



Power project brings land condemnation issues to light

BY C. MICHAEL MONTGOMERY AND
JAMES K. SPIVEY

As many San Antonians have long known, the Texas Hill Country is one of the true jewels of Texas. With its rolling hills and pristine pastures, the Hill Country is a favorite weekend getaway spot and home to ranches that have been in Texas families for generations.

However, large portions of this unique area may be impacted by one of the largest electric transmission line projects that Texas has ever seen. Those transmission lines are being erected as part of the Competitive Renewable Energy Zone (CREZ) Project in the state.

CREZ zones were designated by state authorities as areas in Texas where both the renewable resources were optimal and land areas were sufficient to generate power from renewable energy.

The CREZ Project is vast and will require the taking of easements across private land for public use.

In connection with the CREZ Project, the Lower Colorado River Authority (LCRA) and Oncor Energy of Dallas have been granted condemnation authority by the Texas Public Utility Commission (PUC) to condemn easements across the Texas Hill Country to build high-voltage electric transmission lines. According to the Web sites of the LCRA and Oncor, easements up to 160 feet wide are needed to construct and maintain 345 kilowatt transmission lines and towers. Towers of this size are relatively new to the Hill Country landscape, dwarfing the typical wood H-frame utility towers, and standing up to 180 feet tall. These authorities will be seeking to acquire hundreds of miles of right-of-way easements through the Hill Country.

Understandably, communities throughout the Texas Hill Country are concerned by the CREZ Project. In some parts of the Hill Country, landowners have successfully challenged or delayed proposed transmission line routes. For example, in April 2010, after heavy opposition from local landowners, the PUC denied LCRA's proposed route that would have connected Lampasas and Fredericksburg through Lampasas, Llano and Gillespie counties. Given the political opposition that exists, it is uncertain at this time which of the proposed routes will ultimately be approved.

The condemnation process moves quickly, beginning with notice to the affected landowners of the condemning authority's intention to acquire an easement. If, after negotiations, the parties cannot agree as to



damages to the property, the condemning authority will file a condemnation lawsuit seeking to condemn an easement. The judge will then appoint three disinterested landowners in the county to serve as special commissioners. At a hearing, the special commissioners will issue their findings of the damages to the landowner's property as a result of the proposed taking. Either party can object to the special commissioners' findings. If neither party timely objects to the special commissioners' findings, the court will accept the findings and issue a judgment. If an objection is timely filed, however, there will be a "trial de novo" in the court in which the case was filed. In that situation, the landowner can request that a jury decide the issue of damages to the property.

In many cases, there will be a dispute as to the value of the actual easement area being taken. The condemning authority may contend that the property affected is rural property and assign a value based upon the assumption that the highest and best use of the property is for ranching or agricultural purposes. The landowner, however, may contend that the highest and best use of the property is for residential or commercial development. In those situations, there will likely be significant differences among the parties' appraisers as to the value of the easement area being acquired. In addition, because the condemning authorities will be seeking to acquire an easement, not fee title, over only a portion of the landowner's land, the landowner is allowed to not only seek damages to the land within the easement but may also seek damages to the property outside of the easement. In fact, in many

condemnation proceedings, the key dispute is determining the monetary damages to the remaining property.

In addition to obtaining a fair value for the damage to their property based on the taking, a landowner should pay close attention to the actual easement agreement proposed by the condemning authorities. A landowner may wish to negotiate provisions in the easement agreement to limit the scope of the easement and to address issues such as the landowner's right to use the easement for certain purposes, the utility company's right to assign the easement, the utility company's right of access to the easement, and liability for future damages.

Condemnation can be a confusing and frustrating process — whether it's the CREZ Project or a different development. Landowners whose property will be affected should consider early on in the condemnation process engaging counsel to assist them in obtaining fair value for the damage to their property and negotiating an easement agreement that protects their rights.

MIKE MONTGOMERY AND JIM SPIVEY are shareholders at the San Antonio office of Cox Smith. Montgomery, a member of the firm's Real Estate department and head of the firm's Condemnation practice group, can be reached at mmontgomery@coxsmith.com. Spivey, a member of the firm's Litigation department and head of the firm's Real Estate Litigation practice group, can be reached at jkspivey@coxsmith.com.



Montgomery



Spivey