



# Considerations In Negotiating An Easement

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## FOREWORD

Energy developments will continue to create land-related legal problems for many North Dakota residents. A limited number will have to consider how their coal and oil rights will be leased. However, many other landowners will be negotiating easements for pipelines and powerlines that will cross their property.

What is an easement? Usually, when property is purchased, the entire bundle of rights is included. However, these rights can be separated from each other and acquired individually in the form of an easement with the remaining rights to be kept by the landowner. Thus, an easement is a mutual agreement whereby a landowner allows an individual, agency or company to make limited use of a portion of his land for a special purpose. Typical easements exist where roads cross private lands, powerlines are strung, or pipelines are laid.

Easements involve a number of considerations to insure that the landowner is treated fairly. The following article by Douglas Marshall effectively outlines many of these important considerations.

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Marshall's article appeared in the *Journal of the American Society of Farm Managers and Rural Appraisers* (Volume 38-1, April, 1974).

You may be asked for an easement someday. How will you negotiate the easement? — by taking what is offered you in a short and simple instrument, or will you be well informed on procedure and what you should and should not do in having the easement contract written on matters that will affect you now and in the future?

Experience shows that few land owners, especially farmers or farm managers are aware of methods to protect their rights. Few farmers or farm managers will employ a competent attorney to protect their rights in their land, but rather they tend to employ them to gain back their rights after the fact. There are some "do's" and "don'ts" in drawing up an easement that will protect both the land owner and the grantee, and are virtually certain to assure fairness in settling for the right to cross one's land and the damages caused.

Most easements are drawn by the taker, who makes them as short and simple as they can get by with. Most easements are fair and trouble free, but such is not always the case. Often certain localities cause more trouble than others, or certain landmen are less careful of their public image of the employing firm.

The fact that you are unwilling to sell an easement is not a valid reason to keep this easement from being acquired. Best results are obtained when the utility or transmission company has a courteous and agriculturally informed landman, and a careful and concerned construction foreman. A smart aleck causes more trouble than he is ever worth in savings to the company acquiring the easement. A poorly informed, discourteous, bullish landman causes public relation problems. So does a construction crew that is disrespectful of the landowner's rights.

Some of the "do" items to assist you in obtaining a fair and equitable easement agreement are:

### Keep Adequate Records

1. Keep a diary of every day involved, such as conversations between yourself and the landman. Keep dates and hours of occurrences; keep a detailed account of construction progress on your farm, the day and hour the crew first entered, and what work they performed; take pictures of what they destroyed before and after, and how they left the surface. Keep dates and hours of work you performed to get the land back into shape. Take pictures before you restore the surface; pictures of the equipment you used and of it in action. Keep a log of the hour of the day your equipment worked and finished. Keep a log of the labor and labor value involved, and the name of the laborer.

2. Keep yield records of the easement involved and yield records on the remainder of the farm. Harvest and weigh separately the yield on the easement for comparative purposes. This is a great inconvenience in harvesting, but very important that there be some provable records of differences in yield, if any, and in the income.

Have complete and accurate records to back up your claims. If condemnations proceedings are initiated the landowner cannot then recover damages to crops or to the land per se. The market value of the land taken by condemnation is the only litigious issue.

### Provisions for Damages

3. Make provisions in the written agreement for the payment of crop losses or differences on the easement versus the

undisturbed land for at least three years, payable one year at a time as they occur. Usually the law will be that all present and future damages are to be paid for in one lump sum at one time, unless specified otherwise.

4. Make provisions for the surface to be restored to its original state or to your specifications for at least a three-year period. Land tends to sink and become uneven after a disturbance.

5. State that the ditch, if it is a pipeline easement, is to be double cut and the soil separated (top soil on one side of the ditch and the subsoil on the other side of the ditch) and that it be restored in the same order of removal.

6. Some advisors want the season of the year for construction to be specified, but this is not practical or generally possible. You might be the only landowner holding up a major construction process, and since eminent domain is for the good of the general public, your individual wishes on this matter will not have much, if any, weight.

#### Employ Competent Attorney

7. Employ a *competent* attorney who is an experienced easement specialist to advise you on your agreement *before* you sign. This will usually not be the local or hometown family lawyer.

#### Insist on Specifics

8. Have the contract provide for future damages, infinitum, as well as for the near present damages. Have the exact size of the pipeline, road, telephone, or electric line specified. Mere promissory statements of future intentions by the condemnor are invalid in court. You can agree to a future damage clause in an easement contract when negotiated privately instead of settling the matter in court.

9. State the exact surveyed location of the easement; its width and length. Sometimes a contract will call for a temporary wide easement for construction that reverts to a smaller width after construction.

10. State that only one such utility can be constructed within the easement, and that it is not a multiple use easement.

11. State what product can be transferred through a pipeline easement, such as oil, gas, water, ammonia, chemicals, or other products. State the maximum pumping pressure. If it is an electric transmission line, have the instrument state the maximum voltage.

12. State if the line can be altered, removed, or repaired without the company being liable for crop and surface damages for each occasion of alteration, removal, or repair.

13. State if appurtenances may be erected, whether now or in the future, and their location.

14. State if buildings are permitted on the easement, and whether it can be farmed or grazed, and if it is to be fenced.

15. State if trees and undergrowth can be cleared, and the disposition of same.

16. State the minimum depth the pipeline is to be buried. Usually 36 inches is very satisfactory.

17. State if the construction debris is to be removed and the surface restored to its original condition, and by whom. If it is to be a waterpacked ditch, state who is to furnish the water and who is to actually perform same.

18. State if the grassland is to be reseeded, by whom, and at whose expense.

19. State the area of ingress and egress. Usually by easement only, or by established roads. Do not give a blanket ingress and egress.

#### Other Considerations

20. Talk to other landowners in the immediate area to compare if all are getting the same price per acre or unit, and is it a fair and equitable offer of payment. The easement is not for your benefit; therefore, it should not be any expense to you.

Have the company pay for all survey fees, filing fees of the easement, penalty for mortgage prepayment, a fair price for the improvements that are damaged, destroyed, or altered, and for damage or inconvenience to the remaining farming operation. The landowner has the right to recover for all causes that affect the market value of the easement in one action.

21. Maintain your position, but be courteous and reasonable. With proof to back up your claims, a jury is more likely to be convinced.

22. Hire a *competent* rural land appraiser, one experienced in condemnations and with a reputation of unbiased competence. His services may seem high, but a competent appraiser is your best aid in receiving a fair settlement, and he will also be your expert witness in the event you cannot agree on the easement terms and the matter goes to court for settlement.

#### Some "Don't" Considerations

1. Do not withdraw the special commission award. By doing so the courts may recognize it as a consent to the taking of the easement on the terms of the condemnor, and you then may not complain on trial that the appellant had no right to take the easement; thus the only litigious issue is just compensation for the land taken plus the diminution, if any, in the value of the remainder of the farm. In other words, you forfeit all your right to complain and to expect payment for damages to crops, buildings, or surface, if you withdraw the award. The award will be placed in escrow and earn interest.

2. Don't "bug" or threaten the construction crew. They are only employees of the company.

3. Don't keep company appraisers off your land.

4. Don't guess at anything: measure, weigh, keep records of time and labor charges, and snapshots of anything applicable, and details of anything you expect to recover. All claims must have proof, not just a value grabbed out of the air because that is what you want to settle. If the acquisition of an easement on your land is obtained through the condemnation process, it likely will be several years before coming to trial. It is impossible to remember accurately conversations, offers, crop conditions, weather conditions, yields, prices of commodities, and other pertinent facts. Records taken at the time of occurrence are your proof.