



## IOWA CHAPTER

# Eminent Domain and Easements

### Understanding eminent domain and easements

Private property rights comprise one of the core values conferred on citizens of the United States. At the same time, government entities need to acquire land for schools, roads and other public purposes. Likewise, utility companies need rights-of-way for electricity, cable, water and sewer lines that benefit the landowners and their neighbors.

Government entities can acquire private property from willing sellers to build highways, schools, public hospitals or other government buildings. If the landowner does not want to voluntarily relinquish the property, then the governmental body can acquire the property through a process called eminent domain. When eminent domain is used, the property owner will still be paid for the property. The amount of the payment is determined by a compensation commission, whose membership is established by the Board of Supervisors.

Governmental bodies can also grant the right of eminent domain to private companies. For example, when a tax-increment financed project wants to acquire neighboring land, they can do so through eminent domain.

Another way eminent domain is used is for easements where sewer lines, water lines, telephone and cable lines and electric lines are allowed to cross private property. In those cases, the property remains in the hands of the original landowner. However, the landowner will be paid by the easement holder for the use of the land. In return, the landowner will be restricted in what he or she can do on the easement, such as not growing trees and not building structures on the easement.

Temporary easements can also be granted which allow construction equipment to use the area, which allow storage of materials, and which are allowed to store topsoil and subsoils during the construction process.



*Stockpile of pipe to be used for the Dakota Access pipeline in Iowa*

### Why permanent easements are a problem

A permanent easement preempts the landowner's future plans for the property. Any easement over a property limits what a landowner can do on the property, such as requiring no structures or trees on the easement. The easement may affect what gets built nearby. For example, a landowner may not want to site a house next to a transmission line easement or in the blast radius of a pipeline.

The right to an easement allows representatives of the easement company to have access to the property 24 hours a day, without notice, using motorized equipment on the easement or flying above the property.

Although a landowner may grow crops on the easement, the crops may be destroyed if the easement needs to be accessed. Often the landowner is not allowed to have trees growing on the easement.

High consequences to soil and water occur on an easement. Building on the easement compacts soil, which makes the soil less capable of producing crops. The construction process may mix the soil horizons (A or topsoil, B or subsoil, and C or parent) which may affect soil fertility for decades. Pipelines can affect subsurface water flow, causing water retention on the land, changing drainage or acting as a dam.

If the easement allows structures to be placed above ground, those structures may interfere with farming operations. Valves for pipelines and electric poles and towers create obstructions that must be avoided by farm equipment. Wires may interfere with aerial spraying or aerial application of cover crops.

If the easement is for a pipeline, spills from the pipeline can affect the soils and their fertility.

### **Eminent domain and easements present environmental justice issues**

For many projects, the product being transported over the easement benefits the landowner – water, sewer, electricity. Granting an easement for those items is mutually beneficial.

However, for other products, the landowner never directly benefits from hosting the easement – crude oil pipelines, DC transmission lines that have limited access to lowans. Yet those easements are absolutely essential to transport the product from the source to the end-customer.



*Photo by Warren Gretz, National Renewable Energy Laboratory*

In the case of wind turbines and DC transmission lines, the landowner is paid for leasing the site for the turbine, the turbine owner is paid for the kilowatts of electricity generated, the transmission line owner is paid for the electricity that is transported over its wires and the utility company purchases that power and then sells it to its customers. The only entity that does not get to share in the profits is the landowner hosting the transmission lines and poles; yet that landowner is absolutely essential. Granted, the landowner is paid one time for an easement.

In the case of a pipeline, the owner of the minerals (mineral rights) is paid for the minerals, the extractor or driller is paid for its services, the pipeline owner is paid for transporting the product and the company taking delivery of the minerals purchases those products and then sells a finished product. Just as for the example of wind energy, the only entity that does not get to share in the profits is the landowner hosting the pipeline; yet that landowner is absolutely essential. Again the landowner is paid one time for an easement.

It is only just that all parties involved in contributing to the production and transportation of products be given an opportunity to benefit financially from the profits.

Some landowners in Iowa have been burdened with multiple easements through their property. Iowa has become a bullseye for many proposed regional projects, such as pipelines and transmission lines. For example, there are only a few crossings across Iowa that will be possible to bring wind from North Dakota to Chicago,

Indianapolis or St Louis. Likewise for crude oil from North Dakota. That puts some counties, and even farms, in a bullseye.

### **Policies to improve Eminent Domain**

Numerous examples point to problems with eminent domain.

In many respects the easement laws have not kept up with the cross-state, regional or cross-nation transporting of energy and minerals, particularly in adequately compensating the landowner for the use of his or her land. Although the landowners are compensated for the easement, that compensation is paid one-time for the company to build on the property, and for the company to have on-going access to the property, and for restrictions on what the landowner can do with the property in the easement. The easement payment does not give the landowner a share of the revenue generated by moving energy and minerals across the easement.

Private companies should not be granted eminent domain for projects funded with tax-increment-financing. Private companies should not be allowed to force a landowner to sell his property via eminent domain.

When public officials are considering whether to grant eminent domain, the potential for increased tax benefits should not be part of the decision. Likewise, the potential for part-time, short-term or long-term jobs should not be part of the decision-making process. The landowners who are using their property for their own enjoyment or employment are also creating jobs and paying taxes. The Iowa Utilities Board used the potential for increased tax benefits and the creation of jobs as a key factor in approving the Dakota Access pipeline.



Forested, prairie or wetland properties should not be eligible for eminent domain since so few natural areas remain in the state. Projects should be routed away from natural areas.

Land agents generally are hired to negotiate the sale of the private property or the easement. Some landowners report being harassed, called multiple times a day by a land agent trying to convince the landowner to sell, lied to and otherwise mistreated by the land agents. Given our long-held tradition of private property rights, landowners need to be protected by a bill of rights:

- Forcibly taking a private property should be a measure of last resort, and only for a public purpose.
- No private property owner should be subject to eminent domain because another business can use it more profitably or will provide greater economic benefits to the state or society, in the form of items such as property tax, temporary jobs, or permanent jobs.
- Landowners are to be given truthful information about the projects.
- Inferences about the project being approved when the regulatory agency has not issued a permit and authorized the right to eminent domain are to be treated as fraud and subject to prosecution.

- Landowners are the only parties to be contacted and involved in negotiations. Landowners may hire attorneys to represent them in this process. Landowners may also designate other parties, such as family members, to negotiate on their behalf.
- Tenants are to be kept apprised of plans for an easement.
- Access to property prior to regulatory authorization shall only be granted by the landowner or his/her designated representative.
- A landowner is to be given the name and phone number of the land agent, name and phone number of land agent's employer, as well as the name and phone number of the company who will be owning the easement or the property.
- The land agents are to make appointments to visit with the landowner or the landowner's representative and not show up at the landowner's doorstep without an appointment.
- Land agents are not to harass or mistreat landowners.
- The agency that will be granting the eminent domain must investigate all complaints from landowners about being harassed, lied to and otherwise mistreated. Penalties shall be assessed against any land agent, his/her employer and the company requesting the easement or sale of the property found to be acting inappropriately.
- From the point that a property is targeted for an easement, until the decision is ultimately finalized through a voluntary easement or condemnation, the company seeking the easement should be paying rent for the property. Landowners with potential easements find that making basic business decisions about that property, including the siting of structures, sale of the property and potential sale prices, and renting of the property, are affected by a potential easement. Some of the targets for land acquisitions have waited years for a final decision on the route to be granted by the government agency.