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EMINENT DOMAIN: EXPLOITATION OF MONTANA'S NATURAL RESOURCES

James M. Kaze

Amidst growing nation-wide concern over the protection and wise use of the natural resources of the United States, Montana has both moved and failed to move in the direction of complete supervisory control of her abundant natural resources. As with many other areas dealing with public versus private concern, an intricate balancing of interests must be made when considering the exploitation of natural resources. This comment will attempt to expose some of the efforts made by Montana to balance these interests, with specific reference to the power of eminent domain and its role in the effective use of natural resources.

THE PAST

AN HISTORICAL LOOK AT EMINENT DOMAIN

While the title eminent domain was not placed upon the power of the sovereign to take private property until centuries later, probably the first encounter with the effects of its exercise was during the height of the Roman Empire. Any trace of the use of the power of eminent domain disappeared for several centuries after the fall of the Roman Empire. With the Medieval Period came the loss of individual property rights. No need for a power such as eminent domain existed. All property was vested in the sovereign. Only with the rise of individual ownership of property did the power of eminent domain once again become important.

The rise of individual property rights in England most markedly influenced the concept of eminent domain as it is known today. The common law version of the power found its roots in a concept called "inquest of office." This jury concept was especially used to obtain

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1Obviously, the effects of the exercise of the power of eminent domain on the use of all of Montana's natural resources cannot be explored in a single comment. Therefore, the efforts of the author will be directed toward two areas more recently subject to legislative scrutiny—minerals and water.

2To fully comprehend the complex theory of eminent domain is not the object of this comment. However, a probe into the ancient history of this sovereign power should guide the reader in understanding the constitutional limitations placed upon the power in more recent times.

3Nichols, EMINENT DOMAIN, § 1.2 at 1-55 (3d ed.). During this period of history, one also recalls that the Romans were avid engineers, building a myriad of complex aqueduct systems for the transportation of water and sewerage to and from their cities. This may be the first evidence of the organized exercise of eminent domain by a sovereign for the exploitation of the most important of all natural resources.

4Id. § 1.2 at 1-56.

5Id. With the lack of regard for individual rights, a lack of demand for public improvements also existed.

6Nichols, supra note 3, § 1.21[1] at 1-59. Inquest of office was an inquiry by jurors into any matter which entitled the King to possession of lands, tenements, goods, and chattels. It was originally invoked in cases of escheat and forfeiture.
private lands for new highways, and jury awards of damages for such takings were common. As early as 1544 A.D., the municipal corporation of London was empowered by Parliament to enter upon and appropriate private property for purposes of securing a water supply for the city. Flood prevention and drainage of lowlands also became an object of eminent domain. The power of eminent domain was, thus, well established by the time the first American states were colonized. However, the familiar American limitation on the power of eminent domain—that private property may only be taken, without consent, for public use—did not and does not exist in English law. The English version recognizes the exercise of the power for any purpose tending to promote the public welfare.

The American colonies were, of course, greatly influenced by the English law of eminent domain. The colonies first turned to the inquest-of-office concept for exercising the power for the primary purpose recognized at that time—roads. The first pre-Revolution use of the power of eminent domain for the exploitation of natural resources had the ring of commercialism, rather than of consumptive use. Second only to providing roads, the operation of mills was an important object of eminent domain. The statutes of at least seven colonies allowed the taking of private property for purposes of damming the water of streams in order to operate mills. In providing in this way for the operation of mills, the northern colonies differed from the southern colonies in the procedures for condemnation. The difference in procedure led to two distinct methods of taking private property for public use, by administrative order or by judicial decree. Although modified in form, this distinction remains today.

The colonies had no constitutions per se. Without constitutional limitation, eminent domain existed as an inherent power of the sovereign to appropriate private property for any purpose designed to promote

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1Id., § 1.21[2] at 1-59.
3Statute of Sewers, 23 Hen. VIII, c. 5. See also, Nichols, supra note 3, § 1.21[4] at 1-61 to 1-63, where reference is made to author Robert Callis and his Reading upon the Statute of Sewers, dated 1622 A.D. Note that Callis' objection to the taking of private property for private use was grounded, not in individual property rights, but in terms of the use of public funds for private benefit.
4Nichols, supra note 3, § 1.21[5] at 1-64, and Lewis, Eminent Domain, § 1 at 3(3d ed.).
5Id.
7Id., § 1.22[8] at 1-70.
8Id., § 1.22[12] at 1-71 to 1-72. Massachusetts, for example, effected the taking of private property without judicial proceedings with the right to damages being dependent upon institution of proceedings by the damaged landowner. In contrast, most southern colonies required the condemnor to institute condemnation proceedings in court prior to the taking.
the public good, subject only to the moral obligation to make compensation to the injured owner.\textsuperscript{14} Thus, the power of eminent domain, prior to the creation of the Union, existed basically in its purist form. Upon gaining statehood, all states of the Union became vested with all those powers inherent in the sovereign, including the power of eminent domain.\textsuperscript{15}

This trace of history reveals the beginnings of a necessary power of sovereignty. The exercise of the power to exploit natural resources, however, does not become evident until the history of the power in the western states—Montana, in particular—is explored.

**Montana's Historical View of Eminent Domain**

[Eminent domain is] not a reserved, but an inherent right, a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute.\textsuperscript{16}

Basic to any understanding of the historical significance of the evolution of eminent domain is the absolute nature of the power in the sovereign. The power exists in the sovereign without statutory or constitutional recognition; any statutory or constitutional statements of the power exist merely as a limitation on the exercise of the power, or as a procedure for its exercise.\textsuperscript{17}

(A) **Territorial Laws**

Even prior to statehood, the Montana Territory had statutes defining and “granting” the power of eminent domain. In the two pre-1889 codifications of Montana territorial laws, eminent domain was defined as “... the right of the people or the government to take private property for public use.”\textsuperscript{18} The territorial legislature also listed those uses considered to be public uses. Among those things considered to be public uses for which eminent domain could be exercised were: canals, flumes, ditches, etc., for public transportation, for supplying mines and farms with water, and for draining and reclaiming lands; canals, flumes, ditches, etc., for the use of county, city, and school district inhabitants; stream protection; floating logs on nonnavigable streams; tailing outlets and ditches, flumes, pipes and dumping places for working mines; and

\textsuperscript{14}Nichols, supra note 3, § 1.22[14] at 1-73, and Lewis, supra note 10. This definition of eminent domain becomes important to later discussions of public use in this comment and should be characterized as the unrestricted form of the power.

\textsuperscript{15}Nichols, supra note 3, § 1.23[1] and [2] at 1-73 and 1-74. Incidentally, one should note that the federal government did not clearly have the power of eminent domain until 1875 when recognized in Kohl v. U.S., 91 U.S. 367. Id. § 1.24 at 1-75 to 1-76.

\textsuperscript{16}Lewis, supra note 10, § 2 at 7.

\textsuperscript{17}See, Nichols, supra note 3, § 1.24[5] at 1-77 and § 1.3 at 1-78, and Lewis, supra note 10, § 10 at 21.

\textsuperscript{18}Revised Statutes of Montana, Code of Civil Procedure, § 579 (1879) and Compiled Statutes of Montana, Code of Civil Procedure, § 597 (1887).
sewerage of cities and public buildings.\textsuperscript{19} This early list of public uses made constant reference to uses of water. The importance of the mining industry at that time is also evident from this legislative list of public uses for which eminent domain could be exercised. Since the right to exercise the power cannot exist in private persons or corporations without a franchise from the sovereign,\textsuperscript{20} the territorial legislature granted a form of condemnation power to road, ditch, telegraph, fluming, and railroad corporations \textit{and} to owners of mining claims.\textsuperscript{21}

\textbf{(B) The 1889 Convention}

Gentlemen: It is with much pleasure that I call this convention to order, a convention that meets the purpose of framing a constitution for one of the largest states in the Union, the great gold and silver state of Montana.\textsuperscript{22}

The framers of the 1889 Constitution were not unaware of the importance of Montana’s water and mineral resources. They, likewise, were not ignorant of the condemnation power and its relationship to those resources. Amidst the recorded debates on women’s suffrage and temperance, the framers of Montana’s first constitution found the problem of the adequacy of water for irrigation of supreme importance.\textsuperscript{23} Since the adequacy of water for irrigation depends to some extent on the condemnation power to secure means of transportation from stream to field, the nature of ownership—public or private—of water became

\textsuperscript{19}Id., § 580 and § 598, respectively.

\textsuperscript{20}There may be some question as to whether a territory of the United States is a sovereign with such inherent powers as eminent domain. However, Nichols in his work on eminent domain, supra note 3, § 1.23[3] at 1-74, suggests that, where the Congressional enabling act organizing the territory grants the power of legislation extending to all matters properly the subject of legislation, it has been held that the power of eminent domain has also been conferred upon the territorial government. Citing, \textit{People of Puerto Rico v. Eastern Sugar Assoc.}, 156 F.2d 316 (1st Cir. 1946). Just how this 1946 decision relates to previous territories such as Montana is unclear.

\textsuperscript{21}\textit{REVISED STATUTES OF MONTANA, GENERAL LAWS}, §§ 283, 307 and 887 (1879); and \textit{COMPILED STATUTES OF MONTANA, GENERAL LAWS}, §§ 487, 685 and 1496 (1887). The important point to make here is the character of the corporations granted franchises to exercise the condemnation power. Out of those listed, only the owners of mining claims are truly private parties, the others having to do either with water transportation or public service. Mine owners, in addition, were granted their own procedure for condemnation (§§ 888 and 1497, respectively, of those statutes just cited). This procedure was apparently independent of the codes of civil procedure in both the 1879 and 1887 compiled statutes. Still, not all corporations had the power of eminent domain—that is, the franchise to exercise it.

\textsuperscript{22}\textit{PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION at} 13 (State Pub. Co. 1889) [hereinafter cited as \textit{PROCEEDINGS}]. With these words, Mr. L. A. Walker, Secretary of the Territory of Montana, opened the historic 1889 Montana Constitutional Convention. Note again the initial reference to the mineral wealth of Montana.

\textsuperscript{23}Id. at 61. One of the first propositions introduced at the 1889 convention dealt with irrigation and read:

\textit{Proposition 8. Whereas the subject of irrigation is of paramount interest to the state of Montana, and one which deserves the serious consideration of this convention, as on it depends in a great measure the future prosperity of the agricultural interests of this state. \ldots \textit{The legislature shall provide for the construction and maintenance of a system of irrigating canals and ditches in this state. Such canals and ditches to belong forever to the state, and remain under its direct control.}}}
important. The framers continued throughout the convention to debate the propriety of a constitutional declaration of the public nature of water. But, on the basis of a declaration that the use of water was a public use, already adopted into the Bill of Rights, the declaration of public ownership of state waters failed and was not included in the constitution.\(^2\)

The discussion of the power of eminent domain was not so easily disposed of by the framers. Upon its first reading, the proposed eminent domain section of the 1889 Constitution confusingly contained the language that private property could not be taken for private use.\(^2\) While the framers were not experts on eminent domain, fortunately at least some recognized the unconstitutionality of the section as it stood upon first reading.\(^2\) A man by the name of J. K. Toole became the most forceful influence on the law of eminent domain in Montana when he offered an amendment to §14 and a new §15 of the Bill of Rights.\(^2\)

Those sections, as introduced by Mr. Toole, became §§14 and 15 of Article 3 of the 1889 Montana Constitution. The discussion among the framers leading to final acceptance of Mr. Toole's amendments clearly showed the concern for the effective and beneficial use of Montana's water. The framers realized that without a constitutional declaration that the use of water was a public use, an adequate supply of water might never be obtained.\(^2\) Private property simply could not be taken for private use said the framers; but private property could be taken for public use.\(^2\)

Thus was born the constitutional declaration that the use of water was for the public use, one for which the power of eminent domain could be exercised. The debates of the framers were so caught up with the concern over the use of the state's waters that they are

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**Footnotes:**

1. PROCEEDINGS, supra note 22 at 895 to 901. Meeting in committee of the whole, the framers argued the question of the public nature of the state's water on August 13, 1889. The argument centered upon the questions of whether both appropriated and unappropriated waters could be declared publicly owned without injuring vested rights to water. Referring to §15 of the Bill of Rights [MONT. CONST. art. 3, §15(1889)] which declared that all waters of the state were to be held a public use, the framers decided to delete a declaration of public ownership. Apparently, some confusions existed between ownership of the water itself and ownership of the right to use the water. At least two members of the committee did, however, recognize that the need for control of the state's waters was of paramount importance. Mr. Hiram Knowles expressed his concern by stating that public ownership of water was needed to ensure that the use of water could be controlled and to make sure that no single person or corporation could over-appropriate the waters of the state. Id. at 898.

2. PROCEEDINGS, supra note 22 at 120. The section was first introduced at the 1889 Convention in the form it had taken in the unsuccessful 1884 Constitution (which, because Congress failed to act to admit Montana to the Union, was never functional). On first reading, §14 read as follows:

§14. That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across lands of others for agriculture, mining, milling, domestic, or sanitary purposes.

3. PROCEEDINGS, supra note 22 at 120.

4. PROCEEDINGS, supra note 22 at 148.

5. PROCEEDINGS, supra note 22 at 120 to 124 and 148.
nearly devoid of discussion of any other use of the condemnation power. Evidence Mr. Toole's remarks concerning the declaration that the beneficial use of water is a public one:

In order to accomplish desired results, the right of eminent domain must be invoked to secure the right of way for canals and ditches and the sites for reservoirs for storage and distribution of water, and in order to secure the condemnation of private property for this purpose, the use to which the property is to be applied must not be a private but a public use. . . . [T]he term public use must have a meaning controlled by the necessity and not that which it generally bears. 21

With the heritage of the territorial laws and a new constitution, the courts and legislature of Montana next had their hand in defining and interpreting the law of eminent domain for future generations.

(C) Legislative and Judicial Refinement of Eminent Domain

Since 1889 Montana has seen five re-codifications of the law. The first was in 1895 and, as far as eminent domain was concerned, was a continuation of pre-statehood concepts. A broad section recognized the power of the state to acquire, and to authorize others to acquire, private property for public use through proceedings in eminent domain. 30 The legislature did just that and granted the right to exercise the power to railroad corporations, 31 and apparently to all corporations. 32 Again, a separate procedure by which mine owners could secure rights of way was provided. 33 The legislative list of declared public uses was expanded to include electric power lines, while other declared public uses remained substantially the same as those in territorial days. 34 The following codifications in 1907, 1921, 1935, and 1947 re-enacted the basics of the older laws with minor changes in language and location within the codes.

Seemingly seizing upon the attitude of the framers of Montana's 1889 Constitution, the Montana courts proceeded to define the theory of eminent domain and "public use." 35 One of the first indications of the judicial attitude characterized by thoughts of economic development

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21 Proceedings, supra note 22 at 148. The necessity of obtaining water for irrigation was the point of Mr. Toole's last phrase in the quoted statement. However, as will be seen in later portions of this comment, the Montana courts have stretched this initial interpretation of public use to include exploitation of other natural resources, notably Montana's vast mineral reserves.

22 Montana Codes Annotated, Political Code, § 63 (1895).
23 Id., Civil Code, § 894.
24 Id., § 526.
25 Montana Codes Annotated, Political Code, § 3632 (1895).
26 Id., Code of Civil Procedure, § 2211. See notes 18, 19 and 21 and the related text.
27 See note 29 and the quotation of Mr. Toole in the text of this comment. Two definitions of "public use" exist today; one is in terms of use by the public, and the other is defined as public benefit or advantage. Refer to note 49, infra, and the related text for a discussion of the two distinct theories.
was expressed in 1895 in Butte, A. & P. Ry. Co. v. Mont. Union Ry. Co.\[^{38}\]

Ironically, the Montana supreme court expressed its desire to “correctly” expound on the law of eminent domain, then in its infancy in Montana.\[^{37}\]

Unfortunately, the court may have done just the opposite, both in terms of today’s need and in terms of the general view held at the time.\[^{38}\]

In the Butte, A. & P. Ry. Co. case, one railroad, the condemnor, sought to construct spur lines and crossings through the other railroad’s existing right of way as a matter of necessity in reaching a mine. The court was careful to point out the public character of railroads which were by statute declared to be common carriers—public service corporations.\[^{39}\]

This recognition alone would have been sufficient to sustain the exercise of the power of eminent domain in that case. The court correctly noted the constitutional intent that railroads be public highways providing nondiscriminatory public service.\[^{40}\]

This alone would have established the public’s right to use the offered service, thus justifying the taking of private property for a public use. The court, however, went further. By citing cases from both Nevada and George\[^{41}\] supporting the mining industry, the court recognized the economic benefit to Montana of fostering the mining industry.\[^{42}\]

In due course, the court therefore established the furtherance of Montana’s mining industry as a public use for which the condemnation power could be exercised.

Without legislative or constitutional authority, the Montana court had declared that the fostering of mining interests was for the public benefit or advantage\[^{43}\]—a public use. This attitude has continued to the


\[^{37}\]Id. at 238.

\[^{39}\]The opinions of both Mr. Nichols and Mr. Lewis in their separate works on eminent domain would seem to support this assertion. See Nichols, Eminent Domain, §7.1 at 7-10 and § 7.2[3] at 7-36 (3d ed.); and Lewis, Eminent Domain, § 2 at 3 to 7 (3d ed.).

\[^{40}\]Butte, A. & P. Ry. Co., supra note 36 at 238 and 239.

\[^{41}\]Id. at 239, citing Mont. Const. art. 15, §§ 5, 7 (1889).

\[^{42}\]Butte, A. & P. Ry. Co., supra note 36 at 239, citing Dayton Gold and Silver Min. Co. v. Seawell, 11 Nev. 394, 409, 5 Mor. Min. Rep. 424 (1876) which had held that mining was a proper object of eminent domain because the necessities of mining, milling, smelting, etc., were of direct interest to the people of that state; and citing Hand Gold Min. Co. v. Parker, 59 Ga. 420, 424 (1877) where the taking of private property in aid of the gold and silver mining industry was justified on the ground that gold and silver were the basis of U.S. currency for the public use.

\[^{43}\]Butte, A. & P. Ry. Co., supra note 36 at 241, where the Court noted that mining was the most important Montana industry, employing the most people and providing the greater portion of the state’s prosperity (but, the year was 1895).

The statutes in effect at the time of the decision were those of the 1887 codification, supra notes 18, 19 and 21; also, the 1889 Constitution had been adopted. Neither the statutes nor the Constitution had declared mining to be a public use. The list of legislatively declared public uses was limited to providing roads and water to and from mines. The Constitution, supra note 24, had declared only the beneficial use of water to be a public use. Apparently, the Court, supra note 36 at 243, relied upon a “rule of construction” that the power to take private property for public use could be exercised only so far as authority extends, either by way of express
present, based upon the theories of at least two U.S. Supreme Court cases and upon Montana cases similar to that first 1895 case.

**THE PRESENT**

With this somewhat sketchy history in mind, a critical eye must be turned upon more recent developments and applications of the power of eminent domain. Before analyzing the strengths and weaknesses of Montana's views with respect to the exploitation of her natural resources, one must appreciate the jurisdictional differences of opinion which have diversified the meaning and application of eminent domain.

**EMINENT DOMAIN IN BRIEF**

Eminent domain is the power of the sovereign to take private property for public use without the owner's consent. This is a limited definition, and one used by most state constitutions. In its pure form, eminent domain is not defined in terms of public use, but instead in terms of promoting the public welfare.

Public use, standing as a constitutional limitation on an otherwise broad power, has met with much confusing judicial rhetoric. The outgrowth of this rhetoric has been the formation of two distinct theories, or in some writers' opinions, a general rule and an exception. The more liberal view—public benefit or advantage as a public use—is generally confined in its application to arid western states rich in mineral resources. At least three western states have specifically rejected the

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**Notes:**

4 Clark v. Nash, 198 U.S. 361 (1905) and Strickley v. Highland Boy Min. Co., 200 U.S. 527 (1906). While Clark dealt with condemnation of a right of way for an irrigation ditch, it did establish, in regions of certain climatic and geographical conditions, the viability of the public benefit theory of eminent domain upon which the courts of Montana have relied.


6 Those interested in a more expanded discussion of the historical development of eminent domain should consult Nichols, supra note 3, and Lewis, supra note 10. An excellent and exhaustive analysis of the condemnation and police powers with particular reference to land use planning is found in a study written for the Council on Environmental Quality. See Bosselman, Callies, and Banta, THE TAKING ISSUE (1973) at 50 to 123.

7 Nichols, supra note 3, § 1.11 at 1-5.

8 Lewis, supra note 10, § 1 at 3; see also notes 16 and 17, supra, and the related text.

9 Nichols, supra note 3, § 7.2 at 7-22 and 7-26. The two theories of "public use" may be best expressed by the following: (1) use by the public, or at least a right to use, and (5) public benefit or advantage which contemplates as a public use anything which tends to enlarge the productive power of the inhabitants of an area or which manifestly contributes to the general welfare of the community.

10 See annot., 54 A.L.R. 7, 44 to 45 (1928).

11 Nichols, supra note 49. Among those listed are Montana, Idaho, Nevada, Utah, Arizona, Colorado, and Wyoming.
public benefit theory and have clung to the strict “use-by-the-public” doctrine.\textsuperscript{52}

Clearly, the question as to what constitutes a public use is a judicial one.\textsuperscript{53} Even though the legislature may declare its will in the form of statutes listing public uses, the courts, while giving some deference to those legislative declarations, still have the ultimate decision.\textsuperscript{53.1} Considering, however, that the constitutional recognitions of the power of eminent domain are no more than limitations on the broader power, the courts in those jurisdictions adopting the more liberal view of public use are left with indefinable standards by which to judge the facts before them. By defining the term “public use” as equivalent to public benefit, the courts have in essence erased the constitutional limitations by which they are bound. The raw, inherent power of eminent domain does not exist with the public-use limitation attached.\textsuperscript{54} The public benefit theory of public use merely states the law of eminent domain as it existed prior to constitutional limitation. In those states requiring a showing of the public’s right to use, whether exercised or not, the courts have a clear constitutional mandate to segregate those uses of condemned property which would be only private in nature and those which would be public.\textsuperscript{55} Regardless, the relative merits of public use versus public benefit need not be argued here, for many views and explanations exist to which ready reference may be had.\textsuperscript{56} The point to be made, however, is that the public benefit doctrine has and will continue to play an important role in the exploitation of Montana’s natural resources.

**Montana’s Mistakes**

It appears that the adoption of the public benefit theory in Montana has led this state down many of the wrong paths. Any proposed taking of private property without consent of the owner is bound to be upheld by the Montana courts upon sufficient showing that the use of the property to be condemned will benefit the public in some

\textsuperscript{52}California (with respect to mining at least), Oregon, and Washington as evidenced in Consolidated Channel Co. v. Central Pac. Ry. Co., 51 Cal. 269, 5 Mor. Min. Rep. 438 (1876); Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 P. 74 (1887); Smith v. Cameron, 106 Ore. 1, 210 P. 716 (1922); Apex Transp. Co. v. Garro, 32 Ore. 582, 52 P. 573 (1898); State ex rel. Clark v. Superior Ct., 62 Wash. 612, 114 P. 444 (1911); and Reed v. City of Seattle, 124 Wash. 185, 213 P. 923 (1923).

\textsuperscript{53}LEWIS, supra note 10, § 251 at 497 to 499, and NICHELLS, supra note 3, § 7.225 at 7-181.

\textsuperscript{54}Id.

\textsuperscript{55}LEWIS, supra note 48.

\textsuperscript{56}All those views just expressed are clearly favored by LEWIS, supra note 10, § 251 at 500 to 509.

significant manner. The adoption of the public benefit theory in Montana is not the only problem. Its application in Montana has created additional difficulties.

The list of legislatively prescribed public uses has continuously been added to until it now contains fifteen distinct categories of public uses which otherwise might be private uses. In the spirit of the 1889 Constitutional Convention, the beneficial use of water was constitutionally declared to be a public use. This public use, because of its constitutional status, is not truly open to criticism. The framers of the 1889 Constitution clearly recognized that private property could not be taken for private use; so to ensure the favored status of water for irrigation of Montana's arid lands, they wisely decided to declare that use to be public. By doing so, the framers left no doubt in the minds of the judges that as long as the other prerequisites of eminent domain were met, the beneficial use of water was a public use. Such a constitutional declaration does not exist with respect to the other legislatively declared public uses. With no other guide to decision than their own judicially created public benefit doctrine, the courts must examine each set of facts to determine whether the proposed use will in fact be of public benefit.

There is no question that the use of condemned property for such things as the generation and supply of electrical power, the right of way for railroads and electric power, telephone and telegraph lines, public highways, etc., are public uses. In each case, the condemnor is bound to provide the service or use to the public. In each, the public has at least some right to use the property or the services produced. In each, one also notes that the condemnor is subject to legislative (public) regulation and control to some extent. This right of public use and control through regulation does not exist, however, for at least one of the legislatively declared public uses—the mining and extraction of ores and minerals.

To further compound the problem already presented, the Montana legislature, in adopting the Montana Business Corporations Act, granted to each and every corporation organized thereunder the right to exercise the power of eminent domain. The practical effect of such a blanket declaration is to transform all private corporations into quasi-

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97 See note 19, supra.
98 Revised Codes of Montana, § 93-9902 (1947) [hereinafter cited as R.C.M. 1947].
99 Proceedings, supra notes 22 and 24.
100 Proceedings, supra note 22 at 148 to 149. Mr. Toole, who had introduced that section of the 1889 Constitution, Mont. Const. art. 3, § 15 (1889), stated that he believed that the fundamental law of Montana should speak in no uncertain terms. By declaring the beneficial use of water to be a public use, he hoped to avoid the possibility that the courts would not recognize such use as public.
101 R.C.M. 1947, § 93-9902(15).
102 R.C.M. 1947, § 15-2204(d).
public corporations. A quasi-public corporation is generally thought of as a private corporation which has been vested with certain powers of a public nature—for example, the power of eminent domain.63 These powers are usually granted to enable the corporation to discharge its duties for the public benefit.64 Quasi-public corporations, while not public corporations per se, are commonly known as public service corporations which do not exercise their granted powers solely for profit or for the benefit of their stockholders.65 Generally, public service corporations derive their powers from a franchise from the state government in order to provide a public necessity or convenience. They are, in fact, public utilities subject to legislative and administrative regulation.66

If the intent of the legislature was to transform all Montana corporations into public service corporations, where is the administrative control and service to the public by which such corporations are characterized? The danger inherent in the broad legislative grant of eminent domain to all Montana corporations should be obvious. Consider the possible danger to Montana's water and mineral resources. Take, for example, the Montana mining corporation engaged solely in the business of extracting minerals from the earth for sale on the market. Faced with a need for water to operate its mine, the corporation seeks a method to obtain large quantities of water for its own use. Its first step is the realization that it has been granted the power of eminent domain.67 The corporation knows that the beneficial use of water is a public use.68 Likewise, land necessary for sites for reservoirs to collect and store water is a public use.69 Proceeding to the statutory list of public uses,70 the corporation finds that canals, ditches and flumes for supplying mines with water71 and for working mines,72 and sites for reservoirs necessary for collecting and storing water,73 and finally the mining

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*Id.
*Prime examples are common carriers such as railroads and other utilities such as power companies. In Montana, the regulation of such public service corporations is entrusted to the Public Service Commission. R.C.M. 1947, §§ 70-101 et seq.
*R.C.M. 1947, § 15-2204(d).
*Id.
*R.C.M. 1947, § 93-9902.
*Id., subsec. 4.
*R.C.M. 1947, § 93-9902(5).
*Id.
and extraction of ores, metals, or minerals\textsuperscript{74} are all public uses. Armed with the power and the public uses, the corporation, in a condemnation proceeding, approaches the courts which have settled upon a public benefit or advantage view of public use. What result? Assuming the existence of the other requisites for the exercise of eminent domain,\textsuperscript{75} this hypothetical corporation very likely could secure nearly any quantity of water capable of being put to a beneficial use—and the land necessary for its storage and transportation—at least prior to 1972.\textsuperscript{76}

**The Approach of Other Western States**

As noted previously, Montana is not the only western state recognizing the public benefit version of public use.\textsuperscript{77} Montana is apparently the only western jurisdiction granting to all corporations the power of eminent domain.\textsuperscript{78}

Those western states which have adopted the “use-by-the-public” theory of public use\textsuperscript{79} have in so doing solved many of the problems inherent in the statutory scheme of Montana. In California, for example, the statutory list of public uses is as exhaustive as Montana’s.\textsuperscript{80} In California, however, the use sought by a private corporation through condemnation must be such as will serve the public; that is, the public must have the option to demand the service of the corporation as of right, and not according to the corporation’s will and pleasure.\textsuperscript{81} Thus, a taking for wholly private enterprise and profit is not allowed even though the use—such as for mining facilities—is statutorily declared to be public.\textsuperscript{82} Also, no sweeping grant of the condemnation power to California corporations exists.\textsuperscript{83} Generally, the same pertains to Oregon and Washington law on eminent domain.\textsuperscript{84}

\textsuperscript{74}\textsc{R.C.M. 1947, § 93-9902(15).}
\textsuperscript{75}\textsc{R.C.M. 1947, § 93-9905.}
\textsuperscript{76}\textsc{The year 1972 brought with it a new constitution and the groundwork for a new water law. Both will be discussed infra.
\textsuperscript{77}\textsc{See note 51, supra.}
\textsuperscript{78}\textsc{Model Business Corporation Act, Annotated (West 1971), annotation § 3.02 at 101. Section 4(d) of the Model Act from which the Montana Act was derived does not contain the reference to the power of eminent domain.
\textsuperscript{79}\textsc{See note 52, supra.
\textsuperscript{80}\textsc{California Code of Civil Procedure, § 1238 (West 1964). Among those uses listed as public are: mining facilities, roads, pipelines, hydroelectric and electric facilities, gas, heat, refrigeration or power plants, and airports.
\textsuperscript{81}\textsc{Shasta Power v. Walker, 149 F. 568, 572 (C.C.N.D. Cal. 1906).
\textsuperscript{83}\textsc{Among the powers of a California corporation are the powers to acquire, hold, lease, encumber, convey, or otherwise dispose of real or personal property. California Corporation Code, § 802 (West 1964). But the right to exercise the power of eminent domain is not one of the expressed or implied powers of every corporation in California. Gen. Pet. Corp. of Cal., supra note 82 at 349.
\textsuperscript{84}\textsc{The Oregon Business Corporation Act, Oregon Revised Statutes, § 57.030 (1971) [hereinafter cited as Ore. Rev. Stat.], contains no reference to the power of eminent domain.}
Of those western states following the public benefit theory,\textsuperscript{85} Idaho has the most extensive list of constitutionally declared public uses.\textsuperscript{86} The Idaho Constitution, unlike the 1889 Montana Constitution, also declares that those uses declared to be public are subject to state control and regulation.\textsuperscript{87} The legislative declarations of public use\textsuperscript{88} are not, then, without constitutional basis in Idaho.

Like Idaho, both Wyoming\textsuperscript{89} and Colorado\textsuperscript{90} have listed public uses in their respective constitutions, though not to the same extent. Wyoming has an extensive statutory article on eminent domain procedures covering the exercise of the power by state and local governments, and public utilities,\textsuperscript{91} railroads,\textsuperscript{92} and for ditches, flumes, roads, pipes, and power, telephone and telegraph lines,\textsuperscript{93} and for certain ways of necessity.\textsuperscript{94} Similarly, Colorado makes specific grants of the power to certain persons and corporations.\textsuperscript{85} Noticably lacking from the statutes of these three states is any blanket grant of the power of eminent domain to all private corporations and any exhaustive lists of public uses not supported by constitutional declaration.

In Utah, the state constitution does not enumerate public uses.\textsuperscript{96} The legislature has instead provided a statutory list much in the same manner as has Montana.\textsuperscript{97} Unlike Montana, Utah has provided jurisd
dictional limits on the exercise of the condemnation power for sites for mills, mines and other works for the reduction of ores. These jurisdictional limits on the exercise of the power for mining or milling purposes apparently have the purpose of restricting vast condemnation in and around populated areas and of respecting existing contracts between the condemnor and the land owner.

Having briefly considered the statutory and constitutional law of eminent domain in several western states, a glance must next be taken at some recent developments in Montana.

Montana's Corrective Measures

Probably the most significant advance toward control of Montana's natural resources was made in 1972 with the adoption of the new Constitution. With the 1972 Constitution came the long-needed public ownership of water, as well as a directive to the Legislative that it provide for administration and control of water rights. In turn, the 1973 Montana Legislature enacted the "Montana Water Use Act." This Act, among others of the 1973 session, will have at least an indirect effect on the power of eminent domain. Following the 1972 constitutional mandate, the Legislature has also declared the use of water to be a public use and subject to appropriation for beneficial uses. The definition of "beneficial use" includes the use of water for mining purposes among others. Besides providing for the recognition of existing rights and a procedure for their final determination, the 1973 Legislature established a permit system, administratively controlled, for the appropriation of the unappropriated waters of the State. No right to appropriate State waters may be obtained by any other method. This exclusive method of appropriation applies, of course, to unappropriated

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Id., § 78-34-1(13). In Utah, the power of eminent domain cannot be exercised for mining or milling purposes: (1) in any county whose population exceeds 20,000, nor within one mile of the city limits of any city; (2) unless the condemnor has the right to operate, by purchase, option to purchase, or easement, at least 75% in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter, or other similar works; (3) beyond the limits of that four-mile radius; (4) as to lands covered by contracts, easements, or agreements existing between the condemnor and the owner situated within the four-mile radius and providing for the operation of such mill, smelter, or other similar works; and [most importantly] (5) until an action shall have been commenced to restrain operation of such mill, smelter, or other similar works.

The Montana legislature would be well advised to carefully consider the Utah jurisdictional limits, supra note 98, and similar ones in Oregon, OR. REV. STAT., § 772.405.

Mont. Const. art. 9, § 3 (1972). In addition, the beneficial use of water was continued as a constitutionally declared public use.

waters. The condemnation of unappropriated waters, if ever possible, is surely foreclosed after 1973. The condemnation of existing water rights, either pre-1973 or post-1973, would appear, however, to be unaffected by the Act. Since any condemnation of an existing water right would be no more than a transfer of the right from the original owner to the condemnor, no new appropriation would be created thereby, and no permit would be required therefor.

Mineral speculation—particularly in coal—was also increasing in 1972 in eastern Montana. With inadequate mining laws and the threat of environmental degradation, the 1973 legislative session passed at least two acts dealing directly with the problem, the "Strip Mining and Reclamation Act" and the "Utility Siting Act." Of course, neither of these acts deals directly with the condemnation of private property for mining or energy generation facilities. The extensive and time-consuming requirements of these acts with respect to licensing and certification, environmental protection and reclamation may or may not have an indirect effect on condemnation. From a purely psychological and economic standpoint, the complexities of these acts will undoubtedly discourage development of coal resources by the unprepared or smaller developers. The ultimate effect would appear to be the decline in the exercise of eminent domain by smaller corporations, and in lieu thereof, the sale or lease of their mineral rights to more economically prepared and larger operations which could effectively use the condemnation procedures on a larger scale.

The speculative repercussions of this recent legislation may be somewhat mooted by yet another move by the 1973 Legislature to quiet the development of Montana's coal reserves. Prior to the announcement of the so-called "energy crisis" in late 1973 and after much of the land speculation in eastern Montana was complete, the Legislature significantly amended the statutory list of public uses. By excepting from the definition of "public use" the strip or open pit mining of coal, the Legislature has foreclosed the use of eminent domain for the acquisition of coal mining property. The ultimate life of this amendment is in question. Considering the advent of the "energy crisis" and a legislative policy statement expressed in terms of concern for or lack of knowledge of the effects of strip mining, a logical conclusion would be that this amendment will be short-lived.

The significance of this discussion with respect to eminent domain and natural resources is two-fold. A notable change in public or legisla-
tive attitude toward administrative control of Montana's natural resources is evidenced by this recent legislation. The trend appears to be away from the economical justifications for exploitation in the past and toward administratively controlled effective use and reclamation. Secondly, such a public attitude should impress itself upon the judicial interpretations and decisions of the future.

THE FUTURE

The future of the use of condemnation in Montana to exploit her natural resources seems bound in part by judicial precedent set nearly eighty years ago. While the public benefit doctrine of public use was adopted at a crucial time of economic growth in Montana, it is highly probably that the taking of private property for a use which substantially benefits the public only indirectly has out-lived its usefulness. This may be particularly true with respect to Montana's natural resources—primarily water, minerals and open space. The "energy crisis" has created an expanded need for all three of these vital resources which must be used together in order to produce the energy needed for the future. At present, no one can doubt that Montana is one of very few states with an abundance of water, minerals and open land, as yet largely untapped. The prospects for exploitation of these resources should not be met with "panic" legislation to cure an immediate fear, but should be met with an orderly undertaking to control and ensure the effective and nondevastating use of these resources for all. For examples of "panic" legislation to wrongly cure what is, in fact, a long-range problem, consider the 1973 legislative action which excepted strip coal mining from public use, and a presently proposed bill in the 1974 legislative session which would place a moratorium on the granting of permits to appropriate waters of the Yellowstone River Basin.

Regardless of the suspected impropriety of the public benefit theory based upon today's needs, Montana will likely not abandon it at this late date. Taking this as given, then, suggestions for future legislation are in order.

112See notes 36 through 45, supra.
114A Seattle, Washington, environmental consulting firm has announced that it has done research and submitted reports on nuclear power generation plant sites in Montana. The firm said that two unannounced Montana sites had been chosen for 1,100-megawatt light water reactor units in the "... promising areas with plentiful water..." See, The Missoulian, February 1, 1974, at 1 col. 3.
116The Missoulian, January 30, 1974, at 1 col. 1. Governor Thomas Judge's proposed moratorium on large diversions of water in the coal-rich region of the Yellowstone River Basin was introduced into the Montana Senate on January 29, 1974. The bill appeared, at least initially, slated for passage in the 1974 session and would be at the maximum a three-year moratorium.
117In fact, the public benefit theory has been reaffirmed by the Montana Supreme Court at least as late as 1969. See, Montana Power Co. v. Bokma, 153 Mont. 390, 457 P.2d 769, 772 to 773 (1969).
SOME RECOMMENDATIONS FOR THE FUTURE

Either the Montana legislature must clearly declare that all Montana corporations are quasi-public or public service corporations, or it must repeal that phrase in the Montana Business Corporations Act granting the power of eminent domain to all corporations. The impracticality of sufficiently regulating all Montana corporations militates against the first of these alternatives. The repeal of this unique and unnecessarily broad grant of the condemnation power should be preferred by the Legislature. Of course, the right to exercise the power of eminent domain must exist either by express law or by clear implication. For this reason, the Legislature must then replace the repealed phrase with specific grants of the power to truly quasi-public corporations and to other private corporations specifically enumerated by class. In this manner, administrative regulation of the exercise of the power, ultimately for exploitation of natural resources, would be facilitated by lodging state control in the appropriate sections of the codes. As, for example, with the electrical utilities and common carriers, the condemnation power could be granted in the form of an expressed franchise in those sections regulating public service corporations. This is the method generally followed in granting such franchises to municipal corporations, for example, even in Montana. It is also a method equally functional for specified classes of private corporations. It allows the Legislature to clearly define the limits of such an awesome power as eminent domain. It, in addition, provides the prospective condemnor with a clear indication of the scope of his power so that he may rely upon it in planning his long-range objectives.

If, as a matter of public policy, the fostering of the mining industry in Montana is deemed to be of substantial public benefit, then the franchise from the State to exercise the condemnation power to that end must be clearly defined. Recent legislation, particularly applicable to the mining and uses of coal, has indicated the Legislature’s intent to secure state regulation of the mining industry. These legislative acts provide an excellent location within the law to properly grant and limit the condemnation power with respect to the mining industry. The possibility of strip coal mining as a major producer of badly needed energy presents a certain degree of territorial uncertainty in populated areas of the State. The Legislature should carefully consider municipal territorial integrity and growth potential in drafting orderly eminent do-

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118 See R.C.M. 1947, § 15-2204(d) and the text related to note 62, supra.
119 Id.
121 R.C.M. 1947, Title 70.
122 R.C.M. 1947, § 11-977, which is expressed in terms of the powers of the governing body.
main procedures for the mining industry. Providing for territorial limitations on the exercise of eminent domain for mining purposes in and around municipalities is equally as applicable to open pit mining as it is to strip mining.

The 1973 Water Use Act likewise provides the Legislature with an excellent opportunity to define the scope of condemnation of water rights and to define those persons or organizations in whom the power should be placed. This position was urged by at least one commentator in Montana as early as 1966 with an eye toward what was then a future water code. The fact that often prior beneficial uses of water become outdated at some point in the technological and economic growth of an environment provides the basis for the orderly condemnation of land or its appurtenant water right. This obsolescence of prior uses is equally applicable to advances in environmental or resource preservation as it is to industrial growth. Surely this obsolescence, dependent upon public opinion of the function of the applied use, should be met with sufficiently flexible legislation which will conform to the needs of a changing economic and social environment.

The implication of each of the above recommendations is the need for an appropriate state agency (or agencies) to at least initially regulate the use of the condemnation power for the exploitation of Montana's natural resources. The administrative control of preferred uses of water and condemnation, as well as initial appropriation, has been forcefully advocated. Many of the arguments for such control of water seem to be appropriate for condemnation by the mining industry.

Excellent examples of this type of contemporary legislation are found in Utah and Oregon, supra notes 98 and 99.


Id.

Montana is already provided with a competent agency, the Department of Natural Resources and Conservation, which is vested with the general and newly granted control of the water and mineral resources of the state. See the "Water Use Act," and the "Utility Siting Act," R.C.M. 1947, §§ 89-865 et seq., and §§ 70-501 et seq. (Supp. 1973), respectively. Of equal competence with respect to state land resources is the State Board of Land Commissioners which has been given administrative control of the "Open Cut Mining Act," R.C.M. 1947, §§ 50-1501 et seq. (Supp. 1973) and the "Strip Mining and Reclamation Act," R.C.M. 1947, §§ 50-1034 et seq. (Supp. 1973).

Assuming that the Department of Natural Resources and Conservation will eventually be staffed properly and provided with an adequate budget, the Montana Water Use Act [R.C.M. 1947, §§ 89-865 et seq. (Supp. 1973)] should efficiently and uniformly handle appropriations.

Comment, supra note 126 at 113, and Yeutter, A Legal-Economic Critique of Nebraska Watercourse Law, 44 Neb. L. Rev. 11, 50 to 51 (1965). Yeutter suggests economic conditions of the area dictate which uses of water deserve preference over others. The public should not fear the potential administrative adjustment in the state's economy, Yeutter explains, for at least two sound reasons applicable here: (1) the state as a whole will always benefit from a more efficient use of a natural resource, and (2) displaced permit (water right) holders will not unduly suffer since preference adjustments will require compensation for the 'taking.' Id., Yeutter at 52.
and by public service corporations. Such administrative control of the eminent domain franchise is apparently not repugnant to the Constitution.\textsuperscript{131} The ultimate in regulation would be to provide for an initial administrative decision as to the propriety of a proposed taking with respect to environmental needs and preferences. This administrative decision would be a collective opinion of several persons sharing a degree of expertise often not available to courts and juries. Provision for adequate notice, opportunity to be heard and to object, and finally for judicial review should satisfy constitutional due process requirements. The 1973 amendment to the "public use" section of Montana's statutory law on eminent domain,\textsuperscript{132} if taken in the context of a moratorium on its exercise for strip coal mining, provides the Legislature with the needed time to explore these possibilities.

The basic concept of administrative control of the condemnation power is not new, nor is it entirely unique.\textsuperscript{133} The administrative control of Montana's natural resources has begun. Continuing this policy of protection of the environment and orderly exploitation of natural resources is in the interest of all Montanans. By lodging the control of the exercise of the power of eminent domain in competent state hands, the Legislature can ensure the adequacy of Montana's water and mineral resources for the use of all.

\textbf{SUMMARY REMARKS}\textsuperscript{134}

This comment was introduced with reference to an intricate balancing of interests that must take place when dealing with valuable natural resources. The attitudes of the past need not dictate the future. The complex problems facing the United States and the rest of the world with respect to energy are dependent in large part on the wise and orderly use of natural resources. This wise and orderly use in turn depends largely upon the availability of land and water to make present technological devices functional. The power of eminent domain can play no small part in tapping Montana's water and mineral resources. It is, in fact, a valuable tool and one which should be controlled and not feared. Sufficient administrative control of this power, which has been and will be used to exploit Montana's natural resources, should provide the State with the fulcrum from which interests may be expertly and uniformly balanced.

\textsuperscript{131}There is no constitutional requirement that the taking for public use be \textit{initiated} in the courts. MONT. CONST. art. 2, § 29 (1972).
\textsuperscript{132}R.C.M. 1947, §§ 93-9902(15) and 93-9902.1 (Supp. 1973).
\textsuperscript{133}See note 13, supra.
\textsuperscript{134}Because the "energy crisis" has focused attention on Montana's water and coal reserves, this discussion of eminent domain as an exploitation tool has necessarily been limited. Certainly the definition of "natural resources" is much broader. The reader, it is hoped, has been sufficiently referred to other sources of information which will indirectly broaden the scope of this comment.
Eminent domain is a concept broad enough in definition to adapt to the times. The method prescribed for its exercise must also meet that goal. Social, economical and environmental changes in attitude will result in a shuffled list of “preferred” public uses of natural resources. State administration of the condemnation power will ensure that the public remains the dealer. This State’s natural resources are far too valuable to allow the indiscriminate exercise of an awesome power to facilitate their exploitation solely for profit.