Eminent Domain & For-Profit Energy Companies: Avoiding Unrest with Landowners

by David A. Domina

Overview

Nebraska's rich tradition of public power faces a new challenge. Privately owned, for profit, alternative energy generating systems and sources are becoming prominent across the State. These new generating systems include both wind and solar energy, produced by private investment expecting a return. Nebraska's circumstances are part of a larger, international debate about greenhouse gases, the role of fossil fuels, and a worldwide pivot to renewables.[1]

Two key features distinguish Nebraska power newcomers from public power: 1) they are taxpayers, not political subdivisions, and 2) they lack eminent domain powers unless given controversial special authority by the Legislature.

The duty to pay, instead of the power to impose, taxes or rates is the most obvious difference between the newcomers and public power. In the long run, this will probably be the most telling difference. Most new power generators provide electricity to be sold into a market place where nonprofit and for-profit electricity retailers must compete. Public power will likely be a major customer of the for-profit generators.

The distinction that creates controversy between public and private power entities may lie in land and right-of-way acquisition rights, and the power of eminent domain. Who should hold this power of sovereignty as a private-for profit company? Under what limitations should the power be conferred? These are likely to be increasingly prominent clash points unless Nebraska plans ahead with a proactive policy.

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The Current Tension

Nebraska's public power districts have long held, and sparingly used, the power of eminent domain.[2] This trend may have changed because of recent developments involving the TransCanada Keystone XL pipeline, and the development of wind energy and increasingly large scale solar energy by private investors who require land or easements for their projects.

Few cases in the history of the Nebraska judiciary have commanded as much national or international attention as *Thompson v. Heineman*.[3] The case came about because a foreign, for-profit pipeline company planned construction of an international pipeline from northern Alberta, Canada, to the Gulf Coast of Texas. The routes would cross Nebraska from north to south and dissect hundreds of farms with easements.

TransCanada started seeking easements from landowners long before the company had permission to build the pipeline in Nebraska and even before it had permission to cross the Canadian border with its project. The pipeline is proposed to transport controversial "tar sands" oil slurry to Texas refineries and export markets.

Nebraska landowners have joined with progressive political

activists and environmentalists to oppose the pipeline company. Some have done so out of disagreement with the entire pipeline project, while others have joined in opposition to either the land acquisition methods or easement terms used by TransCanada. For many Nebraskans the issue is landowner's' rights, not the environment.

The *Thompson* case presents challenges to a Nebraska statute passed to accommodate TransCanada's crude oil pipeline construction plans. Landowners contend the law violates the state constitution. They are involved in resistance because TransCanada is a for-profit company, and conducted itself much differently than Nebraska's public power districts have traditionally behaved toward landowners.

Landowner group opposition dramatically increased amounts offered by TransCanada for easements[4] and led to a costly long term public relations campaign by the company. The experience taught landowners that they gain strength by working together for reasonable easement and acquisition terms when groups are affected by a project. These lessons are likely to produce group resistance to future land acquisition attempts for energy projects. Power companies, and landowners, can both learn from the experience. So can their lawyers.

Unique Problems with For-Profit Takings

Legal problems related to whether a for-profit company can, or should, be empowered to exercise eminent domain are at the heart of the *Thompson* case. Both political and legal problems are raised by the practice of permitting a for-profit company to exercise a power of governmental sovereignty, eminent domain, in order to make a profit. Such takings are highly unpopular and likely to become even more so.

Nebraska's public power districts strive to avoid political division. This explains historical success at wielding, but seldom actually using, eminent domain authority. Wind companies cannot exercise eminent domain. Neither can solar companies. Telephone companies and pipelines, on the other hand, can. Publicly held, for-profit electric transmission companies probably can, too. Each time this happens, property used by Nebraskans to make a living on an annual basis, generally by farming and ranching, is compromised so a for-profit company, often owned by someone outside the State, can make a daily profit.

Still, the landowner gets only one payment – *just* compensation, measured as the fair market value of the property taken. Severance damages are recoverable where justified by the facts.[5] The measure of damages is defined by pattern jury instructions. It is fair market value before versus fair market value after a taking occurs, plus damages, measured the same way, to the remainder.[6]

Where the taking is for a clear public purpose and the project to be built will be owned by the public, it operates to keep costs down for the public. The landowner may not like the project, but can generally see its beneficial side. This is not the case when a family farm is divided, or a family ranch is dissected, and making a living is rendered more difficult, so a public company can make a profit for its owners.

In takings cases where private, for-profit companies will generate profit, it is more appropriate to look at the measure of damages as a measurement of periodic rent for ongoing use. Reversion of title to the property owners at the end of the use also makes sense. These contrast with conventional one time, up front, compensation that disregards long-term intrusion on the landowner's rights. A change in the law with more deference given to landowners is necessary to avoid vociferous future conflicts that threaten to pit Nebraskans against future energy project developers. Such a change will help Nebraska families and communities long term, instead of dividing them for decades.

Needed Changes and Clarification

"Public Purpose" Doctrine

The U S Supreme Court's decision in *Kelo v City of New London7*[8] touched on much controversy about eminent domain when used to acquire land for development by a private owner. Within one year of the *Kelo* decision, 34 states passed new laws to curb abuses of the power of condemnation.[8] *Kelo* left the public "shocked and outraged …that city officials could take a private home to facilitate a new corporate headquarters."[9] This shock and outrage is especially acute when the taking involves exploitation of natural resources, like wind, sunshine, or fossil fuels.[10]

Other states established standards for eminent domain used to help private companies to develop or transport natural resources. State legislatures in Arizona, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming specifically grant eminent domain authority to private companies in connection with mining, oil and gas, and other natural resource development.[11] Models for Nebraska's legislative consideration are readily available.

Borrowing from known models, standards to be developed in Nebraska might[12] include quantification standards for determining the public necessity, convenience, advantage, or actual use of the developed project. Standards might be developed to measure benefits to the people of Nebraska directly, and also indirectly where product flows through the State without stopping but benefit a national market.[13]

Just Compensation: Rental Formula

While the statutory procedure for eminent domain proceedings may not require change, the measure of damages does. More flexibility is required when the taking is by a for profit

company. The difference in market value must provide a method of awarding periodic future payments of rents. Damages should be based on compensation factors determined by the jury to be appropriate for takings that more closely resemble procurement, through condemnation of a lease than the taking of a fee simple interest. For example, where a power company or pipeline takes an easement across property, and interferes with yearly agricultural use by creating uncertainty and unpredictably about disruptions, the appropriate measure of damages is a rental calculation. Juries should be able to consider this alternative measure of damages.

Scholars have addressed this subject. Essentially, the argument is that the compensation available for the taking should leave the property owner "subjectively indifferent to the taking".[14] Simple "landowner indifference" is a better description. Reform ideas include awarding the property owner whose land is the target of eminent domain proceedings a share of the "surplus" or economic benefits of the project when completed.[15] This allows the jury to set, as compensation, annual rent payments for the use of property. Land and easement acquisition are regularly budgeted in forecasts for real estate development projects. This approach is not hard for the for-profit energy project developer to plan and accommodate.

Easement rights to place a pipeline under the ground and to access to service it compare well to leasing the right to use a portion of a landowner's property for a specific purpose. Frequently, this is the situation in utility industry settings where rents are paid. For example, this occurs when sites for cellular telephone towers and electricity generating windmills are acquired through private treaty negotiations. Phone companies and windmill companies use leases. They calculate the cost of site acquisition as a capital cost of the project. Project revenue feasibility dictates what portion of total project cost can be expended on land acquisition. This is the project owner's basis for negotiating rental agreements with landowners.

The process is not complicated or unusual; it is familiar in the marketplace and to appraisers.[16] An array of market data is available to appraise reasonable rental value, and reasonable predictable escalations in rental value, for future use of easement rights. Appraisers regularly appraise leasehold interests. Uniform Standards of Appraisal Practice and Procedure[17] govern such appraisals by professionals.

Condemnation of properties producing rents always involves evidence of the takings adverse impact on rents. The change suggested would require consideration of the project for which an easement taking occurs, and compensation for the interest taken at its rental value to the project owner. This would assure that the landowner's award is the greater of a) the before and after value, or b) the rental value to the project owner. When the taking party is a for-profit venture, this is a reasonable approach.[18]

Several states allow evidence by appraisers to include income capitalization with respect to planned improvements across or adjacent to land if these conditions are met: a) the improvement is built for a specific purpose, b) it is or will be so used, c) there is no market for the property as improved separate and apart from the entire improvement and all land it uses, and d) the improvement is the appropriate one at the time.[19] Strong arguments may well be made that these tools are already present in Nebraska law, but clarification, and express standards articulated by the Legislature, would eliminate much potential litigation and confusion in this area.

To assure landowner indifference to the taking, the rental income awarded as just compensation must be payable periodically over the life of the project and must be driven by revenue volume of the project. Reducing the award to present value does not accommodate all objective and subjective factors associated with rent. By its nature rent comes in periodic payments. Most energy projects could readily accommodate an award payable as rent. The award would require the jury to decide on the amounts to be used to complete the rental calculation in the future. A special verdict form can accommodate the decision process.

On a case by case basis, the jury might be instructed to decide on: a) a fraction of gross revenues be paid to the landowner, determined annually during use of the project, b) a base rental amount and the cost-of-living adjustment for selection of the cost-of-living adjustment reference where there is debate about which should be used, c) a compensation formula including a combination of actual usage multiplied by a reasonable rate, but not less than a base rate of compensation, such as kilowatts transmitted, barrels moved, etc. or d) other appropriate factors.

Other Considerations

Legislation should specify easement or title requirements for any energy construction project in which eminent domain is used. The project owner should bear the burden of all environmental compliance, including removal of all aspects of the project at the end of its utilization. The developer should bear costs to remediate all spills and cure defects resulting from operations, or closing down the concluded project. Removal plans should be required with original permit applications, and should undergo mandatory updating periodically. Several jurisdictions use this approach.[20] The landowner who is an involuntary "seller" in eminent domain cases should not bear environmental risks for activities that occur due to the project built on the taken land.

Proof of financial responsibility on the part of the project owner should be required as a prerequisite to land acquisition. Periodic proof that financial responsibility remains intact

should be required. This can occur in a process that mandates periodic renewal of operating permits for the project owner. The financial responsibility to be proven should include proof of wherewithal to remove all components or aspects of the project and restore the land when it is no longer used for the energy project.[21]

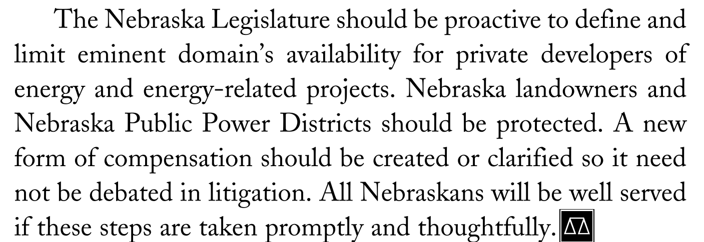
Landowner liability for environmental hazards or pollution should be limited to events caused by the intentional, willful, or criminal conduct of the landowner. This is particularly important in Nebraska where under simple negligence doctrine "the liability of each defendant for economic damages shall be several."[22] Since oil companies often use easement "fine print" to push liability to landowners or limit their own exposure, legislation is necessary to place spill and other environmental risks with the oil, other energy, or pipeline company.[23] Simple negligence should not create landowner liability.

On a separate front, Nebraska landowners should be permitted to buy mineral rights beneath their land when severed from their titles, on right of first refusal basis.[24] This would allow acquisition of severed mineral interests when an attempt is made by a third party owner to sell or lease them, or when they are abandoned by nonuse.

Finally, arbitration should be prohibited in disputes between a landowner and a project owner.[25] Choice of venue and choice of law clauses in easements should also be eliminated. Nebraska law should control, including Nebraska's venue rules.[26] Just compensation must be awarded in full public view, by a jury in a court, since the process involves redressing constitutional rights of landowners to just compensation for property rights taken from them. Legislative authorization for a private company to condemn should require dispute resolution in court, not smoke-filled rooms.

Conclusion

The Nebraska Legislature should be proactive to define and limit eminent domain's availability for private developers of energy and energy-related projects. Nebraska landowners and Nebraska Public Power Districts should be protected. A new form of compensation should be created or clarified so it need not be debated in litigation. All Nebraskans will be well served if these steps are taken promptly and thoughtfully.



Endnotes

1 In November 2014 alone, the President announced a historic accord to protect the environment with China, the U.S. Congress votes on the TransCanada Keystone XL pipeline, and the UN Secretary General continued a bold campaign to curb carbon emissions. Climate change issues include new energy sources, and water shortages. These are the defining issues of the world's political, and of Nebraska's legal future.

2 A Westlaw search reveals 19 cases citing § 70-670. Fourteen of

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those 19 cases did *not* involve public power or irrigation districts, leaving a remarkable total of only 5 Supreme Court decisions citing this statute and involving the entities empowered by it to condemn.

[3] *Thompson v Heineman*, S-14-0158 remains under advisement at this Article's submission for publication. Its resolution by the Supreme Court, one way or the other, is not likely to depreciate its significance as a demarcation between past and future landowner group involvement in cooperation, or resistance, about major multi-owner energy related land acquisitions in Nebraska.

[4] A Molon, *The Other Keystone Fight: US Landowners v Canada Oil Giant*. http://www.cnbc.com/id/101144123# (Oct 25, 2013).

[5] *Neb Const* Art I, § 21; *Neb Rev Stat* §§ 76-704 et seq.; *Henderson v City of Columbus*, 285 Neb 482 (2013).

[6] *NJI 2d Civil*§§13.02-13.07 (2014-15 Ed).

[7] 545 US 469 (2005).

[8] SM 102 ALI-ABA 341, ALI-ABA Course of Study (Jan 4-6, 2007).

[9] A Klass, *The Frontier of Eminent Domain*, 79 U Colo L Rev 653, 653 (2008).

[10] *Id*. At 654 et seq. Natural resource takings are classic examples that bring these concerns forward. Following close behind are takings for the purpose of transporting energy created through exploitation of public nature resources. *Id*. At 655 et seq.

[11] See, e.g., Ariz Rev Stat. Ann § 12-1111(14) (2003); Colo Rev Stat §§ 38-2-104 (2007), 38-1-201(1)(a) (2007); Idaho Code Ann § 7-701(4) (2007); Mont Code. Ann. § 70-30-102(31), (44) (2007); Nev Rev Stat. § 37.010(5), (6) (2006); ND Cent Code § 32-15-02(5), (10) (2006); Okla. Stat 27, § 6 (2001); SD Codified Laws § 45-5-1 (2004); Utah Code Ann § 78-34-1(5), (6) (2007); Wyo Stat Ann § 1-26-815 (2007).

[12] This article's length restrictions prevent discussion of specific standards.

[13] Many commentators and a few courts have addressed this subject. See, City of Norwood v Horney, 853 NE2d 1115 (Ohio 2006)(holding economic benefit alone does not constitute a public use). Articles by commentators are collected at A Klass, *The Frontier of Eminent Domain*, 79 U Colo L Rev 651 fn 82 (2008)(citing authorities & collecting cases).

[14] K Wyman, *The Measure of Just Compensation*, 41 UC Davis L Rev 239 (2007).

[15] *Id. At 259*.

[16] Two appraisers published an article arguing that economic easements should be compensated with periodic payments in the nature of rents. R Nelson & J Messer, *Economic Easements*, Int'l Right of Way Assn *Right of Way* (May/June 1998) https://www.irwaonline.org/eweb/upload/0598a.pdf

[17] Uniform Standards of Appraisal Practice & Procedure require definition of the problem and selection analytically of components for a credible appraisal analysis. USPAP Standards have been adopted as governing the appraisal process in Nebraska. 298 *Neb Admin Code* § 2-001 (May 2012).

[18] Compare comments about taking leasehold interests. M Dennison, *Condemnation of Leasehold Interests*,96 Am Jur Trials 2011 (WL Updated Sept 2014).

[19] **Colorado**. *Denver Urban Renewal Authority v Pogzeba*, 38 Colo. App. 168, 558 P.2d 442 (App. 1976). **Georgia**. *Macon-Bibb County Water & Sewerage Authority v Reynolds*, 165 Ga. App. 348, 299 S.E.2d 594 (1983) (neither privacy nor location of property are sufficient as matter of law to render property unique). **New York**. *City of Glen Cove v Switzer Contracting Co., Inc.*, 47 A.D.2d 917, 367 N.Y.S.2d 43 (2d Dep't 1975). **Texas**. *Religious of Sacred Heart of Texas v City of Houston*, 836 S.W.2d 606, 77 Ed. Law Rep. 992 (Tex. 1992) (compensation may not be measured as private condemnee's cost of purchasing "substitute facilities" when fair market value can be ascertained). See also, 3 J Martinez, *Local Government Law* § 21:34 (WL Updated Sept 2014).

[20] For an example of such a plan for a New York City building, see http://bit.ly/1C1MLo7. Other cities impose deconstruction or removal plans before building is permitted, too. For example, see information about the program in Boulder, CO, http://www.parkrapidsenterprise.com/content/lawyers-landowners-carefully-consider-pipeline-easement-agreements. Increasingly, construction and demolition are linked by regulators. Salkin, 3 NY Zoning Law & Prac §32A:71 (Updated Sept 2014); Florida Jur Forms Legal & Bus § 16A:92 (Updated Sept 2014).

[21] Ground lease landlords have included these requirements in long term ground leases for many years. See, 11 Am Jur Legal Forms 2d § 161:68.

[22] *Neb Rev Stat* § 25-21,185.10.

[23] The author's law firm provides legal services to many, many Nebraska landowners who have, after coming to appreciate the importance of easement terms, refused to sign easements for pipeline right of way with TransCanada. Lawyers for landowners in other states give the same advice. See this Minnesota example. http://www.parkrapidsenterprise.com/content/lawyers-landowners-carefully-consider-pipeline-easement-agreements

[24] This has been proposed on the federal level, too, by lawyers of the Natural Resources Defense Fund. http://switchboard.nrdc.org/blogs/amall/the_unfortunate_consequences_o.html

[25] The Legislature can limit arbitration if it acts carefully to find that arbitration clauses between a party with power of eminent domain and one who does not are inherently disparate and require legal protection. This can be done to condition the grant of eminent domain authority.

[26] Utah developed a unique alternate dispute resolution system for eminent domain cases. It has been successful, but it does not shut down the courts if voluntary resolution fails.

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