August, 2007

The Frontier of Eminent Domain

Alexandra B. Klass

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THE FRONTIER OF EMINENT DOMAIN

ALEXANDRA B. Klass

ABSTRACT

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” the Court deemed a public use under the Fifth Amendment led to eminent domain reform legislation in over 30 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 20th century was the base upon which the Court built its decision in Kelo. This Essay first explores the relationship between Kelo-type economic development takings and natural resource development taking 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.

INTRODUCTION

In 2005, the law of eminent domain captured the attention of the public at large. Suddenly, everyone cared about takings and the Fifth Amendment.1 As a result of the Supreme Court’s decision in Kelo v. City of New London,2 this former backwater of property law 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

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.
home to facilitate a new corporate headquarters or that a state could replace “any Motel Six with a Ritz Carlton.” Although the Supreme Court had upheld similar takings long prior to its decision in *Kelo*, the public had now taken notice, was not happy, and wanted to make sure government officials could not knock on the doors of the nation’s citizens with the same authority.

In many natural resource-rich areas of the country, however, the knock on the door is less likely to come from a government official and much more likely to come from a mining, oil, or gas company representative. Once again, this is nothing new. Since the early 20th century, state constitutions and legislative enactments in the Interior West have given broad authority to natural resource developers to exercise the power of eminent domain 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. 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.

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? On the one hand, 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 the traditional economic development taking must rely on a state or local government to initiate eminent domain proceedings. Thus, there is

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3 *See* Kelo v. City of New London, 545 U.S. at 503 (O’Connor, J., dissenting).
4 An “economic development taking” can be defined generally as a taking where the 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. *See* Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 WM. & MARY L. REV. 1849, 1880 (2007).
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.”

This Essay explores two aspects of natural resource development takings. First, it considers how courts have used natural resource development takings as a benchmark for comparing and contrasting \textit{Kelo}-type economic development takings. It is clear that natural resource development takings are merely one form of economic development takings that benefits a private party directly while providing some public economic benefit. Despite the similarities between the two types of takings, there has been virtually no discussion of whether natural resource development takings should be subject to the same limits now being placed on \textit{Kelo}-type economic development takings.

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

\(^5\) See Rebecca Huntington, \textit{Condemned}, HIGH COUNTRY NEWS (Feb. 5, 2007) (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”).
Exploration of these issues leads to some general observations. First, many of those in favor of eminent domain reform are considering the issue too narrowly as one solely about government abuse of eminent domain power. Eminent domain actions that benefit private parties are not limited to those that involve the government transfer of property from one private party to another. To focus only on government transfers to private parties and ignore private party takings obscures the role of eminent domain in society. This, in turn, can result in inappropriate or insufficient reforms in states where natural resource development takings or other private takings are common and government-initiated economic development takings are rare.

Second, eminent domain law, like property law, must be tied to a particular time and place. As economic and cultural conditions change, property law should also change to reflect those conditions. For instance, as a state moves from an energy extraction economy to one based significantly on tourism and recreation, eminent domain law and other laws that allocate property rights should change to reflect new conditions and values. Applying these principles to the development of the Interior West leads to the conclusion that it may be time to revisit the per se public use designation for natural resource development and instead create a forum in which to balance the needs of natural resource development against the other economic, environmental, and social drivers in the region.

Part I explores the critical role 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 20th century that broadly interpreted “public use” to enlist private industry to develop state natural resources and promote economic prosperity. Part II shows the important role natural resource development takings played in the Court’s <i>Kelo</i> decision. It then suggests that
the public debate over economic development takings has so far 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.” Historians have long struggled with the term “Frontier” and how to define it. Even Fredrick Jackson Turner in his famous 1893 essay, *The Significance of the Frontier in American History*, called the term “elastic” and avoided a precise definition. He went on to describe the Frontier, however, as “the process of evolution in each western area reached in the process of expansion” and “the meeting point between savagery and civilization.”

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 be incapable of precise definition. The term is used here broadly to refer to the time surrounding the beginnings of the extractive economies in the Interior West at the end of the 19th century as well as the more general idea of expansion, progress, and change in the West, both then and now.

The founders of the states that made up the “Frontier” of the Interior West made private development of coal, oil, gas, and minerals a centerpiece of each state’s economy, vision, and

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8 *See* PATRICIA NELSON LIMERICK, *Legacy of Conquest* 24-27 (1987) (contending that the western “frontier,” cannot be fully understood without including later 20th century developments of mining, agriculture, oil, and high-tech industries, and that it is better to study the history of the West as a place continually struggling for property, profit, and cultural dominance); ROBERT V. HINE & JOHN MACK FARAGHER, *The American West: A New Interpretive History* 555-56, 560 (2000) (describing the western frontier as a function of its industrial development, its open space, and also as “our common future.”).
identity. In many of these states today, however, that identity conflicts with a new vision of an economy and culture based significantly on high-tech industries, residential development, and recreational tourism dependent on the preservation rather than the exploitation of the state’s natural resources. As times have changed in the Interior West should natural resource development takings lose their status as a per se public use?

No state legislature has attempted to eliminate the public use status for natural resource development takings, but state courts and legislatures have engaged very recently in more subtle reforms to rebalance the power between natural resource developers and private property owners. These reforms show the beginnings of a new approach with regard to eminent domain and allocation of property rights that is consistent with the cultural and economic changes occurring in the region. States should go further, however, and create a forum at the local or regional government level in which to balance natural resource development against competing development and open space interests which would replace the current default public use designation for natural resource development. In this way, eminent domain laws in the Interior West would reflect the complex and competing property interests that exist in the area. Such changes may also open the door to a more robust national debate over the role of eminent domain in society 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.”\(^9\) While this may be true, it is also true in many states that private party B may bring its own action for

\(^9\) *Keo v. City of New London*, 545 U.S. 469, 477 (2005). 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.
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 allocating property rights in the early 20th century to reflect state values and needs.

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

In the early 19th century, legislatures in many eastern and midwestern states delegated eminent domain authority to private transportation and manufacturing companies in order to promote economic expansion in a country with little surplus capital.10 State courts generally upheld this delegation 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.11 During the latter half of the 19th 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.12

11 Id. at 692 (citing Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 726-28 (1832)).
12 See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 259-61 (1977) (discussing judicial trends in the middle of the 19th century to no longer accept “what before had been a standard and virtually
By the early 20th century, these courts overwhelmingly returned to the 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.\(^\text{13}\) These same courts, however, retained the narrow view of public use when it came to reviewing state laws allowing private entities to exercise the power of eminent domain for economic development. For instance, in 1913, the Pennsylvania Supreme Court declared unconstitutional a state statute that granted mining companies the power of eminent domain to build roads and tramways to convey materials from lands owned or leased for mining purposes.\(^\text{14}\) The court reasoned 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.\(^\text{15}\) According to the court, even if the mining company were to allow the public to use the roads and tramways to be constructed, the company is not a public service corporation and would be constructing the tramway at its own expense, for its own purposes.\(^\text{16}\) 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.”\(^\text{17}\)

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

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\(^{13}\) See, e.g., Kelo v. City of New London, 545 U.S. 469, 479 (2005) (stating that while many state courts in the mid-19th 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 5th Amendment to the states at the close of the 19th century, “it embraced the broader and more natural interpretation of public use as ‘public purpose.’”). See also Fels, et al., supra note 10, at 702-04; Nichols, supra note 12, at 626-27.


\(^{15}\) Philadelphia Clay Co., 88 A. at 488.

\(^{16}\) Id.

\(^{17}\) Id. at 489.
companies, and other private industries to exercise the power of eminent domain to create roads
and transportation networks to move their products. 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 the exercise of eminent domain by such private businesses were inconsistent
with the state constitution.

During this same time period, however, states in the Interior West were in the process of
creating their economies as well as 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. 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,

18 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); 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); 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). But see Jones and Price v. The 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 Hand Gold Mining Co. v. Parker, 59 Ga. 419 (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); Johnston v. Alabama Pub. Serv. Comm’n, 252 So. 2d 75
(1971) (holding that statute granting right-of-way condemnation authority to mining, manufacturing, power and
quarrying operations does not violate the state constitution).

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

1789-1910*, 33 J. of Econ. Hist. 232, 244-45 (1973) (discussing popularity of constitutional provisions and statutes
authorizing private rights of eminent domain in western states in the late 19th 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”).
or ditches across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes.  

In enacting these constitutional provisions, the state founders knew exactly what they were doing. In Idaho, for example, the constitution declares that the taking of private property for construction of reservoirs, storage basin, canals, railroads, tramways, shafts, drainage of mines, dumps, “or any other use necessary to the complete development of the material resources of the state . . . is declared to be a public use[.]” The purpose of this provision was to prevent any individual property owner from blocking the expansion and development of the natural resource industry in the state. 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.”

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.” Ultimately, the economic arguments carried the day, the mining interests won the battle, and 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 came to eminent domain authority for natural resource development in the state. 26 The example of Idaho illustrates that the constitutional delegates in the 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.

In addition to constitutional provisions expressly authorizing natural resource development takings, state legislatures in the Interior West enacted statutes delegating eminent domain power to private industry to develop state natural resources. Statutes in Arizona, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming specifically grant eminent domain authority to private companies in connection with mining, oil and gas, and other natural resource development. 27 These statutes differ significantly from the numerous statutes across the country granting condemnation authority to railroads, power companies, and other common carriers. 28 In the latter case, 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. 29 By contrast, the land condemned by an oil or mining

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26 Id.
27 See, e.g., ARIZ. REV. STAT. § 12-1111(14); COLO. REV. STAT. §§ 38-2-104, 38-1-201(A); IDAHO CODE § 7-701(4); MONT. CODE. ANN. § 70-30-102(31) & (44); NEV. REV. STAT. ANN. § 37.010(5) & (6); N.D. CENT. CODE § 35-51-02(5) & (10); OKLA. STAT § 27-6; S.D. CODIFIED LAWS § 41-5-1; UTAH CODE ANN. § 78-34-1(5) & (6); WYO. STAT. § 1-26-815.
28 See, e.g., 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.05[3][a] (3d ed. 2007) (“Courts in every state have rules that railroads are corporations that served the public and that eminent domain could be delegated to them to acquire rail beds.”).
29 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 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 170-73 (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 will not be subject to public access or public use but is only “public” in the sense that the resource development will add to the growth of the overall state economy.

Likewise, the 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. 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.

See note 4, at 1884, n.52 (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 20, at 232, 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.”).

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. II, § 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 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); 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); Key v. Ellis, __ So. 2d __, 2007 WL 1378112 ( Ala. Ct. App., May 11, 2007) (discussing state statutory authorization for private owner of landlocked parcel to condemn right-of-way over neighboring property); Kennedy v. Martin, 63 P.3d 866 (Wash. Ct. App. 1993) (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); Cirelli v. Endt, 885 So. 2d 423 (Fla. 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); Scheiber, supra note 20, 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 background.”).

See, e.g., Potlatch Lumber 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, at 7 (Feb. 2003), 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, at http://www.wyominglandowners.org/issues/index.php (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 21, 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.\textsuperscript{32} 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.\textsuperscript{33} 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.

\textbf{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.”

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\textsuperscript{32} \textit{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.”).  \\
\textsuperscript{33} \textit{Id.}
\end{flushleft}
1. State Courts and Public Use on the “Frontier”

In the late 19th century, industry in the Interior West made frequent use of its new power of eminent domain for mining, milling, manufacturing, and other industrial development. Not surprisingly, these efforts met with opposition by neighbors who challenged the statutory and constitutional authority of industry to exercise this power. These challenges met with little success. In upholding the delegation of eminent domain authority to private industry, state courts described eloquently the role natural resource development by private industry should play in the states’ identity and prosperity.34 As shown below, the courts used striking language to support the idea that private rights of eminent domain were critical to develop the state’s 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 land owned by the defendant.35 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.36 In reaching its decision, the court was forced to grapple with whether the “public use” language in its constitutional takings clause narrowly meant “possession, occupation or direct enjoyment by the public” or whether it broadly meant “any

34 Most state supreme courts in the late 19th and early 20th 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.
35 Dayton Gold and Silver Mining Co. v. Seawell, 11 Nev. 394 (1876).
36 Dayton, 11 Nev. at **3-4.
purpose of great public benefit, interest or advantage to the community." 37 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. 38 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. 39

The court went on to adopt 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.” 40 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.” 41 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 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. 42

This language clearly ties the state’s prosperity to natural resource development generally and broad authority for private industry specifically. If the interests of industry conflict with the

37 Id. at *5.
38 Id.
39 Id.
40 Id. at *10.
41 Id.
42 Id. at *10.
interest of private property rights, there is a clear winner in the name of public use and public benefit.43

The Idaho Supreme Court reached a similar decision in a 1906 case where a lumber company sought to condemn land to improve a river to store water for floating saw logs and other timber products.44 In upholding the company’s condemnation authority, the court recognized the existence of the narrow view and the broad view of public use.45 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.”46 To hold otherwise would be “to defeat the development of the great natural advantages, resources and industrial opportunities” in Idaho and other states.47 Specifically with regard to Idaho, the court focused on “the contour of the country, its mountain fastness,” the arid condition of the state, and “the great difficulty of preparing and constructing means and modes of communication and transportation.”48 It was thus a “necessity” to enlarge and broaden the power of eminent domain in the state constitution.49

These judicial sentiments continued well into the latter part of the 20th century. 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.50 The issue

43 See also Hand Gold Mining Co. v. John A. Parker, 69 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 production 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.”).
44 Potlatch Lumber Co. v. Peterson, 88 P. 426 (Idaho 1906).
45 Potlatch, 88 P. at 431.
46 Id.
47 Id.
48 Id.
49 Id.
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. 51 The court found it “plain beyond any doubt” that the purpose of the statute and the constitution “was to facilitate the development of our state’s resources.” 52 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.” 53 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.” 54 More recent Wyoming Supreme Court decisions from 2002 and 2005 show continuing judicial approval of private takings for energy and other natural resource development. 55

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. 56 The court interpreted the statute broadly in favor of eminent domain authority for

51 Coronado Oil Co., 603 P.2d at 408 (citing WYO. CONST. art. I, § 32).
52 Id. at 411.
53 Id.
54 Id.
55 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”); Wyoming Resources Corp. v. T-Chair Land Co., 49 P.3d 999, 1003-04 (Wyo. 2002) (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 “landlocked property will not be rendered useless.”).
development of natural resources. The Court declared that from the beginning it has been the policy of the state “to foster and encourage the development of the state’s mineral resources in every reasonable way.” The court 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.”

These decisions show the weight placed on natural resource development during a time period where many western states were seen as barren wastelands barely fit for human habitation, and how the importance of natural resource development in the region continues into more recent years. Both state legislatures and courts embraced the idea that the survival of these states depended on giving free reign 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.

2. Supreme Court Deference to State Public Use Determinations

By the end of the 19th century, the federal courts had begun conducting federal constitutional reviews of state takings cases through the due process clause of the Fourteenth Amendment. As a result, challenges to state delegation of 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
condemnations would promote mining, milling, irrigation, and other industrial development
critical to grow the state economies and, in particular, the western frontier. As a result, the
Court validated the broad view of public use as a matter of federal constitutional law that western
state courts had so eloquently created as a matter of state constitutional law.

The Court’s first cases authorizing broad eminent domain authority for private industry
involved various state “Mill Acts” and other private irrigation projects. In 1885, the Court
upheld New Hampshire’s Mill Act, which authorized any person to maintain a watermill and
milldam upon a stream and pay the owners of nearby flooded land just compensation. 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.

Likewise, in 1905, in Clark v. Nash, the Court upheld a state 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

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 Taking “Muddle,” 90 MINN. L. REV. 826
(2006) (arguing it was not until Penn Central Transportation Company v. 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 1115; Nichols, supra note 12, at 623.
63 Head, 113 U.S. at 19-20.
64 198 U.S. 361 (1905).
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.\textsuperscript{65} The Court reasoned that the validity of the statute must be determined based on the specific conditions of each state, including “the difference of climate and soil, which render necessary these different laws in the states so situated.”\textsuperscript{66} Because the local courts were more familiar with the specific state conditions, the Court would defer to public use determinations of the state courts and legislatures.\textsuperscript{67}

The Court quickly applied this broad reading of public use to natural resource development takings on the American frontier. In 1906, in \textit{Strickley v. Highland Boy Gold Mining Company},\textsuperscript{68} 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 legislative 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.\textsuperscript{69} 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.”\textsuperscript{70}

These Supreme Court decisions at the dawn of the 20th century show the significant deference the Court gave to state legislatures to delegate the power of eminent domain to private industry to develop state resources and economies. The next Part shows that there is a direct line from these early natural resource development cases to the current Supreme Court view that

\textsuperscript{65} Clark, 198 U.S. at 367.
\textsuperscript{66} Id. at 369-70.
\textsuperscript{67} Id.
\textsuperscript{68} 200 U.S. 527, 531 (1906).
\textsuperscript{69} Strickley, 200 U.S. at 531.
\textsuperscript{70} Id.
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*, what constituted a public use under the Fifth and Fourteenth Amendments was far from a “hot topic.” The Court had decided only two cases in the past forty years: *Berman v. Parker*, in 1954 and *Hawaii Housing Authority v. Midkiff*, in 1984. Although the Court had decided several cases earlier in the 20th century, 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 . . .” 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.” Ultimately, an important part of the redevelopment plan included facilitating a $300 million research facility for the pharmaceutical company Pfizer. City planners hoped the creation of a new corporate headquarters in the area would draw new business, create jobs, and

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74 See, e.g. supra Section I.B.2.
75 Nichols, *supra* note 12, at 615.
provide “a catalyst for the area’s rejuvenation.” The City was unable to negotiate purchase agreements with all the property owners in the development area and so it proceeded to use its statutory authority to initiate condemnation proceedings against the petitioner homeowners who refused to give up their homes.

The Court reviewed the case to determine “whether a City’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.” In a 5-4 decision, the Court held that the City’s use of eminent domain for economic development purposes was in fact a public use and was constitutional. 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. The scholarship 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

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77 Kelo, 545 U.S. at 473.
78 Id. at 475.
79 Id. at 477.
80 Id. at 484.
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.\textsuperscript{82}

The treatment of \textit{Kelo} here, by contrast, looks at how the case builds on the natural resource development takings cases to reach its decision. In \textit{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 general public.” In support of that proposition, Justice Stevens cited and discussed in detail \textit{Strickley v. Highland Boy Gold Mining Company}\textsuperscript{83} (mining company condemnation of property for an aerial bucket line), \textit{Dayton Gold & Silver Mining Co. v. Seawell}\textsuperscript{84} (mining company condemnation for road), and the Mill Act cases (allowing private parties to flood upstream land to create dams and power for manufacturing).\textsuperscript{85}

After considering the Court’s prior economic development takings cases, \textit{Berman v. Parker}\textsuperscript{86} and \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{87} Justice Stevens returned to the natural resource development cases. He refused to adopt a bright-line rule rejecting economic development as a public use or even to apply heightened scrutiny to such takings. 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 we have recognized.”\textsuperscript{88} These public purposes, of course, were those that

\begin{footnotesize}
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\item \textsuperscript{82} \textit{See}, e.g., \textit{id.} (citing articles).
\item \textsuperscript{83} \textit{200 U.S. 527} (1906).
\item \textsuperscript{84} \textit{11 Nev. 394} (1876).
\item \textsuperscript{85} \textit{See \textit{Kelo v. City of New London, 545 U.S. 469, 479-80} (2005)}.
\item \textsuperscript{86} \textit{348 U.S. 26} (1954).
\item \textsuperscript{87} \textit{467 U.S. 229} (1984).
\item \textsuperscript{88} \textit{Kelo, 545 U.S. at 484}.
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“facilitated agriculture and mining” and where the Court in upholding such takings “had emphasized the importance of those industries to the welfare of the States in question.”

Based on this authority, the Court declined to “second-guess” the City’s judgment about the efficacy of its redevelopment plan as well as its determination of public need. Such deference draws on the Court’s decisions from 100 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. 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.

The *Kelo* decision was subject to a concurrence and two separate dissents. The dissents focused on the sanctity and security of private property as well as the potential for abuse of the takings power by local officials seeking to “upgrade” property in their jurisdictions. Justice 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.”

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 19th and early 20th 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.” 95 In his view, the irrigation and Mill Act cases came within the true definition of “public use” because the public had a right to use the water these projects produced. 96 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. 97 According to Justice Thomas, the Court’s cases then “quickly incorporated” the public purpose standard set forth in the mining cases “by barren citation.” 98 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.” 99

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. 100 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

95 Id. at 512-515 (Thomas, J. dissenting).
96 Id.
97 Id. at 515-16 (citing Clark v. Nash, 198 U.S. 361 (1905); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906)).
98 Id. at 516-17.
99 See id. at 515-17.
100 See Muskogee County v. Lowery, 136 P.3d 639,651 (Okla. 2006); City of Norwood v. Horney, 853 N.E.2d 1115 (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).
eminent domain. The focus of most of this legislation, not surprisingly, was placing limits on economic development takings by outlawing them completely, narrowing the definition of what constitutes “blight,” or placing other related restrictions on state and local governments. As of April 2007, 36 states had enacted post-*Kelo* reforms.

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. The Castle Coalition is an organization formed by the Institute for Justice that provides a central bank of information and helps support grassroots activism to oppose government takings and reform state eminent domain laws. These interests groups and most state legislatures that have engaged in eminent domain reform have focused almost exclusively on limiting *Kelo*-type economic development takings by government entities and portraying such eminent domain actions as the taking of private property for “private use” or “private gain.” There is virtually no mention that natural resource development takings exist at all and, in fact, 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.

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101 See Somin, supra note 81, at 14-32 (summarizing state legislation and referenda throughout the country but arguing that most of the newly enacted laws will result in few meaningful restrictions on economic development takings); Castle Coalition, LEGISLATIVE ACTION SINCE KELO (Jan. 16, 2007) (summarizing eminent domain reform in the states since Kelo), at http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf. The National Conference of State Legislatures website also tracks eminent domain reform legislation throughout the country. See http://www.ncsl.org/programs/natres/EMINDOMAIN.htm.


For example, in an Institute for Justice Report on economic development takings, the author states that Wyoming had no reported instances of eminent domain for private development other than takings by railroads, oil and gas companies, and coal companies to condemn private property for mineral access. The report concludes that none of 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.

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.

By focusing only on government takings and ignoring private takings, the anti-Kelo forces have clouded the issue by framing it as one solely of government abuse of eminent domain authority. Instead, eminent domain is only one legal mechanism by which society allocates property rights to meet the needs of the public. Such allocations should change as times and circumstances changes. 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

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105 Dana Berliner, PUBLIC POWER, PRIVATE GAIN 217 (Institute for Justice, April 2003).
106 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 Castle Coalition, 50 State Report Card, supra note 102, at 16 and 54.
107 See supra notes 21, 27, 51-55, and accompanying text.
108 See FREYFOGLE, supra note 32, and accompanying text.
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.

To fill this analytical gap and explore the role of eminent domain in allocating property rights, Part III looks at the nature of eminent domain reform and other property rights reform in those states that authorize natural resource development takings. Has the *Kelo* backlash had any impact on the broad powers given to private companies to take private property in the name of natural resource development?

A review of eminent domain reform and related property rights reform in those states reveals that there has not been a frontal attack on natural resource development takings but that 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. States in the Interior West should go further, however, and have a real debate over the continuing role of private takings for natural resource development purposes.

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109 See, e.g., 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.”); 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).
III. Transitions in Natural Resource Development and Property Rights on the Frontier

To date, there has been no significant legislative effort to remove natural resource development as a public use in the Interior West despite the frontal attack on *Kelo*-type economic development takings. Certainly, natural resource development companies remain powerful in many western states and contribute significantly to those states’ economies. But is the need for natural resource development takings expressed so passionately by state judges in the early part of the 20th century still as urgent? Or has both the economy and culture of the region shifted sufficiently to tourism, recreation, high-tech, and other non-extractive industries that the historic, broad authority for private condemnations should be reconsidered?

This Part explores the continuing role of natural resource development on the “Frontier” both in terms of its economic role as well as its role in continuing to shape the identity of the region. It then focuses on judicial and legislative property reforms that are tied up in the national trend of reform flowing from *Kelo* but are in some cases more tailored to the issues and needs of the Interior West. These developments show that states are using eminent domain and related property doctrines to reallocate property rights to reflect the changing economy in the region just as they did in their early years of statehood to promote an extractive economy. 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

When he delivered his famous 1893 essay, *The Significance of the Frontier in American History*, Fredrick Jackson Turner declared that as of that date, the American Frontier had
“closed.” As Patricia Nelson Limerick and others have argued, however, if one accepts the idea that the Frontier closed in 1890, one misses the important economic and cultural developments that have created and continue to create western identities since the beginning of the 20th century. These “Frontier” developments included copper, coal, petroleum, moviemaking, skiing, defense spending, fishing, and tourism. 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.

First, the 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.” Its “dramatic and distinctive landscapes” along with its dependence on a natural resource economy result in an identity tied more closely to physical land and property rights than in other parts of the country. Natural resource development remains an important economic driver in many states in the region. For example, Wyoming mines produce over 27 million tons of coal per year and the state is home to the 10 largest coal mines in the United States. Wyoming produces approximately the same amount of coal as South America, Central America, Africa, and the

110 See Turner, supra note 6, 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.”).
111 See Limerick, supra note 7, at 75. See also PATRICIA NELSON LIMERICK, SOMETHING IN THE SOIL: LEGACIES AND RECKONINGS IN THE NEW WEST 19 (2000) (“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.”); HINE & FARAGHER, supra note 8, at 494 (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.”).
112 Id.
113 See LIMERICK, SOMETHING IN THE SOIL, supra note 111, at 25.
114 See id. at 102-03.
Middle East combined.\textsuperscript{115} Wyoming also holds 41 percent of the estimated proven and potential natural gas reserves and produces nearly 20 percent of the country’s natural gas.\textsuperscript{116}

New Mexico is the West’s second largest crude oil producer (after California) followed by Wyoming, Colorado, Montana and Utah.\textsuperscript{117} The West’s eight oil-producing states amounted to 20.5 percent of the total U.S. crude production.\textsuperscript{118} 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 counties in 2005.\textsuperscript{119} Indeed, over 50 percent of all tax revenues in Wyoming come from the mineral and energy industries, with tourism at 14 percent and agriculture at 2 percent.\textsuperscript{120}

Unlike the early 1900s, however, the recent energy boom is not the only boom in town. Rather, recreation, tourism, fishing, and hunting now represent a major economic driver in the Interior West. In Montana, for instance, nonresident travel increased 30% from 1991 to 2002, topping 9.8 million travelers, more than ten times Montana’s resident population.\textsuperscript{121} In 2003, 9.9 million individuals visited the state, spending $1.86 billion in direct expenditures that resulted in a combined economic impact of $2.75 billion. These expenditures supported 29,600 direct jobs

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\item[115] See Patricia Nelson Limerick et al., \textit{Boom and Bust in the American West} 10 (Center of the American West Workshop Report), at \url{http://www.centerwest.org/publications/pdf/boombust.pdf}.
\item[116] \textit{Id.} at 11.
\item[117] Limerick et al, \textit{What Every Westerner Should Know about Energy} 10 (Center of the American West Report 2003).
\item[118] \textit{Id.}
\item[120] See Patricia Nelson Limerick et al., \textit{Boom and Bust in the American West, supra} note 115, at 4. The oil and gas industry as a whole paid Wyoming government entities about $1.5 billion in total taxes, royalties and lease payments with payments to New Mexico totaling $1.8 billion. See Ray Ring, \textit{Gold from the Gas Fields}, \textit{High Country News} (Nov. 28, 2005).
\end{footnotes}
and 43,300 combined jobs.\textsuperscript{122} 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.\textsuperscript{123} Thus, throughout the region, there has been an economic and cultural transition from what was once an extractive economy to one now also 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.”\textsuperscript{124} 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.\textsuperscript{125}

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 \textit{Kelo} is certainly national in scope. Nevertheless, it has brought about certain reforms in the Interior West that are tailored to the specific 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 necessary these different laws in the states so situated.”\textsuperscript{126} The

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\item[122] \textit{Id.}
\item[123] \textit{The Sonoran Institute, You’ve Come a Long Way, Cowboy: Ten Truths & Trends in the New American West} (Sept. 29, 2006), at \url{www.sonoran.org}.
\item[124] \textsc{Thomas Michael Power & Richard N. Barrett}, \textit{Post-Cowboy Economics} 55 (2001). \textit{See also William Travis}, \textit{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).
\item[125] \textit{See Donald Worster}, \textit{Under Western Skies: Nature and History in the American West} 82-83 (1992).
\end{enumerate}
following Sections explore the 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 see if the reforms focus solely on economic development takings by state and local governments or also address natural resource development takings. Many of these states such as Arizona, Colorado, Idaho, Utah, and Nevada had the largest percentage population growth in the country between 1990 and 2000.\textsuperscript{127} Moreover, according to one study, Colorado and Arizona were in the top half of states in terms of the number of economic development takings between 1998 and 1992.\textsuperscript{128} Thus, it is not surprising that Arizona, Colorado, Idaho, Nevada, Oregon, and Utah have enacted traditional eminent domain reform focusing on government condemnations.\textsuperscript{129}

In other states in the Interior West such as Wyoming, however, population growth and urban development have been much more modest, natural resources development remain a significant part of the economy, and \textit{Kelo}-type economic development takings are rare to nonexistent.\textsuperscript{130} Appropriately then, Wyoming’s 2007 eminent domain reform appears to be tied

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\textsuperscript{128} See Somin, supra note 81, at 13 (Colorado had 23 such takings and Arizona had 11 such takings. The state with the highest number of economic development takings was Pennsylvania, with 2,517, and the second highest was California with 223).
\textsuperscript{129} See id. \textit{See also Castle Coalition, supra note 100 (describing state legislation); National Council of State Legislatures, supra note 100 (same); Castle Coalition, 50 State Report Card, supra note 102.}
\textsuperscript{130} See Berliner, supra note 105 (providing state-by-state data on eminent domain “abuse”); CensusScope, supra note 127 (showing Wyoming, South Dakota and North Dakota in the bottom tier of states in terms of population growth from 1990-2000); Somin, supra note 81, at 13 (showing no “private-to-private condemnations” from 1998-2002 in Idaho, South Dakota, Wyoming, Montana, or New Mexico. The numbers were based on an Institute for
\end{footnotesize}
to the growing tensions in the state between mineral development companies and surface owners rather than local governments and homeowners. In recent years, technology has enabled oil and gas companies to begin developing the estimated 30 trillion cubic feet of coalbed methane ("CBM") gas that underlies the Powder River Basin in eastern Wyoming and Montana.\textsuperscript{131} 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.\textsuperscript{132}

This development has created new conflicts with 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 the surface owner’s use of the lands and harm crops, hayfields, and other ranchlands.\textsuperscript{133} As stated earlier, in Wyoming, private oil and gas companies can exercise eminent domain authority to take private property to access the resources, including taking land for drilling, production, reservoirs, drains, ditches, and other means of discharging waters.\textsuperscript{134} Moreover, Wyoming currently has no limit on the quantity of water that can be discharged, resulting in a “regulatory

\begin{itemize}
\item \textsuperscript{131} See Coal Bed Methane Frequently-asked Questions (2003), at http://waterquality.montana.edu/docs/methane/cbmfaq.shtml.
\item \textsuperscript{134} See WYO. CONST. art. I, § 32; WYO. STAT. § 1-26-185; Wyoming Resources Corp. v. T-Chair Land Co., 49 P.3d 999 (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 note 21, and accompanying text.
\end{itemize}
gap” where surface owners feel that there is nothing to stop developers from taking whatever private property they need to extract the gas and reap significant profits at the expense of private property owners. 135

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 for easement and other property interests to help define fair market value. 136 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. 137 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 the state, interest groups in the state relied on the anti-

Kelo
groundswell to build support for the legislation. The Landowners Association of Wyoming, one of the primary interest groups pushing for eminent domain reform in the state, highlights the

Kelo
case in its online materials and then explains why condemnation is “really a problem in Wyoming” by giving examples of eminent domain abuses. The group cites a few instances of government

137 See WYO. STAT. § 1-226-801(c).
condemnations for public buildings or highways (which meet any definition of public use) but then focuses on condemnations by oil and gas companies for coalbed methane water discharge, gas pipelines, and other natural resource development takings.\textsuperscript{138}

These examples are used not to advocate for limiting or eliminating natural resource development takings but to argue for greater procedural protections and just compensation.\textsuperscript{139} 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.\textsuperscript{140} It then states that the “heightened public attention caused by Kelo” allows the state legislature to reevaluate the state’s eminent domain law “to facilitate economic growth all-the-while providing adequate protection of private property rights.”\textsuperscript{141}

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.\textsuperscript{142} While they may be safe from \textit{Kelo}-type urban redevelopment takings, they experience regularly the threat of natural resource development takings. These takings of course are the oldest form of economic development takings and are even more direct private-to-private condemnations than \textit{Kelo}-type economic development takings.

Newspaper articles covering eminent domain reform throughout the Interior West similarly focus on those provisions that would better protect landowners from resource development condemnors as opposed to government condemnors. One news article describes the burst of eminent domain reform in New Mexico, Colorado, Utah, Wyoming, and other

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item See supra note 106, and accompanying text.
\end{enumerate}
\end{footnotesize}
western states 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.”143 A Wyoming news article declares that property owners in the state “are demanding reform of the state’s eminent domain laws to protect what they say might be a dying Western value.”144 After detailing landowner complaints about coalbed methane companies 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.145 Another Wyoming news 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.146

The changes to eminent domain laws in these states are important property rights reforms that serve to readjust the power balance between natural resources companies and landowners. This shift raises the question of whether in the shadow of *Kelo*, a different type of reform is occurring in natural resource-rich states that addresses the eminent domain issue in a manner tailored to the local concerns of these states. This phenomenon may be a subtle effort to deal with the growing tension between natural resource development interests on the one hand and a growing tourism, recreation, and service economy on the other. Such efforts are consistent with a system of property allocation that shifts, albeit slowly, as the region’s identity, economy, and values shift.

143 *Eminent Domain Reform Sweeps Western States*, HEADWATERS NEWS (Feb. 26, 2007).
145 *Id.*
146 Annie O’Brien, *Governor Signs New Eminent Domain Bill*, PINEDALE ROUNDUP ONLINE (March 9, 2007).
C. Related Property Reforms in the West: Split-Estates and 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.

First, 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 Wyoming, for example, it is estimated that nearly half of privately-owned land is held in split-estate.\(^{147}\) In Montana, 90 percent of the federally-owned coalbed methane reserves are located under privately-owned surface lands.\(^{148}\) The creation of split-estate lands began with the Stock Raising Homestead Act of 1916\(^ {149}\) and the Taylor Grazing Act of 1934.\(^ {150}\) These laws were enacted so that the U.S. Government could convey western lands for ranching and agriculture while still retaining the rights to develop the coal and other minerals underlying the land.\(^ {151}\) The U.S. Government has since leased or sold these retained mineral rights to private natural resource development companies.\(^ {152}\) 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

\(^{149}\) 43 U.S.C.A. § 291 (reserving “coal and other minerals”).
\(^{150}\) 43 U.S.C.A. §§ 315g(c) (reserving “all minerals to the United States”) (repealed in 1976).
\(^{152}\) See generally id. at 1106-1121 (discussing government leasing of oil, gas, coal, and other mineral rights).
and the mineral owner had the right to use that portion of the surface estate reasonably necessary
to develop the severed mineral interests. 153 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. 154 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. 155

Starting in the 1970s, some courts begin 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 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. 156

In recent years, state legislatures have 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 30 days’ written notice to obtain
access to private lands and begin oil and gas operations, and requires that oil and gas operators

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Magnee, 946 P.2d 913, 926 (Colo. 1997) (mineral owner has right to reasonable use of the surface).
154 See Amoco Prod. Co. v. Carter Farms, 703 P.2d 894 (N.M. 1985); EOG Resources v. Turner, 908 So. 2d 848,
1232, 1245-47 (D. Wyo. 2005) (recognizing that surface owners have limited ability to control the activities of
drilling companies on their lands).
155 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).
156 See Gerrity Oil & Gas Co., 946 P.2d at 297; Getty Oil v. Jones, 470 S.W.2d 618, 622 (Tex. 1971); Trenolone v.
attempt to negotiate a surface agreement with landowners regarding oil and gas activities. 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. New Mexico and Colorado both passed surface owner accommodation laws in 2007.

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. Unlike tensions in prior decades where energy interests tended to dominate, the 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 property owners.” 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.” The Landowners Association of Wyoming describes a similar shift on their website. 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.”

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157 WYO. STAT. § 30-5-402.
158 See WYO. STAT. §§ 30-5-405, 406.
159 See New Mexico Surface Owner Protection Act, H.B. 827 (enacted 2007); Colorado Accommodation of the Rights of Surface Owners with respect to Oil and Gas Operators, Colo. H.B. 1252 (enacted 2007). North Dakota and Montana statutory law also provide for surface owner compensation damages resulting from oil and gas operations. See N.D. CENT. CODE § 38-11.1-04; MONT. CODE ANN. § 82-10-504. For a summary of surface owner protection laws across the country see Equalizing the Imbalance Between Mineral and Surface Owners: The Case for Surface Owner Protection Legislation, EARTHWORKS, at www.earthworksactions.org/SPOLegislation.cfm.
161 See Deborah Baker, Surface Protection Bill Signed Into Law, FREE NEW MEXICAN (March 8, 2007).
162 Id.
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 too many roadblocks to natural resource development.

In many ways, this approach is similar to what most states have done with economic development takings and public use. Very few states have abolished economic development takings entirely. Instead, they have created heightened scrutiny of such takings, provided for attorneys’ fees in cases of condemning authority bad faith, allowed for additional compensation rights, and otherwise re-set the playing field between public condemning authorities and private property owners.

164 See National Conference of State Legislatures, supra note 100; Castle Coalition, supra note 100. The NCSL and Castle Coalition websites provide a summary of state eminent domain reform across the country and list only Florida, North Dakota, South Dakota as virtually eliminating economic development takings as opposed to merely placing limits on such takings. See Castle Coalition, 50 State Report Card, supra note 102 (giving only Florida, North Dakota, and South Dakota an “A” for their eminent domain reform with New Mexico receiving an A-), at http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

165 See, e.g., ARIZ. REV. STAT. ANN. § 12-1133 (requiring condemnor to provide comparable replacement dwelling or compensation necessary to purchase comparable dwelling when an individual’s principle residence is taken); ARIZ. REV. STAT. ANN. § 12-1135 (awarding attorneys fees when condemnation found not to be for a public use); GA. CODE ANN. § 22-1-2 (land owner may apply for re-conveyance of property or be entitled to additional compensation if condemned property is not put to a public use); IND. STAT. ANN. § 32-24-1-14 (awarding landowner attorneys’ fees and litigating expenses if damages awarded at trial are greater than amount specified in condemnor’s settlement offer); IND. STAT. ANN. § 32-24-4.5 (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 (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 (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 (court shall award landowner attorneys’ fees and expenses
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, 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.

D. Looking to the Future

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, global warming, overcrowding, traffic, and a host of other concerns that all 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 current 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.

As is shown here, the issue of eminent domain and public use remains as complex and varied as it was in the early 20th century, with different approaches needed for different geographic regions. Today, there is passionate public rhetoric calling for a rebalancing of rights between natural resource development and landowner interests in states where natural resource

| 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 (condemnor must pay a landowner forced to relocate compensation sufficient to purchase comparable property in the community). |
development formed the states’ economies and cultural identities. Recent efforts to rebalance property rights reflects the changing identity of the New West as it comes to grips with a more modern economy and culture while retaining the portion of its history, economy, and identity tied up with natural resource development.

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 20th century, natural resource development was unrivaled as the economic driver for the region. Although natural resource development remains an important part of many of these states’ economies, it now competes with high-tech industries, recreational tourism, preservation needs, and residential development in shaping the future of the region.166 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 the fact 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 them to give the interests of industry sufficient weight over individual property interests that might act as obstacles to economic progress.167 Now, however, perhaps what is needed is the creation of a political forum to weigh the interests of natural resource development against those of not only individual property owners but the interests of competing economic, environmental, and social drivers.

166 See TRAVIS, supra note 124, 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.”).
167 See supra note 26, and accompanying text.
Municipal, county, or regional 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 governmental entity as to why the taking was for a public use. In the public proceeding that followed, the individual landowners affected along with 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 could then be subject to judicial review, with great deference to the decision-making body.

This proposal is not unique, in that it closely resembles the process that exists in the rest of the country for governmental authorities to exercise the power of eminent domain for economic development takings as well as other less controversial takings. Under that process, the governmental entity makes its own political decision after public hearing that the taking is for a public use.168 It then seeks judicial approval of the taking at which time the court reviews whether or not the taking is for a public use.169 In this way, there is a political determination of public use followed by judicial review of that determination. For instance, in Kelo, there were numerous studies, public hearings, environmental and social reviews, and alternatives analyses before the City granted its non-profit development arm authority to exercise eminent domain in

169 Id.
the City’s name to acquire the necessary property. Indeed, Justice Stevens in his majority opinion and Justice Kennedy in his concurring opinion relied heavily on the City’s public process and detailed record of decision in affirming the City’s determination of public use.

In the Interior West today, however, neither the political review nor the judicial review of public use is allowed to take place; the natural resources company can go directly to court to obtain property by eminent domain, bypassing the political determination of public use, and often armed with constitutional authority to eliminate any meaningful judicial review. As a result of being a per se public use, private natural resource companies avoid any political balancing of competing interests while governmental entities 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 20th century, it is not as clear that every natural development taking is a “public use” today when balanced against a community’s other economic, environmental, and social interests.

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

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171 *See* *Kelo*, 545 U.S. 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.”).
172 *See supra* note 26, and accompanying text.
Louisiana, Michigan, Nevada, New Hampshire, North Dakota, and South Carolina all have amended their own state constitution to place limits on government condemnation authority. Now may be the time for states in the Interior West to amend their own constitutions to focus not on government condemnations, but private condemnations that no longer fit the growing economic and social complexities 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.

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 conveyed the mantle of “public use” on mining, oil and gas, and manufacturing 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 energy interests and non-energy interests. No state yet, however, has addressed head-on whether it is time to move away

173 See Castle Coalition, 50 State Report Card, supra note 102.
174 See supra notes 14-19, and accompanying text (discussing judicial decisions in the late 19th and early 20th centuries 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).
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 local, county, or regional government level to weigh the needs of natural resource development interests against other economic, environmental, and social interests in making public use determinations. Once private takings are re-introduced into the public use debate, it may be possible to have a broader (and more interesting) discussion on both a regional and a national level about public use, private property, and the role of eminent domain in reallocating property.