



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE August 26, 2009

TO Wind Energy Task Force

FROM Ian Shaw, LSO Staff Attorney

SUBJECT Power of Eminent Domain for Transmission Lines

Question: Does Wyoming law grant companies the authority to exercise eminent domain for the placement of power transmission lines.

Answer: Yes

Discussion:

Wyoming law provides authority for private companies to exercise the power of eminent domain for the purpose of condemning property to construct "electric power transmission lines and distribution systems." See W.S. 1-26-815. The condemnation action must be initiated by filing suit in state district court and there are various criteria for determining whether the condemnation will be allowed. The procedure and standards are guided by the Wyoming Rule of Civil Procedure and Wyoming statutes. See Wyo.R.Civ.P. 71.1 and W.S. 1-26-501 *et seq.* In addition to various procedural requirements, all of the following substantive criteria must be met:

- The public interest and necessity require the project or the use of eminent domain is authorized by the Wyoming Constitution (W.S. 1-26-504);
- The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury (W.S. 1-26-504);
- The property sought to be acquired is necessary for the project (W.S. 1-26-504);
- A condemnor shall make reasonable and diligent efforts to acquire property by good faith negotiation (W.S. 1-26-509 and W.S. 1-26-510). Good faith negotiation is defined in W.S. 1-26-509(c).

If all of these elements and all procedural requirements have been met, a Wyoming court is authorized to issue an order granting an easement to the condemnor for a right of way. See W.S. 1-26-514. The easement for a right of way constitutes a condemnation and gives the condemnor the right to use the property. Upon issuing the order granting the right of way, due compensation must be paid. Pursuant to Wyoming statute and the Wyoming Constitution, due compensation must be paid even where property is

taken pursuant to a valid exercise of eminent domain. Wyo. Const. Art. 1, Sects. 32 and 33; W.S. 1-26-514.

The power to condemn property for transmission lines has been exercised successfully in Wyoming and such exercise of power has withstood scrutiny from the Wyoming Supreme Court. In Bridle Bit Ranch Co. v. Jerry and Barbara Dilts Family Limited Partnership, 2005 WY 108, 118 P.3d 996 (Wyo. 2005), the Wyoming Supreme Court upheld Basin Electric Power Cooperative's right to condemn land in Campbell County for the construction of a 230 kV transmission line. The line was designed to serve coal bed methane fields. Prior to filing the condemnation suit, Basin had reached settlements with 82% of the private landowners as well as with the United States Forest Service. Before affirming Basin's authority to condemn the property, the Court reviewed in detail the public good to be served by the transmission line, Basin's decisions regarding the location of the transmission line, Basin's negotiations with landowners and Basin's compliance with procedure.

Relevant constitutional provisions, statutes and rules are included below for your review.

RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

1-26-815. Right of eminent domain granted; ways of necessity for authorized businesses; purposes; extent.

- (a) Any person, association, company or corporation authorized to do business in this state may appropriate by condemnation a way of necessity over, across or on so much of the lands or real property of others as necessary for the location, construction, maintenance and use of reservoirs, drains, flumes, ditches including return flow and wastewater ditches, underground water pipelines, pumping stations and other necessary appurtenances, canals, **electric power transmission lines and distribution systems**, railroad trackage, sidings, spur tracks, tramways, roads or mine truck haul roads required in the course of their business for agricultural, mining, exploration drilling and production of oil and gas, milling, **electric power transmission and distribution**, domestic, municipal or sanitary purposes, or for the transportation of coal from any coal mine or railroad line or for the transportation of oil and gas from any well.
- (b) The right of condemnation may be exercised for the purpose of:
 - (i) Acquiring, enlarging or relocating ways of necessity; and
 - (ii) Acquiring easements or rights-of-way over adjacent lands sufficient to enable the owner of the way of necessity to construct, repair, maintain and use the structures, roads or facilities for which the way of necessity is acquired.
- (c) A way of necessity acquired hereunder shall not exceed one hundred (100) feet in width on each side of the outer sides or marginal lines of the reservoir, drain, ditch, underground water pipeline, canal, flume, **power transmission line or distribution system**, railroad trackage, siding or tramway unless a greater width is necessary for excavation, embankment or deposit of waste from excavation. In no case may the area appropriated exceed that actually necessary for the purpose of use for which a way of necessity is authorized.

1-26-504. Requirements to exercise eminent domain.

- (a) Except as otherwise provided by law, the power of eminent domain may be exercised to acquire property for a proposed use only if all of the following are established:
 - (i) The public interest and necessity require the project or the use of eminent domain is authorized by the Wyoming Constitution;
 - (ii) 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
 - (iii) The property sought to be acquired is necessary for the project.
- (b) Findings of the public service commission, the interstate commerce commission and other federal and state agencies with appropriate jurisdiction are prima facie valid relative to determinations under subsection (a) of this section if the findings were made in accordance with law with notice to condemnees who are parties to the condemnation action and are final with no appeals from the determinations pending.
- (c) When a public entity determines that there is a reasonable probability of locating a particular public project on specifically identifiable private property and that the project is expected to be completed within two (2) years of that determination, the public entity shall provide written notice of the intention to consider the location and construction of the project to the owner as shown on the records of the county assessor. The notice shall include a description of the public interest and necessity of the proposed project. The public entity shall provide an opportunity for the private property owners to consult and confer with representatives of the public entity regarding the project.

1-26-509. Negotiations; scope of efforts to purchase.

- (a) A condemnor shall make reasonable and diligent efforts to acquire property by good faith negotiation.
- (b) In attempting to acquire the property by purchase under W.S. 1-26-510, the condemnor, acting within the scope of its powers and to the extent not otherwise forbidden by law, shall negotiate in good faith and may contract with respect to:
 - (i) Any element of valuation or damages recognized by law as relevant to the amount of just compensation payable for the property;
 - (ii) The extent, term or nature of the property interest or other right to be acquired;
 - (iii) The quantity, location or boundary of the property;
 - (iv) The acquisition, removal, relocation or disposition of improvements upon the property and of personal property not sought to be taken;

- (v) The date of proposed entry and physical dispossession;
 - (vi) The time and method of payment of agreed compensation or other amounts authorized by law; and
 - (vii) Any other terms or conditions deemed appropriate by either of the parties.
- (c) Good faith negotiation shall include, but not be limited to, written notice of the following:
- (i) To the extent reasonably known at the time, the proposed project, the land proposed to be condemned, plan of work, operations and facilities in a manner sufficient to enable the condemnee to evaluate the effect of the proposed project, plan of work, operations and facilities on the condemnee's use of the land;
 - (ii) The name, address, telephone number and, if available, facsimile number and electronic mail address of the condemnor and his designee, if any;
 - (iii) An initial written settlement offer that shall include:
 - (A) A description of the general location and extent of the property sought, with sufficient detail for reasonable identification;
 - (B) An offer that, at the condemnee's request, a representative of the condemnor will tour the property sought with the condemnee or the condemnee's representative at a mutually agreeable time prior to the deadline for the condemnee's response to the initial written offer to discuss issues related to the property sought and the initial offer;
 - (C) An estimate of the fair market value of the property sought and the general basis for such estimate;
 - (D) A discussion of the reclamation planned by the condemnor for the property disturbed by the condemnor's project;
 - (E) An offer to acquire the property sought, allowing the condemnee up to sixty-five (65) days from the date the initial written offer was sent via certified mail to respond or make a counter-offer in writing; and
 - (F) A written notice that the condemnee is under no obligation to accept the initial written offer but if the condemnee fails to respond to the initial written offer the right to object to the good faith of the condemnor may be waived under W.S. 1-26-510(a), that the condemnor and the condemnee are obligated to negotiate in good faith for the purchase of the property sought, that formal legal proceedings may be initiated if negotiations fail and that the condemnee has a right to seek advice from an attorney, real estate appraiser, or any other person of his choice during the negotiations and any subsequent legal proceedings.
 - (iv) A written response from the condemnor to any counter-offer made in writing by the condemnee to the initial written offer pursuant to subparagraph (iii)(E) of this subsection.

- (d) The written notice required under subsection (c) of this section shall be given to the condemnee of record as shown on the records in the county assessor's office at the time, no less than ninety (90) days prior to commencement of a condemnation action.
- (e) The condemnor shall send by certified mail, return receipt requested, a notice of final offer at least fifteen (15) days prior to commencing a condemnation action.
- (f) A condemnee shall make reasonable and diligent efforts to negotiate in good faith with the condemnor including a timely written response to the written offer identified in subparagraph (c)(iii)(E) of this section, specifying areas of disagreement.
- (g) The condemnor shall reimburse the condemnee for all reasonable litigation expenses if a court finds the condemnor failed to negotiate in good faith as required under subsections (b) through (e) of this section or to comply with W.S. 1-26-504(a)(ii) and (iii).
- (h) At any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes including mediation or arbitration may be employed or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110 may be requested through the Wyoming agriculture and natural resource mediation board.

1-26-510. Preliminary efforts to purchase.

- (a) Except as provided in W.S. 1-26-511, an action to condemn property may not be maintained over timely objection by the condemnee unless the condemnor made a good faith effort to acquire the property by purchase before commencing the action. A condemnee may not object to the good faith of the condemnor if the condemnee has failed to respond to an initial written offer as provided in W.S. 1-26-509(c)(iii)(E) and the condemnor has met the requirements of W.S. 1-26-509(c).
- (b) Negotiations conducted in substantial compliance with W.S. 1-26-509(b) through (e) are prima facie evidence of "good faith" by the condemnor under subsection (a) of this section.

1-26-514. Interest taken; due compensation.

- (a) In the case of public entities the court may grant an easement or fee simple title to the public entity if necessary for the purpose for which the land was condemned. In cases not involving public entities, following determination of due compensation the court shall enter an order granting an easement to the condemnor which shall not include any claim, interest or property in or to the underlying minerals or mineral estate except for subsurface support.
- (b) The court in determining due compensation may authorize a lump-sum payment or an annual installment or amortization payment to continue throughout the term of the easement.

Wyo. Constitution, Article 1, Section 32. Eminent domain.

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.

Wyo. Constitution, Article 1, Section 33. Compensation for property taken.

Private property shall not be taken or damaged for public or private use without just compensation.

Wyo.R.Civ.P. 71.1. Condemnation of property.

- (a) Applicability of rules . -- The Wyoming Rules of Civil Procedure govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.
- (b) Joinder of properties . -- The plaintiff may join in the same action any number of separate parcels of property, rights or interests situated in the same county and the compensation for each shall be assessed separately by the same or different appraisers as the court may direct.
- (c) Complaint . --
- (1) Contents. -- The complaint shall contain a short and plain statement of:
- (A) The authority for the taking, the use for which the property is to be taken, and the necessity for the taking, a description of the property sufficient for its identification, the interests to be acquired;
- (B) The efforts made to comply with **W.S. 1-26-504, 1-26-505, 1-26-509 and 1-26-510**;
- (C) As to each separate piece of property, a designation of the defendants who have been joined as owners thereof of some interest therein, together with their residences, if known, and whether the plaintiff demands immediate possession or desires to continue in possession;
- (D) If plaintiff is a public entity, facts demonstrating compliance with **W.S. 1-26-512**; and
- (E) If plaintiff seeks a court order permitting entry upon the property for any of the purposes set out in **W.S. 1-26-506**, plaintiff shall set forth in the complaint or in a separate application to the court a short and plain statement that it has made reasonable efforts to enter the property, that such entry has been obstructed or denied, and that a court order permitting entry is sought pursuant to **W.S. 1-26-507**.
- (2) Joinder. -- Upon the commencement of the action the plaintiff shall join as defendants those persons having or claiming an interest in the property as owner, lessee or encumbrancer whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property as owner, lessee or encumbrancer whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. Other defendants, as described in Rule 4(i), shall be made defendants when they are necessary parties.
- (3) Informal Procedure. -- If plaintiff desires that the amount of compensation be determined by informal procedure, pursuant to **W.S. 1-26-601** et seq., it shall allege that the amount in dispute is less than \$ 20,000 or that the difference between plaintiff's latest offer and the total amount demanded is less than \$ 5,000, and shall request that the court proceed informally.
- (4) Deposit at Commencement of Action. -- Condemnor shall make the deposit required by **W.S. 1-26-513**.
- (d) Order for hearing; process; answer . --

(1) Order for Hearing. -- If plaintiff seeks a court order permitting immediate entry upon the property pursuant to **W.S. 1-26-507**, it shall apply to the court for an order fixing time for a hearing, and the court shall direct defendant or defendants to appear at the time and place set for the hearing to show cause why such an order should not be entered. If plaintiff does not seek such an order, it shall apply to the court for an order fixing the time and place for a hearing upon the complaint.

(2) Process. -- Summons shall be issued and served and proof of service shall be made in accordance with Rule 4. The summons and complaint shall be served together. The summons shall state the time and place of the hearing at which the defendant is to appear and defend, and shall further notify the defendant that if the defendant fails to appear at said time and place, judgment will be rendered for plaintiff condemning defendant's interest in the property therein described, appointing appraisers to ascertain the compensation to be paid therefor, and permitting plaintiff, if application therefor has been made as provided in subdivision (e), to take possession or to continue in possession thereof upon the payment into court of such sum of money as may be required, or upon the giving of such approved security as may be determined by the court, and shall further notify the defendant that if the defendant desires to contest the plaintiff's right to take the property, or the necessity therefor, the defendant shall, prior to the time set for hearing, file with the court an answer to the complaint.

(3) Answer.

(A) No answer is required unless defendant desires to contest the plaintiff's right to take the property or the necessity therefor, in which event the answer shall be filed five days prior to the time set for the hearing on the complaint.

(B) If no answer is filed, defendant may file an appearance with the clerk describing the property in which the defendant claims an interest so as to facilitate prompt receipt of notices by the defendant.

(C) If defendant desires that the amount of compensation be determined by informal procedure, the defendant shall allege that the amount in dispute is less than \$ 20,000 or that the difference between plaintiff's latest offer and the total amount demanded is less than \$ 5,000, and shall request that the court proceed informally.

(e) Hearings . –

(1) Show Cause Hearing. -- If plaintiff has requested an order authorizing immediate entry, a show cause hearing shall be held not sooner than 15 days after service of the order to show cause upon the defendant or defendants.

(A) At the hearing, the district judge shall require evidence that notice and an order to show cause has been served upon the defendant as required, and shall hear and determine questions of plaintiff's right to enter the property, the purposes for which entry is sought, plaintiff's efforts to enter under notice to the owner and the owner's prior agreement thereto, if any; and shall require defendant or defendants to show good cause why an order authorizing entry should not be entered.

(B) If plaintiff prevails on these points, the district judge shall enter an order permitting entry. Any order permitting immediate entry shall describe the purpose therefor, setting forth the nature and scope of activities determined to be reasonably necessary and authorized by law, and including terms and conditions respecting time, place, and manner of entry, and authorized activities by plaintiff, all in order to facilitate the purpose of entry and to minimize damage, hardship, and burden upon the parties.

(C) An order permitting entry where the purpose does not contemplate condemnation shall include a determination of the amount, if any, that will fairly compensate defendant or defendants or any other person in lawful possession or physical occupancy for damages for

physical injury to the property or substantial interference with its possession or use, if such damage or interference are found likely to be caused by entry. The district judge will require plaintiff to deposit cash or other security with the court in any such amount.

(2) Hearing on Complaint for Condemnation. -- The hearing shall be held not sooner than 15 days after service of the complaint for condemnation upon the defendant, unless the defendant otherwise consents in writing.

(A) At the hearing, which may be adjourned from time to time, the district judge shall require evidence that notice of hearing has been given as provided in this rule, and shall hear and determine the questions of the plaintiff's right to make the appropriation, plaintiff's inability to agree with the owner, the necessity for the appropriation, and shall hear proofs and allegations of all parties interested touching the regularity of the proceedings.

(B) If the district judge determines these questions in favor of the plaintiff as to any or all of the property and persons interested therein, the judge shall first decide whether a request by any party to proceed informally should be granted.

(C) If the judge decides to proceed informally, the judge shall determine compensation without jury in an informal manner on the basis of such oral and documentary evidence as the parties shall offer which the court deems sufficient.

(D) If the judge determines not to proceed informally, the judge shall make an order appointing three disinterested appraisers, residents of the county in which the complaint is filed, to ascertain the compensation to be made to the defendant, or defendants, for the taking or injuriously affecting the property described in the complaint, and specifying a time and place for the first meeting of such appraisers, and the time within which the said appraisers shall make such assessment.

(E) At the hearing, or at any stage of the proceedings under this rule after the questions previously mentioned have been heard and determined, the district judge may, by order in that behalf made and if demanded by plaintiff in the plaintiff's complaint or in any amendment thereto, authorize the plaintiff, if already in possession, and if not in possession, to take possession of, and use said property during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings against the plaintiff on account thereof; provided,

(F) Unless exempted by statute and subject to the deposit provision of **W.S. 1-26-513**, plaintiff shall pay a sufficient sum into the court, or give approved security to pay the compensation in that behalf when ascertained; and

(G) In every case where possession shall be so authorized, it shall be lawful for the defendant, or defendants, to conduct the proceedings to a conclusion if the same shall be delayed by the plaintiff.

(f) Amendment of pleadings . -- With the leave of court, the plaintiff may amend the complaint at any time before the award of compensation is made, and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (k). The plaintiff shall serve a copy of any amendment, as provided in Rule 5(b), upon any party affected thereby who has appeared. If a party has not appeared in the action and is affected by the amendment, then a notice directed to that party shall be served personally or by publication or other substituted service in the manner provided in subdivision (d).

(g) Substitution of parties . -- Substitution of parties may be made in accordance with Rule 25.

(h) Appraisers; procedure . --

(1) The appraisers appointed by the court, before entering upon the duties of their office, shall take an oath to faithfully and impartially discharge their duties as said appraisers.

- (2) The court shall instruct them in writing as to their duties and as to the applicable and proper law to be followed by them in making their ascertainment.
 - (3) They shall carefully inspect and view the property sought to be taken or affected and shall thereupon ascertain and certify the compensation proper to be made to the defendant, or defendants, for the real or personal property to be taken or affected, according to the rule of damages as set forth in the written instructions given by the court.
 - (4) They shall make, subscribe and file with the clerk of the district court in which the action is pending a certificate of their said ascertainment and assessment in which the real or personal property shall be described with convenience, certainty and accuracy. In addition, supporting data for the amounts set forth in the certificate shall be included with said certificate.
 - (5) Fees allowed the appraisers shall be fixed by the court.
- (i) Order of award . –
- (1) Upon proceeding informally to a determination of the amount of compensation to be paid, under subdivision (e)(2), and if neither party rejects the judgment of the district court, as authorized by **W.S. 1-26-604**;
 - (2) Upon filing of the certificate of appraisers under subdivision (h); or
 - (3) Upon entry of the jury verdict under subdivision (j):
 - (A) The district judge shall, upon receiving due proof that such compensation and separate sums, if any be certified, have been paid to the parties entitled to the same, or have been deposited to the credit of such parties in the county treasury, or other place for that purpose approved by the court, make and cause to be entered an order describing the real or personal property taken, the compensation ascertained, and the mode of making compensation or deposit thereof as aforesaid;
 - (B) A certified copy of said order shall be recorded and indexed in the office of the register of deeds of the proper county; and
 - (C) Upon the entry of such order, the plaintiff shall have such rights in the condemned property as are granted to the plaintiff by the statutes of this state authorizing the exercise of the power of eminent domain by plaintiff and which have been the subject matter of the action.
- (j) Formal trial; jury trial . -- If a judgment has been entered on the basis of informal proceedings, any party may file, within 30 days after such entry of judgment, a written demand for a formal trial to the court or for a jury trial, whereupon the action shall proceed as though no informal proceedings had occurred. If an assessment has been made by appraisers, any party not satisfied with the award may file, within 30 days after the certificate of assessment has been filed, a written demand for a trial by jury on the issue of just compensation, whereupon the action shall proceed to a jury trial on that issue.
- (1) Demand. -- The demand, whether for a formal trial to the court or for a jury trial, shall be filed with the clerk and served upon the other parties in accordance with Rule 5(b).
 - (2) Procedure. -- The formal trial or trial by jury shall be conducted in the same manner as other civil actions.
 - (3) Decision; Verdict. -- If the action is tried without jury, the court shall determine the compensation to be made to the defendant or defendants, and shall render its decision in writing, and enter its judgment accordingly. If the action is tried with jury, the jury shall determine these matters, and shall render its verdict in writing, signed by the foreman, and the verdict shall be entered in the record.
- (k) Dismissal of action . –
- (1) As of Right. -- If no certificate of appraisers has been filed and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that

property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) By Stipulation. -- Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part without an order of the court as to any property by filing a stipulation of dismissal by the plaintiff and defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) By Order of the Court. -- At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court for good cause shown may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) Effect. -- Except as otherwise provided in the notice, or stipulation of dismissal or order of the court, any dismissal is without prejudice.

- (l) Deposit and its distribution . -- The plaintiff shall deposit with the court any money or bond required by law as a condition to the exercise of the power of eminent domain, or as a condition to the right of continuing or obtaining immediate possession. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. Interest shall not accrue as to the sum deposited by the plaintiff from and after the time the deposit becomes available for distribution to the defendant or defendants. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.
- (m) Costs . -- In any proceeding under this rule costs may be allowed and apportioned between the parties on the same or adverse sides in the discretion of the court as authorized by statute or by rule of this court.