

**EXTRATERRITORIAL CONDEMNATION FOR OPEN SPACE  
AND PARKS: A LOOK AT *TOWN OF TELLURIDE V. SAN  
MIGUEL VALLEY CORP.*'S EFFECT ON COLORADO AND THE  
MOUNTAIN WEST**

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INTRODUCTION

As suburban sprawl, commercial development, and ski area expansion begin to become more common throughout the Mountain West,<sup>1</sup>

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1. WILLIAM R. TRAVIS, NEW GEOGRAPHIES OF THE AMERICAN WEST: LAND USE AND THE CHANGING PATTERNS OF PLACE 3 (2007).

communities have begun to search for ways to expand responsibly.<sup>2</sup> Some municipalities have placed limits on sprawl by preserving “natural spaces” around their communities, while others look to create parks and recreational areas for their communities before all remaining open space is developed.<sup>3</sup> By exploring the use of extraterritorial<sup>4</sup> condemnation for the preservation of open space and parks, this Note looks at one way that municipalities can reach beyond their borders to achieve their goals of curbing sprawl and providing recreational areas for their residents.

First, this Note will discuss Telluride, Colorado’s condemnation of 572 acres of undeveloped land outside its boundaries as a means to curb development and provide open space for its residents and visitors. Second, by comparing the aftermath of Telluride’s condemnation to the pro-property rights backlash of *Kelo v. City of New London*,<sup>5</sup> this Note will analyze the likelihood that other municipalities within Colorado will seek to curb development and preserve parks by using their power of extraterritorial condemnation. Third, this Note will look to other states throughout the Mountain West to determine if municipalities within those states will be able to emulate Telluride’s method of curbing growth and preserving open space.

## I. TELLURIDE AND THE VALLEY FLOOR

Telluride is a small mountain-resort town in the San Juan mountain range of southwest Colorado. Surrounded on three sides by a breathtaking box canyon, the only entrance into the town exists to its west along an undeveloped, 880-acre portion of the San Miguel River Basin known to locals as the “Valley Floor.”<sup>6</sup> While Telluride may be known nationally for its great skiing and annual bluegrass festival, the town also has a rich, historic past, and the Valley Floor has played a significant role throughout the years.

Before western settlers discovered the Valley Floor, the Native American Ute Tribe occupied the river basin during the warm summer months.<sup>7</sup> In 1872, prospector Linnard Remine found gold on the Valley

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2. *Id.* at 216–19.

3. *Id.*

4. “Beyond the geographic limits of a particular jurisdiction.” BLACK’S LAW DICTIONARY 666 (9th ed. 2009).

5. *Kelo v. City of New London*, 545 U.S. 469 (2005).

6. Eileen McGinley, *A History of the Valley Floor*, in VALLEY FLOOR ANTHOLOGY: WRITINGS AND IMAGES FROM THE TELLURIDE COMMUNITY 39 (Rhonda Claridge ed., 2006).

7. *Id.*

Floor.<sup>8</sup> As a result, the United States government broke a prior treaty with the Utes and forced them off the Valley Floor and out of the surrounding mountains. By 1875, over 300 miners worked along the San Miguel River.<sup>9</sup> While more temporary settlements were first established directly to its west, Telluride, then known as Columbia, became a town in 1885 with a population of 850.<sup>10</sup>

The new town began to flourish in 1890 when the Rio Grande Southern Railroad connected the town to the rest of the West.<sup>11</sup> These tracks ran across the Valley Floor along the San Miguel River. As a result, the population of Telluride skyrocketed to 5000.<sup>12</sup> “For the next forty years the Valley Floor saw a variety of uses under public and private ownership, as the site[s] of dairies, recreation, and a dump for mine tailings.”<sup>13</sup> In 1930, Joe Oberto began buying mining claims across the Valley Floor in an attempt to consolidate all of the land immediately to the west of Telluride into one large parcel.<sup>14</sup>

Oberto sold his consolidated Valley Floor property to Idarado Mining Company, a subsidiary of Newmont Mining Company, in 1967.<sup>15</sup> While Idarado bought the property mainly to store spent mine tailings, Telluride residents forced the company to stop the dumping—preserving the Valley Floor’s natural beauty.<sup>16</sup> After Telluride declined an offer to purchase the Valley Floor, Idarado sold the Valley Floor to the Cordillera Corporation, the predecessor to the San Miguel Valley Corporation (SMVC) in 1983. Cordillera bought the property for \$6.5 million.<sup>17</sup>

Meanwhile, with the close of its last mine, Telluride was forced to reinvent itself, and the town soon became a world-class ski resort and tourist attraction.<sup>18</sup> With this change came wealth. Telluride’s hippies and ski bums soon found themselves bumping elbows with second homeowners, movie stars, and CEOs.<sup>19</sup>

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8. *Valley Floor Timeline*, TELLURIDE WATCH, June 2, 2008, available at [http://www.telluridewatch.com/printer\\_friendly/50711](http://www.telluridewatch.com/printer_friendly/50711).

9. McGinley, *supra* note 6, at 39.

10. *Id.*; *Valley Floor Timeline*, *supra* note 8.

11. *Valley Floor Timeline*, *supra* note 8.

12. Town of Telluride, Colorado: Town History, <http://telluride-co.gov/home/index.asp?page=33> (last visited Feb. 1, 2010).

13. McGinley, *supra* note 6, at 39.

14. *Id.* at 40.

15. *Valley Floor Timeline*, *supra* note 8.

16. McGinley, *supra* note 6, at 40.

17. *Id.*

18. Town of Telluride, Colorado: Town History, *supra* note 12.

19. Bruce V. Bigelow, *A Rockies Sage*, SAN DIEGO UNION-TRIB., Mar. 25, 2007, at F1; Joanne Kelley, *Telluride Passes Hat, Collects \$50 Million: Fundraising Drive Nets Enough to Preserve Pristine*

Through the 1980s and 90s, SMVC presented numerous development plans for the Valley Floor. One plan included “a series of reservoirs, a golf course, and a population of 7000. SMVC never pursued these plans.”<sup>20</sup> However, in 1999, the company updated plans to develop the Valley Floor and stated its intent to have the property annexed into the nearby resort town of Mountain Village. The development was to include amenities such as a large hotel, a golf course, and a gondola to Mountain Village. Condominiums and single-family homes would also be part of the development.<sup>21</sup>

On June 25, 2000, in reaction to SMVC’s plans, the Telluride Town Council directed staff to prepare to condemn the extraterritorial property. As locals rallied around the Council’s directive, SMVC again backed away from its plans and suspended annexation efforts.<sup>22</sup> In an effort to preserve the portion of the Valley Floor south of Highway 145 (the road into Telluride) for open space, the Town Council adopted an ordinance to condemn the 572 acres.<sup>23</sup> On June 25, 2002, the residents of Telluride backed the Council by voting to pursue the condemnation.<sup>24</sup> After filing an intent to condemn in district court, Telluride had the property appraised at \$19.3 million. SMVC’s appraiser, on the other hand, determined the property to be worth \$48.2 million. Thus, SMVC rejected the town’s effort to purchase the land outright for \$19.5 million.<sup>25</sup>

After officially filing for condemnation in district court, Telluride was faced with a new challenge. In a reaction to the Town’s efforts, the Colorado legislature passed House Bill 04–1203, known as the “Telluride Amendment” and codified.<sup>26</sup> The amendment reads as follows:

(I) Effective January 1, 2004, no home rule or statutory municipality shall either acquire by condemnation property located outside of its territorial boundaries nor provide any funding, in whole or in part, for the acquisition by condemnation by any other public or private party of property located outside of its territorial boundaries; except

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*Land*, ROCKY MTN. NEWS (Denver, Colo.), May 10, 2007, available at <http://m.rockymountainnews.com/news/2007/may/10/telluride-passes-hat-collects-50-million>.

20. McGinley, *supra* note 6, at 40.

21. *Id.* at 40–41; *Valley Floor Timeline*, *supra* note 8.

22. McGinley, *supra* note 6, at 41; *Valley Floor Timeline*, *supra* note 8.

23. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 163 (Colo. 2008) (“The Town of Telluride, a home-rule municipality, sought to condemn 572 acres of real property located adjacent to Telluride for open space and park purposes.”).

24. McGinley, *supra* note 6, at 41.

25. *Valley Floor Timeline*, *supra* note 8.

26. COLO. REV. STAT. § 38-1-101(4)(b) (2008); see *Valley Floor Timeline*, *supra* note 8.

that the requirements of this paragraph (b) shall not apply to condemnation for water works, light plants, power plants, transportation systems, heating plants, any other public utilities or public works, or for any purposes necessary for such uses. (II) Effective January 1, 2004, no home rule or statutory municipality shall either acquire by condemnation property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes, nor provide any funding, in whole or in part, for the acquisition by condemnation by any other private or public party of property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes except where the municipality has obtained the consent of both the owner of the property to be acquired by condemnation and the governing body of the local government in which territorial boundaries the property is located.<sup>27</sup>

Upon the codification of the Telluride Amendment, Telluride was forced to challenge the amendment as unconstitutional during the condemnation proceedings. In an opinion that would later be affirmed by the Colorado Supreme Court, District Judge Greenacre held that the Colorado Constitution allows the extraterritorial exercise of condemnation by home-rule municipalities<sup>28</sup> and that it is unconstitutional for the General Assembly to legislate otherwise.<sup>29</sup>

Judge Greenacre cited over sixty years of Colorado Supreme Court precedent recognizing the power given to home-rule municipalities to condemn land extraterritorially.<sup>30</sup> Judge Greenacre also held that home-rule municipalities have the power to condemn land for open space even though

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27. *Id.* By declaring that extraterritorial condemnation was a matter of statewide and local concern, this statute attempted to assert authority over both home-rule and statutory municipalities' eminent domain powers.

28. Upon adopting a home-rule charter, home-rule municipalities "no longer are dependent upon the state legislature for their authority to determine their local affairs and government, but have power granted directly from the people through the state constitution without statutory authorization." 56 AM. JUR. 2D *Municipal Corporations* § 108 (2009). In contrast, statutory municipalities are subject to state legislative control. These municipalities are not sovereign entities and exist as creatures of the state. *Id.* § 85.

29. See *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22, at 13 (San Miguel County Dist. Ct. Oct. 6, 2004), available at [http://telluride-co.gov/docs/greenacre\\_order.pdf](http://telluride-co.gov/docs/greenacre_order.pdf) ("There is simply no authority for the proposition that the General Assembly may regulate, much less prohibit, a home-rule municipality's constitutional eminent domain powers.").

30. *Id.* at 3–4.

the use is not enumerated in the Colorado Constitution.<sup>31</sup> Judge Greenacre cited precedent rejecting the notion that enumerated uses are the only legal uses allowed to condemn property.<sup>32</sup> Furthermore, he cited Colorado case law that upheld the use of condemnation for parks and recreation trails.<sup>33</sup> With constitutional authority for both extraterritorial condemnation and condemnation for open space, Judge Greenacre concluded that the Telluride Amendment was unconstitutional as it applied to home-rule municipalities.<sup>34</sup>

In the valuation trial, the jury appraised the Valley Floor at fifty million dollars.<sup>35</sup> Because the town had only about twenty-six million on hand<sup>36</sup> to give just compensation, friends and residents of Telluride soon found themselves in a twenty-five million dollar fundraising drive.<sup>37</sup> The fundraising became a community effort; waiters began to donate their tips and school children broke open their piggy banks to help the cause—though it was the larger gifts that really made an impact.<sup>38</sup> On May 9, 2007, Telluride Mayor John Pryor announced that the town had accomplished the remarkable feat of raising over twenty-five million dollars.<sup>39</sup> With the money raised, Telluride continued to pursue the condemnation of the Valley Floor.

## II. *TOWN OF TELLURIDE V. SAN MIGUEL VALLEY CORP.* IN THE COLORADO SUPREME COURT

After Telluride raised the money needed to give SMVC just compensation, the corporation continued to pursue its claim that extraterritorial condemnation for open-space preservation and parks was unconstitutional. In its appeal to the Colorado Supreme Court, SMVC made two key arguments. First, the company claimed that open-space preservation is not a valid public use under article XX of the Colorado Constitution.<sup>40</sup> Second, it claimed that section 38-1-101(4)(b) is

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31. *Id.* at 4.

32. *Id.* at 4–5.

33. *Id.* at 5.

34. *Id.* at 13.

35. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 164 (Colo. 2008).

36. Bigelow, *supra* note 19.

37. Anna Haislip, *Telluride Given Control of Land at Town Entrance*, DENVER POST, June 3, 2008, available at [http://www.denverpost.com/search/ci\\_9460237](http://www.denverpost.com/search/ci_9460237).

38. Bigelow, *supra* note 19; Kelley, *supra* note 19.

39. *Valley Floor Timeline*, *supra* note 8.

40. *San Miguel Valley Corp.*, 185 P.3d at 164.

constitutional and that municipalities are prohibited from condemning extraterritorial land for parks, recreation, or open space as a result.<sup>41</sup>

In addressing SMVC's first argument, the court discussed whether municipalities' condemnation powers are limited to the specific uses enumerated within section 1 of article XX of the Colorado Constitution.<sup>42</sup>

Section 1 of article XX provides that home-rule municipalities:

[S]hall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent . . . .<sup>43</sup>

SMVC argued that Telluride lacks authority to condemn extraterritorial land for parks or open space because such uses are not enumerated in section 1 of article XX.<sup>44</sup> The court rejected this argument and held that the court has ruled on numerous occasions that the purposes listed under section 1 are only examples of home-rule municipalities' "broader grant of power" to condemn property for "any lawful, public, local, and municipal purpose."<sup>45</sup> Furthermore, the court concluded that the plain language in section 6 of article XX confirms that section 1 is not intended to define the full scope of powers given to home-rule municipalities. Section 6 provides that home-rule municipalities are given "all other powers necessary, requisite or proper for the government and administration of its local and municipal matters . . . ."<sup>46</sup> Thus, the court ruled that open-space preservation is not precluded from being a "lawful, public, local, and municipal purpose" simply because it is not enumerated in the Colorado Constitution.<sup>47</sup>

SMVC next argued that even if a park or open-space preservation potentially is a valid public purpose under a home-rule municipality's eminent domain power, such power is limited when a town seeks to

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41. *Id.*

42. *Id.* at 164–65.

43. COLO. CONST. art. XX, § 1.

44. *San Miguel Valley Corp.*, 185 P.3d at 165.

45. *Id.* See *Fishel v. City of Denver*, 108 P.2d 236, 240 (Colo. 1940) (en banc) (holding that the amendment was designed "to give as large a measure of home-rule in local municipal affairs as could be granted under the Republican form of government . . . ."). See also *City of Denver v. Hallett*, 83 P. 1066, 1068 (Colo. 1905) (holding that article XX was only an "expression" of a few prominent powers that municipalities are frequently granted).

46. COLO. CONST. art. XX, § 6.

47. *San Miguel Valley Corp.*, 185 P.3d at 166.

condemn land extraterritorially.<sup>48</sup> The company looked to section 6 of article XX of the Colorado Constitution, which states that municipalities' charters or local ordinances shall take the place of any state law within the territorial limits of the city or town.<sup>49</sup> The court quickly rejected this claim and stated that just because home-rule municipalities have plenary power over matters of local and municipal concern within their territorial limits does not mean that their section 1 power of eminent domain is limited within their borders.<sup>50</sup> The court pointed to other constitutional provisions that granted extraterritorial power and cited precedents where it had previously upheld extraterritorial condemnations involving other public purposes.<sup>51</sup>

The Colorado Supreme Court next decided whether a park or open space constitutes a valid public purpose under article XX. This was an issue of first impression for the court.<sup>52</sup> In its reasoning, the court refused to adopt a uniform standard to determine what constitutes a public use under article XX. Instead, the court looked at "pertinent Colorado law" and the state's tradition of land use policy as a function of local government.<sup>53</sup>

In looking to pertinent Colorado law, the court relied on precedent that gives home-rule municipalities every power which the legislature could confer to the statutory municipalities.<sup>54</sup> In doing so, the court looked to state statutes passed by the Colorado General Assembly giving power to statutory municipalities to condemn land for parks and open space.<sup>55</sup> One such statute granted *statutory* cities and towns the authority to condemn land for "park and recreational purposes or for the preservation or conservation of . . . open space and vistas."<sup>56</sup> The court also looked upon two other statutes that allowed extraterritorial condemnation for open space and parks.<sup>57</sup> By looking to these statutes, the court determined that *home-*

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48. *Id.*

49. *Id.*

50. *Id.* at 165–66.

51. *Id.* at 166. See COLO. CONST. art. XX, § 1 (providing that home-rule municipalities shall have the power to condemn land within or outside their territorial boundaries). See also *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 389 (Colo. 1978) (holding that the city, as specifically granted by the State's Constitution, may condemn extraterritorial water rights).

52. *Id.* at 167.

53. *Id.* at 168.

54. *Id.*

55. *Id.*

56. *Id.* (citing COLO. REV. STAT. § 29-7-107 (2008) (defining "recreational system")). See COLO. REV. STAT. § 29-7-104 (2008) (granting the power of eminent domain to "any municipal board given charge of the recreation system").

57. *San Miguel Valley Corp.*, 185 P.3d at 168; COLO. REV. STAT. §§ 31-25-201(1), 38-6-110 (2008).



*rule* municipalities should have similar rights in their power to condemn property for parks and open space.<sup>58</sup>

The state's tradition of leaving land use policy to local governments brought the court to a similar conclusion regarding home-rule municipalities' power to condemn land for parks and open space. Many of Colorado's home-rule municipalities manage extensive open-space programs, and many mountain-resort communities find such programs to be an important tool in controlling growth and development.<sup>59</sup> Because of the traditional role of municipalities in managing parks and open space and the condemnation powers given to statutory municipalities, the court found that condemnation for parks or open space was a "lawful, public, local, and municipal purpose within the scope of Article XX."<sup>60</sup>

Next, the court addressed SMVC's argument that section 38-1-101(4)(b) is constitutional and, as a result, that municipalities are prohibited from condemning extraterritorial land for parks or open space. SMVC argued that even if article XX grants home-rule municipalities the condemnation power at hand, it is still necessary to weigh competing state and local concerns to determine whether the General Assembly can preempt that power.<sup>61</sup> In response, the court looked to precedents that set out the rules on when state statutes can preempt home-rule municipalities. If the issue is one of statewide or mixed state and local concern, state statutes take priority over any conflicting home-rule ordinance unless the municipality's ordinance is pursuant to the Colorado Constitution.<sup>62</sup> However, the court concluded that no analysis of state and local concerns is necessary regarding home-rule municipalities' power to condemn extraterritorial land for the purpose of parks and open space because the state constitution grants such municipalities this power in article XX.<sup>63</sup>

In response, SMVC argued that the legislature can repeal home-rule powers granted in article XX if those powers are only implied. SMVC argued that home-rule powers that are "merely implied" in article XX only apply in matters that are purely local and that Telluride's condemnation was not a "purely local" matter.<sup>64</sup> The court quickly rejected this argument by reiterating that the condemnation purposes enumerated in article XX are merely examples of a broader grant of power given to home-rule

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58. *San Miguel Valley Corp.*, 185 P.3d at 168.

59. *Id.* at 168–69.

60. *Id.* at 169.

61. *Id.*

62. *Id.*

63. *Id.* at 170.

64. *Id.*

municipalities.<sup>65</sup> As a result, the court declared the Telluride Amendment to be unconstitutional as it applies to home-rule municipalities.<sup>66</sup>

In its conclusion, the court held that extraterritorial condemnation of land for open space was a valid public purpose under article XX of the Colorado Constitution.<sup>67</sup> Furthermore, the court held that the Telluride Amendment was unconstitutional because it prohibited home-rule municipalities from exercising their eminent domain power granted in the constitution.<sup>68</sup> As a result, the court affirmed the judgment of the trial court, which upheld Telluride's condemnation of the Valley Floor.<sup>69</sup>

### III. WILL *TOWN OF TELLURIDE V. SAN MIGUEL VALLEY CORP.* BECOME COLORADO'S *KELO*?

In 2000, New London, Connecticut sought to revitalize its fledgling economy by using its eminent domain power to allow for the creation of a "small urban village," "riverwalk," and a Pfizer research center.<sup>70</sup> Quickly, residents whose homes were to be condemned in furtherance of the project challenged the effort. They argued that the project did not meet the Fifth Amendment's public use requirement because their land was to be transferred to a private party.<sup>71</sup> After granting certiorari on the matter, the United States Supreme Court defined "public use" broadly and held that private property can be condemned and transferred to a private party as long as its use benefits the public.<sup>72</sup>

When the Court released its opinion in *Kelo* in June 2005, the decision led to a "political firestorm" in a majority of state legislatures throughout the country.<sup>73</sup> By November 2006, twenty-eight states had already passed statutes limiting eminent domain power in their states, and residents in eleven states voted on ballot measures designed to limit government's

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65. *Id.*

66. *Id.* at 171.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Kelo v. City of New London*, 545 U.S. 469, 472–74 (2005).

71. *Id.* at 475. The Fifth Amendment of the U.S. Constitution requires that private property only be condemned if the land is taken for a public use and the landowner is provided with just compensation. U.S. CONST. amend. V.

72. *Kelo*, 545 U.S. at 480, 486.

73. Molly G. Brottmiller, Comment, *Is This the Start of a Silent Spring? Kelo v. City of New London's Effect on Environmental Reforms*, 56 CATH. U. L. REV. 1107, 1127 (2007).

ability to condemn land for economic development.<sup>74</sup> Similarly, the media joined the states in their concern that the decision “departed from 200 years of precedent.”<sup>75</sup> Yet, a look at the Court’s takings precedent tells a different tale: it shows that *Kelo* was not as radical a departure from past Takings Clause cases as the media depicted.<sup>76</sup>

The Supreme Court established a broad definition of public use long before *Kelo*. In 1954, the Court in *Berman v. Parker*<sup>77</sup> upheld the eminent domain power to acquire blighted properties to sell them to private parties for redevelopment.<sup>78</sup> In his opinion, Justice Douglas wrote that the government could condemn properties in blighted areas of the District of Columbia for just compensation to promote community redevelopment, regardless of whether the individual properties were blighted themselves.<sup>79</sup> The Court held that “communit[ies] should be beautiful as well as healthy, spacious as well as clean . . . .”<sup>80</sup> “Thus, a taking is for public use so long as the government is taking property to achieve a legitimate government purpose and so long as the taking is a reasonable way to achieve the goal.”<sup>81</sup>

The Court reaffirmed its view of eminent domain thirty years later in *Hawaii Housing Authority v. Midkiff*, in which it upheld a condemnation effort that involved taking land from one private landowner and selling it to another.<sup>82</sup> In an attempt to expand property ownership to a larger number of people, the State of Hawaii sought to condemn property from the land-owning class, with the plan to sell to those in Hawaii who did not own land.<sup>83</sup> In upholding Hawaii’s condemnation, the Court reaffirmed that economic factors could be considered in determining whether a state action qualifies as a public use.<sup>84</sup>

Considering these precedents, the Court’s upholding of the acquisition of non-blighted homes to promote economic development in New London was nothing more than a “direct restatement of *Berman*,” a fifty-year-old precedent.<sup>85</sup> Yet, the media attention in reaction to the decision highlighted

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74. Editorial, *The Anti-Kelo Wave*, WALL ST. J., Nov. 4, 2006, available at <http://online.wsj.com/article/SB116260316340513325.html> [hereinafter *The Anti-Kelo Wave*].

75. See, e.g., *id.* (agreeing with dissenting Justice Sandra Day O’Connor).

76. BrottMiller, *supra* note 73, at 1117.

77. *Berman v. Parker*, 348 U.S. 26 (1954).

78. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 662 (3d ed. 2006).

79. BrottMiller, *supra* note 73, at 1116.

80. *Berman*, 348 U.S. at 33.

81. CHERMERINSKY, *supra* note 78, at 663.

82. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231–32 (1984).

83. CHERMERINSKY, *supra* note 78, at 663.

84. BrottMiller, *supra* note 73, at 1116.

85. *Id.* at 1117.

the not-so-radical holding, creating an anti-*Kelo* backlash throughout a majority of states.<sup>86</sup>

On a smaller scale, *San Miguel Valley Corp.* is analogous to *Kelo* in that the Colorado Supreme Court's holding caused a media frenzy throughout Colorado and the Mountain West.<sup>87</sup> Yet, similar to *Kelo*, the decision should be no surprise considering Colorado Supreme Court precedent and existing Colorado statutes. In hearing SMVC's challenge to Telluride's extraterritorial exercise of their condemnation power, the court cited four previous decisions that upheld such eminent domain powers. In *City of Thornton*, the court upheld the city's extraterritorial condemnation of water rights.<sup>88</sup> In *Toll v. City of Denver*, the court upheld extraterritorial condemnation for easements and channel improvement.<sup>89</sup> In *City of Denver v. Board of Commissioners*, the court allowed extraterritorial condemnation to construct an airport.<sup>90</sup> Lastly, in *Fishel v. City of Denver*, the court permitted extraterritorial condemnation for a bombing range.<sup>91</sup> Furthermore, the court's determination that open space and parks constituted a lawful public purpose was nothing revolutionary within Colorado. The court cited several statutes in which the General Assembly conferred authority to statutory towns and cities to condemn land for parks and open space.<sup>92</sup>

While *San Miguel Valley Corp.* may not be a completely radical holding considering the court's precedents, the case struck the same chord among property rights advocates as *Kelo* did: it explicitly established another reason upon which government can take a property owner's bundle

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86. *The Anti-Kelo Wave*, *supra* note 74.

87. See, e.g., Jean Torkelson, *Telluride Wins Right to Seize Land*, ROCKY MTN. NEWS (Denver, Colo.), June 2, 2008, available at <http://m.rockymountainnews.com/news/2008/jun/02/telluride-wins-right-to-seize-land>; Haislip, *supra* note 37; Staff Report, *Telluride Wins 'Valley Floor' Battle*, ASPEN TIMES, June 2, 2008, available at <http://www.aspentimes.com/article/20080602/NEWS/798846839&parentprofile=search>; Staff, *State Supreme Court: Telluride Can Condemn Valley Floor*, MONTROSE PRESS (Montrose, Colo.), June 2, 2008, available at [http://montrosepress.com/articles/2008/06/02/breaking\\_news/doc48441f6e46678604.178029.txt](http://montrosepress.com/articles/2008/06/02/breaking_news/doc48441f6e46678604.178029.txt); Lucia Stewart, *Supreme Court Rules in Favor of Telluride Valley Floor Condemnation*, NEW WEST, June 3, 2008, available at [http://www.newwest.net/topic/article/supreme\\_court\\_rules\\_in\\_favor\\_of\\_telluride\\_valley\\_floor\\_condemnation/C559/L559/](http://www.newwest.net/topic/article/supreme_court_rules_in_favor_of_telluride_valley_floor_condemnation/C559/L559/).

88. *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 389 (Colo. 1978).

89. *Toll v. City of Denver*, 340 P.2d 862, 865 (Colo. 1959).

90. *City of Denver v. Bd. of Comm'rs*, 156 P.2d 101, 103 (Colo. 1945).

91. *Fishel v. City of Denver*, 108 P.2d 236, 241 (Colo. 1940) (en banc).

92. See COLO. REV. STAT. §§ 29-7-104 to 29-7-107 (2008) (giving municipalities the power to condemn property for parks, preservation sites, or open space); see also COLO. REV. STAT. § 31-25-201(1) (2008) (granting municipalities the authority to extraterritorially condemn parks and open space within five miles of their boundaries).

of sticks. Will *San Miguel Valley Corp.* be Colorado's *Kelo*? Will the case lead to a majoritarian uprising within Colorado to reverse the court's holding? Or could it become an accepted and widely utilized tool for Mountain West municipalities looking to curb growth?

#### IV. THE AFTERMATH OF *TOWN OF TELLURIDE V. SAN MIGUEL VALLEY CORP.*

##### A. *The Property Rights Backlash*

The property-rights movement within Colorado kept its eye on Telluride's effort to condemn the Valley Floor from the case's inception. The movement first attempted to halt Telluride's efforts when State Representative Shawn Mitchell tacked the Telluride Amendment onto a bill aimed at protecting property owners located within urban renewal areas.<sup>93</sup> After intense lobbying by SMVC's lead attorney, Thomas Ragonetti,<sup>94</sup> the General Assembly passed the Telluride Amendment and Colorado Governor Bill Owens signed the bill into law, prohibiting Colorado municipalities from condemning land outside of their boundaries for open space and parks.<sup>95</sup>

Six months after the Telluride Amendment's passage into law, however, property-rights advocates learned that their fight against eminent domain abuse was not over. In January 2005, San Miguel County District Court Judge Charles Greenacre declared the statute unconstitutional.<sup>96</sup> This ruling sent shockwaves through the property-rights movement. The Director of Property Rights Project, Jessica Peck Corry, published an analysis of condemnation within Colorado, with a portion of the publication focusing

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93. Charles Ashby, *Towns Oppose Bill Limiting Power*, THE DURANGO HERALD, Feb. 28, 2004. See COLO. REV. STAT. § 38-1-101 (2008) (asserting authority over both home-rule and statutory municipalities' eminent domain powers). While a portion of this statute included the Telluride Amendment, the majority of the statute dealt with changes to the state's urban renewal law. Those portions are beyond the scope of this note; however, a summary of the legislation can be found at Paul Benedetti et al., *A Brief Overview of Recent Changes in Colorado's Urban Renewal Law*, THE COLORADO LAWYER 99 (Sept. 2004).

94. Peter Kenworthy, *On the Valley Floor: How Did We Get Here?*, THE WATCH (Telluride, Colo.), Jan. 26, 2009, available at [http://www.telluridewatch.com/view/full\\_story/50695/article-On-the-Valley-Floor--How-Did-We-Get-Here-](http://www.telluridewatch.com/view/full_story/50695/article-On-the-Valley-Floor--How-Did-We-Get-Here-).

95. Reilly Capps, *Key Legal Decisions*, THE DAILY PLANET (Telluride, Colo.), Jan. 22, 2008.

96. *Id.* See *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22, at 13 (San Miguel County Dist. Ct. Oct. 6, 2004), available at [http://telluride-co.gov/docs/greenacre\\_order.pdf](http://telluride-co.gov/docs/greenacre_order.pdf) ("There is simply no authority for the proposition that the General Assembly may regulate, much less prohibit, a home-rule municipality's constitutional eminent domain powers.").

on Judge Greenacre's decision and the Telluride Amendment.<sup>97</sup> Corry found Judge Greenacre's decision to be another example of how "families and small businesses across Colorado face the very real threat of eminent domain in their lives every day."<sup>98</sup> Furthermore, Corry stated that local governments are misguided in their belief that they know best how to handle land use issues because these municipalities often neglect their citizens' constitutional rights to own private property.<sup>99</sup>

By defining the issue very broadly, Corry rejected Judge Greenacre's reasoning that the General Assembly had no authority to regulate home-rule municipalities' eminent domain powers. She believes that "[t]he Colorado constitution clearly allows legislators to enact legislation designed to protect all residents from abuses of their most basic constitutional freedoms."<sup>100</sup> In a related editorial, Corry analogized Judge Greenacre's ruling to that of "race or gender discrimination."<sup>101</sup>

The Property Rights Project was not the only voice to criticize Judge Greenacre's holding. A Denver Post editorial expressed the belief that extraterritorial condemnation to preserve open space would be "abusive" regardless of how any court ruled on the issue.<sup>102</sup> Another editorial by Colorado Farm Bureau president, Alan Foutz, expressed concern over Judge Greenacre's ruling because of the risk such a decision will have on the state's agricultural community. He feared that farmers and ranchers could lose their livelihood simply because a town desires an open space buffer along its boundaries.<sup>103</sup>

With backlash already brewing among property rights advocates based simply on a trial court decision declaring the Telluride Amendment unconstitutional, it should not have been surprising that a Colorado Supreme Court holding affirming Judge Greenacre's ruling would only increase anti-condemnation rhetoric among the movement. On June 2, 2008, the Colorado Supreme Court released its decision declaring the

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97. JESSICA PECK CORRY, AT THE CROSSROADS OF CONDEMNATION: THE DEBATE OVER THE USE OF EMINENT DOMAIN FOR PRIVATE DEVELOPMENT AND OPEN SPACE 23-24 (2006), available at [http://www.i2i.org/articles/IP\\_1\\_2006\\_b.pdf](http://www.i2i.org/articles/IP_1_2006_b.pdf).

98. *Id.* at 25.

99. *Id.* at 26.

100. *Id.* at 27.

101. Jessica Peck Corry, Editorial, *Telluride Tug of War: Implications Grave in Taking of Valley Floor*, ROCKY MOUNTAIN NEWS (Denver, Colo.), May 19, 2007, at 28, available at 2007 WLNR 9451846.

102. David Harsanyi, *Land Grab Should Be Condemned*, THE DENVER POST, Nov. 21, 2007, at B01, available at 2007 WLNR 23068739.

103. Alan Foutz, Editorial, *Court Case a Threat to Farmers, Ranchers*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 23, 2008, at 36, available at 2008 WLNR 1283073.

Telluride Amendment unconstitutional—allowing the Valley Floor to be condemned.<sup>104</sup> More *Kelo*-like backlash soon followed.

Newspapers throughout Colorado were the first to weigh in on the holding. A Rocky Mountain News editorial by Vincent Carroll warned that the decision would give municipalities the power to pursue “[l]ots of high-handed bullying.”<sup>105</sup> Carroll feared that the ruling would lead to a rash of government entities spying on private projects outside their borders and suddenly declaring an interest in procuring the land for open space or parks simply because they do not like the project.<sup>106</sup> He also feared that this could lead to resort towns condemning farmland, which would prevent farmers from pursuing their retirement.<sup>107</sup> A Denver Post editorial declared the court’s ruling to be a “troubling expansion of the condemnation power of home-rule cities.”<sup>108</sup> The editorial elaborated that the court should only consider the examples of public use enumerated in article XX of the constitution.<sup>109</sup> Further, it argued that the court should take a restrained approach in condemning land outside municipal borders.<sup>110</sup> In its conclusion, the article implicitly endorsed forcing the courts to take such a restrained approach by pursuing a state constitutional amendment requiring such minimalism.<sup>111</sup>

Following the Supreme Court’s decision, Colorado House Republican Leader Mike May announced his intent to push through a constitutional amendment just as the Denver Post had suggested the previous month.<sup>112</sup> Similar to Corry’s attacks on Judge Greenacre’s ruling, May defined the rights at stake generally as a right to own property and stated that it is “unacceptable for the court to trample that right.”<sup>113</sup> As a result, May claimed he plans to pursue a constitutional amendment to overrule the supreme court’s ruling.<sup>114</sup> May expressed concern that extraterritorial

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104. Haislip, *supra* note 37.

105. Vincent Carroll, Editorial, *Unleashing Mischief*, ROCKY MOUNTAIN NEWS (Denver, Colo.), June 6, 2008, at 39, available at 2008 WLNR 10704443.

106. *Id.*

107. *Id.* Carroll fails to recognize that the requirement of just compensation would ensure that farmers could still pursue their retirement plans.

108. Editorial, *Wrong Course on Eminent Domain*, DENVER POST, Jun. 4, 2008, available at [http://www.denverpost.com/search/ci\\_9468259](http://www.denverpost.com/search/ci_9468259) (last visited Feb. 23, 2010).

109. *Id.*

110. *Id.*

111. *Id.*

112. Tania Vijarro, *Mike May Acts to Defend Private Property Rights*, July 18, 2008, <http://denver.yourhub.com/Parker/Stories/News/Government/Story~497417.aspx>.

113. *Id.*

114. Mike Saccone, *Rep. May Objects to High Court’s Ruling on Telluride Condemning Outside Land*, DAILY SENTINEL (Grand Junction, Colo.), Aug. 7, 2008.

condemnation for open space is particularly oppressive because the property owners cannot vote on the elected officials who threaten to condemn their land.<sup>115</sup> He believes that the people of Colorado will agree that the court's ruling is an abuse of power.<sup>116</sup> May said, "The Supreme Court may be powerful enough to overturn a state law, but the people are powerful enough to overturn the Supreme Court. If you try to take away our property rights, you can expect a fight."<sup>117</sup>

The Colorado Constitution can be amended using one of two different methods. One method allows for a citizen's initiative, and the other allows for revision through the legislative referral process.<sup>118</sup> As a state legislator, May plans to amend the Constitution using the legislative referral process.<sup>119</sup> To do so, May's proposed amendment would need the approval of two-thirds of the members of both the state's house and senate.<sup>120</sup> If the amendment passes through the legislature, the language would then have to be approved by a simple majority of citizens voting in the state's next general election.<sup>121</sup> If the amendment makes its way onto the ballot, the soonest the voters could have their say would be in the November 2010 election.<sup>122</sup> Media coverage of proposed constitutional amendments tends to raise the level of public awareness on the issue, and approval by the electorate soon follows if they make it through the legislature.<sup>123</sup> "In Colorado, between 1964 and 2006, more than [seventy-five] percent of legislatively referred constitutional amendments were approved by the voters."<sup>124</sup> However, as of the end of the 2009 legislative session, May had not yet introduced the House Concurrent Resolution to overturn the Colorado Supreme Court's Valley Floor decision.<sup>125</sup>

### *B. The Local Municipal Power Movement*

While there were outspoken opponents to Telluride's efforts to condemn the Valley Floor, these views did not represent a consensus

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115. *Id.*

116. *Id.*

117. Vjarro, *supra* note 112.

118. UNIV. OF DENVER, STRATEGIC ISSUES PROGRAM, FOUNDATION OF A GREAT STATE: THE FUTURE OF COLORADO'S CONSTITUTION 10 (2007) [hereinafter UNIV. OF DENVER].

119. Vjarro, *supra* note 112.

120. UNIV. OF DENVER, *supra* note 118.

121. *Id.*

122. Vjarro, *supra* note 112.

123. UNIV. OF DENVER, *supra* note 118.

124. *Id.*

125. E-mail from Randy Hildreth, Communications Director, Colorado House Republicans, to Author (Dec. 31, 2009, 08:11 MST) (on file with author).



throughout Colorado. Environmentalists, individual municipalities, and the Colorado Municipal League (CML)<sup>126</sup> spoke out in support of the town during the condemnation process.<sup>127</sup>

When the controversial Telluride Amendment was before the General Assembly, Telluride's neighbors in southwest Colorado began to speak out against the bill. One city official in Durango cautioned that the bill would limit all cities' ability to use condemnation as a last resort just because it may have been abused elsewhere.<sup>128</sup> Similarly, one Cortez official believed that condemnation should be decided at the local level because there are differences within every community.<sup>129</sup> The towns of Bayfield and Ignacio expressed similar concerns about the Telluride Amendment.<sup>130</sup> The Colorado Association of Ski Towns' (CAST) policies also conflicted with the Telluride Amendment prior to the supreme court striking it down. CAST's policies promote "community-based land use" and protecting the environment."<sup>131</sup>

Columnists in Colorado's larger newspapers also showed some support for Judge Greenacre's ruling that knocked down the Telluride Amendment. One Denver Post columnist expressed support for Judge Greenacre's ruling that the Telluride Amendment was unconstitutional. He stressed the importance of municipalities providing local solutions to local problems because "one size never fits all."<sup>132</sup> In response to Colorado Farm Bureau president Alan Foutz's opinion piece attacking Judge Greenacre's decision,<sup>133</sup> Telluride environmentalist Hilary White emphasized that property rights are not god-given, but rather granted by law. She discussed the importance eminent domain has had in society's development because it has given government entities the ability to build roads, hospitals, and parks.<sup>134</sup>

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126. The Colorado Municipal League is a nonpartisan organization that represents almost all of Colorado's municipalities. The organization's mission consists of two parts: to represent municipalities collectively in matters before state and federal government and to educate local officials and employees to help them more effectively manage municipalities. Colorado Municipal League, About CML, <http://www.cml.org/about/about.aspx> (last visited Feb. 23, 2010).

127. Hilary White, *Constitution Allows Telluride Land Acquisition*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Feb. 7, 2008, available at <http://www.rockymountainnews.com/news/2008/Feb/07/constitution-allows-telluride-land-acquisition>.

128. Ashby, *supra* note 93.

129. *Id.*

130. *Id.*

131. Colorado Association of Ski Towns, Mission, <http://www.coskitowns.com/mission.cast> (last visited Mar. 17, 2010).

132. Bob Ewegen, Editorial, *Local Problems Need Local Answers*, THE DENVER POST, Feb. 23, 2007, available at [http://www.denverpost.com/opinion/ci\\_5291634](http://www.denverpost.com/opinion/ci_5291634).

133. Foutz, *supra* note 103.

134. White, *supra* note 127.

While some of the media and grassroots response after the Colorado Supreme Court decision was critical of the holding,<sup>135</sup> other editorials did express support for the landmark ruling. National Trust for Historic Preservation president Richard Moe wrote that the supreme court's opinion was in line with other courts at all levels who had consistently sought to strike "a balance between individual rights and public benefits."<sup>136</sup> Further, Moe stressed that condemnation was "no spur-of-the-moment land grab" and that the town of Telluride repeatedly attempted to purchase the Valley Floor.<sup>137</sup> Regarding just compensation, Moe also pointed out that the owner profited forty-three million dollars off of the land.<sup>138</sup>

The Colorado Municipal League (CML) was Telluride's biggest cheerleader throughout the eight-year process to condemn the Valley Floor. CML advocates that "community issues and needs should be addressed locally" and that "[s]tate and federal government interference can undermine home-rule and local control."<sup>139</sup> In doing so, CML expresses support for enabling legislation that gives towns and cities more authority and flexibility to address local needs.<sup>140</sup> In addressing land use specifically, CML supports policies "that discourage the sprawl of urban, suburban or exurban development into rural and unincorporated areas of the state."<sup>141</sup> As a result, CML opposes state restrictions on the ability of municipalities "to exercise [eminent domain] for the benefit of public health, safety and welfare."<sup>142</sup>

In pursuing its mission to "represent cities and towns collectively in matters before the state and federal government,"<sup>143</sup> CML often submits amicus curiae briefs for Colorado Supreme Court cases that have a substantial likelihood of affecting Colorado municipalities.<sup>144</sup> CML submitted such a brief in support of Telluride's efforts.<sup>145</sup> While property

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135. See Carroll, *supra* note 105 (declaring that the Colorado Supreme Court unleashed "lots of high-handed bullying" by giving home-rule cities the right to condemn land outside their boundaries on any public pretext); Editorial, *supra* note 108 (criticizing the decision because "the court went too far").

136. Richard Moe, Opinion, *Speakout: Court Right on Telluride*, ROCKY MOUNTAIN NEWS (Denver, Colo.), June 15, 2008, available at <http://m.rockymountainnews.com/news/2008/jun/15/speakout-court-right-on-telluride>.

137. *Id.*

138. *Id.*

139. Colorado Municipal League, 2009–2010 Policy Statement 1, available at [http://www.cml.org/pdf\\_files/policy\\_statement.pdf](http://www.cml.org/pdf_files/policy_statement.pdf) (last visited Feb. 22, 2010).

140. *Id.*

141. *Id.* at 8.

142. *Id.* at 9.

143. Colorado Municipal League, About CML, *supra* note 126.

144. Brief of Amicus Curiae the Colorado Municipal League at 1, *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008) (No. 07-SA-101), 2007 WL 4970069.

145. *Id.*

rights advocates feel condemnation for open space and parks is a violation of the fundamental right to own property,<sup>146</sup> CML believes such local power is necessary to “preserve the American west.”<sup>147</sup> In support of Telluride, CML looked less at the generalized right to own property and more to the specific rights granted to home-rule municipalities in article XX of the Colorado Constitution.<sup>148</sup> Just as the Colorado Supreme Court would later hold, CML advocated that the state legislature does not have constitutional authority to limit home-rule municipalities’ eminent domain powers through statute (in this case the Telluride Amendment) because it is an issue of local concern and therefore article XX applies.<sup>149</sup> In discussing the public use component of the case, CML cited *Londoner v. City and County of Denver*<sup>150</sup> as giving home-rule municipalities authority to condemn lands for parks.<sup>151</sup> If Representative May introduces his proposed constitutional amendment to overrule the Colorado Supreme Court’s holding in *San Miguel Valley Corp.*, CML will likely lobby the state legislature to ensure that the holding it advocated will be preserved.<sup>152</sup>

### C. *A Look to Telluride v. San Miguel Valley Corp.’s Influence in the Future*

During and after Telluride’s effort to condemn the Valley Floor, property rights advocates have consistently expressed fear that the precedent will lead to a barrage of condemnation efforts by municipalities throughout the state, increasing the violation of private property rights.<sup>153</sup> In contrast, those in support of the town’s condemnation have attempted to

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146. CORRY, *supra* note 97, at 26; Vijarro, *supra* note 112.

147. Brief of Amicus Curiae the Colorado Municipal League, *supra* note 144, at 3.

148. *Id.* at 9–10.

149. *Id.* at 11–12.

150. *Londoner v. City of Denver*, 119 P. 156, 158–159 (Colo. 1911).

151. Brief of Amicus Curiae the Colorado Municipal League, *supra* note 144, at 13.

152. “The League monitors the daily events of the Colorado Legislature for proposals that would affect municipalities and works to pass, defeat or amend legislation in accordance with general municipal interests and membership direction.” Colorado Municipal League, Media Room: Fact Sheet, Services, <http://www.cml.org/media/media.aspx#services> (last visited Feb. 23, 2010).

153. *See, e.g.*, Carroll, *supra* note 105 (“Incredibly, officials all over Colorado have been authorized to gaze out beyond their jurisdictions, spy a private project they dislike, declare their sudden interest in acquiring the land for ‘open space,’ and move to condemn it.”); Foutz, *supra* note 103 (“[A] frightening precedent will have been set for all of Colorado’s farms and ranches and the families who work and love their land.”); Pat Healy, *After Court Hearing, A Late Blast From SMVC*, THE DAILY PLANET (Telluride, Colo.), Jan. 28, 2008 (“Really, this is a precedent-setting case that fundamentally changes the way eminent domain is used in the State of Colorado.”); Corry, *supra* note 101 (“Such a ruling could establish a damning precedent, one where basic constitutional rights, including property rights and due process, are only protected if a local government decides they should be.”).

ward off such fears by emphasizing that condemnation power will only be used as a last resort.<sup>154</sup>

Throughout the eight years it took Telluride to successfully condemn the Valley Floor, several other municipalities have considered pursuing similar action by extraterritorially condemning property for open space or parks.<sup>155</sup> However, even with the go-ahead from the Colorado Supreme Court, municipalities still face many hurdles before they can condemn private property for open space. As a result, the flood of condemnations that property rights advocates have warned about are unlikely.<sup>156</sup>

Telluride differs from most communities throughout the Mountain West. These differences explain why the supreme court's decision in *San Miguel Valley Corp.* will not cause a flood of extraterritorial condemnations for parks and open space, or even condemnation for parks and open space inside municipal boundaries. First, Telluride raised half of the funds needed to provide just compensation for the Valley Floor through the town's real estate transfer tax and through municipal bonds.<sup>157</sup> Such a tax may be successful in exclusive resort towns such as Telluride, but a majority of communities throughout the West seek to increase their tax base by expanding development, not by taxing newcomers.<sup>158</sup> The current nationwide slump in home sales will also make it more difficult for municipalities to raise money through a similar real estate transfer tax.<sup>159</sup> Furthermore, municipalities in Colorado that do not already have a real estate transfer tax established no longer have the option to create one

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154. See, e.g., White, *supra* note 127 (“Exhausting all attempts at collaboration and negotiation, Telluride was left with no other option than to exercise its powers of eminent domain, which the courts have upheld every step of the way.”); Moe, *supra* note 136 (“Eventually it became apparent that the use of eminent domain was the only viable option that remained . . . .”); Ashby, *supra* note 93 (stating that the City of Durango has never used condemnation and would only use it as a last resort).

155. Parker, Colorado is currently pursuing extraterritorial condemnation for an addition to its regional park. Ed Sealover, *Eminent Domain Battle: Cities Couldn't Use It Outside Limits Under Proposal*, ROCKY MOUNTAIN NEWS (Denver, Colo.), July 18, 2008, at 22, available at 2008 WLNR 13454168. Opponents of the Twin Buttes development in Durango, Colorado have pushed for condemnation of the property to preserve open space. Karen Boush, *Twin Buttes Opponents Meet: Talk About Proposal for Subdivision for Up to 595 Homes*, THE DURANGO HERALD, Oct. 1, 2008, available at [http://www.durangoherald.com/sections/News/2008/10/01/Twin\\_Buttes\\_opponents\\_meet](http://www.durangoherald.com/sections/News/2008/10/01/Twin_Buttes_opponents_meet). Aspen, Colorado also watched Telluride's action closely while it considered condemning Smuggler Mountain as open space. Janet Urquhart, *Telluride Is Poised to Fight Open Space Bill*, ASPEN TIMES, May 25, 2004, available at <http://www.aspentimes.com/article/20040525/NEWS/105250004&parentprofile=search>.

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

157. Bigelow, *supra* note 19, E-mail from Kevin Geiger, Town Attorney, Town of Telluride. to Author (Mar. 18, 2010, 10:38 MST) (on file with author).

158. Ewegen, *supra* note 132.

159. See Abby Goodenough, *Housing Slump Pinches States in Pocketbook*, N.Y. TIMES, Apr. 8, 2007, at 11, available at 2007 WLNR 6703946 (noting that slump in home sales is hurting state revenues).

because the state's Taxpayer Bill of Rights now prohibits these taxes.<sup>160</sup> It is also important to note that condemning land for open space and parks will likely not bring about the future economic and tax benefits that are often used to justify other condemnation efforts for *Kelo*-like urban renewal projects.<sup>161</sup>

Second, residents of most Mountain West municipalities do not have the financial resources to raise the money necessary to provide just compensation for valuable undeveloped open space.<sup>162</sup> The residents and second-home owners of Telluride, one of the wealthiest towns in the Mountain West, were able to raise the money necessary to purchase the Valley Floor more easily than most communities could.<sup>163</sup> It is because of these differences that most municipalities within Colorado will likely not use eminent domain to acquire open space, whether inside or outside municipal boundaries.

#### V. WILL EXTRATERRITORIAL CONDEMNATION OF PROPERTY FOR OPEN SPACE OR PARKS BECOME A REGULARLY USED TOOL THROUGHOUT THE MOUNTAIN WEST?

While it is unlikely that many municipalities in Colorado will begin to condemn property for open space and parks within or without their boundaries due to the financial reasons discussed above, could municipalities in other states throughout the Mountain West proceed with such condemnations if they chose? The following sections discuss the legal power that other Mountain West states give to municipalities with respect to extraterritorial condemnation and the definition of public use. Figure 1 summarizes this discussion.

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160. See Ewegen, *supra* note 132 (noting that Telluride is able to continue taxing real estate sales because the tax was imposed before the Taxpayer's Bill of Rights); see also COLO. CONST. art X, § 20.

161. See JOHN D. ECHEVERRIA, GEORGETOWN ENVTL. LAW & POL'Y INST., THE MYTH THAT *KELO* HAS EXPANDED THE SCOPE OF EMINENT DOMAIN 3 (2005), [http://www.law.georgetown.edu/gelpi/current\\_research/documents/KeloMyth.pdf](http://www.law.georgetown.edu/gelpi/current_research/documents/KeloMyth.pdf) (discussing that economic benefit is the main public use rationalization for urban-renewal-based condemnation).

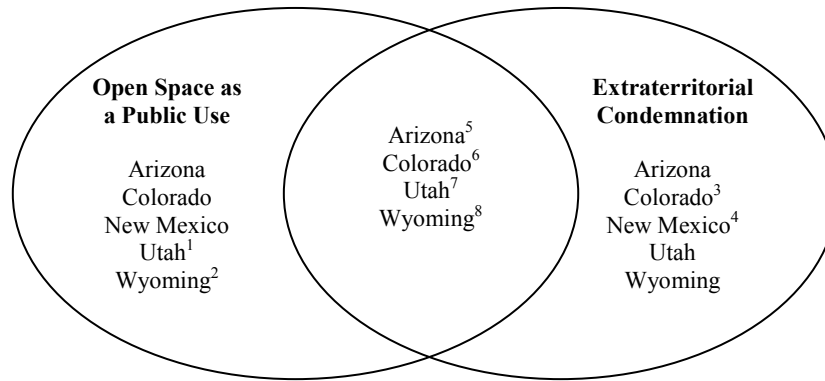
162. See, e.g., Bigelow, *supra* note 19 (stating that Mountain Village, Telluride's resort-town neighbor, often makes *Worth* magazine's survey of "America's Richest Towns"); Ted Holteen, *Condemnation of Twin Buttes a Long Shot*, THE DURANGO HERALD, July 13, 2008, available at [http://archive.durangoherald.com/aspbin/article\\_generation.asp?article\\_type=news&article\\_path=news08/news080713\\_5.htm](http://archive.durangoherald.com/aspbin/article_generation.asp?article_type=news&article_path=news08/news080713_5.htm) (citing Telluride's ability to raise funds due to its famous residents).

163. Bigelow, *supra* note 19.

### A. Utah

Under Utah law, municipalities' power to extraterritorially condemn land for open space or parks is more limited than home-rule municipalities in Colorado. Unlike Colorado, Utah law allows both charter (home-rule) municipalities and noncharter municipalities to condemn land inside and outside their boundaries.<sup>164</sup> Article XI, section 5 of the Utah Constitution grants charter municipalities the power to condemn land outside their boundaries "[t]o furnish all local public services."<sup>165</sup> However, when a charter town is simply making "local public improvements," the municipality can only condemn land within its boundaries.<sup>166</sup> In reaction to the Utah Supreme Court's decision in *Provo City v. Ivie* that prevented a noncharter city from extraterritorially condemning land, the state legislature amended state law to expand noncharter cities' condemnation power.<sup>167</sup> The amended statute now gives noncharter municipalities the power to condemn land outside their boundaries to "furnish all necessary local public services."<sup>168</sup>

Figure 1: A Summary of Mountain West Condemnation Law



<sup>1</sup> If property is not used for recreation

<sup>2</sup> Not yet determined by Wyoming courts

<sup>3</sup> Limitations exist for statutory municipalities

<sup>4</sup> Only for certain infrastructure improvements

<sup>5</sup> Cities larger than 75,000 must condemn land for park *and* utility purposes

<sup>6</sup> Only home-rule municipalities

<sup>7</sup> If the entity meets public use requirements

<sup>8</sup> Not yet determined by Wyoming courts

164. UTAH CODE ANN. § 10-8-2(1)(b)(iii) (Supp. 2009); UTAH CONST. art. XI, § 5(b).

165. UTAH CONST. art. XI, § 5(b).

166. *Id.* § 5(c).

167. *Utah County v. Ivie*, 137 P.3d 797, 799 n.1 (Utah 2006).

168. § 10-8-2(1)(b) (Supp. 2009).

While these grants of power appear to give cities and towns in Utah rights similar to that of home-rule municipalities in Colorado, Utah's municipalities are limited by the state's statutory definition of public use.<sup>169</sup> The statute allows municipalities to condemn land for public parks as long as the park is not primarily used "as a trail, path, or other way for walking, hiking, bicycling, or equestrian use."<sup>170</sup> This could be a roadblock for many municipalities looking to Telluride as a guide because open space and parks are often used to preserve land *and* to provide land for recreation.<sup>171</sup> Such statutory language would place a burden on the local entity to show that the land will not be condemned primarily for recreation.<sup>172</sup> If a municipality can meet this burden, then Utah law allows both charter and noncharter municipalities to extraterritorially condemn land for public parks.<sup>173</sup>

### B. Wyoming

In Wyoming, the law is not so clear. State law explicitly gives all municipalities the power to extraterritorially condemn land. Wyoming law allows condemnation of "property for public use within *and* without the city limits."<sup>174</sup> The state's definition of public purpose is less explicit. Wyoming defines public purpose as "the possession, occupation and enjoyment of the land by a public entity."<sup>175</sup> The statute makes no mention of parks or open space as a public purpose.<sup>176</sup>

The Wyoming Supreme Court has taken the responsibility of determining whether a proposed use is public.<sup>177</sup> The court makes this decision by considering local conditions and the facts surrounding the condemnation.<sup>178</sup> At this time, the Wyoming Supreme Court has not ruled on whether parks or open space qualify as a public use, though state law grants all municipalities the power to establish parks and recreational areas

169. UTAH CODE ANN. § 78B-6-501.

170. § 78B-6-501(11).

171. *See generally* Telluride, Colo., Ordinance 1289 (June 24, 2008), available at [http://telluride-co.gov/docs/valley\\_floor\\_use\\_regulations\\_website.pdf](http://telluride-co.gov/docs/valley_floor_use_regulations_website.pdf) [hereinafter Telluride Ordinance 1289] (noting that bicycles are allowed on marked trails, cross country skiing trails are maintained in the winter and a "pack it in, pack it out" rule will be enforced for those recreating on the Valley Floor).

172. § 78B-6-501(11).

173. § 10-8-2(1)(b)(iii); § 78B-6-501(11); UTAH CONST. art. XI, § 5(b).

174. WYO. STAT. ANN. § 15-1-103(a)(xxxv) (2009) (emphasis added).

175. *Id.* § 1-26-801(c).

176. *Id.*

177. *Associated Enters., Inc. v. Toltec Watershed Improvement Dist.*, 656 P.2d 1144, 1148 (Wyo. 1983).

178. *Id.*

within their borders.<sup>179</sup> This could be an indication that parks and open space areas are considered a public use within Wyoming.

### C. *New Mexico*

New Mexico is more explicit in what it considers to be valid public uses. Under section 42A-3-1 of the New Mexico Statutes, counties and municipalities can condemn property for use as “public parks and playgrounds.”<sup>180</sup> Considering this specific enumeration, a local entity may have to show that the condemned property will not be used only as open space, but also as a park.<sup>181</sup> While New Mexico courts have not ruled on the scope of “public parks and playgrounds,” a land use designation similar to Telluride’s Valley Floor may suffice.<sup>182</sup>

New Mexico follows the general rule that municipalities have no power outside their boundaries without “express authorization from the state.”<sup>183</sup> As a result, New Mexico statutes expressly authorize municipalities to purchase extraterritorial land for parks.<sup>184</sup> However, extraterritorial *condemnation* for parks is prohibited.<sup>185</sup> State law only allows limited extraterritorial condemnation for certain uses, such as widening streets and constructing storm drains.<sup>186</sup> Hence, municipalities are obligated to look within their own boundaries when condemning land for parks, cemeteries, and mausoleums.<sup>187</sup> Thus, municipalities in New Mexico can condemn land for parks, but they must do so within their boundaries.

### D. *Arizona*

Arizona law explicitly states what is considered a public use for eminent domain purposes.<sup>188</sup> All applicable statutes include parks as a valid public use.<sup>189</sup> In *City of Phoenix v. Harnish*, an Arizona appellate court

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179. § 15-1-103(a)(xxii).

180. N.M. STAT. ANN. § 42A-3-1(A)(4) (LexisNexis 2009).

181. This requirement is the inverse of Utah’s allowed public uses under UTAH CODE ANN. § 78B-6-501(11) (2008).

182. See Telluride Ordinance 1289, *supra* note 171.

183. State *ex rel.* Village of Los Ranchos de Albuquerque v. City of Albuquerque, 889 P.2d 185, 195 (N.M. 1994).

184. N.M. STAT. ANN. § 3-18-18 (LexisNexis 2009).

185. § 3-18-10.

186. § 3-18-10(A).

187. § 3-18-10(B).

188. ARIZ. REV. STAT. ANN. §§ 9-511, 9-276(A)(1), 9-521 to 9-522 (1996).

189. *Id.*



clarified what is considered a park for condemnation purposes.<sup>190</sup> By citing *The American Heritage Dictionary*, the court determined that a preserve falls within the definition of “park” for eminent domain purposes if it includes “a large tract of rural land kept in its natural state and usually reserved for the enjoyment and recreation of visitors.”<sup>191</sup> This definition, undoubtedly, would give municipalities in Arizona significant wiggle room in condemning land for open space or parks.

Municipalities’ ability to *extraterritorially* condemn land for open space or parks in Arizona is limited. Section 9-521.01 of the Arizona Statutes states that a park qualifies as a recreational facility and that a “recreational facility” is considered a “utility undertaking.”<sup>192</sup> Section 9-522 further provides that cities with a population of 75,000 or less can acquire land through eminent domain both within and without their boundaries for such “utility undertakings.”<sup>193</sup> In other words, small cities and towns can extraterritorially condemn land for parks and open space purposes.

Yet, as the court ruled in *Harnish*, cities with a population greater than 75,000 cannot extraterritorially condemn land outside their borders solely for parks or open space.<sup>194</sup> Sections 9-511(A) and (C), which by default apply to cities larger than 75,000, allow cities to extraterritorially condemn land “for public utility *and* public park purposes.”<sup>195</sup> The *Harnish* court determined that the statute “allows municipalities to condemn property for public utility purposes and, if desired, to also use the property for park purposes.”<sup>196</sup> As a result, the statute’s reference to “public park purposes” does not grant larger cities the power to condemn extraterritorial land solely for such park or open space purposes.<sup>197</sup>

In summary, municipalities in Arizona with populations of 75,000 or less can extraterritorially condemn land solely for park and open space purposes, while municipalities with populations larger than 75,000 can only extraterritorially condemn land for parks or open space purposes if they also intend to use the land for utility purposes.<sup>198</sup>

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190. *City of Phoenix v. Harnish*, 150 P.3d 245, 248 (Ariz. Ct. App. 2006).

191. *Id.*

192. ARIZ. REV. STAT. ANN. § 9-521.01 (1996).

193. *Id.* § 9-522.

194. *Harnish*, 150 P.3d at 250.

195. ARIZ. REV. STAT. ANN. § 9-511(A), (C) (1996) (emphasis added).

196. *Harnish*, 150 P.3d at 250.

197. *Id.*

198. *Id.*

## CONCLUSION

The development boom across the Mountain West has led to sprawled development with an influx of new business and suburban residential housing.<sup>199</sup> This new development often encroaches upon undeveloped lands.<sup>200</sup> As development continues and communities attempt to curb growth by creating parks and open-space programs, some may be hindered by a lack of appropriate land within municipal borders or a lack of undeveloped property available for purchase.<sup>201</sup> In *Town of Telluride v. San Miguel Valley Corp.*, the Colorado Supreme Court upheld the right of home-rule municipalities to condemn land outside their boundaries to limit development and create open space.<sup>202</sup> While property rights advocates throughout the state rallied against the opinion, it is unlikely that the case will lead to a *Kelo*-like backlash.

As the reaction to the *San Miguel Valley Corp.* decision subsides, a new tool in the municipal planner's toolbox will have emerged. Communities cannot only work to curb growth within their borders; they can have an influence on growth outside their borders. Following Telluride's lead, municipalities throughout the Mountain West should consider utilizing extraterritorial condemnation as suburban sprawl begins to encroach upon their municipal limits.

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199. TRAVIS, *supra* note 1, at 1.

200. *Id.* at 112.

201. *Id.* at 179.

202. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 171 (Colo. 2008).