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Blowing It: Why Is Wyoming Failing to Develop Wind Projects?

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BLOWING IT: WHY IS WYOMING FAILING TO DEVELOP WIND ENERGY PROJECTS?

*Ben N. Reiter**

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“The wind through the sage sounds like heaven singin’ a Song of Wyoming for me.”—Chris Ledoux¹

I. INTRODUCTION

Despite its small population, Wyoming produces the third most energy in the nation.² The majority of this energy is generated from conventional natural resources like coal, natural gas, and crude oil.³ Wyoming is the largest coal producing state in the nation,⁴ home to the largest open pit coal mine in the world,⁵ and is the largest uranium producer in the United States.⁶ Wyoming ranks fourth in natural gas production⁷ and eighth nationally in crude oil production.⁸ It is unsurprising that such prominence in these extractive industries would generate a significant economic advantage to such a sparsely populated state.

However, as prices and demand for these conventional energy sources⁹ have recently declined, so has Wyoming’s economy.¹⁰ The three largest coal companies

¹ CHRIS LEDOUX, *Song of Wyoming, on OLD COWBOY HEROES* (Capitol Records 1991) (originally recorded JOHN DENVER, *Song of Wyoming, on WINDSONG* (RCA Records 1975)).

² See *Wyoming State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/?sid=WY#tabs-3> (last visited Nov. 8, 2018).

³ *Id.*

⁴ See *id.*

⁵ See Praveen Duddu, *The 10 Biggest Coal Mines in the World*, MINING TECH. (Oct. 20, 2013) <http://www.mining-technology.com/features/feature-the-10-biggest-coal-mines-in-the-world/>; *North Antelope Rochelle Coal Mine, Wyoming*, MINING TECH., <https://www.mining-technology.com/projects/north-antelope-rochelle-coal-mine-wyoming/> (last visited Nov. 13, 2018).

⁶ *Uranium*, WYO. MINING ASS’N, <https://www.wyomingmining.org/minerals/uranium/> (last visited Nov. 8, 2018).

⁷ Heather Richards, *New Wind Puts Wyoming Top of the List for Renewables, but the Reality Is More Complicated*, CASPER STAR TRIB. (Apr. 24, 2017), http://trib.com/business/energy/new-wind-puts-wyoming-top-of-the-list-for-renewables/article_e52050d0-73f6-5a53-b5f6-946d8107ae4.html.

⁸ *Wyoming State Profile and Energy Estimates*, *supra* note 2.

⁹ References to “conventional energy sources,” “conventional energy,” or “conventional sources” throughout this article are references to coal, uranium, natural gas, and oil.

¹⁰ See Benjamin Storrow, *In Wyoming, Layoffs Boom as Energy Industry Goes Bust*, BILLINGS GAZETTE (Mar. 30, 2016), http://billingsgazette.com/news/state-and-regional/montana/in-wyoming-layoffs-boom-as-energy-industry-goes-bust/article_45f0d8a4-00e3-53db-bb01-03b1466b846e.html; see generally Heather Richards, *Wyoming Economy Leveling Off After Historic Slump*, CASPER STAR TRIB. (Oct. 18, 2017), http://trib.com/business/energy/wyoming-economy-leveling-off-after-historic-slump/article_6c255772-33d1-5362-98de-7657e8b17531.html [hereinafter Richards, *Wyoming Economy Leveling Off*] (“The downturn wrecked local and state coffers and shrank the state’s employment by more than 11,000 jobs.”).

operating in Wyoming—Peabody Energy Corporation, Arch Coal, Inc., and Alpha Natural Resources—all entered Chapter 11 bankruptcy and laid off hundreds of Wyoming workers in 2015 and 2016.¹¹ From November 2013 to June 2016, the number of new oil and gas rigs in Wyoming decreased by 87%.¹² And the number of operating uranium mines has declined from seventeen in 1979 to just five currently.¹³

The effect of the energy industry's decline on Wyoming's economy and workforce has been devastating. Wyoming's gross domestic product (GDP) contracted by 4.7% from 2015 to 2016, with the mining industry representing a 4.9% decline.¹⁴ By October of 2015, Wyoming had lost 4,400 energy-related jobs due in large part to a downturn in oil and natural gas prices.¹⁵ Layoffs hit the coal industry next, when on March 31, 2016, Peabody Energy Corporation and Arch Coal, Inc., laid off roughly 500 workers.¹⁶ Alpha Natural Resources and Kiewit Corporation followed suit less than a month later by terminating nearly forty employees each.¹⁷ By then—April of 2016—Wyoming's unemployment rate

¹¹ See Benjamin Storrow, *Wyoming's Two Largest Coal Mines Announce Layoffs*, CASPER STAR TRIB. (Mar. 31, 2016), http://trib.com/business/energy/wyoming-s-two-largest-coal-mines-announce-layoffs/article_0d217a3a-5a9d-5b1d-8d0d-8a5081724bb2.html; Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Peabody Energy Corp.* et al., No. 16-42529 (Bankr. E.D. Mo. Apr. 13, 2016); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Alpha Natural Resources, Inc.* et al., No. 15-33896 (Bankr. E.D. Va. Aug. 3, 2015); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Arch Coal, Inc.* et al., No. 16-40120 (Bankr. E.D. Mo. Jan. 11, 2016).

¹² See *U.S. Land Rig Count in Wyoming*, ENERAGENT GRP., <http://insights.energentgroup.com/weekly-rig-counts-in-wyoming> (last visited Nov. 8, 2018) (select to compare November 2013 dates and June 2016 dates to show the number of new rigs decreased from fifty-five to seven during stated period.)

¹³ ANNA B. WILSON, U.S. GEOLOGICAL SURVEY, URANIUM IN THE WYOMING LANDSCAPE CONSERVATION INITIATIVE STUDY AREA, SOUTHWESTERN WYOMING 3 (2015), <https://pubs.usgs.gov/of/2014/1123/pdf/ofr20141123.pdf>; *Uranium Mining*, WYO. STATE GEOLOGICAL SURVEY, <http://www.wsgs.wyo.gov/energy/uranium-mining> (last visited Nov. 18, 2018).

¹⁴ See *Total Gross Domestic Product for Wyoming*, FED. RES. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/WYNGSP> (last visited Nov. 19, 2018); *Real Gross Domestic Product by Industry: Natural Resources and Mining for Wyoming*, FED. RES. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/WYNATRESMINRGSP> (last visited Nov. 19, 2018).

¹⁵ Benjamin Storrow, *A Look Back: 2015, the Year Oil and Gas Went Bust*, CASPER STAR TRIB. (Dec. 26, 2015), http://trib.com/business/energy/a-look-back-the-year-oil-and-gas-went-bust/article_caa4edb4-7ece-5bc9-b116-a80339e0f15c.html.

¹⁶ See Jack Healy, *In Wyoming, Hard Times Return as Energy Prices Slump*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/us/in-wyoming-hard-times-return-as-energy-prices-slump.html>.

¹⁷ See Leigh Patterson, *More Coal Layoffs in Wyoming*, INSIDE ENERGY (Apr. 28, 2016), <http://insideenergy.org/2016/04/28/more-coal-layoffs-in-wyoming/>; Benjamin Storrow, *Buckskin Mine Lays Off 45, as Coal Jobs Continue to Disappear*, CASPER STAR TRIB. (June 14, 2016), http://trib.com/business/energy/buckskin-mine-lays-off-as-coal-jobs-continue-to-disappear/article_fc45b6cc-7218-57f4-9dc5-84160b3d5df9.html.

had risen to its highest level since the Great Recession.¹⁸ At the end of 2016, the Wyoming Department of Workforce Services estimated that 112,000 people had disappeared from the State's workforce—a staggering number for a state with a population of just over half a million people.¹⁹

Given that severance taxes made up well over a third of Wyoming's tax base prior to the downturn,²⁰ the state's tax revenues have unsurprisingly seen a significant decline. From 2014 to 2016, mineral tax valuation declined by almost half.²¹ The Wyoming Legislature entered its 2016 session facing a \$477 million revenue decline.²² This led the state to cut \$248 million from the state's budget for 2016.²³ In 2017, the state cut \$34.5 million from its K-12 education budget and dipped into its rainy day fund to provide \$189 million in funding to certain programs.²⁴ The state's revenue issues are particularly troubling given that a recent economic study commissioned by the Wyoming Legislature's Joint Revenue Committee found development in industries other than energy will not aid the state's revenue generating efforts.²⁵

¹⁸ See *Local Area Unemployment Statistics*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, https://data.bls.gov/timeseries/LASST560000000000003?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last visited Oct. 28, 2018).

¹⁹ Heather Richards, *Wyoming Lost 25,000 Workers in Downturn*, CASPER STAR TRIB. (July 23, 2017), http://trib.com/business/energy/wyoming-lost-workers-in-downturn/article_b0daaf14-31ae-5d94-9a5d-7272aea2f0a0.html.

²⁰ U.S. ENERGY INFO. ADMIN., *State Severance Tax Revenues Decline as Fossil Fuel Prices Drop* (Jan. 12, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=24512> ("Mineral severance taxes from oil, natural gas, and coal production, along with associated federal mineral royalties, are the primary revenue sources for Wyoming. Severance taxes alone accounted for 39% of the state's receipts in 2014.").

²¹ See WYO. DEP'T OF REVENUE, 2017 ANNUAL REPORT (2017), <http://revenue.wyo.gov/dor-annual-reports> (follow "2017 DoR Annual Report" hyperlink).

²² The Legislative Stabilization Reserve Account or, as it is more commonly referred to, the rainy-day fund, was created by the Wyoming Legislature in 2005. The Wyoming Legislature deposited excess revenue in the fund during energy boom years that would be used for years when energy production and state revenues decline, like in 2017. Some of programs that were funded by the rainy-day fund in 2017 include the Excellence in Higher Education Endowment Reserve, the Economically Needed Diversity Options for Wyoming (ENDOW) Initiative, and Wyoming's involuntary commitment program. Laura Hancock, *State Finances Dominated 2016 Legislative Session*, CASPER STAR TRIB. (Mar. 5, 2016), http://trib.com/news/state-and-regional/govt-and-politics/state-finances-dominated-legislative-session/article_706b309f-3276-56a8-bc86-faf1fde06fe2.html.

²³ Dustin Bliezeffer, *Mead Cuts 677 Jobs, \$248m from State Budget*, WYOFILE (June 21, 2016), <http://www.wyofile.com/blog/gov-mead-cuts-677-jobs-248m-state-budget/>.

²⁴ Aria Bendix, *Why Oil and Coal States Are Slashing Their Education Budgets*, ATLANTIC (Mar. 15, 2017), <https://www.theatlantic.com/education/archive/2017/03/why-oil-and-coal-states-are-slashing-their-education-budgets/519738/>; Laura Hancock, *Wyoming's Rainy Day Fund: A Primer*, CASPER STAR TRIB. (Apr. 11, 2017), http://trib.com/news/state-and-regional/govt-and-politics/wyoming-s-rainy-day-fund-a-primer/article_bf0f1fd8-e9f6-5644-aa87-13b48602c89d.html.

²⁵ PETER EVANGELAKIS, REG'L ECON. MODELS, INC. ECONOMIC AND FISCAL DIVERSIFICATION IN WYOMING, (June 4, 2018), available at <https://www.wyofile.com/study-without-tax-reform->

Recently, conventional energy sources—particularly oil and gas—have made a comeback and the state's economic troubles have leveled off.²⁶ However, economists generally view the recent downturn as part of a larger trend and general shift away from these conventional energy sources.²⁷ For example, Oregon has already mandated that its electric rate payers must abandon coal-powered energy by 2029.²⁸ California and Washington, states to which Wyoming has traditionally exported its coal powered energy, appear likely to take similar steps.²⁹

In response, institutions,³⁰ leaders,³¹ and members of the public³² have expressed the need to diversify Wyoming's economy going forward, including a state-funded initiative focused exclusively on the task of economic diversification.³³ Until recently, however, these efforts have largely failed to focus on diversifying the state's energy portfolio.³⁴ Wyoming ranks fifteenth nationally in wind production.³⁵ Yet it has some of the highest technical wind potential in the

economic-diversification-hurts-state/; see also *Study: Without Tax Reform Economic Diversification Hurts State*, WYOFILE (June 5, 2018), <https://www.wyofile.com/study-without-tax-reform-economic-diversification-hurts-state/> (study appended to webpage below the article).

²⁶ See Richards, *Wyoming Economy Leveling Off*, *supra* note 10.

²⁷ Justin Fox, *Why Wyoming Is in Economic Trouble*, BLOOMBERG (Dec. 19, 2016), <https://www.bloomberg.com/view/articles/2016-12-19/why-wyoming-is-in-economic-trouble>; see also *Levelized Cost of Energy 2017*, LAZARD (Nov. 2, 2017), <https://www.lazard.com/perspective/levelized-cost-of-energy-2017/>; JONATHAN M. HARRIS & BRIAN ROACH, *Energy: The Great Transition*, in ENVIRONMENTAL AND NATURAL RESOURCES ECONOMICS: A CONTEMPORARY APPROACH Ch. 11, (Routledge ed., 4th ed. 2018), http://www.ase.tufts.edu/gdae/Pubs/te/ENRE/4/Ch11_Energy_4E.pdf.

²⁸ See Aisling Irwin, *Oregon Becomes the First US State to Vote to Go Coal Free*, NEWSIDENTIST (Mar. 3, 2016), <https://www.newscientist.com/article/2079541-oregon-becomes-the-first-us-state-to-vote-to-go-coal-free/>.

²⁹ Heather Richards, *As West Coast Shuns Coal, States Like Wyoming Will Face Difficult Choices*, CASPER STAR TRIB. (May 28, 2018), http://trib.com/business/energy/as-west-coast-shuns-coal-states-like-wyoming-will-face/article_b9eba459-4a77-51f7-acc6-5e58cbfc58a7.html.

³⁰ See, e.g., The Associated Press, *University of Wyoming Looks to Help Diversify State Economy*, SEATTLE TIMES (Dec. 13, 2017), <https://www.seattletimes.com/nation-world/university-of-wyoming-looks-to-help-diversify-state-economy/>.

³¹ Arno Rosenfeld, *State Leaders Tout ENDOW's Potential to Diversify Wyoming Economy*, CASPER STAR TRIB. (Aug. 15, 2017), http://trib.com/news/state-and-regional/govt-and-politics/state-leaders-tout-endow-s-potential-to-diversify-wyoming-economy/article_c88f2445-a659-5fa3-87ac-10a1da70fc7a.html.

³² Stephanie Joyce, *How To Diversify Wyoming's Economy?*, INSIDE ENERGY (Apr. 29, 2016), <http://insideenergy.org/2016/04/29/how-to-diversify-wyomings-economy/>.

³³ Arno Rosenfeld, *supra* note 31.

³⁴ On October 2nd and 3rd, 2017, the University of Wyoming's Ruckelshaus Institute of Environment and Natural Resources and School of Energy Resources' Center for Energy Economics and Public Policy sponsored a two-day forum on Wyoming's Wind Energy Future. Video recordings of the forum are available at *Forum Presentations*, HAUB SCH. ENR, UNIV. OF WYO. (Oct. 2017), <https://www.uwyo.edu/haub/ruckelshaus-institute/forums/wind/presentations.html>.

³⁵ Cooper McKim, *The Window for Wyoming's Wind Industry*, INSIDE ENERGY (Nov. 3, 2017), <http://insideenergy.org/2017/11/03/the-window-for-wyomings-wind-industry/> [hereinafter McKim, *Window for Wyoming's Wind*].

country, including “class 6 and 7 wind resources,” considered to be the highest quality wind resources.³⁶ From 2010 until 2015, windy western neighbor states, like Colorado, Idaho, and Montana, increased their wind generation capacity by 1693, 620, and 279 megawatts respectively, while Wyoming’s capacity actually decreased during the same period.³⁷ In fact, Wyoming had only one new wind project enter into service in the last seven years³⁸ and it is still awaiting its first solar energy facility.³⁹

While some believe Wyoming is on the verge of a major wind boom, past wind developments in Wyoming were short lived.⁴⁰ Many have argued that Wyoming’s historic inability to transport wind electricity to larger, more demanding markets explains its lack of wind energy development.⁴¹ But economic analysts believe an additional reason for the lack of wind generation in the state is its legal and regulatory framework. Some economists have gone so far as to say that “[a]n analysis of the market incentives that other states provide suggests that Wyoming is among the least attractive western states in this regard.”⁴² If the state wants to ensure that Wyoming’s winds are captured, and thus transformed into energy, jobs, and tax revenue, Wyoming must reform its legal and regulatory

³⁶ Jeff Deyette, *As Coal Stumbles, Wind Power Takes Off in Wyoming*, UNION OF CONCERNED SCIENTISTS: BLOG (July 12, 2017), <https://blog.ucsusa.org/jeff-deyette/coal-wind-wyoming>.

³⁷ ROBERT GODBY ET AL., UNIV. OF WYO. CTR. FOR ENERGY ECON. & PUB. POLICY, AN ASSESSMENT OF WYOMING’S COMPETITIVENESS TO ATTRACT NEW WIND DEVELOPMENT, AND THE POTENTIAL IMPACTS SUCH DEVELOPMENT MAY BRING THE STATE 14 (2016), http://www.uwyo.edu/cee/_files/docs/201609_wyoming-wind-competitiveness.pdf. Commercial wind development first began in Wyoming in the mid-1990s between Arlington and Medicine Bow, in the area of Foote Creek Rim. *Id.* However, “[t]he first commercial utility scale wind generation facility was built by the Platte River Power Authority at its Medicine Bow Wind Project site in [the] spring [of] 1998.” Between 1999 and 2001, many additional facilities were built and the wind capacity in Wyoming stood at 141 megawatts. *Id.* By 2010, “Wyoming wind capacity was ten times that of 2001,” but no new growth has occurred since then. *Id.*

³⁸ Deyette, *supra* note 36.

³⁹ Heather Richards, *Wyoming’s First Large Solar Farm Edges Forward*, CASPER STAR TRIB. (Apr. 11, 2018), https://trib.com/business/energy/wyoming-s-first-large-solar-farm-edges-forward/article_d938e9af-45ab-5876-a128-2fab6f4431bf.html.

⁴⁰ See Heather Richards, *Why Wind? Why Now? Experts Say Wyoming Needs to Face Challenges and Opportunities of New Wind Development*, CASPER STAR TRIB. (Oct. 7, 2017), http://trib.com/business/energy/why-wind-why-now-experts-say-wyoming-needs-to-face/article_7a8f491f-20bb-5879-8906-a57e5ec0ed9.html [hereinafter Richards, *Why Wind*].

⁴¹ See Cooper McKim, *Energy Trends Conference Touches on Transmission Capacity, Blockchain Use*, WYO. PUB. MEDIA (Apr. 6, 2018), <http://www.wyomingpublicmedia.org/post/energy-trends-conference-touches-transmission-capacity-blockchain-use#stream/0> [hereinafter McKim, *Energy Trends*] (“Coal has railroads, oil and gas have pipelines, but transferring renewable energy isn’t so easy. Wyoming has one of the best wind resources in the country, though many see a ceiling to its success due to transmission capacity limits.”).

⁴² GODBY ET AL., *supra* note 37, at 3.

framework to compete with the many other states that have already joined the green energy rush.⁴³

This Article will address the legal and regulatory structure that has hindered Wyoming's wind energy growth in the past and, comparing it to other states that have more successfully developed large scale wind projects, analyze the changes Wyoming should make to become an attractive destination for wind energy. Part II of this Article will review current Wyoming laws and regulations governing wind farms, including the permitting and siting process, the taxation of wind projects, the lack of renewable portfolio standards, and the classification of wind property rights.⁴⁴ Part III of this Article will focus on how Wyoming's legal and regulatory decisions regarding wind projects have damaged its ability to compete with other states in attracting wind power.⁴⁵ Finally, Part IV of this Article will analyze how Wyoming can address the policies that have damaged its competitiveness in the past and make it a national leader in not only conventional energy sources, but also in wind power going forward.⁴⁶

II. WYOMING'S WIND ENERGY FRAMEWORK

For a state that often takes a laissez-faire approach to laws and regulations, Wyoming has a surprisingly burdensome legal framework for regulating wind energy. This framework includes a permitting and siting process which requires state and local approval with a right to a contested hearing,⁴⁷ a wind generation tax that is higher than any other in the country,⁴⁸ and a limitation on landowners' ability to transfer their wind rights.⁴⁹ In short, Wyoming imposes a greater regulatory burden on wind power than any other energy industry operating within its borders causing it to lag far behind its windy western neighbors in total wind production.⁵⁰

A. *Permitting and Siting Process*

The heavy hand of Wyoming's wind regulatory framework is most apparent in its approach to the permitting and siting of wind projects. Before a developer can even break ground on its wind farm, it must generally go through two permit

⁴³ See *infra* notes 157–318 and accompanying text.

⁴⁴ See *infra* notes 47–156 and accompanying text.

⁴⁵ See *infra* notes 157–277 and accompanying text.

⁴⁶ See *infra* notes 278–318 and accompanying text.

⁴⁷ See WYO. STAT. ANN. §§ 18-5-501 to -513 (2018).

⁴⁸ Richards, *Why Wind*, *supra* note 40 (“Wyoming is the only state that has a tax on wind power, and increasing that charge to developers comes up nearly every year.”).

⁴⁹ See WYO. STAT. ANN. § 34-27-103(b).

⁵⁰ McKim, *Window for Wyoming's Wind*, *supra* note 35.

application processes with at least two different governmental agencies, namely, the Wyoming Industrial Siting Council (ISC)⁵¹ and the county commissioners in whichever Wyoming county the proposed project lies.⁵² An applicant must be prepared to spend millions of dollars in upfront costs in preparing its application materials and participating in various public proceedings.⁵³

The Wyoming Industrial Development Information and Siting Act (WIDISA) is intended to protect “Wyoming’s environment and the social and economic fabric of its communities from the mischiefs resulting from massive, unregulated industrial development.”⁵⁴ WIDISA prohibits the construction of any industrial facility within the State of Wyoming without the prior obtainment of a permit from the ISC.⁵⁵ While the WIDISA initially applied to facilities like large commercial waste incinerators, Wyoming amended the WIDISA in 2010 to include any significant wind project within its definition of industrial facility.⁵⁶ As a result, wind farms are now subject to the same legal and administrative requirements as a commercial radioactive waste management facility.⁵⁷

1. WIDISA’s Application Requirements

An application for a wind facility permit, or “109 Permit,” is a voluminous document that is often well in excess of 400 pages when submitted.⁵⁸ A wind

⁵¹ The ISC is a seven-member panel that functions in a quasi-judicial manner and ultimately decides whether to issue a wind facility permit. *See* WYO. STAT. ANN. § 35-12-104.

⁵² WYO. STAT. ANN. § 35-12-102(a)(vii)(E)–(F); *id.* § 18-5-502(a).

⁵³ *Existing Regulatory Structure and Public Involvement Panel*, UNIV. OF WYO. HAUB SCH. ENERGY, YOUTUBE 1:21:57 (Oct. 5, 2017), <https://www.youtube.com/watch?v=Z0tozTedP9E>; *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm’rs*, 2012 WY 158, ¶ 7, 290 P.3d 1063, 1069 (Wyo. 2012) (observing that the application process “was very complex and included information about numerous areas of potential concern, including environment, wildlife, impacts on communities and labor resources, tax projections, financial resources, and others”).

⁵⁴ *City of Evanston v. Griffith*, 715 P.2d 1381, 1384 (Wyo. 1986).

⁵⁵ WYO. STAT. ANN. § 35-12-106.

⁵⁶ *Id.* § 35-12-102(a)(vii); Act of Mar. 5, 2010, ch. 47, 2010 Wyo. Sess. Laws 221, 222–23 (codified as amended at § 35-12-102(a)(vii)(E), (xi), (xiv)).

⁵⁷ Actually, wind facilities have more application requirements to fulfill than commercial radioactive waste management facilities. *Compare* WYO. STAT. ANN. § 35-12-102(a)(vii)(E), (xi), (xiv) (wind facility permitting requirements), *with id.* § 35-12-102(a)(vii)(C), (xxi)–(xxii) (commercial radioactive waste management facility requirements).

⁵⁸ WYO. STAT. ANN. § 35-12-109; *see also, e.g.*, TPW RENO JUNCTION, LLC, WYOMING INDUSTRIAL DEVELOPMENT INFORMATION AND SITING ACT SECTION 109 PERMIT APPLICATION: RENO JUNCTION WIND ENERGY PROJECT (2010), http://deq.wyoming.gov/media/attachments/Industrial%20Siting/Application%20and%20Permits/Reno%20Junction%20Wind%20Energy%20Project%202010-0422_ISD_Application-for-Permit-Reno-Junction-Third-PLanet-Windpower-09-02.pdf; POWER CO. OF WYO. LLC, CHOKECHERRY AND SIERRA MADRE WIND ENERGY PROJECT WYOMING INDUSTRIAL DEVELOPMENT INFORMATION AND SITING ACT SECTION 109 PERMIT

developer may wish to forgo this process and seek a waiver from ISC.⁵⁹ However, the waiver application process overlaps significantly with the process for a permit and is almost as extensive.⁶⁰ The process for a waiver still requires multiple public meetings or hearings.⁶¹ Because of the overlap between these two permitting processes and the traditional bypass of the waiver process, no permitted wind facility in the state has used the waiver process. Therefore, this Article will focus exclusively on the non-waiver traditional 109 Permit.⁶²

A 109 Permit application must have basic information such as a description of the nature and location of the facility, the estimated time of commencement, the duration of construction time, and any known future additions or modifications to the project.⁶³ The plan must also include a litany of environmental and social impact evaluations, including inventories of physical, chemical, biological, and radiological discharges, inventories and control methods for emissions and solid waste disposals, procedures to avoid being constituted a public nuisance or endangering the public health, safety, human, animal, or plant life, and an analysis and proposal for environmental impacts on “scenic resources, recreational resources, archaeological and historical resources, land use patterns, economic base, housing, transportation, sewer and water facilities, solid waste facilities, police and fire facilities, educational facilities, health and hospital facilities, water supply, agriculture, terrestrial and aquatic wildlife, threatened and endangered species, and other relevant areas.”⁶⁴ The application must also include economic information such as the number of jobs generated by the project by “calendar quarter” for the life of the project, the estimated cost of the facility, and the applicant’s financial capability of decommissioning and reclaiming the facility.⁶⁵ There are also a myriad of other miscellaneous requirements (e.g. the applicants’ efforts to “maximize employment and utilization of the existing local or in-state contractors”) that an application must address.⁶⁶ Under the WIDISA,

APPLICATION (May 2014), http://deq.wyoming.gov/media/attachments/Industrial%20Siting/Application%20and%20Permits/Chokecherry%20and%20Sierra%20Madre%20Wind%20Energy%20Facility/2014-0515_ISD_Application-Chokecherry-Sierra-Madre-12-07.pdf.

⁵⁹ See WYO. STAT. ANN. § 35-12-107.

⁶⁰ Compare *id.* (109 permit process), with *id.* § 35-12-109 (ISC waiver process).

⁶¹ *Id.* § 35-12-107(d)(i), (g)(i).

⁶² As of January 2018, the vast majority (ten out of the eleven total approvals of wind facilities in Wyoming) of the permits issued to wind projects have been through the non-waiver 109 permit process. See *Applications and Permits*, WYO. DEP’T OF ENVTL. QUALITY, <http://deq.wyoming.gov/isd/application-permits/> (last visited Nov. 1, 2018).

⁶³ See WYO. STAT. ANN. § 35-12-109(a)(iii), (iv), (vi).

⁶⁴ *Id.* § 35-12-109(a)(ix)–(xiii).

⁶⁵ *Id.* § 35-12-109(a)(v), (xiv), (xxi).

⁶⁶ *Id.* § 35-12-109(a)(xviii).

wind facilities—and only wind facilities—must list all “affected landowners”⁶⁷ and provide the ISC with the address of those affected landowners.⁶⁸

With the application, the applicant must pay an application fee in an amount to “be determined by the director” and based upon the estimated cost to the ISC of reviewing and processing the application.⁶⁹ The application fee, however, cannot exceed 0.5% of the project or one hundred thousand dollars, whichever is less.⁷⁰

2. *Administrative Requirements under WIDISA*

Submitting the application is just the first step in the process. After filing the application, the Director of the Wyoming Department of Environmental Quality (Director) must serve a copy on all governing bodies and local governments affected by the proposed facility, the county clerk, and all affected landowners.⁷¹ A summary of the application must also be published in the newspapers of general circulation within the area affected by the project.⁷² The Director shall then obtain information and recommendations from nineteen other state departments or agencies regarding the impact of the proposed facility.⁷³ The State departments and agencies have sixty days to provide the information requested and must include an opinion as to the advisability of granting or denying the permit.⁷⁴ The nineteen departments and agencies must also solicit and receive comments from all affected landowners and provide a summary of the comments.⁷⁵

Within thirty days of receiving the application, the Director must review the application and inform the applicant of any deficiencies therein.⁷⁶ The applicant then has thirty days to remedy its application.⁷⁷ If the Director determines that deficiencies in the application remain, she shall notify the applicant of the continued deficiencies and the applicant must remedy the application within fifteen days or withdraw its application.⁷⁸ Within ninety days of receiving the application, the

⁶⁷ An “affected landowner” is defined as any person holding record title to land on which any portion of a commercial facility generating electricity from wind is proposed to be constructed and including any portion of any collector system located on those same lands. *Id.* § 35-12-102(a)(xv).

⁶⁸ *Id.* § 35-12-109(a)(xxii).

⁶⁹ *Id.* § 35-12-109(b).

⁷⁰ *Id.*

⁷¹ *Id.* § 35-12-110(a)(i), (iii).

⁷² *Id.* § 35-12-110(a)(ii).

⁷³ *Id.* § 35-12-110(b).

⁷⁴ *Id.* § 35-12-110(c).

⁷⁵ *Id.* § 35-12-110(g)(iii).

⁷⁶ *Id.* § 35-12-110(d).

⁷⁷ *Id.*

⁷⁸ *Id.* § 35-12-110(e).

Director must schedule and conduct a public hearing on the proposed facility.⁷⁹ All local governments and affected landowners must be notified of the hearing and notice must be published in the newspapers of general circulation within the area affected by the project.⁸⁰ Within twenty-five days of the hearing the Director must provide all information received by State departments and agencies to all affected landowners.⁸¹ Additionally, the Director must solicit information and recommendations from all affected landowners on the impact of the proposed facilities to their property.⁸²

3. *ISC Hearing and Appeal*

The ISC then conducts a contested case hearing pursuant to the Wyoming Administrative Procedures Act (WAPA).⁸³ The WAPA provides all parties to the contested case with rights to conduct discovery, subpoena witnesses and documents, and put on any evidence that “reasonably prudent men in the conduct of their serious affairs” would rely upon.⁸⁴ The contested case hearing operates as a trial, but is subject to less stringent evidentiary standards.⁸⁵

Forty-five days after the contested case hearing, the ISC must issue its decision to approve or deny the permit.⁸⁶ The ISC must grant the permit if it finds that (i) the proposed facility complies with the law; (ii) it will not pose a threat of serious injury to the environment, social or economic conditions, or inhabitants or expected inhabitants of the affected area; (iii) the facility will not substantially impair the health, safety, or welfare of the inhabitants; and (iv) the applicant has the financial resources to construct, maintain, operate, and decommission the facility.⁸⁷ The ISC may, however, issue a conditional permit requiring the applicant to modify its application prior to commencing construction.⁸⁸ Upon issuing its decision, the ISC’s findings and decision must be served on all parties, filed with the county clerk, and published in the newspapers of general circulation within the area affected by the project.⁸⁹

⁷⁹ *Id.* § 35-12-110(f)(i).

⁸⁰ *Id.* § 35-12-110(f).

⁸¹ *Id.* § 35-12-110(g)(ii).

⁸² *Id.* § 35-12-110(g)(i).

⁸³ *Id.* § 35-12-112.

⁸⁴ *Id.* §§ 16-3-107, -108 (2018).

⁸⁵ *See id.*

⁸⁶ *See id.* § 35-12-113(a).

⁸⁷ *Id.* § 35-12-113(a)(i)–(iv).

⁸⁸ *See id.* § 35-12-113(c).

⁸⁹ *See id.* § 35-12-113(f).

Although the ISC's decision is a final decision for the purposes of judicial review, it may be subject to several levels of appeal.⁹⁰ Any party "aggrieved" by the ISC's decision to issue or not issue a permit for the facility may appeal to the local district court in the county where the project was to be located.⁹¹ This process is governed by the WAPA and allows a party dissatisfied with the district court's decision to appeal to the Wyoming Supreme Court.⁹² Both the district court and the Wyoming Supreme Court's standard of review is whether there was "substantial evidence" to support the ISC's decision.⁹³ The Wyoming Supreme Court has accurately summarized the WIDISA process as one that is "very complex."⁹⁴

The WIDISA's definition of parties who are entitled to participate in a contested case hearing is extremely broad. A party under the WIDISA includes not only the applicant, local governments, and affected landowners, but also any person residing in a local government that is a party.⁹⁵ The definition also encompasses any nonprofit organization that has a Wyoming chapter, and which is even partly concerned with the promotion of any of the following causes: conservation or natural beauty, protecting the environment, personal health, or other biological values, preserving historical sites, promoting consumer interests, representing commercial, agricultural, and industrial groups, promoting orderly development in the area affected by the project facility.⁹⁶

4. *WWEFA Application Requirements*

The WIDISA process is not the only complex permitting process which a Wyoming wind developer must navigate. Even if an applicant is successful in obtaining a wind facility permit from the ISC, the project cannot move forward until the applicant obtains a separate permit from the local board of county commissioners⁹⁷ under Wyoming's Wind Energy Facilities Act (WWEFA).⁹⁸ The WWEFA requires what is often a less materially complex, although ultimately more politically fraught, permitting process due to the background, expertise, and local nature of the officials making the permitting decision.⁹⁹

⁹⁰ See *id.* § 35-12-114(b).

⁹¹ *Id.* § 35-12-114(a).

⁹² *Id.*; see also *id.* § 16-3-115 (2018).

⁹³ *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm'rs*, 2012 WY 158, ¶ 19, 290 P.3d 1063, 1072 (Wyo. 2012).

⁹⁴ *Id.* ¶ 7, 290 P.3d at 1069.

⁹⁵ See WYO. STAT. ANN. § 35-12-111(a).

⁹⁶ *Id.* § 35-12-111.

⁹⁷ *Id.* § 18-5-502(a).

⁹⁸ I have adopted this name for the legislation as it does not define itself. See *id.* §§ 18-5-501 to -513.

⁹⁹ *Id.*

The WWEFA requires that anyone constructing a wind generation facility—which is any facility rated by the manufacturer to generate more than one-half megawatt of electricity—must first obtain a permit from the board of county commissioners in the county in which the facility will be located.¹⁰⁰ The WWEFA application imposes numerous notice requirements, including a certification that reasonable efforts have been made to provide notice to all landowners within one mile of the facility and all towns within twenty miles of the facility.¹⁰¹ The application must also include various plans, such as an emergency management plan developed in coordination with the county sheriff, county fire warden, and county emergency medical services, and a waste management plan.¹⁰² The applicant must demonstrate that it has secured legal access to the facility and provide a traffic study of the effect of the proposed facility on any public roadway.¹⁰³ Furthermore, the application must have a reclamation and decommission plan for the end of the facility's useful life.¹⁰⁴ Finally, the applicant must submit a fee.¹⁰⁵ In this case, the fee is not capped in any manner like it is by the WIDISA, although it should not exceed the reasonably anticipated costs of processing the application and conducting the hearings.¹⁰⁶ The board, in its discretion, may tack on a building permit fee.¹⁰⁷

The WWEFA requires that the application complies with all applicable rules and, unlike WIDISA, it imposes prohibitions on where a wind facility may be built. Any wind turbine must be placed a distance of 110% of its height from any adjoining properties or public roads.¹⁰⁸ Similarly, no wind turbine may be constructed within a distance of 5.5 times the turbine's maximum height from any platted subdivision or residential dwelling.¹⁰⁹ Furthermore, the base of a turbine cannot be located within one-half mile of the limits of any city or town.¹¹⁰

5. *County Commissioners Hearing and Appeal*

Once the application has been submitted to the board of county commissioners, the board must make a preliminary determination whether the

¹⁰⁰ *Id.* §§ 18-5-501(a)(ii), -502(a).

¹⁰¹ *Id.* § 18-5-503(a)(i).

¹⁰² *See id.* § 18-5-503(a)(v), (vi).

¹⁰³ *Id.* § 18-5-503(a)(vii).

¹⁰⁴ *Id.* § 18-5-503(a)(x).

¹⁰⁵ *Id.* § 18-5-513(a).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 18-5-513(b).

¹⁰⁸ *Id.* § 18-5-504(a)(ii)–(iii).

¹⁰⁹ *Id.* § 18-5-504(a)(iv)–(v).

¹¹⁰ *Id.* § 18-5-504(a)(vi).

application is complete.¹¹¹ If the application is deemed incomplete, the applicant will have another thirty days to provide the board with additional information.¹¹² If the board determines the application is complete, it shall set a public hearing on the application within forty-five to sixty days.¹¹³

The hearing for WWEFA permits is not a contested case nor does it resemble any other form of adversary-type hearing.¹¹⁴ Rather, the hearing is an informal meeting that allows citizens to voice their questions and concerns, while also allowing the developer an opportunity to address those concerns in front of the board.¹¹⁵ As such, there are no formal discovery procedures provided by statute and evidence is not formally introduced.¹¹⁶ Because of the informal nature of the proceeding, the board's ultimate decision is subject only to the deferential arbitrary and capricious standard of review.¹¹⁷

Within forty-five days of the hearing, the board must issue its findings and decision on whether to grant a permit.¹¹⁸ The WWEFA provides that the board shall grant a permit if "it determines that the proposed wind energy facility complies with all standards properly adopted by the board of county commissioners and the standards required by this article."¹¹⁹ While this provision appears to make granting a permit mandatory if the application complies with the law, it also explicitly allows the board to develop its own distinct standards, which may allow the board additional discretion to grant or deny a permit.¹²⁰

¹¹¹ *Id.* § 18-5-505.

¹¹² *Id.*

¹¹³ *Id.* § 18-5-506.

¹¹⁴ The Wyoming Supreme Court noted that the Converse County permit case, No. S-12-0060, proceeded as a public hearing in accordance with Wyoming Statute §§ 18-5-501 through 18-5-513 (2010). In accordance with Wyoming Statute § 18-5-506 (2010), the proceeding was not a formal trial-type or contested case hearing, but an informal hearing where public comment was solicited. The witnesses were not sworn, comment times were limited and there was no typical cross-examination or other indicia of a true adversarial process. *See* *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm'rs*, 2012 WY 158, ¶ 10, 290 P.3d 1063, 1070 (Wyo. 2012).

¹¹⁵ *N. Laramie Range Found.*, ¶ 10, P.3d at 1070.

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶¶ 13–15, 18–20, 290 P.3d at 1072–73.

¹¹⁸ WYO. STAT. ANN. § 18-5-507(a).

¹¹⁹ *Id.*

¹²⁰ For example, Carbon County, Wyoming, requires wind projects to be "located such that they do not interfere with any designated Federal, State or County scenic resources, byways or scenic corridors to the greatest extent possible" and that they "shall be located as far as possible away from important views in order to diminish the visual impact of the structure." The Carbon County regulations even require "that towers and blades shall be painted off-white or another nonreflective, unobtrusive color that is agreed upon by the County prior to authorization. The color selected is intended to help the project blend with the natural visual character of the area." CARBON CTY., WYO. PLANNING & ZONING COMM'N, CARBON CTY. ZONING RESOLUTION OF 2015, at 5-25 (2015), <http://carbonwy.com/DocumentCenter/Home/View/2640>.

As with the WIDISA, any “party aggrieved” may appeal the board’s decision to the local district court.¹²¹ The district court’s decision can then be appealed to the Wyoming Supreme Court.¹²² As noted, the board’s decision is subject to the more deferential arbitrary and capricious standard of review, making an adverse decision significantly more difficult to overturn.¹²³ In the event that an applicant successfully navigates this byzantine process and receives approval from both the ISC and the board of county commissioners, then it may finally commence construction.¹²⁴

B. *Wind Taxation*

Unfortunately for wind developers looking to invest in Wyoming, the State’s regulatory burden does not cease once the wind facility is permitted and completed. Rather, once a wind facility is operational in Wyoming, the State will stick it with the highest—and one of only two—wind production taxes in the nation.¹²⁵

In 2010, at the same time that Wyoming passed the extensive permitting requirements outlined above, the Wyoming Legislature passed an “excise tax upon the privilege of producing electricity from wind resources in this state.”¹²⁶ The tax is imposed on the producer of electricity at the point of interconnection with an electric transmission line,¹²⁷ at the rate of one dollar per megawatt-hour produced.¹²⁸ However, the tax is not effective on a turbine until three years after it commences production of electricity.¹²⁹

¹²¹ WYO. STAT. ANN. § 18-5-508(a).

¹²² *Id.* § 18-5-505.

¹²³ *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm’rs*, 2012 WY 158, ¶ 18, 290 P.3d 1063, 1072 (Wyo. 2012).

¹²⁴ *See* WYO. STAT. ANN. § 18-5-510.

¹²⁵ *See* William Yardley, *Wyoming Rejects Tax on Wind Energy that Will Likely Be Sold in California*, L.A. TIMES (Sept. 27, 2016), <http://www.latimes.com/nation/la-na-wyoming-wind-tax-20160926-snap-story.html> [hereinafter Yardley, *Wyoming Rejects Wind Tax*]; McKim, *Window For Wyoming’s Wind*, *supra* note 35 (“Wyoming is one of two states with a wind production tax. The other state is Minnesota.”); Joel Funk, *Wyoming Wind Energy Production Tax Bill Coming Back Again*, WYO. TRIB. EAGLE (Dec. 3, 2017), https://www.wyomingnews.com/news/local_news/wyoming-wind-energy-production-tax-bill-coming-back-again/article_fe9ee7de-d7fd-11e7-b49c-5b3f237ae244.html. “Wyoming’s the only state to impose a tax specific to wind separate from other taxes (Minnesota has a \$1.20 per megawatt hour tax, but it’s in lieu of property tax, so the state isn’t assessing the tax on the improved property value).” *Id.*

¹²⁶ WYO. STAT. ANN. § 39-22-103.

¹²⁷ *Id.*

¹²⁸ *Id.* § 39-22-104.

¹²⁹ *Id.* § 39-22-105(b).

Sixty percent of the revenues generated by the wind tax remain in the county where the facility is located.¹³⁰ The other 40% of revenues are sent to the state.¹³¹ Failure to timely or accurately pay the wind tax will result in prime rate interest, penalties, and liens on the wind farm.¹³² Between 2011 and 2016, Wyoming generated slightly more than \$15 million in revenue from the tax.¹³³

C. Renewable Portfolio Standards—or the Lack Thereof

Many states impose Renewable Portfolio Standards (RPS) on public utilities.¹³⁴ RPS require a certain percentage of a public utilities total retail sales be comprised of renewable energy by a certain point in the future.¹³⁵ For example, New Mexico's RPS initially required that 5% of a public utilities sales would come from renewable energy by 2006.¹³⁶ By 2011, renewable energy had to make up 10% of New Mexico's retail utility sales.¹³⁷ In 2015, the standard was 15%.¹³⁸ And New Mexico's RPS will cease to increase further in 2020, remaining at a rate at 20%.¹³⁹

RPS essentially create a separate market for renewable energies to compete against each other, in a forum separate from conventional energy sources.¹⁴⁰ RPS do not prevent renewable energies from also competing against conventional energy sources, but RPS carves out a requirement that each utility company sell a

¹³⁰ *Id.* § 39-22-111(a)(i).

¹³¹ *Id.* § 39-22-111(a)(ii).

¹³² *See id.* § 39-22-108.

¹³³ *See* William Yardley, *Who Owns the Wind? We Do, Wyoming Says, and It's Taxing Those Who Use It*, L.A. TIMES (Aug. 14, 2016), <http://www.latimes.com/nation/la-na-sej-wyoming-wind-tax-snap-story.html>.

¹³⁴ States with some form of RPS include Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. *See State Renewable Portfolio Standards and Goals*, NAT'L CONF. OF ST. LEG., (Aug. 1, 2017), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx>.

¹³⁵ *See* Timothy P. Duane, *Greening the Grid: Implementing Climate Change Policy Through Energy Efficiency, Renewable Portfolio Standards, and Strategic Transmission System Investments*, 34 VT. L. REV. 711, 759 (2010) ("A renewable portfolio standards (RPS) is a target fraction of total installed capacity or total generation that must be provided by renewable generation technologies as defined by the RPS in order to achieve a more diverse electricity generation portfolio by a specified date.").

¹³⁶ *See* N.M. STAT. § 62-16-4(A)(1)(a).

¹³⁷ *See id.* § 62-16-4(A)(1)(b).

¹³⁸ *See id.* § 62-16-4(A)(1)(c).

¹³⁹ *See id.* § 62-16-4(A)(1)(d).

¹⁴⁰ *See* Duane, *supra* note 135, at 760.

certain percentage of renewable energy.¹⁴¹ RPS are designed to provide renewables with a sufficient foothold in the market such that they can eventually compete with the traditional powers of coal, oil, and natural gas.¹⁴² RPS are particularly effective at encouraging wind development, given wind power's early emergence as a leading renewable energy resource.¹⁴³ Twenty-nine states currently have RPS.¹⁴⁴ Wyoming is not one of them.¹⁴⁵ It is one of just three continental western states with no such standards.¹⁴⁶

D. Wind as a Property Right

In the same year that Wyoming decided to create an extensive permitting framework and impose a wind tax, it also decided to pass the Wind Energy Rights Act (WERA).¹⁴⁷ The WERA creates and defines a "wind energy right" as "a property right in the development of wind powered energy generation."¹⁴⁸ A wind energy right is considered to be an interest in real property and appurtenant to the surface estate.¹⁴⁹

Although the WERA effectively codifies a wind energy right in favor of Wyoming landowners, it expressly limits what those landowners may do with that right.¹⁵⁰ The wind energy right cannot be severed from the surface estate under the WERA.¹⁵¹ Wind energy rights are expressly subservient to mineral rights and the wind energy right may only be developed through a "wind energy agreement" that is defined and necessarily limited by the WERA.¹⁵²

While attempting to clarify the issue of wind energy rights, the WERA confuses and complicates the issue.¹⁵³ For example, a "wind energy agreement"

¹⁴¹ *See id.*

¹⁴² *See* Allco Fin. Ltd. v. Klee, 861 F.3d 82, 93 (2d Cir. 2017) ("Connecticut has articulated several reasons for incorporating these geographic limitations into its RPS program. Central among these is the State's interest in encouraging the development of new renewable energy generation facilities that are able to transmit their electricity into the ISO-NE grid.").

¹⁴³ *See* Akanksha Gupta, *The World's Most Used Renewable Power Sources*, POWER TECH. (Jan. 14, 2014), <http://www.power-technology.com/features/featurethe-worlds-most-used-renewable-power-sources-4160168/>.

¹⁴⁴ *State Renewable Portfolio Standards and Goals*, *supra* note 134.

¹⁴⁵ *Id.*

¹⁴⁶ Nebraska and Idaho are the other two states without RPS standards. *See id.*

¹⁴⁷ *See* WYO. STAT. ANN. §§ 34-27-101 to -107 (2018).

¹⁴⁸ *Id.* § 34-27-102(a)(iii).

¹⁴⁹ *Id.* § 34-27-103(a).

¹⁵⁰ *See id.* § 34-27-103.

¹⁵¹ *Id.* § 34-27-103(b).

¹⁵² *See id.* §§ 34-27-104, -103(b).

¹⁵³ *See infra* Section II.A.3.

is defined as “a lease, license, easement or other agreement, whether by grant or reservation, to develop or participate in the income from or the development of wind powered energy generation.”¹⁵⁴ However, it is less than clear how a landowner could “grant” or “reserve” a wind energy right under a wind energy agreement and yet not sever—at least in some limited manner—the wind energy right from the surface estate.¹⁵⁵

Traditionally, in Wyoming, a grant or reservation has been used by property owners to sever mineral rights from the surface estate.¹⁵⁶ It is unclear what would happen if a rancher reserves a wind right when his property is deeded. For example, the law is silent as to whether the rancher can lease that right to a wind developer despite not owning the surface or whether the wind right remains with the surface despite the deal the rancher struck with the buyer. Furthermore, it is unclear who enforces the WERA against the rancher. This issue and others like it may be a source of confusion that can hold up wind energy development in Wyoming.

III. THE FAILURE OF WYOMING’S WIND ENERGY FRAMEWORK

Given Wyoming’s complex and burdensome regulatory wind framework, it should be of no surprise that the state has lagged so far behind in wind energy development. While Wyoming’s lack of transmission capacity is often cited as the primary reason for its minimal wind development, its burdensome regulatory framework does not help.¹⁵⁷ But there is no singular policy to blame for Wyoming’s poor wind energy performance. Rather, the culprit is a combination of Wyoming’s duplicitous wind development permitting regime, wind tax, lack of RPS, and restrictions on wind energy rights that have led Wyoming to lag so far behind its western neighbors in this renewable energy source.

A. *WIDISA and WWEFA’s Effect on Wind Development*

The Wyoming permitting process has numerous issues, including requirements that impose massive upfront costs on wind developers, a structure that is litigious in nature, and broadly confers standing to challenge permitting approvals, and encourages “Not in My Backyardism” or “NIMBYism.”¹⁵⁸

¹⁵⁴ WYO. STAT. ANN. § 34-27-102(a)(i).

¹⁵⁵ See *supra* Section I.

¹⁵⁶ See, e.g., *Boley v. Greenough*, 22 P.3d 854, 859 (Wyo. 2001) (“Fee owners, such as the Greenoughs, have the capacity to create and convey any one or all of a myriad of separately identifiable interests in oil and gas under their property, including royalty interests.”).

¹⁵⁷ See *McKim, Energy Trends*, *supra* note 41 (“Coal has railroads, oil and gas have pipelines, but transferring renewable energy is not so easy. Wyoming has one of the best wind resources in the country, though many see a ceiling to its success due to transmission capacity limits.”).

¹⁵⁸ *Huntington Beach City Council v. Superior Court*, 115 Cal. Rptr. 2d 439, 447 (Cal. Ct. App. 2002) (stating “nimbyism” after the acronym for “not in my backyard”).

1. *Significant Upfront Costs*

Both the WIDISA and the WWEFA require that any wind project developer devote significant resources to a project before that project has any promise of actually being permitted. Prior to submitting a permit to the ISC pursuant to the WIDISA, a wind developer must commission an environmental and social impact study that evaluates the proposed facilities effect on scenic resources, recreational resources, archaeological and historical resources, land use patterns, the economic base, housing, transportation, sewer and water facilities, solid waste facilities, police and fire facilities, educational facilities, health and hospital facilities, water supply, and agriculture.¹⁵⁹ The report must also account for effects on terrestrial and aquatic wildlife, threatened, endangered and rare species and other species of concern identified in the state wildlife action plan as prepared by the Wyoming Game and Fish Department.¹⁶⁰ Such a report is no small undertaking. The average cost for a similar environmental impact statement often required by the National Environmental Policy Act (NEPA) was \$6 million and \$600,000 from 2003 until 2012.¹⁶¹ The less extensive environmental assessments, which NEPA also occasionally requires, cost an average of \$301,000 in 2013.¹⁶²

Of course, the environmental and social impact study submitted to the ISC is not the only report that a wind developer is required to produce. Under the WWEFA, a wind company must also produce and submit to the local board of county commissioners an emergency management plan,¹⁶³ a waste management plan,¹⁶⁴ and a reclamation and decommissioning plan.¹⁶⁵ Additionally, the developer must show that they have legal access to the proposed facility.¹⁶⁶ The legal access requirement often means that a developer must pay to secure easements and roadway agreements with landowners before it has any certainty of whether it will ever actually use the access. Moreover, because

¹⁵⁹ WYO. STAT. ANN. § 35-12-109(a)(xiii).

¹⁶⁰ *Id.*

¹⁶¹ NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES, U.S. GOV'T ACCOUNTABILITY OFFICE 12 (Apr. 2014), <https://www.gao.gov/assets/670/662543.pdf> (“DOE tracks limited cost data associated with NEPA analyses. DOE officials told us that they track the funds the agency pays to contractors to prepare NEPA analyses and does not track other costs, such as the time spent by DOE employees. According to DOE data, the average payment to a contractor to prepare an EIS from calendar year 2003 through calendar year 2012 was \$6.6 million, with the range being a low of \$60,000 and a high of \$85 million.”).

¹⁶² *See id.* (“In its March 2014 NEPA quarterly report, DOE stated that, for the 12 months that ended December 31, 2013, the median cost for the preparation of 8 EAs was \$73,000, and the average cost was \$301,000.”).

¹⁶³ *See* WYO. STAT. ANN. § 35-12-109(a)(v).

¹⁶⁴ *See id.* § 35-12-109(a)(vi).

¹⁶⁵ *See id.* § 35-12-109(a)(x).

¹⁶⁶ *See id.* § 35-12-109(a)(vii).

the project has not been permitted, the developer arguably could be prevented from taking advantage of the State's eminent domain statute and therefore may have no mechanism for requesting that landowners accept fair market value for the access.¹⁶⁷

While the costs and hassle of commissioning environmental and social impact studies, emergency management plans, waste management plans, and reclamation and decommissioning plans may seem to be minor costs that are simply part of the wind business, the experiences of wind developers in the state that have already gone through the permitting process suggest this is not the case.¹⁶⁸ Roxane Perruso, the Vice President and General Counsel of Power Company of Wyoming LLC, has stated that the company “spent hundreds of millions of dollars” in up-front costs to permit their Chokecherry and Sierra Madre Wind Energy Project.¹⁶⁹ Given these up-front costs, a Wyoming wind farm is the type of massive investment that only companies like Power Company of Wyoming LLC—which is fully owned by the multi-billion dollar energy, real estate, and entertainment behemoth, the Anschutz Corporation—can afford to make.¹⁷⁰

2. *Litigious Structure*

A company considering a Wyoming wind project must also have significant resources to devote towards litigating its right to develop its project. This preparation must be made not only in the event of an appeal from an ISC or county commissioner's decision, but at the very outset of the WIDISA process. As previously addressed,¹⁷¹ WIDISA requires that the Director hold a public hearing on every permit application.¹⁷² The hearing is conducted as a contested case hearing and, therefore, even if it the application is unopposed, the developer must be prepared to put on evidence and carry its burden of demonstrating that the

¹⁶⁷ See *id.* § 1-26-509(c)(i) (stating that a good faith negotiation should include, at a minimum, written notice of “*the proposed project*, the land proposed to be condemned, plan of work, operations and facilities in a manner sufficient to enable the condemnee to evaluate the effect of the *proposed project*, plan of work, operations and facilities on the condemnee's use of the land” to the extent reasonably known at the time (emphasis added)).

¹⁶⁸ See HAUB SCHOOL OF ENERGY, *supra* note 53 at 1:21:57.

¹⁶⁹ *Id.*

¹⁷⁰ See Roxane Perruso, *Energy and Resources Infrastructure Projects: Hearing Before Committee on Energy and Natural Resources*, 115 CONG. (Dec. 12, 2017), https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=59CEC76A-6C3A-4FB0-9135-F6ECFCB381B9 (“As background, Power Company of Wyoming LLC (“PCW”) which is developing the wind farm, and TransWest Express LLC (“TransWest”), which is developing the transmission system, are both wholly owned subsidiaries of The Anschutz Corporation (“TAC”).”); *Company Overview of the Anschutz Corporation: Oil, Gas and Consumable Fuels*, BLOOMBERG <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=932266> (last visited Nov. 14, 2018).

¹⁷¹ See *supra* notes 79–86 and accompanying text.

¹⁷² WYO. STAT. ANN. § 35-12-110(f).

facility will comply with applicable law, not pose a serious threat to the environment or social, economic, health, safety, or welfare conditions of inhabitants of the area affected by the facility, and that the developer has the financial capability to decommission the plan.¹⁷³ Under the WAPA, the developer must demonstrate that it presented substantial evidence to meet these requirements.¹⁷⁴

Additionally, the WIDISA's incredibly lax standing requirements allow for challenges that would be prohibited under common law standing requirements.¹⁷⁵ The WIDISA confers standing to challenge the application upon affected local governments and affected landowners, as these parties are likely to have a tangible interest affected by a wind facility.¹⁷⁶ However, the WIDISA also confers standing upon any single person residing within the jurisdiction of an affected local government and

any nonprofit organization with a Wyoming chapter, concerned in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial, agricultural and industrial groups, or to promote the orderly development of the areas in which the facility is to be located.¹⁷⁷

The above-listed individuals and groups have just as much right as an adjoining landowner to appear at the contested case hearing and offer opening and closing statements, present testimony and experts, and cross-examine all witnesses.¹⁷⁸ An applicant must be prepared to address all concerns and objections. To be fully prepared for these concerns and objections, an applicant may need to conduct discovery with respect to every single party.¹⁷⁹

By allowing so many individuals and groups to present evidence, the scope and duration of these contested hearings is significantly and unnecessarily expanded. To begin, there is no need to confer standing upon individuals located within the jurisdiction of an affected local government. Local governments are

¹⁷³ See *id.* § 35-12-113(a)(i), (iv).

¹⁷⁴ *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm'rs*, 2012 WY 158, ¶ 19, 290 P.3d 1063, 1072 (Wyo. 2012).

¹⁷⁵ See WYO. STAT. ANN. § 35-12-111 (2018).

¹⁷⁶ See *id.* § 35-12-111(a)(ii).

¹⁷⁷ *Id.* § 35-12-111(a)(iii).

¹⁷⁸ See 0020-0004-2, WYO. CODE R. § 14 (Practice and Procedure Industrial Siting Council, Order of Procedure at Hearings).

¹⁷⁹ See WYO. STAT. ANN. § 16-3-107(c).

designed to represent the general views and interests of their constituents.¹⁸⁰ Local governments—including local Wyoming governments—appear every day in litigation and other contested procedures on behalf of their residents. Their appearance is assumed to represent the interest of all their constituents.¹⁸¹ If constituents disagree with the position their local governments' take, there are political mechanisms available to them (e.g., elections) in which they can note their disagreement and effect a change in the local governments' position.¹⁸² Individuals are not allowed to intervene in any proceeding in which their government is a party and that principle should be no different in the WIDISA process.¹⁸³ An affected local government should represent the interest of all its constituents in front of the ISC and individuals located within affected local governments should voice their concerns and objections through their local governments.

¹⁸⁰ For example, in *Georgia v. Tennessee Copper Co.*, Justice Holmes stated:

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. *This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.* It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.

206 U.S. 230, 237 (1907) (emphasis added). See generally *State ex rel. Schieck v. Hathaway*, 493 P.2d 759, 763 (Wyo. 1972) (internal citations omitted) (“A fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’ As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.”).

¹⁸¹ See, e.g., *Georgia v. Pa. R. Co.*, 324 U.S. 439, 445–46 (1945) (internal citations omitted) (“Georgia as *parens patriae* and as proprietor of various institutions asserts a claim within judicial cognizance. The complaint of Georgia in those respects is not of a political or governmental character.”).

¹⁸² See, e.g., *Handy v. Lane Cty.*, 937 F. Supp. 2d 1297, 1303 (D. Or. 2013), *aff’d in part, vacated in part, remanded*, 585 F. App’x 570 (9th Cir. 2014) (“the basis of McCall’s alleged injury flows from the fact that Handy no longer represents his political and/or social interests. McCall, however, does not contend that defendants’ alleged conduct inhibited his individual right to vote. Because McCall does not allege that he was unable to vote for Handy in the primary election, it is unclear how the alleged injury is fairly traceable to defendants’ actions.”).

¹⁸³ See, e.g., *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“The Constitution created a representative Government with the representatives directly responsible to their constituents . . . [T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the ‘ground rules’ established by the Congress . . .”). Indeed, “[l]ack of standing within the narrow confines of [Article] III jurisdiction does not impair the right to assert his views in the political forum or at the polls.” *Id.* Rather, “our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.” *Id.*

Additionally, the WIDISA's conference of standing on essentially any Wyoming affiliated non-profit is far broader than courts' general conference of standing on such organizations.¹⁸⁴ For example, under the Endangered Species Act (ESA), the United States Supreme Court has required members of an organization to show "through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of [organization's] members would thereby be 'directly' affected apart from their 'special interest' in the subject."¹⁸⁵ Similarly, under the United States Administrative Procedure Act (APA), the United States Supreme Court has found that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."¹⁸⁶ The WIDISA does not take this approach. Rather, under the WIDISA, a New York organization devoted to the preservation of habitat for panda bears with a three-person chapter in Sundance, Wyoming, would presumably have standing to oppose a wind farm project in the opposite corner of the state in Evanston, Wyoming, even if none of the members had ever been to Evanston. The broad grant of standing to organizations under WIDISA could be easily and fairly curtailed by simply limiting standing to traditional judicial standing principals—as the Wyoming Supreme Court has done under WWEFA.¹⁸⁷

3. *Encouragement of NIMBYism*

Perhaps the most baffling element of Wyoming's wind permitting framework is that it requires a wind developer to go through two separate wind application processes.¹⁸⁸ Such an approach makes even less sense given that the WIDISA permitting process is a fully comprehensive permitting process that allows residents and local governments to voice their social, environmental, and economic concerns relating to a wind project.¹⁸⁹ But Wyoming overlays the WIDISA process with a local approach that allows county commissioners to develop standards that effectively prohibit wind projects.¹⁹⁰

¹⁸⁴ See WYO. STAT. ANN. § 35-12-111(a)(iii) (2018).

¹⁸⁵ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992).

¹⁸⁶ *Sierra Club v. Morton*, 405 U.S. 727, 739, (1972).

¹⁸⁷ See *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm'rs*, 2012 WY 158, ¶ 35, 290 P.3d 1063, 1076 (Wyo. 2012). "There is nothing in NLRF's claims which separates its asserted injury from that of the general public who enjoys the Northern Laramie Range . . . Nevertheless, because White Creek Ranch and NLRA have standing, we will consider the merits of this appeal." *Id.* (holding NLRF "failed to establish an injury or potential injury sufficient to warrant judicial intervention on its behalf").

¹⁸⁸ See WYO. STAT. ANN. §§ 35-12-101 to -119; *id.* §§ 18-5-501 to -513.

¹⁸⁹ See *id.* § 35-12-111.

¹⁹⁰ See *id.* § 18-5-504(a)(i).

A comparison of the WIDISA and the WWEFA reveals that there is very little required by the WWEFA that is not already required by the WIDISA.¹⁹¹ Both require the applicant to notify affected parties and governments of the application.¹⁹² Both require reclamation and decommissioning plans.¹⁹³ Both require some variation of plans and studies on how environmental and social impacts can or will be mitigated.¹⁹⁴ There is no reason why the Wyoming Legislature could not amend the WIDISA to include any requirements that are unique to the WWEFA, particularly because the differences between the two acts are already minimal. The most significant difference between the two acts is who makes the decision as to whether a wind developer has satisfied the respective application requirements.¹⁹⁵

Under the WIDISA, a seven-member bipartisan panel appointed by the Governor makes the ultimate decision on whether to approve an application for a wind project.¹⁹⁶ The ISC members generally come from different parts of the State.¹⁹⁷ On the other hand, the WWEFA leaves decision-making authority to the local board of county commissioners.¹⁹⁸ The WWEFA also leaves the standards required of a permit—so long as the standards are at least as restrictive as imposed by the WWEFA—to the county commissioners.¹⁹⁹ Arguably, this distinction between the two acts is designed to give local residents, via their county commissioners, a voice in the wind project permitting process. But county commissioners, as well as each of their constituents, already have an avenue for input under the WIDISA.²⁰⁰ While the input allowed to county commissioners under the WIDISA does not enable them to veto any project, like the WWEFA does, it nevertheless provides them with a significant voice in the permitting process.

¹⁹¹ See *supra* notes 71–82, 97–110 and accompanying text.

¹⁹² Compare WYO. STAT. ANN. § 18-5-503(a)(i) (requiring certification of efforts to notify nearby land owners and local governments), *with id.* § 35-12-109(a)(xix), (xxii) (requiring certification that local governments and affected landowners received notice).

¹⁹³ Compare *id.* § 18-5-503(a)(x) (requiring facility reclamation and decommission plan), *with id.* § 35-12-109(xx) (requiring facility reclamation and decommission plan that is updated every five years).

¹⁹⁴ Compare *id.* § 18-5-503(a)(vi), (xi) (requiring environmental and social impact studies), *with id.* § 35-12-109(a)(v), (viii), (ix)–(xiii) (requiring various environmental impact studies).

¹⁹⁵ See *supra* notes 58–110 and accompanying text.

¹⁹⁶ See WYO. STAT. ANN. § 35-12-104(b).

¹⁹⁷ See generally WYO. DEPT. OF ENVTL. QUALITY, INDUSTRIAL SITING COUNCIL, <http://deq.wyoming.gov/isd/resources/council/> (last visited Nov. 5, 2018).

¹⁹⁸ See WYO. STAT. ANN. § 18-5-507.

¹⁹⁹ See *id.* § 18-5-504(b).

²⁰⁰ The WIDISA confers standing on county commissioners, as a local government, to participate in the permitting process and appeal to the local district court for relief. See *id.* § 35-12-111(a)(ii)–(iii).

Allowing local county commissioners to both set the requirements for permitting a wind facility and to make the final decision as to whether a wind project receives a permit encourages NIMBYism.²⁰¹ In her article on the relationship between NIMBYism and wind farms, Susan Lorde Martin describes the term NIMBY as a generally pejorative term “to refer to people who fight against the siting of public utilities, commercial enterprises, or new residential developments which may negatively affect nearby property values, local aesthetics, or the environment, but which might provide benefits to the larger community.”²⁰² NIMBYism has the potential to be particularly problematic in the context of wind development, where the broader community enjoys the benefits of less expensive, renewable energy and the jobs and economic development associated with it, but only the individuals within sight and sound of the wind turbines bear the negative effects. Indeed, a Danish study has suggested that the closer people live to a wind project, the more likely they are to oppose such wind generated power.²⁰³

While the concerns of individuals opposed to wind projects should be heard and addressed in any permitting process, it is important that their often-self-motivated concerns do not cause wind projects that would benefit the larger local and state populations to be abandoned. Unfortunately, the permitting process designed by the WWEFA encourages NIMBY opposition. Rather than having seven bipartisan individuals from distinct parts of Wyoming make a neutral decision on a wind permit application—as the WIDISA does²⁰⁴—the WWEFA requires locally elected officials to decide whether a project will receive a permit that will be constructed in their own backyard.²⁰⁵ Local county commissioners are subject to the whims of local voters and the publicity of local press. In many of the sparsely populated counties of Wyoming, a small group of loud and active anti-wind activists could turn a large wind farm into a politically unpopular project that no politician would want to support.

Although no group or individual has yet to successfully oppose a permit under the WWEFA, it is not for a lack of effort. In *Northern Laramie Range Foundation v. Converse County Board of County Commissioners*, a group of roughly 900 members opposed and contested the Converse County Board of County Commissioners’ decision to issue a wind project permit.²⁰⁶ In this instance, the

²⁰¹ See WYO. STAT. ANN. §§ 18-5-504(b), -507.

²⁰² Susan L. Martin, *Wind Farms and Nimbys: Generating Conflict, Reducing Litigation*, 20 FORDHAM ENVTL. L. REV. 427 (2010).

²⁰³ See DANISH OFFSHORE WIND: KEY ENVIRONMENTAL ISSUES, DANISH ENERGY AUTHORITY, ET AL., (Nov. 2006), <http://depons.au.dk/fileadmin/depons/Files/Depons-report.pdf>.

²⁰⁴ See WYO. STAT. ANN. § 35-12-104(b).

²⁰⁵ See *id.* § 18-5-507.

²⁰⁶ *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm’rs*, 2012 WY 158, ¶ 30, 290 P.3d 1063, 1075 (Wyo. 2012).

Converse County Commissioners did not bend to the will of their 900-odd constituents, and issued the wind developer a permit despite opposition.²⁰⁷ However, members of the group have suggested they will be back to challenge future applications that may be located in a different county.²⁰⁸

Some might suggest that, because county commissioners must grant any application that complies with the WVEFA, and because the applicant can appeal any decision, the applicant is protected from an unduly political decision by the county commissioners.²⁰⁹ However, that position ignores the county commissioners' ability under the WVEFA to promulgate their own rules and then decide whether an applicant complied with them.²¹⁰ Moreover, any appeal under the WVEFA is subject to the deferential arbitrary and capricious standard of review.²¹¹ In short, if a board of county commissioners facing the pressure from NIMBYs decides to adopt extremely restrictive wind project requirements or simply decides not to grant an application under existing standards, its decision will be largely insulated from appeal.

Wyoming would not, and does not, require many of its other extractive industries to obtain a permit from a local government before those industries undertake development, such as drilling a well.²¹² Wyoming should not restrict wind development in this manner unless it desires to be not only a "Not in My Backyard State" but also a BANANA Republic (Build Absolutely Nothing Anywhere Near Anybody Republic) of wind development.²¹³

B. Wind Tax as a Penalty for Wind Developers

At a time when many of Wyoming's western neighbors are opening their doors to wind developers, Wyoming has suggested that wind turbines are not welcome in the Cowboy State.²¹⁴ Wyoming already imposes the only operational²¹⁵ wind

²⁰⁷ *Id.*

²⁰⁸ See Ken Otterbourg, *The Power Struggle for Wyoming's Wind*, FORTUNE (Sept. 14, 2011), <http://fortune.com/2011/09/14/the-power-struggle-for-wyomings-wind/> (stating that "[w]e do not want industrial-scale development in the mountains," and questioning how "100 of those wind farms [are] going to get connected to the grid" and what "southeast Wyoming [is] going to look like when they're done").

²⁰⁹ See, e.g., WYO. STAT. ANN. § 18-5-507.

²¹⁰ See *id.*

²¹¹ *N. Laramie Range Found.*, ¶ 18, 290 P.3d at 1072.

²¹² See WYO. STAT. ANN. §§ 30-2-101 to -108; *id.* §§ 30-5-101 to -128.

²¹³ Jonathan Zasloff, *NIMBYs Gone Wild!!*, LEGAL PLANET BLOG (Nov. 18, 2015), <http://legal-planet.org/2015/11/18/nimbys-gone-wild/>.

²¹⁴ See *supra* notes 125–33 and accompanying text.

²¹⁵ See Funk, *Wyoming Wind Energy Tax Bill*, *supra* note 125.

tax in the country of \$1.00 on each megawatt hour.²¹⁶ Several Wyoming legislators seem bound and determined to raise the tax even higher.²¹⁷ In 2017, longtime Wyoming State Senator Cale Case introduced a measure to Wyoming's Joint Revenue Committee to raise the wind tax by 400%, from \$1.00 per megawatt hour to \$5.00.²¹⁸ In 2018, other Wyoming state legislators joined Case's effort in a less dramatic way by introducing a bill that would increase the tax on all renewable energy produced in Wyoming to \$2.00 per megawatt hour.²¹⁹ This episode was not the first or sole attempt to raise Wyoming's wind tax.²²⁰ In 2016, a measure was introduced to the same committee that would have raised the tax to \$3.00 per megawatt hour.²²¹

Although all measures to increase Wyoming's wind tax have failed thus far, legislators in support of the tax appear to believe the battle is just beginning.²²² Senator Case has stated: "I'm not giving up on this—not to the very end."²²³ Senator Case has vowed to, if necessary, take his fight to the Wyoming people with a legally questionable citizens' initiative.²²⁴

While the objectives legislators seek to achieve in raising the wind tax are mixed, they are equally dubious from an energy development standpoint.²²⁵ For example, Wyoming State Representative Mike Madden has consistently supported an increase to the wind tax.²²⁶ Representative Madden argues that such a tax would significantly raise state revenues at a time the state severely needs it.²²⁷ He has further stated that such a tax is imperative to ensure that Wyomingites

²¹⁶ WYO. STAT. ANN. § 39-22-104 (2018).

²¹⁷ See Funk, *Wyoming Wind Energy Tax Bill*, *supra* note 125.

²¹⁸ See Joel Funk, *Wind Tax Axed by Committee*, CASPER STAR TRIB. (Dec. 6, 2017), http://trib.com/business/energy/wind-tax-axed-by-committee/article_99cdd925-4fb3-555c-98d3-512c9ce182ac.html.

²¹⁹ See Heather Richards, *Wyoming Lawmakers Propose Taxing Solar, Increasing Wind Tax*, CASPER STAR TRIB. (Feb. 8, 2018), http://trib.com/business/energy/wyoming-lawmakers-propose-taxing-solar-increasing-wind-tax/article_4b966e3d-2379-5592-84dd-952200336f00.html.

²²⁰ See generally Yardley, *Wyoming Rejects Wind Tax*, *supra* note 125.

²²¹ See *id.*

²²² See Funk, *Wyoming Wind Energy Tax Bill*, *supra* note 125.

²²³ *Id.*

²²⁴ See *id.* Senator Case has more recently admitted that "Wyoming is behind the curve" but he maintains the need to tax wind at a higher rate than any other state because, "[l]ike it or not, we have to have something to replace our tax base Clearly coal is going away." Heather Richards, *Bigger than Ever, Wind is Coming to Wyoming*, CASPER STAR TRIB. (May 18, 2018), https://trib.com/business/energy/bigger-than-ever-wind-is-coming-to-wyoming/article_972f6b0e-bc17-53dd-87fb-c15b83d83e08.html.

²²⁵ See *infra* note 229.

²²⁶ See Yardley, *Wyoming Rejects Wind Tax*, *supra* note 125.

²²⁷ *Id.*

will receive a benefit from the wind developments located in their state, since most of the energy will be transported to California.²²⁸ Representative Madden believes that an increase in the wind tax to \$3.00 per megawatt hour could result in more than \$40 million in additional state revenue as a result of new projects becoming operational.²²⁹

Of course, Representative Madden's belief rests on the assumption that an increase in the wind tax will not deter current and future wind producers from development in Wyoming. University of Wyoming energy economists Robert Godby, David Taylor, and Roger Coupal have suggested that Representative Madden's assumption is not sound.²³⁰ In their 2016 paper titled *An Assessment of Wyoming's Competitiveness to Attract New Wind Development, and the Potential Impacts such Development may bring the State*, Godby, Taylor, and Coupal catalogued the numerous economic disadvantages that Wyoming wind producers already face as compared to other states in the region.²³¹ Specifically, they noted:

An analysis of the market incentives that other states provide suggests that Wyoming is among the least attractive states in this regard. While Wyoming's lack of a corporate income tax should be attractive to developers, Wyoming, is not unique in the west with respect to this advantage. Additionally, other states having an income tax often offer partial or even full tax exemptions, and/or tax credits to wind developers to offset these tax costs. Wyoming also does not offer a sales tax exemption for wind generation expenditures in the state, while several states in the west do. Given the capital intensity of wind development and the fact a significant portion of wind project costs occur in the construction phase, such an exemption is considered among the most important incentives for wind developers. Wyoming did have a sales tax exemption for wind equipment, however, this was ended in 2011. Wyoming also does not offer any property tax exemptions, another renewable energy development incentive commonly found in other states.²³²

²²⁸ See *id.* ("It looks like there's nothing in it for the state of Wyoming and everything in it for the consumers of California," Madden said, referring to the Chokecherry and Sierra Madre project.").

²²⁹ See *id.* Referring specifically to the Chokecherry and Sierra Madre projects, Representative Madden said "the increase would have raised almost \$40 million in revenue after completion of a new project that will have as many as 1,000 wind turbines and generate as much as 3,000 megawatts." *Id.* The Chokecherry and Sierra Madre project "would be the largest wind farm in the nation." *Id.*

²³⁰ See GODBY ET AL., *supra* note 37, at 53.

²³¹ See *id.*

²³² *Id.* at 3.

In addition to these drawbacks, Wyoming wind producers also face what is effectively the only wind generation tax in the country.²³³

Representative Madden assumes that, despite these disadvantages, wind producers will continue to seek development opportunities in Wyoming. Yet, Godby, Taylor, and Coupal suggest that an increase in the wind tax could turn wind producers away from the state and further deprive it of the revenue increase, economic impact, and jobs that further development would bring.²³⁴ Their 2016 report studied the economic effect of five proposed wind production facilities including the Chokecherry and Sierra Madre Wind Project, Pathfinder Wind Project, Invenergy Wind Project, Pioneer Wind Park, and Viridis Eolia Wind Project.²³⁵ The report found that, if all five projects were constructed and operated for twenty years, they would generate an estimated tax benefit of \$1.9 billion for the state, including \$721 million that would be allocated to school funding.²³⁶ Moreover, the projects would generate 51,178 job-years of new employment and a total economic impact of \$7.1 billion.²³⁷

Of course, the obvious answer is that Wyoming could, in fact, generate more revenue in the immediate future by increasing the wind tax. But if the increase in the tax caused even one wind producer to change its plans, the total revenue increase would be marginalized, and the number of total new job-years and economic impact would be reduced. For example, if Wyoming raised its wind tax to \$2 per megawatt hour, but the Power Company of Wyoming decided to halt its Chokecherry and Sierra Madre Wind Project, the state would only increase its revenue from the other four wind projects (assuming all four remained online) by roughly \$250 million according to Godby, Taylor, and Coupal's study.²³⁸ Meanwhile, the state would lose over 700 new jobs and over 10,000 new job-years.²³⁹ Godby, Taylor, and Coupal ultimately conclude that:

In a worst case scenario, should the largest projects choose not to continue their development plans, the revenue losses experienced due to the new tax policy could result in a net

²³³ See Funk, *Wyoming Wind Energy Tax Bill*, *supra* note 125.

²³⁴ See GODBY ET AL., *supra* note 37, at 6 ("Each new tax case represents a significant increase in the total tax burden wind developers would face, and would clearly have consequences with respect to Wyoming's competitiveness to attract such projects relative to other states.").

²³⁵ See *id.* at 5.

²³⁶ See *id.* at 52 ("Total tax revenues from both construction and operations over the 20-year life of the projects listed are estimated to be nearly \$1.9 billion.")

²³⁷ *Id.* at 57 ("Overall, currently proposed projects could create \$7.1 billion in new state economic activity, 51,178 job-years of new employment and \$3.0 billion in new labor income over their 20-year lifetime.").

²³⁸ See *id.* at 54 fig.19.

²³⁹ See *id.*

decrease in realized state revenues relative to what would occur in the absence of such a change. This is without consideration of the economic benefits such projects bring through increased income and employment in the private sector.²⁴⁰

They urge Wyoming to “recast” its discussion regarding tax increases as one that seeks to generate more revenue by attracting more wind developers to the state.²⁴¹

The potential effects of further increasing wind taxes is not merely theoretical to a wind producer considering pursuing a project in Wyoming. Rocky Mountain Power spokesman David Eskelsen has said that “[a]ny changes to state or federal tax policy would prompt the company to evaluate its current proposal for wind projects in Wyoming to determine if it still makes economic sense for our customers.”²⁴² The Power Company of Wyoming has also echoed this sentiment.²⁴³ Subsequently, Godby noted, “[t]his is an industry that could potentially bring significant benefits and investment in the state at a time when I don’t know a single other sector considering a \$1 billion investment in the state.”²⁴⁴

Although a partial motivation for the tax increase is to generate more revenue for a state that has been forced to make dramatic cuts to education during the recent decline in conventional energy development, the main motivation of some legislators, including Senator Case, appears to be to ultimately halt wind development and preserve Wyoming’s scenic vistas.²⁴⁵ Senator Case fears a future in which Wyoming is transformed, in his words, into an “industrialized landscape—one scarred by thousands of bird-smashing turbines, high-tension lines and innumerable utility roads.”²⁴⁶

While it would be surprising to find a Wyomingite that disagrees with Senator Case regarding the beauty of Wyoming’s vistas, Wyoming policy should also reflect an effort to maintain the populations who enjoy those vistas through

²⁴⁰ *Id.* at 9.

²⁴¹ *Id.* at 58 (“Given such considerations and the potential benefits of wind generation locating in Wyoming, the state might wish to recast its discussion regarding revenue increases, and instead consider what actions might be taken to increase the probability of wind development occurring in the state.”)

²⁴² Funk, *Wyoming Wind Energy Tax Bill*, *supra* note 125.

²⁴³ *See id.* (“Overall, project economics must consider and reflect federal and state tax policies, as well as the state of the market with respect to capital costs and prices for renewable power,” said Kara Choquette, Power Company of Wyoming and TransWest Express director of communications.”)

²⁴⁴ *Id.*

²⁴⁵ *See* Cale Case, *State Must Raise Tax on Wind Power, Resist Industry Lobby*, WYOFILE (Jan. 10, 2017), <http://www.wyofile.com/column/state-must-raise-tax-wind-power-resist-industry-lobby/>.

²⁴⁶ Cale Case, *Case: Support Wind Energy, but Also Support Raising Wind Tax*, CASPER STAR TRIB. (June 28, 2017), http://trib.com/opinion/columns/case-support-wind-energy-but-also-support-raising-wind-tax/article_21bda4cb-64b6-58fd-99b7-9546640ae7fe.html.

promoting job opportunities.²⁴⁷ After all, a ranch with a couple of turbines is better than a subdivision, as some Wyoming ranchers have argued.²⁴⁸ For example, Wyoming Rancher Mark Eisele sees wind projects as an opportunity for his century-old cattle ranch in southern Wyoming to remain a viable operation for future generations of his family.²⁴⁹ Mr. Eisele is not alone in recognizing how wind can supplement Wyomingites' traditional livelihoods.²⁵⁰ Several years ago, a group of Wyoming farmers facing decreasing commodity prices and already narrow margins formed a wind association to attract wind developers.²⁵¹ The association now has a deal with Pathfinder Renewable Wind Energy for the company to construct wind turbines on its land in exchange for a reliable stream of revenue that will supplement the farmers' traditional agricultural operations.²⁵² One of the farmers noted that wind, like oil beneath his property, is just another way to make his operation more profitable.²⁵³ And, as one of Representative Madden and Senator Case's fellow legislators has stated, "[v]istas are great . . . [b]ut living here is better. We need opportunities for our children to live here."²⁵⁴

C. Renewable Portfolio Standards: A Market-Based Approach to Wind Development

Given Wyoming's approach to permitting and taxing wind production facilities, it is not surprising that Wyoming has failed to adopt RPS. Nevertheless, the absence of RPS has still harmed Wyoming's ability to compete in the wind production market—particularly given the number of Wyoming's western neighbors that have adopted RPS.²⁵⁵ One study estimates that 62% of growth in non-hydro renewable energy since the year 2000 was to satisfy RPS.²⁵⁶ And, as is

²⁴⁷ See Stephanie Joyce, *Legislative Committee Nixes Wyoming Wind Tax Increase*, INSIDE ENERGY (Sept. 23, 2016), <http://insideenergy.org/2016/09/23/legislative-committee-nixes-wyoming-wind-tax-increase/>.

²⁴⁸ See, e.g., Madelyn Beck, *Rural Wyoming Warms to Wind*, WYO. PUB. MEDIA (Sept. 15, 2017), <http://wyomingpublicmedia.org/post/rural-wyoming-warms-wind#stream/0>.

²⁴⁹ See *id.* (“The real reason we were excited about it was because it gave us the ability to bring some young folks back to the ranch, and also generate some income that would level out some ups and downs of the cattle business.”).

²⁵⁰ See *id.*

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See *id.*

²⁵⁴ Joyce, *supra* note 247.

²⁵⁵ See GODBY ET AL., *supra* note 37, at 4 (“Wyoming’s competitiveness to attract wind is also undermined by the fact that other states in the west have renewable portfolio standards (RPS), which have been shown to be effective in encouraging wind development.”).

²⁵⁶ See Galen Barbose, *U.S. Renewables Portfolio Standards: Overview of Status and Key Trends*, 2015 NAT’L SUMMIT ON RPS 4 (Nov. 5, 2015), <https://www.cesa.org/assets/2015-Files/RPS-Summit/Galen-Barbose-11.5.15.pdf>.

intended by RPS, non-hydro renewable energy growth has outpaced those rates required under RPS.²⁵⁷

Economists have found that RPS policies are key drivers for the development of wind production facilities.²⁵⁸ RPS policies offer state governments a market-based approach to facilitate the development of not only wind, but also other renewable energy development within state borders.²⁵⁹ RPS policies also offer states and their citizens a host of benefits including reducing the state's greenhouse gas emissions, decreasing water use, increasing jobs, reducing consumer electricity prices, and decreasing the cost of natural gas.²⁶⁰ While RPS standards may impose some additional costs, the benefits they generate will almost certainly outweigh the costs.²⁶¹

Unfortunately, support for RPS has historically polled lower in Wyoming than in any other state.²⁶² However, nearly 45% of Wyomingites have supported RPS.²⁶³ If the application of RPS is explained as a market-based approach that will not significantly increase energy costs while also increasing jobs, it seems that more Wyomingites might get behind such a policy.²⁶⁴ Even more Wyomingites may support the adoption of RPS if provided with information as to how RPS may

²⁵⁷ See *id.* at 4.

²⁵⁸ See U.S. ENVTL. PROT. AGENCY, EPA ENERGY AND ENVIRONMENTAL GUIDE TO ACTION 5-1 to 5-3 (Aug. 2015), https://www.epa.gov/sites/production/files/2015-08/documents/guide_action_chapter5.pdf (“RPS policies have supported the installation of new wind capacity, which accounted for approximately 78 percent of RPS-motivated renewable energy capacity additions between 1998 and 2012.”).

²⁵⁹ See *id.* at 5-1 to 5-24.

²⁶⁰ NAT'L RENEWABLE ENERGY LAB., MULTI-YEAR ANALYSIS EXAMINES COSTS, BENEFITS, AND IMPACTS OF RENEWABLE PORTFOLIO STANDARDS (2016), <https://www.nrel.gov/docs/fy16osti/65409.pdf>.

²⁶¹ See David Roberts, *The Most Effective Clean Energy Policy Gets the Least Love*, VOX (Oct. 21, 2017), <https://www.vox.com/energy-and-environment/2017/9/27/16365290/renewable-energy-standards-are-working> (“If existing RPSs are maintained through 2050, they will impose, at the very most, \$31 billion in costs, and produce, at the very least, \$85 billion in benefits. Seems like a pretty good deal.”).

²⁶² See Nancy W. Stauffer, *State-Level Renewable Energy Policies: Strengthening Critical Public Support*, MIT ENERGY INITIATIVE (June 30, 2017), energy.mit.edu/news/state-level-renewable-energy-policies/.

²⁶³ See *id.* Recipients of the new survey “received a central statement posing the possibility of the recipient's state adopting a new RPS bill requiring that the state meet 35% of its electricity needs with renewable energy sources by the year 2025.” *Id.* Additionally, recipients “received a variety of additional statements about specific attributes of the bill, randomly distributed among the survey recipients. For each attribute, some (randomly selected) people received no added information, thereby serving as the control group in the experiment.” *Id.* The survey received approximately 2,500 responses. *Id.*

²⁶⁴ See *id.* (“[L]earning that the policy would mean a \$10 increase in monthly electricity costs shifts support to opposition in 33 of the 40 states. On the other hand, if many new jobs are expected, eight states move from majority opposition to majority support.”).

lower their electricity costs.²⁶⁵ Economists and legal commentators have come to view RPS requirements as the “most effective tool to encourage investment in new wind power capacity. . . .”²⁶⁶ RPS requirements “have been the quiet workhorses of renewable energy deployment in the [United States]” and they could be the workhorse of wind development in Wyoming as well.²⁶⁷

D. *Wind as a Property Right?*

What constitutes a “wind right,” and whether such a right is a severable property right, are the most debated questions of wind development among legal scholars.²⁶⁸ In their attempt to analogize wind to other property rights, legal scholars and courts have analogized wind to a severable mineral estate,²⁶⁹ a water right,²⁷⁰ and even wild animals passing over one’s property.²⁷¹ In making these analogies, legal scholars appear to be trying to find a property interest that wind is similar to and then determine whether that interest is severable under common law property principles.²⁷² The answer to that question, as legal scholarship suggests, correlates with whether wind should be severed or not.²⁷³ However, for the purposes of this Article and the development of wind energy,

²⁶⁵ See Roberts, *supra* note 261.

²⁶⁶ Emily L. Wasserman, *I’ll Huff and I’ll Puff and I’ll Blow Your House Down: The Argument for the Ability to Purchase Your Neighbors Wind*, 84 U. COLO. L. REV. 861, 875 (2013).

²⁶⁷ Roberts, *supra* note 261.

²⁶⁸ See *infra* notes 269–71 and accompanying text.

²⁶⁹ See, e.g., *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272, 278 (Cal. Ct. App. 4th 1997) (“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, from the right to pump and sell subsurface oil, or subsurface natural gas by means of wells and pumps.”). In fact, arguments against this analogy have been rejected. See *id.* (“[T]he argument that harvesting windpower somehow requires greater usage of the surface than harvesting oil and gas resources defies common sense to anyone who has seen a field of oil derricks.”).

²⁷⁰ See, e.g., Yael R. Lifshitz, *Winds of Change: Drawing on Water Law Doctrines to Establish Wind Law*, 23 N.Y.U. ENVTL. L.J. 434 (2015).

²⁷¹ See, e.g., Alan J. Alexander, *The Texas Wind Estate: Wind as a Natural Resource and a Severable Property Interest*, 44 U. MICH. J.L. REFORM 429, 446 (2011) (“One possible analogy to establish ownership of wind blowing over a landowner’s land and through his airspace is the theory of ownership of wild animals.”). For example, in Texas, wild animals are “property of the state until they are removed from their natural liberty[.]” *Id.* However, a wild animal’s natural liberty is not easily defined. See *id.* (stating that “[w]ild animals are not confined to any one area, and their specific location and movements are not predictable to a very precise degree”). Like wild animals, wind is often unpredictable, with accurate weather predictions occurring only about three days in the future. *Id.* Given the unpredictable nature of both wind and wild animals, some argue that the “laws governing the ownership of wild animals could be a useful tool to help landowners establish a property right in wind.”

²⁷² See generally K.K. DuVivier, *Animal, Vegetable, Mineral—Wind? The Severed Wind Power Rights Conundrum*, 49 WASHBURN L.J. 69 (2009).

²⁷³ See *supra* notes 269–72 and accompanying text.

this discussion misses the point. The sort of property right most analogous to a wind right is not particularly important to whether that right allows for efficient wind development.²⁷⁴

In 2010, the Wyoming Legislature decided to expressly limit its citizens' property rights by disallowing property owners to sever their wind rights from their surface estate.²⁷⁵ The Legislature also decided through the WERA that a wind energy right may only be developed through a certain form of "wind energy agreement."²⁷⁶ While the WERA's limitations are certainly not the most significant impediment to wind development in Wyoming, they confiscate the option for land owners and wind developers to reach alternative agreements concerning this right. This mandate runs contrary to the general freedom of contract, libertarian approach that Wyoming generally adopts.²⁷⁷ One could easily imagine landowners negotiating over the sale of their wind rights, just as they have with the sale or lease of their mineral rights for over a hundred years. Moreover, allowing land owners and wind developers to enter into agreements with respect to their wind property rights would provide both parties with confidence about the nature of their respective bargains.

IV. A WINDIER FUTURE FOR WYOMING

Wind development in Wyoming has had a slow start, due in part to the legal and regulatory framework the state has adopted. However, as Wyoming's power transmission ability increases, wind producers are beginning to take a second look at Wyoming and its elite wind power potential.²⁷⁸ Wyoming should seize wind development as a method to boost its economy, provide jobs for future generations, and stabilize its depleted tax base. Wyoming can do this by repealing the WWEFA and its duplicative, political process, revising WIDISA's

²⁷⁴ See *infra* notes 314–17 and accompanying text.

²⁷⁵ See WYO. STAT. § 34-27-103(b) (2018).

²⁷⁶ *Id.* at § 34-27-103(c), (d).

²⁷⁷ Jennifer Bendery & Arno Rosenfeld, *The Reddest State in the Nation Isn't that Interested in the GOP's Moral Agenda*, HUFFPOST (Oct. 13, 2017), https://www.huffingtonpost.com/entry/wyoming-social-issues_us_59db9cb7e4b0208970cea6ac. For example,

It's not to say Wyoming doesn't embrace traditionally conservative policies in certain areas. It has some of the lowest property and sales taxes in the country, and no personal or corporate income tax. Even while facing a budget deficit of several hundred million dollars, leaders in the Legislature have shown far more interest in slashing services than raising revenue. When it comes to natural resources, the lifeblood of the state's economy, nearly all politicians call for more state control and less federal influence on drilling and mining regulations.

Id.

²⁷⁸ See Amanda Paulson, *Why Coal-Rich Wyoming is Investing Big in Wind Power*, CHRISTIAN SCI. MONITOR (Dec. 29, 2017), <https://www.csmonitor.com/Environment/2017/1229/Why-coal-rich-Wyoming-is-investing-big-in-wind-power>.

provisions that encourage litigation, passing a wind tax moratorium, imposing minor RPS, and restoring wind property rights to surface owners by making a wind right severable from the surface estate, as discussed below.²⁷⁹

A. *Repealing WWEFA and Reforming WIDISA*

One of the most important and common-sense steps Wyoming can take to encourage wind development is to reform its wind development permitting process. To do so, Wyoming should turn to the permitting framework established by the leading wind energy producing state in the nation: Texas.²⁸⁰ The Lone Star State undoubtedly has a rich energy history, from the Spindletop oil gusher in 1901,²⁸¹ to the pioneering of modern fracking in the Barnett shale nearly a century later.²⁸² However, the Lone Star State has recently turned its attention from the black gold to green renewable wind-powered energy. Today, Texas produces nearly as much wind energy as any country.²⁸³

Texas wind producers have benefited from established advantages like the State's dense wind resources, first class transmission capacity, and its own electric grid.²⁸⁴ Texas has also taken affirmative steps to create a regulatory environment that encourages wind development. In 2005, Texas created Competitive Renewable Energy Zones (CREZ), a transmission project funded by Texas rate payers to connect windy secluded parts of Texas to less windy, more energy intensive urban areas.²⁸⁵ Even earlier, Texas became one of the first states to adopt RPS and then quickly surpassed its RPS standards.²⁸⁶ While other states, like Wyoming, adopted comprehensive wind facility permitting regimes, Texas left the siting process to landowners and wind developers to negotiate amongst themselves.²⁸⁷

As Thomas Boyd noted in his article analyzing Texas's wind development success, Texas wind farm permitting is "a private matter between developer and

²⁷⁹ See *infra* notes 280–317 and accompanying text.

²⁸⁰ See AM. WIND ENERGY ASS'N, U.S. WIND ENERGY STATE FACTS (last visited Nov. 1, 2018), <https://www.awea.org/resources/fact-sheets/state-facts-sheets>.

²⁸¹ See Alexander, *supra* note 271, at 429.

²⁸² See ADAM BRIGGLE, A FIELD PHILOSOPHER'S GUIDE TO FRACKING 37–43 (2015).

²⁸³ ANNE R. BRODY, S. LEGIS. CONF., BLOWN AWAY: WIND ENERGY IN THE SOUTHERN STATES (PART II) 1 (2018), http://slcatlanta.org/Publications/EnergyEnvironment/Wind_Part_II.pdf.

²⁸⁴ See *id.* at 1, 4.

²⁸⁵ Jim Malewitz, *\$7 Billion Wind Power Project Nears Finish*, TEX. TRIB. (Oct. 14, 2013), <https://www.texastribune.org/2013/10/14/7-billion-crez-project-nears-finish-aiding-wind-pol/>.

²⁸⁶ N.C. ST. UNIV. CLEAN ENERGY TECH. CTR., RENEWABLE GENERATION REQUIREMENT: TEXAS, <http://programs.dsireusa.org/system/program/detail/182> (last updated June 26, 2018); BRODY, *supra* note 283.

²⁸⁷ Thomas Boyd, *Who Owns the Texas Sky? An Analysis of Wind Rights in Texas*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10426, 10433 (2015).

landowner . . . minimizing regulatory hurdles.”²⁸⁸ In Texas, there is no WWEFA equivalent that requires a developer to go before local county commissioners before it can begin developing its wind farm.²⁸⁹ There is also no equivalent of WIDISA requiring a wind developer to go through an extensive permitting process.²⁹⁰ If a developer wants to set up a wind farm and a property owner enters into an agreement to allow the wind farm, the wind development may proceed. In fact, “state, county, and local governments do not regulate the siting of wind energy projects” at all.²⁹¹

While Wyoming may not be willing to entirely repeal its wind farm permitting framework,²⁹² it must reform its wind permitting regime to unleash its wind power potential. As a first step, Wyoming should repeal the WWEFA, as it duplicates many of the requirements already imposed by the WIDISA.²⁹³ Both the WWEFA and the WIDISA require that applicants notify affected parties and governments of the application plan, provide reclamation and decommissioning plans, and supply some variation of plans and studies showing how the applicant can or will mitigate environmental and social impacts.²⁹⁴ Imposing varying standards which are based on the political whims of county commissioners will only add to that uncertainty and make sustainable economic development in Wyoming less likely. Wyoming needs “a statewide one-stop siting mechanism that [can] preempt these local siting authorities”²⁹⁵ To ensure that county

²⁸⁸ *Id.*

²⁸⁹ *See id.*

²⁹⁰ *See id.*

²⁹¹ BRODY, *supra* note 283, at 5.

²⁹² Wind projects are not without certain social costs and there are good reasons to provide at least some minimal regulations for their development. For example, an estimated 140,000 to 328,000 birds are killed every year in collisions with wind turbines’ spinning rotor blades and support towers. *See* Tom Metcalfe, *Wind Energy Takes a Toll on Birds, But Now There’s Help*, NBC NEWS (Apr. 17, 2018), <https://www.nbcnews.com/mach/science/wind-energy-takes-toll-birds-now-there-s-help-ncna866336>. Additionally, there is the noise from wind propellers “that never stops.” Dado Galgieri, *‘This Noise That Never Stops’: Wind Farms Come to Brazil’s Atlantic Coast*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/americas/brazil-wind-energy.html>. However, advances in wind turbine technology are increasingly mitigating these concerns. *See, e.g.*, Paul Dvorak, *Siemens Low Noise Wind Turbine Blades Inspired by Silent Flight of the Owl*, WINDPOWER ENG’G & DEV. (Sept. 28, 2016), <https://www.windpowerengineering.com/business-news-projects/siemens-low-noise-wind-turbine-blades-inspired-silent-flight-owl/>; Molly Bennet, *How New Technology Is Making Wind Farms Safer for Birds*, AUDUBON (Spring 2018), <https://www.audubon.org/magazine/spring-2018/how-new-technology-making-wind-farms-safer-birds>.

²⁹³ *See supra* notes 60–62 and accompanying text. *See generally supra* notes 57–110 and accompanying text.

²⁹⁴ WYO. STAT. ANN. § 18-5-503(a)(i), (vi), (x)–(xi) (2018); *id.* § 35-12-109(a)(v), (viii)–(xiii), (xix)–(xx), (xxii).

²⁹⁵ Gary D. Allison & John L. Williams, *The Effects of State Laws and Regulations on the Development of Renewable Sources of Electric Energy*, NAT’L POLICY ENERGY INST. 5 (Dec. 2010), <http://nepinstitute.org/wp-content/uploads/2010/12/RFF-NEPI-AllisonandWilliams-StateLaws.pdf>.

commissioners do not simply impose wind development regulations through their land use and zoning powers, Wyoming will also need to prohibit zoning restrictions that contravene wind development—as they have already done for mineral development.²⁹⁶

In addition to repealing the WWEFA, the Wyoming Legislature should revisit the WIDISA and consider carve outs for wind farms. The WIDISA was originally adopted in 1957 to deal with industrial facilities like waste incineration and disposal facilities.²⁹⁷ Although Wyoming amended the WIDISA in 2010 to include wind generating facilities, the amendment did not properly tailor the act to apply to such facilities.²⁹⁸ Rather, the amendment seems to reflect the assumption that requirements for a radioactive waste management facility could be applied seamlessly to a wind development permit.²⁹⁹ This is not the case.

The WIDISA imposes requirements including a study of the social and economic analysis of impacts like the wind farm's effect on sewer and water facilities, police and fire facilities, educational facilities, and water supply.³⁰⁰ While the rationale for these requirements is apparent for a radioactive waste site, it is difficult to see how a wind farm would significantly affect sewer and water facilities. The largest effect a wind development project is likely to have on communities is an increase in jobs and economic development.

The Wyoming Legislature should also seriously consider revising the WIDISA's broad grant of standing to challenge wind facility permits. As addressed, the WIDISA confers standing to challenge wind facility applications upon any single person residing within the jurisdiction of an affected local government and "any nonprofit organization with a Wyoming chapter, concerned in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values," or a whole host of other societal concerns.³⁰¹ This conference of standing is unnecessarily broad. Affected landowners and local governments should have standing to object to and participate in the WIDISA permitting process. Affected landowners, whether they form an organization or participate individually, undoubtedly have an interest in seeing that wind facilities are safely and efficiently constructed. Local

²⁹⁶ See WYO. STAT. ANN. § 18-5-201 ("[N]othing in §§ 18-5-201 to -208 shall be construed to contravene any zoning authority of any incorporated city or town and no zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto.").

²⁹⁷ See *id.* § 35-12-113(a)(i)–(iv).

²⁹⁸ See *id.* § 35-12-102(a)(vii) (originally enacted as Act of Mar. 5, 2010, ch. 47, 2010 Wyo. Sess. Laws 221, 222–23).

²⁹⁹ See WYO. STAT. ANN. § 35-12-102(a)(vii)(C).

³⁰⁰ *Id.* § 35-12-109(a)(xiii).

³⁰¹ WYO. STAT. ANN. § 35-12-111(a)(iii); see also *supra* 58–70 and accompanying text.

governments also have an interest in ensuring that the infrastructure it provides will not be abused or overly burdened by a new facility. Outside of those two groups, however, it is difficult to see the need to grant anyone else standing.

The Wyoming Legislature could simply remove the explicit grants of standing contained in the WIDISA and allow the Wyoming Supreme Court to apply traditional common law standing principles, as it did under the WWEFA in *Northern Laramie Range Foundation*.³⁰² Alternatively, the Legislature could explicitly limit the participants of the WIDISA process to affected landowners and local governments. Either way, amending the WIDISA to allow only those individuals and groups that are truly affected by a proposed wind facility to participate would lead to a more efficient and less litigious permitting process.

Without going as far as Texas's completely unregulated approach to wind farm permitting, Wyoming can repeal the WWEFA and tailor the WIDISA process to create a common-sense approach for developers, affected landowners, and local communities. Creating a regulatory environment that is at least similar to that of Texas should be Wyoming's first step to unleashing renewable energy development in our similarly large rural state.³⁰³

B. *Wind Tax Moratorium*

For Wyoming to demonstrate to the wind industry that it is now open to putting its first-class winds to productive use, it should repeal the sole wind energy tax in the nation. Or, to compromise with the legislators who are adamant about increasing the wind tax, other state legislators should propose a wind tax increase moratorium that would be effective for the next ten to twenty years. The moratorium could be structured to prevent increasing or repealing the current tax. Such a moratorium would ease wind developer's fears about a generation tax increase from \$1.00 per megawatt to \$3.00 or \$5.00, as legislators have previously proposed. It would also lend predictability to a capital-intensive industry that deeply desires it.³⁰⁴

³⁰² See *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm'rs*, 2012 WY 158, ¶ 35, 290 P.3d 1063, 1076 (Wyo. 2012) ("NLRf has failed to establish an injury or potential injury sufficient to warrant judicial intervention on its behalf. Nevertheless, because White Creek Ranch and NLRA have standing, we will consider the merits of this appeal.").

³⁰³ Brian Jansen, *Community Wind Power: Making More Americans Energy Producers Through Feed-in Tariffs*, KAN. J.L. & PUB. POL'Y 329, 340 (2011) ("For communities with strong resources, community ownership of wind farms is a powerful new source of economic development and job-creation. Investing in wind-energy projects is a way for rural landowners to secure additional revenue sources without sacrificing large amounts of land.").

³⁰⁴ See 1 INT'L RENEWABLE ENERGY AGENCY, RENEWABLE ENERGY TECHNOLOGIES: COST ANALYSIS SERIES 3 (June 2012), https://www.irena.org/documentdownloads/publications/re_technologies_cost_analysis-wind_power.pdf ("Given the capital intensive nature of most renewable power generation technologies and the fact that fuel costs are low, or often zero, the weighted average cost of capital . . . used to evaluate the project has a critical impact on the LCOE.").

Moreover, a tax moratorium is a more likely political possibility than repealing the wind tax completely. Wyoming legislators are currently searching for new consistent revenue streams.³⁰⁵ Supporting a tax decrease on green energy is unlikely to generate significant support with much of the State's populace. A tax moratorium would offer a compromise to assuage wind developers' fears of drastic tax increases, while keeping anti-wind legislators at bay.

C. Adoption of Minor RPS with Cost Caps

Given Wyoming's regulatory approach to wind development thus far, adopting RPS that require a certain percentage of the state's electricity to be derived from wind and solar power seems like a pipe dream. Wyoming should not underestimate the powerful signal that the adoption of even minor RPS could send to wind developers.³⁰⁶ Additionally, in adopting minor RPS goals, Wyoming could also impose caps that would control the ultimate cost of an RPS.³⁰⁷

Most states that have imposed RPS have simultaneously imposed some form of cost control mechanism that insures that the costs derived from requiring a certain percentage of electricity to come from renewable energy do not impose too great a burden on utilities or consumers.³⁰⁸ RPS cost caps, if structured correctly, can provide a "release valve" that limits renewable energy deployment when costs are higher than a predetermined level.³⁰⁹ Drawing upon these examples, there are a number of different ways that Wyoming could structure a cost cap on RPS. For example, Montana puts a statutory cost cap on the contract price that utilities must pay for renewable energy resources.³¹⁰ If a Montana utility cannot enter into a contract for a renewable energy resource that is within 15% of non-renewable energy sources, the utility is excused from the RPS requirement.³¹¹ Other states, like North Carolina and Michigan, impose RPS cost caps that limit the amount that electricity consumers are required to pay for renewable energy.³¹²

³⁰⁵ See, e.g., Arno Rosenfeld, *Money Shuffling Could Turn up \$130 Million to Shrink State Budget Deficit*, CASPER STAR TRIB. (Nov. 7, 2017), https://trib.com/news/state-and-regional/govt-and-politics/money-shuffling-could-turn-up-million-to-shrink-state-budget/article_bfab3f81-0e60-585b-9436-b50f1b7e7c67.html.

³⁰⁶ See Trevor Graff, *Fight over State Renewable Energy Standards Renewed in Senate Committee*, KAN. HEALTH INST. (Mar. 19, 2014), <https://www.khi.org/news/article/fight-over-state-renewable-energy-standards-renewe> (explaining the signaling effect of passing RPS standards in Kansas in 2009).

³⁰⁷ BRENDAN PIERPONT, CLIMATE POLICY INITIATIVE, *LIMITING THE COST OF RENEWABLES: LESSONS FOR CALIFORNIA*, at ii (2012), <https://climatepolicyinitiative.org/wp-content/uploads/2012/06/Limiting-the-Cost-of-Renewables-Lessons-for-California.pdf>.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 6.

³¹⁰ *Id.* at 3; MONT. CODE ANN. § 69-3-2007 (2017).

³¹¹ PIERPONT, *supra* note 307.

³¹² *Id.*

Wyoming should consider imposing a minor RPS with a cost control cap. This approach would be a common-sense way to demonstrate not only to wind developers, but also other renewable energy producers, that Wyoming will be a player in the renewable energy market moving forward.

D. Allowing the Unrestricted Development of Wind Rights in Wyoming

As addressed earlier in this Article,³¹³ Wyoming currently limits its citizens' wind rights by prohibiting property owners from severing wind rights from their surface estate³¹⁴ and limits development of wind to a specific form of "wind energy agreement."³¹⁵ Other states have taken a similar restrictive approach and still realize the benefits of significant wind development.³¹⁶ There is no reason to believe Wyoming's current limitation on wind rights will prevent it from realizing its wind energy potential.

As wind energy is a relatively new venture, new developments in this field are often affected in unforeseen ways by regulations. Studies suggest that new wind energy developments may also be adversely affected by regulations as well.³¹⁷ By amending the WERA to simply provide a definition of a wind right and by removing any restriction on severing wind rights from the surface estate, Wyoming would be letting wind developers and landowners decide the best way to develop wind in the State.

V. CONCLUSION

Wyoming appears poised to finally join its western neighbors as a leader in renewable wind energy generation. However, the promise of wind projects and the jobs and economic development that comes with this development has been presented to the Cowboy State before.³¹⁸ If Wyoming wants to make sure that

³¹³ See *supra* notes 147–56 and accompanying text.

³¹⁴ WYO. STAT. ANN. § 34-27-103(b) (2018).

³¹⁵ *Id.*

³¹⁶ For example, Oklahoma forbids landowners from severing their wind rights from the surface estate. OKLA. STAT. ANN. tit. 60, § 820.1(B) (2018) ("It is the intent of this act to restrict the permanent severing of the airspace over any real property located in this state for the purpose of developing and operating commercial wind or solar energy conversion systems."). However, this restriction appears not to have significantly affected wind development in Oklahoma, given its status as second in the nation in wind production capacity and fourth in the nation in total installed wind turbines. See AM. WIND ENERGY ASS'N, WIND ENERGY IN OKLA., <http://awea.files.cms-plus.com/FileDownloads/pdfs/Oklahoma.pdf>.

³¹⁷ See, e.g., Joshua M. Pearce, *Solar Is Being Held Back by Regulations, Not Technology*, HARV. BUS. REV. (Dec. 15, 2016), <https://hbr.org/2016/12/solar-is-being-held-back-by-regulations-not-technology> (nothing that a recent study "found that antiquated regulations are costing the growing solar market an additional \$70 billion.").

³¹⁸ See Richards, *Why Wind*, *supra* note 40.

this time it capitalizes on wind development, it should begin by repealing the WWEFA and retooling the WIDISA.³¹⁹ Wind developers require some degree of certainty, which Wyoming's current permitting framework simply does not offer.³²⁰ Wyoming should also impose a wind tax moratorium and minimum RPS with costs caps.³²¹ These minor, but common-sense, measures could send a powerful signal to the wind industry that Wyoming is open for wind energy development now and in the future. Finally, when it comes to what landowners can do with their wind rights, Wyoming should, as it so often does, let property owners decide what is best for their property.

³¹⁹ See *supra* notes 158–213 and accompanying text. See generally *supra* Section IV.A.

³²⁰ 1 INT'L RENEWABLE ENERGY AGENCY, *supra* note 304.

³²¹ See *supra* notes 304–05 and accompanying text. See generally *supra* Section IV.C.