

Testimony
of
Ernie Torrez
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On
Eminent domain
Before the
New Mexico House Interim Water & Natural Resources Committee
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Farmington, New Mexico

Chairman McQueen and members of the Committee, my name is Ernie Torrez. I am a 14th generation in La Jara, New Mexico. I am a member of the New Mexico Cattle Growers' Association currently serving as Water Committee Chairman and am a past Northwest Regional Vice President.

I come before you today to discuss the issue of **eminent domain**, an issue that plagues private property owners across the state.

In the New Mexico Constitution, Article II, Section 20, states "*Private property shall not be taken or damaged for public use without just compensation.*"

The Legislature provides for the power of Eminent domain to "*Associations organized under Chapter 3, Article 28 NMSA 1978 shall have the power of **eminent domain**, as provided by law, except the power of **eminent domain** shall not be used to acquire any plant or system or extension thereof described in a certificate of public convenience and necessity, or any interest therein, owned or operated by an entity that is regulated by the New Mexico public utility commission or the federal energy regulatory commission or their successors.*" (3-28-19. **Eminent domain**)

State statutes grant the power of eminent domain to Municipalities, Historic Districts and Landmarks, Electric Utilities, Gas Utilities, Water or Natural Gas Associations. All of these entities are considered "for the public good." Large transmission lines do not fall into this category, but the New Mexico legislature has given them the ability to condemn private property through RETA. There is no doubt that in today's world there is need for power and water for the masses.

The rub comes when the "public good" intersects with private property rights and just compensation as required by the Constitution. Groups with the power of eminent are in the business of acquiring rights-a-way at the least cost. While these groups are "public" they are still in the business of making money and reducing their own costs.

Eminent domain isn't even a take it or leave it proposition. Under the power of eminent domain, landowners have only one option of taking what's offered or fighting the taking through the courts. Either way, the land owners lose.

The only "fight" within the jurisdiction of the court is whether the project is in the "public benefit" but this fight is severely limited by state statute. The second issue the courts will consider is the "fair compensation" paid.

Thus, issues like landowner liability to the condemnor, reclamation of the private lands taken, width of the easements and others cannot be challenged and the landowners is mandated to take with the condemnor offers. If the court happens to rule in their favor on the public interest issue, they have depleted their financial resources in the courts. The issue with regard to the compensation is simply one of the amount per acre of payment (at ag value, not industrial value even though the property will now have an industrial use) and the landowner loses his property anyway.

The other issues are not even addressed. This clearly and unequivocally puts the landowner in a far detrimental position in negotiating under the threat of condemnation.

I have included as an exhibit a generic agreement that is currently being used for a power line. While the agreement states clearly at the bottom of the first page that the agreement is being made under the threat of eminent domain, the entity does not have eminent domain powers at the present time. That must be reviewed by the Public Regulation Commission (PRC) and then the New Mexico Renewable Energy Transmission Authority (RETA) before any power is granted. The issue currently sits before the PRC.

Mind you that this transmission line will not even provide power for New Mexicans. The power will be generated on the East Side of New Mexico and will be transmitted to Arizona and California. Landowners on the East Side will be helped greatly by the income generated from the wind on their property. They receive an initial payment and then are paid by the kilo watt hour for the duration of the contract.

Unfortunately the folks that the transmission lines are crossing only get a one-time, least cost payment. The entire situation pits neighbor against neighbor.

Given that all is fair in love and war, when easements are being acquired there is no transparency in what is being offered to each individual --- and each individual is told that the neighbor has already taken the same amount. A statement that may not always be true. With the threat of eminent domain often landowners settle for less than they might have made.

Some of the most egregious items in the agreement include the fact that although there is a projected location of the line, the agreement allows the line to be placed anywhere on the property. We have learned that the folks determining the path of the line have never set foot on the ground. They are using only modeling.

In one instance the line goes right down the middle of the headquarters of the ranch splitting houses, barns and corrals.

The agreement places a tremendous amount of liability on the landowner. This is liability that there is no way to insure against. If the ranchers or an employee causes harm to the line, likely the ranch will be lost.

On the other hand, if a fire starts due to the transmission line, the rancher will have to sue the company's limited liability holding company to be compensated for the full loss of the fire. That fire would not have happened had there not been a transmission line.

The 35-page agreement is filled with terms that apply only to wind farms, further confusing the issue for landowners dealing with transmission lines.

If livestock are lost due to the transmission line, the company is liable only for the replacement cost of the animal plus reasonable transactions costs. There is no definition of those transaction costs, so how would anyone claim them?

The full cost of replacement is much greater than what a like animal might be purchased for on any day. What was the genetic value of the animal? What was the economic value of future production of the animal? Can a replacement be bought that knows the country? Did a cow have a calf that has to be bottle raised? There are many more considerations.]

Then there is the just plain silly. The agreement says that no family member of the landowner may ever work for the county.

There is much more, but it would take too much time to list.

So, is there a solution? Not really unless we can work on federal law to change the way there payments are made. It would be much fairer if payments were made over the life of the transmission line to compensate for the ongoing loss of land production. Maybe some sort of

royalty payment over the life of the line or a fee per kilo watt hour, as the wind farmers are paid.

The only thing that landowners in New Mexico can do today is to develop that best possible agreement possible, which will likely take the advice (costly advice) of an attorney.

There are folks in Wyoming working on the process proposing minimum statutory standards for easements e.g. unless specified otherwise, the easement is 100 feet, no more than 2 lines per easement unless by agreement of the landowner, and land to be reclaimed to substantially the same condition as prior to the use. This may be useful legislation for the 2019 Legislature.

Neither the New Mexico Cattle Growers' Association nor I are in the business of offering legal advice, but here are some considerations of what might be included in that agreement:

- In negotiations make sure the change of use from agricultural to industrial land is recognized when valuing land to be taken
- Make sure everything in the agreement is specific to the exact property location that is to be taken
- If a change of location is necessary the project is responsible for providing all additional documents for the change. The change can be no more than 50 feet in any direction from the agreed upon location without prior permission of the landowner
- Make sure that the land to be taken can be used only for the specific purpose of the project
- Make sure cost of damages from fire and other causes are to be paid by the project with need for litigation
- No refunds from the landowner if the project is not complete
- Absolve landowner of any and all liability from unintentional damage to the project and other liabilities

Thank you for your time and I stand for questions.