Indiana Farm Bureau®

Landowner Toolkit

Utility Line Easements – Landowner's Rights

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With its vast agricultural landscape, electrical utilities installing transmission lines in Indiana naturally look to farmland for right-of-way. These utilities acquire easements in order to survey, construct, operate, and maintain their lines over a landowner's property. Seemingly, the sale of easements generates easy income for Indiana's farmers. However, farmers may come to regret granting an easement to a utility if they fail to consider the following points during negotiation of an agreement.

Scope.

- Easement agreements should specify the types, number, and size of permanent and temporary structures that may be constructed by the utility, which may include poles, foundations, concrete pads and footings, guy wires, fences, electrical transmission towers and lines (above or below ground), substations, storage structures, and access roads.

- Agreements should also state whether the utility may add or replace lines over time and whether the easement is exclusive to the named utility.

Location.

- The legal description should be fully described and checked for accuracy.

- Electrical transmission line easements (which may be 200 feet in width as opposed to a 60 foot wide distribution line easement), should not interfere with planned use of existing structures and land.

- Will the easement interfere with access to the property?

- Where and how will agents and employees of the utility access the easement for construction and maintenance? The utility should not use any lands beyond the boundaries of the easement for any purpose, including ingress to and egress from the right-of-way, without the written consent of the landowner, which should be in the form of a separate easement.

- Is the easement set back a sufficient distance from farming operations and property lines?

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[1] *This checklist was prepared for the Indiana Agricultural Law Foundation, Inc. by James R. Schrier of REILING TEDER & SCHRIER, LLC, 250 Main Street, Suite 601, Lafayette, IN 47902-0280; (765) 423-5333; jrs@rtslawfirm.com. The information in this checklist should not be construed as legal advice.*

- Will the easement location cause privacy or safety issues with the farmer's use of the land?

- Consider working with surrounding landowners to propose the most favorable placement of towers.

Compensation.

- Compensation should take into consideration the market value of the land plus the impact on future value of the farm as a whole, as well as damages to the property, increases in insurance premiums, and interference with farming operations as a result of the utility's activities and placement of electric line structures.

- Costs for which landowners may seek compensation include replacement of fencing, ditches, crops, trees, and damage to the land and structures caused by the utility.

- In negotiating compensation for an easement, also consider the potential changes in land use resulting from the installation of transmission lines (e.g., farming, hunting, irrigation, and recreation) and aesthetic changes.

- How will the compensation be paid? (Generally, transmission line easements provide for a one-time payment. However, a landowner may elect to receive annual payments with interest if the utility acquires the easement by eminent domain proceedings.)

- If a utility uses its power of eminent domain to obtain the easement, appraisers will determine compensation if the landowner rejects the utility's offer to purchase the easement.

- Are there potential tax consequences to the sale of the easement that could effectively reduce the amount of compensation realized by the landowner?

Landowner's Rights.

- Does the easement place any restrictions upon the farmer's use of the land within the easement? Will there be limitations on farming, irrigation, surface or sub-surface drainage, or spraying within the easement?

- May the landowner grant easements to others over the same area (a "nonexclusive easement")?

- The landowner should reserve any rights that are unique to his land, such as the right to conduct farming, recreational, or agricultural activities and to market mineral, oil, gas, or other natural resources.

- The landowner should retain the right to all timber, trees and firewood and specifically provide that the utility has the obligation to remove all unwanted brush and wood.

Obligations of Utility.

- What will be required to reclaim the property affected by construction? Who will conduct reclamation activities? How will compaction damages be remediated? Compensated?

- The original contour of the land should be restored. Slopes, contours and waterways should be restored to their original condition.

- Who will maintain the area within the easement? Schedules and responsibilities for activities such as cutting grass and weed control may be included.

- The agreement may provide for installation of a suitable ground cover where appropriate.

- Will excavated soil be removed or made available for use elsewhere on the property? The landowner may want to ensure that the top soil is stripped, piled and replaced upon completion of the operation.

- What trees, waterways, drain tiles, water lines, or other permanent features must the utility preserve?

- If water lines or drain tiles are damaged, the utility must immediately implement temporary measures necessary to provide drainage or water until repairs are completed. An extended time period for repairs to drainage tiles should be considered since the damage may not be evident for months or years.

- If livestock are displaced during construction, what arrangements will be made? What measures will be taken to protect livestock remaining on the property (e.g., cattle guards, fences, gates)?

- Utilities should agree to keep the property free from any liens, such as mechanic's liens, and to not use the property as security or collateral.

- Utilities must comply with all federal, state and local law and regulations and obtain any necessary permits for construction and operation of transmission lines.

- Proper use, storage, and disposal of construction materials, including any hazardous substances, must be ensured.

- The utility should be required to clear all debris and remove stones and rocks resulting from the construction activities.

- A landowner may limit access to the easement by requiring that notice be given before entry.

- The utility should employ all reasonable measures to ensure that the landowner's satellite, GPS, television and radio reception and transmission are not adversely affected by the high-voltage transmission lines.

Taxes and Utilities.

- Taxes – such as personal or real estate taxes – which increase as a result of the improvements constructed by the utility, should be the responsibility of the utility.

- Any utilities consumed during the utility's activities should also be the utility's responsibility. If the utility uses any water, electricity, or other service in the landowner's name, reimbursement should be required.

Assignment.

- Typically, the utility will include a provision allowing it to assign its rights in the easement to another party without the landowners' consent. To protect against overdevelopment of the easement, the scope of the easement may be limited to installation of a specified number of electrical transmission lines only.

- The landowner may ask to include a provision in the easement agreement requiring the utility to provide prior written notice of any assignments, including the name, address and phone number of the assignee.

Indemnification.

- Indemnification or "hold harmless" provisions may require that the utility is responsible for any costs associated with the construction or operation of its transmission line, including claims (such as stray voltage lawsuits) against the landowner by third parties such as neighbors or creditors.

- The utility may agree to indemnify the landowner for any attorney's fees incurred in the event of the utility's breach of the easement agreement.

- Indemnification by the utility should include any environmental hazards. Leaking petroleum products from large construction equipment could result in significant soil remediation.

- The landowner should not be responsible for any injury to persons or property caused by the design, construction or upkeep of the high-voltage transmission lines or towers.

- Landowners should use caution if the utility seeks indemnification for costs or damages resulting from the actions of the landowner's tenants or guests. Before agreeing to such a provision, the landowner should confirm that such liability is covered by insurance.

Insurance.

- The easement should require that the utility maintain liability insurance in the amount of at least one million dollars covering all of its activities on the property, naming the landowner as an additional insured.

- The utility should provide proof of insurance to the landowner annually of a policy that cannot be cancelled without at least 30 days written notice to landowner.

- The utility should reimburse the landowner for any premium increases resulting from the presence of the transmission line or related structures on the property.

Eminent Domain.

- Electrical utilities whose offer to purchase an easement is declined by the landowner generally have the right of eminent domain (condemnation) to take the easement through procedures outlined in the Indiana Code.

- Court-appointed appraisers will determine the fair market value of the affected property, including improvements, as well as damages to the remaining property and to the landowner resulting from the taking.

- The landowner and utility are entitled to take exception to the appraiser's award, in which case the matter is tried in court.

- Eminent domain may be preferable to signing an easement agreement with onerous terms.

Default and Termination.

- If the utility fails to pay the landowner or otherwise comply with the terms of the easement agreement, the landowner should be entitled under the agreement to recover damages, and possibly terminate the easement.

- Absent default, the typical easement continues indefinitely unless it is abandoned by the utility. Consideration should be given to providing that the abandonment of the easement for electric lines results in immediate vacation of the easement such that it cannot be used by other utilities.

- The easement should provide that upon termination, the utility must remove all structures and equipment from the property within a specified time. Again, the utility should be responsible for payment of damages to the property and the landowner's operations as a result of the removal. The landowner may want to provide that it obtains a security interest in the structures to secure the payment of any such damages.

- A suitable document terminating the agreement should be recorded by the utility.

Miscellaneous.

- Landowners should be sure to inform farm tenants of the easement agreement and its effect on them. Agreements between landowners and farm tenants may need to be modified to reflect changes caused by the easement. In some situations, the damages may need to be allocated between the landowner and the tenant.

- Landowners need to use caution in giving, and be aware of laws allowing, the utility the right to remove "hazards," such as trees, which are located outside the easement area.

- Landowners should also consult with their local FSA office to determine whether prior approval of the easement is required. Otherwise, the landowner runs the risk of losing payments under USDA programs.

- Landowners' interests are best protected when an attorney experienced in real estate and agricultural matters is consulted prior to agreeing to a proposed easement.

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