



When Grandma's House Gets in the Way of Windmills

How the Push Towards Renewable
Energy Sources Will Impact Eminent
Domain

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Overview

- Increasing efforts to reduce reliance on fossil fuels means increased need to develop renewable energy sources and the infrastructure to support them
- “Eminent Domain 101” for Public Utilities
- Some broader implications regarding efforts to limit eminent domain
- How renewable energy push can impact highest and best use analysis & valuation even when property is not being condemned for a renewable energy project

Eminent Domain and Renewable Energy

- Seeking energy independence is more than a matter of building renewable energy power plants
- Windfarms and solar arrays are often best sited in remote areas, but must be connected to the grid
- Transmission lines, in particular, often raise significant severance-damage claims

Eminent Domain 101 for Public Utilities

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Eminent Domain 101

- Eminent domain is the power of the sovereign to take property for “public use” -- without the owner's consent -- upon paying just compensation
- The power of the Legislature to take private property is largely unlimited, and its determination to do so is conclusive, subject only to requirement that the take be: (i) “for public use”; and (ii) “after just compensation.”
(Cal. Const., art. I, § 19.)
- The theory is that the sovereign (the State) holds the ultimate and superior title; our Constitution limits that power by requiring the payment of just compensation.

Eminent Domain 101: How it Works

- Government must first make an offer of compensation to the owner
- If negotiated price not reached, government adopts a “resolution of necessity” upon finding need to condemn the property
- Government then files condemnation action and acquires title through a “final order of condemnation”

Precondemnation Offers

- Offer must be based on an appraisal, and the offer itself must include a summary of the basis for the appraisal
- Government must provide the owner with an “informational pamphlet” about the eminent domain process
- Government must offer to pay up to \$5,000 for the owner to get an appraisal

Resolution of Necessity

- Government must adopt resolution following properly noticed public hearing
- Property owner has the right to appear and oppose the taking
- Government must make findings that:
 - ✓ Public interest and necessity require the proposed project;
 - ✓ Project planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
 - ✓ Property to be condemned is necessary for the project.

(Code Civ. Proc., § 1240.030.)

Eminent Domain 101: Private Entities

- Everyone thinks eminent domain is the power of the **government** to seize property for public use
- Power not limited to government
- Public Utilities Code contains explicit provisions providing the power of eminent domain to private companies that qualify as “public utilities”

What is a “public utility”?

- Pub. Util. Code § 612: “An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant.”
- Other provisions grant right to:
 - railroad corporations
 - gas corporations
 - pipeline corporations
 - telephone corporations
 - water corporations
 - common carriers



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How is condemnation by a public utility different?

- Public utility must still make offer of compensation based on appraisal
- Public utility must present owner with summary of basis for appraisal
- Public utility must provide owner with informational pamphlet
- **BUT:** Public utility arguably not required to offer owner \$5,000 for an appraisal

The \$5,000 Question

- Until recently, no obligation by any condemnor to pay money to property owner for an appraisal
- \$5,000 requirement arose from the myriad proposed eminent domain reforms that followed the 2005 *Kelo* decision
- Requirement to offer the \$5,000 part of SB 1210, adopted in 2006, resulted in addition of CCP § 1263.025

The \$5,000 Question (Cont.)

- Section 1263.025, on its face applies only to “a public entity”
- Section 1235.190 defines “public entity” as “the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.”
- As drafted, seems to mean that public utilities need not comply
- However, no reason to exempt public utilities, and nothing to indicate that was the Legislature’s intent

The \$5,000 Question (Cont.)

- This definitional problem does not extend throughout California's eminent domain laws
 - Some statutes drafted to apply to any condemnation action (rather than being tied to “public entities”)
 - Much of the procedural law, especially for precondemnation conduct, is contained within the Government Code, not the Code of Civil Procedure

Government Code Definitions

- Under the Government Code, many of the requirements also apply only to a “public entity”
- However, Government Code defines “public entity” differently than the Code of Civil Procedure

Government Code Section 7260

"Public entity" includes the state . . . , a county, city, city and county, district, public authority, public agency, and any other political subdivision or public corporation in the state . . . , and **any person who has the authority to acquire property by eminent domain under state law.**

What does it mean?

- When reviewing the rules and regulations governing eminent domain, whenever the phrase “public entity” is used, deciding whether the phrase encompasses public utilities depends on whether the statute resides within the Government Code or the Code of Civil Procedure
- Again, not clear this was done intentionally, and good reason exists for changing the definitions to remove the inconsistency.

Resolution of Necessity?

- Public utilities are not required to adopt a resolution of necessity before filing a condemnation action.
- Action governed by the Public Utilities Commission, which must make findings in order to justify the taking.

PUC Findings

- 1) The public interest and necessity require the proposed project.
- 2) The property to be condemned is necessary for the proposed project.
- 3) The public benefit of acquiring the property by eminent domain outweighs the hardship to the owners of the property.
- 4) The proposed project is located in a manner most compatible with the greatest public good and least private injury.

(Pub. Util. Code, § 625, subd. (b)(2))

Efforts to Limit Eminent Domain

Chris Madden
www.chrismadden.co.uk



"As a commitment to the environment
it comes with its own wind turbine."

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Kelo and Renewable Energy

- 2005 *Kelo* decision changed the landscape for eminent domain in the United States
- What was *Kelo* about?
- What wasn't *Kelo* about?
- Why should we care about it?

The Eminent Domain Reform Effort

- Backlash against eminent domain following *Kelo*
- Most states (including California) enacted at least some reform
- Most common reforms involved trying to prevent – or at least limit – condemnation for redevelopment purposes
- In California, reform also included new procedural protections

Kelo's Impact on Renewable Energy

- Country has heightened sensitivity to claimed “eminent domain abuse”
- “Classic” eminent domain receives relatively little attention
- All other efforts to use eminent domain likely to be subject of criticism
- Many renewable energy projects are not government run; rather, they are private companies trying to condemn property

Renewable Energy & Reform

WYOMING

- Governor signed a one-year moratorium to prevent the use of eminent domain for “collector lines” to connect renewable energy projects to the grid
- Push underway to enact permanent changes to the Wyoming law
- Governor states last week that the issue should be at the “top of the state's legislative agenda”

Renewable Energy & Reform

MINNESOTA

- Controversy over plans for an 8 megawatt wind farm
- Government has already acquired the property needed for the wind farm
- Requirement that wind farm developer acquire rights to wind across neighboring property
- Government seeking to acquire those rights by eminent domain



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INDIANA

- Bill proposed in January would grant private companies building carbon dioxide pipelines the right to condemn property
- Motivated (at least in part) by an effort to modify a coal plant to reduce emissions

“Granting eminent domain to a private entity is reason enough, we think, to oppose this bill,” said Kerwin Olson, program director for Indianapolis-based Citizens Action Coalition.



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TEXAS

- T. Boone Pickens recently postponed construction of a large wind farm in Texas
- One reason: Texas repealed a law that gave his company the power of eminent domain to acquire right of way for transmission lines

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OKLAHOMA

- In 2009, court rejected a right to take challenge against effort by utility company to condemn right of way to connect wind farm to grid
- Opponents argued lack of “public use” since utility company planned to sell much of the electricity out of state

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CALIFORNIA

- No notable efforts to restrict eminent domain related to renewable energy projects
- Major projects currently underway – most notably, Edison’s Tehachapi Renewable Energy Transmission Project
- 33 percent renewable energy by 2020?
 - Executive Order S-21-09, 9-15-09, directing the California Air Resources Board to set up rules requiring 33% renewable energy by 2020 as part of its implementation of AB 32
 - Implementation of AB 32 not guaranteed (e.g., Meg Whitman has pledged a one year moratorium on AB 32 through an executive “order on [her] first day as governor”)

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Proposition 16

- Would require a 2/3 “supermajority” vote before the government could provide electrical service in competition with existing utility company
- Sponsored by PG&E, which has spent \$28.5 million to get it passed (only \$40,000 raised in opposition)
- “Despite the proposition’s title, Proposition 16 does not have a direct effect on the taxing power of local governments or on the tax rates of citizens.”
- “The proposition may be found to have no impact on the development of renewable power, but under some circumstances, it might get in the way.”

Source: May 2010 White Paper, *California’s Proposition 16 June 2010 Primary: An Analysis* (UC Berkeley Center for Law, Energy & the Environment)

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Issues of Just Compensation

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Highest and Best Use

- As push towards renewable energy increases, properties that previously enjoyed little value may realize a new highest and best use
- The test:
 - Legally permissible
 - Physically possible
 - Financially feasible
 - Maximally productive
- Could make acquiring property for renewable energy projects much more expensive

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Highest and Best Use

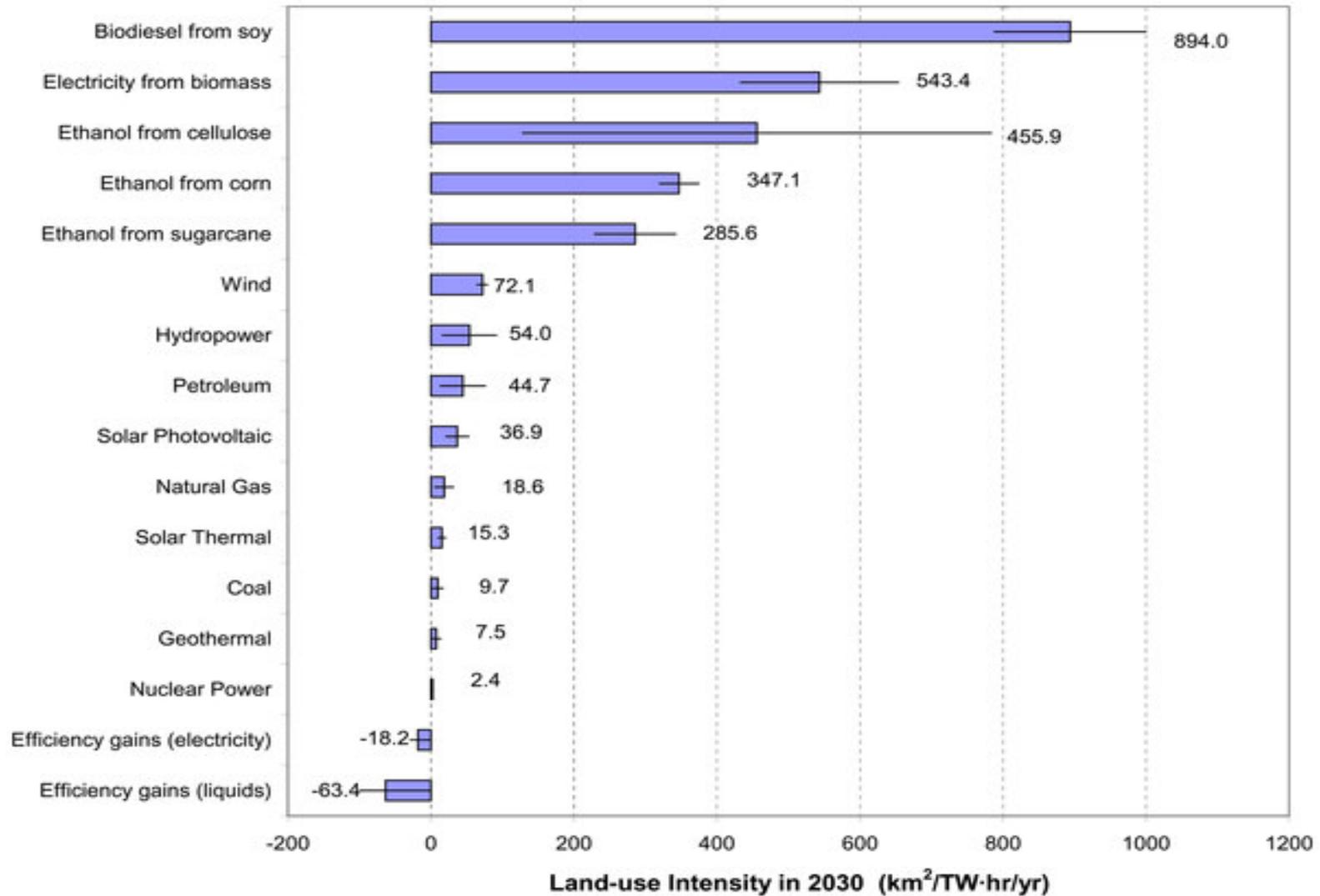
- May also impact acquisitions unrelated to renewable energy
- For example, a remote landfill site could be a potential site for a wind farm or solar array
- Any property “in the middle of nowhere” could see a spike in value, especially when one considers the large footprint renewable energy projects require

Land Usage

Manner of Production	# of Square Miles to Generate 1,000,000 Megawatt hours
Nuclear	1
Geothermal	3
Coal	4
Solar	6
Natural Gas	8
Petroleum	18
Wind Farms	30
Ethanol / Biodiesel	500

Source: 9/09 Wall Street Journal article by Lamar Alexander **MAKING IT HAPPEN.**

2030 Land Use Projections (Nature Conservancy)



Source: 10/09 article by Nature Conservancy, *Energy Sprawl or Energy Efficiency: Climate Policy Impacts on Natural Habitat for the United States of America* **MAKING IT HAPPEN.**

Just Compensation

- Typically, transmission lines involve only part takes, and easement interests
- Issues arise concerning the value of the easement as a percentage of the fee value (though typically paid at 100%)
- Also, major issues concerning severance damages

Severance Damages

- View impacts to remainder property may impact development options
- Possible setback issues
- Access and other rights that encompass more than the easement itself
- EMF concerns

Severance Damages -- Views

- Often, property acquired for transmission lines in remote, undeveloped areas
- Properties have potential for future development
- Especially where highest and best use involves residential development, views can be important
- Loss of view is compensable in California (don't get lulled by law specific to freeways)

Severance Damages -- Setbacks

- Questions can arise about whether construction on remainder will be constrained by setback requirements
- Issue complicated by the fact that the condemning agency typically not the agency that might impose such setbacks
- Should public utilities indemnify owners against future setback requirements?

Severance Damages -- Access

- Major issues arise when condemnor wants access rights across remaining property
- Public utilities typically include sweeping rights in their form easements
- Those rights may be fine in a voluntary acquisition, but could create a massive severance damage award if “most injurious use” would eliminate economical use of remainder

Severance Damages -- Access

- Broad access rights located at condemnor's discretion arguably preclude any future development
- Ability to construct and move roads may preclude any use of property for mitigation value
- If these are both true, owner may argue remainder, regardless of how large, qualifies as an uneconomic remnant

Severance Damages – Remnant

- Code of Civil Procedure § 1240.410 states that the condemnor **may** acquire remnant, or excess property “of little market value” (i.e., optional, not mandatory)
- BUT, Government Code § 7267.2 provides:
"If the acquisition of only a portion of a property would leave the remaining portion in such a shape or condition as to constitute an uneconomic remnant, **the public entity shall offer to acquire the entire property if the owner so desires.**"

Severance Damages – EMFs

- Fear of electromagnetic fields and the harm they can cause may lead to claims for severance damages
- *United States v. 87.98 Acres Of Land More Or Less In The County Of Merced* (2008) 530 F.3d 899:
 - Evidence that EMFs cause health problems inadmissible as “not scientifically reliable”
 - **“Wholly apart from evidence of actual health risks, evidence of public perceptions of health risks – even irrational public perceptions – may properly establish an impact on market value.”**

The “Developer’s Approach”

- Owner may seek to value property based on the expected return for a renewable energy project
- For example, owner may have been in discussions with a private operator at the time the eminent domain issue arose
- Analyzing value based on expected return typically not admissible in an eminent domain case (see *Contra Costa Water District v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 657-658)

Questions?

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