



LR 83 White Paper Topic 3

“The current status of the eminent domain power of utilities and the policy changes, if any, that would be necessary for public and private wind energy development.”

Nebraska Eminent Domain Law

The Nebraska Constitution and state statutes establish the power of eminent domain. The Nebraska Constitution provides that "[t]he property of no person shall be taken or damaged for public use without just compensation therefore." Under Nebraska law, the power of eminent domain is an inherent attribute of sovereignty and it exists independently of [the] Constitution. Constitutional provisions relating thereto are in no sense a grant but are a limitation upon the power. The constitutional limits on the power of eminent domain are the "public use" and "just compensation" requirements. Whether a use is public or private is a judicial question.

As a general rule, the measure of compensation for taking property for public use is the value of the land actually taken or appropriated, [and] also any depreciation in the value of the remainder of the tract caused by the construction work, excluding general benefits. Nebraska courts have established the burden of proving damages in condemnation cases. The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate damages.

Nebraska statutes grant the power of eminent domain to public power districts, municipalities and electric cooperatives. Neb. Rev. Stat. Chapter 25, article 25 and Chapter 76, article 7 govern the procedure for condemning property by the state's public power entities and private utility companies. Chapter 19, Article 7, establishes the procedures for cities of the primary, first, or second class, or villages, to exercise the power of eminent domain with respect to certain public utilities.

Nebraska statutes permit public power districts to acquire, through the exercise of the power of eminent domain, all property that is reasonably necessary for a public use. The Nebraska Legislature passed LB 561 in the past legislative session. LB 561 permits public power districts to agree to limit the exercise of the power of eminent domain. LB 561 provides that a public power district "may agree to limit its exercise of the power of eminent domain to acquire a project which is a renewable energy generation facility producing electricity with wind and any related facilities." It does not apply to municipal electric utilities or electric cooperatives.

Public power districts may operate jointly and exercise their powers of eminent domain. Two or more public power districts may create a joint authority to plan, finance, develop, own, and operate a system or facility for the generation, transmission, and transformation of electric power. Joint authorities have the same power of eminent domain as the public power districts have under Neb. Rev. Stat. §70-670. Public power districts may also participate jointly or in cooperation with municipalities, other public agencies, electric cooperatives, and electric membership corporations and could jointly exercise the power of eminent domain.

Renewable Energy & Eminent Domain

The Community-Based Energy Development Act (C-BED) permits electric suppliers to agree to limit exercising their powers of eminent domain in certain circumstances. For purposes of C-BED, an "electric supplier" means "any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail." C-BED applies to new wind energy developments that meet certain statutory requirements. The C-BED statutes provide that an electric supplier "may agree to limit its exercise of the power of eminent domain to acquire a C-BED project which is a renewable energy generation facility producing electricity with wind and any related facilities if such electric supplier enters into a contract to purchase output from such facility for a term of 10 years or more."

In addition, LB 561, passed by the Nebraska Legislature in 2009, permits a public power district to "agree to limit its exercise of the power of eminent domain to acquire a project which is a renewable energy generation facility producing electricity with wind and any related facilities." Thus, public power districts would be able to agree to limit exercising the power of eminent domain with respect to *any* wind energy development, not just C-BED projects.

Although Nebraska law confers upon public power districts the power of eminent domain, it does not affirmatively mandate that public power districts use that power in every circumstance where it would be advantageous.

Current Law Makes Additional Eminent Domain Restrictions Unnecessary.

It appears that the limitations on the exercise of eminent domain in the C-BED statutes and LB 561 have eliminated the concerns of renewable energy developers regarding the risk of condemnation of their projects by Nebraska public power suppliers. The Nebraska Legislature allows public power districts to agree to limit exercising their eminent domain powers. Nebraska's C-BED law currently permits public power districts to agree to limit the exercise of the power of eminent domain with respect to renewable energy generation facilities that produce electricity with wind. LB 561 expands the ability of public power districts to agree to limit the exercise of the power of eminent domain. Thus, current law permits public power districts to agree to limit the exercise of the power of eminent domain with respect to renewable energy projects, making the need for additional restrictions questionable and unnecessary.

Further restrictions on public power districts' power of eminent domain are also unnecessary because of the vast protections provided by the Nebraska Constitution, statutes, and common law. The Nebraska Constitution requires a public use and the payment of just compensation if a public power district acquires private property through the exercise of eminent domain. This constitutional protection is self-executing. The Nebraska Constitution "prohibits the state from damaging property for public use without compensation. The Nebraska Constitution protects property rights from invasion by the state as well as the subdivisions of the state and corporations." Therefore, the Nebraska Constitution adequately protects wind energy developments from public power districts' exercise of eminent domain. Nebraska law already protects private property owners by requiring a public use, the payment of just compensation, an independent damage appraisal process, and good faith negotiations. Wind energy developments do not need additional special protections from public power districts' power of eminent domain.

Finally, Nebraska courts protect property owners by limiting the exercise of the power of eminent domain. The power of eminent domain may only be exercised "on the occasion, and in the mode and manner, prescribed by the Legislature." Nebraska courts strictly construe statutes that confer and circumscribe the power of eminent domain. By determining the property rights that are reasonably necessary for a public use, Nebraska courts limit the extent of property rights that may be acquired through the exercise of eminent domain. Because Nebraska courts strictly construe and limit statutes authorizing public power districts to exercise the power of eminent domain, special protections for wind energy developments are unnecessary.

Conclusion

Nebraska's constitutional, statutory and common law already provide substantial protections to private property owners, including wind energy developments. The Nebraska Constitution requires a public use and the payment of just compensation for property to be acquired through the exercise of the power of eminent domain. Nebraska statutes mandate that the public power entities attempt to purchase property through good faith negotiations prior to exercising the power of eminent domain. Nebraska statutes also require that the value of condemned property be independently appraised.

The concerns relative to the power of eminent domain and private wind energy development have been essentially eliminated by the C-BED legislation and by LB 561 that was passed by the Legislature in May and signed into law by Governor Heineman.

Leaders of Nebraska's public power industry formed the Nebraska Power Association in 1980 to address industry-wide concerns and interests. This voluntary association represents all segments of the public power industry in Nebraska: municipalities, public power districts, public power and irrigation districts, rural public power districts and rural electric cooperatives engaged in generation, transmission or distribution of electric energy in the state.