

## EMINENT DOMAIN AND PIPELINE SITING - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3007 (attached as an [appendix](#)) directs the Legislative Management to study eminent domain laws as they relate to pipeline siting. The resolution focuses on the following concerns:

- Multistate pipelines may not provide a direct benefit to this state.
- Eminent domain may be used against a property owner without the property owner's consent and places a burden on the property owner to defend the action which includes legal fees and costs.
- Eminent domain may be used to take property without consideration for the surrounding property and future uses of the property.

This resolution was approved for study at the November 3, 2011, meeting of the Legislative Management. The chairman of the Legislative Management requested the study include a review of bonding authority and liability issues for abandoned pipelines.

The legislative history reveals the impetus for the study came from the siting of the Keystone pipeline. A landowner had concerns with the negotiation procedures used by the pipeline company. The company wanted to place the pipeline 150 feet from the landowner's house and wanted the landowner to agree. The landowner wanted at least the 500-foot setback required by the siting law and was able to negotiate a 1,500-foot setback. This setback and compensation reached agreement before eminent domain proceedings. The landowner was concerned that eminent domain is used as a threat and that private landowners do not have any leverage with a pipeline company. The landowner also was concerned that the pipeline siting process was not easy to access by the landowner.

### EMINENT DOMAIN

Article I, Section 16, of the Constitution of North Dakota, relates to eminent domain:

**Private property shall not be taken or damaged for public use without just compensation** having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, unless the owner chooses annual payments as may be provided by law, irrespective of any benefit from any improvement proposed by such corporation.

**Compensation shall be ascertained by a jury, unless a jury be waived.** When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned.

For purposes of this section, **a public use or a public purpose does not include public benefits of economic development**, including an increase in tax base, tax revenues, employment, or general economic health. **Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.** (emphasis supplied)

The statutory eminent domain law is contained in North Dakota Century Code (NDCC) Chapter 32-15. Under Section 32-15-01, eminent domain is the right to take private property for public use with just compensation. Private property may not be taken for the use of a private entity unless the property is necessary for conducting a common carrier or utility business.

Under NDCC Section 32-15-05, before property can be taken it must appear that the taking is necessary for an authorized use. Under Section 49-19-12, a common pipeline carrier has the right and the power of eminent domain necessary for the construction, maintenance, or authorization of its pipeline. To have the power of eminent domain, a common pipeline carrier must accept regulation by the Public Service Commission, including the agreement to carry without discrimination and to rate regulations. Under Section 49-19-18, when a common pipeline carrier is engaged in the interstate transportation of oil, coal, or gas, the commission meets jointly with the other states involved as to control, supervision, ratemaking, and other matters.

Under NDCC Section 32-15-06, the person seeking to take land under eminent domain--the condemnor--may enter the property to survey and locate the property, but the property must be located

in the manner in which is compatible with the greatest public benefit and least private injury. Once the property is located or selected, under Section 32-15-06.1, the condemnor must make a reasonable and diligent effort to acquire the property by negotiation. The condemnor must establish an amount the condemnor believes to be just compensation for the property. The condemnor must give the landowner a copy of a written appraisal of the property, if one has been prepared, or a written statement and summary showing the basis for the amount of compensation.

Under NDCC Section 32-15-06.2, the landowner has the right to request a list of at least 10 neighboring landowners to whom offers are being made for the same project. If fewer than 10 neighboring landowners are affected, then a list of all landowners must be provided to the landowner. The landowner also has the right to examine and copy any map in the condemnor's possession showing the property affected by the project and to demand from the condemnor a list of any other landowners within the county or adjacent counties whose property must be taken for the project.

An eminent domain proceeding begins when the condemnor serves the landowner. Under NDCC Section 32-15-03, the default taking for a pipeline is an easement; however, the court has the power to order a fee simple interest. Under Section 32-15-22, the landowner has the right to be compensated for the value of property taken, including the value of any improvements to the property and additional damages. These damages include severance damages and consequential damages. Severance damages are awarded for property taken that is part of a larger parcel, and the remaining property loses value or is damaged because it is severed from the larger parcel. Consequential damages are awarded if property not taken by the condemnation is damaged by the construction of the public project.

If the condemnor is not a governmental entity, the condemnor is not allowed quick take procedure and is not allowed to take possession of the property until the amount of just compensation has been determined through the court system and that amount has been paid to the landowner or deposited with the court. Under NDCC Section 32-15-29, after a judgment, the condemnor may pay the defendant, or deposit with the court for the defendant, the full amount of the judgment and the court may authorize the plaintiff to take possession of and use of the property until final litigation.

Under NDCC Section 32-15-32, the court may award the landowner reasonable actual or statutory costs, or both, which may include interest, costs on appeal, and reasonable attorney's fees for all judicial proceedings. If the condemnor appeals and does not prevail, the costs of appeal may be taxed against the condemnor. In all cases when a new trial is granted at the request of the landowner and the landowner fails to gain greater compensation, the costs of a new

trial are taxed against the defendant. According to the Attorney General, most courts order the condemnor to pay the landowner's reasonable costs and attorney's fees associated with the trial. The court decides what is reasonable so the landowner may not be fully reimbursed for all actual costs and attorney's fees.

In short, landowners have the following rights relating to eminent domain:

1. To negotiate for condemnation.
2. To receive a copy of the appraisal or written statement and summary showing the basis of the offer.
3. To request and receive a list of neighboring property owners to whom offers have been made.
4. To ask a judge to decide whether the property the condemnor wants to take is necessary for the proposed use.
5. To have a judge or jury decide the amount of just compensation.
6. To appeal a court decision regarding public use, necessity, or just compensation and to ask for attorney's fees and costs.

## **PIPELINE SITING**

Although eminent domain and siting are fairly mutually exclusive concepts, a pipeline company must be a common carrier to be entitled to eminent domain. Not only does the pipeline company have to be a common carrier, under NDCC Section 49-22-07 a utility may not construct a pipeline or exercise the right of eminent domain without first obtaining a route permit from the Public Service Commission.

Under NDCC Chapter 49-22, the Public Service Commission sites energy conversion and transmission facilities. Under Section 49-22-03, a transmission facility means a gas or liquid transmission line capable of transporting coal, gas, liquid hydrocarbons, liquid hydrocarbon products, or carbon dioxide. However, a transmission facility is not an oil or gas pipeline gathering system, a pipeline with an outside diameter of four and one-half inches or less that will be plowed in with a power mechanism with a vertical knife or horizontally directionally drilled, or a pipeline that is less than one mile long. A gathering system includes the pipelines used to collect oil from the lease site to the first pipeline storage site where pressure is increased for further transport or pipelines used to collect gas from wells to the gas processing facility at which end-use consumer quality gas is produced.

Once the jurisdiction of the Public Service Commission is engaged in under NDCC Chapter 49-22, a utility needs a corridor and route permit from the commission under NDCC Section 49-22-07. Although corridor and route permits are contemplated as separate permits with separate applications, the applications usually are combined. The application for a corridor permit is for the general area of the pipeline, and the route is the actual physical location. Under North Dakota Administrative Code (NDAC)

Section 69-06-04-02, the width of a corridor must be at least 10 percent of its length, but not less than one mile nor greater than six miles unless otherwise determined by the commission. The application relating to the corridor permit is for a certificate or corridor compatibility. The procedure to receive these permits begins with a letter of intent from the utility to the commission followed by an application for a certificate of corridor compatibility under NDCC Section 49-22-08 and for a route under NDCC Section 49-22-08.1. The application for the corridor certificate requires information on the size and type of the facility, a summary of environmental impact studies, a statement of need, identification of preferred location, a description of merits and detriments of the identified location, a description of mitigative measures, and an evaluation as to the factors listed in NDCC Section 49-22-09 and exclusion and avoidance areas. The application for the route permit requires information on the size and type of the facility, the location of the facility, and an evaluation of the proposed route with consideration for the factors listed in NDCC Section 49-22-09 and exclusion and avoidance areas, mitigative measures for foreseen adverse impacts, a description of right-of-way preparation and construction and reclamation procedures, a statement setting forth how the utility will inform affected landowners and how the utility will compensate the landowners, and any other information required by the commission.

Under NDCC Section 49-22-09, the Public Service Commission must consider these factors when evaluating the corridor and route:

1. The effect of the facility on public health and welfare, natural resources, and the environment.
2. The effects of transmission technologies and systems designed to minimize adverse environmental effects.
3. Adverse direct and indirect environmental effects that cannot be avoided.
4. Alternatives that minimize adverse impact.
5. Irreversible and irretrievable commitments of natural resources.
6. The direct and indirect economic impacts of the proposed facility.
7. Existing plans for other developments in the vicinity of the route.
8. The effect of the proposed route on scenic areas, historic sites and structures, and paleontological and archaeological sites.
9. The effects of the route which are unique because of biological wealth or because of rare and endangered species.
10. Other problems raised by governmental entities.

Under NDCC Section 49-22-05.1, the Public Service Commission is required to develop criteria to be used in identifying exclusion and avoidance areas and to guide the corridor and route suitability evaluation and designation process. Under this

section the commission has developed rules contained in NDAC Section 69-06-08-02 relating to transmission facility corridor and route criteria. Exclusion and avoidance areas may be located within a corridor but may not encompass more than 50 percent of the corridor width unless there is no reasonable alternative. Exclusion areas must include a buffer zone of reasonable width to protect the integrity of the area. Exclusion areas include:

1. National parks, memorial parks, historical sites and landmarks, natural landmarks, monuments, and wilderness areas.
2. State parks, monuments, historical markers, archeological sites, and nature preserves.
3. County parks and recreational areas, municipal parks, and parks owned by other governmental entities.
4. Areas critical to the life stages of threatened or endangered animal or plant species.
5. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.

Avoidance areas are geographical areas that may not be used for routing unless the applicant shows there is no reasonable alternative. Again, a buffer zone of reasonable width to protect the integrity of the area must be included. Avoidance areas include:

1. National historical districts; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
2. State wild, scenic, or recreational rivers; game refuges; game management areas; management areas; forests; forest management lands; and grasslands.
3. Other historical resources.
4. Geologically unstable areas.
5. Within 500 feet of a residence, school, or place of business.
6. Reservoirs and municipal water supplies.
7. Water sources for organized rural water districts.
8. Irrigated land, but this does not apply to underground facilities.
9. Areas of recreational significance.

In addition to exclusion and avoidance areas, the Public Service Commission must look at the following impacts, and the applicant must demonstrate that any significant adverse impact will be kept to an acceptable minimum. These impacts include:

1. The impact on agriculture.
2. The impact on noise-sensitive land uses; the visual effect on the adjacent area; extractive and storage resources; wetlands, woodlands, and wooded areas; radio and television reception; human health and safety; animal health and safety; and plant life.

After notice and a public hearing, the Public Service Commission may designate a corridor and route for the proposed facility. Under NDCC Section 49-22-13, the commission must hold public hearings in the county in which the corridor or route is proposed

to be located. Under Section 49-22-16, the issuance of a permit is the sole route approval required to be obtained by the utility. A permit for the construction of a pipeline within a designated corridor may supersede and preempt any local land use, zoning, or building rules, regulations, or ordinances upon a finding by the commission that is the same or unreasonably restrictive in view of existing technology, factors of cost or economies, or needs of consumers regardless of their location. Without this finding, a route may not be designated which violates local land use, zoning, or building rules, regulations, or ordinances. In addition, the pipeline must obtain state permits required to construct and operate the pipeline and must follow the rules of any state agency.

### **CONSUMER PROTECTION PROVISIONS**

One of the expressed concerns with the present system for obtaining an agreement with a landowner is the lack of consumer protection provisions. Under NDCC Section 49-22-16.1, a person employed by a public utility may not use any harassment, threat, intimidation, misrepresentation, deception, fraud, or other unfair tactics to induce the owner of land to grant an easement. If at least five landowners are aggrieved, the landowners can bring an action in district court to find that these listed practices have happened. If the court so finds, the court shall order the easements void and the compensation returned, or that the landowner retain the compensation, or receive up to three times the compensation. The landowner is entitled to costs and reasonable attorney's fees if the court finds in the landowner's favor. If the court finds the utility knowingly allowed, encouraged, or participated in the bad acts the court shall send the opinion to the Public Service Commission. The commission may refuse to issue, revoke, or suspend the permit.

By way of comparison, in 2009 consumer protection provisions for wind easements and wind energy leases were adopted and were codified as NDCC Section 17-04-06. These provisions include:

1. A general warning as to the importance of the easement or lease.
2. Prohibiting execution for at least 10 days.
3. Prohibiting confidentiality unless in the final document.
4. Preserving the right of the property owner to continue conducting business operations as currently conducted and for the property owner to accommodate the wind energy facility.
5. Prohibiting making the property owner liable for property taxes associated with the wind energy facility.
6. Prohibiting making the property owner liable for damages caused by the wind energy facility.
7. Prohibiting making the property owner liable for violations of law by the developer, owner, or operator of a wind energy facility.

8. Allowing the property owner to terminate the agreement if the wind energy facility has not operated for a period of at least three years unless the property owner receives the normal minimal lease payments.
9. Requiring a clear statement on when payments may be withheld from the property owner.
10. Requiring that the owner of the wind energy facility carry general liability insurance and allowing the wind energy facility to add the property owner as an additional insured.

In addition, this section allows a court to reform the easement or lease in accordance with the previous requirements, void the easement or lease, or order any relief allowed by law if the terms of the easement or lease are not in accordance with the previous requirements.

### **ABANDONED PIPELINES**

Common carrier pipelines are regulated as to decommissioning under the siting jurisdiction of the Public Service Commission. As stated before, gathering pipelines are not regulated by the commission. As such, there are no requirements for bonding or filing the location of gathering pipelines at the state level. This may create an issue with an excavator who follows one-call procedures and is excavating and finds an abandoned pipeline.

Under NDCC Section 49-23-04, the excavator may not presume that the underground facility is abandoned unless the facility has been verified as abandoned by reference to installation records or by testing. A notification center is required to establish a method of providing personnel from a facility owner to inspect whether the pipeline is abandoned or inactive. In short, an inactive facility must be considered active.

In an effort to address the location of gathering pipelines, 2011 House Bill No. 1382 would have required the operator of a gas gathering pipeline to provide a map of the location of pipeline within 90 days of completion of construction to the state one-call center. Although this concept was amended out of the bill, there was committee discussion and testimony relating to the topic. Testimony indicated that because the abandoned lines are difficult to find, ground-penetrating radar across the entire corridor may be done which is extremely expensive. It was argued that it would be acceptable to ask companies to provide the location of existing abandoned infrastructure; however it was countered that, the cost burden to relocate the lines, some of which have been in place since the 1950s, would be cost-prohibitive. These lines are internally documented with engineering firms that work for oilfield companies; however, the information is not provided to a central agency. One of the proposed amendments would have placed a duty on the excavator to notify the operator or, if unknown, the one-call notification center, with the discovery of a previously unidentified underground facility.

**SUGGESTED STUDY APPROACH**

The committee may wish to determine whether the concerns that were the impetus for the study came from issues with consumer protection negotiation, eminent domain, or siting. Once the committee determines the issue to address, the committee may focus the study and seek testimony from interested parties.

ATTACH:1