Montana Law Review

Volume 9
Issue 1 *Spring 1948*

Article 9

January 1948

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Eminent domain is a power inherent in all sovereignties and is defined as the right of the nation or the state or those to whom the power has been lawfully delegated, to appropriate for public use every description of private property upon the payment of just compensation.[1] The exercise of this power by the federal government is limited by the Fifth Amendment of the Constitution of the United States,[2] while its exercise by the states is limited by the Fourteenth Amendment of the Federal Constitution[3] as well as by the constitutional provisions of the states. The power itself can be exercised only by virtue of legislative authority, and whether or not the exercise of the power under such legislative enactments is within the federal and state constitutional provisions is a judicial question.[4]

Few states have constitutional provisions stating that private property cannot be taken for a private use, but all courts, although they offer different reasons for their conclusions, are unanimous in holding that such cannot be done. Although courts are in agreement as to this principle, here unanimity ceases, and what will constitute a public use has been provocative of many and divergent views. Some of these decisions may be reconciled by the different constitutional and legislative provisions in the various states. In others, the divergency may be due to the difference in climatic and geographical conditions, and in still others the results do not appear so divergent after consideration of the localities' changing needs. Nevertheless, there are decisions which cannot be reconciled. There are those courts which hold that public use is that public benefit which is material and necessary to the development of the natural resources of the

[1]City of Cincinnati v. Louisville & N. R. Co. (1912) 32 S. Ct. 267, 22 U. S. 390, 56 L. Ed. 481.

[2]U. S. CONST. 5th Amend. provides: "No person shall be deprived of life, liberty, or property, without due process of law. . . . Nor shall private property be taken for a public use without just compensation."

[3]U. S. CONST. 14th Amend. provides: ". . . 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."

[4]Komposh v. Powers (1926) 75 Mont. 493, 244 P. 298, 48 S. Ct. 156, 275 U. S. 504, 73 L. Ed. 396.

state. An opposite view is that to constitute a public use, the public or some appreciable part thereof must assume control of the property taken, or that the right to the use of the property must pass to the state or the public.

Perhaps the most common instances of the exercise of eminent domain in the early history of our country arose in the New England states, where land adjacent to streams was condemned in order to allow for the erection of dams to furnish power to grist mills and saw mills. The most frequently cited case involving this situation is that of *Olmstead v. Camp*,[5] a Connecticut decision, wherein the court stated:

> ". . . Any appropriating of private property under its right of eminent domain for purposes of great advantage to the community is a taking for a public use."

The court held that although one individual was to obtain direct gain or benefit from the operation of the mill, the community being in need of it, the condemnation was justified.

Another early decision is *The Bellona Company's Case*,[6] in which the court in speaking of the public use requirement in eminent domain, expressed itself as follows:

> "The exercise of this power of the government of the state is not confined to those cases only in which the private property taken is to be applied immediately, directly and exclusively to some public use, as to the making of an open highway or the like; for it is enough if it clearly appears that the application of such private property to the proposed new use will be attended by a material public benefit; which would not be so immediately and effectively produced."

Similar definitions of the term are numerous among the early decisions.[7]

A problem similar to that presented by these early decisions, and one which arises frequently in the western states, is whether land may be condemned for the purpose of constructing an irrigation ditch. In a California decision, *Graverly Ford Canal Co. v. Pope & Talbot Land Co.*,[8] the plaintiff, a mutual irrigation company, sought to condemn a right of

[5](1886) 33 Conn. 532, 89 Am. D. 221.

[6](1831) 3 Bland 442 (Md.).

[7]See: Brown v. Beatty (1857) 34 Miss. 227, condemnation for railroad right of way; Amoskeag Mfg. Co. v. Head (1876) 56 N. Hamp. 386, condemnation of land necessitated by erection of a dam for mill power purposes; Concord R. Co. v. Greely (1845) 17 N. Hamp. 47, condemnation for railroad right of way; Talbot v. Hudson (1860) 16 Gray 417 (Mass.), flooding of land by mill dam.

[8](1918) 36 Cal. App. 717, 178 P. 150.

way through defendant's land for the construction of an irrigation ditch designed to irrigate seventeen thousand acres of land. Plaintiff relied on a statute declaring irrigation to be a public use. The court held that since the irrigation contemplated by the plaintiff was to be devoted to his lands but to none others, it did not qualify under the statute.

In the Oregon case of *Smith v. Cameron*,[9] plaintiff sought to enlarge an irrigation ditch already existing on the defendant's land to allow irrigation of his 160 acres of semi-arid farm land. Here, plaintiff relied on a statute providing for a right to enlarge an existing irrigation system on the land of another to provide irrigation of petitioner's land. The Oregon Supreme Court held, as did the California Supreme Court, that there was no public use involved. In each of the two cases just mentioned the court defined public use in terms of a duty devolving on the individual or corporation to furnish the public with the use intended and took the position that the public must be entitled as a matter of right to use or enjoy the property taken.

The above cases pronounce a doctrine which has likewise been adopted in the state of Washington. In the case of *Healy Lumber Co. v. Morris*,[10] plaintiff sought to condemn certain land and waters for a logging road and waterway to enable it to carry on logging operations on its property. It relied on a statute which authorized the condemnation of land for logging roads, water-courses, etc., to enable the owner of timber to reach a railroad, highway or stream. The Washington Supreme Court, in holding the statute unconstitutional, said that it violated the constitutional provision forbidding the taking of private property for a private use. The court conceded that there were decisions which held that a public use existed where the community or state would enjoy a material benefit from such condemnation, but added that it felt that such interpretation was a dangerous and unwarranted extension of the doctrine, and one which tended to encroach upon private rights.[11]

[9] (1922) 106 Ore. 1, 210 P. 716, 27 A.L.R. 510.

[10] (1903) 33 Wash. 490, 74 P. 781, 63 L.R.A. 820, 99 Am. St. Rep. 964.

[11] Cases in accord: Anderson v. Smith-Powers (1914) 710 Ore. 276, 139 P. 736, L.R.A. 1916B 1089; Hammond Lumber Co. v. Public Service Comm. (1920) 96 Ore. 595, 189 P. 639, 9 A.L.R. 1223; Witham v. Osburn (1873) 4 Ore. 319, 18 Am. Rep. 287; Lorenz v. Jacob (1883) 63 Cal. 73; Thayer v. Calif. Development Co. (1912) 164 Cal. 117, 128 P. 21; State ex rel. Puget Sound Power & Light Co. v. Superior Court of Snohomish County et al. (1925) 133 Wash. 308, 233 P. 651; State ex rel. Chelan Electric Co. v. Superior Court for Chelan County (1927) 142 Wash. 270, 253 P. 115, 58 A.L.R. 779.

However, there are other jurisdictions which have taken a different view. In the case of *Nash v. Clark*,[12] plaintiff sought to condemn a right of way in a ditch owned by the defendants for the purpose of conveying water to his land. The pertinent provision of the statute upon which the plaintiff based his right of action was as follows:

> "When any person desires to convey water for irrigation or other beneficial purpose, and there is a canal or ditch already constructed on the property of another that can be enlarged to carry the required quantity, then such person shall have the right to enlarge the ditch by compensating the owner for any damages caused thereby"[13]

The court, in recognizing the fact that there are two lines of authority as to what constitutes a public use, said that the group of decisions adopting a more liberal construction of the term "public use" is more in harmony with enlightened public policy, and a liberal interpretation of the term is more conducive to individual and public advancement. The court held that in view of the climatic conditions of many sections of the West and in view of the beneficial results accomplished by irrigation in such localities, it would be an insurmountable barrier to the development of the state to adopt a narrow interpretation of what constitutes a public use—a view, which the court said, was never intended by the constitution.

Not all the decisions in Montana's neighboring states have had to do with condemnation for irrigation purposes. The Idaho case of *Potlatch Lumber Co. v. Peterson*[14] concerned the condemnation of twelve acres of defendant's land which would be flooded by plaintiff's dam, the erection of which was necessary to create an even flow of water in a stream used to transport logs to plaintiff's mill. The constitutional provision upon which plaintiff based his case provided:

> "The necessary use of lands for the construction of reservoirs or storage basins for the purpose of irrigation or for the right of way for the construction of ditches—to carry water to the place of use for any useful purpose—or any other use necessary to the complete development of the natural resources of the state is hereby declared to be a public use."[15]

The applicable statute provided:

> "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses . . . for storing and floating logs on streams not navigable."[16]

12 (1904) 27 Utah 158, 75 P. 371, 1 L.R.A. (N.S.) 208, 101 Am. St. Rep. 953, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085.
13 Rev. Stat. Utah 1898, 1278.
14 (1906) 12 Ida. 769, 88 P. 426, 118 Am. St. Rep. 233.
15 IDAHO CONST. Art. I, §14.
16 Rev. Stat. Ida. 1887, §5210.

After holding that the stream was not navigable the year-round and that the plaintiff's cause could thereby qualify under the constitution and the statutes, the court went on to say that lumber was one of the state's leading natural resources, for the development of which the power of eminent domain might be exercised.[17]

Montana has been classified by text authorities and encyclopedias as being within that group of states adopting the more liberal interpretation of what constitutes a public use. The Montana constitution provides that private property shall not be taken for a public use without just compensation[18] and that no person will be deprived of his property without due process of law.[19] In addition, Art. III, Sec. 15, provides:

> "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all drains, ditches, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for the collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road and the amount of the damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited."

Under these constitutional provisions the legislature enacted what is now R.C.M. 1935, Sec. 9934, wherein are designated the public uses for which eminent domain may be exercised.[20]

[17]Cases in accord: Oury v. Goodwin (1891) 3 Ariz. 255, 26 P. 376; Ortez v. Hansen (1905) 35 Colo. 78, 83 P. 964; Dayton Gold & Silver Min. Co. v. Seawell (1876) 11 Nev. 394; State ex rel. Stand. Slag Co. v. Fifth Judicial Court (1943) 62 Nev. 113, 143 P. (2d) 476; Strickley v. Highland Boy Min. Co. (1904) 28 Utah 215, 78 P. 296, 1 L.R.A. (N.S.) 956, 3 Ann. Cas. 1110, 107 Am. St. Rep. 711.

[18]Art. III, Sec. 14.

[19]Art. III, Sec. 27.

[20]Par. 1 covers uses authorized by the government of the United States. Condemnations for the direct benefit of the state or political subdivisions thereof which are comprehended within Pars. 2, 3 and 9 would be upheld even in those jurisdictions adhering to the strict interpretation of public use. It is to be noted, however, that the part of Par. 3 allowing the raising of banks of streams, removing obstruction therefrom, and widening, deepening, or straightening their channels, does not specifically provide that such changes may be made only for the benefit of the state or a subdivision thereof, and there has been no Montana decision indicating whether this particular public use would be so limited. (State ex rel. Livingston v. District Court, 90 Mont. 191, 300 P. 916, allowed the condemnation of a small tract of farm land so that the channel of a river might be changed, thereby avoiding the construction of two highway bridges. This condemnation, however, was at the instance of the County). Several other paragraphs of the statute provide for public

One of the earlier cases in Montana involving eminent domain and the question of public use is *Butte, A. & P. Ry. Co. v. Montana U. Ry. Ry. Co.*,[21] where plaintiff sought to condemn defendant's right of way to the extent of allowing its lines to cross defendant's tracks and spurs. Both railroads were interested in the transportation of ore from certain mines. The court, holding for the plaintiff, said:

> "In ingrafting upon the law of this jurisdiction the doctrine that the magnitude of the interests involved may properly become a determining factor in sustaining the right of the railroad to construct lateral tracks, branches, and spurs to mines and mining works as public uses, by virtue of the law of eminent domain, we are always duly mindful, not only of the constitutional guaranty of the individual right of possessing and protecting property, but are equally impressed with the declaration that 'the good of the whole' is the very foundation of the constitution. . . . The force of the principle might vary in different communities. What cogently applies in Montana with its mountains and quartz would be an absurd process of reasoning to urge in Louisiana. . . . Therefore to correctly define what the force is in the case before us, it is imminently reasonable and appropriate that the conditions of the whole people be considered."

The court admitted that other routes could be found for the plaintiff's railroad, but in each case the obstacles to be encountered would have made its construction prohibitive. The court concluded that, since the mining industry is one of the important industries of the state, and one in which vast numbers of people are employed and upon which numerous others are indirectly dependent, the condemnation should be allowed.

uses which are essentially of a public utility nature and such uses are unquestionably sufficient to justify condemnation. These are Pars. 7, 8 and 11, which designate telephone or electric light lines, telegraph lines, and electric power lines as public uses. Pars. 4. 5, 12 and 13 are primarily for the benefit of the mining, agricultural and lumbering industries. In the light of the Montana decisions discussed and cited herein, it seems reasonable to anticipate that these provisions would be upheld as constitutional. However, since the condemnations in the aid of those industries will directly benefit individuals or corporations, their constitutionality would be questionable in jurisdictions where the public benefit element is not a test. The constitutionality of condemnation for "private roads leading from highways to residences and farms," found in Par. 6, was upheld in Komposh v. Powers, 75 Mont. 493, 244 P. 298, 275 U. S. 504, 48 S. Ct. 156, 72 L. Ed. 396. Par. 10, which provides for tramway lines, has not been interpreted by the Montana Supreme Court. If the tramway were to be used to transport ore and lumber from places of procurement, it could be justified as a public use in Montana, on the basis of its being a necessary facility in the operations of a major industry.

[21] (1895) 16 Mont. 504, 41 P. 232, 50 Am. St. Rep. 508, 31 L.R.A. 298.

Two years later (1897) the Supreme Court decided *Ellinghouse v. Taylor*.[22] In this case, plaintiff, proceeding under a legislative act passed in 1891, sought to condemn a right of way across defendant's land for an irrigation ditch. Defendant contended that the statute upon which plaintiff based his right of condemnation was unconstitutional in that it permitted a taking for a private use, and was therefore invalid under Art. III, Sec. 15, of the Montana Constitution. The defendant relied upon a construction given a substantially similar constitutional provision in the California case of *Lorenz v. Jacob*.[23] The Montana court took the position that a much narrower interpretation of the term public use had been followed in California than the Montana court cared to agree with. The court said that public use is not limited to situations where the persons exercising the power have bound themselves to a direct discharge of a duty to the people at large, in the discharge of which, people are to derive a direct benefit, as, for example, the situation of the common carriers who are bound to transport passengers and freight without discrimination. The court took the position that the right of eminent domain might be exercised where the public had no direct interest in the operations, whose main end was mere private gain and where the benefit to the people at large could result only from the increase in wealth and the development of the natural resources of the state. In a more recent case the court reiterated its definition of public use. In *Helena Power Commission v. Spratt*,[24] plaintiff sought to appropriate several tracts of land to be flooded by construction of a dam to be built across the Missouri river. Defendant contended that the taking was not a public use. The court, adopting the views expressed in *Ellinghouse v. Taylor*,[25] stated that the furnishing of electric power for use in mines and smelters was as great an aid in the development of those industries as was the taking of land for a road to transport machinery, or a ditch to carry water to farm land.

Kipp v. Daley[26] was an action where the plaintiffs sought an injunction against a corporation to restrain its construction and operation of a railroad line on a public thoroughfare in the city of Butte, on which the plaintiffs were abutting property owners. The city council, under authority of a statute which gave the city exclusive control and power

22 (1897) 19 Mont. 492, 48 P. 757.
23 (1883) 63 Cal. 73.
24 (1907) 35 Mont. 108, 88 P. 773.
25 See Note 22, **supra.**
26 (1910) 41 Mont. 509, 110 P. 237.

to regulate the use of the city streets, had passed an ordinance authorizing such construction. The plaintiffs claimed that they had property rights in the street which would be damaged. The court admitted the existence of such property right but held that the construction of the railroad, being essential to defendants in the carrying on of mining operations, an industry which was not only a dominant one in Montana but also one upon which many other business enterprises were dependent, was a public use.

Much is to be said in favor of the view adopted in Montana. It is submitted that it is a view which, while preserving the right of private property, is elastic enough to allow the power of eminent domain to be exercised in a manner most beneficial to private and public interests alike. A study of the cases indicates that the courts, in adopting the narrow view of the doctrine, do not concern themselves with whether or not the condemnation sought will result in public benefit, nor do they hold that the public benefit to accrue is inconsequential. Each case is disposed of by the observation that since the individual who seeks to condemn stands to gain the direct benefits, the use thereby becomes private. The result would seem to be that any development of a natural resource, through the powers conferred by eminent domain, must be accomplished by the state itself and not through the medium of individual enterprise.

Of course, no one would contend that *any* advancement of public interest is a justification for the taking of private property or that public benefit is synonomous with public use. Yet it is difficult to conceive how a distinct line of separation can be drawn between public benefit and public use. The United States Supreme Court has recognized the inadequacy of use by the general public as a test of public use, and, while emphasizing the great caution necessary to be shown, has pointed out that there are times and places in which the public welfare could not be promoted without requiring concessions from individuals to each other upon just compensation.[27] This is particularly significant today when the preservation and development of our natural resources is so vital to our public welfare.

[27]Strickley v. Highland Boy Mining Co. (1906) 200 U. S. 527, 26 S. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174. This case involved a proceeding by a mining corporation to condemn a right of way for an aerial bucket line across a placer mining claim of the defendants. Plaintiffs' mining claim was in a high mountain region, and to transport ore to a railway below it built a bucket line supported by four movable towers, each occupying an area seven and a half feet square on defendant's land. The condemnation was allowed.

The term "public use" can be properly applied only if considered as a relative term. A proceeding under the power of eminent domain is in its nature equitable, and as such the court should weigh all interests involved. A proper result can be reached only after considering whether or not the enterprise necessitating the condemnation will promote the public welfare, and, bearing in mind the high value placed upon the right of private property by the spirit as well as the letter of the constitution, whether such public welfare justifies the condemnation of that private property. Such a test of public use can be applied equally well in any jurisdiction, regardless of climatic or geographical conditions or other factors. Such a test is flexible and when properly applied will not unjustly infringe the rights of the individual, but will serve the purpose for which it was intended.

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