



Best Practices in Avoiding Condemnation of Conservation Lands

A Guide for Texas Land Trusts

Part 1. Introduction to Eminent Domain

“Eminent domain” is the inherent power of governments (and certain private companies granted permission by the government) to take private property for “public use.” The Fifth Amendment of the U.S. Constitution states: “No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.” Article I, Section 17(a) of the Texas Constitution states: “No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made”

“Condemnation” refers to the formal act by the authority with eminent domain power to take land from a private property owner and grant land rights to the condemning party. In condemnation language, this process is referred to as a “take.” Examples of takings include private land for roads, transmission lines, water and petroleum pipelines, rail facilities and schools. The land not taken but whose value may be impacted is referred to as the “remainder.”

If property is needed for a public use, it may be “taken” by a government agency (or other entity given eminent domain authority by the government), even against the wishes of the private owner, including a land trust. If the property is restricted by a conservation easement that prevents the proposed use, those conservation restrictions may also be terminated by condemnation. Unfortunately, conservation properties may be attractive to government takings: they are ready open space and the land trust may be perceived as being easier to deal with than other, more developed properties.

Condemnation of privately held conservation lands or conservation easements is legally permissible in Texas. Though, in certain cases, state law exists to require that “there is no feasible and prudent alternative” to taking the land, and that in condemning the conservation property, “all reasonable planning to minimize harm to the land resulting from the use or taking” has been employed. These stipulations apply to all conservation easement lands protected using *Texas Farm and Ranch Land Conservation Program* dollars. They also serve to acknowledge that the state sees value in the avoidance of condemnation of conservation lands, particularly those where public investments are made.

Condemnation is a complex issue, especially when it involves conservation land or easements. Land trusts should be prepared for potential condemnation action on any of their conservation holdings. A land trust must understand its rights and obligations under condemnation, and responds appropriately.

Part 2: Steps in the Condemnation Process in Texas

There are four main steps to the condemnation process, depending on how the condemnation goes:

Step 1: Initial Study & Routing

Before a route is selected, a utility or agency will conduct a study of engineering and environmental issues related to the particular facility (road/utility line/etc.) that will require said route. Sometimes during these studies, the engineering firms conducting them will send letters to land owners describing the “study area” and ask for information that can help them in evaluating route options.

New oil and gas and water pipelines, new railroad facilities, and new roads follow a more informal process. For example, oil and gas companies are regulated by the Railroad Commission (“RRC”) after the pipelines are in operation. Before that, the companies will route their pipelines while condemning land for their easements without RRC oversight, and they DO NOT provide routing maps for the overall projects. While the Texas Department of Transportation (TxDOT) also has no formal routing process, they will generally have “open houses” and invite the public to provide input on the various routes before selecting a final route. After TxDOT announces its final route, it will begin surveying and condemning land.

Private and cooperative electrical transmission line routing is the only truly regulated, formal process in Texas. City’s are not required to go through a formal process to take transmission line easements. For example, with an electric utility easement, the power line company will file at the Public Utility Commission of Texas (“PUC”) an application to amend its Certificate of Convenience and Necessity (“CCN”). That request will be heard by the State Office of Administrative Hearings (“SOAH”), which makes a recommendation to the PUC, who will make a determination on whether the company can proceed with the project and where it will be routed. After the PUC approves the CCN and issues an order, the utility has eminent domain authority and will begin negotiating with landowners to access their property and to initiate the easement taking process.

At this point in the PUC process, your land trust must determine if it plans to formally “Intervene” or just “Comment” in a PUC proceeding. If you provide information about conservation lands in the “study area” and meet with the firm to discuss the restrictions in place and public funds appropriated, etc., you may have success in steering them away from your lands.

“INTERVENORS” in a PUC proceeding can successfully INFLUENCE ROUTE SELECTION and the land trust should be prepared to seek this opportunity and speak up at the appropriate time. When intervening, your land trust should provide written, direct testimony and identify the ecological concerns it has about the proposed transmission line. You may elect to consult an attorney who specializes in PUC proceedings, to ensure that your testimony is effective to improve the outcome for conservation. You might hire legal experts to analyze the different routes proposed, and to help recommend an ALTERNATIVE route, or to support or rebut routes recommended to the PUC. This is the opportunity for input that can most easily steer the condemnation action away from your land trust’s conservation holdings.

Step 2: The initial offer and negotiation. Pursuant to Chapter 21 of the Texas Property Code, private property intended to be taken must be appraised along with a 30-day initial offer and a 14-day final offer to purchase the property rights. A “Landowner Bill of Rights” statement must also be provided to the landowner so they know their rights and options.

- **Read the Texas Landowner’s Bill of Rights**
https://www.texasattorneygeneral.gov/agency/Landowners_billofrights.pdf

All condemning authorities must make Chapter 21 “bona fide offers” before initiating a condemnation lawsuit in court. It is at this stage, where the condemning authority is attempting to obtain an easement or purchase the property from the landowner, that the land trust can attempt to persuade the condemning authority to negotiate a land use agreement that minimizes damages to the conservation values of the property. For example, you may persuade the authority to move away from sensitive areas, to clear a narrower easement strip, cut fewer trees, or restore the property to its original ecological condition once the project is complete.

NOTES on Negotiating Your Terms and Compensation:

Typically, the company landman’s initial 30-day written offer is “low.” Know that the offer price, location of the take, and terms are all negotiable with the landman and/or company lawyers. If an agreement is not reached, the company will then issue a 14-day final written offer. This is a critical time to have consulted with an attorney (ideally, before you get this final offer). Companies sometimes give a higher 30-day written offer (sometimes with a bonus). If an agreement is not reached, they may send an appraisal and a 14-day written offer that is much lower, which may be intimidating.

- Things you may negotiate: Price of land taken, other damages, details of routes, location of facilities, temporary agreements (e.g. access easements), permanent easements, restoration or protection of land or conservation values, access points, roads, improvements, fences and gates, liability protections, landowner’s future use, limits on others’ use, etc.
- Pipeline specific items: non-exclusivity, limitation of number of lines, limitation of diameter of pipe, limitation of easement width, limitation of surface facilities, depth of pipe, surface restoration measures, indemnity protection, termination clause, land/ranch specifics, etc.

Important Part of Negotiation: Ensuring Proper Valuation of the Conservation Easement (if applicable)

Total compensation = Value “Before” minus Value “After”

- Value of the “Take” (permanent easement or fee ownership)
- “Remainder” damage, if any, is compensable
- Stewardship costs may increase, make sure your land trust is compensated.
- GET YOUR OWN APPRAISAL!
- Utility’s appraisal can be low...be sure the valuation is accurate and at true market value. Here is an example of an appraisal depicting two ways to view the value of the take and remainder.
- See the following example calculation:

Landowner's Appraiser's
COMPENSATION SUMMARY

Market value of Land:	\$1,025,000
Market Value of Improvements:	\$515,000
Market Value of Whole Property Before Taking:	\$1,540,000
Market Value of Whole Property After Taking:	\$1,220,753
Compensation Damages (Loss in Value):	<u>\$319,247</u>
Oncor Easement Acquisition:	\$9,901
Temporary Construction Easement:	\$3,430
20% Damages to the Remainder:	\$305,916
COMPENSATION:	<u>\$319,247</u>

Step 3: Special Commissioners hearing. If the landowner does not accept what is offered for their property, and negotiations have failed, the process moves to a Special Commissioners' hearing. After a condemnation petition (lawsuit) is filed in the county where the property is located, the judge appoints three resident landowners in the county as Special Commissioners to assess damages and "award" a dollar amount to the landowner. The Special Commissioners will not decide easement terms or anything other than compensation.

The Special Commissioners will make an award based on the information presented to them (typically only information from the condemning authority) and that award will be filed with the court. The land trust can provide testimony at the hearing, but it will often be advisable to have an experienced attorney on your side. Critical deadlines result from the various stages of condemnation cases. If you don't have an experienced condemnation attorney and you miss one of these critical deadlines, you could be harmed from recovering just compensation.

After the condemning authority posts the Special Commissioners' award with the Court, it has the right to possess and construct its project. Under certain conditions, the landowner may give permission for the construction prior to the Special Commissioners' hearing.

Step 4: Jury trial and appeal. If either party disagrees with the Special Commissioners' award, objections must be filed within a certain time period. This is where a landowner can object to the commissioners' award and/or the intended use of the property. This will result in a formal courtroom jury trial, where the final price/outcome will be determined by the jury verdict. This is *expensive* and should be used only as last resort.

After a trial, either party may appeal the decision to a Texas Courts of Appeal.

Part 3: State and Federal Law Regarding Condemnation of Conservation Lands

No state's version of the Uniform Conservation Easement Act (enabling legislation) expressly protects easement property from eminent domain. If the conservation easement is co-held with a government agency, that may impede or discourage condemnation by other agencies. Also, a federal conservation interest may override state and local powers.

Twelve States and D.C. are silent on eminent domain. Texas is among them. However, Texas has an additional statute dealing with Agricultural Conservation Easements. That contains statutory provisions expressly protecting agricultural easement property from eminent domain.

Texas limits condemnation on land with conservation easements purchased (even partially) with Texas Farm and Ranch Lands Conservation Program ("TFRLCP") funding. To condemn those lands encumbered by TFRLCP easements, the condemner must demonstrate that 1) "there is no feasible and prudent alternative to the use or taking of the Property"; and 2) "the proposed program or project includes all reasonable planning to minimize harm to the land resulting from the use or taking."

Related State Law

TEXAS PARKS AND WILDLIFE CODE; TITLE 5. WILDLIFE AND PLANT CONSERVATION

SUBTITLE E. WILDLIFE MANAGEMENT AREAS, SANCTUARIES, AND PRESERVES

CHAPTER 84. TEXAS FARM AND RANCH LANDS CONSERVATION PROGRAM

Sec. 84.007. PROTECTED LAND; NOTICE OF TAKING. (a) A department or agency of this state, a county, a municipality, another political subdivision, or a public utility may not approve any program or project that requires the use or taking through eminent domain of private land encumbered by an agricultural conservation easement purchased under this chapter unless the governmental entity or public utility acting through its governing body or officers determines that:

- (1) there is no feasible and prudent alternative to the use or taking of the land; and
 - (2) the program or project includes all reasonable planning to minimize harm to the land resulting from the use or taking.
- (b) A determination required by Subsection (a) may be made only at a properly noticed public hearing.
- (c) The governing body or officers of the governmental entity or public utility may consider clearly enunciated local preferences, and the provisions of this chapter do not constitute a mandatory prohibition against the use of the area if the determinations required by Subsection (a) are made.
- (d) If, after making the determination required by Subsection (a), a department or agency of this state, a county, a municipality, another political subdivision, or a public utility acquires by eminent domain a fee simple interest in land encumbered by an agricultural conservation easement purchased under this chapter:
- (1) the easement on the condemned property terminates; and
 - (2) the entity exercising the power of eminent domain shall:
 - (A) pay for an appraisal of the fair market value, as that term is defined by Section 84.006, of the property subject to condemnation;
 - (B) pay to the qualified easement holder an amount equal to the amount paid by the holder for the portion of the easement affecting the property to be condemned;
 - (C) pay to the landowner an amount equal to the fair market value of the condemned property less the amount paid to the qualified easement holder under Paragraph (B); and
 - (D) pay to the landowner and the qualified easement holder any additional damages to their interests in the remaining property, as determined by the special commissioners under Section 21.042, Property Code.
- (e) If, after making the determination required by Subsection (a), a department or agency of this state, a county, a municipality, another political subdivision, or a public utility acquires by eminent domain an interest other than a fee simple interest in land encumbered by an agricultural conservation easement purchased under this chapter:
- (1) the entity exercising the power of eminent domain shall pay for an appraisal of the fair market value, as that term is defined by Section 84.006, of the property subject to condemnation; and
 - (2) the special commissioners shall consider the fair market value as the value of the property for purposes of assessing damages under Section 21.042, Property Code.

(f) The qualified easement holder shall pay to the fund any amounts received under Subsections (d) and (e), not to exceed the amount paid by the fund for the purchase of the easement.

Transferred, redesignated and amended from Natural Resources Code, Subchapter B, Chapter 183 by cts 2015, 84th Leg., R.S., Ch. 401 (H.B. 1925), Sec. 1, eff. June 10, 2015.

Related Federal Law

Treasury Regulation § 1.170A-14(g)(6)

(6) Extinguishment.

(i) In general. If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution. (ii) Proceeds. In case of a donation made after February 13, 1986, for a deduction to be allowed under this section, at the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time. See Sec. 1.170A-14(h)(3)(iii) relating to the allocation of basis. For purposes of this paragraph (g)(6)(ii), that proportionate value of the donee's property rights shall remain constant. Accordingly, when a change in conditions give rise to the extinguishment of a perpetual conservation restriction under paragraph (g)(6)(i) of this section, the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.

Part 4. Land Trust Duty to Defend their Conservation Holdings

Land trusts must defend their conservation properties and should not readily succumb to the threat of condemnation. Land trusts have many opportunities early in the condemnation process to anticipate, divert and minimize damage to conservation permanence. Skillful and early negotiation coupled with smart and timely community response can lead to successful avoidance of condemnation of your conservation holdings.

2017 Land Trust Standards and Practices refers to condemnation not as a separate practice, but as an item under *Fee and CE Conservation Stewardship*. The practices state simply that if a conservation easement is threatened with condemnation, a land trust **must** “take steps to avoid or mitigate harm to conservation values and document the actions taken”. A land trust should have documentation of the important conservation values (baseline documentation report) for every conservation property they own, or easement they hold. In addition, your land trust must take steps to ensure that it is financially compensated for the taking, and that the compensation is the correct amount owed. Both cash and in-kind mitigation options should be examined.

Land Trusts must:

1. Calculate and document the percentage of the value of the property represented by the conservation easement
 - a. How do you do this? Appraisal of the CE value. Whether done by the landowner for tax deduction, or by land trust for purchase of CE, keep a copy of the appraisal in the permanent records for the project. Also, include language in the CE that outlines the

respective percentage of value that landowner/easement holder would receive if condemnation, occurs, based on the appraisal. Ex: “.....Holder’s proportional interest is determined as of the date of this grant ...”

2. Document the land trust’s attempts to receive its proportional share of the proceeds
 - a. Calculate the percentage of the value of the property represented by the conservation easement
 - b. To establish CE value, begin with the unencumbered value of the property, i.e. value of the property without reduction for CE value.
 - Just compensation includes: Development rights (CE value) **AND** other damage to conservation easement property (the remainder).
 - Use formula in conservation easement for apportioning amount received between property owner and land trust.
3. Show how any proceeds from a condemnation proceeding were used in a manner consistent with the conservation purposes of the conservation easement deed.
 - a. Include language into the CE that outlines this. Ex: “Holder will use such proceeds for its conservation purposes.”

A land trust faced with condemnation should consult with legal counsel and carefully deliberate how to proceed. The land trust, through its legal counsel, should also closely consider state law. Approach communications with the condemning agency with professionalism and strong documentation and careful research. Often, government agencies do not know about conservation easements before disputes begin or did not understand them when they learned about them, and do not appreciate the extent to which the land trusts will fight for them. Land trusts should educate the condemning entity and strongly advocate for ensuring the permanence of conserved land. Perhaps, simply the realization that the land trust will resist condemnation may cause the condemning authority to look elsewhere.

Significant public financial investments have been made via the federal, state and local programs that encourage, incentivize and pay for conservation land and conservation easements. Land trusts must make sure that the condemning authority recognizes the public’s stake in lands protected by conservation easements and aim to avoid all unnecessary impacts on these lands.

Condemnation is not just a technical legal problem, but a community engagement issue that requires quick and tactical response. Local politics and community involvement are often key in determining condemnation issues. Land trusts should utilize their connections and community supporters to help avoid the condemnation of its conservation lands. Sometimes, the land trust may determine they will have more success by waging a public relations or letter-writing campaign against the condemnation of conservation land. Or if the outcome (condemnation) is certain, the land trust may focus its energies on negotiating the best out-of-court settlement that serves the needs of the conservation resources, the landowner, and the land trust.

Early landowner engagement is also key in order to maintain positive relationships with your landowners during the condemnation process. It can be surprising when a landowner realizes they may not be entitled to the entire share of condemnation proceeds. It is important for land trusts to have these conversations before the conservation easement is signed, and again each time the land changes hands to heirs or completely new owners of the land. Open, regular communication is essential to limiting negative outcomes for the landowner-land trust relationship.

Averting condemnation- or at least minimizing the damage it can cause -requires legal competence, smart strategy, time, and money. The more prepared the land trust is, the better the outcome will be whether through the courts, through negotiation with the condemning entity, or in the public sphere.

Helpful Tips, Depending on Where you Are in the Process

Things Your Land Trust Can Do BEFORE Condemnation Strikes

- File the Conservation Easement Memorandum for each easement to REQUIRE Land Trust Notice of a condemnation action.
- Make sure your easements have adequate condemnation provisions and address eminent domain and follow the division of proceeds or condemnation awards in the Internal Revenue Code and related regulations; include language that considers negotiating a settlement. Also, make sure that you have discussed these with your landowners. *Ex. “.....Holder’s proportional interest is determined as of the date of this grant and will not include value attributable to authorized improvements to the Protected Property made after the date of this grant, except as to improvements that are made by or at the expense of Holder. Holder will use such proceeds for its conservation purposes.”*
- Pay attention to potential projects in the area; attend and know of regional planning meetings for roads and transmission infrastructure, etc.
- If you discover a route is planned in an area where you have conservation holdings, educate the condemning authority about conservation lands in the proposed project path. Condemning authorities are usually unaware that land is permanently conserved and the extent of those legal protections. Emphasize the public investments in and use of the protected property. Also, understand the law and your land trust’s rights related to eminent domain. Consult with legal counsel on this and identify possible next steps.
- Make sure your landowners KNOW they should contact the land trust ASAP if receive any notice of proposed condemnation. Maintain a good relationship with the property owners to promote communication and cooperation if this happens. Also, think through and put into policy what your LT will do if you and the landowner are not in agreement on how address the condemnation issue. Idea: Include condemnation related questions in annual monitoring visits.
- Identify what your land trust will do to avoid condemnation well before it happens. Create a board policy to outline how far your land trust will go and under what circumstances, and steps for volunteers and staff to follow if they receive a potential condemnation notice.
- Maintain an adequate legal defense fund for your land trust for these purposes. Terra Firma does not (as a general rule) cover condemnation. You will need professional help or advice; be sure you are financially ready to pay for it.
- Develop community network for quick response/action if you need it: nearby landowners; area brokers and realtors; interested volunteers and land trust members.
- Register your easements with the National Conservation Easement Database (NCED). Some entities consult this database when planning routes.

How Best to Respond to a Filed Condemnation Action

- Know the law on this. Condemnation procedure in Texas is governed by **Texas Property Code Chapter 21**. If your land trust faces the threat of condemnation, review Chapter 21 and (ideally) discuss it with your attorney.
- Consult your land trust's policy on how to handle condemnation and appoint a point person or committee to head up the land trust response. Keep the entire board informed. Remember: The land trust's interests may not be aligned with the landowner's.
- Know your rights and get involved early! Think through the best way to proceed; compare the risk of losing your case to the protections or offsets that positive negotiations with the condemning authority may provide. The condemnation process is focused on the landowner; you must inject the land trust into the negotiations. If a land trust waits for public hearings to make itself known to the government agency, it may find it is too late to propose alternatives. If a land trust waits until the legal proceedings, then all that may remain is a dispute over valuation. Getting involved early is crucial.
- Notify funders of the conservation easement, promptly, particularly if state or federal government funding involved (they may be able to help you!).
- Assess impact of condemnation on conservation values and be sure that your knowledge of the state of the conservation values is up to date (Is it possible that the condemnation results in zero impact on conservation values?) Diligently work to prevent loss to conservation values, or at a minimum, minimize damage.
- Demonstrate that protected property is **not** the path of least resistance. The land trust should ask the authority to only condemn the conservation easement for the limited use of the intended project, and to clarify that the conservation easement continues for all purposes not inconsistent with the condemnor's use. The landowner should make sure that the condemnor provides a written agreement governing its use of the property.
- While other condemnors are not required by statute to restore the property, they must pay compensation for damage to the property. The land trust can often negotiate for restoration in lieu of payment of money damages.
- Work with the landowner to identify potential expert witnesses to testify to conservation values present on the land.
- Retaining an experienced eminent domain attorney focused on the threats (utility, road, pipeline, etc.) is WISE. They can help you use existing laws and planning processes to oppose the taking: (i) gain legal and practical leverage; (ii) possibly obtain mitigation (besides financial compensation); (iii) better advocate for alternatives (they know strategies to keep the proposed route off your conservation lands from the beginning).
- Retain an appraiser with eminent domain experience. The eminent domain appraisal will focus on the value of the easement and damage to the remainder of the property from the taking. Remember, the land trust must document that it sought its "fair share" of proceedings from the condemnation, whatever the outcome. Seek required appraisal cost reimbursement from the condemning authority.
- Stay prominently but professionally engaged. Keep negotiating with the condemning authority to craft remedies that reduce these impacts or allow for additional conservation action. Ex: Offering an alternative location to the conserved land can be a successful strategy.

- Remember to consider the impact of any proposed relocation on other landowners (exercise care: this is complicated and you can easily create conflict with other community members or interests).

TIP: The condemnor MUST comply with Texas Property Code Chapter 21 and make a bona fide offer to negotiate before they go to court...use this negotiation to your advantage (save time and money). Don't let condemning authority RUSH you!

- Be SURE you understand the process, know what documents your land trusts has/will receive and how to respond to each. Remember: You MUST document ALL land trust actions and communications to avoid the condemnation on conserved lands.
- Develop a strategy for communicating with membership, building coalitions to positively affect the decision making process. This is when the land trust strategy for influencing the outcome via public influence, media, members, and coalitions comes into play. Determine whether to try to oppose or influence outcome of public project. (Develop PR strategy, attend public meetings, etc.)
- Coordinate owners of conserved land early. Strive to create a coalition of local landowners to support your cause to reduce or eliminate impacts to permanently and legally conserved lands. State and local government listen to landowners.

Your Conservation Land or Easement IS Being Condemned...Now What?

- Land trusts are advised to closely monitor survey and construction work that takes place in sensitive areas. Visit the site often to make sure agreements are being upheld. Larger condemning authorities in major projects are sometimes willing to hire a biologist chosen by the land trust to monitor construction operations, which can improve compliance with the use agreement.
- Observe the condemnor's actions to see if they are following all required procedural steps.
- Ensure that your land trust gets its fair share of the proceeds based on the % value of the CE. Condemning authorities see conserved land as an inexpensive acquisition because the property often has no structures and has a lower fair market value. For land subject to a conservation easement, **most condemning entities forget to account for the compensation to which the land trust is entitled. Do not let them.**
- A land trust can use its right to condemnation proceeds to negotiate a better surface use agreement, in lieu of accepting the money. Many condemning authorities are familiar with the concept of mitigation and may provide nearby properties in fee or in conservation easement as compensation for the damage done to your conservation easement by the taking.
- Make sure that any agreement you sign is the best deal you can get to best preserve the conservation values of the property. See the checklist below for several issues to consider.

CONDEMNATION USE AGREEMENTS: A CHECKLIST FOR THINGS TO LOOK OUT FOR

The checklist is excerpted from Understanding the Condemnation Process in Texas by Judon Fambrough and is provided courtesy of the Texas Real Estate Center at Texas A&M.

The following checklist may be helpful, as a guide for negotiations:

- Is the proposed location of the easement or right-of-way for the pipeline or utility line accurately described in the agreement? The agreement should contain more than just the legal description of the property it crosses. Otherwise the condemnor may choose to place the utility line anywhere on the described property.
- Has the width of the easement or right-of-way been specified? Some landowners prefer to negotiate two easements—one a fairly wide, temporary working easement and the other, a more narrow, longer term easement. These easements should be surveyed and clearly marked before operations begin.
- Does the agreement provide when the easement will terminate? Any easement reverts to the landowner when abandoned. However, to prove abandonment in Texas, the landowner must show that the owner of the easement ceased to use it with the intent never to use it again. The intent of a pipeline or power company may be difficult to prove. Consequently, some landowners prefer to have the agreement state that the easement reverts when not used for a certain length of time.
- Does the agreement have a written timetable for construction? To achieve the least interference, construction should be scheduled to coincide with periods when the landowner is not using the land. By having a timetable, the landowner can “work around” the condemnor’s operations.
- Does the agreement specify the condemnor’s routes of ingress and egress? If not stated, the condemnor may use any convenient route or routes. The landowner may explore the possibility of the condemnor constructing and maintaining certain types of access roads. Does the agreement specify all roads used by the condemnor will be repaired to their former condition or improved when the construction is finished?
- Will gates and/or cattleguards be constructed where the routes of ingress and egress enter and leave public roads? Most landowners prefer to keep gates locked where public trespass is a potential problem.
- Will gates and/or cattleguards be constructed where the easement crosses fence lines? Will fences be well braced before they are cut?
- Will temporary crossings be provided across open trenches or ditches?
- Is there an indemnity provision in the agreement to protect the landowner against any future lawsuits? An indemnity agreement provides that the condemnor will save and hold harmless the landowner against any legal causes of action, including environmental, levied against the landowner resulting from the condemnor’s activities both on and off the land. The indemnity would be against both judgments and any legal fees incurred by the landowner in defense of a suit.
- Do the terms of the agreement state the condemnor’s right to assign interest in the easement to a third party? If such provisions are present, some procedure to notify the landowner of such an assignment may be included. Further, the agreement should state that any assignment of rights must comply strictly with the original easement agreement and may not increase its burden.
- Do the payments coming to the landowner/land trust reflect three elements?
 - (1) payment for the easement,
 - (2) payment for damages to crops, timber or other products located within the easement

(3) payment for damages to the “remainder”

- How will the payments be divided between the landowners and the land trust?
- Is the condemnor liable for potential payment of damages for up to three years after the work is completed? If so, this will insure the land is properly filled when settling occurs, spots of erosion are carefully tended, injured trees that die later are paid for and other similar occurrences are compensated. The statute of limitations in Texas for these events is only two years unless specified in the agreement.
- Is the condemnor liable for the payment of all survey and filing fees incurred incidental to the condemnation?
- What usage can the landowner make of the surface area within the easement after the construction is completed? Generally, the landowner should be able to use the surface in any way that will not interfere with the condemnor’s activities.
- Does the price reflect the size and number of pipes or lines laid within the easement? For instance, the Oklahoma Wildlife Commission charges a set fee per rod for each pipe between one to six inches in diameter. For pipes exceeding six inches in diameter, a fixed surcharge is added. Similarly, for power lines, the Oklahoma Wildlife Commission charges a specific amount per rod for the easement, for a single pole, for a double post and per guy wire.
- Are the details of the agreement in writing? Oral agreements generally are unenforceable.
- Does the condemnor’s actual use of the easement consider the following items?
 1. Limit number of pipes or lines to be laid or placed within the easement
 2. State the maximum size of the pipes to be laid
 3. State the maximum pressure or voltage the line or lines can transmit
 4. Determine the minimum depth for buried pipelines
 5. Limit the substances the pipeline(s) can transport
 6. Determine whether additional pipes or lines can to be laid or placed in the easement without further payments or additional damages
 7. Resolve whether the original pipes or lines can be replaced without additional payments or damages
 8. Establish maintenance and inspection schedules to be followed by the utility company (some landowners prefer to maintain the easement themselves)
 9. Resolve whether above-ground facilities can be built and state their locations
 10. Determine the manner trenches or ditches will be backfilled and compacted (some landowners state that only topsoil will be used to backfill the trench and a certain extra overburden of topsoil will be maintained for a given period of time to accommodate settling)
 11. Specify how the easement will be cleaned and restored (Generally, the landowner will want the land restored to its former condition, including depth and fertility of topsoil, and vegetation/trees replanted as soon as practical after the operations cease.)
 12. Specify the type of electrical support structures to be used and identify the precise location of electrical support structures (Landowners want them in places where they may least interfere with farming or ranching operations.)

14. Limit the height of the power lines transversing the property (Landowners want them placed at heights that cause minimum interference with aerial seeding, crop-dusting or similar operations.)

15. Specify the locations of any aboveground structures such as test leads, markers and valves (Landowners want them in places where they least interfere with their operations).

Acknowledgements

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Additional Resources

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McLaughlin, Nancy A., Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation, 41 UC Davis L. Rev. 1897 (2008)

CHECKLIST TAMU Real Estate Center <https://assets.recenter.tamu.edu/documents/articles/394.pdf>