

MEMORANDUM

TO: REPRESENTATIVE KERMIT BROWN, CHAIRMAN OF THE WYOMING LEGISLATURE WIND ENERGY TASK FORCE

FROM: CRYSTAL MCDONOUGH, 2ND YEAR STUDENT, UW COLLEGE OF LAW

SUBJECT: JUST COMPENSATION IN EMINENT DOMAIN PROCEEDINGS

DATE: 6/30/2010

CC: MARY BYRNES, UW SCHOOL OF ENERGY RESOURCES; PROFESSOR DENNIS STICKLEY, UW COLLEGE OF LAW

INTRODUCTION

This analysis was prepared in response to a request by Chairman Brown for legal authority and policy analysis regarding alternatives to traditional fair market valuation for property acquired through the exercise of eminent domain. Specifically, this request focused on the potential utilization of a periodic payment system or other alternative to fair market valuation and lump sum payments as compensation for property taken in eminent domain proceedings.

SCOPE OF ISSUES COVERED IN RESEARCH

My research up to this point includes all fifty states and federal case law, statutes, codes and agency materials for periodic payments made in eminent domain proceedings. The scope of research included the issues surrounding amount, method and duration of payments to landowners who are subject to the construction and operation of wind energy collector systems on their land. An additional issue for consideration includes appropriate conditions for the exercise of eminent domain through condemnation for the operation of wind energy collector systems. While this information is outside the immediate scope of my research, the conditions for the exercise of eminent domain with respect to wind energy collector systems is relevant to the analysis of potential alternatives and my final report will reflect, to a limited extent, the interrelated nature of both issues.

JUST COMPENSATION: MAKING THE LANDOWNER WHOLE

The Fifth Amendment of the United States Constitution recognizes the power of eminent domain, stating, “nor shall private property be taken for public use, without just compensation.”¹ The Takings Clause applies to the States through the Fourteenth Amendment.² Under the Wyoming Constitution, private property can be taken 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” but must not be “taken for private use” and “shall not be taken or damaged...without just compensation.”³

¹ U.S. Const. amend. V.

² See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

³ Wyo. Const. art. 1, § 32-33. See *Wyo. Res. Corp. v. T-Chair Land Co.*, 49 P3d 999, 1001, 1003-1004 (Wyo. 2002).

The purpose of just compensation is to put the landowner in the same position as he would have been before the taking of his property.⁴ This is a well established process using a traditional fair market value analysis. According to the Wyoming Eminent Domain Act, fair market value is determined by examining sales of similar property where there is an informed, willing but not obligated seller and an informed, willing but not obligated buyer.⁵ Generally accepted appraisal techniques must be used and may be done by a certified appraiser using comparable easements or leases in arms length transactions.⁶ Most states seem to follow a process similar to Wyoming where condemnation proceedings take place after negotiations break-down between the landowner and the party with condemnation authority.⁷ The property valuation depends on each state's fair market value statute which has traditionally been a one-time payment.⁸

This information is provided as a brief introduction to eminent domain proceedings. I am conducting additional research into possible alternatives and considerations that would affect the wind energy industry and not other industries such as oil and gas. It would be useful to examine the Wyoming Split Estate Act which created specific requirements for the compensation of surface owners where the mineral estate is held in separate title.⁹ I am currently developing those theories, and they will be provided as part of my final report to this task force.

FAIR MARKET VALUE AND PERIODIC PAYMENTS

It is difficult to ascertain how often periodic payments are made instead of the traditional one-time payment for fair market value due to the private nature of negotiations between landowners and those with condemnation authority. Those with condemnation authority know how often negotiations break down and eminent domain is used to acquire the necessary property rights. The following table shows where periodic payments have been recognized by courts or statute, but not specifically mandated for eminent domain proceedings.

	Authority	Eminent Domain Proceeding	Periodic Payments
Florida	<i>Schick v. Florida Dept. of Agriculture</i> , 586 So. 2d 452 (Fla. 1 st Dist. App. 1991).	Taking by Florida Dept. of Agriculture through inverse condemnation by depriving landowners of all beneficial use of their underground well water.	Parties settled out of court for periodic payments of the fair market value of the property taken through inverse condemnation. The court held that the landowner's attorney fees must be included as part of just compensation.
U.S. Court Of Appeals 3 rd Circuit	<i>U.S. v. Certain Parcels of Land</i> , 144 F.2d 626 (3 rd Cir. 1944).	Landowner entered into a contract for sale of property where periodic payments were to be paid to the landowner. Opposing party instead proceeded with condemnation.	Court held that the contract entered into by both parties for sale with periodic payments could be admitted into evidence in determining fair market value for land taken through eminent domain.
California	Cal Gov Code § 984 (2010).	NA	Statute outlining periodic payment requirements in tort proceedings in situations where the government is not immune.

⁴ *U.S. v. Miller*, 317 U.S. 369, 373 (1943).

⁵ Wyo. Stat. Ann. § 1-26-704(a)(i) (2007).

⁶ Wyo. Stat. Ann. § 1-26-704(a)(iii) (2007).

⁷ See e.g. Colo. Rev. Stat. §38-1-101, 121(3) (2010). Utah Code Ann. § 17C-2-602 (2010).

⁸ *Id.*

⁹ Wyo. Stat. Ann. §30-5-401 et. Seq.

While there is not much case law or statutes addressing alternatives to a one-time payment for the fair market value of land in eminent domain proceedings, the BLM and U.S. Forest Service, have policies for managing payments of transmission lines and energy projects based on federal statutes and policy. The BLM uses a periodic payment system to calculate annual rental payments for wind energy projects, including wind turbines and transmission lines through federal lands managed by the Bureau; although, policy does allow for rental fee to be paid in advance for the entire rental term for site testing and monitoring right-of-way grants.¹⁰ BLM calculates the linear right-of-way rent using a per acre rent schedule and adjusts that value annually, revising the schedule every 10-years.¹¹ The calculated linear right-of-way annual rental payment per acre = the value per acre zone X encumbrances X rates of return X annual adjustments.¹² BLM is the only authority I found in my research thus far that addresses annual payments for wind energy specifically. However, these payments are rental fees for a linear right-of-way and not for an easement.¹³

The U.S. Forest Service through the U.S. Department of Agriculture uses a similar annual periodic payment structure of fair market value for federal land used in transmission lines and energy projects. The Federal Land Policy and Management Act states that those holding a right-of-way pay may make annual payments or payments for more than one year at a time.¹⁴ The Mineral Leasing Act of 1920 requires annual payments based on the fair market value of the permit, right-of-way.¹⁵ In the 2009 Forest Service Manual, Special Uses Management report of amendments, the forest service defines the following valuation terms:

- Fair Market Value: “The amount or value for which in all probability a property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy.”¹⁶
- Fee Schedule: “A predetermined fee for a defined category of use. A schedule may be National, regional, or forest-wide in scope and may be adjusted at certain intervals based on an appropriate index.”¹⁷
- Fee System: “A set of procedures and techniques used to establish fees for a particular category of authorized use.”¹⁸

Examining a Special Use Permit from the U.S. Forest Service might be a useful tool. The Special Use Permit authorized by the U.S. Department of Agriculture and the U.S. Forest Service to the Southern California Edison, Antelope-Pardee Transmission Line (or Tehachapi Renewable Transmission Project) in 2008 outlined specific annual payment requirements.¹⁹ In this permit, the annual payments were based on the fair market value, subject to a fee schedule and to reviews and adjustments according to changes in the fair market value.²⁰

My final report will include an analysis of these policies and regulations in relationship to eminent domain proceedings through wind energy development in Wyoming.

¹⁰ U.S. Department of the Interior, Bureau of Land Management, Wind Energy Development Policy (available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2009/IM_2009-043.html).

¹¹ 43 CFR § 2806.20(a) (Lexis current through June 24, 2010).

¹² *Id.* at § 2806.20(b).

¹³ *Id.*

¹⁴ 43 U.S.C.S. § 1764(g) (Lexis 2010).

¹⁵ 30 U.S.C.S. § 185(l) (Lexis 2010).

¹⁶ U.S. Forest Service, Forest Service Manual, FSM 2700 - Special Uses Management, (available at www.fs.fed.us/im/directives/fsm/2700/2700_zero_code.doc).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ http://www.sce.com/NR/rdonlyres/64EDA8E0-2CBC-4E04-95E6-3126D68C61F1/0/0811_TRTPSeg1_2_AngelesNatlForestSUP.pdf

²⁰ *Id.*

INTERNATIONAL COMPARISONS²¹

The siting of transmission lines for wind-energy projects has been of particular concern in New Zealand and the United Kingdom. In both countries, the nature of the right to locate ‘pylons’ on private land depends upon whether the land was acquired by negotiation between the parties or through the use of statutory authority. As a general proposition, landowners have started to view transmission from private wind-energy developments in the same vein as cell phone towers.

In New Zealand, pylons that connect to the main transmission system are owned by the wind-energy developers. If satisfactory arrangements cannot be negotiated with landowners, the developer can apply to the Minister of Energy for the acquisition to be made under the Public Works Act 1981. If the application is acceptable, the Minister will act on behalf of the government to acquire the land. Compensation is based on the “full loss” of value to the landowner. Typically, this has been limited to a single payment.

More recently, landowners have been denying power companies access for inspection of transmission pylons unless an annual rental is paid.

As a result, the New Zealand Institute of Economic Research (NZIER) was commissioned to review landowner compensation to determine whether a single payment accurately reflects the “full loss” of value. NZIER concluded that due to changes in land values over time, the single payment may not reflect the full loss of value and that landowners should have the ability to seek additional compensation if it can be shown that the value of their land had increased. The New Zealand Government is evaluating this report as part of its general review of the Electricity Act.

Wind-energy developers in the United Kingdom have the option of either siting their pylons under a wayleave or as an easement. The wayleave is a terminable license for which the power company makes an annual payment. In contrast, the easement is an interest in land which is acquired by purchase from the landowner. In the United Kingdom, the location of transmission lines for wind-energy projects is determined by local governments.

²¹ Contributed by Professor Dennis Stickley