Condemning the Wind:

Eminent Domain Issues for Wind Collector Systems

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Foreword[1]

The Wind-Energy Project is conducted under the auspices of the Rural Law Center at the College of Law. The activities of the Wind-Energy Project have included research on improving state and federal cooperation in constructing and regulating interstate transmission lines, statutory clarification of wind-energy rights, and the exercise of eminent domain for wind collector systems. The Wind-Energy Project is also cooperating with the School of Environment and Natural Resources on the revision of a guide for Wyoming landowners concerning the development of wind resources.

Activities of the Wind-Energy Project are performed by second and third year law students working under a supervising professor. Students are funded through the Graduate Assistantships provided by the School of Energy Resources (SER). Reports and publications of the Wind-Energy Project are available on SER's website.

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Executive Summary

The Wyoming Constitution states that 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."[2] In the context of electrical systems, Wyoming Statute § 1-26-815 grants private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through "electric power transmission lines and distribution systems…electric power transmission and distribution."[3]

The above statutory authority creates a broad right for the use of condemnation in Wyoming but does not specifically allow private wind energy developers the power of condemnation for collector systems. This report recommends two propositions for recognizing the use of condemnation for wind energy. First, the Legislature could amend the broad act, Wyoming Statute § 1-26-815, to include language granting private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through wind energy collector systems.[4] The second proposition includes adopting a special provision for wind collector systems, outlining appropriate use of eminent domain authority and any factors that may narrow its use.

The Wyoming legislature could amend the broad Eminent Domain Act to include language granting private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through wind energy collector systems.[5] This type of

[2] Wyo. Const. art. 1, § 32-33. See *Wyo. Res. Corp. v. T-Chair Land Co.*, 49 P3d 999, 1001, 1003-1004 (Wyo. 2002).
[3] Wyo. Stat. Ann. § 1-26-815 (2010).
[4] *Id*.
[5] *Id*.

amendment would circumvent the need for a wind energy developer to prove the "public interest and necessity" required for the collector system.[6] While it does not appear that a wind energy collector system requires a Certificate of Public Convenience and Necessity, issued by the Wyoming Public Service Commission,[7] federal regulations may require this Certificate due to the interstate nature of wind energy transportation.[8]

The second proposition includes adopting a special provision for wind collector systems, detailing the appropriate use of eminent domain for wind energy collector systems and any factors that might condition its use. Such factors may include annual compensation to land owners through surface use agreements, providing compensation for surface damages through those agreements, providing for bonds in the event surface agreements are not met and granting the landowner reversionary rights.

Compensation of land taken through condemnation for wind collector systems requires multi-faceted examination of Wyoming state lands and federal lands, including private negotiations. An examination of Wyoming's Split Estate Act further shows the need for compensation and compares the Wyoming State Land's Surface Use Agreement to condemnation proceedings for wind collector systems. The final factor, conditioning eminent domain authority includes a reversionary right to the landowner in the event wind energy collector systems cease operations.

[6] Wyo. Stat. Ann. § 1-26-504(a)(i) (LexisNexis 2010).
[7] Wyo. Stat. Ann. § 1-26-816 (LexisNexis 2010) (providing, "no person shall institute a condemnation proceeding relating to any facility for which a certificate of public necessity and convenience is required until the certificate has been issued.").
[8] 15 USCS § 717(c), (h) (LexisNexis 2010), *see also* FERC, Pre-Filing—For All Natural Gas Projects (Sept., 18, 2010) (available at http://www.ferc.gov/industries/gas/indus-act/pre-filing/faqs.asp) ("grants the right of eminent domain when a certificate of public convenience and necessity is issued by the Commission under section 7(c) of the NGA.")

In the event that developers use the power of condemnation to acquire land necessary for a wind energy project, compensation could to be paid either annually or in one lump-sum payment for the life of the project for an easement with a right of reverter. As a general rule, land granted through condemnation results in the condemnor receiving an easement in perpetuity. In comparison, oil and gas pipeline easements in some states grant the condemnee a right of reverter to the landowner five years following the cessation of operations.[9] A wind energy easement could also contain provisions for a reversion of easements upon termination or non-use of a wind energy project including turbines, facilities and collector systems.

Eminent Domain has a long history at both the federal and state levels. Eminent domain by way of condemnation functions as an integral part of the energy industry in Wyoming.[10] The Wyoming State Legislature will need to address whether wind energy developers may use condemnation authority to take private land for the development of wind energy collector systems by either amending the current, broad Eminent Domain Act or by adopting a special provision for wind energy collector systems. Once it is decided that eminent domain by way of condemnation may be used by private wind energy developers, appropriate compensation must be provided for the property right acquired by the condemnor in which the condemnee retains a reversionary interest.

[9] Minn. Stat. § 216G.09 (2009).

[10] See Generally *Wyo. Res. Corp. v. T-Chair Land Co.*, 49 P3d 999, 1001, 1003-1004 (Wyo. 2002).

1.0 Introduction

This report was prepared in response to a request by Chairman Brown for an analysis of legal authority and policy 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 or annual payment system or other alternatives to the traditional lump sum payment as compensation for the fair market value of the property taken through condemnation in eminent domain proceedings. Although this report does not analyze valuation methods, it does examine the specific types of payments made to landowners for wind energy collector systems.

1.1 Scope of Report

Perhaps the most compelling question surrounding wind energy collector systems is whether eminent domain authority can be used for a wind energy collector system. The State Legislature's recent passage of a moratorium for the use of eminent domain for collector systems has focused attention on whether condemnation can appropriately be employed for wind energy.[11] This report outlines the Wyoming Statutes that grant condemnation authority and probes the justification for allowing private developers to avail themselves of this power of condemnation. Further analysis explores the appropriate conditions for the exercise of eminent domain for the construction, operation and maintenance of wind energy collector systems.

If private wind energy developers have the statutory authority to exercise eminent domain through condemnation for the construction and operation of wind energy collector systems, as a matter of law, appropriate compensation must be provided for the property right acquired in

[11] Enrolled Act No. 48, Wyo. St. Legislature (2010) (available at http://legisweb.state.wy.us/2010/Enroll/HB0079.pdf) (stating, "no person qualified to exercise the condemnation authority granted by [W.S. § 1-26-815]…shall exercise the authority for the erection, placement or expansion of collector systems associated with commercial facilities generating electricity from wind.").

which the condemnee retains a reversionary interest. The scope of research includes issues regarding the amount, method and duration of payments made to landowners whose property is subject to the construction and operation of wind energy collector systems. This report examines current case law and statutes that support annual or periodic payments for land taken by condemnation, but does not include any research or analysis on valuation methods. A comparison of payment procedures required by both federal and Wyoming state agencies for wind energy projects gives further insight regarding alternative approaches to landowner compensation for wind energy in Wyoming.

1.2 Wind Collector Systems

Enrolled Act No. 48, granting the state's moratorium for use of eminent domain on wind energy collector systems defines a collector system as follows:

> "the conductor infrastructure, including conductors, towers, substations, switchgear and other components necessary to deliver power from any commercial facility generating electricity from wind up to but not including electric substations or interconnections facilities associated with existing or proposed transmission lines that serve load or that export energy from Wyoming."[12]

The "footprint of wind turbines, and the accompanying spider web of transmission, collection, and distribution lines, interferes with many concurrent uses of the surface."[13] KK DuVivier and Roderick E. Wetsel outline surface impact issues from wind energy stating:

> "Wind companies must utilize significant portions of the surface for (1) roads, (2) O&M [operation and maintenance] facilities and substations, and (3) laydown yards. Wind farm roads are huge in comparison with oilfield roads and may be as much as 60 feet wide prior to turbine construction…Each wind farm has one or more O&M facilities and substations [including] power stations and company offices…located on tracts of three to five acres each. Laydown yards—areas where repairs are made and parts are stored—are strategically placed [covering] between five and 20 acres or more per site…[M]ost significantly, the turbines are

[12] *Id*.
[13] KK DuVivier, University of Denver – Sturm College of Law, *Animal, Vegetable, Mineral—Wind? The Severed Wind Power Rights Conundrum*, at 77 (available at http://ssrn.com/abstract=1435003) (Sept. 17, 2010).

> linked by a spiderweb of underground and overhead transmission, collection, and distribution lines."[14]

These collector systems can impact a large surface area and may impact the landowner's surface use. It is understandable, therefore, that landowners who may be subject to eminent domain for a wind collector system feel the need for further compensation beyond a one-time, lump-sum payment.

1.3 Wyoming Eminent Domain Law

According to 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."[15] Wyoming Statute § 1-26-815 grants private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through "electric power transmission lines and distribution systems…electric power transmission and distribution."[16]

1.4 State Lands

The Wyoming Office of State Lands and Investments (OSLI) has issued a policy outlining annual payments for wind energy projects granted through a special use lease called the Wind Energy Lease Agreement. The OSLI Wind Energy Lease Agreement also requires surface impact payments to the surface lessee or fee holder though annual payments based on a predetermined payment schedule.

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[14] Jousting at Wind Mills: When Wind Power Development Collides With Oil, Gas, and Mineral Development, 9-10 through 9-11. (available at http://ssrn.com/abstract=1441359).
[15] Wyo. Const. art. 1, § 32-33. See *Wyo. Res. Corp. v. T-Chair Land Co.*, 49 P3d 999, 1001, 1003-1004 (Wyo. 2002).
[16] Wyo. Stat. Ann. § 1-26-815 (2010).

1.5 Federal Lands

Federal regulatory agencies such as the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) set polices granting wind energy developers a right-of-way or a Special Use Permit for a number of years according to a fixed fee or payment schedule in which the wind energy developer makes annual payments to the federal agency. These right-of-ways or special use permits for wind energy projects encompass an entire project area, including wind turbines, supporting facilities and collector systems. This practice makes valuation very simple for federal land managers. At the risk of oversimplifying the process, once the federal agency grants a right-of-way or special use permit, the annual rent is based on a predetermined value for that location. Annual payments are made according to a preset fee schedule.

The BLM has adopted a new posture in Wyoming regarding wind energy development which could have reaching impacts on private and state lands. BLM's policy essentially creates a three-year moratorium on wind energy development in order to study the best areas for wind development on federal land. As the dominant land owner in Wyoming, federal policy that only allows wind to be developed in a few specific areas throughout the State will determine, to an extent, when and where development will occur on adjoining private and state lands as well.

1.5 International Comparisons[17]

The use of private property for development of wind energy is a topic of concern for landowners in other countries. The main distinction between their situation and the U.S. is that the authority to take private property through the exercise of eminent domain is strictly limited to the national government. The use of the state's eminent domain powers is not delegated to private corporations.

[17] Contributed by Professor Dennis Stickley, Visiting Professor, University of Wyoming College of Law.

The siting of transmission lines for wind energy projects has received particular attention in the United Kingdom and New Zealand. Landowners have started to view transmission from private wind energy developments in the same vein as cell phone towers erected by telecommunication companies rather than public infrastructure. In both countries, the right to locate 'pylons' on private land can be acquired either by negotiation between the parties or through the exercise of compulsory statutory authority.

In the United Kingdom, the location of transmission lines for wind energy projects is determined by the government in accordance with land use planning law. Each country of the United Kingdom has its own planning system. Responsibility for town and country planning is devolved to the Northern Ireland Assembly, the Scottish Parliament and the Welsh Assembly.[18]

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. The Secretary of State for the Department of Community and Local Government has the authority to acquire easements through compulsory purchase.[19]

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

[18] Current planning legislation for England and Wales is consolidated in the Town and Country Planning Act 1990.The basic planning law of Northern Ireland is contained in the Planning (Northern Ireland) Order 1991.The relevant Acts for Scotland are the Town and Country Planning (Scotland) Act 1997 and the Planning etc (Scotland) Act 2006.

[19] Planning and Compulsory Purchase Act 2004, which received Royal Assent on 13 May 2004.

landowner. Generally, 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.[20] The New Zealand Government is evaluating this report as part of its general review of the Electricity Act.

2.0 Discussion of Options

According to 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."[21] Wyoming Statute § 1-26-815 grants private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through "electric power transmission lines and distribution systems."[22]

The above statutory authority creates a broad right for the use of condemnation in Wyoming, providing the use meets the public purpose requirement set out in the Wyoming Constitution, but does not specifically allow private wind energy developers the power of

[20] "Compensation for Transmission Infrastructure" New Zealand Institute of Economic Research, 30 November 2009, www.fedfarm.org.nz/n 1778 html.
[21] Wyo. Const. art. 1, § 32-33 (LexisNexis 2010), See *Wyo. Res. Corp. v. T-Chair Land Co.*, 49 P3d 999, 1001, 1003-1004 (Wyo. 2002).
[22] Wyo. Stat. Ann. § 1-26-815 (LexisNexis 2010).

condemnation for collector systems. This report recommends two propositions for recognizing the use of condemnation for wind collector systems. First, the legislature could amend the broad act, Wyoming Statute § 1-26-815, to include language granting private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through wind energy collector systems.[23] The second proposition includes adopting a special provision for wind collector systems, outlining appropriate use of condemnation and any conditions that may limit its use.

2.1 Amending the Blanket Eminent Domain Provision to Include Wind Collector Systems

The Wyoming legislature could amend the broad Eminent Domain Act to include language granting private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through wind energy collector systems.[24] This type of amendment would circumvent the need for a wind energy developer to prove the "public interest and necessity" required for the collector system.[25] Consideration should also be given as to whether a wind energy collector system requires authorization from a state agency such as a Certificate of Public Convenience and Necessity, issued by the Wyoming Public Service Commission, [26] or a permit from the Office of Industrial Siting as a condition to the exercise of eminent domain.[27]

[23] *Id*.
[24] *Id*.
[25] Wyo. Stat. Ann. § 1-26-504(a)(i) (LexisNexis 2010).
[26] Wyo. Stat. Ann. § 1-26-816 (LexisNexis 2010) (providing, "no person shall institute a condemnation proceeding relating to any facility for which a certificate of public necessity and convenience is required until the certificate has been issued.").
[27] Wyo. Stat. Ann. § 35-12-106(a) (LexisNexis 2010) (stating, "No person shall commence to construct a facility, as defined in this chapter, in this state without first obtaining a permit for that facility from that council.").

A. Public Interest and Necessity

Under the current statute, a wind energy developer must prove that "public interest and necessity require the project."[28] The Wyoming Supreme Court thoroughly examined the "public interest and necessity" requirement in *Bridle Bit* where Basin Electric Power Cooperative, a private, "regional wholesale electric generation and transmission cooperative that supplies wholesale electricity to its distribution cooperatives" needed to use its condemnation authority to acquire land needed for a new transmission line.[29] The Supreme Court held that Basin established "the project was necessary and in the public interest" as the transmission line was necessary to keep up with the supply and demand for power to Campbell County.[30]

The court stated that an "ever-increasing demand for more electric power" is sufficient evidence to demonstrate the projects necessity and is in the public's interest.[31] The key factual point from this case is that Basin's transmission line fed power to Campbell County, Wyoming.[32] Most energy collected in the state from wind turbines that interconnect with transmission lines will be transported through collector systems to Wyoming's neighboring States.[33] Much of the wind energy passing through wind collector systems will not meet the energy needs of Wyoming consumers. Condemnation of private land for wind energy collector lines may not meet the "public interest and necessity" requirement due to the fact that these collector lines will feed transmission lines, supplying energy to Western States.[34]

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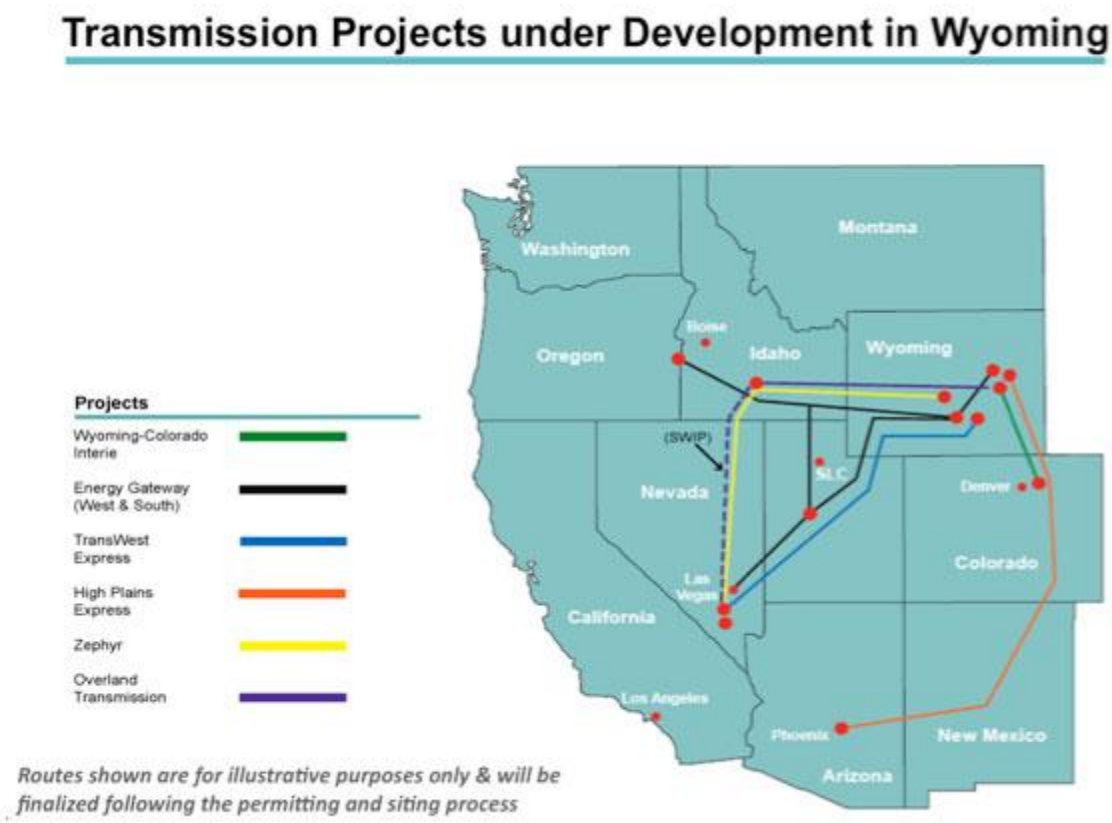
[28] *Id*.
[29] Wyo. Stat. Ann. § 1-26-504 (LexisNexis 2010), *Bridle Bit Ranch Co. v. Basin Electric Power Co*. 2005 WY 108, P1, P; 118 P.3d 996, 998 (Wyo. 2005).
[30] *Bridle Bit*, 118 P.3d at 1015.
[31] *Bridle Bit*, 118 P.3d at 1105.
[32] *Bridle Bit*, 118 P.3d at 1015.
[33] See the following map, outlining each transmission line project.
[34] Wyo. Stat. Ann. § 1-26-504 (LexisNexis 2010).

The Wyoming Infrastructure Authority has published the following map, showing each of the six current transmission projects under development, including the Wyoming-Colorado Intertie Project, Energy Gateway South, Energy Gateway West, TransWest Express Project, High Plains Express Project, Zephyr Project and Overland Transmission Project.[35] While each of these transmission projects begin in Wyoming, energy is transported to consumers in Colorado, Nevada, Utah, Idaho and Arizona.[36]



[35] Wyoming Infrastructure Authority, Projects (Available at http://wyia.org/projects/) (Sept. 17, 2010).
[36] *Id*.

B. Public Use

It is arguable that wind energy collector systems may not meet the "public interest and necessity" requirement because the energy will not supply Wyoming consumers. However, this approach is not conclusive on the question of public use. The Supreme Court's recent ruling in *Kelo v. City of New London* broadened the meaning of public use for condemnation proceedings to include economic reasons such as revitalization, job creation and tax revenue as providing a legitimate public interest.[37] Wind energy development, including collector systems will add to Wyoming's ad valorem tax base, which in turn benefits the residents of the state. Construction, operation and maintenance for wind energy projects require job creation, again bringing benefit to the people in Wyoming. The broad language used in *Kelo* could be argued to satisfy the Eminent Domain Act's requirement for public interest.

C. Comparison with Oil and Gas

The broad statute authorizes condemnation authority for the transportation of energy from the point of generation or extraction to include oil and gas, coal and transmission lines.[38] The Wyoming Constitution provision grants condemnation authority for "mining" purposes.[39] The Wyoming Supreme Court, in *Coronado Oil Co. v. Grieves*, held that "mining" includes oil and gas exploration and production.[40] The court further explained that the provision in the Wyoming Constitution "was to facilitate the development of our state's resources."[41] The statute does not specifically mention wind energy; although, it would follow that as the statute mentions

[37] 545 U.S. 469 (2005), *see also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (Where taking private land to sell to other private individuals achieved a legitimate public purpose.), *Burman v. Parker*, 348 U.S. 26 (1954) (Where taking land for the purpose of revitalizing a blighted area was held to be a public purpose.)
[38] Wyo. Stat. Ann. § 1-26-815 (LexisNexis 2010).
[39] Wyo. Const. art. 1, § 32-33 (LexisNexis 2010).
[40] *Coronado Oil Co. v. Grieves*, 603 P.2d 406, 411 (Wyo. 1979) (condemnation case in which an oil and gas company required access for exploration and development of their federal mineral lease.)
[41] *Id*.

other forms of energy, wind energy should be included under an interpretation that the purpose of the statute is achieved by considering spur lines, gathering pipelines and collector systems to be part and parcel of the facilities discussed in the Act.

In *Contra Costa*, the California court addressed the relationship between wind as a resource comparable to oil and gas, stating:

> "The right to generate electricity from windmills harnessing the wind, and the right to sell the power so generated, is no different, either in law or common sense, for the right to pump and sell subsurface oil, or subsurface natural gas by means of wells and pumps."[42]

It follows, when considering the interpretation of the broad statute which grants private companies condemnation authority for transporting energy, that wind energy production and any associated facilities should be treated similar to oil and gas production. Using the *Contra Costa* analogy, wind is also a viable natural resource for energy production as is oil and gas.[43]

D. Certificate of Public Convenience and Necessity

Another issue for consideration includes whether a wind energy collector system requires a Certificate of Public Convenience and Necessity, issued by the Wyoming Public Service Commission.[44] The court will not authorize a wind energy company to exercise the power of

[42] *Contra Costa Water District v. Vaquero Farms, Inc*., 68 Cal. Rptr. 2d 272, 278 (Cal. Ct. App. 1997) (This quote was based on the water district's argument, which the court agreed with, in a condemnation case in which the water district severed the wind rights, taking only the surface of the land for a reservoir. The wind rights remained with the condmnee.). *See also* KK DuVivier, University of Denver – Sturm College of Law, *Animal, Vegetable, Mineral—Wind? The Severed Wind Power Rights Conundrum*, at 88.

[43] *Contra Costa Water District*, 68 Cal. Rptr. 2d at 278, *See also* KK DuVivier, *Animal, Vegetable, Mineral—Wind? The Severed Wind Power Rights Conundrum*, at 88.

[44] Wyo. Stat. Ann. §37-2-205 (stating, "no public utility shall begin construction of a line, plant or system, or of any extension of a line, plant of system without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.")

eminent domain if that company is required to obtain, but has not yet been granted a Certificate of Public Convenience and Necessity.[45]

Based on the *Bridle Bit* decision, unless the wind energy collector system is supplying energy "to or for the public" it is not required to obtain a Certificate of Public Convenience and Necessity.[46] As discussed above, wind collector systems will provide energy from the wind turbine to larger transmission projects carrying energy to Wyoming's neighbors. Much of the energy from these projects will not supply energy to Wyoming residents. As the wind energy supply feeds transmission lines to Wyoming's neighbors, federal statutory requirements may apply due to the interstate nature of wind energy transportation. A wind energy company might, under federal statutory law, be required to obtain a federal Certificate then apply federal condemnation authority. Further examination of this issue may be required.

The Federal Energy Regulatory Commission (FERC) requires interstate gas pipelines to obtain this Certificate before granting federal eminent domain authority under the Natural Gas Act.[47] Transmission lines in "national interest electric transmission corridors" may be granted a federal siting permit by FERC "only when a state commission is unable to act on a permit application in a national interest corridor, fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions."[48]

The FERC permitting examples for pipelines and transmission lines provide insight to the possibility of federal preemption for wind energy siting permits based on the interstate reality of

[45] Wyo. Stat. Ann. § 1-26-816 (LexisNexis 2010).
[46] *Bridle Bit*, 118 P.3d 996, 1011.
[47] 15 USCS § 717(c), (h) (LexisNexis 2010), *see also* FERC, Pre-Filing—For All Natural Gas Projects (Sept., 18, 2010) (available at http://www.ferc.gov/industries/gas/indus-act/pre-filing/faqs.asp) ("grants the right of eminent domain when a certificate of public convenience and necessity is issued by the Commission under section 7(c) of the NGA.")
[48] *Piedmont Envtl. Council v. Edison Elec. Inst*., 558 F.3d 304, 310, 315 (4th Cir. 2009), PL 109-58, FPA § 216 (Energy Policy Act of 2005).

wind energy transmission. This might affect wind collector systems as they are an integral point of transporting energy from the wind tower to the hub-transmission station.

E. Conclusion

Wind energy companies have several legal theories in which to base condemnation authority, including comparisons with oil and gas, the U.S. Supreme Court holding in *Kelo* and the Wyoming Supreme court decision in the *Bridle Bit* decision. However, absent legislative authority, many of these arguments could be subject to litigation and could only be resolved in the courts. This uncertainty could be resolved if the Legislature were to amend W.S. § 1-26-815 to include expressly wind energy collector systems.

2.2 Specific Provisions

The second proposition includes adopting a special provision for wind collector systems, outlining appropriate use of condemnation for wind energy collector systems and any factors that might narrow its use. Such factors may include annual compensation to land owners through surface use agreements, providing compensation for surface damages through those agreements, providing for bonds in the event surface agreements are not met and granting the landowner reversionary rights.

Compensation of land taken through condemnation for wind collector systems requires multi-agency examination, including private negotiations, Wyoming State lands and federal lands. An examination of Wyoming's Split Estate Act further shows the need for compensation and compares the Wyoming State Land's Surface Use Agreement to condemnation proceedings for wind collector systems. The final factor, narrowing eminent domain includes a reversionary right to the landowner in the event wind energy collector systems cease operations.

A. Payments for Just Compensation in Wyoming

Like the United States Constitution, The Wyoming Constitution requires just compensation for property taken for a public purpose, stating that property "shall not be taken or damaged…without just compensation."[49] Fair market value is the traditionally accepted payment form for just compensation in eminent domain condemnation proceedings, affirmed by the Wyoming Supreme Court in *Coronado Oil Co. v. Grieves* and the United States Supreme Court in *U.S. v. Miller*.[50]

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.[51] 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.[52] Generally accepted appraisal techniques must be used and may be done by a certified appraiser using comparable easements or leases in arms-length transactions.[53]

B. Private Landowners

Methods for payment to the condemnee by the condemnor depend upon the language of the eminent domain statute. Traditionally, state and federal courts have interpreted this to provide for a one-time, lump-sum payment for fair market value.[54]

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[49] Wyo. Const. art. 1, § 32-33. See also U.S. Const. amend. V. See *Wyo. Res. Corp. v. T-Chair Land Co.*, 49 P3d 999, 1001, 1003-1004 (Wyo. 2002).

[50] See *U.S. v. Miller*, 317 U.S. 369, 373 (1943) (holding, "the owner is to be put in a good as position pecuniarily as if the property had never been taken."), see generally *Coronado Oil Co. v. Grieves*, 642 P.2d 423 (Wyo. 1982) (providing discussion on just compensation and fair market value).

[51] *Miller*, 317 U.S. 373.

[52] Wyo. Stat. Ann. § 1-26-704(a)(i) (2007).

[53] Wyo. Stat. Ann. § 1-26-704(a)(iii) (2007).

[54] *Id*, see also *Miller*, 317 U.S. 373, see generally *Coronado Oil Co.* 642 P.2d 423.

Due to the private nature of negotiations between landowners and condemnors, it is difficult to ascertain how often the condemnor makes periodic payments instead of the traditional one-time payment for fair market value. Often, condemnation authority can only be invoked when direct negotiations have reached an impasse, resulting in the compulsory acquisition of the necessary property rights. This is not to say that alternative payment methods are unknown. The following table shows where periodic payments have been recognized by courts or statute, but not specifically mandated for eminent domain proceedings.

Table 1

	Authority	Eminent Domain Proceeding	Periodic Payments
Florida	*Schick v. Florida Dept. of Agriculture*, 586 So. 2d 452 (Fla. 1st 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 3rd Circuit	*U.S. v. Certain Parcels of Land*, 144 F.2d 626 (3rd 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.

There are no judicial decisions mandating alternative compensation due to the well-established principle that private land-owners receive just compensation based on the fair market value of their property in the form of a one-time, lump-sum, payments. In both *Schick v. Florida Dept. of Agriculture* and *U.S. v. Certain Parcels of Land* the parties agreed to periodic payments for the condemned land.[55] The Court only mentions this because it relates to issues on appeal before the Court. Neither Court held that these alternatives are mandated or even recommended.

[55] 586 So. 2d 452 (Fla. 1st Dist. App. 1991), 144 F.2d 626 (3rd Cir. 1944).

Payment for these condemned lands was ultimately decided through private contract negotiations or settlement, and the court simply recognized the contractual rights of the parties. While these cases were in Florida and Pennsylvania respectively, they represent the lack of case law surrounding annual payments for condemnation.

Title 18, Article 5 of the Wyoming Statutes provides for County regulation of wind energy development. Wind energy developers must obtain "a permit from the board of county commissioners in the county in which the facility is located."[56] While these regulations streamline the application and permitting process for wind energy projects, these regulations do not stipulate any payment system for private land lease agreements. Private contract negotiations between the wind energy developer and the land owner determine the terms of final lease agreements and payments for the lease. While no authority in Wyoming provides for annual or periodic payments for an interest in land taken in condemnation for wind energy facilities or collector lines, examples of these payment structures may be found by examining Wyoming State Lands and Federal Lands.

C. Wyoming State Lands

The Wyoming Office of State Lands and Investments (OSLI) provides policy outlining annual payments for wind energy projects on lands managed by the State.[57] The following information in Table 2,taken directly from The OSLI Rules and Regulations for Wind Energy Leasing, including *Leasing Wyoming State Trust Lands for Wind Energy Development* and based

[56] Wyo. Stat. Ann. § 18-5-502 (LexisNexis 2010).
[57] *See Generally* R. and Reg., Board of Land Commr., Chapter 6, Wind Energy Leasing (found at http://legisweb.state.wy.us/ARULES/AR10-035statelands.pdf).

on W.S. §36-5-101(b) and § 36-5-114, provides an overview of wind energy policy from the Wyoming State Lands perspective.[58]

Table 2

TYPE	DEFINITION	TERM	RENT	RENEWAL	BOND
Temporary Use Permits	Non-Exclusive Permit for installation and monitoring met towers Does not guarantee or prioritize permittee future development	5 years	$1,200 per met tower	None	None
Special Use Leases	Exclusive wind energy development rights, subject to any existing uses with 3 phases of the lease agreement: 1. Data Collection 2. Construction 3. Operation *Requires surface impact payments.*	Usually 35 years, but no longer than 75 years	Based fair market value with 3 phases: 1. Annual rents per acre until operation 2. Installation fee based on generating capacity 3. The greater of rent based on generating capacity or rent per acre	May be renewed but must not exceed 75 years	Require reclamation bond

The Temporary Use Permit only provides for a non-exclusive permit for data collection related to installing and monitoring meteorological (met) towers to determine areas of future wind energy development.[59] These permits only grant the developer a five year permit for $1,200 per tower with no promised lease for future development.[60]

The Special Use Lease provides "the lessee with exclusive wind energy development rights" on Wyoming State lands subject to an existing lease in exchange for annual payments to the OSLI and surface impact payments to the surface fee owner or lease holder.[61] All rental

[58] *Id.*, Wyo. Off. of St. Lands and Inv., *Leasing Wyo. St. Trust Lands for Wind Energy Dev.* (found at http://slf-web.state.wy.us/estate/adobe/windlease.pdf).
[59] *Id.*
[60] *Id.*
[61] *Id.*

payments are based on fair market value.[62] Under phase-one of the Special Use Lease, the wind energy developer pays "annual rents per acre" for data collection and feasibility studies.[63] The second phase of the Special Use Lease requires "an installation fee based on generating capacity" of which half must be paid "at commencement of construction" with the remaining half payable "prior to operation."[64] The final phase of the Special Use Lease payments require the greater of a "percentage of gross revenue…based on generating capacity, or a rent per acre."[65] The OSLI Wind Energy Lease Agreement lists the operating fees as the greater of the gross revenue operating fee or the base operating fee which cannot be less than the rent per acre.[66]

The OSLI Wind Energy Lease Agreement outlines a complex calculation for the percentage of gross revenue in which annual payments are adjusted on the 10th, 15th and 20th year anniversaries of the date of operations for the wind energy project. The following formula, taken directly from the OSLI Wind Energy Lease Agreement, specifies how the OSLI determines payments due by the wind energy developer.

$$(CM)\ \frac{P}{PCM} = TKW$$

> CM is the total number of kilowatt hours available for sale at the common meter.
>
> P is the total number of kilowatt hours generated on the Property as measured by individual meters at each WTG.
>
> PCM is the total number of kilowatt hours generated on the Property and other properties within the Project as measured by individual meters at each WTG (wind turbine generator)

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[62] *Id.*, Wyo. Stat. Ann. § 36-5-114(c) (LexisNexis 2010).
[63] *Leasing Wyo. St. Trust Lands for Wind Energy Dev.* (available at http://slf-web.state.wy.us/estate/adobe/windlease.pdf) (July 12, 2010).
[64] *Id*.
[65] *Id*.
[66] Available at http://slf-web.state.wy.us/estate/adobe/windtemplate.pdf.

TKW is the total number of kilowatt hours generated by Lessee for use in determining the Gross Revenue Operating Fee

The OSLI requires the wind energy leaseholder to pay an annual surface impact payment for compensation for impacts or damage to the surface fee or lease holder. The State owns the surface estate in fee but may lease the surface for grazing or other agricultural use. The OSLI Surface Impact Payment Statement requires annual payments to both the OSLI and the surface Lessee to cover "potential adverse impacts" caused by the wind energy lessee for "known and/or anticipated use(s) of the state surface," including roads and other off-lease production activities.

D. Wyoming Split Estate Act

In Wyoming Split Estate Act requires a surface use agreement similar to OSLI for oil and gas operations. An oil and gas operator must provide notice and act in good faith toward an "executed surface use agreement providing for compensation to the surface owner for damages to the land and improvements."[67] Alternatively, the oil and gas operator may execute a surety bond in order to secure payment for any surface damages.[68] Either way, the surface owner has the ability to collect monies for surface damages from oil and gas operations; although, the burden of proof belongs to the surface owner to show actual damages.[69]

Reno Livestock Corp v. Sun Oil Co. is an example in which a surface owner attempted to negotiate annual payments as compensation for damages related to oil and gas development and operations.[70] In *Reno* the surface owner requested annual payments for maintenance and payments for damages.[71] Negotiations collapsed and the operator sought an injunction to prevent

[67] Wyo. Stat. Ann. § 30-5-402(c)(ii) (LexisNexis 2010).
[68] Wyo. Stat. Ann. § 30-5-402(c)(iv) (LexisNexis 2010).
[69] *Id*.
[70] 638 P.2d 147, 149 (Wyo. 1981).
[71] *Id*.

the surface owner from interfering with its right as a federal lessee.[72] On appeal, the Wyoming Supreme Court held that the bond posted by Sun Oil was sufficient and alternative payments through a surface use agreement were not necessary.[73] This case occurred prior to Wyoming's adoption to the Split Estate Act. Wyoming's adoption of the Act shows the State Legislature's concern for compensating a surface owner or lessee for surface damages caused by energy development. In comparison, the OSLI's Annual Surface Impact Payment Statement provides for a surface owner to be compensated beyond the initial payment for a mineral or wind energy rights lease or easement.

Private landowners should be granted the same consideration regarding impacts to their lands as required by Wyoming state lands. Both the Split Estate Act and the Surface Impact Payment Statement provide a means of alternative compensation in the event an energy developer causes damage to roads, crops, gates, pasture or other surface impacts. The Wind Energy Task Force should consider these alternative forms of payment as models for compensating private landowners through annual payments for wind energy collector systems.

E. Federal Lands in Wyoming

The BLM and the USFS follow policies for managing annual payments for a predetermined fair market value for wind energy development projects based on federal statutes.[74] The BLM uses an annual payment system to calculate rental payments where a wind energy developer has been granted a right-of-way for wind energy projects, including wind turbines and collector systems/lines on Federal lands managed by the Bureau.[75] BLM currently

[72] *Id*.
[73] *Id* at 151.
[74] *See Generally* 43 CFR 2800 and 2900 (LexisNexis 2010).
[75] U.S. Dept. of the Int., Bureau of Land Mgt., *Wind Energy Dev. Policy* (available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2009/IM_2009-043.html) (June 29, 2010).

uses three types of right-of-way grants for wind development in Wyoming, but that policy expires September 30th of this year.[76] According to BLM's Tom Lahti (Chief, Renewable Energy, Wyoming State Office), the BLM will make Wyoming a test State for new policy that will create a competitive bidding process, granting a wind energy development lease following a three year study of wind energy on Federal land in Wyoming while doing away with the three-tiered, right-of-way system.[77] BLM's new policy could have significant impacts on wind energy development in Wyoming.

1. Bureau of Land Management (BLM)

The Bureau of Land Management (BLM) is at the forefront of wind energy policy in Wyoming due to the vast amounts of federal land managed by the Bureau in the state and in position to be of great influence over wind energy development affecting private land owners who may be subject to condemnation through eminent domain proceedings. BLM's Wind Energy Development Policy currently provides for three types of applications for wind development on federal land managed by the Bureau.[78] These applications include grants for right-of-ways for a single met tower, right-of-ways locking up an area of land for further study, and the actual wind farm right-of-way.[79]

The current policy expires September 30th, 2010 according to the BLM's instruction memorandum.[80] The Washington office just authorized the use of funds for the development of a new wind energy policy using Wyoming as a test State.[81] This new policy puts a hold on all

[76] *Id.*
[77] Interview with Tom Lahti, Chief, Renewable Energy, Bureau of Land Mgt., Wyo. St. Office (Aug. 16, 2010).
[78] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[79] *Id*.
[80] *Id*.
[81] Interview with Tom Lahti.

new wind energy development on Federal lands managed by BLM during a three year study.[82] BLM would then offer specific Federal lands in Wyoming up for wind energy development to the highest bidder for a leased term rather than a right-of-way.[83] This new policy development could have far reaching impacts on the State and private landowners, making the private landowner more susceptible to condemnation through eminent domain due to specified wind energy corridors in Wyoming.

Under current BLM policy, wind energy developers submit applications for a right-of-way grant. The right-of-way functions similar to a lease, but has its faults, according to Tom Lahti. The right-of-way process creates a land grab situation where the first wind energy developer to get a completed application in to the Bureau gets the right-of-way grant.[84] Many applications get turned into the BLM office incomplete and some applicants request right-of-ways that overlap lands requested by other applicants.[85] Right-of-ways granted for wind energy only allow the developer the right to install, maintain, and collect wind for energy production. The wind energy company does not retain an exclusive right to use the land.[86] BLM retains interest in the land and may use it for uses compatible with wind energy.[87] BLM uses comparables from private, non-Federal lands to create the Bureau's right-of-way fees for wind energy testing, monitoring and developing.[88] Wind energy developers are required to undergo an environmental analysis (EA), according to the National Environmental Policy Act (NEPA), in order to develop wind energy on Federal land.[89]

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[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] Interview with Janelle Wrigley, Reality officer, Bureau of Land Mgt., Wyo. St. Office (July 29, 2010).
[87] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[88] *Id*.
[89] *Id*.

The following table shows each of the three types of right-of-ways currently available through BLM for wind energy development based on BLM's policies.

Table 3

	Type 1: Site-specific Grant for Testing and Monitoring	Type 2: Project Area Grant for Testing and Monitoring	Type 3: Development Grant
Definition	Non-exclusive right-of-way for a single met tower. No right for future wind development.	Right-of-way granting an interest in an area of land for data collection, precluding other developers for the 3 year term, with the right to apply for a type 3 right-of-way.	Actual wind farm right-of-way; includes collector systems/lines and other support facilities. Transmission lines are not included in this right-of-way.
Term	3 year term.	3 year term.	30 year term.
Rent	$100 per met tower/per year; payable yearly in advance.	The greater of $1,000 per year or $1 per acre of public land; payable yearly in advance or may pay the entire sum in advance.	$4,155 per anticipated megawatt; payable yearly in advance. Prorated over 3 years. - 25% 1st year - 50% 2nd year - 100% 3rd year and every year after
Roads	Included in rent as ancillary to the met tower.	Included in rent as ancillary to the project area.	Included in rent as ancillary to the development area.
Bond	$2,000 per met tower minimum, but could be more.	$2,000 per met tower minimum, but could be more.	$10,000 per wind turbine.
Renewal	Cannot be renewed. Must reapply for a new short term right-of-way.	Renewable if application submitted within 120 days of right-of-way expiration, not to exceed 3 additional years. Or must submit application for Wind Energy Development Project, Type 3 right-of-way.	Renewable according to provisions in 43 CRF 2807.22.

The first application a wind developer might apply for is a Type 1, Site Specific Grant for Testing and Monitoring.[90] This short-term right-of-way grants the wind developer the right to place a single met tower for data collection on BLM land with a rent of $100 per tower.[91] The road to and from the tower is considered ancillary to the tower and is included in the rent. If the tower is located on private land but the only access to the tower is through BLM land, then BLM would issue a road right-of-way and the rent would be calculated according to BLM's linear schedule.[92] A Site-Specific Grant for Testing and Monitoring is issued for only three years and is non-renewable.[93] If a wind developer wants to extend the term for the met tower then the developer would have to reapply for another Type 1, Site-Specific Grant for Testing and Monitoring.[94] The BLM requires any agent with a Site-Specific Grant to pay a bond as insurance against any work that the BLM might have to do for restoration in the event the short-term right-of-way holder would walk away from the site.[95] The bond requirements for BLM land by a wind developer who holds this short-term right-of-way are $2000 per met tower minimum but could be more depending on the site.[96] This is BLM's way of protecting themselves for clean-up and restoration costs.[97]

A Type 2, Project Area Grant for Testing and Monitoring is similar to the Type 1 application as the three year right-of-way only grants the right for gathering information through met towers.[98] Rent for a Type 2 right-of way includes any necessary roads as ancillary to the

[90] Interview with Janelle Wrigley.
[91] *Id*.
[92] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[93] *Id*.
[94] *Id*.
[95] Interview with Janelle Wrigley.
[96] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[97] Interview with Janelle Wrigley.
[98] *Id*.

project area for a cost of "$1,000 per year or $1 per acre per year, whichever is greater."[99] Bonding for a Project Area Grant for Testing and Monitoring is $2,000 per met tower minimum, but it could be more depending on the site just as in a Type 1 right-of-way.[100]

The difference between the Type 1 and Type 2 right-of-ways is the amount of land included in the right-of-way and the type of interest a wind energy developer retains with the right-of-way. A developer would submit a Type 2, Project Area Grant for Testing and Monitoring for a large piece of land in order to "lock up" an area so that other developers would not have a chance to develop that area.[101] A wind energy developer with a Type 2 right-of-way retains an interest in the land such that the developer has the right to renew the Type 2, Project Area Grant for Testing and Monitoring, or to apply for a Type 3, Development Grant.[102] The boundaries for the right-of-way can span private land as well as land managed by the Bureau.[103]

Type 2 right-of-ways are granted on a first come first serve basis, creating a land-grab situation in which wind energy developers submit applications in order to prevent their competitors from having a chance to develop the land.[104] This process creates many problems within the Bureau.[105] Most applications are submitted incomplete or have overlapping boundary lines with other project applications.[106] Where the Bureau receives multiple applications for the same land area, the first wind energy developer to complete the application receives the right-of-

[99] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[100] *Id*.
[101] Interview with Janelle Wrigley.
[102] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[103] Interview with Janelle Wrigley.
[104] Interview with Tom Lahti.
[105] *Id*.
[106] *Id*.

way grant with an interest allowing for a Type 3 Application for actual wind energy development.[107]

A Type 3 Development Grant is the actual wind farm development and energy production right-of-way.[108] The Development Grant functions much differently than the Type 1 and 2 right-of-ways as it facilitates a "commercial wind energy development project," including wind turbines, access roads and collector systems.[109] BLM includes access roads within the boundaries of the project area as ancillary to the project, but use of access roads to and from the project area, outside of the right-of-way boundaries, must be granted thorough a separate linear right-of-way.[110] Transmission lines are not included in the development right-of-way grant.[111] Similar to the Type 1 and 2 right-of-way grants, wind energy developers must pay a bond as insurance for environmental clean-up and restoration costs should the developer back-out of the project.[112]

Commercial wind energy companies pay rent based on the output of energy in megawatts.[113] The current fee includes $4,155 per anticipated megawatt, payable yearly and in advance.[114] The initial rent paid by a wind energy developer is prorated over the first three years with the first year being 25% of the anticipated megawatt production.[115] The second year a developer pays 50% then 100% the final year.[116] Each year following, the right-of-way holder must pay 100% of the anticipated megawatt production at the rate of $4,155 per megawatt.[117]

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[107] *Id*.
[108] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[109] *Id*.
[110] Interview with Janelle Wrigley.
[111] *Id*.
[112] *Id*., Bureau of Land Management, *Wind Energy Development Policy*.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id.*
[117] *Id.*

The Bureau of Land Management uses a fixed annual rental fee, calculating the right-of-way rent using a per acre rent schedule, adjusting that value annually then revising the schedule every 10-years.[118] The formula used by BLM for the calculated right-of-way annual rental payment per acre = the value per acre zone X encumbrances X rates of return X annual adjustments, or "$4,155 per megawatt of anticipated total installed capacity on public land."[119]

The following table is an example rent schedule for a Development Grant right-of-way based on a fictitious wind farm project with 100 turbines, each producing two megawatts per year or an anticipated energy production of 200 megawatts per year multiplied by $4,155.

Table 4

	Year 1	Year 2	Year 3
ANTICIPATED PRODUCTION	200 mw	200 mw	200 mw
RENT PER MEGAWATT	$4,155	$4,155	$4,155
PERCENTAGE DUE	25%	50%	100%
TOTAL RENT	$207,750	$415,500	$831,000

Source: Fictitious data, for illustration purposes only

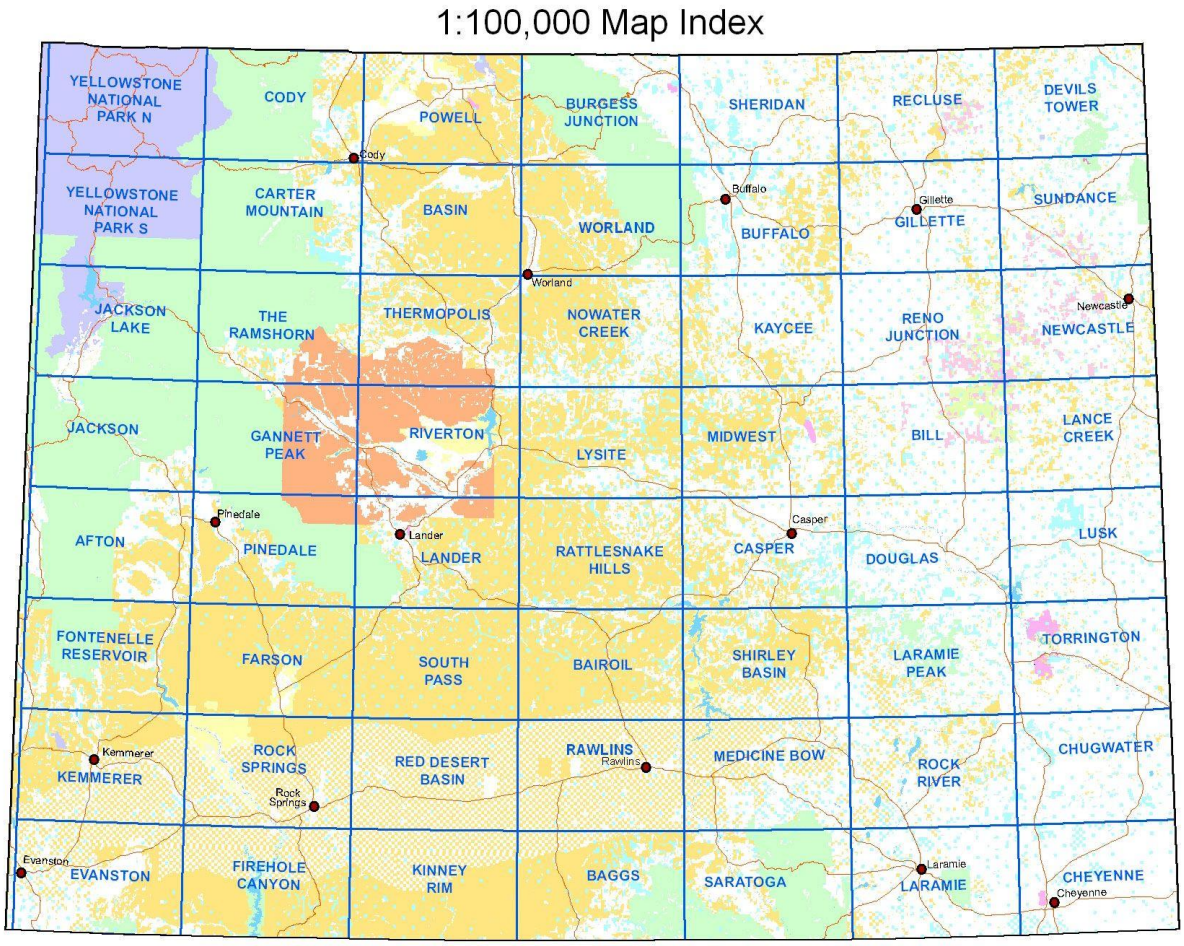
The BLM's Wind Energy Development Policy includes a due diligence requirement for Type 3 Development Grants to try to keep wind energy developers from keeping large land areas locked up, preventing development by their competitors.[120] This policy requires wind energy developers holding a right-of-way Development Grant to provide information on the "applicant's technical capability to construct, operate, and maintain the wind energy facilities and associated transmission facilities.[121]

[118] 43 CFR § 2806.20(a) (LexisNexis 2010).
[119] Bureau of Land Mgt., *Wind Energy Dev. Policy*.
[120] *Id*.
[121] 43 CFR 2804.12(a)(5) (LexisNexis 2010).

Up to this point, BLM has not done any competitive leasing for wind energy going on in the state of Wyoming.[122] However, new policy coming out of the Washington BLM office and the Wyoming State office reveals that the Bureau will in effect be dictating a three year moratorium on all new wind energy development proposals touching any federal land managed by the Bureau.[123] This moratorium will allow BLM to complete a study, at the end of which will create their preferred wind energy sites. These sites will then be released into a competitive bidding process throughout the state. This could significantly impact the state of Wyoming's wind energy development as it will dictate the location of most wind development in the State. The first image below is the BLM map of surface ownership for the State of Wyoming. The white spaces are privately owned lands, the orange spaces are federal lands managed by the Bureau of Land Management.

[122] Interview with Tom Lahti.
[123] *Id*.

Bureau of Land Management Surface Ownership Map for Wyoming

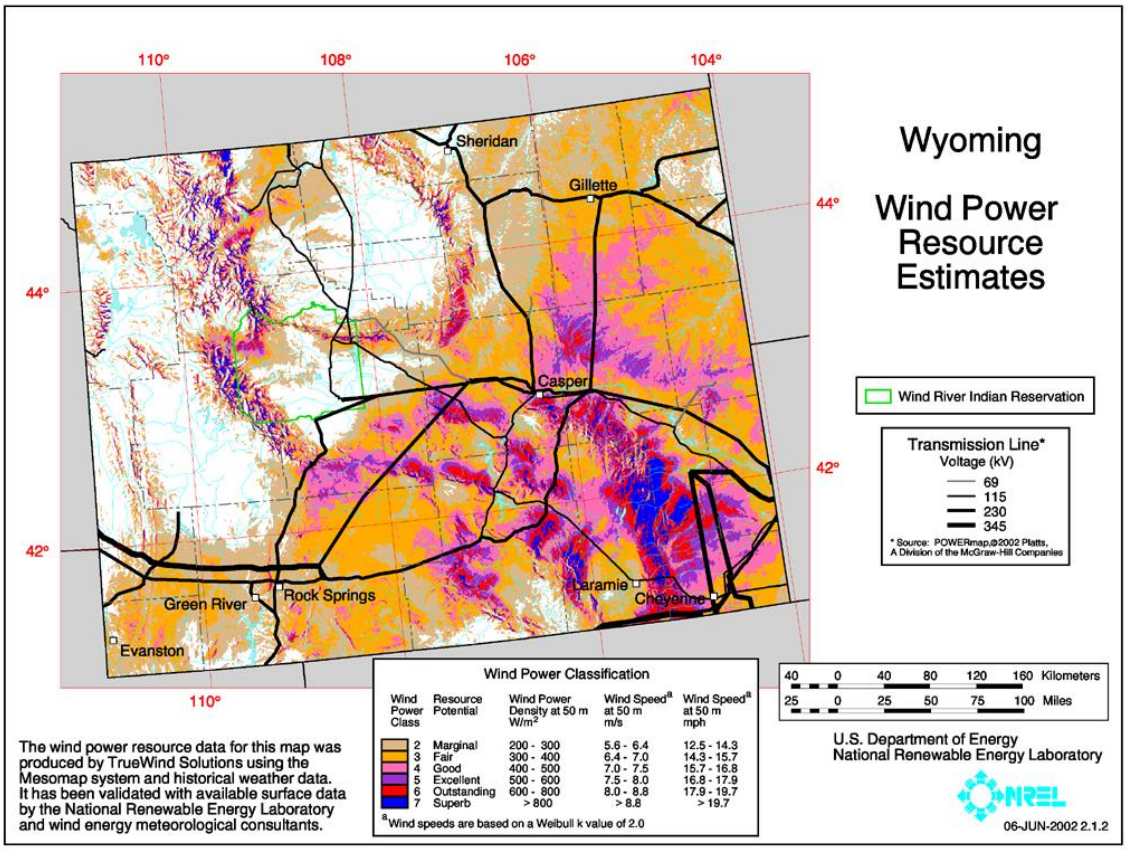


http://www.blm.gov/pgdata/etc/medialib/blm/wy/resources/gis/state/images.Par.6690.Image.-1.-1.1.gif

The following map shows the most viable wind resources in the State. By comparing the above map and the below map, one can see that federal land managed by the Bureau represented by the orange spaces and checkered areas will coincide with much of the most dense wind resource areas in Wyoming. These two maps reveal the significance of federal policy on wind energy development in the State of Wyoming and the potential impact the new policy will have not only on private landowners, but also on State land wind energy development. Landowners may or may not be more adverse to the federal government dictating where wind energy can be

development which might give rise to increased condemnation use for wind energy development in Wyoming.

U.S. Department of Energy Map of Wyoming Wind Power Resources



http://www.windpoweringamerica.gov/images/windmaps/wy_50m_800.jpg

2. United States Forest Service (USFS)

The United States Forest Service (USFS) currently follows the BLM wind policy while the USFS Washington Office finishes developing its own wind policy.[124] Current estimates place final wind energy policy approval in the next year.[125] The USFS policy has many

[124] Interview with Tom Florich, USFS Program Manager, Lands/Minerals/Special Uses Medicine Bow-Routt N.F. & Thunder Basin N.G. (August 3, 2010).
[125] *Id*.

similarities in its current draft form to the BLM's due to their need to work together for many of these wind energy projects.[126] Although, the BLM's move to halt all new wind energy development in the State of Wyoming to, in a sense, rewrite wind energy policy for Wyoming, could have an impact on the USFS's wind energy policy considerations relating to Wyoming.[127]

While the USFS current wind energy policy is to follow BLM wind energy policy, the United States Statutes do give guidance for valuation and payments on federal land managed by the USFS. 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."[128]

- 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."[129]

- Fee System: "A set of procedures and techniques used to establish fees for a particular category of authorized use."[130]

Examining a USFS Special Use Permit might be a useful tool. The Special Use Permit authorized by the U.S. Department of Agriculture and the USFS and granted to the Southern California Edison, Antelope-Pardee Transmission Line (or Tehachapi Renewable Transmission Project) in 2008 outlined specific annual payment requirements.[131] In this permit, the annual payments were based on the fair market value, subject to a fee schedule and to reviews and

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[126] *Id*.
[127] Interview with Tom Lahti.
[128] U.S. Forest Service, Forest Service Manual, FSM 2700 - Special Uses Mgt., (available at www.fs.fed.**us**/im/directives/fsm/2700/2700_zero_code.doc) (June 29, 2010).
[129] *Id*.
[130] *Id*.
[131] http://www.sce.com/NR/rdonlyres/64EDA8E0-2CBC-4E04-95E6-3126D68C61F1/0/0811_TRTPSeg1_2_AngelesNatlForestSUP.pdf.

adjustments according to changes in the fair market value.[132] This contract is a good example of how federal policy implementation for land valuations and payment structures apply to current utility projects. The USFS uses a similar annual periodic payment structure of fair market value for federal land used in transmission lines as in wind energy projects. The Federal Land Policy and Management Act states that those holding a right-of-way may make annual payments or payments for more than one year at a time.[133] The Mineral Leasing Act of 1920 requires annual payments based on the fair market value of the special use permit, right-of-way.[134]

While this analogy works well for examining the fees and payment structure outlined by USFS policy, this Special Use Permit grants authorization for a transmission line and not for a wind energy project which includes wind collector lines/systems. The USFS, as stated above, follows the BLM's wind energy policy. Each federal land managing agency uses specific policy and procedures for granting transmission lines.

In Wyoming, USFS land currently functions only as an operating agency for wind energy projects with the BLM taking the lead.[135] Most proposed wind energy projects do not include wind turbines or collector systems on USFS land in Wyoming; although transmission lines will cross USFS land.[136]

F. Land Ownership Rights and Reversionary Interest

As discussed above, both federal and Wyoming state lands retain an interest in the land even after granting use for development, operation and maintenance of wind energy projects. If the private surface owner negotiates a contract for use with the wind energy developer, he/she

[132] *Id*.
[133] 43 U.S.C.S. § 1764(g) (LexisNexis 2010).
[134] 30 U.S.C.S. § 185(l) (LexisNexis 2010).
[135] Interview with Tom Florich, Interview with Tom Lahti.
[136] Interview with Tom Florich.

usually retains the same right to use the land in a manner conducive to the wind energy project. The following table outlines some the land rights currently granted through state and federal law.

Table 5

	Easement	Lease	Right-of-Way	Special Use Permit
Definition	"An easement is an acquired privilege or right, such as a right-of-way, afforded a person or company to make limited use of another person's or company's real property."[137]	"Wind Energy Leasing" means leasing of state land for the exclusive right to convert wind energy into electrical energy including collecting and transmitting the electrical energy so converted to the substation from which the electricity will be transmitted from the wind energy development to the interconnection of the transmission grid."[138]	"The term "right-of-way" includes an easement, lease, permit, or license to occupy, use, or traverse public lands."[139] "Public land authorized to be used or occupied pursuant to a right of way grant. A right of way grant authorizes the use of a right of way over, upon, under, or through public lands for construction, operation, maintenance and termination of a project."[140]	"A permit granting rights or privileges of occupancy and use to the holder. These permits contain specific terms and conditions that the holder must follow."[141]
Duration	Usually perpetual	Determined by contract terms, statute or agency policy	Determined by agency policy	Determined by agency policy
Renewal	No renewal due to ownership in perpetuity	Determined by contract terms, statute or agency policy	Can be renewed according to agency policy	Can be renewed according to agency policy
Granting Party	Granted through private negotiations, condemnation or state/federal land mgt. agencies	Granted through private negotiations, or state/federal land mgt. agencies	Granted by BLM and/or USFS	Granted by USF

[137] Blanket Certificate Program, Notice to Landowners, Department of Energy, Federal Energy Regulatory Commission, page 10 (available at http://www.ferc.gov/industries/gas/indus-act/blank-cert/blanketcert.pdf) (Sept. 10, 2010).
[138] County Commissioners (available at http://legisweb.state.wy.us/ARULES/AR10-035statelands.pdf).
[139] 43 U.S.C. 1702(f) (LexisNexis 2010).
[140] Cascade Crossing Transmission Project, Glossary (Found at http://www.cascadecrossingproject .com/glossary.aspx) (Sept. 10, 2010).
[141] *Id*.

The greatest difference between the private landowner's rights and those of federal and Wyoming State lands is the duration of ownership allowed a wind energy developer. Under traditional rules for eminent domain, the wind energy developer is granted a perpetual easement, in which ownership of that land interest stays with the developer and his successors indefinitely. Federal and Wyoming State land managers grant wind energy developers a 35 to 50 year right-of-way, special use permit or lease depending on the agency and the negotiations with Wyoming State land capping the wind energy lease at 75 years.

While these wind energy grants runs for a specified number of years, or for the life of the project, an easement taken through condemnation runs in perpetuity. When the life of the wind energy project is over, the easement taken through condemnation remains with the developer or his successors indefinitely.

The disparity between fixed term leases, right-of-ways and permits with perpetual easements for wind energy projects that may have a limited life-span raises the issue of reversionary interests for wind energy projects, including towers and collector systems. Suggested language for the Wind Energy Rights Bill submitted to the current Interim Joint Judiciary Committee is as follows:

> All easement interests acquired after the effective date of this Act, for the purpose of constructing and operating wind energy facilities and associated collector systems shall revert to the then fee owner if the wind energy facility and associated collector system cease operation for a continuous period of five years.[142]

Because the wind energy company negotiates for an easement for the wind towers and facilities for a leased number of years, then easements taken through condemnation for wind

[142] Minn. Stat. § 216G.09 (LexisNexis 2009).

energy facilities and/or collector systems should include a right of reverter to the original landowner and/or his/her successors.[143]

3.0 Conclusion and Recommendations

Eminent Domain has a long history at both the Federal and State levels. Eminent domain by way of condemnation functions as an integral part of the energy industry in Wyoming. The Wyoming State Legislature will need to address whether wind energy developers may use condemnation authority to take private land for the development of wind energy collector systems by either amending the current, broad Eminent Domain Act or by adopting a special provision for wind energy collector systems. Once it is decided that eminent domain by way of condemnation may be used by private wind energy developers, appropriate compensation must be provided for the property right acquired by the condemnor in which the condemnee retains a reversionary interest.

The Wyoming legislature could amend the broad Eminent Domain Act to include language granting private companies "authorized to do business in this state" the right to use eminent domain for transporting energy through wind energy collector systems.[144] This type of amendment would circumvent the need for a wind energy developer to prove to the "public interest and necessity" required for the collector system.[145] While it does not appear that a wind energy collector system requires a Certificate of Public Convenience and Necessity, issued by the Wyoming Public Service Commission, federal regulations may require this Certificate due to the interstate nature of wind energy transportation.[146]

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[143] *Id*.
[144] *Id*.
[145] Wyo. Stat. Ann. § 1-26-504(a)(i) (LexisNexis 2010).
[146] Wyo. Stat. Ann. § 1-26-816 (LexisNexis 2010) (providing, "no person shall institute a condemnation proceeding relating to any facility for which a certificate of public necessity and convenience is required until the certificate has been issued.").

The second proposition includes adopting a special provision for wind collector systems, outlining appropriate use of condemnation for wind energy collector systems and any factors that might narrow its use. Before a wind energy company exercises its eminent domain authority it must be authorized to do business in Wyoming and have the necessary permits from either the Wyoming Industrial Siting Council or a Certificate of Public Necessity and Convenience from the Wyoming Public Service Commission. Factors narrowing the use of eminent domain for collector systems may include annual compensation to land owners through surface use agreements, providing compensation for surface damages through those agreements, providing for bonds in the event surface agreement negotiations break down and granting the landowner reversionary rights in the event wind energy collector systems cease operations.

The Legislature should also consider whether the Wyoming Rules of Civil Procedure governing eminent domain proceedings should be amended as well.[147] Any alteration or amendment to current eminent domain statutes may affect these procedures; therefore, this matter should be researched further. I am able to provide further analysis of this issue at the Task Force's request.

[147] W.R.C.P 71.1 (2009) (71.1(a) (stating, "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.").

Appendix 1

Proposed Draft Statute

1-26-818. Condemnation and Wind Energy Collector Systems.

(a) Except as otherwise provided by law, the power of eminent domain may only be exercised by any person, association, company or corporation is authorized to do business in this state to acquire property for wind energy collector systems where all of the following are established:

(i) The person, association, company, or corporation has been issued all permits, certificates or appraisals from state agencies that are required for the project.

(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; and

(iv) Compensation for the property right acquired through eminent domain shall follow W.S. 1-26-701 through W.S. 1-26-714.

(v) The condemnor shall prepare a surface impact statement and shall pay compensation annually for development and operation of wind energy collector systems:

a. For survey, inspection and maintenance, and

b. Reduction in land value, and

c. Damages to improvements or crops

(vi) In lieu of a surface impact statement in 1-26-818 (a)(v) the condemnor may provide a surety bond for damages payable to the permitting agency in the event a landowner shall prove damages.

b. All easement interests acquired after the effective date of this Act, for the purpose of constructing and operating wind energy facilities and associated collector systems shall revert to the then fee owner if the wind energy facility and associated collector system cease operation for a continuous period of five years.[148]

[148] Minn. Stat. § 216G.09 (2009).

STATE OF WYOMING
BOARD OF LAND COMMISSIONERS
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SURFACE IMPACT PAYMENT STATEMENT

SURFACE IMPACT PAYMENT SCHEDULE:

FIRST $5,000 OF PAYMENT	PORTION OF PAYMENT	PORTION OF PAYMENT	ANNUAL PAYMENT
LESSEE'S SHARE - 40%	BETWEEN $5,001 - $10,000	OVER $10,000	LESSEE'S SHARE - 20%
STATE'S SHARE - 60%	LESSEE'S SHARE - 30%	LESSEE'S SHARE - 20%	STATE'S SHARE - 80%
	STATE'S SHARE - 70%	STATE'S SHARE - 80%	

1. Payor of Surface Impact Payment:
Name
_____
Address
_____
Phone No.
_____
Contact Person
_____
2. State Grazing Lease No.
_____
3. Surface Lessee
Name_____
4. State Mineral _____ Federal Mineral _____ Fee Mineral _____

5. What is the source or cause of the enclosed surface impact payment?*

Type of Use	Basis of Total Payment	# Rods or # Acres	Amount
Geophysical Activities	$_____	_____	$_____
Access Road (To well location on STATE land)	$_____	_____	$_____
Drill Site	$_____	_____	$_____
Pipeline	$_____	_____	$_____
Other	$_____	_____	$_____

Please describe below any other basis for calculating the surface impact payment(s) and the surface activities covered by the impact payment:
_____
_____
_____
_____
_____
_____

***PLEASE NOTE: Use of state surface lands for off-lease production activities, including, without limitation, compressor stations used for off-lease production, pipelines and utilities used for off-lease production, roads to access off-lease wells, or water containment reservoirs used to store water generated from off-lease production, and the payment of any surface impact payments associated with the use of surface for any such off-lease activities is not negotiated through the surface lessee. Instead, if a mineral lessee would like to use state surface lands for off-lease production activities, it must first apply for and receive approval of the Board of Land Commissioners. A surface impact payment for the use of state surface lands for off-lease production activities is determined by a board approved schedule and is paid directly to the surface lessee. Please contact the Office at 307-777-7333 for the appropriate application.**

In cases of SPLIT ESTATE, negotiations must be conducted directly with the Office, not with the surface lessee. For assistance, please contact the Office at 307-777-6358.

6. Surface Impact Payment Information:
TOTAL PAYMENT: $_____
Lessee's Share $_____ _____ _____

Amount Check Number Date Issued
State's Share $_____ _____ _____
Amount Check Number Date Issued
7. Annual Payments Negotiated: (If none negotiated, please mark N/A.)
Type of Use Basis of Payment # Rods or # Acres Amount
Drill Site $_____ _____ $_____
Access Road $_____ _____ $_____
Other_____ $_____ _____
$_____
8. State Lands Involved:
Section: _____, T._____N.,
R._____W.
Section: _____, T._____N.,
R._____W.
Well Name or No.
_____
_____
_____
Participatory Unit Name (if applicable)
_____

The undersigned certifies that the surface impact payor has negotiated the above described surface impact payment in good faith with the surface lessee, the negotiated surface impact payment covers the potential adverse impacts caused by the payor's known and/or anticipated use(s) of the state surface and, if applicable, the payor has not and will not use the above described surface lands for off-lease production activities, including, without limitation, compressor stations used for off-lease production activities, pipelines and utilities used for off-lease production, roads used to access off-lease wells, or water containment reservoirs use to store water generated off-lease.

_____ _____
Signature of Payor Date

For Office Use Only:
Board Date: **Percentage:**

_____
Print or Type Name

INSTRUCTIONS:
1. Form to be completed and signed by SURFACE IMPACT PAYMENT PAYOR.

2. Issue separate checks payable to THE OFFICE OF STATE LANDS AND INVESTMENTS and the SURFACE LESSEE.

3. Provide SURFACE LESSEE'S share of payment by separate check and provide a copy of this completed form to SURFACE LESSEE.

4. Immediately mail original Surface Impact Payment Statement and State's share of payment by separate check to THE OFFICE OF STATE LANDS AND INVESTMENTS, 122 West 25th Street, Herschler Building, Cheyenne, WY 82002. **Phone (307) 777-6358**. TIN:830208667

5. Retain copy of Surface Impact Payment Statement for your records.

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Pasted from <http://slf-web.state.wy.us/estate/word/impactpayment.doc>