

Eminent domain

Exclusive to the Cheyenne Herald

by **Bill Winney** (Capt. USN, retired)

Our Legislature is considering legislation to current law that allows taking of private property for public benefit. The recent Kelo Decision by the US Supreme Court expanded the definition of "Public Use" greatly to the benefit of governments bringing wide consternation.

The basis of the taking lies in the 5th Amendment to the Constitution. In the absence of clear legislation on this issue, the US Supreme Court has chosen to define the "true" meaning of this clause.

The basis of the Supreme Court decision goes back nearly 50 years to case law. The 1959 *Courtesy Sandwich Shop, Inc. v. Port of New York Authority* was the first case wherein takings could expand beyond the previous requirement that any taking be put, in fact, to public "use."

The *Courtesy Sandwich Shop* had refused to sell to the Port of New York Authority. The proposed use of its land was the World Trade Center Buildings. This case proceeded through the New York State Courts without relief.

"This became settled law when the US Supreme Court refused the appeal." (*Judge Andrew P. Napolitano, Hillsdale College*) This case turned the definition from clear "Public Use" to that of "Public Purpose." In this case, since the taking was to be used by a "government entity," it was felt justified by the Judiciary.

The Kelo Decision actually expanded this definition. The core of the case brought by the City of New London was tax base enhancement. The Kelo Decision thus changed the discussion from the "Public Purpose" above to that of "Public Benefit."

Since the decision as to whether this applies will lie in the hands of the government that will gain from a given taking, this effectively gutted the 5th Amendment, as many understood its plain and simple language.

In the case itself the taking was to be sold by the City of New London to another private entity not party to the suit (this company did not need this particular parcel and offered to place their construction elsewhere).

As a final twist, when the City of New London, won their case, it sought to charge rent for the period of the litigation. Thus putting on notice landowners that might be affected by future condemnations.

I attended the recent Hearings of the Wyoming House Agriculture Committee on Eminent Domain. The emotion by private landowners was apparent though muted. Landowners clearly feel that our current law places all the cards in the hands of government and private companies.

A truly telling discussion regarding the preference of private companies seeking rights of way occurred on the House Floor. It was noted that there is a clear preference for private land over public land "because the permitting process" is so onerous for public lands. Cases were described where private companies zigzagged around public land when the route with least engineering & construction cost was across public land.

This must be recognized for what it is: A business decision about allocation of resources.

It is clear that companies and governments, seeking to minimize spending, use the law to coerce landowners. They cannot coerce another government entity, so they go after those least capable of responding. Organizations behave that way. Our protection is in the representatives we elect.

This nation would be far poorer without interstate highways, railroads, transmission lines and pipelines. There is a legitimate business need to be able to access rights of way and resource extraction. The legislature must balance this. The emotion present in testimony before the Agriculture Committee demonstrates with clarity the perception of a tilted playing field under current law.

In a small show of conscience, the US Supreme Court encouraged states to redefine their law to prevent such takings as just allowed.

Stories in development ...

Judge Roberta Coates: "Even when I'm wrong, I'm right."

The Laramie County Circuit Court Judge denied a Motion to Offset Judgment, but in doing so cited the wrong statute again.

Wyoming Tribune-Eagle misses big prize again.

Deming Cup for overall excellence again eludes WT-E. When did they last win it?

Why did these learned Justices do this?

An unspoken power of a bureaucracy is the ability to redefine "truth." The Courts of New York and later the US Supreme Court redefined what most citizens believe to be clear language in our Constitution.

Another unspoken facet of a bureaucracy is they rarely bite the hand that feeds them. Our Constitution has a provision in it forbidding reducing the salary of a judge during his tenure precisely to enable our judiciary to act independently. Still the Judiciary is reluctant to do so for they remain part of the government.

Academic robes, the title of "Your Honor," and extensive academic credentials, do shelter judges from the forces that cause a bureaucracy to act in certain ways. But, like it or not, our Judiciary reflects many aspects of a bureaucracy.

In affirming case law settled for nearly 50 years, the Supreme Court sought to avoid upsetting the apple cart. And then passed the buck to the state legislatures.

Changing our definition of "Public Use" is a political decision. Courts rarely handle political decisions well.

What must be done this session?

First: Level the playing field in condemnation proceedings to minimize the ability of entities to use the law as a weapon. Several landowners asked the Committee to allow freedom in negotiations and not hobble them with excessive rules while others spoke of institutional arrogance.

Much discussion has centered on disclosure of price paid for an easement. Other discussion was about "fair market value" of the property involved in a transaction. Without disclosure there is no market and without a free market there is in essence no way to determine a real fair market value for an easement.

Second: Require rights-of-way to take more direct or less expensive routes even if across public land. The brief discussion on the House Floor regarding private companies seeking condemnation of private land rather than pursue permitting of public land illuminates this issue brightly.

Third: Where there is evidence of bad faith there should be a penalty. In testimony before the Agriculture Committee there was clear indication of such by one condemnor.

Fourth: Property owners should be notified when use of their property is first contemplated. In this era of digital mapping and computer-assisted design, companies know what the construction "least cost route" is within days of concept formulation.

Delay of notification until 180 days before planned condemnation effectively provides a powerful tool that reduces the ability of the landowner to respond.

Fifth: Encourage the formation of organizations with sufficient resources to make the tactic of running a landowner out of money a useless tactic. Like it or not, the basis of our legal system is that one must make their case in court. It is not sufficient to state the facts and expect a court to recognize their validity.

I moved nearly 20 times on active duty. Across the street to halfway around the world, no move is easy.

The Navy left Charleston, SC, when I did. I faced the prospect of a below mortgage sale of a house (fortunately I had another choice). To have to move and absorb the cost of a below mortgage settlement may impoverish a family.

Sixth: Where property is under a mortgage obtained in the normal course of business, that should be accepted as evidence of value. No family should be expected to relocate with less money than previously invested, and continue paying off a below mortgage sale.

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Methamphetamine in Cheyenne.

What treatment options are available and what do authorities know about the Oxford House(s), the Jericho House, and other offerings and programs?

Sells v. Outlaw Saloon trial.

The civil trial is to begin February 5, 2007 in Judge Nicholas Kalokathis' courtroom. A settlement agreement in the amount of \$250,000 was reached with a bouncer/patron involved in the April 23, 2005 altercation that claimed the life of Dwayne Sells. The Herald will attend the trial as time allows - and report on it.

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