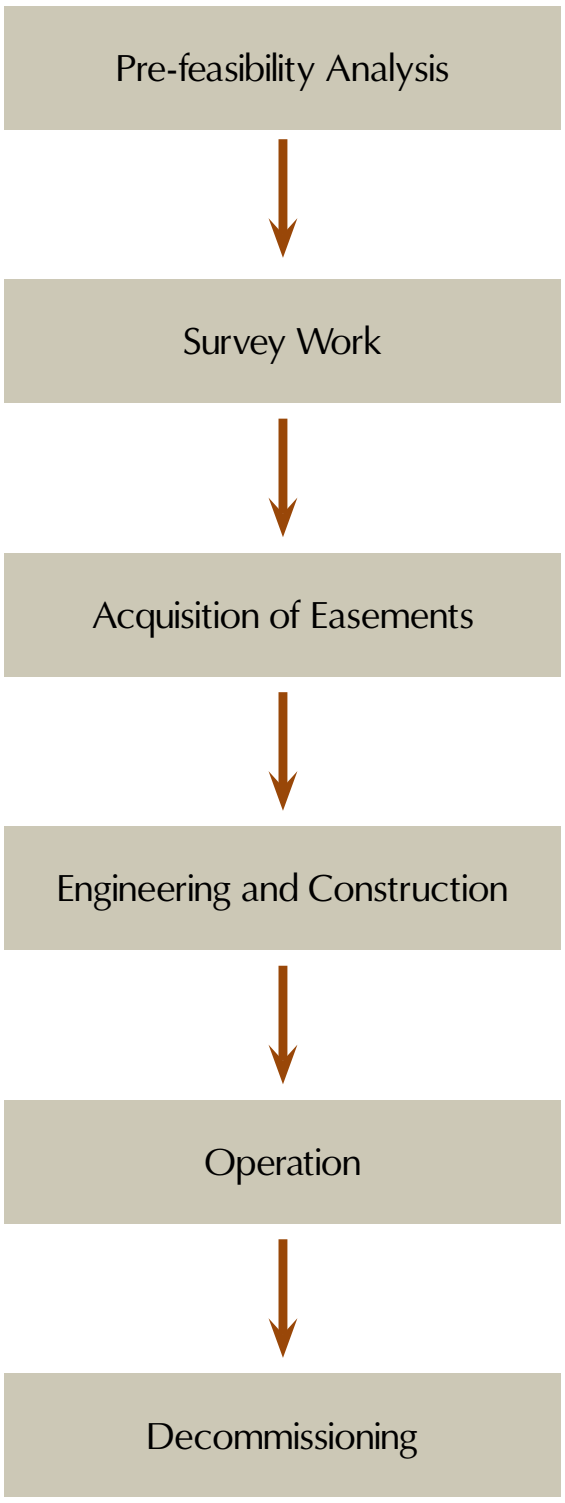

Figure 7. Steps of transmission line development.

3 Legal Considerations of Wind Energy Development

A landowner's agreement with a commercial wind energy developer will determine not only payment structures, but possible restrictions on the use of land. Every contractual agreement between a landowner and a developer has unique possibilities that differ across regions and operations and must be negotiated with the help of legal counsel. A landowner's first step when pursuing commercial wind development should be to hire a lawyer who is experienced with wind development issues.

3.1 Property Rights

The Wind Energy Rights Act (WERA), enacted in 2011, brings more certainty to both wind energy developers and landowners (see Appendix II for full text of WERA). WERA provides a framework from which landowners may negotiate with developers for wind energy development on their land. It also supports the wind industry by recognizing wind as a viable energy resource in Wyoming.

Wind Energy Rights and Agreements

As defined under WERA, a "wind energy right" means "a property right in the development of wind-powered energy generation." Wind ownership, as well as the rights that are incidental to the use and development of wind, are part of the surface estate and cannot be severed. WERA also recognizes that landowners have the legal right to develop their wind resources.

The act also provides for wind energy to be developed through a "wind energy agreement."[14] Through a wind energy agreement, a landowner can determine which development option is optimal for him/her, including granting an easement or entering into a lease to develop wind energy while reserving a royalty interest from wind energy production. Both landowners and developers have a right to assign or transfer their interest in the agreement, including a landowner's royalty interest. This allows landowners to pledge income from wind development agreements or as a bequest in estate planning.

For landowners who may have already severed the wind from the surface of their land through a contract, lease, memorandum, or other means prior to April 1, 2011, WERA provides a grandfather clause, which permits those previous agreements to remain valid. Any of these contracts or agreements must be recorded at the county clerk where the land under agreement is located no later than July 1, 2011. If a landowner severed the wind estate from the surface, full disclosure must be provided to a prospective buyer.

Just as for any other interest in real property, a wind energy agreement should be recorded in the county clerk's office where the land is located both upon creation and termination. However, a wind energy agreement is terminated if energy production ceases for 10 continuous years, or if no energy production takes place 20 years after the initial agreement. The parties may agree to different termination terms within the agreement.

Surface Use Agreement. Similar to other forms of resource development, a landowner may wish to consider negotiations for a surface use and damages agreement or surface impact payments as the means for addressing impacts on operations and improvements during the construction process. These agreements should be negotiated along with the lease agreement to ensure adequate compensation and protection of the landowner. The surface use agreement or impact payments can be included in a wind energy lease or agreement, can be created as an addendum to a lease, or can be a separate agreement.

Mineral Rights and Wind Energy

WERA also specifies that minerals rights are dominant to wind energy rights. This means a mineral interest owner has a right to be notified prior to state or county permitting. Since the wind rights are part of the surface estate, the wind developer and mineral owner are required to reasonably accommodate their respective activities, as is required with any surface activities.

Eminent Domain

Eminent domain refers to the right to seize land for a public use, such as telephone, power, water, or gas lines. If eminent domain is exercised, landowners are entitled to "just compensation," which is usually defined as the fair market value of the property. The act of taking land under eminent domain is done through a "condemnation" action in court.

Wyoming currently has a moratorium in place on eminent domain powers of wind energy developers to site collector lines that bring electricity generated from a wind facility to transmission lines. This moratorium will extend until June 30, 2013. Public utilities still retain authority to exercise condemnation, and a public utility can be a wind energy developer and could condemn land for a wind energy collector system. As of the publication of this guide, however, no public utility developing wind energy projects in the state has condemned any land for a wind energy collector system. The eminent domain moratorium does not apply to siting and building transmission lines (see Section 2.5).

State Lands and Commercial Wind Energy

Wind energy developers considering siting a commercial facility on state lands that have existing surface leases must negotiate surface impact payments directly with the lessee. Often a state land lessee owns lands adjacent to a state parcel and negotiations pertain to a larger commercial wind facility that encompasses both private and state lands. The surface impact payment compensates the lessee for damages or loss of income that may occur from wind energy development. The Wyoming Office of State Lands and Investment (OSLI) also requires compensation to the state for any negative impacts to state lands in the form of an installation/construction fee. Under previous OSLI Chapter 5 rules, which were in effect until July 2010, the surface impact payment was divided between the State of Wyoming and the existing surface lessee for any wind energy development on State Trust Land. Under current Chapter 6 rules, the surface impact payment is negotiated and paid directly to the surface lessee, but recorded with OSLI.[15] The impact payment distribution schedule, recording form, and Chapter 5 and Chapter 6 rules are available at: http://lands.state.wy.us.

Box 3: Major Wind Energy Legislation in Wyoming

Wyoming Wind Energy Act (2011)

Provides clarity for wind energy developers and landowners by defining "wind energy rights" and "wind energy agreements." Wind energy rights are defined as real property that is part of the surface estate. The legislation also provides requirements for wind energy agreements and for a reversion of interests. In addition, it clarifies the dominance of mineral rights over wind energy rights and provides a means for compensation when leasing wind energy rights.

Wind Energy Facilities Act (2010)

Sets minimum and consistent standards for the county-level commercial wind permitting process. It also allows for county commissioners to refer a project for permitting under the Industrial Siting Council. The act allows for individual counties to create more stringent regulations.

Wind Energy and Eminent Domain (passed in 2010, extended in 2011)

Prohibits wind energy developers from exercising eminent domain authority when siting wind collector lines (to bring wind electricity from a facility to transmission lines). It expires on June 30, 2013.

Wind Energy Excise (Generation) Tax (2010)

Requires wind generators to pay a $1 generation tax per megawatt hour (MWh) of electricity produced from wind beginning January 1, 2012. A company is exempt from this generation tax for the first three years of wind electricity production. The county—or if a wind facility spans two counties, the counties that house the wind facility—receives 60 percent of the tax collected; the state receives 40 percent.

Wind Energy Equipment Sales Tax Exemption (2003)

Exempts sales tax for equipment used in a wind energy project up to the point of transmission interconnection. This tax incentive expires December 31, 2011.

Note: See Appendix I: Additional Resources for links to full text of all referenced legislation.

3.2 Permitting

Every commercial wind energy project in the state must go through a regulatory or permitting process. These may include state agency approval and permits from multiple divisions within the Wyoming Department of Environmental Quality (DEQ). Other permits or approval must come from the counties where a wind energy project will be developed. If a project includes any federal lands, transmission lines, or wetlands, federal permits will likely be required.[16]

Federal Permitting

A Special Use Permit must be obtained by a wind energy developer for projects on U.S. Forest Service (USFS) lands. The Bureau of Land Management (BLM) requires a wind energy lease for a right-of-way. Federal permits are required for any wind energy project connecting to a federally managed or owned transmission line. The Army Corp of Engineers is responsible for issuing permits involving interstate rivers and streams. Every project on federal land, tied into federal transmission, or that receives direct federal funding must undertake a National Environmental Policy Act (NEPA) assessment. This entails first completing an Environmental Assessment (EA), which, if impacts are found, is followed by an Environmental Impact Statement (EIS) of the proposed project. These analyses can be time consuming and require environmental consultants to access all lands

leased for the project to conduct environmental studies on wildlife and habitat. Once a final decision has been made regarding environmental impacts, a federal agency may issue a permit for the project.

State of Wyoming Permitting

Any wind energy project with 30 or more wind turbines must be permitted by the Industrial Siting Council (ISC), a division within DEQ. The ISC determines if the proposed wind energy project poses any major environmental, social, or economic threats to an area. The ISC can also determine the proportion of impact assistance payments to be paid to local governments in counties that are primarily affected by a project. For example, two wind facilities that were completed in 2008, Seven Mile Hill and Seven Mile Hill Phase II, resulted in $1.3 million in impact assistance payments distributed between Albany and Carbon Counties;[17] due to how these payments are calculated, wind project impact assistance payments will likely increase when the sales tax exemption sunsets at the end of 2011. In addition to the ISC, numerous other state organizations play a role in wind energy development or transmission (see Table 2).

County Permitting

In 2010, the Wyoming Legislature passed legislation that created a statutory framework to guide counties in permitting any wind energy facility.[18] A wind energy developer must now obtain a permit from the board of county commissioners in each county where a facility will be located.

A county may require more stringent regulations than those required by the 2010 legislation. As of June 2011, the following counties have enacted regulations for wind energy development within a land use plan and/or zoning regulation (see www.uwyo.edu/renew-energy for links to specific county regulations):

- Albany County
- Carbon County
- Converse County
- Laramie County
- Lincoln County
- Natrona County
- Park County
- Platte County
- Sweetwater County

Table 2. Wyoming state agencies or organizations involved in wind energy development.

Wyoming Department of Environmental Quality (DEQ)/Industrial Siting Division (ISD)	Responsible for permitting all wind energy facilities with 30 or more turbines. Designates impact assistance payments for counties affected by a project. Ensures a project will pose no serious environmental, social or economic threat to an area.
Wyoming Department of Revenue and Taxation	Collects sales and use tax and wind energy generation taxes.
Wyoming Game and Fish Department (WGFD)	Publishes guidelines for adequate wildlife protection within wind energy projects. These recommendations cover big game winter ranges, greater sage-grouse habitat (including sage-grouse core areas), priority watersheds, and other important habitats.
Wyoming Infrastructure Authority (WIA)	The agency responsible for transmission infrastructure in the state. Can participate in planning, financing, constructing, developing, acquiring, maintaining, and operating electric transmission facilities and their supporting infrastructure.
Wyoming Office of State Lands and Investment (OSLI)	Oversees wind energy leases on state lands and requires a negotiated agreement for surface impact payments between a wind energy developer and an existing surface lessee of state lands.
Wyoming Public Service Commission	Reviews filings for Certificates of Public Convenience and Necessity, and oversees rate base filings and tariffs of net metering and rates, where appropriate.
Wyoming State Historic Preservation Office (SHPO)	Reviews permits for protection of historical or cultural resources. Negotiates with developers for mitigation of cultural impacts.

County regulations are subject to change and should be reviewed for an understanding of the most recent wind energy siting requirements.

3.3 Taxes

Private property owners are not responsible for any taxes associated with a commercial wind energy facility on their land, other than those associated with their own increased income from rents or royalties received. Developers pay any additional property taxes incurred and all sales and generation tax associated with a wind facility.

Property Tax

A property owner who chooses to lease land to a wind energy developer for wind energy production will not pay additional property taxes for the increased property value from the wind energy facility. The wind energy company pays the property tax to the county based on the fair market value of the facility. In Wyoming, industrial properties are assessed at 11.5 percent of taxable value and then subject to the mill levy of the county.[19] A 100 MW project in Wyoming in its first year of operation will pay roughly $1.5–2.0 million in property tax.[20]

Generation Tax

A wind energy company is also required to pay an additional $1 generation tax per megawatt hour (MWh) of electricity produced from wind beginning January 1, 2012. Companies are exempt from this generation tax for the first three years of wind electricity production. The county in which the wind facility is located and the state share wind generation tax revenues. Each county receives a proportionate amount based on the percentage of assessed value from the wind energy facility, totaling 60 percent of the tax collected. The state receives 40 percent of the tax income, which is placed in Wyoming's General Fund.

Sales Tax

Wyoming exempts sales tax for equipment used in a wind energy project up to the point of transmission interconnection. The state has set a repeal date for this provision of December 31, 2011. To take advantage of this benefit, developers must have had a written agreement in place with a landholder for a wind facility before January 1, 2010. They must also have purchased the equipment and have it physically located in Wyoming before the sunset date. After the sunset date, all wind energy equipment will be subject to the statewide 4 percent sales tax, plus any additional county sales and use taxes.

4 Living with Wind Development

4.1 Lifestyle Impacts

Most wind turbines in Wyoming are located in rural areas where ranching or farming is taking place or where there is low-density housing development. While wind energy projects can benefit landowners, there is potential for negative impacts as well, and disrupted viewsheds, increased noise, and decreased privacy can be a concern. Maintenance employees must access turbine sites, production areas, and storage areas via a network of roads, and for landowners accustomed to living in isolated areas, acceptance of some level of disruption may be necessary. The risk of lifestyle or other land-use disruptions from wind energy development can be reduced, although not eliminated, by careful planning and foresight by the landowner and developer.

Wind and Agriculture

Landowners and developers must consider the compatibility of commercial wind energy development with existing uses of agricultural land. While proponents of wind energy highlight its compatibility with crops and grazing livestock, noting that these activities can take place right to the base of a wind turbine, there may be other disruptions to landowners that lease lands for wind projects. For instance, each tower requires an access road for maintenance and repair that could reduce efficiency of field operations. It is important to note that landowners participating in a variety of USDA programs should consult with USDA before entering into a wind energy agreement (see Box 4).