Why aren't Kelo *activists also incensed over natural resource development takings?*

The Frontier of Eminent Domain

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In 2005, the law of eminent domain captured the attention of the public at large. Suddenly, everyone cared about public use, takings, and the Fifth Amendment. As a result of the Supreme Court's decision in *Kelo v. City of New London*, the issue of what constitutes a public use for purposes of eminent domain authority dominated the media, dinner conversations, state and federal legislative sessions, and highway billboards. The public was shocked and outraged to learn that city officials could take a private home to facilitate a new corporate headquarters and that a state could replace "any Motel Six with a Ritz Carlton." Although the Supreme Court had upheld similar takings long prior to its decision in *Kelo*, the public had now taken notice, was not happy, and wanted to make sure government officials could not knock on the doors of the nation's citizens with the same authority.

In many natural resource–rich areas of the country, however, the knock on the door is less likely to come from a government official and much more likely to come from a mining, oil, or gas company representative. Once again, this is nothing new. Since the early 20th century, state constitutions and legislative enactments in the Interior West have given broad authority to natural resource developers to exercise the power of eminent domain directly to promote development of coal, oil, gas, and other state natural resources. These "natural resource development takings" have much in common with the *Kelo*-type "economic development takings." Both types of takings grant the condemning authority the right to displace private property interests in the name of economic development that will ultimately benefit the public at large by facilitating the operations of private firms.

This article explores two aspects of natural resource development takings. First, it considers how courts have used natural resource development takings as a benchmark for comparing and contrasting *Kelo*-type economic development takings. Despite the similarities between the two, there has been virtually no discussion of whether natural resource development takings should be subject to the same limits states are now placing on *Kelo*-type takings.

Second, this article considers the extent to which the public and legislative reaction to *Kelo* has affected natural resource development takings in the Interior West. A review of judicial decisions and legislative developments in resource-rich states shows that *Kelo* has had a subtle but important effect. A review of those developments provides not only new insights on property allocation concerns unique to the Interior West, but serves as a case study of how eminent domain law is merely one method of reallocating property in order to promote social and economic goals. When those goals change, a jurisdiction's approach to eminent domain law can and should change as well.

NATURAL RESOURCE DEVELOPMENT

It is black-letter law that a sovereign may not take the property of A for the sole purpose of transferring it to another private party B even though A is paid just compensation. However, in many states B may bring its own action for eminent domain to take A's property if B's activity is the development of natural resources. A closer look at the historic constitutional and statutory authority for natural resource development takings illustrates the important role eminent domain played in allocating property rights in the early 20th century to reflect state values and needs.

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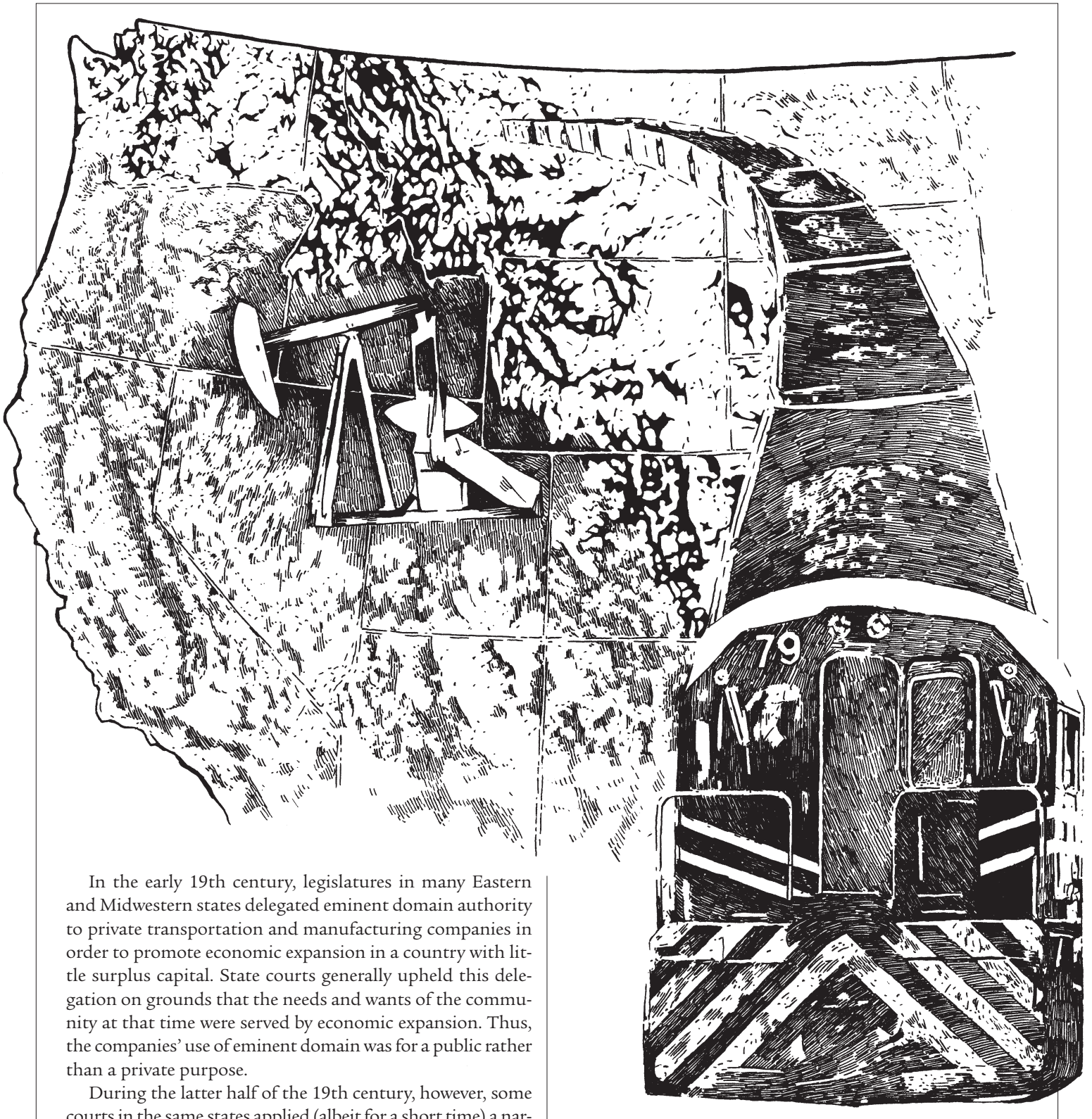

MORGAN BALLARD

In the early 19th century, legislatures in many Eastern and Midwestern states delegated eminent domain authority to private transportation and manufacturing companies in order to promote economic expansion in a country with little surplus capital. State courts generally upheld this delegation on grounds that the needs and wants of the community at that time were served by economic expansion. Thus, the companies' use of eminent domain was for a public rather than a private purpose.

During the latter half of the 19th century, however, some courts in the same states applied (albeit for a short time) a narrower concept of public use in order to preserve the rights of property owners. Under this approach, a taking that would benefit a private party could be upheld only if the project would actually be open to use by the public.

By the early 20th century, the courts overwhelmingly returned to a broad construction of public use, defining it not as "use by the public" but as any "public purpose," at least when it came to government-initiated eminent domain actions. The courts, however, retained the narrow view of public use when it came to reviewing state laws allowing private entities to exercise the power of eminent domain for economic development. For instance, in 1913 the Pennsylvania Supreme Court declared unconstitutional a state statute that granted mining companies the power of eminent domain to build roads and tramways to convey materials from lands owned or leased for mining purposes. According to the court, even if the mining company were to allow the public to use the roads and tramways to be constructed, the company is not a public service corporation and would be constructing the tramway at its own expense, for its own purposes. The court

concluded that "a private business corporation has no public use to serve, and hence cannot properly be invested with the privilege of taking private property for private uses."

ACCESS TO RESOURCES During this same time period, however, states in the Interior West were in the process of creating their economies and their first state constitutions. The founders in those states were less concerned with preserving private property rights and more focused on developing their natural resources as quickly as possible by encouraging private mining, oil and gas development, forestry, and other industry. As a result, the constitutions of the new states often included explicit provisions declaring that private parties could exercise the power of eminent domain in furtherance of mining, irrigation, forestry, and other natural resource development. For instance, the constitutions of Colorado (1876), Idaho (1890), Wyoming (1890), and Arizona (1911) all declare that private property may be taken for private uses that include reservoirs, drains, flumes, or ditches across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes. This allowed private industry to file their own condemnation actions in state court to obtain private property in furtherance of natural resource development without any need for state or local governmental officials to participate in the eminent domain action or make any further determination that this private taking was a public use or otherwise in the interests of the public.

In addition to constitutional provisions expressly authorizing natural resource development takings, state legislatures in the Interior West enacted statutes delegating eminent domain power to private industry to develop state natural resources. Statutes in Arizona, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming specifically grant eminent domain authority to private companies in connection with mining, oil and gas, and other natural resource development. The statutes differ significantly from the numerous statutes across the country granting condemnation authority to railroads, power companies, and other common carriers. In the latter cases, the railroad, power line, or other common carrier project is destined for "use by the public," thus meeting even the narrowest interpretation of public use. By contrast, the land condemned by an oil or mining company will not be subject to public access or public use, but is only "public" in the sense that the resource development will add to the growth of the overall state economy.

In the late 19th century, industry in the Interior West made frequent use of its new power of eminent domain for mining, milling, manufacturing, and other industrial development. Not surprisingly, the efforts met with opposition by neighbors who challenged the statutory and constitutional authority of industry to exercise this power. The challenges met with little success. In upholding the delegation of eminent domain authority to private industry, state courts described eloquently the role natural resource development by private industry should play in the states' identity and prosperity.

For instance, in 1876 the Nevada Supreme Court upheld a mining company's exercise of eminent domain authority to condemn a strip of private land. The court adopted a broad view of public use and then stated that mining is the "greatest" of the industrial pursuits in the state and that all other interests are "subservient to it." It declared, "Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state." The court thus made clear that if the interests of industry conflict with private property rights, there is a clear winner in the name of public use and public benefit.

Those judicial sentiments continued well into the latter part of the 20th century in the Interior West. In 1979, the Wyoming Supreme Court upheld the authority of an oil company to condemn private property to provide access for exploration and development of oil and gas leases. The court found it "plain beyond any doubt" that the purpose of the statute and the constitution "was to facilitate the development of our state's resources." The court went on to cite not only the needs of the state at the time of its founding, but also the "great public interest in an imminent need for energy." Likewise, in 1987, the Montana Supreme Court held that a mining company could condemn the surface rights held by another mining company because the development of the mineral interest was a "public use" and was "more necessary" than the rights of the surface owner. The court declared that from the beginning it has been the policy of the state "to foster and encourage the development of the state's mineral resources in every reasonable way." The court justified this authority "because the mineral wealth of this Treasure State, so named for its huge store of minerals taken and yet to be taken, is a prime springhead of past and future economic increase for Montanans."

Those decisions show that from a very early time in the Interior West, private natural resource development took on the mantle of public use, public benefit, and public good. It is thus not surprising that courts in those states were quick to find natural resource development takings were a public use for purposes of eminent domain authority. Moreover, the courts recognized virtually no judicial authority to balance the purported needs of the private condemning authority against any countervailing economic, land use, or social concern. Indeed, the seemingly straightforward nature in which the cases were decided reveals the lack of any significant judicial power under state law to consider any competing interests in making the determination of public use.

SUPREME COURT By the end of the 19th century, the federal courts had begun conducting federal constitutional reviews of state takings cases. In the decisions that resulted from those challenges, the Supreme Court adopted a broad view of public use. In doing so, it gave great deference to state delegation of eminent domain authority to private actors if such condemnations would promote mining, milling, irrigation, and other industrial development critical to grow the state economy and, in particular, the western frontier. Significant-

ly, the Court's deference was based in large part on the recognition that different states had different economic needs based on their population, natural resources, and other economic drivers.

For instance, in 1905 the Court upheld a Utah statute that allowed a private landowner to condemn an irrigation ditch across his neighbor's land for private irrigation purposes. The Court reasoned that the validity of the Utah statute must be determined based on the specific conditions in that state, including "the difference of climate and soil, which render necessary these different laws in the states so situated." Because the local courts were more familiar with the specific state conditions, the Court would defer to public use determinations of the state courts and legislatures. Likewise, in 1906 Justice Oliver Wendell Holmes upheld a Utah statute that allowed a mining company to condemn a right-of-way across private property for an aerial bucket line. The Court noted that the state legislature and state supreme court had determined that "the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below" should not be frustrated by a private owner's refusal to sell the right to cross his land. As to the Court's role in reviewing that determination, Justice Holmes declared, "The Constitution of the United States does not require us to say that they are wrong."

The Supreme Court decisions at the dawn of the 20th century show the significant deference the Court gave to state legislatures to delegate the power of eminent domain to private industry to develop state resources and economies. The Court was fairly explicit in its opinions that this deference was based in large part on the different economic and resource conditions in each state, which argued against imposing a uniform public use rule to be applied nationwide.

KELO AND NATURAL RESOURCE DEVELOPMENT TAKINGS

Prior to *Kelo*, what constituted a public use under the Fifth and Fourteenth Amendments was far from a "hot topic." The Supreme Court decided only two such cases in the past 50 years, neither of which drew much national attention. In 2005, however, the Court once again took up the issue of what constitutes a "public use" sufficient to allow a taking of private property with payment of just compensation. In *Kelo*, the Court reviewed the City of New London's plan to redevelop its waterfront area "to increase tax and other revenues and to revitalize an economically distressed city." Ultimately, an important part of the redevelopment plan included a proposed $300 million research facility for the pharmaceutical company Pfizer. New London planners hoped the creation of a new corporate headquarters in the area would draw new business, create jobs, and provide "a catalyst for the area's rejuvenation." New London was unable to negotiate purchase agreements with all the petitioner home owners in the development area, so it proceeded to use its statutory authority to initiate condemnation proceedings against them.

The Court reviewed the case to determine "whether a City's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." In a 5–4 decision, the Court held that the city's use of eminent domain for economic development purposes was in fact a public use and was constitutional. In his majority opinion, Justice John Paul Stevens began by explaining that the Court had long approved the transfer of property from one private party to another even where the property will not be put into "use by the general public." In support of that proposition, Justice Stevens cited and discussed in detail the early mining company and other industry condemnation cases from the Interior West. Justice Stevens refused to adopt a bright-line rule rejecting economic development as a public use or even to apply heightened scrutiny to such takings as a matter of federal law. Instead, he declared, "Promoting economic development is a traditional and long accepted function of Government" and that there is no way to distinguish economic development takings "from the other public purposes we have recognized." Justice Stevens emphasized, however, that nothing in the opinion precluded any state from "placing further restrictions on its exercise of the takings power."

The *Kelo* decision was subject to a concurrence and two separate dissents. The dissents focused on the sanctity and security of private property as well as the potential for abuse of the takings power by local officials seeking to "upgrade" property in their jurisdictions. Justice Sandra Day O'Connor's dissent in particular warned that the "specter of condemnation" looms large over all private property. "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

The public, legislative, and judicial reaction to *Kelo* was significant and swift. Throughout the country, the public, state legislatures, and state courts were quick to take up Justice Stevens' invitation to narrow what constitutes a public use as a matter of state law. The supreme courts of Oklahoma and Ohio each rejected the broad view of eminent domain expressed in *Kelo* and held that economic development alone was not a public use or public purpose justifying the exercise of eminent domain as a matter of state constitutional law. More important, the *Kelo* decision led to a flood of new state legislation and constitutional amendments to limit economic development takings and otherwise place limits on the power of eminent domain. The focus of much of this legislation, not surprisingly, was placing limits on economic development takings by outlawing them completely, narrowing the definition of what constitutes "blight," or placing other related restrictions on state and local governments. As of August 2007, 42 states had enacted post-*Kelo* reforms, some of which significantly limited the ability of state or local governments to engage in the type of economic development takings the Court found constitutional in *Kelo*.

The legislative reforms have been helped by the efforts of the Institute for Justice and the Castle Coalition. The Institute for Justice is a libertarian public interest law firm that represented the property owners in *Kelo* and represents landowners in economic development takings across the country. The Castle Coalition is an organization formed by the Institute for

Justice that provides a central bank of information and helps support grassroots activism to oppose government takings and reform state eminent domain laws.

These interests groups and most state legislatures that have engaged in eminent domain reform have focused almost exclusively on limiting *Kelo*-type economic development takings by government entities and portraying such eminent domain actions as the taking of private property for "private use" or "private gain." The groups make virtually no mention of the fact that natural resource development takings exist at all. Indeed, many people (including law professors and lawyers outside the Interior West) are surprised to hear that in many states, natural resource companies have the direct right of eminent domain to facilitate natural resource development for private economic gain.

For example, in an Institute for Justice report on economic development takings, the author states that Wyoming had no reported instances of eminent domain for private development other than takings by railroads, oil and gas companies, and coal companies to condemn private property for mineral access. The report concludes that none of those takings involved "the type of private eminent domain abuse so common in most of the rest of the country" and that Wyoming landowners are "safe" from economic development takings. While Wyoming landowners may not be exposed to government-initiated economic development takings, Wyoming law encourages and facilitates takings by oil and gas companies to aid the efficient extraction of natural resources.

Moreover, recent efforts in many states to limit the government's power of eminent domain have resulted in the drafting of proposed legislation and constitutional amendments that carefully leave intact the power of private entities to exercise the power of eminent domain. For instance, efforts to limit eminent domain in Idaho (both through successful legislative action and a failed ballot initiative) retained in full eminent domain authority for roads, tunnels, ditches, flumes, pipes, and dumping places for tailings and other refuse associated with mining activity. More fundamentally, federal law and the law in many states expressly delegates the power of eminent domain to power companies and oil and gas companies for the construction of electric transmission lines and oil and gas pipelines. This eminent domain authority granted directly to private industry is rarely, if ever, questioned as part of the recent initiatives to rethink the concept of "public use."

By focusing only on government takings and ignoring private takings, legislators and interest groups have clouded the issue by framing it as one solely of government abuse of eminent domain authority. Instead, eminent domain is only one legal mechanism by which society allocates property rights to meet the needs of the public. Such allocations should change as times and circumstances change. As a result, it is perfectly appropriate for states to expand or contract the power of eminent domain, or to create additional procedural rights or compensation rights for parties subject to condemnation actions. In doing so, however, it is shortsighted to ignore private takings for natural resource development in states where such condemnations are prevalent and to treat the issue as one that is a relationship only between local governments wielding too much power and vulnerable private property owners.

These important changes in eminent domain law readjust the power balance between natural resources companies and landowners.

Instead, eminent domain is often a tool used by private industry to promote private interests at the expense of other private parties with no state or local government involvement in the eminent domain proceeding.

TRANSITIONS IN PROPERTY RIGHTS

A review of eminent domain and property rights reform in the Interior West reveals that while there has not been a frontal attack on natural resource development takings, subtle reforms have taken place both as a result of *Kelo* and of changing economic and social forces in the region. Those reforms can be seen as part of a broader reconsideration of the role of natural resource development in the Interior West, as those states attempt to balance economic development, urban expansion, traditional natural resource development, and preservation of the environment. In adopting recent reforms, state legislatures and courts are readjusting the allocation of property rights in favor of individual property owners to address the present-day needs of their states, just as they adjusted them in favor of natural resource extraction companies to promote that industry over 100 years ago.

For instance, Wyoming enacted an eminent domain reform law in 2007 that focuses primarily on providing new landowner rights in all condemnation proceedings, whether initiated by the government or private industry. Specifically, the Wyoming law requires new negotiation protocols between condemning parties and landowners, provides for the recovery of attorneys' fees if the condemning party refuses to negotiate in good faith, and expressly allows rural landowners to use comparable sales for easement and other property interests to help define fair market value. A provision of the law also

addresses economic development takings by limiting the ability of state and local governments to take private property for the purpose of transferring it to another private person or entity. Despite this new limit on economic development takings, the law as a whole focuses on "condemnors" rather than public entities, thus creating reforms that will apply equally to public and private condemning authorities.

Notably, despite the fact that traditional economic development takings are essentially nonexistent in Wyoming, interest groups in the state relied on the anti-*Kelo* groundswell to build support for the legislation. The Landowners Association of Wyoming, one of the primary interest groups pushing for eminent domain reform in the state, highlights the *Kelo* case in its online materials and then explains why condemnation is "really a problem in Wyoming" by giving examples of eminent domain abuses. The group cites a few instances of government condemnations for public buildings or highways (which meet any definition of public use) but then focuses on condemnations by oil and gas companies for coalbed methane water discharge, gas pipelines, and other natural resource development takings. The eminent domain reform experience in Wyoming calls into question the Institute for Justice's assurances that Wyoming landowners are "safe" from economic development takings. While they may be safe from *Kelo*-type urban redevelopment takings, they regularly experience the threat of natural resource development takings.

Newspaper articles covering eminent domain reform throughout the Interior West similarly focus on statutory reforms that would better protect landowners from resource development condemnors as opposed to government condemnors. One news article describes the burst of eminent domain reform efforts in Interior West states such as Colorado, New Mexico, and Utah and concludes, "Many of these reform bills stress fair compensation for landowners, protecting them against companies that could be preying on landowners without the means to fight."

The changes to eminent domain laws in these states are important property rights reforms that serve to readjust the power balance between natural resources companies and landowners. This phenomenon may be a subtle effort to deal with the growing tension between natural resource development interests on the one hand and a growing tourism, recreation, and service economy on the other. Such efforts are consistent with a system of property allocation that shifts, albeit slowly, as the region's identity, economy, and values shift.

LOOKING TO THE FUTURE

The issue of eminent domain and public use remains as complex and varied as it was in the early 20th century, with different approaches needed for different geographic regions. This is illustrated in part by the wide variation in state approaches to eminent domain reform both prior to and since *Kelo*. Some states have significantly reduced or virtually eliminated economic development takings, others grant

broad authority for such takings, while yet other states have focused on improving procedural protections in both public and private takings.

Arguably, those differences reflect the different needs of different states. It may be that the difficulty of assembling land in highly dense areas of the country such as New York or California are part of the reason why those states have not placed any additional limits on economic development takings since *Kelo*. By contrast, in North Dakota, South Dakota, and other areas with less urban density, land assembly may not be as difficult and states can perhaps "rein in" government authority for economic development takings without significant adverse consequences.

Thus, although eminent domain has become a high-profile issue across the country, the form of the debate in each state is driven by that state's economics, social fabric, and resources both past and present. The question remains, however, whether it is time for states in the Interior West to go beyond "the edges" of eminent domain reform and reconsider directly the constitutional and statutory provisions declaring natural resource development takings a per se public use. When those provisions were enacted in the early 20th century, natural resource development was unrivaled as the economic driver for the region. Although natural resource development remains an important part of many of those states' economies, it now competes with high-tech industries, recreational tourism, preservation needs, and residential development in shaping the future of the region. In light of that reality, the per se public use designation for natural resource development may no longer be an appropriate mechanism for reallocating property rights.

Any proposal for reform in this area must consider that during those states' constitutional conventions, the delegates intended to take the question of public use out of the hands of the state legislatures and state courts, not trusting them to give industry interests sufficient weight over individual property interests that might act as obstacles to economic progress. Now, however, perhaps what is needed is the creation of a political forum to weigh the state's interest in natural resource development against those of not only individual property owners but the interests of competing economic, environmental, and social drivers.

Municipal, county, or other local governmental entities in each of the states could serve that purpose. Under such a system, when a natural resource development company wishes to exercise the power of eminent domain, it would make its case to the designated city, county, or regional governmental entity as to why the taking would be for a public use and would bear the burden of proof on that issue. In the public proceeding that would follow, the individual landowners affected, along with representatives of environmental interests, governmental interests, and other economic interests, could make their case as to why the taking would not be for a public use. The decisionmaker would weigh the various interests based on the record created and make a decision in the best interests of the community, taking into account the local government's land use planning documents, the desires of the community, the impact of the natural resource development on the economy, and competing economic and social concerns. This decision could then be subject to judicial review, with deference to the decisionmaking body.

This proposal is not unique. It resembles the process that exists or is being adopted in many states in other parts of the country for governmental authorities to exercise the power of eminent domain for economic development takings as well as other, less controversial takings. By contrast, because natural resource extraction is a per se public use, private natural resource companies avoid any political balancing of competing interests. While this broad authority for private industry may have made sense at the dawn of the 20th century, it is not as clear that every natural development taking is always a "public use" today when balanced against a community's other economic, environmental, and social interests.

Reforming natural resource development takings will not happen easily. In many states it will require amending the state constitution; in other states, only statutory amendments will be required. In either case, natural resource companies still wield significant political power in the region.

While the hurdles may seem high, the public reaction to *Kelo* has focused attention on eminent domain and public use in a way not seen since the states in the Interior West enacted their constitutional provisions on the subject nearly 100 years ago. Indeed, since *Kelo*, Florida, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, and South Carolina all have amended their state constitutions to place limits on government condemnation authority. Now may be the time for states in the Interior West to amend their own constitutions and statutes to focus not on government condemnations, but on private condemnations that no longer fit the growing economic and social complexities in many parts of the region. For those states that undertake such an effort, it will allow state legislatures and state courts to engage in the legislative and judicial consideration of public use that courts in the rest of the country began nearly 100 years ago. R

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