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THE FRONTIER OF EMINENT DOMAIN

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The Supreme Court's 2005 decision in Kelo v. City of New London brought the issues of takings and public use into the national spotlight. A groundswell of opposition to government-initiated "economic development takings" led to eminent domain reform legislation in over forty states. Many people are surprised to learn, however, that another type of economic development taking is alive and well in many western states that are rich in natural resources. In those states, oil, gas, and mining companies have the power of eminent domain under state constitutions or state statutes to take private property to develop coal, oil, or other natural resources. In fact, the Supreme Court's deference to such "natural resource development takings" in the early part of the twentieth century was the base upon which the Court built its decision in Kelo. This Article first explores the relationship between Kelo-type economic development takings and natural resource development takings, and argues that the national reaction to Kelo has focused too narrowly on government takings and ignored the impact of private takings. It then uses recent property reforms in the Interior West to explore the broader implications of the role of eminent domain in reallocating property in society and proposes some additional reforms for natural resource development takings.

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INTRODUCTION

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.¹ As a result of the Supreme Court's decision in *Kelo v. City of New London*,² the issue of what constituted 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."³ Although the Supreme Court had upheld similar takings prior to its decision in *Kelo*, the public now had 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 twentieth 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" currently in the national spotlight.⁴ Both types of takings grant the condemnor the right to displace private property interests in the name of economic development that will benefit the public at large.

1. The Fifth Amendment to the U.S. Constitution reads in relevant part "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. 545 U.S. 469 (2005).

3. See *id.* at 503 (O'Connor, J., dissenting).

4. An "economic development taking" can be defined generally as a taking where a government entity takes private property by eminent domain and then transfers it to another private entity (usually a commercial one) with the goal of creating more jobs and generating higher tax revenue for the community. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1880 (2007).

So how do these two types of takings relate? Does the national reaction to *Kelo* have any impact on natural resource development takings? Should it? Natural resource development takings are a much more direct form of “private to private” transfer of property in that the benefited private entity has statutory authority to initiate eminent domain proceedings on its own. By contrast, the benefited private entity in a traditional economic development taking must rely on a state or local government to initiate eminent domain proceedings. Thus, there is at least on the surface a more “public” aspect to traditional economic development takings.⁵ Nevertheless, opponents of economic development takings rarely, if ever, question the validity of natural resource development takings or advocate for removing them from the definition of “public use.”

Part I of this Article explores the importance of natural resource development takings in shaping the law of eminent domain. This Part focuses on state statutes, constitutional provisions, and case law in the early nineteenth century that broadly interpreted “public use” to enlist private industry to develop state natural resources and promote economic prosperity. Part II highlights the central role natural resource development takings played in the Court’s *Kelo* decision and then suggests that the public debate over economic development takings since *Kelo* has missed the opportunity for a more robust analysis of eminent domain because it focuses exclusively on government takings and ignores private takings.

Part III considers more broadly the role of natural resource development takings on what was once the American “Frontier.” It then turns to recent judicial and legislative property reforms within the Interior West that in part flow from *Kelo* but in some cases are more tailored to the issues and needs of the region. These reforms consist primarily of additional procedural rights for landowners in eminent domain actions and additional rights for surface owners on split-estate lands. In enacting these reforms, Interior West states are moving in the right direction but should go further and reconsider the continuing need for a per se public use designation for natural resource development.

5. See Rebecca Huntington, *Condemned*, HIGH COUNTRY NEWS, Feb. 5, 2007, at 4 (discussing natural resource development takings in Idaho and other Interior West states and noting that in those states “private entities don’t even need the government as a go-between”).

Finally, Part IV explores some proposals for reform, arguing that such reforms must be tailored to the specific needs and economies of each state. These proposals focus on creating a forum at the state or local government level in which to balance natural resource development against competing development and open space interests. This process would replace the current default public use designation for natural resource development. States can implement such changes through procedural reforms similar to those many states have adopted in connection with economic development takings or, better, by creating new procedures modeled after state and federal environmental review laws to study and debate the competing economic, environmental, and social concerns at issue in natural resource development takings today.

I. NATURAL RESOURCE DEVELOPMENT AS A "PUBLIC USE"

All agree that "the 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."⁶ While this may be true, it is also true in many states that private party B may bring its own action for eminent domain to take the property of private party A if private party B's activity is the development of natural resources. This Part traces the history of constitutional and statutory authority for natural resource development takings. It then focuses specifically on the rhetoric used by early courts to justify or to reject natural resource development takings as a public use. In these decisions, courts in the Interior West speak passionately about the critical dependence of their states on the private exploitation of timber, oil, minerals, water, and other natural resources, while Eastern state courts speak just as passionately about the sanctity of private property. This divide shows the important role eminent domain played in ensuring that states' allocations of property rights in the early twentieth century reflected their individual values and needs.

6. *Kelo*, 545 U.S. at 477. This prohibition on transfers of private property derives from the Fifth Amendment to the U.S. Constitution, which states in relevant part "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

A. *Early Constitutional and Statutory Authority for Natural Resource Development Takings*

In the early nineteenth 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 very little surplus capital."⁷ State courts generally upheld such delegations on grounds that the needs and wants of the community at that time were served by economic expansion and thus the companies' use of eminent domain was for a public rather than a private purpose.⁸ During the latter half of the nineteenth century, however, some courts in these 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.⁹

By the early twentieth century, these 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.¹⁰ These same courts, however, retained the narrow view of public use when it came to reviewing state laws allowing

7. See Charles Fels et al., *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681, 690-92 (1974).

8. *Id.* at 692-93 (citing *Scudder v. Trenton Del. Falls Co.*, 1 N.J. Eq. 694, 726-28 (1832)).

9. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 259-61 (1977) (discussing judicial trends in the middle of the nineteenth century to no longer accept "what before had been a standard and virtually unchallenged utilitarian justification" for private eminent domain actions in furtherance of general economic development); Fels et al., *supra* note 7, at 694-95 (citing *Ryerson v. Brown*, 35 Mich. 333, 336-37 (1877); *Bloodgood v. Mohawk & H.R.R.*, 18 Wend. 9 (N.Y. 1837)); see also Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617 (1940) (stating that by the 1850s "a narrower construction of the term 'public use' began to emerge, according to which public benefit was insufficient, and public use began to be defined as use by the public.").

10. See, e.g., *Kelo*, 545 U.S. at 479-80 (stating that while many state courts in the mid-nineteenth century adopted the "use by the public" definition of public use, this narrow view eroded over time and when the Supreme Court began to apply the Fifth Amendment to the states at the end of the nineteenth century, "it embraced the broader and more natural interpretation of public use as 'public purpose'"); see also Fels et al., *supra* note 7, at 702-04; Nichols, *supra* note 9, at 626-27.

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 for mining purposes.¹¹ The court reasoned that the owner of private property has the uninterrupted use and enjoyment of the property subject only "to the sovereign right of the state to take so much of it as may be necessary to serve . . . public uses[.]"¹² According to the court, even if the mining company were to allow the public to use the roads and tramways after they were constructed, the company is not a public service corporation and would be constructing the tramways at its own expense, for its own purposes.¹³ 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."¹⁴

Courts in Illinois, Virginia, and West Virginia, among others, reached similar conclusions during this same time period and invalidated state laws authorizing coal companies, timber companies, and other private industries to exercise the power of eminent domain to create roads and transportation networks to move their products.¹⁵ In each case, the court refused to support the legislature's declaration that the promotion of the industry in question was a "public use" and held instead that

11. *Philadelphia Clay Co. v. York Clay Co.*, 88 A. 487 (Pa. 1913).

12. *Id.* at 488.

13. *Id.*

14. *Id.* at 489.

15. See *Sholl v. German Coal Co.*, 10 N.E. 199 (Ill. 1887) (invalidating state statute authorizing condemnation of land for extension of a tramway to facilitate transportation of the company's coal); *Boyd v. C.L. Ritter Lumber Co.*, 89 S.E. 273 (Va. 1916) (invalidating state statute allowing lumber company to condemn right-of-way over neighbor's property to haul lumber even where company would allow the public to use the right-of-way); *Hench v. Pritt*, 57 S.E. 808 (W. Va. 1907) (invalidating as unconstitutional statute allowing saw mill to condemn land for railroad connection to transport product). But see *Johnston v. Ala. Pub. Serv. Comm'n*, 252 So. 2d 75 (Ala. 1971) (holding that statute granting right-of-way condemnation authority to mining, manufacturing, power and quarrying operations does not violate the state constitution); *Hand Gold Mining Co. v. Parker*, 59 Ga. 420 (1877) (gold company can exercise right of eminent domain for right-of-way over unoccupied lands because development of mineral resources of the state from which constitutional currency is stamped is of public benefit); *Jones v. Mahaska County Coal Co.*, 47 Iowa 35 (1877) (holding that coal company can condemn land for a road but only if it allows the public and other industry to use the road).

the exercise of eminent domain by such private businesses was inconsistent with the state constitution.¹⁶

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 these states were less concerned with preservation of 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.¹⁷ As a result, the constitutions of these new states often included explicit provisions declaring that private parties could exercise the power of eminent domain in furtherance of mining, irrigation, forestry, or manufacturing. 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.¹⁸ These provisions allowed private companies 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 an individual private taking was for a public use or in the interests of the public.

In enacting these constitutional provisions, the state founders knew exactly what they were doing. The Idaho Constitution declares that the taking of private property for construction of reservoirs, storage basins, canals, railroads, tramways, shafts, drainage of mines, dumps, "or any other use necessary to the complete development of the material resources of the

16. See Scholl, 10 N.E. at 201-02; Boyd, 89 S.E. at 275-76; Hench, 57 S.E. at 809-10.

17. See Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232, 244-45 (1973) (discussing the popularity of constitutional provisions and statutes authorizing private rights of eminent domain in western states in the late nineteenth century based on "the hardships of life in arid lands and mountain fastnesses, the nature of the resource base, vast distances, and, above all, men's impatience to force the pace of economic development").

18. See, e.g., ARIZ. CONST. art. II, § 17; COLO. CONST. art. II, § 14; IDAHO CONST. art. I, § 14; WYO. CONST. art. I, § 32; see also ROBERT B. KEITER & TIM NEWCOMB, *THE WYOMING STATE CONSTITUTION* 67 (1993) (stating that "private eminent domain or private condemnation" is "a unique feature found in many western state constitutions").

state . . . is . . . declared to be a public use[.]”¹⁹ The purpose of Idaho’s provision was to prevent any individual property owner from blocking the expansion and development of the natural resource industry in the state.²⁰ The provision was subject to significant debate at the convention, where the mining delegates argued such broad private condemnation authority was necessary to guarantee Idaho’s economic growth. Specifically, proponents of the private takings clause contended that the provision was “absolutely necessary, unless we want to leave the whole domain of this . . . state practically undeveloped” and that “the very root of our prosperity in the future” depends on this “most important matter.”²¹

On the other side, the non-mining delegates strongly opposed the grant of authority as “thievery,” a “tool of monopolists,” and an authorization of the takings power for “any purpose on God’s green earth.”²² Ultimately, the economic arguments carried the day and the mining interests won the battle. As a result, the provision’s supporters succeeded in depriving the state legislature and, to a large extent, the state judiciary, of the power to declare what is and is not a public use when it comes to eminent domain authority for natural resource development.²³ The example of Idaho illustrates that constitutional delegates in Interior West states intended to rely very heavily on natural resource development to create their state economies and used the power of eminent domain to allocate property rights accordingly.²⁴

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.

19. IDAHO CONST. art. I, § 14.

20. DONALD CROWLEY & FLORENCE HEFFRON, *THE IDAHO STATE CONSTITUTION* 8 (1994).

21. See 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 1889, at 296–98 (I.W. Hart ed., 1912); see also Kent M. Brown, Note, *Cohen v. Larson: The Idaho Constitution and the Right of Eminent Domain*, 31 IDAHO L. REV. 623, 633–34 (1995) (discussing proceedings at the Idaho Constitutional Convention).

22. See GORDON M. BAKKEN, *ROCKY MOUNTAIN CONSTITUTION MAKING 1850-1912*, at 30–32 (1987).

23. *Id.*

24. See KEITER & NEWCOMB, *supra* note 18, at 67 (discussing the importance of natural resources development in Interior West states and how that importance was reflected in state constitutions); Scheiber, *supra* note 17, at 244–45.

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.²⁵ These statutes differ significantly from the numerous statutes across the country granting condemnation authority to railroads, power companies, and other common carriers.²⁶ 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.²⁷ By contrast, the land condemned by an oil or mining company will not be subject to public access or public use and is only “public” in the sense that the resource development will add to the growth of the overall state economy.

25. See, e.g., ARIZ. REV. STAT. ANN. § 12-1111(14) (2003); COLO. REV. STAT. §§ 38-2-104 (2007), 38-1-201(1)(a) (2007); IDAHO CODE ANN. § 7-701(4) (2007); MONT. CODE. ANN. § 70-30-102(31), (44) (2007); NEV. REV. STAT. § 37.010(5), (6) (2006); N.D. CENT. CODE § 32-15-02(5), (10) (2006); OKLA. STAT. 27, § 6 (2001); S.D. CODIFIED LAWS § 45-5-1 (2004); UTAH CODE ANN. § 78-34-1(5), (6) (2007); WYO. STAT. ANN. § 1-26-815 (2007).

26. See, e.g., 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.05[3][a] (3d ed. 2007) (“Courts in every state have ruled that railroads are corporations that served the public and that eminent domain could be delegated to them to acquire rail beds.”).

27. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (discussing railroad and common carrier cases as a familiar example of a private benefit that meets the narrow definition of “use by the public” and distinguishing these cases from the economic development case before the Court). The use of eminent domain for railroads, highways, and other transportation corridors is also independently justified by the “assembly” problem. Without eminent domain authority, property owners would “hold up” the development and demand unreasonable compensation because he or she knows the project cannot be assembled without his or her parcel. See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781–82 (Mich. 2004) (holding that condemnation of private property by a railroad or other transportation company is a public use because their existence depends on overcoming assembly problems); see also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 170–75 (1985) (contending that unlike a railroad or other common carrier, simply because a resource is locked in place creating a “situational necessity” does not satisfy the demands of public use “because it places no restraint upon the mining company’s behavior and makes no provision for” distributing surplus profits from the taking); Merrill & Smith, *supra* note 4, at 1884 n.152 (noting that most opponents of economic development takings make an exception for common carriers such as railroads or public utilities because such entities provide services to the entire community, and benefits are widely distributed and are often “subject to rate regulation, which limits the gain they can obtain through the use of coerced property transactions”); Scheiber, *supra* note 17, at 237 (stating that if railroad, bridge, and canal companies had lacked the power of eminent domain “they would have been left at the mercy of any individual landowner disposed to be stubborn or extortionate”).

Likewise, natural resource takings provisions differ significantly from statutes in other states granting private parties the right to condemn easements or rights-of-way of necessity to facilitate ingress and egress of people or goods.²⁸ Instead, the condemnation authority granted to natural resource development companies in the Interior West included the power to take lands not only for ingress and egress but for disposal of wastewater, creation of reservoirs, and placement of buildings and equipment necessary for the extraction of the natural resource.²⁹

28. Compare COLO. CONST. art. II, § 14 (granting broad condemnation authority for reservoirs, drains, flumes, and ditches for agricultural, mining, and milling purposes), with COLO. CONST. art. XVI, § 7 (granting limited condemnation authority by all persons or corporations for rights-of-way across public, private, and corporate lands for conveyance of water for multiple purposes). See also OR. CONST. art. I, § 18 (granting limited condemnation authority for use of roads, ways, and waterways necessary to promote transportation of raw products of mine or farm or forest or water for beneficial use); WASH. CONST. art. I, § 16 (granting limited condemnation power for private ways of necessity and for drains, flumes, and ditches for agricultural, domestic, or sanitary purposes); *Key v. Ellis*, No. 2051020, 2007 WL 1378112 (Ala. Civ. App. May 11, 2007) (discussing state statutory authorization for private owner of landlocked parcel to condemn right-of-way over neighboring property); *Cirelli v. Ent.*, 885 So. 2d 423 (Fla. Dist. Ct. App. 2004) (discussing statutory authorization for private party to condemn an easement by necessity over neighboring property); *Eversole v. Morgan Coal Co.*, 297 S.W.2d 51 (Ky. 1956) (affirming coal company authority to condemn right-of-way under state statute to construct a truck road to transport goods to market); *Kennedy v. Martin*, 63 P.3d 866 (Wash. Ct. App. 2003) (discussing statutory right of private party to condemn private way of necessity over neighboring property); *Foianini v. Brinton*, 855 P.2d 1238 (Wyo. 1993) (discussing statutory right for private party to condemn ditch right-of-way over neighboring property); Scheiber, *supra* note 17, at 245–46 (noting that while western courts could have relied on the fact that mining is tied to a particular resource site to justify the need for eminent domain, they relied instead on the argument that mining was a public benefit to the community, leaving the “more impressive” site necessity argument “in the back-ground”).

29. See, e.g., *Potlatch Lumber Co. v. Peterson*, 88 P. 426 (1906) (holding that the state constitution authorizes a private timber company to condemn twelve acres of property to build a reservoir); MICHELE STRAUB & MELINDA HOLLAND, A CONFLICT ASSESSMENT OF SPLIT ESTATES ISSUES AND A MODEL APPROACH TO RESOLVING CONFLICTS OVER COALBED METHANE DEVELOPMENT IN THE POWDER RIVER BASIN 7 (2003), available at <http://www.ecr.gov/pdf/CAR.pdf> (explaining that coalbed methane companies have authority under state law to condemn private lands for construction of roads, reservoirs, pumping stations, and other facilities); Landowners Association of Wyoming, What You Can Expect, <http://www.wyominglandowners.org/issues/index.php> (last visited Feb. 18, 2008) (discussing ability of coalbed methane companies to use power of eminent domain to take private hayfields and creek bottoms for discharge of wastewater); see also *supra* note 18 and accompanying text (discussing constitutional provisions).

This broad authority given to private parties for natural resource development takings illustrates the principle that eminent domain, whether undertaken by the government or a private party, is a method by which society reallocates land or other resources to promote the public interest.³⁰ Whenever eminent domain is authorized, it is a statement by a government authority that it wishes to promote the public interest through reallocation of property rights in a context where it does not trust the market to reach an optimal result.³¹ These statutes and constitutional provisions in the Interior West exist as a reflection of the desire of these states to use their property laws to promote particular forms of economic growth without interference from other private property interests.

B. Judicial Confirmation of Natural Resource Development as a Public Use

The preceding section shows the wide authority state constitutions and legislative enactments in the Interior West delegated to natural resource development interests to encourage these private interests to create economies for resource-rich states. Once this power was granted, it was up to the courts to determine how broadly to interpret these provisions when they were challenged by landowners who did not want to give up their land in the name of development. For the most part, courts in the Interior West responded to public use challenges with strong language upholding the right of private industry to exercise the power of eminent domain as a “public use” without the need for any oversight by local, county, or state political bodies (as is needed for traditional economic development takings in other states). This precedent has resulted in the absence of meaningful judicial review of natural resource development companies’ contentions that the taking of private property to support development of natural resources is for a public use. It is this lack of meaningful judicial review, even more than the ability of private parties to go directly to courts

30. See ERIC T. FREYFOGLE, NATURAL RESOURCES LAW 583 (2007) (“The power of eminent domain is essentially the power of government to reclaim land or other resources for reallocation to a new use or user, public or private.”).

31. *Id.* at 587, 605 (discussing whether to authorize private condemnations under monopoly or other market failure conditions).

to condemn land, that necessitates the statutory or constitutional reforms proposed in Part IV.

1. State Courts and Public Use on the "Frontier"

In the late nineteenth 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, these efforts were met with opposition by neighbors who challenged the statutory and constitutional authority of industry to exercise this power. Such challenges had 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.³² As shown below, the courts used strong language to support the idea that private rights of eminent domain were critical to develop the states' natural resources and economy, that such private development was a public use, and that these condemnation rights must prevail over any other private property rights that might stand in the way.

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.³³ The defendant argued that the law authorizing the taking was unconstitutional because it allowed the taking for a private use rather than a public use.³⁴ In reaching its decision, the court was forced to grapple with whether the "public use" language in the takings clause of the Nevada Constitution narrowly meant "possession, occupation or direct enjoyment by the public" or whether it broadly meant "any purpose of great public benefit, interest or advantage to

32. Most state supreme courts in the late nineteenth and early twentieth centuries analyzed state eminent domain laws solely under their state constitutions. It is not clear from the decisions why the parties challenging the takings did not also raise a challenge under the Fifth and Fourteenth Amendments to the U.S. Constitution. It may be because the Supreme Court's jurisprudence was unclear at that time whether the Fifth Amendment applied to the states, or whether litigants believed the federal constitution would be less protective of individual property rights than the state constitution. For a further discussion of the timing of the Supreme Court's application of the Fifth Amendment to the states through the Fourteenth Amendment, see *infra* note 60.

33. *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394 (1876).

34. *Id.* at 398-99.

the community.”³⁵ The court first rejected the argument that the mining company’s power of eminent domain could fit within the narrow view of public use. The court refused to find such takings akin to the private power of eminent domain to build roads, canals, railroads, or pipelines, as those latter takings were for projects that were directly used or enjoyed by the public.³⁶ Instead, the court reasoned that the statute granting the right of eminent domain for mining purposes could be sustained only if the court were to adopt the broad view of public use.³⁷

The court adopted the broad view of public use and then explained why mining met this standard. The court stated that mining is the “greatest” of the industrial pursuits in the state and that all other interests are “subservient to it.”³⁸ It declared that “[o]ur 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.”³⁹ The court stated in quite stark terms that:

Nature has denied to this state many of the advantages which other states possess; but by way of compensation to her citizens has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals.⁴⁰

This language clearly tied the state’s prosperity to natural resource development and broad authority for private industry. Consequently, if the interests of industry conflicted with private property rights, there was a clear winner in the name of public use and public benefit.⁴¹

35. *Id.* at 400.

36. *Id.* at 402.

37. *Id.*

38. *Id.* at 409.

39. *Id.*

40. *Id.* at 409–10.

41. *See also* *Hand Gold Mining Co. v. Parker*, 59 Ga. 419 (1877) (holding that gold and silver mining company had authority to condemn private property because “[g]old and silver is the constitutional currency of the country,” and produc-

The Idaho Supreme Court reached a similar decision in a 1906 case where a lumber company sought to condemn land to dam a river and store water for floating saw logs and other timber products.⁴² In upholding the company's condemnation authority, the court recognized the existence of the narrow view and the broad view of public use.⁴³ The court adopted the broad view on the theory that the framers of the state constitution "understood that a complete development of the material resources of our young state could not be made unless the power of eminent domain was made broader than it was in many of the Constitutions of the several states of the Union."⁴⁴ To hold otherwise would be "to defeat the development of the great natural advantages, resources and industrial opportunities" in Idaho and other states.⁴⁵ Specifically with regard to Idaho, the court focused on "the contour of the country, its mountain fastnesses," the arid condition of the state, and "the great difficulty of preparing and constructing means and modes of communication and transportation."⁴⁶ It was thus a "necessity" to enlarge and broaden the power of eminent domain in the state constitution.⁴⁷

These judicial sentiments have continued through more recent years. 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.⁴⁸ The issue was whether a state statute granting eminent domain authority to companies engaged in "mining" also encompassed oil and gas exploration. The court interpreted the statute broadly because the Wyoming Constitution expressly provides that private property can be taken for private development of mining and related purposes so long as just compensation is paid.⁴⁹ The court found it "plain beyond any doubt" that the purpose of the statute and the constitution "was to fa-

tion of such currency is "of vital importance to the permanent welfare and prosperity of the people of the state of Georgia, as well as the people of the United States").

42. Potlatch Lumber Co. v. Peterson, 88 P. 426 (Idaho 1906).

43. *Id.* at 431.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Coronado Oil Co. v. Grieves, 603 P.2d 406 (Wyo. 1979).

49. *Id.* at 408 (citing WYO. CONST. art. I, § 32).

cilitate the development of our state's resources."⁵⁰ 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."⁵¹ The court noted that when the constitution was adopted "the concern was one of developing the economy and settlement of the state" but in 1979, "the urgency has now become one of survival."⁵² More recent Wyoming Supreme Court decisions from 2002 and 2005 show continuing judicial approval of private takings for energy and other natural resource development.⁵³ In these cases, once it is established that the use of eminent domain is authorized by the state constitution, the court's review of public use is over.⁵⁴

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.⁵⁵ The court interpreted the statute broadly in favor of eminent domain authority for development of natural resources.⁵⁶ 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 rea-

50. *Id.* at 411.

51. *Id.*

52. *Id.*

53. See *Bridle Bit Ranch Co. v. Basin Elec. Power Coop.*, 118 P.3d 996, 1014 (Wyo. 2005) (upholding condemnation of private power line to service coalbed methane development in the area as consistent with public interest and necessity to "permit mineral estate owners to realize the full benefit of their property ownership" (quoting *Wyo. Res. Corp. v. T-Chair Land Co.*, 49 P.3d 999, 1004 (Wyo. 2002))); *Wyo. Res. Corp.*, 49 P.3d at 1003–04 (holding it is a public use under state eminent domain laws for oil and gas company to condemn access easement to reach coalbed methane wells and that the laws were established "to permit mineral owners to realize the full benefit of their property ownership" and so "land-locked property will not be rendered useless").

54. See, e.g., *Bridle Bit Ranch Co.*, 118 P.3d at 1013–14 (applying a "broad meaning" to public use and public necessity and giving great deference to private party condemnation "by virtue of the delegation of the power of eminent domain by the state to the condemnor" (quoting 1A NICHOLS ON EMINENT DOMAIN § 4.11[2], 4–191 to 4–194 (3d ed. 1998))); *Wyo. Res. Corp.*, 49 P.3d at 1001–02 (stating that the Wyoming Constitution sets forth private uses that are deemed to indirectly benefit the general public and thus such a private use "is by constitutional edict given the force and effect of a public use" (quoting *Coronado Oil Co.*, 603 P.2d at 410)).

55. *Mont. Talc Co. v. Cyprus Mines Corp.*, 748 P.2d 444 (Mont. 1987).

56. *Id.* at 447–48.

sonable way.”⁵⁷ The court found this authority justified “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.”⁵⁸ Thus, in present day Montana, as in Wyoming, once a private taking is found to be within a broadly-defined statutory or constitutional public use, there is little further role for a court in reviewing whether the exercise of the taking power is in fact in the interests of the public.⁵⁹

These decisions show both the weight placed on natural resource development during a time period when many western states were seen as barren wastelands barely fit for human habitation, and the continuing importance of natural resource development in the region. State legislatures and courts embraced the idea that the survival of these states depended on giving free rein to private industry to develop state resources for both public and private good. 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 these states were quick to find natural resource development takings were a public use for purposes of eminent domain authority. Moreover, these cases show that the courts provided limited review of private condemning authorities’ statements that takings were for a public use. The courts recognized no ability to balance the purported needs of the private condemning authorities against any countervailing economic, land use, or social concern. Indeed, the seemingly straightforward nature in which these cases were decided reveals the lack of any significant authority by the courts under state law to consider any countervailing interests in making the determination of public use.

57. *Id.* at 449 (quoting *Kip v. Davis-Daly Copper Co.*, 110 P. 237, 241 (Mont. 1910)).

58. *Id.* at 448. *But see McCabe Petroleum Corp. v. Easement & Right-of-Way*, 87 P.3d 479, 481–83 (Mont. 2004) (distinguishing *Montana Talc* and holding power of eminent domain for “mining” does not encompass exploration for oil and gas wells; plaintiff company could not condemn easement and right-of-way over ranch to allow it to drill and operate oil wells).

59. *See Mont. Talc Co.*, 748 P.2d at 447–48 (rejecting the argument that the statutorily-enumerated public uses should be strictly construed and stating that “the legislature has given to mining concerns the awesome power to condemn private property for public use in return for just compensation”).

2. Supreme Court Deference to State Public Use Determinations

By the end of the nineteenth century, the federal courts had begun conducting federal constitutional reviews of state takings cases.⁶⁰ As a result, challenges to state delegation to private entities of the power to effect natural resource development takings and other economic development takings became a matter of federal constitutional law in addition to state constitutional law. In the decisions that resulted from these challenges, the Supreme Court adopted the broad view of public use. In doing so, it gave great deference to state legislative delegations of eminent domain authority to private actors where such delegations would promote mining, milling, irrigation, and other industrial development critical to grow the states' economies and, in particular, the western frontier.⁶¹ As a result, the Court validated—as a matter of federal constitutional law—the broad view of public use that western state courts had so eloquently created as a matter of state constitutional law. Equally as important, 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.

The Court's first cases authorizing broad eminent domain authority for private industry involved various state "Mill Acts" and other private irrigation projects which had been authorized by statute as early as the late colonial era.⁶² In 1885, the Court upheld New Hampshire's Mill Act, which authorized any person to maintain a watermill and milldam upon a stream

60. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (stating that the Supreme Court began applying the Fifth Amendment to the States "at the close of the 19th century"); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1132 (Ohio 2006) (same). But see *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 158 (1896) (stating that the Fifth Amendment does not apply to the States and "applies only to the federal government"); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826 (2006) (arguing it was not until *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), that the Court applied the Fifth Amendment taking clause directly to the states and that earlier Supreme Court takings cases reviewing state condemnations were actually doing so on Fourteenth Amendment due process grounds).

61. *City of Norwood*, 853 N.E.2d at 1132–33; Nichols, *supra* note 9, at 623.

62. See *Kelo*, 545 U.S. at 511–12 (Thomas, J., dissenting) (recognizing that many states had Mill Acts at the time of the nation's founding).

and pay the owners of nearby flooded land just compensation.⁶³ The Court held that the purpose of these laws was to improve the water power of rivers for manufacturing and mechanical purposes, and that it would defer to the various state legislatures to determine whether such laws were for a public use.⁶⁴

Likewise, in 1905, in *Clark v. Nash*,⁶⁵ 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 rejected the defendant's argument that the condemnation was not for a public use because the purpose of the condemnation was to irrigate only the plaintiff's land with no common or public right to use the water.⁶⁶ 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."⁶⁷ Because the local courts were more familiar with the specific state conditions, the Court would defer to the public use determinations of the state courts and legislatures.⁶⁸

The Court quickly applied this broad reading of public use to mining and other natural resource development takings on the American frontier. In 1906, in *Strickley v. Highland Boy Gold Mining Company*,⁶⁹ Justice Holmes upheld a Utah statute that allowed a mining company to condemn a right-of-way across private property for an aerial bucket line. Once again, the Court deferred to the state determination of public use. 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.⁷⁰ As to the Court's role in reviewing that determination, Justice Holmes declared "[t]he Constitution of the United States does not require us to say that they are wrong."⁷¹

63. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885).

64. *Id.* at 19-21.

65. 198 U.S. 361 (1905).

66. *Id.* at 367-68.

67. *Id.* at 369-70.

68. *Id.*

69. 200 U.S. 527 (1906).

70. *Id.* at 531.

71. *Id.*

These Supreme Court decisions at the dawn of the twentieth 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. The next Part shows that there is a direct line from these early natural resource development cases to the current Supreme Court view that takings for economic development purposes can be a public use consistent with the Fifth Amendment.

II. *KELO* AND NATURAL RESOURCE DEVELOPMENT TAKINGS

Prior to *Kelo v. City of New London*,⁷² what constituted a public use under the Fifth and Fourteenth Amendments was far from a "hot topic." The Court had decided only two public use cases in the past forty years: *Berman v. Parker*,⁷³ in 1954, and *Hawaii Housing Authority v. Midkiff*,⁷⁴ in 1984. Although the Court had decided several cases earlier in the twentieth century,⁷⁵ none reached the level of flagship cases in constitutional law or property law. Indeed, in 1940, one commentator stated almost apologetically that the issue of public use was an important part of the law of eminent domain even though the issue "has never figured in the constitutional cases which have aroused passionate controversy, nor in those whose names are known to the lay public . . ."⁷⁶ Times have changed.

In 2005, after a more than 20-year hiatus, 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."⁷⁷ An important part of the redevelopment plan included a proposed \$300 million research facility for the pharmaceuti-

72. 545 U.S. 469 (2005).

73. 348 U.S. 26 (1954).

74. 467 U.S. 229 (1984).

75. See, e.g., *supra* Section I.B.2.

76. Nichols, *supra* note 9, at 615.

77. *Kelo*, 545 U.S. at 472.

cal 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 to the area's rejuvenation."⁷⁸ 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.⁷⁹

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."⁸⁰ In a 5-4 decision, the Court held that New London's use of eminent domain for economic development purposes was in fact a public use and was constitutional.⁸¹ Numerous courts and scholars have analyzed the *Kelo* decision and the issue of economic development takings since the time the Supreme Court agreed to hear the case.⁸² The scholarship

78. *Id.* at 473.

79. *Id.* at 475.

80. *Id.* at 477.

81. *See id.* at 484.

82. *See, e.g.,* City of Norwood v. Horney, 853 N.E.2d 1115, 1142 (Ohio 2006) (discussing *Kelo* and holding that economic benefit alone does not constitute a public use under the Ohio Constitution); Muskogee County v. Lowery, 136 P.3d 639, 651 (Okla. 2006) (discussing *Kelo* and holding that state constitution places more stringent limitations on governmental eminent domain power than the Fifth Amendment of the U.S. Constitution); Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663 (2006); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. 365 (2006); Timothy Dowling, *How to Think about Kelo after the Shouting Stops*, 38 URB. LAW. 191 (2006); Robert Dreher & John D. Echeverria, *Kelo's Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development*, Georgetown Envtl. Law & Policy Inst. Report, at 11, 14 (2006), available at http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf; Richard Epstein, *Kelo: An American Original*, 8 GREEN BAG 2D 355 (2005); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957 (2004); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006); Douglas W. Kmiec, *Eminent Domain Post-Kelo*, 9 U. PA. J. CONST. L. 501 (2007); Amnon Lehari & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704 (2007); Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237 (2006); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, George Mason University Law and Economics Research Paper Series, SSRN Id. 976298 (Jan. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298; Laura S. Underkuffler, *Kelo's Moral Failure*, 15 WM. & MARY BILL RTS. J. 377 (2006); Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 87 N.Y.U. L. REV. 177 (2007).

in this area has focused primarily on the implications of the case for economic development takings generally, the state statutory reform it has spawned, and whether there are other approaches to eminent domain that can be used to address the "fairness" problem that arises when private property is taken from one party and given to another in the name of economic development.⁸³

The treatment of *Kelo* here, by contrast, looks at how the case builds on natural resource development takings cases to reach its decision. In *Kelo*, Justice 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 public."⁸⁴ In support of that proposition, Justice Stevens cited and discussed in detail *Strickley v. Highland Boy Gold Mining Company*⁸⁵ (mining company condemnation of property for an aerial bucket line), *Dayton Gold & Silver Mining Co. v. Seawell*⁸⁶ (mining company condemnation for a road), and the Mill Act cases (allowing private parties to flood upstream land to create dams and power for manufacturing).⁸⁷

After considering the Court's most recent public use authority (i.e., *Berman v. Parker*⁸⁸ and *Hawaii Housing Authority v. Midkiff*⁸⁹), Justice Stevens returned to the natural resource development cases.⁹⁰ He refused to adopt a bright-line rule rejecting economic development as a public use or even to apply heightened scrutiny to such takings.⁹¹ Instead, he declared that "[p]romoting 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 that we have recognized."⁹² The other public purposes to which Justice Stevens referred, of course, related to natural resource development. The Court, in upholding such

83. See, e.g., articles cited *supra* note 82.

84. *Kelo*, 545 U.S. at 479.

85. 200 U.S. 527, 531 (1906).

86. 11 Nev. 394, 1876 WL 4573, *11 (Nev. Oct. 1876).

87. See *Kelo*, 545 U.S. at 479–80 nn.7–8.

88. 348 U.S. 26 (1954).

89. 467 U.S. 229 (1984).

90. *Kelo*, 545 U.S. at 483.

91. See *id.* at 482–484.

92. *Id.* at 484.

takings, "emphasized the importance of those industries to the welfare of the States in question."⁹³

Based on this authority, the Court declined to "second-guess" the City's judgment about the efficacy of its redevelopment plan and its determination of public need.⁹⁴ Such deference draws on the Court's decisions from one hundred years ago that granted the same deference to local decision-makers with regard to the best way to develop state resources to promote the state's economy.⁹⁵ Consistent with this focus on local determination of local needs, the Court "emphasized" that nothing in the opinion precluded any state from "placing further restrictions on its exercise of the takings power" and that many states had already done so through their own statutory or constitutional law.⁹⁶

The *Kelo* decision included a concurrence and two separate dissents.⁹⁷ 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 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."⁹⁸

Justice O'Connor did not cite the natural resource development takings cases in her dissent but Justice Thomas did in his. In tracking the Court's public use decisions from the late nineteenth and early twentieth centuries, he focused on when and how the Court had shifted from a "use by the public" definition of "public use" to the current, broader standard of "public purpose."⁹⁹ In his view, the irrigation and Mill Act cases came

93. *Id.*

94. *Id.* at 488-89.

95. *Id.* at 482-83, 483 n.11 ("[O]ur jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances." (citing, e.g., *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598 (1908) (public use determination for rail spur); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (allowing mining company to condemn private property for aerial lines between mines))).

96. *Id.* at 489.

97. See *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring); *id.* at 494 (O'Connor, J., dissenting); *id.* at 506 (Thomas, J., dissenting).

98. *Id.* at 503 (O'Connor, J., dissenting).

99. *Id.* at 512-16 (Thomas, J., dissenting).

within the true definition of “public use” because the public had a right to use the water these projects produced.¹⁰⁰ Many of these irrigation and Mill Act decisions, however, used the “public purpose” language in dicta and that language was picked up in the subsequent Court decisions involving mining company condemnations that Justice Stevens relied upon in his majority opinion.¹⁰¹ According to Justice Thomas, the Court’s cases then “quickly incorporated” the public purpose standard set forth in the mining cases “by barren citation.”¹⁰² Under this view of the precedent, the broad “public purpose” test that supported the economic development takings allowed in *Kelo* rests on a line of natural resource development takings cases that strayed from the true meaning of “public use.”¹⁰³

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.¹⁰⁴ 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.¹⁰⁵ The focus of much of this legislation, not surprisingly,

100. *Id.*

101. *Id.* at 515–16 (citing *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906); *Clark v. Nash*, 198 U.S. 361 (1905)).

102. *Id.* at 516–17.

103. *See id.* at 515–17.

104. *See Muskogee County v. Lowery*, 136 P.3d 639, 651–52 (Okla. 2006); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1140–41 (Ohio 2006). Just prior to *Kelo*, the Michigan Supreme Court reached a similar conclusion. *See County of Wayne v. Hathcock*, 684 N.W.2d 765, 786–88 (Mich. 2004). These recent decisions follow earlier rulings in Arizona, Arkansas, Illinois, South Carolina, and Maine interpreting their state constitutions to hold that economic development alone is not a public use. *See Muskogee County*, 136 P.3d at 651 n.20 (collecting cases).

105. *See Somin, supra* note 82, at 14–35 (summarizing state legislation throughout the country but arguing that most of the newly enacted laws will result in few meaningful restrictions on economic development takings); CASTLE COALITION, 50 STATE REPORT CARD: EMINENT DOMAIN REFORM LEGISLATION SINCE KELO (2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf (summarizing eminent domain reform in the states since *Kelo*) [hereinafter 50 STATE REPORT CARD]. The National Conference of State

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, forty-two states had enacted post-*Kelo* reforms, some of which limited significantly the ability of state or local governments to engage in the type of economic development takings the Court found constitutional in *Kelo*.¹⁰⁶

These 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.¹⁰⁷ 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.¹⁰⁸ These interests groups, as well as 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." Such 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

Legislatures website also tracks eminent domain reform legislation throughout the country. See National Conference of State Legislatures, <http://www.ncsl.org/programs/natres/emindomain.htm> (last visited Feb. 27, 2008).

106. See, e.g., Castle Coalition, 50 State Report Card, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=57 (last visited May 6, 2008) (noting that as of 2007, forty-two states had passed new eminent domain reform laws since the *Kelo* decision); National Conference of State Legislatures, *supra* note 105 (summarizing state legislation enacted from 2005–2007); see also 50 STATE REPORT CARD, *supra* note 105.

107. See Somin, *supra* note 82, at 13; Institute for Justice: Litigating for Liberty, <http://www.ij.org> (last visited Feb. 27, 2008).

108. See Castle Coalition, About Us, <http://www.castlecoalition.org/profile/index.html> (last visited Feb. 27, 2008).

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.¹⁰⁹ The report concludes that none of these 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.¹¹⁰ 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.¹¹¹

Moreover, recent efforts in many states to limit the government’s power of eminent domain have resulted in 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.¹¹² Even 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.¹¹³ This

109. See DANA BERLINER, INSTITUTE FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 217 (Apr. 2003).

110. *Id.* To its credit, the more recent Castle Coalition report on eminent domain reform does at least raise concerns regarding the existence of private takings in Idaho and Wyoming. See 50 STATE REPORT CARD, *supra* note 105, at 16, 54.

111. See *supra* notes 18, 25, 48–54 and accompanying text (discussing authority for natural resource development takings in Wyoming contained in the state constitution, statutes, and judicial decisions).

112. See, e.g., IDAHO CODE ANN. § 7-701(a) (2006); 50 STATE REPORT CARD, *supra* note 105, at 16 (noting that Idaho Proposition 2 on eminent domain failed to pass in November 2006); JOHN D. ECHEVERRIA, GEORGETOWN ENVTL. LAW & POLICY INST., ALL OVER THE MAP: THE DIVERSITY OF 2006 STATE BALLOT MEASURES ADDRESSING EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT 4–5 (2007).

113. See, e.g., 16 U.S.C. § 824p(a), (e)(1) (Supp. V 2005) (creating private right of eminent domain for electronic transmission facility pursuant to federally-authorized construction permit in a designated “national interest electric transmission corridor”); 15 U.S.C. § 717f(h) (2000) (creating private right of eminent domain to construct and operate natural gas pipeline where government has granted pipeline operator a “certificate of public convenience and necessity”); East

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."¹¹⁴

By focusing only on government takings and ignoring private takings, legislators and interest groups have improperly framed the issue 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.¹¹⁵ 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. 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. Thus, Part III considers the nature of eminent domain reform in the Interior West and shows that the *Kelo* backlash in some of these states has not focused exclusively on prohibiting or significantly limiting economic development takings, but instead has attempted broader reforms that also encompass natural resource development takings.

III. TRANSITIONS IN NATURAL RESOURCE DEVELOPMENT AND PROPERTY RIGHTS ON THE FRONTIER

A review of eminent domain and property rights reform in the Interior West reveals that while there has not been a fron-

Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 822–23 (4th Cir. 2004) (discussing process by which natural gas company obtains a certificate of public convenience and necessity under the Natural Gas Act and acquires rights of eminent domain pursuant to that certificate); Jim Behnke & Harold Dondis, *The Sage Approach to Immediate Entry by Private Entities Exercising Federal Eminent Domain Authority Under the Natural Gas Act and the Federal Power Act*, 27 ENERGY L.J. 499, 501–07 (2006) (discussing sources of statutory authority for eminent domain by private parties).

114. See ECHEVERRIA, *supra* note 112.

115. See FREYFOGLE, *supra* note 30 and accompanying text.

tal attack on natural resource development takings, subtle reforms have in fact taken place. These reforms can be seen as part of a broader reconsideration of the role of natural resource development in the Interior West, as these 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.¹¹⁶

This Part explores the continuing economic and identity-shaping role of natural resource development on the "Frontier." It then focuses on judicial and legislative property reforms within the Interior West that in part flow from *Kelo* but in some cases are more tailored to the issues and needs of the Interior West. As proposed below, however, states should go further and consider reforms that address directly the per se public use designation for natural resource development.

A. *The Role of Natural Resources in the Identity of the New West*

Historians have long struggled with the term "Frontier" and how to define it. Fredrick Jackson Turner described the Frontier as "the process of evolution in each western area reached in the process of expansion" and "the meeting point between savagery and civilization."¹¹⁷ Modern-day historians, many of whom have rejected Turner's approach, continue to struggle with a term that "has become a metaphor for promise, progress and ingenuity" but continues to elude precise definition.¹¹⁸ When Turner delivered his famous 1893 essay, *The*

116. See, e.g., *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 531 (1906) (deferring to state determination that public welfare requires eminent domain power to promote mineral development); *Clark v. Nash*, 198 U.S. 361, 370 (1905) ("This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated.").

117. FREDRICK JACKSON TURNER, *The Significance of the Frontier in American History*, in *THE FRONTIER IN AMERICAN HISTORY* 1, 2-3 (1920).

118. See DAVID M. WROBEL, *THE END OF AMERICAN EXCEPTIONALISM: FRONTIER ANXIETY FROM THE OLD WEST TO THE NEW DEAL* 145 (1993); see also Patricia Nelson Limerick, *The Adventures of the Frontier in the Twentieth Cen-*

Significance of the Frontier in American History, he declared that, as of that date, the American Frontier had "closed."¹¹⁹ As Patricia Nelson Limerick and others have argued, however, if one accepts the idea that the Frontier closed in the 1890s, one misses the important economic and cultural developments that have created and continue to create western identities since the beginning of the twentieth century.¹²⁰ These "frontier" developments include copper, coal, petroleum, moviemaking, skiing, defense spending, fishing, and tourism.¹²¹ This section discusses the importance of the natural resource extraction industry in shaping those states that make up the Interior West and its continuing role today.

The Interior West has always served a distinctive regional role that includes its "long-term involvement with the boom/bust economies of extractive industries" as well as "the commercial, intentional mythologizing of the West as a place of romantic escape and adventure."¹²² Its "dramatic and distinctive landscapes" along with its dependence on a natural resource economy have resulted in an identity tied more closely to physical land and natural resource development than in other parts of the country.¹²³

Natural resource development remains an important economic driver in many states in the region. For example, Wyoming mines produce over twenty-seven million tons of coal per year and the state is home to the ten largest coal mines in the

ture, in *THE FRONTIER IN AMERICAN CULTURE* 67, 67–80 (James R. Grossman ed., 1994) (describing historians' perpetual struggle with the idea of the "frontier").

119. See TURNER, *supra* note 117, at 1, 38 ("And now, four centuries from the discovery of America, at the end of a hundred years of life under the Constitution, the frontier has gone, and with its going has closed the first period of American history.").

120. See Limerick, *supra* note 118, at 75; see also ROBERT V. HINE & JOHN MACK FARAGHER, *THE AMERICAN WEST: A NEW INTERPRETIVE HISTORY* 494 (2000) (discussing problems with Turner's notion of a "closed frontier," noting that more land west of the Mississippi was taken up in the years after 1890 than before, and that "[a] century later, the West has yet to fill up."); PATRICIA NELSON LIMERICK, *SOMETHING IN THE SOIL: LEGACIES AND RECKONINGS IN THE NEW WEST* 19 (2000) [hereinafter LIMERICK, *SOMETHING IN THE SOIL*] ("A number of extractive industries—timber, oil, coal, and uranium—went through their principal booms and busts after 1890. If one went solely by the numbers, the nineteenth-century westward movement was the tiny, quiet prelude to the much more sizable movement of people into the West in the twentieth century.").

121. HINE & FARAGHER, *supra* note 120, at 555; Limerick, *supra* note 118, at 75.

122. See LIMERICK, *SOMETHING IN THE SOIL*, *supra* note 120, at 25.

123. See *id.* at 102–03.

United States.¹²⁴ In recent years, Wyoming has also benefited economically from the development of coalbed methane as an energy source, resulting in over \$257 million in tax and royalty income to the state and its counties in 2003.¹²⁵ Indeed, over fifty percent of all tax revenues in Wyoming come from the mineral and energy industries, with tourism at fourteen percent and agriculture at two percent.¹²⁶ Other states in the region also rely on natural resources—New Mexico is the second-largest producer of crude oil in the West, followed by Wyoming, Colorado, Montana and Utah.¹²⁷ The Intermountain West is also home to over forty percent of the potential natural gas reserves in the country, and produces nearly twenty percent of the nation's natural gas.¹²⁸

Unlike the early 1900s, however, energy is not the only booming industry in town. Rather, recreation, tourism, fishing, and hunting now represent major economic drivers in the Interior West. In Montana, for instance, nonresident travel increased thirty percent from 1991 to 2002, topping 9.8 million travelers, more than ten times Montana's resident population.¹²⁹ In 2003, visitors to Montana spent \$1.86 billion, and created a total economic impact of \$2.75 billion.¹³⁰ Indeed, hunting, angling, and related industries alone added \$3 billion in 2001 to the combined economies of Arizona, Idaho, New Mexico, Montana, Utah, and Wyoming.¹³¹ Unlike Wyoming,

124. See PATRICIA NELSON LIMERICK ET AL., CTR. OF THE AM. WEST, WHAT EVERY WESTERNER SHOULD KNOW ABOUT ENERGY 10 (2003) [hereinafter LIMERICK ET AL., WHAT EVERY WESTERNER SHOULD KNOW].

125. See RUCKELSHAUS INST. OF ENV'T AND NATURAL RES., WATER PRODUCTION FROM COALBED METHANE DEVELOPMENT IN WYOMING: A SUMMARY OF QUANTITY, QUALITY AND MANAGEMENT OPTIONS 8-9 (2005), <http://www.uwyo.edu/enr/ienr/CBMWaterFinalReportDec2005.pdf>.

126. See PATRICIA NELSON LIMERICK ET AL., CTR. OF THE AM. WEST, BOOM AND BUST IN THE AMERICAN WEST 4 (2002), <http://www.centerwest.org/publications/pdf/boombust.pdf>. The oil and gas industry as a whole paid Wyoming government entities about \$1.5 billion in total taxes, royalties, and lease payments. Payments to New Mexico totaled \$1.8 billion. See Ray Ring, *Gold from the Gas Fields*, HIGH COUNTRY NEWS, Nov. 28, 2005, at 8, 9, 11.

127. LIMERICK ET AL., WHAT EVERY WESTERNER SHOULD KNOW, *supra* note 124, at 10.

128. *Id.* at 11.

129. Montana Fish, Wildlife & Parks, Montana Tourism and the Role of Fish and Wildlife, <http://fwp.mt.gov/tmc/reports/tourism.html> (last visited Feb. 16, 2008).

130. *Id.*

131. SONORAN INST., YOU'VE COME A LONG WAY, COWBOY: TEN TRUTHS & TRENDS IN THE NEW AMERICAN WEST 6 (2006), <http://sonoran.org/index.php?>

where natural resources and mining continued to employ nearly ten percent of the population in 2005,¹³² extraction industries employed between only one and five percent of the population in Montana,¹³³ Colorado,¹³⁴ and New Mexico.¹³⁵

Thus, many parts of the region have undergone an economic and cultural transition from what was once an extractive economy to one now based heavily on preservation, recreation, services, and trade. As economists Thomas Power and Richard Barrett have stated, “[h]owever large the natural resources industries may still loom in the American imagination as symbols of the Old West, in the economy of the New West their economic stature has been sharply diminished.”¹³⁶ As a result, there exists a “Western Paradox” in the region that consists of an intense belief in the industry, technology, and extractive economy of the past along with a similarly intense devotion to nature, open space, solitude, and preservation.¹³⁷

Recent legislative developments in allocating property rights show a trend toward reassessing the role of natural resource development in these states and a new focus on balancing surface use and mineral extraction. Such reforms show the law “catching up,” albeit in subtle ways, with the economic and cultural changes that have been taking place in the West for decades. The public reaction to *Kelo* is national in scope. Nevertheless, it has brought about certain reforms in the Interior West that are tailored to the economics and culture of the region. In this way, the law of eminent domain continues to be sensitive to “the difference of climate and soil, which render

option=com_content&task=view&id=155&Itemid=204 (follow “Download PDF” hyperlink).

132. HEADWATERS ECONOMICS, A SOCIOECONOMIC PROFILE: WYOMING 32 (2007), http://www.headwaterseconomics.org/profiles/p_Wyoming.pdf.

133. HEADWATERS ECONOMICS, A SOCIOECONOMIC PROFILE: MONTANA 32 (2007), http://www.headwaterseconomics.org/profiles/p_Montana.pdf.

134. HEADWATERS ECONOMICS, A SOCIOECONOMIC PROFILE: COLORADO 32 (2007), http://www.headwaterseconomics.org/profiles/p_Colorado.pdf.

135. HEADWATERS ECONOMICS: A SOCIOECONOMIC PROFILE: NEW MEXICO 32 (2007), http://www.headwaterseconomics.org/profiles/p_New_Mexico.pdf.

136. THOMAS MICHAEL POWER & RICHARD N. BARRETT, POST-COWBOY ECONOMICS 55 (2001); see also WILLIAM R. TRAVIS, NEW GEOGRAPHIES OF THE AMERICAN WEST 3 (2007) (stating that for some time now, the development occurring in the Interior West “has had little to do with natural resource extraction” and instead is based more on information technology, light manufacturing, tourism, and retirement).

137. See DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 82–92 (1992).

necessary these different laws in the States so situated.”¹³⁸ The following sections explore recent reforms and consider their broader implications for the role of eminent domain in society.

B. Eminent Domain Reform on the Frontier

This section looks at recent statutory reforms in states that grant eminent domain authority to private entities for natural resource development to determine if the reforms focus solely on economic development takings by state and local governments or also address natural resource development takings. Although these states share a common history, they have followed very different social and economic paths in recent years and thus now face different land use, economic, and resource challenges.

For instance, Arizona, Colorado, Idaho, Utah, and Nevada had the largest percentage population growth in the country between 1990 and 2000, bringing with it significant urban development.¹³⁹ In other states in the Interior West such as Wyoming, however, population growth and urban development have been much more modest, natural resources development remains a significant part of the economy, and, not surprisingly, *Kelo*-type economic development takings are rare to non-existent.¹⁴⁰ Appropriately then, Wyoming’s 2007 eminent domain reform appears to be tied to growing tensions in the state between mineral development companies and surface owners, rather than between local governments and homeowners. In

138. *Clark v. Nash*, 198 U.S. 361, 370 (1905).

139. See CensusScope, States Ranked by Population Growth 1990–2000, http://www.censuscope.org/us/rank_popl_growth.html (last visited Feb. 16, 2008) (showing Nevada, Arizona, Colorado, Utah, and Idaho ranked 1–5 in percentage population growth from 1990–2000 and growth rates ranging from 28.53% to 66.27%).

140. See Somin, *supra* note 82, at 13 (showing no “private-to-private condemnations” from 1998–2002 in Idaho, South Dakota, or Wyoming, and only one such taking in North Dakota); CensusScope, *supra* note 139 (showing Wyoming, South Dakota and North Dakota in the bottom tier of states in terms of population growth from 1990–2000). It should be noted, however, the numbers from the Somin article were based on an Institute for Justice Study, which did not break out economic development takings from other “private-to-private” condemnations and also did not appear to include takings for natural resource development purposes. See Somin, *supra* note 82, at 12–15 (explaining data limitations of study). See generally BERLINER, *supra* note 109 (providing state-by-state data on eminent domain “abuse”).

recent years, technology has enabled oil and gas companies to begin developing the estimated thirty trillion cubic feet of coalbed methane ("CBM") gas that underlies the Powder River Basin in eastern Wyoming and Montana.¹⁴¹ There are over 15,000 CBM wells operating in the Powder River Basin with 20,000 to 50,000 more expected in the next ten years.¹⁴²

CBM development has created new conflicts for ranchers and other property owners because in order to release the methane gas, it is necessary to discharge millions of gallons of groundwater into surface streams and ditches. This water, which is quite saline, can interfere with surface owners' use of their lands and harm crops, hayfields, and other ranchlands.¹⁴³ In Wyoming, private oil and gas companies can exercise eminent domain authority to take private property to access these resources, including taking land for drilling, production, reservoirs, drains, ditches, and other means of discharging waters.¹⁴⁴ Moreover, Wyoming currently has no limit on the quantity of water that can be discharged, resulting in a situation where surface owners feel that there is nothing to stop developers from taking whatever private property they need to

141. See KRISTIN KEITH ET AL., MONTANA STATE UNIV.-BOZEMAN, FREQUENTLY ASKED QUESTIONS: COAL BED METHANE 2 (2003), <http://waterquality.montana.edu/docs/methane/cbmfaq.pdf>.

142. See RUCKELSHAUS INST. OF ENV'T AND NATURAL RES., *supra* note 125, at 5-6; J. Benjamin Winburn, Comment, *The Coalbed Methane Boom: The Push for Energy Independence Raises Questions About Water and the Rights of American Homesteaders*, 19 TUL. ENV. L.J. 359, 364 (2006) (noting "CBM methane production in the United States has skyrocketed in the past decade" and the Bureau of Land Management "forecasts an estimated 51,000 CBM wells in the [Powder River Basin] over the next 10 years" (internal quotation omitted)); Environmental Working Group, *Who Owns the West: Oil and Gas Leases* (Aug. 24, 2004), www.ewg.org/oil_and_gas/part9.php.

143. See, e.g., Gary C. Bryner, *Coalbed Methane Development: The Costs and Benefits of an Emerging Energy Resource*, 43 NAT. RESOURCES J. 519, 533-41 (2003) (discussing the environmental impacts of coalbed methane development); Winburn, *supra* note 142, at 370-72 (discussing controversies over production of water from coalbed methane wells); Samantha Bohrmann, Comment, *Groundwater Conservation and Coalbed Methane Development in the Powder River Basin*, 24 LAW & INEQ. 181, 187-88 (2006) (discussing the impact of coalbed methane gas extraction on surface water, irrigated crops, and groundwater).

144. See WYO. CONST. art. I, § 32; WYO. STAT. ANN. § 1-26-815 (2007); *Wyoming Resources Corp. v. T-Chair Land Co.*, 49 P.3d 999, 1003-04 (Wyo. 2002) (holding private mineral developer had right under state law to condemn private lands for roads and water discharge associated with CBM development); see also *supra* notes 18 & 25 and accompanying text.

extract the gas and reap significant profits at the expense of private property owners.¹⁴⁵

This state of affairs led Wyoming to pass 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 of easements and other property interests to help define fair market value.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ 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

145. See Tripp Baltz, *Wyoming Government Rejects Rules on Water Produced by Coal Bed Methane Operations*, BNA DAILY ENV'T REP., Apr. 25, 2007, at A-10.

146. See 2007 Wyo. Sess. Laws 139 (codified in scattered sections of WYO. STAT. ANN. titles 1, 15, 16); see also Annie O'Brien, *Governor Signs New Eminent Domain Bill*, PINEDALE ROUNDUP, Mar. 9, 2007, available at http://www.pinedaleroundup.com/fe_view_article_window.php?story_id=222&page_id=72&heading=0 (discussing provisions of the 2007 eminent domain reform law in Wyoming).

147. See WYO. STAT. ANN. § 1-26-801(c) (2007).

148. Landowners Association of Wyoming, *Frequently Asked Questions*, <http://web.archive.org/web/20070531064702/www.wyominglandowners.org/faqs/index.php> (last visited Feb. 16, 2008).

discharge, gas pipelines, and other natural resource development takings.¹⁴⁹

The Landowners Association of Wyoming uses these examples not to advocate for eliminating natural resource development takings, but to argue for greater procedural protections and just compensation.¹⁵⁰ The group specifically points to Wyoming's "tremendous burst in economic activity" as "causing an increase in the number of eminent domain [actions] by private entities"¹⁵¹ It then states that the "heightened public attention caused by *Kelo*" allows the state legislature to re-evaluate the state's eminent domain law "to facilitate economic growth all-the-while providing adequate protection of private property rights."¹⁵² 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.¹⁵³ While they may be safe from *Kelo*-type urban redevelopment takings, they experience regularly 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 natural resource development takings as opposed to government takings. One news article describes the burst of eminent domain reform efforts in Interior West states such as Colorado, New Mexico, and Utah and concludes that "[m]any of these reform bills stress fair compensation for landowners, protecting them against companies that could be preying on landowners without the means to fight."¹⁵⁴ A Wyoming news article declares that property owners in the state, particularly ranchers, "are demanding reform of the state's eminent domain laws to protect what they say might be a dying Western value."¹⁵⁵ After detailing landowner complaints about coalbed methane compa-

149. *See id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *See supra* note 110 and accompanying text.

154. *Eminent Domain Reform Sweeps Western States*, HEADWATERS NEWS, Feb. 26, 2007, available at http://www.newwest.net/topic/article/eminent_domain_reform_sweeps_western_states/C37/L37/.

155. Dustin Bleizeffer, *Property Power Struggle*, CASPER STAR-TRIBUNE, Jan. 1, 2007, available at <http://casperstartribune.net/articles/2007/01/01/news/wyoming/61dabdd4fe2d83cd87257255002687df.txt>.

nies abusing the power of eminent domain, the article describes the fight as one between the booming energy economy and the need for smart growth and land preservation.¹⁵⁶ Another Wyoming article describes the new state law in detail without ever mentioning the limits on government condemnation authority. Instead, it focuses exclusively on the provisions of the law that grant landowners additional rights in natural resource development takings.¹⁵⁷

The changes to eminent domain laws in these states, particularly in Wyoming, are important property rights reforms that serve to readjust the power balance between natural resource companies and landowners. Such efforts are consistent with a system of property allocation that shifts, albeit slowly, as the region's identity, economy, and values shift.

C. Related Property Reforms in the West: Surface Owner Accommodation Laws

In addition to eminent domain reform, there have been significant reforms in state common law and statutory law that have begun to realign the power balance between natural resource development companies and surface owners in the Interior West. These changes may be even more significant than the eminent domain reforms because they go to the heart of the issue of how to reallocate property interests in a region that has one foot in an extractive economy and another in an economy based on open space, recreation, and residential amenities.

Much of the land in the Interior West is in "split-estate" ownership, meaning one party owns the surface rights of the land and another party owns the subsurface and mineral rights. In Montana, for example, 90 percent of the federally-owned coalbed methane reserves are located under privately-owned surface lands.¹⁵⁸ In Wyoming, it is estimated that nearly half of privately-owned land is held in split-estate.¹⁵⁹ The creation of split-estate lands began with the Stock Raising

156. *See id.*

157. O'Brien, *supra* note 146.

158. Robert J. Duffy, *Political Mobilization, Venue Change and the Coal Bed Methane Conflict in Montana and Wyoming*, 45 NAT. RESOURCES J. 409, 414 (2005).

159. Landowners Association of Wyoming, Oil and Gas Drilling on Split Estate Lands, www.wyominglandowners.org/splitestates/index.php (last visited Feb. 16, 2008).

Homestead Act of 1916¹⁶⁰ and the Taylor Grazing Act of 1934.¹⁶¹ These laws were enacted so that the U.S. Government could convey western lands for ranching and agriculture while still retaining the right to develop the coal and other minerals underlying these lands.¹⁶² The U.S. Government has since leased or sold many of these retained mineral rights to private natural resource development companies.¹⁶³ Where land is held in split-estate, disputes between mineral rights holders and surface owners are inevitable.

Until recently, the law had been fairly settled with regard to the rights of mineral owners and surface owners. As a matter of common law, the mineral estate was the "dominant" estate and the mineral owner had the right to use that portion of the surface estate reasonably necessary to develop the severed mineral interests.¹⁶⁴ In addition, the owner of the mineral right was not liable for surface damage in the absence of negligence unless there was a contractual agreement to pay damages or a statute providing a right to damages.¹⁶⁵ Moreover, any recoverable damages often were limited to damages to "crops" and "improvements" and did not include damages to natural vegetation, non-agricultural buildings, or general loss of land value.¹⁶⁶

Starting in the 1970s, however, a few courts began to adopt forms of the "accommodation doctrine" which required mineral owners to accommodate surface owners to the fullest extent possible. This meant that if the method of developing mineral rights would preclude or impair surface uses and there were reasonable alternatives available to develop the mineral that

160. 43 U.S.C. § 291 (1970) (reserving "all minerals") (repealed 1976).

161. *Id.* § 315g(c) (reserving "all minerals to the United States") (repealed 1976).

162. See JAN G. LAITOS ET AL., NATURAL RESOURCES LAW 1040-41 (2006).

163. See generally *id.* at 990-1043 (discussing government leasing of oil, gas, coal, and other mineral rights).

164. See, e.g., *Gerrity Oil & Gas Co. v. Magness*, 946 P.2d 913, 926 (Colo. 1997) (noting mineral owner has right to reasonable use of the surface); *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736, 740 (Wyo. 1989).

165. See *EOG Resources v. Turner*, 908 So. 2d 848, 854-55 (Miss. Ct. App. 2005); *Amoco Prod. Co. v. Carter Farms*, 703 P.2d 894, 897 (N.M. 1985); see also *Wyo. Outdoor Council v. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1245-47 (D. Wyo. 2005) (recognizing that surface owners have limited ability to control the activities of drilling companies on their lands).

166. See *Gilbertz v. United States*, 808 F.2d 1374, 1380 (10th Cir. 1987) (describing the limitation of compensation for surface owners under the Stock-Raising Homestead Act).

would not preclude or impair surface uses, such alternatives must be used. Under the doctrine, any interference with surface rights that could have been avoided through reasonable alternatives constituted a trespass for which damages could be recovered.¹⁶⁷

State legislatures have now begun to adopt the accommodation doctrine by statute. For example, in 2005, Wyoming adopted the Surface Owner Accommodation Act, which provides additional protections to surface owners during oil and gas development. The law codifies the doctrine of "reasonable accommodation," requires thirty days' written notice to obtain access to private lands to begin oil and gas operations, and requires that oil and gas operators attempt to negotiate a surface agreement with landowners regarding oil and gas activities.¹⁶⁸ The law also grants landowners the right to compensation for economic loss caused by oil and gas activity, including lost land value, loss of value of improvements, and loss of production and income.¹⁶⁹ New Mexico and Colorado have followed suit and passed surface owner accommodation laws in 2007.¹⁷⁰

A news article from 2005 cites the natural gas boom as "causing tension across the American West" by pitting oil and gas companies against ranchers and other surface owners.¹⁷¹ Unlike tensions in prior decades, where energy interests tended to dominate, recent legislation shows that other interests are gaining power. In an article reporting on New Mexico's 2007 surface owner accommodation law, Governor Bill Richardson said that the law shows the state is "an energy producer with sensitivity to the land and property rights and

167. See *Gerrity Oil & Gas Co.*, 946 P.2d at 927; *Getty Oil v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971); *Trenolone v. Cook Exploration Co.*, 166 S.W.3d 495, 498-99 (Tex. App. 2005).

168. WYO. STAT. § 30-5-402 (2007).

169. See WYO. STAT. §§ 30-5-405, 406 (2007).

170. See New Mexico Surface Owner Protection Act, H.B. 827 (N.M. 2007); Colorado Accommodation of the Rights of Surface Owners with Respect to Oil and Gas Operators, H.B. 1252 (Colo. 2007). North Dakota and Montana statutory law also provide for surface owner compensatory damages resulting from oil and gas operations. See N.D. CENT. CODE § 38-11.1-04 (2006); MONT. CODE ANN. § 82-10-504 (2007). For a summary of surface owner protection laws across the country, see Earthworks, Surface Owner Protection Legislation, Equalizing the Imbalance Between Mineral and Surface Owners: The Case for Surface Owner Protection Legislation, <http://www.earthworksaaction.org/SOPLegislation.cfm>.

171. See Todd Wilkinson, *Energy Boom is Crowding Ranchers*, THE CHRISTIAN SCIENCE MONITOR, May 10, 2005, available at <http://www.csmonitor.com/2005/0510/p01s02-usju.html>.

property owners.”¹⁷² Even the president of the New Mexico Oil and Gas Association stated that “[t]his isn’t your grandfather’s oil and gas industry, and we need to demonstrate that.”¹⁷³ On its website, the Landowners Association of Wyoming describes a similar shift. In explaining “what changed” so as to necessitate the 2005 legislative reform, the group cites the accelerating impact of oil and gas activity in the state at a time when “Wyoming surface land is valued higher for its amenity values like open space, clean air and remoteness.”¹⁷⁴

So what do these new surface owner accommodation laws have to do with public use and eminent domain? I think a great deal. Development of coal, oil, gas, and other mineral resources in western states is still an important part of many of those states’ economies and is integral to their culture and history. As a result, efforts to eliminate or significantly limit authority for natural resource development takings will meet with major resistance. Surface owner accommodation laws, on the other hand, give additional bargaining power, property rights, and leverage to surface owners without creating substantial roadblocks to natural resource development.

This approach is similar to what many states have done with economic development takings and public use. Few states have abolished economic development takings entirely despite strong pressure to do so.¹⁷⁵ Instead, they have increased scrutiny of such takings, provided for attorneys’ fees in cases where condemnation authority was used in bad faith, allowed for additional compensation rights, and otherwise re-set the playing field between public condemning authorities and private property owners.¹⁷⁶

172. See Deborah Baker, *Surface Protection Bill Signed into Law*, FREE NEW MEXICAN, Mar. 8, 2007, <http://www.freewmexican.com/news/58227.html>.

173. *Id.*

174. Landowners Association of Wyoming, Oil and Gas Drilling on Split Estate Lands, <http://www.wyominglandowners.org/splitestates/index.php> (last visited Feb. 21, 2008).

175. See National Conference of State Legislatures, *supra* note 105. The National Conference of State Legislatures and Castle Coalition websites provide a summary of state eminent domain reform across the country and list only Florida, North Dakota, and South Dakota as virtually eliminating economic development takings as opposed to merely placing limits on such takings. See 50 STATE REPORT CARD, *supra* note 105, (giving only Florida, North Dakota, and South Dakota an “A” for their eminent domain reform with New Mexico receiving an A-).

176. See, e.g., ARIZ. REV. STAT. ANN. § 12-1133 (2007) (requiring condemnor to provide comparable replacement dwelling or compensation necessary to purchase

In both sets of reforms, the goals are the same but there are different local problems to be addressed. In urban areas, state legislatures and courts are responding to perceived abuses by limiting government authority to use the power of eminent domain to engage in urban redevelopment projects. In less urban parts of the Interior West, particularly in Wyoming, state legislatures and courts are responding to perceived abuses by forcing both public and private condemning authorities to pay more in the way of compensation, work with surface owners, and otherwise negotiate in good faith. In each case, courts and state legislatures have attempted to tailor their reforms to the specific practices and needs of the community.

IV. LOOKING TO THE FUTURE: REFORMING NATURAL RESOURCE DEVELOPMENT TAKINGS

This is a critical time to be reflecting on property rights both in the Interior West and throughout the rest of the country. The nation as a whole is struggling with energy needs, climate change, and a host of other concerns that rest in large part on how to best use and allocate property and resources. The public reaction to *Kelo* is merely one example of the cur-

comparable dwelling when an individual's principal residence is taken); ARIZ. REV. STAT. ANN. § 12-1135 (2007) (awarding attorneys' fees when condemnation found not to be for a public use); GA. CODE ANN. § 22-1-2 (2007) (landowner may apply for re-conveyance of property or be entitled to additional compensation if condemned property is not put to a public use); IND. CODE ANN. § 32-24-1-14 (2007) (awarding landowner attorneys' fees and litigation expenses if damages awarded at trial are greater than amount specified in condemnor's settlement offer); IND. CODE ANN. § 32-24-4.5 (2007) (condemnor must pay 150% of the market value if taking a residence, 125% of the market value if taking agricultural land, and in all condemnations must pay for relocation expenses and any related loss to landowner's business or trade); MO. REV. STAT. § 523.039 (2007) (requiring condemnor to pay 125% of market value when taking a "homestead" and 150% of market value when taking property that has been utilized in the same manner and owned within the same family for 50 or more years); MO. REV. STAT. § 523.256 (2007) (condemnor must pay landowner's attorneys' fees and condemnation petition will be dismissed if condemnor fails to conduct good faith negotiations); MINN. STAT. § 117.031 (2007) (court *shall* award landowner attorneys' fees and expenses if compensation judgment is 40% greater than condemnor's last written offer prior to filing the petition or if the court determines the taking is not for a public use, and court *may* award landowner attorneys' fees and expenses if compensation judgment is at least 20% but not more than 40% greater than condemnor's last written offer); MINN. STAT. § 117.187 (2007) (condemnor must pay a landowner forced to relocate compensation sufficient to purchase comparable property in the community).

rent focus on these concerns. The *Kelo* debate, however, has focused too narrowly on government takings and so far has missed the opportunity for a broader discussion about the role of eminent domain in allocating property. This Part argues for more widespread reform of natural resource development takings based on the diverse needs of specific states or regions.

A. *Diverse Reforms for Diverse State Needs*

The issue of eminent domain and public use remains as complex and varied as it was in the early twentieth century, with different approaches needed for different geographic regions. The need for different solutions in different states 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, and others have focused on improving procedural protections for both public and private takings.¹⁷⁷ Arguably, these differences reflect the different needs of different states. For instance, it may be that the difficulty of assembling land in densely populated areas of the country such as New York and California is the reason why those states have not placed additional limits on economic development takings since *Kelo*.¹⁷⁸ 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 conse-

177. See ECHEVERRIA, *supra* note 112.

178. See Brief for American Planning Association et al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005), 2005 WL 166929 (arguing that because conditions that might justify the exercise of eminent domain vary greatly from one part of the country to another a single federal rule binding on all states is not appropriate); 50 STATE REPORT CARD, *supra* note 105 (giving a grade of “F” to New York, Connecticut, and New Jersey; a grade of “D-” to California; and a grade of “A” to North Dakota and South Dakota for eminent domain reform efforts); *The Kelo Decision: Investigating Takings of Homes and Other Private Property: S. Hearing on 109-208 Before the S. Comm. On the Judiciary*, 109th Cong. 5 (Sept. 20, 2005) (testimony of Thomas W. Merrill, Professor, Columbia University Law School) [hereinafter Merrill Testimony] (cautioning against “a prohibitory limitation on the use of eminent domain at a federal level” because problems in assembling property vary greatly from one part of the country to another based on urban density in some areas and rangeland conditions in another).

quences.¹⁷⁹ 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 past and present economics, social fabric, and resources.

Today there is passionate public rhetoric calling for a re-balancing of rights between natural resource development and landowner interests in states where natural resource development formed the states' economies and cultural identities. 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 these provisions were enacted in the early twentieth century, natural resource development was unrivaled as the economic driver for the region. Although natural resource development remains an important part of many of these states' economies, it now competes with high-tech industries, recreational tourism, preservation needs, and residential development in shaping the future of the region.¹⁸⁰ In light of this 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 these 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 those governmental bodies to give the interests of industry sufficient weight over individual property interests that might act as obstacles to economic progress.¹⁸¹ Now, however, perhaps what is needed is the creation of a political forum to weigh the state's interest in natural resource development against the interests

179. Douglas W. Kmiec, *The 2006 Templeton Lecture Proceedings: Eminent Domain Post-Kelo*, 9 U. PA. J. CONST. L. 501, 528 (2007) (comments of Thomas Merrill, stating that South Dakota can easily enact legislation restricting the use of eminent domain for any but "traditional public uses" because "there's a lot of empty land in South Dakota and you don't really need to use eminent domain . . . to assemble parcels of land to do much of anything" but that it is a very different situation in urban areas on the East Coast).

180. See TRAVIS, *supra* note 136, at 3 (stating that most of the development occurring in the West, including the Interior West, has little to do with natural resource extraction and that "[a]n economically diverse postindustrial regime of services, information technology, light manufacturing, tourism, and retirement now drives growth.").

181. See *supra* notes 18–24 and accompanying text.

not only of individual property owners but also of competing economic, environmental, and social drivers.

Municipal, county, or other local governmental entities in each of these states could serve that purpose. Under such a system, when a natural resource development company wished to exercise the power of eminent domain, it would make its case to the designated city, county, or other local governmental entity as to why the taking was for a public use and would bear the burden of proof on that issue. In the public proceeding that followed, 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 was not for a public use. The decision-maker 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 would then be subject to judicial review, with deference to the decision-making body.

This proposal is not unique, in that it resembles the process that exists or is being adopted in many states for when governmental authorities exercise the power of eminent domain for economic development takings. Under that process, the governmental entity makes its own political decision after a public hearing on the question of whether a taking is for a public use.¹⁸² It then seeks judicial approval of the taking, at which time the court reviews whether or not the taking is for a public use.¹⁸³ In this way, there is a political determination of public use followed by judicial review of that determination. Even in *Kelo*, for instance, there were numerous studies, public hearings, environmental and social reviews, and alternatives analyses before New London granted its non-profit development arm authority to exercise eminent domain in its name to

182. See, e.g., *Housing and Redev. Auth. v. Richfield*, 630 N.W.2d 662 (Minn. Ct. App. 2001) (discussing statutory requirements for local government to take private property for economic development as a "public purpose" and judicial review of local government finding); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 31–33 (2006) (describing government takings as subject to public accountability and requiring various regulatory approvals).

183. See *supra* note 182 and accompanying text; *infra* note 184 and accompanying text.

acquire the necessary property.¹⁸⁴ Indeed, Justice Stevens's majority opinion and Justice Kennedy's concurrence relied heavily on New London's public process and detailed record of decision in affirming New London's determination of public use.¹⁸⁵ As Nicole Garnett has noted, the Court's emphasis on the planning process in *Kelo* may result in a greater focus on this issue in future cases.¹⁸⁶ It is likely that state and local governments will come to rely more heavily on the planning process to better insulate themselves from constitutional challenges by landowners and, likewise, courts may more closely scrutinize government claims of "public use" that take place outside a public planning process.¹⁸⁷

The review, public comment, and creation of a reviewable administrative record in *Kelo* exemplifies a public process that simply does not exist for many natural resource development takings today. Instead, in the Interior West, a natural resources development company can go directly to court to obtain property by eminent domain. Such companies thus bypass any political determination of public use, and often have no constitutional or statutory obligation to create any administrative record that allows for meaningful judicial review.¹⁸⁸ Because natural resource extraction is a per se public use, private natural resource companies avoid any political balancing of competing interests. Governmental entities, by contrast, must go through a comprehensive process prior to exercising condemnation authority for economic development purposes. While this broad authority for private industry may have made sense at the dawn of the twentieth century, it is not as clear that every natural development taking is always a "public use" today

184. See *Kelo v. City of New London*, 545 U.S. 469, 473–74 (2005).

185. See *id.* at 483–84 (focusing on "the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of [the Court's] review" in finding that the taking satisfied the public use requirement of the Fifth Amendment); *id.* at 493 (Kennedy, J., concurring) (stating that "[t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes.").

186. See Nicole Stelle Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 454 (2007).

187. *Id.* See also 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129–31 (C.D. Cal. 2001) (holding that city's proposed taking was not for a "public use" because city failed to justify its blight designation and the need for the taking in its public hearings and proceedings prior to filing the condemnation lawsuit).

188. See *supra* notes 18–24 and accompanying text.

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.¹⁸⁹ While these 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.¹⁹⁰ 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.¹⁹¹

B. Eminent Domain Reform Proposals for the Interior West

In states that do attempt to undertake such reforms, there are some helpful models to follow. Since the *Kelo* decision, many states have enacted laws focused not only on limiting economic development takings but also on strengthening the procedural aspects of condemnation proceedings. These additional procedures include providing greater public notice, providing more public hearings, requiring good-faith negotiation with property owners, and requiring elected bodies to approve

189. See *id.*

190. See 50 STATE REPORT CARD, *supra* note 105.

191. See *supra* notes 7–16 and accompanying text (discussing judicial decisions in the late nineteenth and early twentieth centuries outside of the Interior West that considered whether to uphold legislation allowing natural resource development interests to take private property for roads, tramways, and other projects that would enhance resource production).

all proposed condemnations.¹⁹² For instance, Utah has amended its eminent domain statute to require the legislative body of the relevant city, county, or town to approve each taking, and to require that prior to each expected vote of that body, every owner of property subject to condemnation will receive written notice of the meeting and be provided an opportunity to be heard.¹⁹³ Moreover, any person who seeks to acquire property by eminent domain must make a reasonable effort to negotiate with the property owner for the purchase of that property and advise the property owner of his or her rights to mediation and arbitration.¹⁹⁴ Colorado law now states that the condemning authority must prove by a preponderance of the evidence that the taking is for a public use and, for economic development takings, must meet its burden of proof by "clear and convincing evidence."¹⁹⁵ Delaware law now requires that property can only be condemned for a "public use" if, six months in advance of the initiation of condemnation proceedings, the condemning authority establishes the taking is for a public use through a planning document, a public hearing on acquisition of the property, or in a public report by the agency.¹⁹⁶

These types of procedural reforms do not prohibit condemning authorities from obtaining land in connection with economic development and other takings, but do create a more public process in which to debate the merits of the taking and place a higher burden on the condemning authority to justify the taking. Indeed, many of these reforms may seem obvious in today's administrative state where notice, hearings, public comment, and the creation of an administrative record have been integral parts of federal and state agency decision-making

192. See, e.g., Patricia Salkin, *Eminent Domain Legislation Post-Kelo: A State of the States*, 36 ENVTL. L. REP. 10864, 10865 (Nov. 2006) (discussing state reforms); ECHEVERRIA, *supra* note 112 (describing the approaches states have taken to eminent domain reform since *Kelo*); U.S. GOVERNMENTAL ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 40-41 (Nov. 2006) (stating that after the *Kelo* decision, twenty-four states changed their eminent domain procedures or added new requirements and discussing the details of some of these new state procedures).

193. See UTAH CODE ANN. § 78-34-4 (2007).

194. See UTAH CODE ANN. § 78-34-4.5 (2007).

195. See COLO. REV. STAT. § 38-1-101(2)(b) (2007).

196. See DEL. CODE ANN. tit. 29, § 9505(15) (2005).

for decades.¹⁹⁷ In the Interior West, even more than in the rest of the country, the ability of a private party to go directly to court to condemn property with no prior public forum on the taking, no elected body making the decision, and no real judicial review seems inconsistent with the idea that such takings are “for a public use” or in the interests of the public at all. Creating a public forum to debate what is actually in the public’s interest makes sense in a time and place where natural resource development no longer completely dominates these states’ economies or cultures.

Some scholars have suggested that state and local governments should move beyond eminent domain reform and adopt a review process for public use decisions similar to that contained in the National Environmental Policy Act (“NEPA”) or the many state environmental review statutes modeled on NEPA.¹⁹⁸ Under most state environmental review statutes, the state agency proposing a public project—or considering approval of a permit for a private project—with potential environmental impacts must conduct a review of those impacts prior to authorizing the project or granting the permit.¹⁹⁹ This

197. See Merrill Testimony, *supra* note 178, at 7 (observing that most states’ eminent domain procedures were adopted in the nineteenth century “and have scarcely been modified since”).

198. See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (“NEPA”) (2000); Merrill Testimony, *supra* note 178, at 7 (proposing that governments adopt a NEPA-type process to all exercises of eminent domain and that such a process “requiring open, public, participatory inquiries into the need for the exercise of eminent domain would . . . provide better protection for property owners . . . [and] allow the real objections to the project to come to the fore, would create a mechanism for identifying way [sic] to proceed that would involve less or no use of eminent domain, and would allow property owners a forum in which to voice their objections to being uprooted.”); Asmara Tekle Johnson, *Correcting for Kelo: Social Capital Impact Assessments and the Re-Balancing of Power Between “Desperate” Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J. L. & PUB. POL’Y 187, 216–28 (2006) (proposing that states establish as a matter of statutory law or common law a NEPA-type process that would require a “social impact” study of economic development takings in advance of commencing the eminent domain process to create a public forum that considers the land use, social impact, potential mitigation, and various economic impacts of the taking).

199. See Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 903–06 (2002) (describing basic goals and effects of NEPA and the fact that numerous states have adopted their own environmental review laws to ensure environmental impacts are reviewed in connection with state and sometimes local governmental decisions); Noah D. Hall, *Political Externalities, Federalization, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49, 79–81 (2008) (describing the NEPA process and report-

review generally consists of preparing an environmental review document (in the form of an Environmental Impact Statement ("EIS"), Environmental Assessment ("EA"), or other similar document), giving notice of the preparation to the public and environmental agencies, soliciting comments, and responding to those comments.²⁰⁰ Beyond preparing the environmental review document itself, state agencies must "identify and confront the environmental consequences of their actions, about which they otherwise would remain ignorant," make available background information to the affected community, and consider alternatives to the proposed project.²⁰¹ This process serves to open government decisions to a high level of public scrutiny and creates political consequences for state and local decision-making.²⁰² In some states, namely California, New York, Minnesota, Massachusetts, and Washington, the environmental review laws apply not only to state decisions with potential environmental impacts but also to local zoning, land use, and eminent domain decisions.²⁰³ Other states have created additional review and public hearings at the state's environmental quality council in cases where a condemning authority seeks to take land within a wetland preservation area, agricultural preserve area, or other environmentally-sensitive area.²⁰⁴

The federal and state environmental review process is certainly not without its critics. Many in the public and private

ing that thirty-two states have some form of an environmental impact assessment policy modeled after NEPA).

200. See ROBERT L. GLICKSMAN ET AL, ENVIRONMENTAL PROTECTION: LAW AND POLICY 235–38, 322–23 (5th ed. 2007) (describing EA and EIS process and state environmental review laws); Johnson, *supra* note 198, at 219–20 (describing EA and EIS process).

201. See Hall, *supra* note 199, at 79–80.

202. Johnson, *supra* note 198, at 220–21 (noting that the success of NEPA has been its ability to influence decision-making, give structure to public debate concerning projects of environmental import, and allow community groups to participate in the decision-making process in a way that was not possible prior to NEPA).

203. See GLICKSMAN, *supra* note 200, at 322–33 (describing state environmental review laws and their application in some states to local planning and land use regulations); Hall, *supra* note 199, at 81 (same).

204. See, e.g., MINN. STAT. § 40A.122 (2007) (special procedures for proposed eminent domain action for land with a total area over ten acres within an agricultural preserve area); MINN. STAT. § 103F.614 (2007) (special procedures for proposed eminent domain action for land with a total area over ten acres within a wetland preservation area).

sector consider the process to be a costly and pointless "paperwork" exercise that unnecessarily delays or stops meritorious development projects without resulting in better decision-making.²⁰⁵ There is certainly room for reform at both the federal and state level. Nevertheless, one important outcome of the environmental review process is that there is a public forum to debate competing economic interests, environmental interests, governmental interests, and other interests prior to a final decision or a commitment of resources. This is particularly true at the local level, where private development projects (for natural resource development or otherwise) can often make their way through the approval process with limited opportunity for public debate.

States in the Interior West could use environmental review laws as a model and adopt legislation that requires all use of eminent domain for economic or natural resource development purposes (or, in the alternative, only the use of eminent domain by private parties) to trigger a "public use review" proceeding. As part of this proceeding the natural resource development company or other condemning authority would apply to a state or local government body for public use approval of the proposed eminent domain action.²⁰⁶ The government body would then prepare a review document assessing the economic, social, and environmental impacts of the proposed taking and determine whether, based on the information gathered, the taking is for a public use. The politically-accountable state or local decision-making body could then make the public use determination with reference to the information gathered during the review process and any party dissatisfied with that decision could seek judicial review of the decision itself under an arbitrary and capricious standard of review.

Such a process would serve the purpose of limiting, but not prohibiting, the use of eminent domain for natural resource development purposes. First, the mere existence of the process would impact pre-condemnation negotiation between the par-

205. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 857 (5th ed. 2006); Karkkainen, *supra* note 199, at 903, 921-32 (describing deficiencies in the NEPA process).

206. In the case of a public body wishing to exercise the power of eminent domain for economic development purposes, the public use review would be completed prior to the public body making a finding that the exercise of eminent domain was for a public use.

ties by encouraging natural resource development companies to provide additional compensation, better terms, and other benefits to landowners that would allow voluntary transactions to replace many instances of condemnation. Second, even if the developer ultimately determined condemnation was necessary, the process itself gives the affected property owners and community a forum to voice their concerns and create a fuller picture of the impact of the potential taking.

The process could also contain aspects of the “certificate of convenience and necessity” process used by federal and state agencies to approve power plants, power lines, natural gas pipelines, or other private resource development deemed to be in the interests of the public.²⁰⁷ In these cases, the utility makes its proposal, the federal or state public entity conducts a review of the need for—and public interest in—the project, and consumer and environmental groups are allowed to participate as intervenors. The public use review process would be more limited than the certificate of need process in that the public body would not be reviewing the need for the coal, oil, or coal-bed methane itself (other federal or state agencies generally conduct that review) but only the need for eminent domain in connection with the natural resource development. Thus, looking either to NEPA, the certificate of convenience and necessity process, or existing state eminent domain reforms, there are several models states can consider to create a forum that will recognize current social, economic, and environmental concerns in deciding whether a natural resource development taking is for a public use.

With any of these types of procedures in place three things will hopefully happen. First, natural resource development takings will cease to be *per se* public uses. Instead, there will be a forum at the state or local government level where landowners and interest groups can present testimony, data, and other evidence on economic, social, recreational, and environmental matters that will provide a broader perspective on whether the natural resource development taking is in fact a

207. See FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS AND THE ENVIRONMENT* 1092 (2d ed. 2006); see also *supra* note 113 and accompanying text (discussing process by which a natural gas company or power company obtains the power of eminent domain in connection with receipt of a certificate of convenience and necessity or other determination that the project is in the public interest).

public use. Second, there will be a decision by a politically-accountable local body that weighs the competing evidence and makes the decision on public use. Third, when the natural resource development company seeks judicial permission to exercise the power of eminent domain, courts will have an ability that does not exist today to review a record on the competing economic, social, and environmental concerns in the eminent domain proceedings. Bringing these competing concerns into the public domain better reflects the reality of economic, social, and environmental development in the Interior West today.

CONCLUSION

Advocates of eminent domain reform have generally framed the issue as one of government abuse of condemnation authority to take private property for economic development purposes. Despite this widespread rhetoric, eminent domain as a tool of property reallocation is not limited to government takings of private property. In the early years of the nation, states in the Interior West conferred the mantle of "public use" on mining, oil and gas, and other natural resource development companies to encourage them to help create economies in difficult and inhospitable regions of the country. These private entities used this power and have continued to do so even as the West has changed to take on a new cultural and economic identity less dependent on natural resource development.

Recent eminent domain reform and other property reforms in the Interior West illustrate how changes in economic and social dynamics have driven changes in the way the law allocates property rights among surface owners and mineral owners and among resource interests and non-resource interests. No state yet, however, has addressed head-on whether it is time to move away from the *per se* public use designation for natural resource interests in light of the changing identity of the region. With so much focus on this area of law, coupled with the rapid changes in the Interior West, it is time to consider the creation of a public forum at the state or local government level to weigh the needs of natural resource development interests against other economic, environmental, and social interests in making public use determinations.