessary. Prior to the court case, Salois had asked MATL to move the transmission line away from several teepee rings on his property. MATL refused and filed suit against Salois.

The Court ruled that MATL did NOT have the authority to condemn. The Court found: "Private real property ownership is a fundamental right," and stated: "MATL does NOT possess the power of eminent domain, either express or implied, and it has NO authority to take the private property from a non-consenting landowner."

So, MATL ran to the Montana Governor and Legislature to bail it out so it could condemn Salois' and other private property.

Insane logic...

Now, the insane logic: the Republican-led Legislature is rushing to provide, for the first time, the powerful right to condemn private property to an entity that exists only to make money for its shareholders. In 2007, in response to *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the Legislature passed a law to prevent condemnation for urban development. HB 198 would treat rural landowners differently than urban landowners because it would allow condemnation of rural property for the purpose of supposed economic development.

Where are the Kelo supporters?

Many Republican legislators publicly support property rights and decried the Kelo situation. But now, with HB 198, those same legislators are rushing to throw Salois and other landowners under the bus. Rural landowners should not be sacrificed in the FALSE choice between "development" or "property rights."

The facts...

The facts, according to the MATL Environmental Impact Study (EIS), are that the "expected beneficial effect of this long-term employment on the line would be MINOR." Transmission lines create FEW jobs after they are built.

Also, MATL was given a substantial tax break in the 2007 Special Session, which would have significant (and negative) impacts on local government revenues, according to the HB 198 fiscal note.

One Republican legislator wrote that the landowner's suit "put the investors and the utility line in a real bind." But it was MATL that filed the suit - NOT the landowner. And MATL refused a minor move of its line. MATL's management - not the landowners - put its investors in a real bind. If MATL had met with the landowners prior to the siting of the line and had attempted to work with the landowners instead of running over them with eminent domain threats, it is highly likely that MATL would not be spending its resources lobbying the Legislature. Without MATL's mistakes, it would be out in the field completing the project.

Finally, MATL is NOT a public utility in the conventional sense of that term. It is a private, merchant line.

Questions...

During these strangest of times, it seems the leadership of the Legislature wants to please the Governor and to advance his legacy of green energy. Yet, it remains to be seen whether or not any green energy will use this transmission line if built. MATL would run to Alberta, not to California or the Southwest where the market for green energy exists. Who knows if MSTI, which would run to the Southwest, is a viable project.

Also, green energy is heavily subsidized, and MATL is using stimulus dollars to build this project. Isn't there something just wrong with private corporate entities using taxpayer dollars to condemn a farmer's land to make a profit? Instead, it seems like a good place to begin reducing the deficit.

HB 198 will create relatively few jobs. Do those relatively few jobs justify allowing merchant lines to condemn private property? I don't think it is worth impinging on basic constitutional rights protecting private property just so MATL can meet its deadline to spend its 160 million in stimulus dollars.

Immediately after the Court decision, MATL said that it had a deal ironed out with Montana's legislators and the governor's office that would reverse the court's decision by March, according to a Lethbridge Herald article reprinted in the Great Falls Tribune. Tonbridge's Canadian spokesperson said the Glacier County Judge was wrong and that his company had the right to take Montanans' property for the transmission project. Contrasting Montana with Alberta, a Canadian farmer commented that "Landowners seem to have rights in the U.S."

MATL was right about one thing...

Now that the House has acted, it seems MATL was right. MATL did have a deal ironed out with the Governor and the Legislature to divest Montana landowners from their private property rights.

What you can do...

Maybe you feel differently. You should - your property might be next. If you don't want the Legislature to give condemnation authority to a private entity for private gain, please call your Senator NOW to stop passage of HB 198. Tell your Senator that you want the SAME protections for rural property that are provided to urban property owners in Montana. Tell your Senators that you do NOT want rural private property taken for someone else's private economic gain.

Note: Hertha Lund practices law at Lund Law in Bozeman, Montana. She represents landowners against whom MATL sought to condemn property. She is an active advocate of the protection of private property rights.