Montana's Condemnation Procedure - The Inadequacy of the "Commission System" of Determining Compensation

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MONTANA'S CONDEMNATION PROCEDURE —
THE INADEQUACY OF THE "COMMISSION SYSTEM"
OF DETERMINING COMPENSATION

INTRODUCTION

This article suggests legislation which would provide a more practicable condemnation procedure for Montana. Primarily, the suggested legislation would eliminate the present practice of using three lay commissioners to initially determine just compensation, and would also allow greater use of the concept of immediate possession. Constitutionality of the proposed procedure has been carefully considered. Relevant constitutional and statutory eminent domain provisions of forty-eight states and the federal government have been examined and compared with Montana's constitutional and statutory provisions. Some are similar to those of Montana, others are patently dissimilar. This article draws attention to the procedures utilized by the federal government, North Dakota, California, Washington, Idaho, and Arizona. Research has indicated that the statutory and case law of these jurisdictions provides the greatest aid for suggesting legislation which could feasibly be adopted for use by Montana, and in pointing out a rationale for upholding the constitutionality of such legislation.

EXISTING MONTANA CONDEMNATION PROCEDURE

In Montana, the district court judges have the power to determine whether the public interest requires the taking of particular lands sought to be condemned.¹ This determination is made in a proceeding provided for by statute,² commonly termed a "necessity hearing." If the judge is satisfied from all evidence presented at the necessity hearing that the public interest requires the taking of such lands, he must forthwith make and enter a preliminary condemnation order stating that the condemnation of the land or other real property may proceed in accordance with the provisions of Title 93, Chapter 99, Revised Codes of Montana, 1947.³

Immediately upon making and entering the preliminary condemnation order, the judge must meet with the respective parties, or their attorneys, for the purpose of appointing valuation commissioners to ascertain the amount to be paid by the condemnor to anyone having an interest in the condemned property.⁴ The judge then appoints three valuation commissioners, one of whom has been nominated by the plaintiff, another by the defendant. The third commissioner is the chairman, and is nominated by the two commissioners previously nominated, or, if they fail to do so, by the judge.

¹Revised Codes of Montana, 1947, § 93-9911. (Hereinafter, Revised Codes of Montana will be cited R.C.M.)
²Id., § 93-9909.
³Id., § 93-9911.
⁴Id., § 93-9912.
The commissioners meet at a time set by the judge, but no later than ten days following their appointment, to examine the property sought to be appropriated, and to hear the allegations and evidence of all parties interested in the property. The judge presides over the hearing, and makes all necessary rulings on procedure and the admissibility of evidence. Upon conclusion of the hearing, after having been instructed by the judge, the commissioners determine the amount of compensation to be awarded to the defendants. A concurring vote of only two commissioners is required by statute for their submission of a final report or award.

If the parties involved agree to the award rendered by the commissioners, the proceeding terminates. However, if any interested party is dissatisfied with the amount of the award, an appeal may be taken in the manner set forth by statute. Such an appeal results in a trial de novo in the district court as to damages or compensation. The commissioners' award is not competent evidence at the trial de novo for any purpose, except to impeach those commissioners, sworn as witnesses, whose testimony differs from their previous findings. Therefore, every time a condemnation case is appealed, recognizing that such appeal always assumes the form of a trial de novo, the previously conducted commissioners' hearing is completely effaced.

Section 93-9920 of the Revised Codes of Montana, 1947, sets forth the time at which the plaintiff-condemnor may take possession of the condemned property and provides that any time after the preliminary condemnation order has been entered, or after the commissioners' report has been made and filed in court, and upon application of the plaintiff, the judge has the power to place the plaintiff in possession. However, before such application can be granted, the plaintiff must pay into court for the defendant either the amount claimed by the defendant in his answer or the amount assessed by commissioners, depending upon when the application was made. If the plaintiff is already in possession of the property to be condemned, the granting of the application allows him to continue in possession. If the plaintiff is not already in posses-

Ibid.
Ibid., § 93-9914.
R.C.M. 1947, § 93-9915 states: "* * * Such appeal must be taken within the period of thirty (30) days after the service upon appellant of the notice of the filing of the award by the service of notice of such appeal upon the opposing party or his attorney in such proceedings and the filing of the same in the district court wherein the action is pending, and the same shall be brought on for trial upon the same notice and in the same manner as other civil actions, and unless a jury shall be waived by the consent of all parties to such appeal, the same shall be tried by jury, and the amount to which appellant may be entitled, by reason of the appropriations of his property, shall be re-assessed upon the same principle as hereinbefore prescribed for the assessment of such amount by commissioners; upon any verdict or assessment by commissioners becoming final, judgment shall be entered declaring that upon payment of such verdict or assessment, together with the interests and costs allowed by law, if any, the right to construct and maintain the highway, railroad, or other public work or improvement, and to take, use and appropriate the property described in such verdict or assessment, for the use and purposes for which said land has been condemned, shall, as against the parties interested in such verdict or assessment, be and remain in the plaintiff and his or its heirs, successors or assigns forever. * * *"


Ibid.
tion, then the granting of the application authorizes the plaintiff to take possession of and use the property until the conclusion of the proceedings.

Section 93-9920 also provides that the amount assessed by the commissioners, or by the jury on appeal, shall be considered as just compensation for the property appropriated until reassessed in a later proceeding. However, the fact that the plaintiff has paid a certain sum into court in order to acquire possession does not preclude him from taking an appeal from the commissioners' award. In addition, if there is no dispute among the defendants as to who is the legal owner of the property, the defendant who is the title holder may demand and receive all or any part of the money deposited for his benefit. The defendant's receipt of any part of the money deposited does not bar his right of appeal from a commissioners' award. Further, if the assessment is reduced on appeal by either party, the defendant is liable to the plaintiff for any excess received over the amount finally assessed plus interest on such excess from the time of the defendant's receipt. Section 93-9920 expressly provides that upon any appeal from an assessment by the commissioners, the jury may find a lesser as well as an equal or greater amount than that assessed by the commissioners. The outcome of the trial de novo can, of course, be appealed to the Montana Supreme Court.

REASONS FOR PROPOSING NEW PROCEDURE

Widespread use of the power of eminent domain in the United States did not begin until after 1900. Prior to that time, few privately owned properties, and even fewer highly developed properties, were being condemned for public use.\(^\text{10}\)

Although the question of just compensation was an important issue in most condemnation actions of the early 1900's, the major issue was whether the property was being condemned for a public use. The requirement that property sought to be condemned be taken only for a public use became the primary method of preventing the arbitrary and complete disregard of the rights of private property owners.\(^\text{11}\) For this reason, a strict interpretation of public use developed. In addition to limiting the condemnor, the public use concept also preserved the rights of the individual in view of the limitations of the Fifth Amendment to the United States Constitution and the various state constitutional restrictions.

A critical factor in the law of eminent domain today concerns the efforts of a condemnor to take immediate possession at the commencement of the condemnation proceeding. In contrast, the economic status of the United States fifty years ago did not demand that immediate possession be a critical issue in eminent domain law. Business activity pro-


\(^{11}\)Ibid.
ceeded at a much slower pace than it does today. Therefore, questions of just compensation and immediate possession simply did not attain the importance in early condemnation cases that the question of public use did.

The increasing use of the power of eminent domain has also brought with it the growing importance of timing in condemnation actions. The condemnor has become faced with a growing necessity to shorten the period between the commencement of the condemnation proceeding and the time possession is acquired. Each year it becomes more apparent that the delay in the construction of a needed project caused by postponement of possession—whether it be a school, highway, reservoir, or urban redevelopment project—adversely affects both the condemnor and the public in many ways. Exploding school populations, joined with delay in the construction of school buildings, has become a national concern; increased traffic and a growing accident rate indicate the need for more and better highways; water shortages seriously affect the future of great population centers; and rapidly decaying areas of our cities have threatened the entire economy. Although the need for many types of public improvements has become quite clear, construction of these improvements has frequently been delayed for unnecessarily long periods of time by the condemnor’s inability to hasten the taking of possession. These problems are continuing to grow at a shocking pace.12

However, the delay in moving various public improvements from the planning board to reality is not the only loss caused by failure to provide adequate immediate-possession procedures. In view of present economic conditions, with continually increasing costs of labor and materials, delays in initiating a project appear in the increased cost of the improvement, and thus are ultimately reflected in increased taxes.13 Furthermore, many modern public improvements are financed by bond issues so that the inability to take immediate possession may result in a failure to meet the bonding requirements and consequently may not only detain, but completely prohibit, construction of the improvement.14 Under the terms of many bonding provisions, delays in the construction of the improvement will often increase already large interest rates even before the construction has started.

The above considerations, now important in the problem of immediate possession, were not formerly appreciated because the primary question was one of public use. Court decisions within the past ten years, however, have made the question of public use a relatively minor issue in the application of the power of eminent domain. Grounds for attacking the necessity of the taking and for questioning whether the proposed use is a public use have been greatly limited.15 Therefore, the only real-

istic issue remaining is that of insuring *just compensation* to the property owner. If he can be insured receipt of *just compensation*, there appears to be little reason for delaying public improvements and thereby increasing the public's tax burden.

The following advantages could be gained by the public if condemners were allowed to take immediate possession:

1. Early possession allows early construction.
2. Early possession permits condemners to make better use of the federal aid available for many improvements, such as the Federal Aid Highway Act of 1956, the Urban Renewal Act, and various irrigation and housing acts.¹⁶
3. Immediate possession would often have the practical effect of preventing harassment of the condemnor. A condemnor who cannot take immediate possession is often forced to pay excessive prices for land in order to meet construction deadlines.¹⁷ Immediate possession could frequently lead to settlements, by curtailing the use of litigation for such harassment.
4. The allowance of immediate possession could serve to prevent the accrual of heavy and unnecessary interest charges, thus saving the public unnecessary costs.

However, possible disadvantages of an immediate possession provision must also be considered:

1. Condemnors may have an opportunity to harass condemnees or otherwise abuse the power of immediate possession.
2. Later abandonment of the property could create difficult problems if provisions protecting the condemnee were not included.¹⁸
3. Without proper deposit and withdrawal provisions, the condemnee could lose possession of his property without receiving compensation for a prolonged period.

It is submitted that the advantages accompanying an immediate possession provision easily outweigh the disadvantages, provided, that sufficient safeguards are included to minimize any possible hardship to the condemnee.

In those jurisdictions whose constitutions require that just compensation be paid or deposited in court in advance of taking,¹⁹ there

¹⁷See note 16 *supra*. "In addition, no workable redevelopment program can tolerate delay . . . . [It results in] rising construction and interest costs [and] . . . , encourages "'holdup'" suits by property owners for the purpose of forcing a higher settlement price." *Note, 69 YALE L.J.* 321, 327-28 (1959). See also *State Roads Comm'n v. Franklin*, 201 Md. 549, 95 A.2d 99 (1952).
¹⁸See *HIGHWAY RESEARCH BD.* at 2.
¹⁹*Montana is one.* See *MONT. CONST. art. III, § 14.*
arises the problem of how to ascertain just compensation for the purpose of granting immediate possession. Under existing Montana law, the condemnor may acquire possession prior to a jury determination of just compensation only by paying into court for the owner either the amount of the commissioners' award, or the amount claimed by the defendant in his answer. Although the latter method is a recent attempt to provide a means for acquiring immediate possession, it has proved impracticable because of generally exorbitant landowners' claims.

Does the use of the valuation commission system in Montana expedite the condemnor's acquisition of possession? The only realistic answer is "No." For example, defendants will frequently delay their nomination of a commissioner. Such a move leaves the condemnor nearly helpless so far as his hopes for taking immediate possession are concerned. Moreover, such hopes are completely destroyed if, in addition to such delay, the defendant's answer makes necessary a deposit into court of an exorbitant amount before possession can be taken. As a result of these situations, a contractor on a public improvement must often perform his work in piece-meal fashion because the condemnor cannot obtain possession of all of the necessary property at a predictable time. This can seriously affect construction costs. Also, heavy and unnecessary interest charges often accrue. Delays lasting weeks and even months are not uncommon.

Economic Aspects

Does Montana's utilization of the commission system reduce costly litigation or promote settlement of the just compensation issue? Again, the only realistic answer is "No." The condemnation files of the Montana Highway Department provide ready statistics. On March 29, 1963, the Montana Highway Department had 192 condemnation cases pending in the district courts of Montana. The Highway Department appears more often in the Montana courts as a condemnor than does any other party. During the period from January 1, 1960, to March 29, 1963, 58.2% of the Highway Department condemnation cases which had proceeded through the commission hearing stage were appealed by either the Highway Department or the defendant. Because such an appeal results in a trial de novo, no good reason remains for conducting the commission hearing, other than to allow the plaintiff early possession within the limitations of Article III, Section 14 of the Montana Constitution. It is also well recognized that the commission hearing is not only a cumbersome but often an expensive proceeding. Therefore, the leg-
islation suggested by this comment is intended to remove all use of the commission hearing and at the same time provide a method by which the plaintiff may still acquire immediate possession of the condemned property within the limitations of the Montana Constitution.

EXAMINATION OF PROCEDURES USED BY OTHER STATES AND THE FEDERAL GOVERNMENT

The power of eminent domain is an inherent power, necessary to the very existence of a government. Such power comes into being at the same instant a government is established, and continues as long as that government exists. It is neither a property right nor an exercise of ultimate ownership in the soil by the state, but rather is an attribute of state sovereignty, and, as such, needs no additional justification.

As the power of eminent domain exists in absolute and unlimited form, it need not be recognized by constitutional provision. However, some positive assertion of the limitations upon the power is required. That is, the sovereign power of a state is sufficiently broad to cover the enactment of any law affecting persons or property within its jurisdiction which is not prohibited by the United States Constitution. The condemnation of property within the jurisdiction of a state for the public use and upon payment of just compensation is not prohibited by the federal constitution. Limitations upon the power of eminent domain are generally found in state constitutions. Such constitutional provisions neither directly nor impliedly grant the power of eminent domain, but are simply limitations upon a power already in existence and which would otherwise be unlimited.

An examination of the eminent domain provisions of 48 state constitutions reveals a great variance in the types of provisions and the extent of the limitations they impose upon their respective legislatures. Due to this variance, a comparison of condemnation procedures utilized by states whose constitutional provisions are completely dissimilar to Article III, Section 14 of the Montana Constitution serves no purpose other than to illustrate such differences. On the other hand, where constitutional provisions are quite similar to that of Montana, an examination of the condemnation procedures used by those jurisdictions can be most enlightening in drafting new legislation. The following material is a summary of the constitutional and statutory condemnation provisions of six jurisdictions.

Federal Government

The federal government’s power of eminent domain is limited by the Fifth Amendment to the Constitution of the United States, the pertinent part of which reads: “... nor shall private property be taken for pub-


1 Nichols § 1.14(2).


1 Nichols, EMINENT DOMAIN § 1.13(4) (Sackman and Van Brunt, 3d ed. will be cited Nichols).

See note 27 supra. See also State v. Aitchison, 96 Mont. 335, 30 P.2d 805 (1934).

Ibid.
lie use, without just compensation.” Of course, legislation passed by Congress further limits the federal government’s exercise of the power of eminent domain, but in enacting such legislation, Congress is limited only by the Fifth Amendment.

The procedure for the condemnation of property by the federal government is established by Rule 71A of the Federal Rules of Civil Procedure. Except as otherwise specifically provided, this Rule requires that the Rules of Civil Procedure for the United States District Courts govern the condemnation of property by the federal government under the power of eminent domain.32

Rule 71A, however, does not supersede the Declaration of Taking Act,33 passed in 1931, as a supplementary condemnation statute. It is permissive in nature, designed to permit the prompt acquisition of title by the United States upon making a deposit into court.34 Under this act, the federal government simply files a declaration of taking and deposits into court an amount of compensation estimated by itself and stated in the declaration. Title to the lands in fee simple, or any lesser interest specified in the declaration, vests in the United States at the time such deposit is made. The land is then considered condemned for the use of the United States. At the same instant, the right to just compensation vests in the persons entitled thereto. However, the actual determination of just compensation is not made until some future date when a proceeding is conducted for that purpose.

The Fifth Amendment only requires that just compensation must be paid in order for the federal government to take private property for public use. The United States Constitution, except for the due process clause of the Fourteenth Amendment, does not impose any other limitations upon the exercise of the power of eminent domain. Therefore, since Congress has the power to prescribe the procedure for actions involving the exercise of eminent domain,35 it was free to enact the Declaration of Taking Act within the broad limitations of the federal constitution.

North Dakota

It is generally recognized that, except for the due process clause of the Fourteenth Amendment, a state constitution imposes the only limitations upon an otherwise unrestricted power of the state legislature to enact eminent domain legislation.36 The limitations established by Article I, Section 14 of the North Dakota Constitution appear to be equally as broad as those of the federal constitution. This is particularly true, at least where the condemnation is for highway purposes, with respect to the time at which just compensation must be paid and the time at which a condemnor may acquire possession. As amended in 1956, Article I, Section 14 of the North Dakota Constitution provides:

36See note 20 supra.
Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner . . . provided, however, that when the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making any offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages.

Although the wording of this constitutional provision differs from that of the Fifth Amendment to the United States Constitution, the procedure used by the federal government and the procedure allowed by the North Dakota Constitution are virtually the same.37

California

Article I, Section 14 of the California Constitution provides in part:

Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner, . . . provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, . . . the aforesaid State or municipality or county . . . may take immediate possession and use of any right of way . . . required for public use, whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.

The first twenty-six words of the above provision are identical to Article III, Section 14 of the Montana Constitution.38 However, the above

37See pp. 111 supra for a discussion of the federal condemnation procedure.
38See PROCEEDINGS AND DEBATES OF THE MONTANA CONSTITUTIONAL CONVENTION 253 (1889), where it is indicated that a comma followed the phrase "without just compensation having first been made to, . . ." Apparently all subsequent codifications of Montana law which have contained the Montana Constitution, with the exception of the Sanders edition of the Montana Codes, 1895, have inadvertently omitted this comma. This fact also strengthens the position that the Montana constitutional provision was taken directly from the California Constitution, as amended in 1879.
provision goes on to specify that the state, in any eminent domain proceeding, may take immediate possession and use of any right of way upon giving "security" for the landowner. This security requirement is met by depositing into court such amounts of money as the court reasonably determines to be adequate to secure to the owner of the condemned property immediate payment of just compensation for such taking and any damage incident thereto.

The portion of the above provision allowing the deposit of security did not appear in the original California Constitution, but was added in 1918. The 1849 California Constitution stated:

Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a Court of record, as shall be prescribed by law.

The California immediate possession statute is also relevant to that state’s condemnation procedure by allowing the deposit of security to gain immediate possession. This statute, enacted in 1961, provides in part:

In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned. (Emphasis added.)

In California, the commissioner-system for assessing just compensation is not used. The major aspects of the above-quoted immediate possession statute are: (1) The plaintiff is allowed immediate possession by depositing into court an amount which acts as security for the just compensation ultimately to be determined, even though the precise amount of such compensation is not known at the time the deposit is made. (2) The court itself determines the amount of the security which must be paid into court for the landowner. (3) The amount of the security is determined simply by way of the plaintiff’s ex parte application to the court for an order ascertaining that amount.

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Washington

The limitations on the exercise of the power of eminent domain are set out in Article I, Section 16, Amendment 9 of the Washington Constitution:

No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner. . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. . . .

The first sentence of the above-quoted provision seems to restrict Washington's power of eminent domain within limits identical to those established by Article III, Section 14 of the Montana Constitution. However, unlike Montana, Washington law makes no provision for the use of a valuation commission to determine just compensation. The Washington Constitution does require a jury trial, unless waived, for the determination of just compensation where the condemnor is a corporation other than a municipal corporation. However, no requirement for a jury trial is imposed by the constitution when the condemnor is the state or any of its political subdivisions, although a Washington statute does provide that the determination of compensation and damages shall be by a jury, if one is demanded, or otherwise by the court sitting without a jury.42

If the state, as condemnor, requires immediate possession and use of the property sought to be condemned, the attorney general may stipulate with the condemnee for an order of immediate possession and use.43 The attorney general must then file with the clerk of the court in which the action is pending a certificate which states the amount of money offered to the condemnee, and that such offer constitutes a continuing tender of that amount.44 The attorney general must then file a copy of the certificate with the state auditor, who must issue a warrant payable to the order of the clerk of the court in which the action is pending in the amount of the state's offer, and that amount must be paid into the registry of the court. After the above procedure has been complied with, the court enters an order granting to the state the immediate possession of the property described in the order of necessity. This order also binds the state to pay the full amount of any final judgment of compensation and damages which may be thereafter awarded for the taking and damaging of the condemned property. At any time after entry of the order of immediate possession, the condemnee may withdraw the amount paid into court.

Prior to its amendment in 1955,45 Section 8.04.090 of the Revised Codes of Washington provided a similar means of acquiring immediate

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1Cf., MONT. CONST. art. III, § 14.
3Id., § 8.04.090.
4Ibid.
5Wash. Laws 1955, ch. 213, § 3.
possession, but did not require that the immediate possession and amount paid into court be based upon a stipulation between the condemnor and condemnee. Consequently, the Washington Supreme Court, in State ex rel. Eastvold v. Yelle, held that Section 8.04.090, as it read prior to the 1955 amendment, was unconstitutional.

In the Yelle case, the Washington Supreme Court stated that the question before it was: "Can the State take possession of private property for public use without first making just compensation, the amount of which has been determined by a jury unless waived?" (Emphasis added.) The court held that:

[U]nder Art. I, Section 16, amendment 9 of the state constitution, a property owner is entitled to a judicial determination of just compensation, and payment thereof, before the state can deprive him of possession under the power of eminent domain. This includes the right to jury trial unless waived. R.C.W. 8.04.090 [before the 1955 amendment], inasmuch as it denies the owner these rights, is unconstitutional. (Emphasis added.)

Idaho

The relevant portion of Article I, Section 14 of the Idaho Constitution reads:

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

The above constitutional provision differs slightly from Article III, Section 14 of the Montana Constitution by stating that just compensation shall be ascertained "in the manner prescribed by law." Montana, without language in its constitution directing the enactment of such statutes, provides for the manner of determining just compensation in Section 93-9920 of the Revised Codes of Montana.

Prior to 1953, Idaho law prescribed the use of three commissioners for determining just compensation. The same statute also denied the condemnor possession until after the commissioners' findings were filed in court. The Idaho legislature recognized the seriousness of this delay in acquiring possession, and therefore, in 1953, amended the statute by deleting the provisions prescribing the appointment of commissioners to assess damages, and substituting a method of determining just compensation which also allowed the condemnor early possession. Under this method, the plaintiff submitted to the court an affidavit estimating the value of the property and the damages which would accrue from the condemnation, and then moved the court for an order permitting early

46 Wash. 2d 166, 279 P.2d 645 (1955).
47 Id., 279 P.2d at 650.
49 Ibid.
possessions. If the motion was granted, the plaintiff was then required to deposit with the clerk of court a sum equivalent to twice the amount set forth in the plaintiff's affidavit. Title to the condemned property vested in the plaintiff upon payment of this amount to the clerk of court, and at the same time the right to one-half of this sum vested in the defendants.

Briefly, the 1953 amendment allowed the condemnor to acquire early possession and title based only upon the plaintiff's affidavit of the value of the property and his depositing into court a sum equal to twice that amount. When asked to rule upon this procedure, the Idaho Supreme Court in *Yellowstone Pipe Line Company v. Drummond*, held the amendment to be unconstitutional. The court felt that this manner of determining just compensation was not commensurate with due process of law.

The real vice in the 1953 amendment is that it does not provide due process of law for the determination of the value of the land sought to be condemned and the damages arising from such condemnation and the payment thereof prior to the making of an order for possession, which results in the taking of the property before just compensation is paid therefor. Due process of law envisions an opportunity upon reasonable notice for a fair hearing before an impartial tribunal. The provision in the amendment that the plaintiff may file an affidavit appraising the damages and that the court upon such affidavit may enter an order that upon payment of double such amount, plaintiff may take possession, does not provide due process of law. Such provision neither provides for an impartial tribunal to fix the damages nor for a hearing before same are assessed. (Emphasis added.)

The language chosen by the court emphasizes its conclusion that, in determining just compensation, the test of due process is met only by means of a fair hearing before an impartial tribunal, and that nothing less will suffice.

**Arizona**

Article II, Section 17 of the Arizona Constitution provides in part:

No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law.

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See note 50 supra.

177 Id. 36, 287 P.2d 288 (1955).

With respect to the requirement of payment of just compensation when condemning property for public use where the state or its political subdivisions is the condemnor, Arizona's constitutional provision is substantially identical to Montana's Article III, Section 14. Therefore, Arizona's condemnation statutes invite particular comparison with those of Montana.

Arizona statutes govern the procedure to be used for prosecuting a condemnation action, prescribing both the time and method by which a condemnor may acquire possession. Arizona's immediate possession statute, Section 12-1116 Arizona Revised Statutes, sets forth the following steps:

1. The application for an order permitting immediate possession can be made at the same time the complaint is filed.
2. After the court has deemed the use to be necessary at the necessity hearing, the court will, at the same hearing, hear evidence concerning the probable damages to each owner, determine the amount of those probable damages, and direct that the plaintiff be let into possession upon his deposit of twice that amount into court.
3. In lieu of having the court determine probable damages, the parties themselves can stipulate the amount of the plaintiff's deposit.
4. The money so deposited remains subject to final judgment after trial of the action.
5. This statute also provides that the parties may stipulate to a bond executed by the plaintiff in place of a deposit.

The original Arizona immediate possession statute did not provide that the amount deposited in court would also serve as a fund to compensate the owner for damages sustained in the event the property was not ultimately taken for public use. For this reason, in DeHansen v. District Court, the Arizona Supreme Court held the original statute to be unconstitutional. Following this decision, the Arizona legislature amended the immediate possession statute to read as it is presently worded, i.e., that the amount deposited also serves as a fund for any damages sustained if the property is not finally taken for public use.

The constitutionality of section 12-1116, as amended, was recently upheld by the Arizona Supreme Court in Desert Waters, Inc., v. Superior Court. The court held that this statute, in permitting immediate pos-

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Id., § (A).
Id., § (C).
Id., § (F).
Id., § (D).
Id., § (F).
11 Ariz. 379, 94 Pac. 1125, 1127 (1908).
Ariz. Laws 1909, ch. 8, § 1.
session by the condemnor upon a deposit of probable damages, did not violate the constitutional provision prohibiting the taking of private property without first paying compensation or making payment into court. After determining that the constitutional provision was not clear upon its face, the court considered extrinsic materials to ascertain the intent of the constitutional framers and those who adopted the constitution. The court related that "Such materials may include the history of legislation existing at the time the constitutional provision was adopted," and "the records of the constitutional convention." After considering these materials, the court concluded:

It appears to us from the history of § 12-1116 and from discussions of the constitutional convention that the phrase "or paid into court for the owner" in the constitutional provision which states, "No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner," was used to permit, as an alternative to advance determination, a payment into court of an amount and upon such terms as would adequately secure to the condemnee compensation and damages resulting from granting immediate possession to a municipal corporation, as well as damages for the property taken.

Arizona does not use the commissioner-system for determining just compensation. Section 12-1116(A), Arizona Revised Statutes, requires that all condemnation actions be brought, as are other civil actions, in the superior court of the county in which the property is located. Thus, after the initial determination of compensation or probable damages is made by the court, when the condemnor desires immediate possession, the case proceeds in every instance to a jury trial (unless a jury is waived), where the final determination of compensation is made. This procedure, of course, assumes that no settlement or agreement has been otherwise reached by the parties prior to trial.

PROPOSED LEGISLATION FOR MONTANA

The following proposed legislation is offered to illustrate how Montana’s present condemnation procedure could be reformed by amending only five existing statutes. It is submitted that by adopting legislation similar to that proposed herein, no amendment to the Montana Constitution would be necessary. The suggested legislation is based primarily upon Sections 12-1111 through 12-1128, Arizona Revised Statutes, for two reasons: (1) Arizona’s constitutional provision concerning eminent domain is essentially identical to Montana’s. (2) An examination of the condemnation procedures used by other states with constitutional provisions similar to those of Montana and Arizona discloses that the Arizona procedure is not only fair and just to the landowner, but provides a more expedient method of allowing early possession to the condemnor.
The following legislation appears in "bill" form. It has been drafted to indicate both the words or sections that would be added, and the words or sections of the existing statutes which would be deleted.

A BILL FOR AN ACT ENTITLED: "AN ACT RELATING TO EMINENT DOMAIN PROCEEDINGS; ALTERING AND REVISING THE PROCEDURES FOR DETERMINING COMPENSATION TO BE PAID DEFENDANTS AND FOR PUTTING THE PLAINTIFF IN POSSESSION; AMENDING SECTION 93-9911, R. C. M. 1947, RELATING TO THE POWER OF THE COURT AND PRELIMINARY CONDEMNATION ORDER, TO STRIKE OUT MATTER WHICH REFERS TO ASSESSMENT OF COMPENSATION; AMENDING SECTION 93-9912, R. C. M. 1947, TO PROVIDE FOR THE USE OF THE DISTRICT COURT OR JUDGE FOR MAKING THE PRELIMINARY ASSESSMENT OF COMPENSATION, INSTEAD OF USING VALUE COMMISSIONERS, AND TO PROVIDE GENERALLY FOR THE ASCERTAINMENT AND ASSESSMENT OF COMPENSATION; AMENDING SECTION 93-9915, R. C. M. 1947, TO PROVIDE THE PROCEDURE FOR DETERMINING COMPENSATION IN DISTRICT COURT AND TO PROVIDE GENERALLY FOR THE RIGHTS OF THE PARTIES; AMENDING SECTION 93-9920, R. C. M. 1947, TO PROVIDE THE PROCEDURE FOR PUTTING THE PLAINTIFF IN POSSESSION; REPEALING SECTION 93-9914, R. C. M. 1947; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE."

Be It Enacted by the Legislative Assembly of the State of Montana:

Section 1. Section 93-9911, R. C. M. 1947, is amended to read as follows:

"93-9911. (9943) Power of court—preliminary condemnation order. The court [or judge] has power:

1. To regulate and determine the place and manner of making the connections and crossings, and enjoying the common uses mentioned in sub-division 5, section 93-9904, and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by the laws of this state or of the United States;

2. To determine whether or not the use for which the property is sought to be appropriated is a public use, within the meaning of the laws of this state;

3. To limit the amount of property sought to be appropriated, if in the opinion of the court [or judge] the quantity sought to be appropriated is not necessary;

4. If the court [or judge] is satisfied, from the evidence presented at the hearing provided for in section 93-9909, that the public interests require the taking of such lands, and that the facts necessary to be found before condemnation appear, it [or he] must forthwith make and enter a preliminary condemnation order that the condemnation of the
land or other real property may proceed in accordance with the provisions of this chapter.

[5. If the property sought to be appropriated is a sand, stratum or formation suitable for use as an underground natural gas storage reservoir and the existence and suitability of it for such use has been proved by plaintiff upon substantial evidence, the order of the court or judge shall direct the commissioners so appointed to ascertain and determine the amount to be paid by the plaintiff to each person for his interest in the property sought to be appropriated for use as such underground natural gas storage reservoir, and/or as the annual rental for the use of such underground gas storage reservoir and for the use of so much of the surface as is required in the operation of the said underground gas storage reservoir, and for the use in connection with the creation, operation and maintenance thereof, and for all the native gas contained in said reservoir as compensation and damages by reason of the appropriation of such property; provided, however, the amount to be paid for such native gas and all thereof shall be no less than the market value of such gas.]

[The court shall appoint three (3) persons, qualified as experts and recommended as such by the oil and gas conservation commission of the state of Montana, to assist and advise the commissioners in determining the compensation and damages to be paid by plaintiff to each person for his interest in the property sought to be appropriated and the fees and expenses of such persons shall be chargeable as costs of the proceedings to be paid by the plaintiff."

Section 2. Section 93-9912, R.C.M. 1947 as amended in 1961, is amended to read as follows:

"93-9912. (9944) Ascertainment and assessment of compensation. [Appointment and meeting of commissioners. Immediately upon making and entering the preliminary condemnation order the judge must meet with the respective parties, or their attorneys of record, for the purpose of appointing condemnation commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner or other persons interested in such property by reason of the appropriation of such property. The court must thereupon appoint three (3) qualified, disinterested condemnation commissioners. One of such commissioners shall be nominated by the party or parties plaintiff; one of such commissioners shall be nominated by the party or parties defendant. The third commissioner shall be the chairman and shall be nominated by the two commissioners previously nominated, provided, however, that if said two commissioners fail to make such choice at the time of their appointment, then such nomination shall be made by the presiding judge. Each commissioner shall possess the following qualifications: a citizen of the United States and over twenty-one (21) years of age; that he is not more than seventy (70) years of age; that he is in possession of natural faculties, of ordinary intelligence and not decrepit; that he is possessed of sufficient knowledge of the English language; that he has not been convicted of malfeasance in office, or any felony or other high crime; that he is not related within the sixth degree to any party; that he does not stand..."
in the relation of guardian and ward, master and servant, debtor and creditor, or principal and agent, or partner or surety as to any party. At the time of such meeting and nominations there shall be filed with the court by each nominating party or judge an affidavit of the person so nominated stating substantially as follows: that he has formed no unqualified opinion or belief as to the compensation to be awarded in the proceeding or as to the fairness or unfairness of the plaintiff's offer for the lands and improvements of the defendants; and that he has no enmity against or bias in favor of any party and has not discussed, communicated or overheard or read any discussion or communication from any party relating to values of the lands in question or the compensation offered, demanded or to be awarded; that if selected as a condemnation commissioner he is willing to serve and will well and truly try the issues of compensation and a true decision render according to the evidence and in compliance with the instructions of the court; that he will not discuss the case with anyone except the other commissioners until a decision has been filed with the court.

[Immediately upon such nomination and appointment of commissioners the same shall proceed to meet at the time and place stated in the order appointing them, which time shall be not more than ten (10) days after the order of appointing, and proceed to examine the lands sought to be appropriated. At a time appointed by the judge and within said (10) day period they shall hear the allegations and evidence of all persons interested in each of the several parcels of land. Such hearing shall be attended by, and be presided over by, the presiding judge who shall make all necessary rulings upon procedure and the admissibility of evidence. At the conclusion of the aforesaid hearing, the court or judge shall instruct the commissioners as to the law applicable to their deliberations and shall instruct them that their duty is to determine, solely upon the basis of said examination of lands, the evidence produced at the hearing or hearings and the instructions of the court, the following:

The court or jury shall ascertain and assess:

1. The value of the property sought to be appropriated, and all improvements thereon pertaining to the realty, and of each and every separate estate and interest therein; if it consist of different parcels, the value of each parcel and each estate or interest therein must be separately assessed.

2. If the property sought to be appropriated constitutes only a part of a larger parcel, the depreciation in value which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvements proposed by the plaintiff, and if the benefit shall be equal to the amount assessed under subdivision 2, the former shall be deducted from the latter, and the remainder shall be the only amount allowed in addition to the value.
4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle-guards where fences may cross the line of such railroad.

5. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award, for said property first determined, as hereinbefore stated, as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of each of such defendants in and to the award shall be determined by the [commissioners, under supervision and instruction of the court,] court or jury, and the award apportioned accordingly.

6. If the property sought to be appropriated is a sand, stratum or formation suitable for use as an underground natural gas storage reservoir, and the existence and suitability of it for such use has been proved by plaintiff upon substantial evidence as under section 93-9911, the court or jury shall ascertain and assess the amount to be paid by the plaintiff to each person for his interest in the property sought to be appropriated for use as such underground natural gas storage reservoir, or as the annual rental for the use of so much of the surface as is required in the operation of the said underground gas storage reservoir, and for the use in connection with the creation, operation and maintenance thereof, and for all the native gas contained in said reservoir as compensation and damages by reason of the appropriation of such property; provided, however, the amount to be paid for such native gas and all thereof shall be no less than the market value of such gas.

Section 3. Section 93-9915, R. C. M. 1947, as amended in 1961, is amended to read as follows:

“93-9915. [Appeal from assessment of commissioners.] Rights of parties. [An appeal from any assessment made by the commissioners may be taken and prosecuted in the court where the report of said commissioners is filed by any party interested. Such appeal must be taken within the period of thirty (30) days after the service upon appellant of the notice of the filing of the award by the service of notice of such appeal upon the opposing party or his attorney in such proceedings and the filing of the same in the district court wherein the action is pending, and the same] All proceedings for the final determination of compensation under this chapter shall be brought on for trial upon the same notice and in the same manner as other civil actions, and unless a jury shall be waived by the consent of all parties [to such appeal], the same shall be tried by jury. [and the amount to which appellant may be entitled, by reason of the appropriation of his property, shall be re-assessed upon the same principle as hereinbefore prescribed for the assessment of such amount by commissioners;] Upon any verdict [or assessment by commissioners] becoming final, judgment shall be entered declaring that upon payment of such verdict [or assessment], together with the interests and costs allowed by law, if any, the right to construct and maintain the highway, railroad, or other public work or improvement, and to take, use and appropriate the property described in such verdict [or assessment], for the use and purposes for which said land has been condemned, shall, as against the parties interested in such verdict [or assessment], be and
remain in the plaintiff and his or its heirs, successors or assigns forever. [In case the party appealing from the award of the commissioners in any proceedings, as aforesaid, shall not succeed in changing to his advantage the amount finally awarded in such proceeding, he shall not recover the costs of such appeal, but all the costs of the appellee upon such appeal shall be taxed against and recovered from the appellant; provided, that upon the trial of such appeal,] Upon trial, the plaintiff may contest the right of any party or parties thereto to any of the property mentioned and set forth or involved in said [appeal] trial, which was located after the preliminary survey of any such highway or railroad, seeking to condemn its right of way under and pursuant to the provisions of this act; provided, such condemnation proceedings are begun within one year after such preliminary survey.

The costs of the jury trial shall be taxed against the plaintiff.

Section 4. Section 93-9920, R. C. M. 1947, as amended in 1961, is amended to read as follows:

"93-9920. (9952). Putting plaintiff in possession. The plaintiff may, at the time of filing the complaint, make application to the court for an order permitting the plaintiff to take possession of, and use the property sought to be condemned for the purpose prayed for.

If such application has been filed, then immediately upon making and entering the preliminary condemnation order as provided by section 93-9911, R. C. M. 1947, as amended, and during the hearing provided by section 93-9909, R. C. M. 1947, as amended, the court shall receive evidence as to the probable value of the property sought to be appropriated and probable depreciation in value to the portion not sought to be condemned as just compensation to each owner, possessor or person having an interest in each parcel of land sought to be condemned as provided in section 93-9912, R. C. M. 1947, as amended. The judge shall file in the court his assessment of just compensation to be paid each defendant within five (5) days after receipt of such evidence at the hearing. The clerk of court shall immediately notify the parties interested that such assessment has been filed together with a true copy of such assessment.

At any time after the filing of the preliminary condemnation order or after the [report and] assessment of the [commissioners have] court has been made and filed [in the court], and either before or after [appeal from such assessment, or from] any other order or judgment in the proceedings, the court or any judge thereof at chambers, upon application of the plaintiff, shall have power to make an order that upon payment into court for the defendant entitled thereto of the amount of compensation claimed by the defendant in his answer or the amount assessed, either by the [commissioners] court or by the jury, as the case may be, the plaintiff be authorized, if already in possession of the property of such defendant sought to be appropriated, to continue in such possession; or, if not in possession, that the plaintiff be authorized to take possession of such property and use and possess the same during the pendency and until the final conclusion of the proceedings and litigation, and that all actions and proceedings against the plaintiff on account thereof be stayed until such time; provided, however, that [where an appeal is
taken by such defendant,] after the court has made its assessment and pending the trial by jury, the court [or judge] may, in its [or his] discretion, require the plaintiff, before continuing or taking such possession, in addition to paying into court the amount assessed, to give bond or undertaking, with sufficient sureties, to be approved by the judge and to be in such sum as the court [or judge] may direct, conditioned to pay defendant any additional damages and costs over and above the amount assessed, which it may finally be determined that defendant is entitled to for the appropriation of the property, and all damages which defendant may sustain if for any cause such property shall not be finally taken for public uses.

The amount assessed by the [commissioners,] court, or by the jury, [on appeal,] as the case may be, shall be taken and considered, for the purposes of this section, until reassessed or changed in the further proceedings, as just compensation for the property appropriated; but the plaintiff, by payment into court of the amount claimed in the answer or the amount assessed, or by giving security as above provided, shall not be thereby prevented or precluded from [appealing from such assessment] having a jury trial, but may [appeal] have the right of a jury trial in the same manner and with the same effect as if no money had been deposited or security given; and in all cases where the plaintiff deposits the amount of the assessment and continues in possession, or takes possession of the property, as herein provided, and the defendant entitled thereto, if there be no dispute as to the ownership of the property, may at any time demand and receive upon order of the court, all or any part of the money so deposited, and shall not by such demand or receipt be barred or precluded from his right [of appeal from such assessment, but may, notwithstanding, take and prosecute his appeal from such assessment;] to a jury determination of compensation; provided, that if the amount of [such] the assessment [is finally reduced on appeal by either party,] of the court is reduced by the jury, such defendant who has received all or any part of the amount deposited, shall be liable to the plaintiff for any excess of the amount so received by him over the amount finally assessed, with legal interest on such excess from the time such defendant received the money deposited, and the same may be recovered by action; and, provided, further, that upon any [appeal from assessment by the commissioners to a jury,] trial by jury, the jury may find a less as well as an equal or greater amount than that assessed by the [commissioners;] court; and provided, further, that the court shall not order the delivery to any defendant of more than seventy-five (75) per cent of the money deposited on his account except upon posting of bond by such defendant equal to the amount in excess of seventy-five per cent, with sureties to be approved by the court; to repay to the plaintiff such amounts withdrawn as are in excess of his final award in the proceedings.

The parties may stipulate as to the amount of deposit. The stipulation or evidence of such deposit, or the assessment of the court, shall not be introduced in evidence or used to the prejudice of any party in interest at the jury trial.

Section 5. Section 93-9914, R. C. M. 1947, as amended in 1961, is repealed.
Section 6. It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 7. This act is effective upon its passage and approval.

Matter in brackets [ ] is deleted.

CONSTITUTIONALITY OF THE PROPOSED LEGISLATION

While no one can predict with absolute accuracy whether any particular legislation is constitutional until it is ruled upon by the proper court, by means of meticulous analysis an effort can still be made to ascertain whether that legislation lies within the restrictions imposed by the constitution.

As stated earlier, the proposed legislation amending Montana's condemnation statutes is based, with a few modifications, upon Arizona's condemnation procedure. The Arizona Supreme Court was recently faced with the question of whether a portion of its condemnation procedure was constitutional. In that case, Desert Waters, Inc. v. Superior Court, the Arizona court unanimously held that the crucial portions of the procedure, pertaining to the time of acquiring possession and the manner of determining just compensation for the purpose of acquiring possession, were within the limitations charged by the Arizona Constitution.

Might the Desert Waters case be cited as persuasive authority to the Montana Supreme Court? This question can be answered affirmatively only if the constitutions of Arizona and Montana impose like limitations upon the respective legislatures. Although the pertinent constitutional provisions of these two states have been quoted previously in this paper, they are again set out to afford a visual comparison.

Arizona Constitution, Article II, Section 17:

No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner. . . .

Montana Constitution, Article III, Section 14:

Private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner.

Even a quick glance at these two provisions readily indicates that the limitations they impose upon the respective legislatures are identical. Therefore, a closer look at the rationale used by the Arizona court in deciding the Desert Waters case is in order.

In the Desert Waters case, the petitioner contended that the Arizona
immediate possession statute, Arizona Revised Statutes, Section 12-1116, violated Article II, Section 17 of the Arizona Constitution in that it permitted the condemnor to go into immediate possession of the condemned property upon payment into court of twice the amount set by the court as probable damages. According to the petitioner, this statutory provision did not satisfy the requirement that just compensation must first be made or paid into court for the owner. The petitioner further argued that the only purpose of the phrase “or paid into court for the owner” was to permit the condemnor to pay the ascertained amount into court if the condemnee refused to accept the award of the jury. 7

Squarely confronted with this question, the Arizona Supreme Court had to determine what was actually meant in Article II, Section 17, by the words “without just compensation having been first made, or paid into court for the owner.” Extrinsic materials were reviewed to ascertain the intent of the constitutional framers and the persons who adopted the constitution, including the history of legislation existing at the time the constitutional provision was adopted and the records of the constitutional convention. 72 The Arizona court also recognized that even though no one source is a conclusive indication of the intent of the framers and the people who adopted the constitution, nevertheless when all such extrinsic materials are taken together, they may be of great assistance in determining the effect intended. 73

Reviewing the history of Arizona’s immediate possession statute, the court found that the Territorial Legislature, in enacting paragraph 2453, Arizona Revised Statutes of 1901, permitted condemnors to take immediate possession of condemned property upon deposit of a sum of money which the court or judge directed. All money so paid was to be deposited with the clerk, subject to the judgment upon trial of the action in regular course. In 1908, the Supreme Court of the Arizona Territory, in DeHansen v. District Court, 74 held this statute to be unconstitutional under the Fifth Amendment to the Federal Constitution because it did not make adequate provision for payment of the condemnee’s damages if the property was not finally taken by condemnation. The important thing to note in this decision, however, is that the court did not accept the contention that the federal constitution requires that compensation must be paid prior to or at the time of taking the property, and stated that it was only essential that adequate provision for compensation be made prior to the taking. 75

In 1909, one year after the DeHansen decision, the Territorial Legislature enacted an immediate possession statute providing for a cash deposit of double the probable damages, and making that deposit security for any damages including those the condemnee might suffer if the property was not finally taken for public use. That statute is now section 12-1116 of the Arizona Revised Statutes.

1 Id., 370 P.2d at 654.
2 Id., 370 P.2d at 655.
3 Ibid.
411 Ariz. 379, 94 Pac. 1125 (1908).
The Arizona Constitutional Convention met the next year, and on November 25, 1910, discussed and considered section 16 of Proposition Number 94, which is now Article II, Section 17 of the Arizona Constitution.76 The Arizona Supreme Court had the entire record of this discussion of the constitutional framers before it when it decided the Desert Waters case. After carefully considering this history of Arizona's immediate possession statute, the court concluded that the phrase "or paid into court for the owner" was used to permit:

... as an alternative to advance determination, a payment into court of an amount and upon such terms as would adequately secure to the condemnee compensation and damages resulting from the granting of immediate possession to a municipal corporation, as well as damages for the property taken.

If the Montana Supreme Court were called to rule upon the constitutionality of the legislation proposed by this article, its decision might not be reached as easily as was that by the Arizona Supreme Court in Desert Waters. The records of the Montana Constitutional Convention relating to the eminent domain provision of the Montana Constitution do not reveal the intent of the constitutional framers.78 The Arizona court, on the other hand, was particularly fortunate in this respect as such intent was clearly spelled out in the records of the Arizona Constitutional Convention.79

Turning to legislative history for assistance, however, the Montana court would have available a sound rationale upon which it could uphold the constitutionality of the legislation suggested herein. Since much of Montana's early condemnation law, including Article III, Section 14 of the Montana Constitution, appears to have been taken directly from California,80 a careful analysis of California's legislative history concerning the concept of immediate possession is required. Such an analysis is especially necessary in view of California's present condemnation procedure.81

The development of California's eminent domain with respect to immediate possession has followed a peculiar path. The California constitution originally provided only that private property should not be taken for public use without just compensation.82 There were apparently

76 Id., 370 P.2d at 656.
77 Id., 370 P.2d at 657.
78 PROCEEDINGS AND DEBATES OF THE MONTANA CONSTITUTIONAL CONVENTION 253 (1889). This record of the Montana constitutional convention indicates only that section 14 was read by the clerk to the convention and that no amendments were offered. No evidence of any discussion on this section is shown.
80 Concerning the origin of the Montana eminent domain constitutional provision, see note 39 supra. Uncommonly great similarity between the wording of California and early Montana eminent domain statutes, coupled with the observation that nearly all of the annotations to the eminent domain statutes in the 1895 Montana Code of Civil Procedure are to California cases, leads to the conclusion that California law served as the model for early eminent domain provisions. There is, however, no such specific reference.
81 See p. 114 infra. Present California eminent domain procedure allows the condemnor to gain possession of the condemned property upon a deposit of "security" into court.
82 Steinhardt v. Super. Ct., 137 Cal. 575, 70 Pac. 629, 630 (1902).
statutory provisions in force at that time insuring "the payment on reasonable terms as to delay and difficulty in the enforcement of the right." The first major constitutional change concerning eminent domain was adopted in 1879. It seems clear that the reason for this change was to insure that the property owner would receive not only just compensation for the property taken, but also damages for any injury to his property, even though no physical taking occurred. The language used to achieve this goal, however, was that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for, the owner.

Thus, the 1879 revision implies that the owner must be paid just compensation for the property taken before the condemnor may possess the property, and therefore, immediate possession without compensation would be unconstitutional. However, further examination tends to efface such a conclusion.

First, the primary aim of the 1879 constitutional change was to expand the area of compensation to include damages. Second, it must be stressed that in 1872, section 1254 of the California Code of Civil Procedure was enacted to allow immediate possession at any time after service of summons. Section 1254 was amended in 1877-78 to frame it somewhat similar to its present wording. As amended, it limited the taking of possession prior to final payment to cases where an appeal was taken from the judgment; taking possession at the commencement of the proceedings was not provided for. However, even after amendment, section 1254 still allowed the condemnor to take possession prior to a final adjudication of rights of the parties.

In 1897, events took a strange course when the California legislature reversed the 1877-78 "possession pending appeal" amendment of section 1254, and again adopted the terminology of section 1254 as enacted in 1872. The 1897 revision of section 1254 permitted any condemnor to take possession upon commencement of the proceedings after making an appropriate deposit in court. No provision was made, however, for the property owner's withdrawal of such deposit.

Following this confusing development, the constitutionality of section 1254 was put in issue in *Steinhart v. Superior Court*. The California Court in the *Steinhart* case upheld the condemnee's contention that section 1254 was unconstitutional. The court invalidated section 1254 on two principle grounds. Relying upon these grounds, regardless of their validity, some persons contended that another constitutional amendment was necessary in order for all condemnors to be given the right to immediate possession. However, the reasoning of the court in the *Steinhart* case, also lends support to the conclusion that a constitutional

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83Ibid.
84Cal. Const. art. I, § 8 (1879).
87Ibid.
88137 Cal. 575, 70 Pac. 692 (1902).
89Section 1254 was again amended in 1903 to restore the text as it appeared in 1880, thereby eliminating all the changes made in 1897. Cal. Stat. 1903, ch. 98, § 1 at 109.
amendment to authorize the granting of immediate possession may not have been necessary, and that such result could have been provided by ordinary legislative enactment.

The basic reasoning of the Steinhart decision was that, under section 1254 of the California Code of Civil Procedure, the property owner was unable to withdraw the security deposited into court by the condemnor. Following this reasoning of the court, a strong argument can be made that it would be unconstitutional to allow either immediate possession or possession pending appeal without making provision for permitting the condemnee to withdraw the amount of security deposited by the condemnor. This same point has been emphasized by one of the leading writers in the field of eminent domain.91

[An amount] must be deposited subject to the order of the owner. This being so, a law which permits the party condemning to take possession pending an appeal by him, upon depositing the amount of the first award to be held until the appeal is determined, would be unconstitutional and void, at least so far as it withheld the money deposited from the owner. . . . Where the constitution expressly requires prepayment . . . the owner is entitled to the award deposited, if possession has been taken, and may enforce such right by appropriate proceedings. [Emphasis added.]

Therefore, if there is a statutory provision permitting the condemnee to withdraw the security deposited into court by the condemnor, the principal ground for declaring immediate possession statutes unconstitutional would not exist. Moreover, statutes allowing immediate possession which contain such a provision have been upheld on constitutional grounds in at least sixteen states which have constitutional provisions similar to that of California.92 In most of these states the courts have asserted that the deposit provisions, or the deposit and withdrawal provisions, are adequate security within the meaning of the constitutional provisions requiring payment of just compensation.93

Another argument urging that a constitutional provision requiring prior payment in full is not a barrier to an immediate possession statute grows out of the somewhat inconsistent situation created by section 1254 of the California Code of Civil Procedure. Under section 1254 as it presently reads, a condemnor may take possession either, after trial and judgment but before the judgment is final, or pending an appeal from the judgment, by paying the full amount of the judgment into court plus any further sum required by the court to cover additional damages and costs. Although the present statute permits the condemnee to withdraw the amount of the judgment and still appeal, the statute has been upheld simply on the ground that the constitution requires only that

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90Steinhart v. Super Ct., 137 Cal. 575, 70 Pac. 629, 630-31 (1902).
93See Highway Research Bd. at 3-4.
the judgment be paid into court. Consequently, it is possible for possession to be taken in instances where the condemnee has not first received just compensation. Therefore, an incongruous situation is created on one hand by the belief that the condemnee must first receive full and just compensation in immediate possession cases, while on the other hand the condemnee need not first receive full and just compensation in cases where there is a judgment which has not yet become final. If the payment of full and just compensation is not a necessary prerequisite to taking possession pending appeal, it would seem that such payment should not be a constitutional prerequisite to the taking of possession at the commencement of the action.

Still another point, this one advanced by the Illinois Supreme Court in upholding an immediate possession statute, indicates that the terminology “first made to, or paid into Court for, the owner” may not have the limitation asserted by the Steinhart court. The 1879 California constitutional amendment, which quite clearly was aimed primarily at expanding the area of compensation to include damages, provides, “that the property shall not be taken or damaged for public use.” Obviously, damage can occur without formal commencement of proceedings to condemn. But it is impossible in such cases to grant just compensation first. Therefore, since damages cannot first be given in those cases, the proper constitutional interpretation to be given to the 1879 California amendment would be that the amendment was not established as a bar to immediate possession.

The analysis of the Steinhart decision’s first major premise leads one to conclude that statutory and constitutional history, both before and after the Steinhart case, reveals the supreme court’s reasoning to have been incomplete. Even if the Steinhart court were correct in its analysis, the court based its conclusion primarily upon the inability of the condemnee to withdraw security. Thus, if the condemnee has such a right of withdrawal (as he now does to a limited extent under section 1243.7 of the California Code of Civil Procedure), then support of the argument for unconstitutionality no longer exists.

The second point advanced by the Steinhart court has some validity. The Court relied upon the second clause of Section 14 of Article I of the California constitution, which guarantees a jury trial in eminent domain cases in order to ascertain compensation. A literal reading of the provision would indicate that the jury trial must come “first,” i.e., before possession. However, this terminology should constitute no bar to immediate possession.

"In Spring Valley W.W. v. Drinkhouse, 95 Cal. 220, 30 Pac. 218 (1892), the court upheld section 1254 where the condemnor took possession pending appeal. The court merely recited the need to deposit the judgment, making no mention that a withdrawal provision need be necessary. In Heilbron v. Super. Ct., 151 Cal. 271, 90 Pac. 706, 708 (1907), the court said, in a like situation: "The constitution merely guarantees that there shall be ascertained and paid into Court before plaintiff’s right of entry attaches, the amount of the judgment, and this, notwithstanding that that judgment may be reversed and that the defendant may ultimately obtain a verdict for a much larger amount of money.”"

Two western jurisdictions, Idaho and Washington, have recently ruled that an immediate possession statute is unconstitutional on the ground that it does not provide for determination of compensation by a court or jury. For example, the Idaho court stated:

"The real vice in the 1953 amendment is that it does not provide due process of law for the determination of the value of the land sought to be condemned and the damages arising from such condemnation and the payment thereof prior to the making of an order for possession, which results in the taking of the property before just compensation is paid therefor. Due process of law envisions an opportunity upon reasonable notice for a fair hearing before an impartial tribunal."

The Washington court in *State ex rel. Eastvold v. Yelle*, also held that the lack of a prior jury determination of just compensation was a bar to immediate possession by the condemnor under its constitution.

On the other hand, the Arizona Supreme Court, in *Bugbee v. Superior Court*, after considering a constitutional provision identical to that of Washington, held that the state could take immediate possession despite the lack of a previous jury trial. It is important to note that Idaho's immediate possession statute had neither a provision permitting a preliminary court determination, nor any other safeguard to insure just and adequate compensation; the amount of deposit was solely determined by administrative decision. Similarly, Washington's immediate possession statute had no provision for a preliminary judicial determination of just compensation. It is more than likely that if either of these states had made provision for a preliminary judicial determination of compensation in their immediate possession statutes, the statutes would have been upheld. The concurring opinion in the Washington case, *State ex rel. Eastvold v. Yelle*, also submits this same conclusion. In discussing the *Bugbee* case, the concurring justice wrote:

"A somewhat comparable statutory procedure was approved by the supreme court of Arizona in *Bugbee v. Superior Court*, 34 Ariz. 38, 267 Pac. 420. The significant difference in the Arizona statutory procedure is the fact that thereunder the trial judge, without a jury, takes evidence as to probable damages or compensation, and thereupon determines or fixes the amount of probable damages or compensation."

If legislation of the latter-mentioned type, comparable to that involved in the *Bugbee* case, supra, had existed, it is my best judgment, and I am strongly convinced, that the court in the early Washington cases could, and probably would, have decided the basic questions involved in the same manner, but without

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97 *46 Wash. 2d 166, 279 P.2d 645 (1955).*
98 *34 Ariz. 38, 267 Pac. 420 (1928).*
99 *See HIGHWAY RESEARCH Bd. at 23.*
100 *See note 97 supra.*
101 *46 Wash. 2d 166, 279 P.2d 645, 651 (1955).*
being compelled to advert to the broad, sweeping language with reference to the matter of prepayment of compensation.\textsuperscript{102}

In my judgment, the defects just mentioned significantly distinguish our existing legislation from that involved in the \textit{Bugbee} case. These defects render our legislation invalid constitutionally (Art. I, § 3, state constitution), strictly upon the ground of a lack of acceptable due process safeguards for property owners in eminent domain proceedings, where the state is seeking immediate possession of property for right-of-way purposes. \textit{The defects in the eminent domain procedure, as I see them, may be corrected by appropriate legislation, without the necessity of constitutional amendment.} [Emphasis added.]\textsuperscript{103}

It is submitted that the rationale and authority considered above reveal that the court’s reasoning in the \textit{Steinhart} case was incomplete. It should properly, therefore, be considered neither relevant nor binding today.

What value does this analysis of California condemnation procedure have for Montana? In many states the history of immediate possession statutes discloses that they have survived only after severe attack in the courts concerning their constitutional validity. Therefore, it is submitted that this analysis points out a legal rationale upon which the Montana Supreme Court could rest a decision upholding the constitutionality of the legislation proposed by this comment.

Prior to adoption of the Montana constitution, the Montana statutes contained a section allowing immediate possession at any time after service of summons.\textsuperscript{104} This Montana statute was identical to California’s section 1254 as it was originally enacted in 1872. After the adoption of the Montana constitution in 1889, the 1895 legislature amended the condemnation statutes to essentially the form which survived until the 1961 amendments. Although the Montana legislature had first provided for the use of valuation commissioners in 1887,\textsuperscript{105} the 1895 legislature retained the commission system and further provided that the condemnor could gain possession only after the commissioners’ report had been filed.\textsuperscript{106}

The chronology of these events reveals that the Montana constitution’s eminent domain provision, Article III, Section 14, was adopted subsequent to the 1879 amendment to the California constitution. Although the Montana statute providing for immediate possession after service of summons remained a part of Montana law for nearly six years following the ratification of the constitution, Montana has no equivalent to California’s \textit{Steinhart} case. The 1895 Montana legislature removed the possibility of immediate possession by stipulating that possession could be acquired only after the commissioners’ report had been filed.

\textsuperscript{102}\textit{Id.}, 279 P.2d at 651.
\textsuperscript{103}\textit{Id.}, 279 P.2d at 653.
\textsuperscript{104}\textit{Compiled Statutes of Montana, 1887, § 614.}
\textsuperscript{105}\textit{Id.}, § 607.
\textsuperscript{106}\textit{Montana Code of Civil Procedure, 1895, § 2229.}
It is important to note that this act of the 1895 Montana legislature occurred seven years before the *Steinhart* decision.

The need for immediate possession in California, as well as elsewhere, was not ignored following the *Steinhart* decision. In 1918, Article I, Section 14 of the California constitution was amended to allow immediate possession in right-of-way cases upon the deposit of security.\(^{107}\) This provision and later additions did not provide for the withdrawal of the security placed into court by the condemnor. Not until 1957 was such a withdrawal provision enacted.\(^{108}\) The 1918 amendment was obviously passed in light of the *Steinhart* case. Thus, the *Steinhart* decision has apparently been considered an obstacle to immediate possession statutes which can only be mitigated by further constitutional amendments. As previously indicated, careful reasoning does not lead to this conclusion.

This analysis of the early development of California’s condemnation procedure is relevant to any constitutional consideration of the legislation suggested by this article. It must be remembered that this discussion of the *Steinhart* decision is an analysis of a decision construing a constitutional limitation precisely identical to Article III, Section 14 of the present Montana constitution. The objections sustained in the Washington and Idaho cases do not here present themselves because the proposed legislation provides for a determination of probable damages by means of a *judicial determination* before an impartial tribunal. Moreover, the Montana constitution does not require a jury trial in eminent domain proceedings. Finally the recent Arizona case, *Desert Waters, Inc. v. Superior Court*, provides sound reasoning which should serve as highly persuasive authority for the Montana Supreme Court.

**CONCLUSION**

Whether the objectives sought by this proposed legislation, elimination of the commissioner system and allowance of immediate possession, are achieved by constitutional amendment or by legislative enactment is not of critical importance. It is submitted, however, that the goals sought by this legislation ought to be achieved. Since constitutional referendums tend to be rejected, as indicated by the recent refusal of Montana voters to remove all constitutional reference to justice of the peace courts\(^{109}\) (perhaps partly because voters do not always fully appreciate the factors involved in this area of the law), the goal may better be achieved by legislation. Indeed, this article does not stand alone in submitting that the objective here sought might be obtained by means of legislation rather than by constitutional amendment.\(^{110}\)

\(^{107}\)**CAL. CONST. art I, § 14. The amendment essentially added the provision that ‘‘in an action in eminent domain brought by the State, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district’’ for right of way purposes, immediate possession may be taken providing adequate security is deposited in the court.**

\(^{108}\)**CAL. CODE CIV. PROC. § 1243.7.**

\(^{109}\)Interested groups often find it difficult to educate the public on these and similar proposals, largely because of the great expense and time involved; this may be particularly true regarding the attempt of a public or governmental organization to influence such legislation.

\(^{110}\)See *Highway Research Bd. at 4.*
THE CONSTITUTIONS OF KANSAS, MISSOURI, MONTANA AND OKLAHOMA REQUIRE THAT COMPENSATION BE PAID OR DEPOSITED IN COURT IN ADVANCE OF TAKING POSSESSION. THIS TYPE OF PROVISION IS NOT A HINDERANCE, RATHER IT MAY FORM THE BASIS FOR AN ENACTMENT OF AN EARLY POSSESSION STATUTE. SUCH STATES AS ARIZONA, CALIFORNIA AND FLORIDA HAVE SIMILAR CONSTITUTIONAL PROVISIONS AND YET HAVE STATUTES AUTHORIZING POSSESSION AT AN EARLY STAGE OF THE PROCEEDINGS. IT WOULD SEEM THAT IN THESE JURISDICTIONS THE PROBLEM IS ONE OF LACK OF LEGISLATION RATHER THAN A CONSTITUTIONAL PROHIBITION. [EMPHASIS ADDED.]

MONTANA IS IN THE POSITION OF BEING ABLE TO ADOPT AN UP-TO-DATE CONDEMNATION PROCEDURE. THE PROCEDURE SUGGESTED BY THIS ARTICLE PRESERVES THE RIGHTS OF THE INDIVIDUAL PROPERTY OWNER AND STILL ALLOWS THE CONDEMNOR A REASONABLE MEANS OF OBTAINING IMMEDIATE POSSESSION. FURTHERMORE, THE ADOPTION OF SUCH A PROCEDURE COULD BE ACCOMPLISHED WITH LITTLE DIFFICULTY BY SIMPLY AMENDING FIVE EXISTING STATUTES. WHETHER OR NOT THE MONTANA LEGISLATURE WILL SEE FIT TO ADOPT SUCH A PROCEDURE RESTS AS A MATTER OF DECISION FOR THE INDIVIDUAL LEGISLATORS.

GARY L. BEISWANGER

INITIATION OF PROSECUTION BY INFORMATION—LEAVE OF COURT OR PRELIMINARY EXAMINATION?

INTRODUCTION

A FELONY PROSECUTION IN MONTANA MAY BE INITIATED BY EITHER A GRAND JURY INDICTMENT OR BY AN INFORMATION. A PROSECUTION BY INFORMATION MAY BE COMMENCED BY FILING THE INFORMATION EITHER AFTER EXAMINATION AND COMMITMENT BY A MAGISTRATE, OR AFTER LEAVE IS GRANTED BY THE DISTRICT COURT. THE PURPOSE OF THIS ARTICLE IS TO EXAMINE THE PROCESS OF INITIATING PROSECUTIONS BY OBTAINING LEAVE OF COURT; ITS ORIGINS, ITS USE IN MONTANA AND OTHER STATES, AND TO DETERMINE WHETHER SUCH PRACTICE SHOULD BE RETAINED IN MONTANA.

HISTORY

THE AUTHORITY TO INITIATE PROSECUTION BY INFORMATION AFTER LEAVE IS GRANTED BY COURT IS PROVIDED BY ARTICLE III, SECTION 8 OF THE MONTANA CONSTITUTION. THIS SECTION WAS ADOPTED BY THE CONSTITUTIONAL CONVENTION OF 1889, UPON THE MOTION OF W. W. DIXON OF SILVER BOW COUNTY. HE STATED THAT SECTION 8 WAS LARGELY COPIED FROM CALIFORNIA'S CONSTITUTION, BUT THAT THE PROVISION RELATING TO LEAVE OF COURT TO FILE AN INFORMATION WAS NOT. UNFORTUNATELY, THE RECORD OF THE MONTANA CONSTITUTIONAL CONVE...