

MINUTES OF THE MEETING
NATURAL RESOURCES
STATE SENATE

February 17, 1979

The thirteenth meeting of the Natural Resources Committee was called to order by Senator George F. Roskie, Chairman, at 9:35 A.M., on the above date in Room 405 of the State Capitol Building.

ROLL CALL: Upon roll call, all members were present with the exception of Senators Brown, Etchart, Lockrem and Thiessen.

Mr. Jim Lear, Staff Attorney from the Legislative Council was also present.

Senator Jergeson reviewed the amendments to SB 478 which were adopted in the meeting on February 16th. He then moved that SB 478 receive a DO PASS as Amended recommendation. Senator Jergeson reiterated his concern about eminent domain and said he felt it should be dealt with on a case by case basis.

Senator Story reminded Senator Jergeson that this same concern was expressed in a previous legislature and at that time a law was passed that if a landowner is offered less than he knows a jury will award him, he can take the condemnor to court and the condemnor has to pay for all fees and expenses incurred by both parties involved.

Senator Lowe said that we have got to have the power of eminent domain. He said you cannot stop a project by one man saying there is no way you are going through my place.

Chairman Roskie summarized the intent of SB 478 again for the benefit of the Committee.

Senator Jergeson moved to put a recommendation on the floor and Senator Dover seconded the motion. Chairman Roskie called for a roll call vote on Senator Jergeson's motion that SB 478 DO PASS as Amended. The motion failed (see attachment).

Senator Story then moved that SB 478 receive a DO NOT PASS as Amended recommendation. There was further discussion and then Chairman Roskie called for a roll call vote on Senator Story's motion. The motion failed (see attachment) thereby leaving SB 478 in the Committee.

Senator Dover then moved that SB 480 receive a DO NOT PASS recommendation and Senator Manley seconded the motion.

Senator Jergeson said that he felt this bill was a good idea and deserved more consideration than the Committee was giving it.

"Eminent domain is the right of the state to take private property for public use."
70-30-101 M.C.A.

Present situation

Section 70-30-102, M.C.A. states "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:
(Section 4) . . . sites for reservoirs, necessary for collecting and storing water.
(Section 5) . . . sites for reservoirs, necessary for collecting and storing water."

By the inclusion of this language, eminent domain may be employed for reservoir sites. The problem with such a broad granting of authority is that it conflicts with 70-30-101 because eminent domain may be employed by private concerns for private profit.

Who this potentially affects

1. Landowners in Wibaux County where 11 potential sites for a reservoir of 36,000 acre feet per year have been identified by Intake Water Co. (a wholly owned subsidiary of Tenneco, the Texas based international conglomerate) along Beaver Creek.
2. Landowners in Daniels County where one potential site for a reservoir over 12,000 acre feet per year capacity have been identified by Farmer's Potash Co. (A partnership of two wholly owned subsidiaries, Dreyer Bros. Inc. and C.F. Industries, which are owned by Burlington Northern and Cenex, respectively.).

Intent of SB 478

1. This bill does not remove the power of eminent domain for all water reservoirs. It establishes limitations on when condemnation may be used for water reservoirs.
2. It does not interfere with legitimate uses of eminent domain, but places restrictions on private speculators who would use it for a profit.
3. It strengthens legitimate uses by clearly enumerating them.
4. It protects agricultural people's property rights and allows for more equal bargaining by landowners.
5. It is not the intent of this bill to stop certain projects. It is the intent and effect to insure that they proceed on their own merit.
6. The present eminent domain law is too broad and all inclusive when it comes to condemnation for water reservoirs. The effect of SB 478 is to narrow the focus of the eminent domain statutes.
7. The bill may not be perfect, but it is an honest attempt to minimize the condemnation of private property. It is an attempt to insure that the power of eminent domain is used sparingly, prudently, and only when the public good necessitates its use.

Some arguments

1. The power to condemn for water reservoirs was codified in 1955 to address the realities of Montana at that time. The ensuing 24 years have produced a new set of realities, especially in Eastern Montana, which this legislature should address.
2. The responsibility to delineate when eminent domain can be used has always been within the jurisdiction of the legislature. There is substantial precedent to confirm the legislature's right to determine when eminent domain can or can not be used. The prerogative rests with the legislature, this is not a break with the past.
3. Water reservoirs are a beneficial use of water, therefore condemnation should be allowed. The real question which must be addressed first is: Who will benefit? Will a private concern make a profit by the taking of private property? Is some taking for reservoirs a public use or a private use?
4. Limitations on the use of eminent domain for water reservoirs are unconstitutional.

4. Article IX, Section 3, (2) states: "The use of all water that is now or may hereafter be appropriated for sale, rent distribution, or toerh beneficial use ... and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use." Article II, Section 29, states: "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 court for the owner." The Constitution of Montana provides that reservoir sites are beneficial uses for which eminent domain may be used, it also provides that eminent domain may not be used for private purposes. There is no conflict.

5. The industry is vital and should be allowed these liberties, even if property rights are violated. One of the precepts that has emerged in Western United States case law on eminent domain is the test of the validity of the use of eminent domain is the pre-eminence, predominance, and vitalness to the well being of the State of a particular industry in a particular locale. By this test, agriculture, which is Montana's number one industry, should be able to condemn for agricultural purposes industry, and not vice versa.

6. Why does SB 478 disallow condemnation for one type of water reservoirs and allow for another, this seems to be an inconsistency. The bill is intended to specify the uses of a State authority. Admittedly this is a somewhat discriminatory bill because the problem it addresses is a very specific one. Agricultural use of eminent domain should be allowed because:

- a) farmers who would use eminent domain do not have an inexhaustible supply of capital as the international conglomerates do;
- b) agricultural use is a local concern, more often than not between adjoining landowners;
- c) agriculture is a renewable industry, Montana's number 1, and it should be promoted.

Nichols on Eminent domain (the work on eminent domain)

3.21(2) Even corporations which are under no obligation to serve the public may, in some states, under peculiar local conditions be granted authority to exercise the power of eminent domain.

The state may not, however, grant the power of eminent domain for a private purpose.

7.6 Direct aid to private enterprise.

It is well settled, as a general principle of law, that the more it generally subserve the public good, the power of eminent domain cannot be constitutionally employed. It is not the business of the state to make discriminations to enable private individuals to cultivate their land (or to in favor of one class against another, or in favor of one industry on their business to better advantage), even if the prospect of employment against another." "The prosperity of the community will be enhanced by their success." It

could hardly be said that there is no universally accepted rule which justifies the exercise of eminent domain for such purposes. Cases of this class are special and peculiar, and they are based either upon an ancient custom running back before the constitutions were adopted, or upon peculiar local conditions which make the adoption of such a rule the only alternative to economic ruin. Nevertheless, takings of this character have been sanctioned by law in many of the states, and no definition of "public use" which does not recognize them is either complete or accurate.*

Generally, however, it is not one of the proper functions of a constitutional government to furnish direct assistance to private enterprise, either in the form of a gift of public funds, or of the grant of such franchises as exemption from taxation, and the right to exercise eminent domain. The basis of this rule was well set forth by Judge Cooley in 1870, and although it is now generally accepted that "railroading" is not a private enterprise, the soundness of the principle set forth by him has never been disputed and is as good law today as it was when it was written. Judge Cooley said:

"The discrimination by the state between different classes of occupations and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation and is an invasion of that equality of right and privilege which is a maxim in state government. When the door is once opened to it there is no line at which we can stop and say that thus far can we go with safety and propriety, but no farther. Every honest employment is honorable; it is beneficial to the public; it deserves encouragement. The more successful we can make

"Property must be secured or liberty cannot exist." John Adams

Government "has no other end but the preservation of property." John Locke

Natural Resources Committee
February 17, 1979
Page -2-

Senator Story said that he felt a much more reasonable approach to the problem would be to address it by covenants in specific localities.

ADJOURNMENT: Senator Jergeson moved the Committee adjourn. Chairman Roskie accepted the motion and the Committee adjourned at 10:00 A.M. without taking action on Senator Dover's motion.



Senator George F. Roskie, Chairman

ROLL CALL

Natural Resources COMMITTEE

46th LEGISLATIVE SESSION - 1979

NAME	PRESENT	ABSENT	EXCUSED
ROSKIE, George F., Chairman	✓		
DOVER, Harold L., Vice-Chairman	✓		
BROWN, Steve		✓	
ETCHART, Mark		✓	
JERGESON, Greg	✓		
LOCKREM, Lloyd C., Jr.		✓	
LOWE, William R.	✓		
MANLEY, John E.	✓		
STORY, Pete	✓		
THIESSEN, Cornie R.		✓	

Each Day Attach to Minutes.

SENATE COMMITTEE NATURAL RESOURCES

Date February 17, 1979 Senate Bill No. 478 Time _____

NAME	YES	NO
ROSKIE, George F., Chairman		✓
DOVER, Harold L., Vice-Chairman		✓
BROWN, Steve	✓	
ETCHART, Mark		
JERGESON, Greg	✓	
LOCKREM, Lloyd C., Jr.		
LOWE, William R.		✓
MANLEY, John E.	✓	
STORY, Pete		✓
THIESSEN, Cornie R.		

SHARON NASON *SN*
Secretary

GEORGE F. ROSKIE *GFR*
Chairman

Motion: By Senator Jergeson that SB 478 DO PASS as Amended.

(include enough information on motion--put with yellow copy of committee report.)

SENATE COMMITTEE NATURAL RESOURCES

Date February 17, 1979 Senate Bill No. 478 Time _____

NAME	YES	NO
ROSKIE, George F., Chairman		✓
DOVER, Harold L., Vice-Chairman	✓	
BROWN, Steve		✓
ETCHART, Mark		
JERGESON, Greg		✓
LOCKREM, Lloyd C., Jr.		
LOWE, William R.	✓	
MANLEY, John E.		✓
STORY, Pete	✓	
THIESSEN, Cornie R.		

SHARON NASON *SN*
Secretary

GEORGE F. ROSKIE *GFR*
Chairman

Motion: By Senator Story that SB 478 DO NOT PASS as Amended.

(include enough information on motion--put with yellow copy of committee report.)