

TRANSMISSION LINES, PIPELINES, RAILROADS, SOLAR and WIND FARMS THEIR EFFECT ON LAND VALUES

*Laura Harmon
Senior Counsel
Illinois Agricultural Association*



Illinois Farmland Impacted By Boom In:

- Transmission Line Projects
- Pipelines - Oil and Natural Gas
- Railroads
- Solar Farms
- Wind Farms
- Cable Lines in Road Right-of Way

Farm Managers & Appraisers Need To Know

- How Transmission Lines and Pipelines are approved, easement negotiations process and impact of these projects on Farmland
- Impact of Solar and Wind Farms and Leases on Farmland
- Valuation Issues for Cable Lines installed in Road Right-of-Ways

Clean Line Transmission Cases

➤ Rock Island Clean Line

- ICC granted RICL a certificate of public need
- 3rd District Appellate Court overruled ICC; said that ICC is not a public utility
- IL Supreme Court Accepted PLA

➤ Grain Belt Clean Line

- ICC granted GB a certificate of public need
- IAA and landowners filed appeal in the 5th District Appellate Court
- ICC Commissioners issued written Dissenting Opinion

Before You Can Construct Line Utility Must Show the ICC:

- Project will promote public convenience and is necessary
- Reliable and efficient service to its customers and is least cost means of doing so; OR
- Project will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is least cost means; and
- Capable of efficiently managing and supervising the construction process
- Intervenor can argue CPCN should be denied because project not necessary
 - RTO and Utility will provide expert testimony



ICC Grant of Eminent Domain Authority

- Utility must first have Section 8-503 Order to Construct Line

- Standard under Section 8-509:
 - Utility must show it made reasonable attempt to acquire the property (easement)

- Factors considered to determine reasonable attempts to negotiate:
 - (1) Number and extents of contracts
 - (2) Whether utility has explained its offers
 - (3) Whether offers of compensation are comparable to similarly situated
 - (4) Whether utility has made effort to address landowner's concerns (e.g., pole placement, location of line, easement terms)
 - (5) Whether further negotiations would be fruitful.



Ameren Eminent Domain Case Before ICC: Unlicensed Appraisers at Issue

- Ameren filed for Eminent Domain under 8-509 before the ICC against certain landowners impacted by 380 mile Illinois Rivers Project. Docket 14-0380
- Stock Family Interveners objected to Ameren's easement offers and claimed appraisals not valid because didn't comply with REAL Act
 - 4 unlicensed appraisers made significant contributions to appraisals signed by licensed appraisers
 - Appraisals incomplete-seed corn contracts Premium Crop vs. Commercial Crops
 - Ameren refused to modify compensation
 - Drain Tiles impacts-\$800-\$900/acre to tile a field
 - Limited access to property from public road
 - No onsite inspection or interview with property owner



Adams County Court Dismisses Ameren Condemnation Suits

- *Ameren Transmission v. Breckenkamp Farms*; 8th Judicial Circuit, Adams County (Dec. 5, 2014)
- Ameren failed to include appraisal with its offer and failed to disclose the appraisal after it filed Condemnation suit and landowners filed Traverse and Motion to Dismiss.
- Ameren objected to Defendant Landowners examining the appraisals and failed to present any evidence as to the basis, methodology and foundation for them.
- Court Held: Ameren had some burden, in the face of the Traverse and Motions to Dismiss, to present some direct, non conclusory evidence support the basis and methodology of the appraisals and allow the Defendant Landowners the opportunity to question or challenge those appraisals.
- Failure to provide minimal evidence or the opportunity for examination of the appraisals precludes finding of good faith negotiations, Court granted Defendant Landowners Motions to Dismiss.



Methodology Behind Compensation Offers

- Ameren offering 100% of Fee Value for Easement Strip
- Easement Calculation Form
 - Damage to the Remainder
 - Crop Loss - 3 years for entire easement area paid over 5 years
- Factors: Size, Shape, Zoning, and Physical characteristics compared to Market Data
 - Location of easement on property
 - Impact of easement on subsurface, surface, and air rights
 - Soil quality - prime farmland
- Effect on Market Value of Property with Easement vs. No Easement = 90% of Fee value + 10% signing bonus

ICC: Must Include Damage To The Remainder

- Measure of damage to remainder of property not taken is depreciation in FMV caused by the disturbance
- ICC makes Ameren modify Easement Valuation Forms to include line item for damage to the remainder
 - Livestock Operations
 - Future expansion
 - Irrigation
 - Increased costs

Negotiating An Easement

1. Follow the Project's status before the ICC
2. Review ALMA and incorporate into Easement
3. Determine compatibility of transmission line with farming operations, mineral leases (or interests), federal floodplain easements
4. Negotiate terms of transmission line easement. Do NOT sign their standard easement-it is one-sided and doesn't address farm land owner concerns

Checklist of Farmland Issues to Address

- Scope of agreement.
 - Limit scope to 1 345kV electric transmission line, and 150 ROW and include legal description where ROW is
 - Limit access rights-designate where access line
 - Limit telecommunications so can't install commercial cable lines
- Reserve all other rights to landowner.
- Limit land subject to easement.
 - Don't grant unlimited access to all adjoining lands.
- Mitigate damages to operations due to construction and maintenance of the line.
 - Drainage tile and irrigation systems.
 - Soil compaction, rutting, fertilization.
 - Construction debris, tree and brush clearing.
 - Soil erosion, weed control.
 - Agricultural inspector.

Note: Need to incorporate AIMA into the easement in order to enforce its provisions.



[Checklist, Cont.]

- Indemnification and hold harmless
- Insurance
- Compensation
 - Temporary easement: construction damages, crop loss, restoration
 - Permanent easement: FMV of land permanently taken out of production, Damage to the Remainder
 - Other Damages: increased cost to farming operations, impact irrigation, loss of right to exploit mineral interests, breach of conservation easement

Pipeline Approval and Easement Negotiations

- ICC Process-Similar to Transmission Lines
- Pipeline seeks Common Carrier Status under 15-401 of the Illinois Public Utility Act
- Hearing process similar, but Pipeline usually files for Eminent Domain Authority when they file petition to construct the pipeline
 - Negotiate Pipeline Route before file case
 - Blanket Easements or Multi-Line Easements allow Multiple Pipelines
- ICC usually grants Eminent Domain unless Pipeline Company not negotiating in good faith
- Enbridge Southern Access Line: 07-0446 granted Common Carrier but not ED
- Enbridge Southern Access ED Case 13-0446 - ICC finally granted ED landowners appealed. 4th District Affirmed on Appeal



Negotiating Pipeline Easements

- Bargaining power – does pipeline have Eminent Domain authority from ICC?
 - Does pipeline have blanket or multi-line easement?
 - Compensation – typically 100% + for easement
 - Crop loss over 5 year period
 - Construction process causes greater impact to farmland:
 - Soil compaction, mixing
 - Damage to drain tiles
 - AIMA should be incorporated into easement
 - Require Agricultural Inspector or farmer/agent to monitor and supervise installation of pipeline and be compensated
 - Limit rights to relocate or install additional pipelines of structures

AIMA: Agricultural Impact Mitigation Agreement

- Illinois Department of Agriculture and Pipeline Company entered into AIMA-incorporate into easement to landowner can enforce restoration and construction standards
- Soil Management and Replacement
- Repair of Drain Tile Lines
- Mitigation of Soil Rutting and Compaction
- Fertilization of disturbed soils and Repair Conservation Practices
- Tree removal and compensation
- Agricultural Inspector



HB2532 Amend Eminent Domain Act

- Amends Section 10-5-5 of the Eminent Domain Act to provide that if Jury trial requested in Condemnation action, the Condemning Authority may not take possession of the property before a determination of Just Compensation by a Jury.
- Legislative Fix to 4th District Appellate Court's decision in Enbridge v. Troyer which upheld McLean County Trial Court Order allowing Enbridge access to the property to construct pipeline prior to hearing and award of just compensation. Illinois Eminent Domain Act does not allow quick take for public utilities such as pipelines and transmission lines. Enbridge decision contrary to Eminent Domain Act.



New Pipeline Projects

- SPIRE Natural Gas Pipeline proposed in Scott, Greene and Jersey Counties will be heard by FERC and subject to Federal Eminent Domain Law
- Centennial Extension LP/Natural Gas Pipeline proposed for Effingham, Jasper and Crawford Counties
- Enbridge Line 62 Twin-approaching landowners in WI, but not IL

Eminent Domain Under the Natural Gas Act

- Section 7(h) of the Natural Gas Act (NGA) grants the right of eminent domain when a certificate of public convenience and necessity is issued by the Commission under section 7(c) of the NGA.
- To condemn property, company must show:
 - (1) it has a CPCN from FERC;
 - (2) land to be taken is necessary for the project; and
 - (3) company was unable to acquire property through negotiation
- Company can file condemnation in Federal or State Court if property value \$3,000 or more
- Companies favor Federal Court Condemnation Actions
- Company must choose State or Federal Court - can't



Eminent Domain Under the Natural Gas Act (con't)

- Where: Federal District Court where property to be condemned is located
 - Central District: Scott and Greene Counties
 - Southern District: Jersey County

- Federal Condemnation Procedure:
 - No right to jury trial;
 - Join all landowners in a single action;
 - Court can appoint 3 person commission to determine amount of compensation; and
 - Quick Take allowed and \$\$ deposited into Court

- Court determines if property to be taken is within scope of the FERC CPCN and if so, the amount of compensation due to the landowner

Eminent Domain Under the Natural Gas Act (con't)

- Federal law applies to determining amount of compensation
 - Highest and best use of the property and FMV of the property before the pipeline easement vs. highest and best use of and FMV of property after the pipeline easement
 - Just compensation = FMV before - FMV after the easement
 - Damages for Crop Loss
 - Damage to the Remainder
 - Temporary Construction Easement

- No requirement in Federal Rules that company negotiate in good faith prior to filing condemnation action, but N.D. Illinois recognized “judicial gloss” that company must engage in good faith negotiations before filing eminent domain
 - Courts have held that 1 offer is sufficient

- Company may file condemnation action even though FERC CPCN is on rehearing or on appeal in court



Great Lakes Basin Railroad

- Retired Entrepreneur Frank Patton filed a Notice of Intent to File an Application or Exemption with the STB to construct a 280-mile rail line and 15,000 acre railport around Chicago from IN through Kankakee, Grundy, LaSalle, Lee, Ogle, Winnebago and Boone Counties in IL into WI
- STB must approve a proposal to construct or operate a rail line unless STB finds that such activities are inconsistent with the Public Convenience and Necessity 49 U.S.C. 10901(c)
 - STB weighs the transportation need/benefits against harm
 - Is there a public demand or need for the proposed service?
 - Is the applicant financially able to construct and provide rail service?
 - Is the proposal in public interest and won't unduly harm existing services?
- Applicant may seek exemption from full application process under 49 U.S.C. 10502 which STB must grant if:
 - Procedures not necessary to carry out rail transportation policy; and either
 - The proposed project is of limited scope, or
 - Full Application procedures are not necessary to protect shippers from an abuse of market power



Great Lakes Basin Railroad

- STB Pre-Scoping Public Comment period under NEPA EIS review ended June 20, 2016
- GLBT proposed new route after close of public comment
- Illinois Farm Bureau and many stakeholders request STB re-open public comment period
- GLBT asks STB to temporarily halt EIS review while it prepares Application
- STB grants GLBT's request and requests for additional public comment as part of pre-scoping EIS
- GLBT to provide status update to STB by February 28, 2017



Great Lakes Basin Railroad

- GLBT will be a toll railroad but no class 1 railroad supports or indicates they will use it
- GLBT fails to support why it needs 15,000 acres for Kankakee County Railport-largest railport in US 3,000 acres
- GLBT requests STB approve 50 ft of 200 ft ROW for future use for utilities-not related to railroad and exceeds scope of STB authority



SB 1388 and HB 2557

- Amends Illinois Highway Code to give “communications providers” the right to install cable lines with road ROW’s without obtaining an easement or compensating the landowner for the use of the ROW
- Illinois Farm Bureau opposes SB 1388 and HB 2557 because allows communications providers to trespass and deprives landowner of right of compensation for the use of his/her property
 - *Ruud v. McLeod-SJ* granted in favor of landowner for ejectment and intentional trespass against cable company who installed line in ROW without consent
- FMV of ROW: Value of Utility Easement



New Interest in Commercial Solar Farms

- Federal Investment Tax Credit renewed and extended through 2021
- 30% Tax Credit through 2019
- Steps down to 26% and 22% in 2020 and 2021
- All projects must be completed by 2024 to qualify
- Solar Energy Development Activities in Northern Illinois but moving South
- Cypress Creek Renewables offering \$800-\$1200/acre
 - Lease Agreement is grossly one-sided and should be revised to protect landowners interests



Solar Property Access Agreement

- Agent Authorization Form
- Authorizes state and federal employees, and all entities under contract with developer to perform site assessments, site verifications, and permitting exercises on the entire property
- Too broad in scope and no provisions for property damage or crop loss
- Revise agreement to limit the type of activities and define what those are
 - Include terms on when and where they can perform activities
 - Include provision providing for crop loss and any other damages
 - Include provision providing compensation for access to perform these activities



General Provisions and Considerations

- Broad grant of powers:
 - typically exclusive right to construct and install facilities
 - excavating, grading, leveling, roads, foundations, transmission lines, substations, etc.

- How will this interfere with your farming operations on adjacent acreage?
 - Crop protection?
 - Ability to plant trees or build structures?
 - Burning?
 - CRP?
 - Development of mineral interests?

- Negotiate limits to powers granted to developer so you can continue current farming operations and negotiate compensation for impact on current and future operations

Lease Provisions

- Legal description of the land subject to the Agreement (¶12)
 - What is the site plan? What other facilities will need to be installed?
 - Transmission lines, access roads, etc.
 - Limited to land needed for operation of solar farm – not entire parcel
 - Rent is based upon Acreage used for Solar farm footprint –not your entire parcel
 - Landowner input on the siting; ask company to take commercially “reasonable” or “feasible” suggestions
 - Need Solar lease boundary line before

Easement Agreements

➤ Construction, Access and Transmission

- Developer access for construction; travel across your property to construct and operate farm -- ¶12
- Consider water use requirements; ask the company about water access
- 16,000 gallons/MW annually

➤ Sun obstruction

- Agree not to do anything that may interfere with sunlight -- ¶24(a)
- Dust from adjacent farming operations?
- Particulates? What about spraying?
- Agree to remove existing uses or improvements on any property adjacent to the premises which Developer determines will impair the use of your property

➤ Interference -- ¶120

- Agree to allow glare, noise, flicker, electromagnetic, or any other effects from the solar farm

➤ Includes an easement over adjacent property!!! --¶120; 24(a)



Easement Agreement: Grant Multiple Easements in Paragraph 20

- Grant Easements for Light, Solar Energy Resources, Access, Utility Access over all property adjacent to or in the vicinity of the Premises
 - Don't grant ridiculously broad easements-including those to 3rd parties that aren't a party to the agreement for all of your property-adjacent or in the vicinity of the Solar Farm footprint.
- Grants Easement for any and all Encroachments of Tenants property onto your Adjacent property
- Grant Easements over, under and across your Adjacent Property for audio, visual, view, light, flicker, noise, vibration, and any other effects attributable to the intended use of the premises
- Agree to sign and deliver any separate easement agreements for the Developer or the Utility which the Solar Farm connects to the grid



Continued Interest in Wind

- **Congress Extended Production/Investment Tax Credit for Wind Farms**
 - Projects that began construction in 2016 were eligible for 2.3% PTC
 - Beginning in 2017-20% annual step-down in PTC
- **WIND AIMA Legislation enacted in 2015**
- **Requires wind developers to sign Agricultural Impact Mitigation Agreements (AIMA) with the Illinois Department of Agriculture (IDOA)**
- **Minimum restoration standards for agricultural land impacted by construction or deconstruction**
 - Minimum decommissioning standards and financial protections

<https://www.agr.state.il.us/aima>



Wind Farm Leases

- Similar issues with Solar Farm Leases
- Revise Lease terms to protect landowners interests
- Determine how turbine could interfere with farming operations and work to minimize impacts
- Negotiate Agreed upon wind facilities site plan to give landowner ability to review plan and agree to location of wind facilities on his/her property
- Incorporate AIMA into Lease
- Avoid broad grant of rights to developer: retain rights necessary to continue farming operations

QUESTIONS?

