



**T**he power of “Eminent Domain” is derived from the Takings Clause of the Fifth Amendment of the United States Constitution. The term “eminent domain” has been injected into the mainstream vernacular in the last decade with media focus and political attention upon traditional infrastructure public projects such as roads, pipelines, government buildings, railroads and even border walls. This public eye on right of way projects has led to a proliferation of projects that are planned and even started, but then come to abrupt ends before completion. This article will discuss the consequences of canceling or abandoning right of way projects.



# THE **AFTERMATH** OF CANCELED OR ABANDONED ROW PROJECTS

What happens to condemning agencies and property owners?

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The threat of a government body, or even a private company, using eminent domain powers can be daunting and extremely disruptive to affected property owners. Yet, it may be surprising that after an offer is made, negotiations occur, or where a condemnation action has been filed with the courts, the condemnor may have a right to abandon the eminent domain action it has undertaken. In most instances, especially in the early stages of a project, a condemnor has an absolute right to walk away from an eminent domain action it threatened or initiated. Nearly every jurisdiction recognizes the right of a condemning authority to abandon a condemnation action, with some permitting abandonment, even after a determination of just compensation. The consequences to the condemning agency are fairly clear from state to state, depending upon applicable law, but the impacts upon and rights of affected property owners when a condemnation action is withdrawn, dismissed or abandoned, are murkier, leaving many landowners at risk and in the dark.

### Authority for Abandonment or Cancellation

After an eminent domain action has been filed with the courts, there is some guidance as to how an action can be dismissed. First, for matters pending in federal courts, where federal jurisdiction is created due to the participation of a federal agency or some federal law such as the Natural Gas Act, guidance is set forth in the Federal Rules of Civil Procedure, specifically, Rule 71.1.(i) titled “Dismissal of the Action or a Defendant.” If no compensation hearing has occurred, and the property has not yet been acquired, then the condemnor taking entity may, without court order, file a notice of dismissal. Prior to the condemnor acquiring property, the condemnor and property owner may jointly file a stipulation dismissing the action. The court action may be dismissed by court order at any time before compensation has been determined and paid. However, if title has already been acquired, the court must award compensation for the property taken.

Additionally, the Department of Justice may offer some insight in its Justice Manual 5-15.650 aptly titled, “Dismissal or Abandonment of Condemnation Case” and 5-15.544 titled, “Revestment of Property Acquired by Declaration of Taking.” Additionally, the Justice



Department publishes the Environment and Natural Resources Division (ENRD) Resource Manual, of which Section 10 details “Procedures For Excluding Or Dismissing Land From Condemnation Proceeding.”

Finally, 42 U.S.C. § 4654(a) “Judgment For Owner Or Abandonment Of Proceedings” states that, in a federal condemnation proceeding, if the final judgment is that the federal agency cannot acquire the property or the proceeding is abandoned by the United States, the owner of the property shall be reimbursed for reasonable costs, disbursements and expenses, such as attorney, appraisal engineering costs incurred.

For condemnation matters initiated in state courts, state legislation and/or court rules will ordinarily provide for the remedies and consequences of a project abandonment. For instance, in New Jersey state condemnation matters, the condemnor has the right to abandon a taking without the consent of the owner at any time within 30 days after the entry of a condemnation commissioners’ award or just compensation judgment, so long as a “Declaration of Taking” has not been previously filed. In matters where the condemnor has taken the property using its quick take powers and has already filed a Declaration of Taking, it cannot abandon without the owner’s consent. See N.J.S.A. 20:3-35. In either event, the abandonment by the condemning agency will also entitle the affected owner to recover costs, fees, expenses and damages incurred as a result of the condemnation. See N.J.S.A. 20:3-24 and -26. Other states have similar provisions and local legislation should be reviewed to determine the consequences in other jurisdictions.

### Why is a Project Abandoned or Canceled?

The theory behind permitting a taking entity to begin the condemnation process is that a public entity, which is likely to be funded by taxpayer money, should not be required to complete the acquisition of property where the situation may be deemed unnecessary, problematic or costly. Many times, a condemnor will decide not to pursue a condemnation action, even after it has negotiated with and threatened condemnation. Some of the reasons for cancellation or abandonment can include sheer cost of the project or being unable to obtain certain regulatory permits or approvals. In addition, as was seen in the recent Keystone/XL and Penn East Pipeline projects, public perception, politics and other issues may cause condemning agencies to rethink and potentially change, cancel or abandon projects, even after years of planning, partial implementation or construction, and/or the expenditure of many millions of project costs.

# THE CONSEQUENCES AND RISKS OF A PROJECT BEING ABANDONED OR CANCELED CAN VARY BASED ON THE POINT AT WHICH POINT THE PROJECT IS TERMINATED.



## Consequences and Risks Associated with Abandonment or Cancellation

The consequences and risks of a project being abandoned or canceled can vary based on the point at which the project is terminated. Questions that typically arise related to those consequences may include:

1. Who is responsible for paying the costs, interest, expert and legal fees incurred by the property owner?
2. If the property has already been acquired by the taking entity, will it revert to the former property owner and what is the process?
3. What if the property had been acquired by the taking entity and changes had already been made? Will the property be returned to the former property owners? What about the changes made to the property?
4. If the former property owner has already accepted the compensation from the taking entity and gets the property back, does the compensation have to be returned to the taking entity?
5. Should there be any compensation to the former property owner for development or transfer opportunities that were lost or missed as a result of the taking?

To better understand the consequences, it is helpful to review the actual experience of other recently canceled or abandoned projects.

The Atlantic Coast Pipeline project, announced in 2014, was a natural gas pipeline running through West Virginia, Virginia and North Carolina. It was projected to be complete by 2019 with an initial \$4-5 billion dollar budget, however, delays increased the budget to \$8 billion. The FERC certificate detailed that if the certificate applied for was not issued for the Atlantic Coast Pipeline Project or was permanently rescinded, all easement agreements executed and all monies paid shall remain the Grantors.

The Keystone/XL Pipeline Project spanned across international, State and Native American lands. It was designed to carry tar sands oil from Canada to the United States. The project was introduced in 2008 and by 2020, nearly 100% of the right of way had been acquired. From its outset, this project was considered controversial in part because it involved a foreign (Canadian) private corporation exercising eminent domain powers in the United States, and the project area crossed aquifers, farmland and other sensitive areas. It involved protests in its earlier years, including rallies at the White House during the Obama administration. In 2021, President Biden signed an executive order revoking the permit for the pipeline. The aftermath of this project remains ongoing, and it is unclear what will happen with the rights of way still owned by Keystone. Keystone could retain the property rights indefinitely, use them for another purpose or even sell them to other companies.

The Penn East Pipeline project was a \$1 billion dollar interstate pipeline project spanning 116 miles that would have shipped fracked Marcellus Shale gas from Northeast Pennsylvania to New Jersey to provide more affordable natural gas to residents. Against opposition, including from the State of New Jersey, Penn East won a major victory in the United States Supreme Court, which determined that a private company could, through the Natural Gas Act, wield the power of eminent domain even over lands owned by the State itself. However, in fall 2021, shortly after emerging victorious in the U.S. Supreme Court, Penn East announced that it was canceling the project, citing the lack of water and wetland permits in New Jersey as key barriers to



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completing the project. The cancellation of the Penn East Pipeline project leaves speculation as to the status of other similar projects.

The aftermath of a large-scale project being abandoned is often overlooked when reported in the media. Perhaps this is because there is no immediate, straightforward answer to the question of what happens to the properties or property rights acquired for these abandoned projects. Depending on the individual acquisition agreements, the taking utility or developer that acquired the interests may still own the property or property rights acquired for the now canceled project. Some easements may have terminated upon the project's cancellation, but others will still be owned by the taking authority and the status of which will be in limbo



until it is determined what to do with the properties. Although property owners may hope that the property or rights get reverted to them, the taking authority may still need access to the easements to complete any environmental restoration required by FERC. Otherwise, the property or permanent easements can continue to be held by the taking authority forever.

## Conclusion and Future Considerations

How can the experience of these projects provide right of way professionals and affected property owners with guidance on handling future projects? Several common threads exist from this recent experience.

First, projects which require extensive regulatory approvals may find themselves facing heightened scrutiny and public opposition which could lead to political influence upon the project's successful completion. Second, time delays and increased project costs and risks can lead to cancellation or abandonment. This potential exists not only for right of way projects undertaken by private corporations focused upon the economic viability of a project, but it can also affect public infrastructure projects facing budgetary restrictions and problems. For example, the trans-Hudson "ARC" train tunnel project was slated for years to be constructed in New York City and New Jersey, but was canceled abruptly by former N.J. Governor Chris Christie after his administration declared the project too expensive and as presenting unfair costs to New Jersey as compared with the relative costs to neighboring New York.

Finally, faced with the prospect of a possible abandonment or cancellation of a right of way project in the future, right of way professionals, property owners and their respective representatives should account for these risks in their negotiations, in any agreements entered into and in any condemnation litigation strategies in the future, rather than assuming a project will be constructed and completed merely because it is planned and commenced. For example, if a condemnor and owner enter into an agreement concerning the acquisition, and the project is later canceled or abandoned, what are the owner's rights to compensation? And does the right of way acquired consensually revert back to the owner, or does the condemnor retain it? Is there a provision in the agreement which specifically addresses the owner's rights to damages or other remedies?

Recognition of the possible consequences of a project's future termination in the planning and acquisition phases can help to ensure that those affected — both the condemnors and the property owners — are more fully informed as to their rights and remedies if an abandonment or cancellation occurs. 🌟



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