

Wind Energy Development and Eminent Domain in Wyoming: Who Has the “Power”?

Abigail M. Jones, Esq.*
June 6, 2011

Wind energy development and eminent domain is a hot topic not only in Wyoming, but in many of the Western states. This article is intended to give the reader a brief overview of the legal doctrine of eminent domain generally, how eminent domain is applied in Wyoming, the issues concerning the use of eminent domain for wind energy development in Wyoming, and how these issues will affect landowners in the State.

A. Eminent Domain Defined

First, eminent domain is the government’s inherent authority to take private property without the landowner’s consent. This right comes from the English common law and has been a legal doctrine in the United States since its inception as a country. However, while the right of the government to condemn private property is inherent, the Takings Clause of the Fifth Amendment of the U.S. Constitution imposes limitations on the exercise of the government’s eminent domain power: the taking must be for “public use,” due process must be granted and just compensation must be paid.¹

These limitations are carried over into the Wyoming Eminent Domain Act.² However, the Wyoming Legislature has chosen to take it one step further.

Wyoming, like most states, has delegated its inherent right of eminent domain to certain public and even *private* entities, provided that the taking is still for a “public use.”³ Additionally, the Wyoming Constitution provides that “Private property shall not be taken or damaged for public or private use without just compensation;” thus, Wyoming has even allowed eminent domain for very limited private uses.⁴ The Wyoming Constitution further states: “Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.”⁵ For example, a well-known application of the taking of private property for a private use in Wyoming is that landowners can get private rights-of-way to their landlocked properties across other landowners under the Wyoming Private Road statute.⁶ This is because the State Legislature has determined that such a taking – even though for a clearly private use – is ultimately in the greater public interest.⁷

The Wyoming Legislature has further defined what is meant by the term “public use.” According to the State Eminent Domain Act, the power of eminent domain may be exercised to acquire property for a proposed use *only if* all of the following are established:⁸

1. The public interest and necessity require the project or the use of eminent domain is authorized by the Wyoming Constitution;

2. The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
3. The property sought to be acquired is necessary for the project.

Additionally, findings of the State Public Services Commission, which regulates public utilities, or other state or federal agencies is legally sufficient evidence that the use contemplated is a public use; meaning that if a public utility (as defined by statute) wants to take private property for a project, it is assumed that that project is for the “public use.”⁹

Turning now to wind energy development in Wyoming, there are three main stages of development of wind energy of which we are concerned about the application of eminent domain: (1) there are the wind turbines and wind farms that generate the wind energy; (2) there are the transmission lines –either *interstate* or *intrastate*—which transmit the energy to the distribution substations near population centers; and (3) there are the intermediary lines – in this case the “collector systems” – which connect the energy generated from the wind farms to the large transmission lines.

Each of these three stages of wind energy development has a different level of eminent domain authority associated with it. For two of the stages, the power to condemn private property is clear-cut; for the third, it’s not so simple.

B. No Eminent Domain Authority for Wind Turbines or Wind Farms

First, it is clear that there is no eminent domain authority for the siting, construction, operation or maintenance of wind turbines or wind farms. A “wind farm” is loosely defined as a group of wind turbines in the same location used for production of electric power. A large wind farm may consist of several hundred individual wind turbines, and cover an extended area of hundreds of square miles, but the land between the turbines may be used for agricultural or other purposes. The reason why there is no eminent domain authority for wind farms is simply because the Wyoming State Legislature did not delegate the authority for this purpose. As mentioned above, eminent domain authority is an inherent power of the government. Non-governmental entities can only have the power to condemn if that power is specifically granted to them by the State through statute. In Wyoming, the State did not specifically grant such authority to either private companies or public utilities for the siting, construction, maintenance or operation of wind turbines or wind farms; therefore, there is no eminent domain authority for wind turbines and wind farms.¹⁰

Because the State did not delegate eminent domain authority for wind farms, the wind energy companies must negotiate directly with landowners or landowner coalitions in order to be granted a lease, easement, or other such land use agreement for the siting, construction, operation and maintenance of wind turbines and wind farms. Because there is no threat of eventual condemnation, these negotiations are arms-length transactions between willing parties.

C. Is Eminent Domain for Transmission for High Voltage Electric Lines

Second, it is also clear that there is eminent domain authority for the siting, construction, operation, and maintenance of the transmission lines associated with wind energy development in Wyoming. Transmission lines, otherwise known as high electric voltage lines, carry the bulk transfer of electrical energy, from generating power plants (in this case, the wind turbines and farms) to substations located near population centers. This is distinct from the local wiring between high voltage substations and customers, which is typically referred to as electricity distribution. And, as discussed below, these transmission lines do not include the lines that connect directly to the wind turbines or wind farms. Transmission lines, when interconnected with each other, become high voltage transmission networks, which are commonly referred to in the United States as “power grids,” or just “the grid.” In Wyoming, transmission lines for wind energy are contemplated to transport wind energy developed in state to substations located in other states, and at least six of these large interstate transmission lines are currently being planned.¹¹

The Wyoming State Legislature has statutorily delegated eminent domain authority to those private entities “authorized to do business in the state” to condemn a “way of necessity” over private lands for “electric power transmission lines and distribution systems.”¹² As well, the Wyoming State Legislature has specifically granted eminent domain authority to “public utilities” which are defined by statute to include “every person that owns, operates, leases, controls or has power to operate, lease or control...any plant, property or facility for the generation, transmission, distribution, sale or furnishing to or for the public of electricity for light, heat or power, including any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.”¹³ However, there is one prerequisite that all public utilities must meet in Wyoming before they are able to condemn private property: they must first obtain a “certificate of public necessity and convenience” from the Wyoming Public Services Commission.¹⁴ Thus, both private companies and public utilities have the authority to condemn private property for electric power transmission lines and distribution systems in Wyoming.

D. Eminent Domain Questions Remain for Wind Collector Systems

The use of eminent domain for the third stage of wind energy development – collector systems – is a hot topic of discussion here in Wyoming. At the most basic level a “wind collector system” is the infrastructure which is necessary to connect wind towers to export hubs (*e.g.*, transmission lines). Statutorily, Wyoming defines wind energy collector systems as: “The electrical transmission infrastructure, including conductors, towers, substations, switch gear, and other components necessary to deliver power from a commercial wind facility to, but not including, electric substations or interconnection facilities associated with existing or proposed transmission lines that serve load or export energy from Wyoming.”¹⁵ This definition contemplates all parts of an electrical transmission system from the point of generation at a wind turbine to the last point before the electricity enters a facility allowing it to serve load or be exported out of state.¹⁶

Currently, the state statute does not allow condemnation for “the erection, placement or expansion of collector systems associated with commercial facilities generating electricity from

wind” (unless the company is a public utility who gets a certificate of public necessity and convenience from the Public Services Commission).¹⁷ This is because in 2010, the State Legislature amended the State Eminent Domain Act to enact a state-wide moratorium on allowing land for collector systems to be condemned.¹⁸ The moratorium was enacted to allow a State Committee to thoroughly consider whether the power of eminent domain should be delegated to private companies seeking to use the power to construct wind energy collector systems.¹⁹ As originally enacted, this moratorium was slated to end on June 30, 2011, “or whenever the state enacts appropriate legislation.”²⁰ As explained in detail below, this moratorium has recently been extended for another 2 years.

E. The Purpose behind the Initial Moratorium

A few years ago, it became apparent that, as written, the Wyoming Eminent Domain Act was so broad that the grant of condemnation authority for “the location, construction, maintenance, and use of ...electric power transmission and distribution”²¹ would arguably give the power to condemn for these intermediary collector systems. Realizing that there was a considerable amount of public opposition to such a broad grant of power relating to wind energy development, in 2009, the Wyoming Legislature created the “Wyoming Wind Energy Task Force” to study many of the broad topics impacting wind energy development in Wyoming.²² In 2010, the Wind Energy Task Force was specifically tasked with first clearly defining the term “collector systems” and then identifying and recommending the conditions appropriate for the use of condemnation authority authorized under the Eminent Domain Act for collector systems of commercial facilities generating electricity from wind.²³

The Wind Energy Task Force considered two main alternatives for this issue: Alternative 1 was simple: Remove the authority of eminent domain for collector systems from private entities while keeping the authority of eminent domain for regulated public utilities.²⁴ This alternative would change the status quo for private wind energy development companies, but would keep the status quo for public utilities interested in wind energy development. Alternative 2 would allow the authority of eminent domain for private entities but, importantly, it would require the private developer to first obtain negotiated land use (*i.e.*, easement) agreements from a certain percentage of the total acreage of land that is necessary for the project.²⁵

In 2010, the Wind Energy Task Force published its “Final Report to the Legislature and the Governor” regarding the issue of whether or not collector systems should be granted eminent domain authority in Wyoming.²⁶ The Task Force ultimately chose to recommend Alternative 1: no eminent domain authority for private developers for wind energy collector systems, but still allowing public utilities to keep such eminent domain authority provided they get the necessary certificate of public necessity and convenience from the State Public Services Commission.²⁷

Based upon the recommendation of the Wind Energy Task Force, during the 2011 legislative session, Representative Kermit Brown (who was Chairman of the Wind Energy Task Force) introduced three different bills that would respond to the moratorium in extremely different ways:

House Bill 25 followed Alternative 1 as recommended by the Wind Energy Task Force: It would enact a complete and permanent ban on the power of eminent domain for collector systems for wind energy development.²⁸ However, this Bill was defeated by a 4-5 vote in Minerals Committee.²⁹

House Bill 70, on the other hand, followed Alternative 2: It would grant eminent domain authority for collector systems constructed by private developers³⁰ but with numerous requirements and conditions.³¹ As written, House Bill 70, applied to both wind farms *and* collector systems. Specifically, it applied to “Commercial facilities generating electricity from wind” which includes wind farms with at least 30 turbines, or that obtained the necessary County permit if the facility generated more than .5 MW (or alternative permit under Industrial Information and Siting Act).³² It also applied to “collector systems” as defined by the Wind Energy Task Force.³³ The most important limitation on the condemnation authority under this Bill was that the private wind energy companies must first acquire land use and compensation agreements from 85% of the total land (or landowners) necessary for the project.³⁴ Only after the companies have had successful arms-length negotiations without the threat of eminent domain, would they be allowed to petition the court to condemn the remaining 15% of the land/landowners.³⁵ In its petition to the court for condemnation of the remaining 15%, the company would then have to prove that the wind energy project contemplated for condemnation constituted an “economically, legally and logistically viable project.”³⁶ Additionally, the Bill specified that the amount of “just compensation” for condemnation of the remaining 15% would be “equal to the average consideration, monetary and otherwise” which was paid to the first 85% of the landowners.³⁷ This Bill essentially is a compromise of the interests of both the landowners and the wind energy developers. House Bill 70 also died in the Minerals Committee.³⁸

After the failure of the Legislature to pass one of these two bills, Representative Brown introduced House Bill 230 which would extend the current moratorium on eminent domain for collector systems by private entities for two additional years – until June 30, 2013.³⁹ This Bill was passed by the State Legislature and became effective on March 2, 2011.⁴⁰ Thus, as it stands now, the moratorium on eminent domain for the private development of wind collector systems is still in effect.

F. So Where Does this Leave Wyoming Landowners?

The main purpose of the Wind Energy Task Force was to get input from various different interest groups in Wyoming – from the wind energy development industry to the concerns of individual landowner groups – and then to make recommendations to the Legislature that would best encapsulate those interests. The Task Force undertook studies, heard presentations from various interests, and formulated alternatives that it found appropriate. It made a final recommendation that it believed was in the best interest of Wyoming, which was to implement a complete and permanent ban on the use of eminent domain by private developers of wind energy collector systems. When presented with the final recommendation, however, the Legislature seemed to disagree.

Industry representatives have informed some Legislators that there are currently no plans to build collector lines to wind farms during the next year or two anyway.⁴¹ Therefore, it appears that the

extension of the moratorium on the use of eminent domain for wind energy collector systems will not affect the private wind energy developers in the meantime.

The power of private companies to condemn private land without the landowner’s consent has been a contentious subject for the people of Wyoming for a long time. As we all know, Wyomingites feel deeply about their rights as private landowners and private citizens. Eminent domain basically disregards those rights. It strips landowners of any bargaining power they may have. As well, many landowners feel that the “just compensation” due to them under the Wyoming Eminent Domain Act – which is the “fair market value” of the land – is an insufficient measure of what their land is actually worth in a true “willing buyer-willing seller” market. On the other hand, the wind energy developers see the ability to condemn private property as a tool that helps them keep the cost of energy low and prevents a few individuals from stopping these multi-million or multi-billion dollar energy projects. As well, because similar eminent domain authority is available for other forms of energy and natural resources development – like collector lines for coal and gas power plants – the industry feels that a complete ban would be unfair. The moratorium will allow the Legislature to continue to hear from the interest groups in the State, and to re-evaluate what it believes is best for all of those interests as well as the long-term potential for renewable energy to be generated in Wyoming.

The second alternative studied by the Wind Energy Task Force presents what the Task Force thought was a compromise between landowners and the wind energy industry. For landowners, it offers much greater protections to their private property rights. The wind energy companies must negotiate with most of the landowners affected by a project without the threat of condemnation. This is likely to result in land use agreements that offer more protections and more monetary compensation than could be negotiated if there was the threat of eminent domain. As well, for those landowners who choose to “hold out,” they would receive the average compensation and protections offered to the landowners who freely negotiated. Even this would make the landowners better off than if the wind energy companies had eminent domain authority under the present Eminent Domain Act. On the other hand, this compromise would remove the biggest complaint of the wind energy industry: that one landowner could defeat the entire project.

Thus, for the next two years at least, who has the “power” for wind energy development in Wyoming is clear: *private* wind energy developers do *not* have the authority to condemn private land for wind turbines, wind farms, or wind energy collector systems; *private* wind energy developers *do* have the authority to condemn private property for interstate transmission lines and energy distribution systems. And landowners still have the power at the bargaining table with wind energy developers and can negotiate freely with them for the lease of their lands for wind farms and collector systems without the threat of condemnation. Time will only tell if this remains the way for wind in Wyoming.

* Abigail Jones is an associate attorney with the Budd-Falen Law Offices, LLC in Cheyenne, Wyoming. This article has been adapted from a speech given by Ms. Jones at the Carbon County Higher Education’s Third Annual Celebration of Wind, held on May 21, 2011 in Rawlins, Wyoming.

¹ U.S. CONST. amend. V.

² WYO. STAT. §§ 1-26-501 to -817.

³ *See id.*

⁴ WYO. CONST. art. I, § 33.

⁵ WYO. CONST. art. I, § 32.

⁶ WYO. STAT. §§ 24-9-101 *et seq.*

⁷ *See Wyoming Resources Corporation v. T-Chair Land Company*, 2002 WY 104, ¶¶ 13-14, 49 P.3d 999, 1003-04 (Wyo. 2002) (“The taking of private property for a private way of necessity is recognized as valid in Wyoming because “[t]here is a public interest in giving access by individuals to the road and highway network of the state as a part and an extension thereof for economic reasons and the development of land as a resource for the common good, whether residential or otherwise.” *Hulse v. First American Title Co. of Crook County*, 2001 WY 95, ¶ 30, 33 P.3d 122, ¶ 30 (Wyo.2001). “[T]he right to condemn a way of necessity under constitutional and statutory provisions is an expression of public policy against landlocking property and rendering it useless.” *Id.*; *see Coronado Oil Co.*, 603 P.2d at 410.”).

⁸ WYO. STAT. § 1-26-504(a).

⁹ WYO. STAT. § 1-26-504(b).

¹⁰ *See, generally* WYO. STAT. §§ 1-26-501 to -817.

¹¹ Wyoming Wind Energy Task Force, *Report to the Legislature and Governor*, 3 (Nov. 1, 2010), available at <http://legisweb.state.wy.us/lsoewb/Wind%20Energy/Documents/WETF%20Final%20Report.pdf>.

¹² WYO. STAT. § 1-26-815(a).

¹³ WYO. STAT. § 1-26-814.

¹⁴ WYO. STAT. § 1-26-816; *see also* WYO. STAT. § 37-2-205.

¹⁵ WYO. STAT. § 1-26-815(d).

¹⁶ Wyoming Wind Energy Task Force, *Report to the Legislature and Governor*, 6-7 (Nov. 1, 2010), available at <http://legisweb.state.wy.us/lsoewb/Wind%20Energy/Documents/WETF%20Final%20Report.pdf>.

¹⁷ *Id.*

¹⁸ 2010 Wyo. Laws, Ch. 48, § 1 (eff. Mar. 5, 2010).

¹⁹ *See* 2009 Wyo. Laws, Ch. 159, § 348.

²⁰ 2010 Wyo. Laws, Ch. 48, § 1.

²¹ WYO. STAT. § 1-26-815(a).

²² *See* 2009 Wyo. Laws, Ch. 159, § 348.

²³ 2010 Wyo. Laws, Ch. 48, § 3.

²⁴ Wyoming Wind Energy Task Force, *Draft Report Outline (2010)*, available at <http://legisweb.state.wy.us/lsoewb/Wind%20Energy/Documents/2%202010%20Wind%20Energy%20Draft%20Outline.pdf>.

²⁵ *Id.*

²⁶ Wyoming Wind Energy Task Force, *Report to the Legislature and Governor* (Nov. 1, 2010), available at <http://legisweb.state.wy.us/lsoewb/Wind%20Energy/Documents/WETF%20Final%20Report.pdf>.

²⁷ *Id.*, at 14.

²⁸ H.R. 0025, 61st Leg. (Wyo. 2011).

²⁹ *See* Wyoming State Legislature, 2011 Bill Digest, H.B. No. 0025, <http://legisweb.state.wy.us/2011/Digest/HB0025.htm> (last visited May 25, 2011).

³⁰ This bill would only apply to private entities; public utilities would still have eminent domain for collector systems, conditioned only on the acquisition of the certification of public necessity and convenience from the Public Services Commission.

³¹ H.R. 0070, 61st Leg. (Wyo. 2011).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See* Wyoming State Legislature, 2011 Bill Digest, H.B. No. 0070, <http://legisweb.state.wy.us/2011/Digest/HB0070.htm> (last visited May 25, 2011).

³⁹ H.R. 0230, 61st Leg. (Wyo. 2011).

⁴⁰ 2011 Wyo. Laws, Ch. 86, § 1.

⁴¹ See Wyoming Infrastructure Authority, *Panel Rejects Eminent Domain Ban for Wyoming Wind Developers* (Jan. 24, 2011) <http://wyia.org/announcements/marketplace-news/panel-rejects-eminent-domain-ban-for-wyoming-wind-developers/> (last visited May 25, 2011).