Conservation Easements - Consideration in routing transmission lines

Texas Land Conservation Conference

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Disclaimers

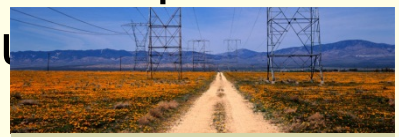
- This presentation is an overview of the Public Utility Commission's rules, procedures, and process for reviewing an application for a transmission line and a discussion of conservation easement issues affecting the process.
- The presentation is a general discussion, not legal advice, and the information and materials provided may not apply to any specific factual or legal set of circumstances.
- No attorney-client relationship is formed by this presentation and no such relationship is implied.
- If you have specific questions about any legal matter consult an attorney.

Outline of presentation

- Eminent domain and utility easements
- PUC process for approval of a route
  - Statutes and rules
  - Data and criteria considered
- Where do CEs fit in the PUC's process?
- What are the federal issues?
  - Texas has an independent electricity grid
  - National Interest Electric Transmission Corridor (NIETC)
  - Prior Public Use doctrine
  - National Conservation Easement Database
- Conclusion and "take homes"

What is eminent domain?

- Eminent domain is the power of the sovereign to take property for ‘public use’ without the owner’s consent
- Eminent domain raises three basic issues:
  - Whether there has been a “taking” of a condemnee’s property interest
  - Whether the property has been taken for a public use.
  - Whether compensation for a proper taking is just
- Eminent domain power may be delegated to governmental agencies and private entities
  - A utility company must obtain both a construction permit and a right-of-way across each piece of public or private property along the proposed ro



What is a utility easement?

- A utility easement is an easement that gives a utility the right to use and access specific area of another's property for laying gas, electric, water, or sewer lines
- A utility easement is attached to the property deed so it passes on even when the property is transferred or sold
- Having an easement gives the utility the right to use the land, but the utility does not own the land
- There may be restrictions on the landowner's land use in an area covered by a utility easement

A utility easement example

- An easement that allows the power company to run electrical lines on a property and to install utility poles for support where needed
  - The utility has the right to use a strip of land for the lines and to enter the land for maintenance and repair of the lines

How is the route selected?

- Texas statutes identify the criteria and factors the PUC is required to consider
  - PURA § 37.056(c)
- The Commission's rules identify factors that the utility is to consider in the selection of routes
  - P.U.C. SUBST. R. 25.101(b)(3)(B)

PURA § 37.056(c)

- The commission shall grant each certificate on a nondiscriminatory basis after considering:
  - The adequacy of existing service;
  - The need for additional service;
  - The effect of granting the certificate on the recipient of the certificate and any electric utility serving the proximate area;

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PURA § 37.056(c)

- The commission shall grant each certificate on a nondiscriminatory basis after considering:
  - Other factors, such as:
    - Community values;
    - Recreational and park areas;
    - Historical and aesthetic values;
    - Environmental integrity;
    - The probable improvement of service or lowering of cost to consumers in the area if the certificate is granted; and
    - To the extent applicable, the effect of granting the certificate on the ability of this state to meet the renewable energy goals.

P.U.C. SUBST. R. 25.101(b)(3)(B)

- Routing:
  - An application for a new transmission line shall address the criteria in PURA § 37.056(c) and considering those criteria, engineering constraints, and costs, the line shall be routed to the extent reasonable to moderate the impact on the affected community and landowners unless grid reliability and security dictate otherwise.

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P.U.C. SUBST. R. 25.101(b)(3)(B)

- The following factors shall be considered in the selection of the utility's alternate routes . . .:
  - Whether the routes utilize existing compatible rights-of-way, including the use of vacant positions on existing multiple-circuit transmission lines;
  - Whether the routes parallel existing compatible rights-of-way;
  - Whether the routes parallel property lines or other natural or cultural features; and
  - Whether the routes conform with the policy of prudent avoidance.

Where do CEs fit in?

- PURA § 37.056(c)
  - Community values
  - Recreational and park areas
  - Historical and aesthetic values
  - Environmental integrity
- P.U.C. SUBST. R. 25.101(b)(3)(B)
  - Route to moderate the impact on the affected community and landowners
  - Whether the routes parallel property lines or other natural or cultural features

Application and EA

- Utility/Transmission Service Provider completes the Commission's CCN application for transmission lines
  - Includes basic information about the project
  - Incorporates the Environmental Assessment (EA)
    - Textual description of the project and criteria
    - Many tables with potentially useful data
      - Data on 32 to 38 factors
    - Maps of the proposed routes

Standards of construction and operation

- P.U.C. SUBST. R. 25.101 (d)(3) Measures shall be applied when appropriate to mitigate the adverse impacts of the construction of any new electric transmission facilities, and the rebuilding, upgrading, or relocation of existing electric transmission facilities. Mitigation measures shall be adapted to the specifics of each project and may include such requirements as:
  - (A) selective clearing of the right-of-way to minimize the amount of flora and fauna disturbed;
  - (B) implementation of erosion control measures;
  - (C) reclamation of construction sites with native species of grasses, forbs, and shrubs; and
  - (D) returning site to its original contours a

EA data table example

	ROUTE 1	ROUTE 2	ROUTE 3	ROUTE 4	ROUTE 5	ROUTE 6	ROUTE 7	ROUTE 8	ROUTE 9	ROUTE 10	R
1. Length of alternative route	497,535	498,680	494,295	485,698	486,842	522,681	523,825	517,330	518,474	573,721	
2. Length of route parallel and adjacent to existing transmission lines	358,886	354,226	322,781	329,915	325,255	241,203	236,543	241,203	236,543	226,672	
3. Length of route parallel and adjacent to existing public roads/highways	10,718	10,718	19,437	901	901	0	0	0	0	6,435	
4. Length of route parallel and adjacent to existing pipelines	0	0	0	0	0	26,838	26,838	26,838	26,838	0	
5. Length of route parallel and adjacent to railroads	0	0	0	0	0	0	0	0	0	0	
6. Length of route parallel to apparent property boundaries	0	8,069	2,412	0	8,069	0	8,069	0	8,069	2,696	
7. Total length of route parallel to existing corridors (including apparent property boundaries)	369,604	373,013	344,630	330,816	334,225	268,041	271,450	268,041	271,450	235,803	
8. Number of habitable structures[1] within 310 ft of the route centerline	1	1	1	1	1	0	0	0	0	0	
9. Length of route across parks/recreational areas[2]	0	0	0	0	0	0	0	0	0	0	
10. Number of additional parks or recreational areas within 1,000 ft of the route centerline	0	0	0	0	0	0	0	0	0	0	
11. Length of route through commercial/industrial areas	0	0	0	0	0	0	0	0	0	0	
12. Length of route across agricultural pastureland	0	0	0	0	0	0	0	0	0	0	
13. Length of route across agricultural cropland and orchards	0	0	0	0	0	0	0	0	0	0	
14. Length of route across agricultural land with mobile irrigation systems	0	0	0	0	0	0	0	0	0	0	
15. Length of route across upland forest	0	0	0	0	0	0	0	0	0	0	
16. Length of route across riparian woodland, including forested wetlands[3]	0	0	0	0	0	0	0	0	0	0	
17. Length of route across emergent wetlands[3]	0	0	0	0	0	0	0	0	0	0	
18. Length of route across scrub/shrub wetlands[3]	123	123	123	123	123	123	123	123	123	123	
19. Number of streams crossed by the route	38	38	40	39	39	48	48	48	48	67	
20. Length of route parallel to rivers, creeks, and streams (within 100 ft)	10,797	10,775	11,214	10,997	10,975	14,395	14,374	14,374	14,353	19,920	
21. Number of known rare/unique plant locations within the ROW[4]	1	1	1	1	1	1	1	1	1	0	
22. Length of route through potential endangered or threatened species habitat[5]	131	131	131	131	131	131	131	131	131	131	
23. Number of recorded cultural resource sites crossed by the route[6]	0	0	0	0	0	1	1	1	1	2	
24. Number of additional recorded cultural resource sites within 1,000 ft of the route centerline[6]	9	9	9	9	9	9	9	9	9	9	
25. Length of route across areas of high prehistoric and historic archaeological site potential	101,037	101,037	102,755	102,773	102,773	134,563	134,563	134,698	134,698	191,733	
26. Number of airstrips with runways greater than 3,200 ft within 20,000 ft of the route centerline	2	2	2	2	2	1	1	1	1	1	
27. Number of airstrips with runways equal to or less than 3,200 ft within 10,000 ft of the route centerline	0	0	0	0	0	0	0	0	0	0	
28. Number of heliports within 5,000 ft of the route centerline	0	0	0	0	0	0	0	0	0	0	
29. Length of route across open water (lakes, ponds)[7]	477	477	477	85	85	85	85	85	85	461	
30. Number of commercial AM radio transmitters within 10,000 ft of route centerline	0	0	0	0	0	0	0	0	0	0	
31. Number of FM radio transmitters, microwave relay stations, and other electronic installations within 2,000 ft	35	36	35	35	36	19	20	19	20	18	
32. Number of U.S. or State Highways crossed by the route	3	3	3	3	3	3	3	3	3	3	
33. Number of FM roads, county roads, or other street crossed by the route	102	103	113	96	97	114	115	114	115	121	
34. Length of route within foreground visual zone of park/recreational areas (1/2 mile unobstructed)	0	1,450	0	0	1,450	0	1,450	3,542	4,992	0	
35. Length of route within foreground visual zone of State and U.S. Highways (1/2 mile unobstructed)	78,597	79,163	78,546	62,352	62,917	64,519	65,084	77,317	77,882	49,943	

[1] Habitable structures include but are not limited to single-family and multi-family dwellings and related structures, mobile homes, apartment buildings, commercial structures, industrial structures, business structures, churches, hospitals, nursing homes, and schools, or other structures normally inhabited by humans or intended to be inhabited by humans on a daily or regular basis.

[2] Defined as parks and recreational areas owned by a governmental body or an organized group, club, or church.

[3] Riparian woodlands, including forested wetlands were determined based on areas mapped as Palustrine Forested by NWI; scrub/shrub wetlands were determined based on areas mapped as Palustrine Scrub/Shrub by NWI; and emergent wetlands were determined based on areas mapped as Palustrine Emergent by NWI. The jurisdictional status of these wetland systems (in reference to Section 404 of the Clean Water Act) is not known as the project area was not delineated in accordance with USACE's 1987 Wetland Delineation Manual.

[4] Numbers of known rare/unique plant locations within the ROW were calculated based on the locations of NDD EO data for rare plants within the study area.

[5] Length of route through potential endangered or threatened species habitat was determined for the Pecos/puzzle sunflower, northern aplomado falcon, southwest willow flycatcher, Comanche Springs pupfish, and Pecos gambusia. Pecos/puzzle sunflower habitat was determined based on the NDD EO data; northern aplomado falcon habitat was delineated based on grasslands (Category 71) from NLCD and counties where the species has the potential to occur based on USFWS and TPWD maps; southwest willow flycatcher habitat was delineated based on the distribution of NWI Palustrine Shrub/Scrub and Forested Wetlands within the study area and counties where the species has the potential to occur based on USFWS and TPWD maps; Commanche Springs pupfish habitat was delineated based on NDD EO data and the extent of Toyah Creek and adjacent waters (the only water bodies in the study area where this species is known to occur) and counties where the species has the potential to occur based on USFWS and TPWD maps; and Pecos gambusia habitat was delineated based on the extents of the Pecos River, Toyah Creek to the confluence with the Pecos River and adjacent waters, and Salt Creek, all of which are locations where this species may occur, or provide connections to known populations and counties where the species has the potential to occur based on USFWS and TPWD maps.

[6] Recorded cultural resources sites are defined as those sites recognized and recorded by the THC.

[7] Open water was determined based on areas mapped as open water by the NHD.

Note: All length measurements in feet. All linear measurements, with the exception of areas of high archaeological/historical probability, were obtained from aerial photography flown in February-March 2013 which was ortho-rectified to National Map Accuracy Standards of +/- 10 feet.

TPWD comments

- TPWD submits comments on environmental issues
- TPWD reviews the Environmental Assessment
  - Focuses on impact to wildlife and resources
  - Does not review other factors
- Makes recommendations
  - Best route considering environmental impact
  - Accommodations to wildlife and environment
- PUC must respond to TPWD's recommendations
  - Texas Parks & Wildlife Code § 12.0011
- Sometimes references the Texas Natural Diversity Database (TXNDD)

Are some criteria more important than others?

- The Commission considers and weighs all factors, however, two factors often are important to the PUC
  - Cost
  - Impact on landowners
    - Includes number of habitable structures or prudent avoidance
- Other factors that can be important
  - Parallel existing compatible rights-of-way
    - Existing transmission lines, roads, other utilities
  - Parallel property lines or other natural or cultural features

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Are some criteria more important than others?

- The Commission also considers:
  - Community values
    - A shared appreciation of an area or other natural or human resource by a national, regional, or local community
    - This assessment of values and resources to the local community can include:
      - Information obtained at public meetings
      - Comments received from community leaders and the public
  - Recreational and park areas
  - Historical and aesthetic values
    - Subjective perception of natural beauty in
  - Environmental integrity

What are the federal issues?

- No clear answers

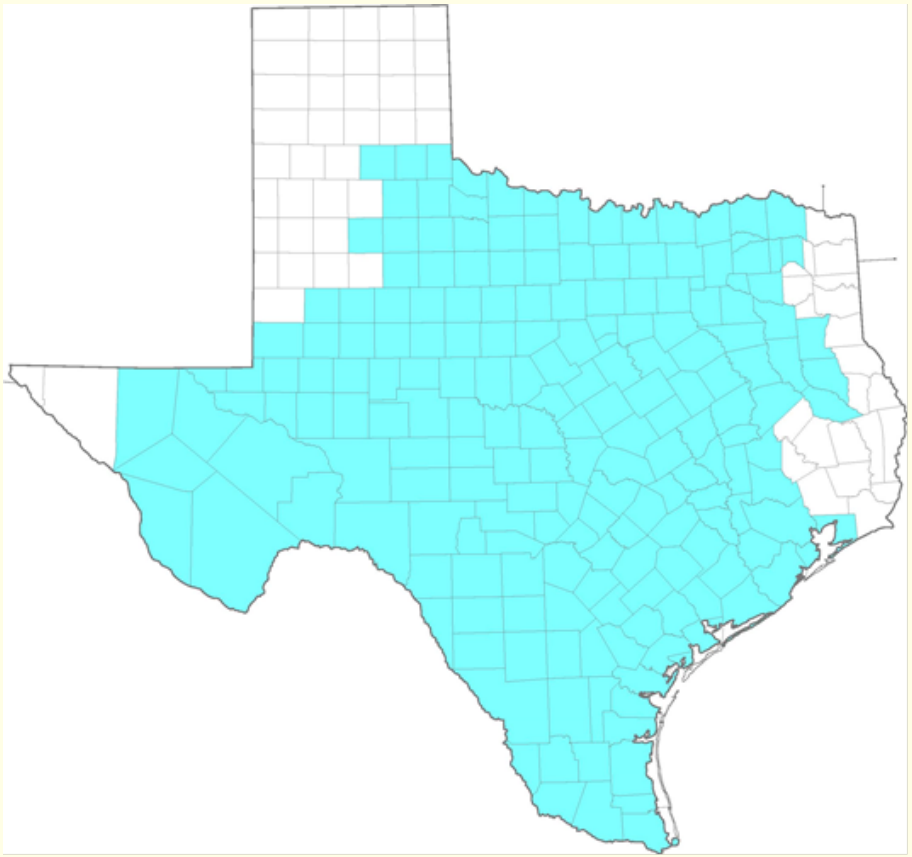
What are the federal issues?

- Texas is distinct in being the only state in the nation with an independent electricity grid
  - This arrangement keeps ERCOT free from much of the federal oversight that generally accompanies interstate trade
- National Interest Electric Transmission Corridor (NIETC)
  - Many issues raised – even if they do not apply in much of Texas, gives basis for arguments that can be made in Texas
- Prior Public Use doctrine
- National Conservation Easement Database

Texas is less affected by federal law

- Much of its transmission grid is operated by the Electric Reliability Council of Texas (ERCOT)
  - ERCOT manages the flow of electric power to 24 million Texas customers - representing about 90 percent of the state's electric load and about 75 percent of the land mass
  - The ERCOT grid is located solely within the state of Texas and is not synchronously interconnected to the rest of the United States

The ERCOT Region



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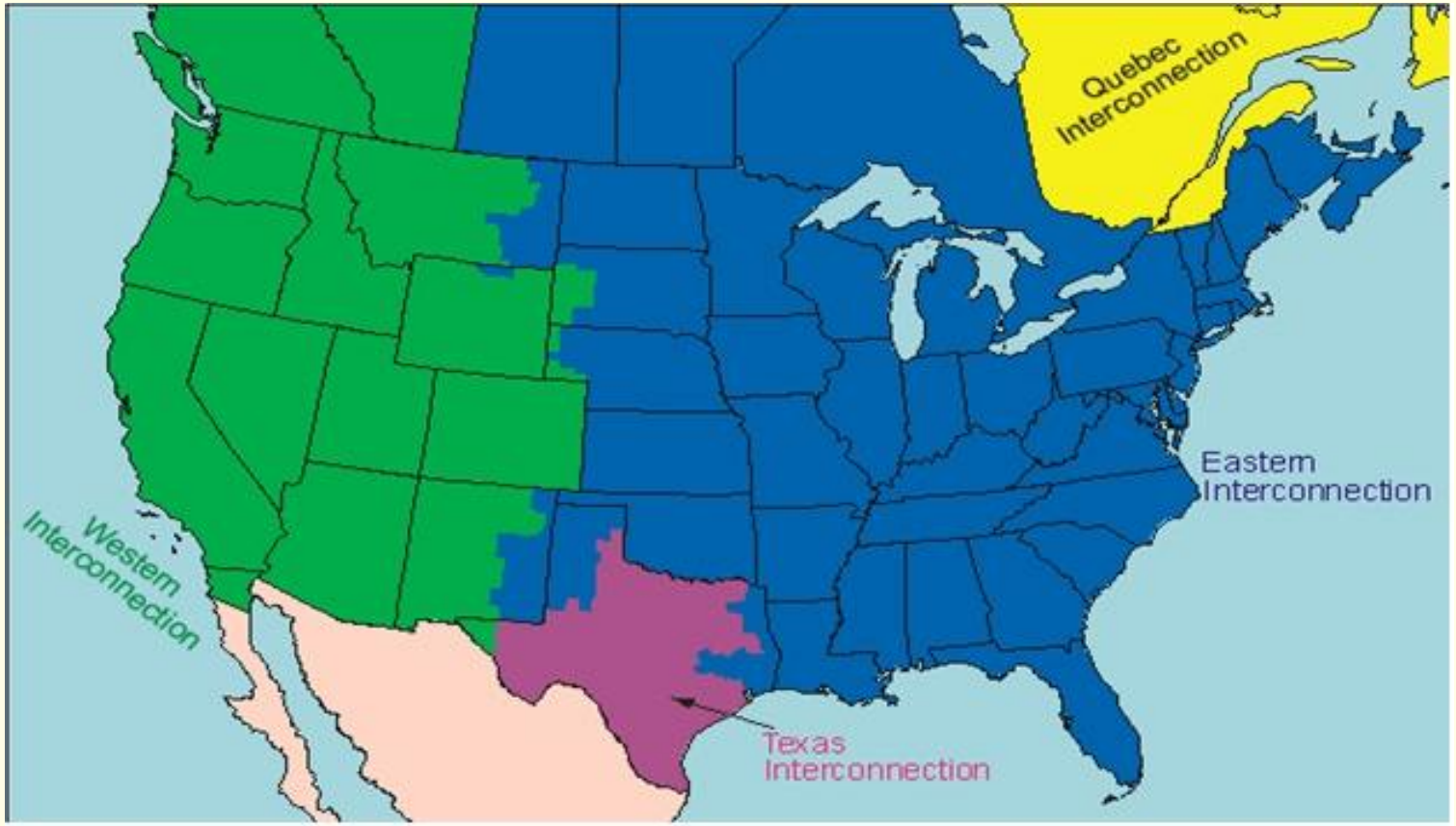
North American Interconnections



Texas independent electricity grid

- Keeps ERCOT free from much of the federal oversight that generally accompanies interstate trade
  - The transmission of electric energy occurring wholly within ERCOT is not subject to Federal Energy Regulatory Commission (FERC) jurisdiction under sections 203, 205, or 206 of the Federal Power Act

Traditionally – a limited federal role

- Historically, the federal government has had a limited role in siting transmission lines
  - It has generally only made siting decisions on federal lands
  - 2009 DOE and 8 federal agencies MOU to improve coordination among project applicants, federal agencies, states and tribes involved in the siting and permitting process for electric transmission facilities on Federal land
  - Departments of Agriculture or Interior usually will be the Lead Agency – they have jurisdiction over most of the federal lands and right-of-ways for proposed electric transmission facilities
- State governments, through public utility commissions and other agencies, traditionally approve transmission line siting
- The Energy Policy Act of 2005 expanded the government's role

Energy Policy Act of 2005

- Energy Policy Act of 2005 (16 U.S.C. §824p)
  - Secretary of the Department of Energy (DOE) must conduct a study of congestion in electric transmission every 3 years
  - Under certain circumstances, FERC now has the authority to approve and issue siting permits for new transmission lines in National Interest Electric Transmission Corridor (NIETC)
    - Capacity constraints or congestion that adversely affects consumers
    - If state and local governments fail to issue permits allowing construction of new transmission, FERC may issue permits
    - Challenges to designations in 2007 and 2009 resulted in delays and uncertainty

What is the 824(p)e exception?

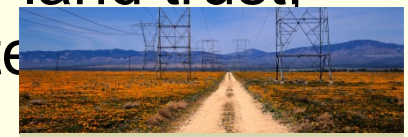
- The 824(p)e exception:
  - In the case of a permit under subsection (b) for electric transmission facilities to be located on property *other than property owned by the United States or a State*, . . . the permit holder may acquire the right-of-way by the exercise of the right of eminent domain

The 824p(e) exception

- May apply only to national parks, state parks, state conservation areas, and wildlife refuges
  - May not apply to conservation easements burdening private land
- The scope of the 824p(e) exception is uncertain.
  - Whether the exception prohibits condemnation of partial interests in land (such as conservation easements) held or co-held by federal or state government has not been indicated by Congress and not yet determined by a court.
  - The 824p(e) exception will apply to partial interests in land to the extent that these interests are considered "property," and can be "owned."
- CEs held solely by private entities probab
  are not protected by the exception

Possible 824p(e) protections?

- CEs held by a federal or state agency recorded as a grantee
  - Wetland easements held by the USFWS
- Federal agency co-holds the easement
  - Only precludes eminent domain
  - A transmission project can be built across the property if the government agency involved is willing to grant a right-of-way or to abandon its property interest
- Farm and Ranch Lands Protection Program
- Conservation easements held or co-held by political subdivision of a state – less likely
- Conservation easements held by private land trust, with federal or state contingent future inte easement
  - Recorded and not speculative or remote



Common law doctrine of Prior Public Use

- Land appropriate to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end
- Two lines of cases
  - Common-law doctrine of prior public use
  - Line of cases following from the 1946 U.S. Supreme Court case *U.S. v. Carmack*, which contains dictum suggesting that eminent domain authority delegated to private entities (such as utility companies) is limited and therefore subject to a more stringent standard of review than similar delegations to governmental actors.

Carmack Footnote 13

- A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.
  - *United States v. Carmack*, 329 U.S. 230, 243 (1946). Footnote 13.

Nice try, but . . .

- National Environmental Policy Act
  - Federal agencies must prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.”
- Endangered Species Act (ESA)
  - FERC must comply with the ESA before issuing a permit under Section 824p
  - The utility also is subject to ESA requirements
  - Mitigation and take permits are common in Texas
- Clean Water Act
  - A person who discharges dredged or fill material into navigable waters must obtain a general or individual permit, or fall within an exemption

What can land trusts do?

- Consider protecting CEs vulnerable to Section 824p condemnation by co-holding the easement with a federal or state agency
  - Land trusts adverse to this option may consider arrangements where a federal or state agency holds a contingent future interest in the easement
  - The CE may specify that the agency will co-own the easement upon the occurrence of an event related to condemnation.
    - Whether the future interest constitutes property ownership may depend on the likelihood that the contingency will come to pass in the foreseeable future.
- Be cautious when considering taking ownership of CEs from federal or state government unless the government's status as co-owner is maintained

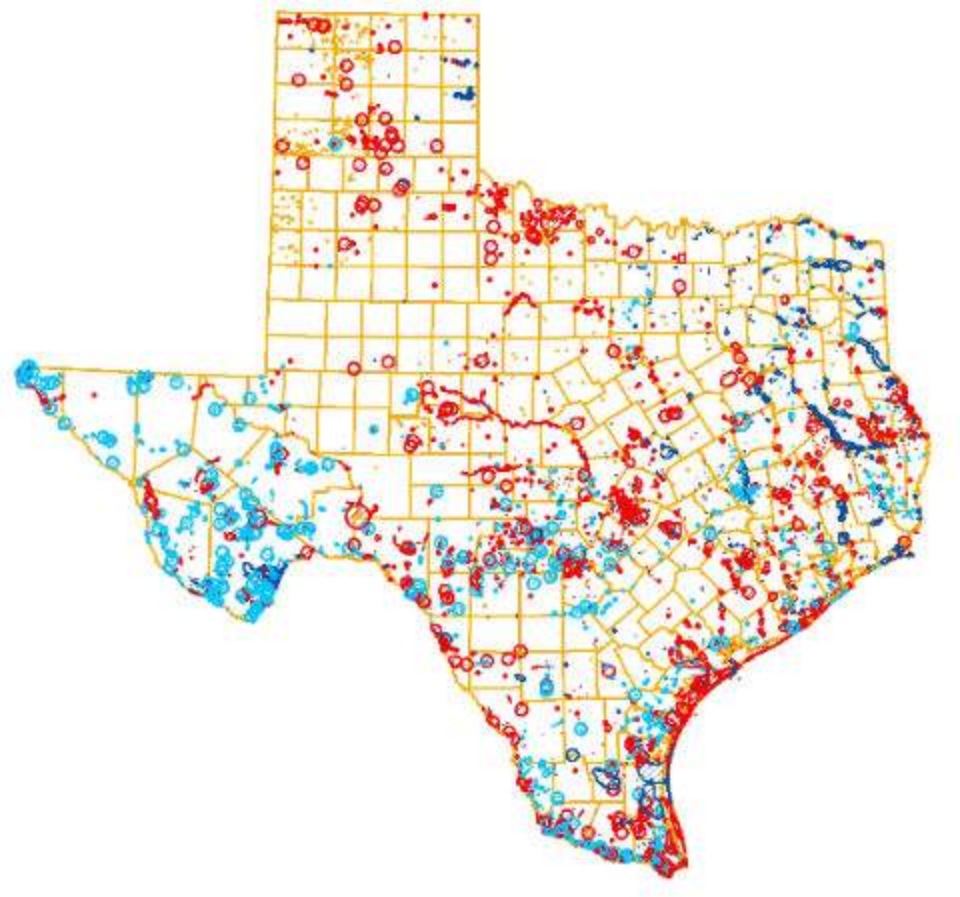
Other questions and possibilities?

- Federal grant funds used to purchase CEs, other initiatives
- Mitigation bank land
- What is in your easement?
  - Conservation purpose statement
  - Special protective language
  - Limits on uses and activities
  - Affect on scenic viewsheds
  - Protection of wildlife habitat or migratory bird pathways
  - Identification of cultural or natural heritage resources
  - Riparian buffers, soil disturbance, vegetative covers
  - Forestland management
  - Limits on future easements
  - Public access requirements
  - Archaeological inventory

What is the TXNDD?

- Texas Natural Diversity Database
  - A GIS integrated Oracle database that stores spatial and tabular information for:
    - Threatened and endangered species
    - Rare species of concern
    - Rare natural vegetation communities
    - Other rare natural resources
  - TXNDD goals
    - Be the single most complete repository for Texas rare species data
    - Provide rare species data to conservation partners and others impacting the Texas landscape
  - Data is used in planning transmission lines
  - Currently administered by NatureServe

Statewide depiction of TXNDD data



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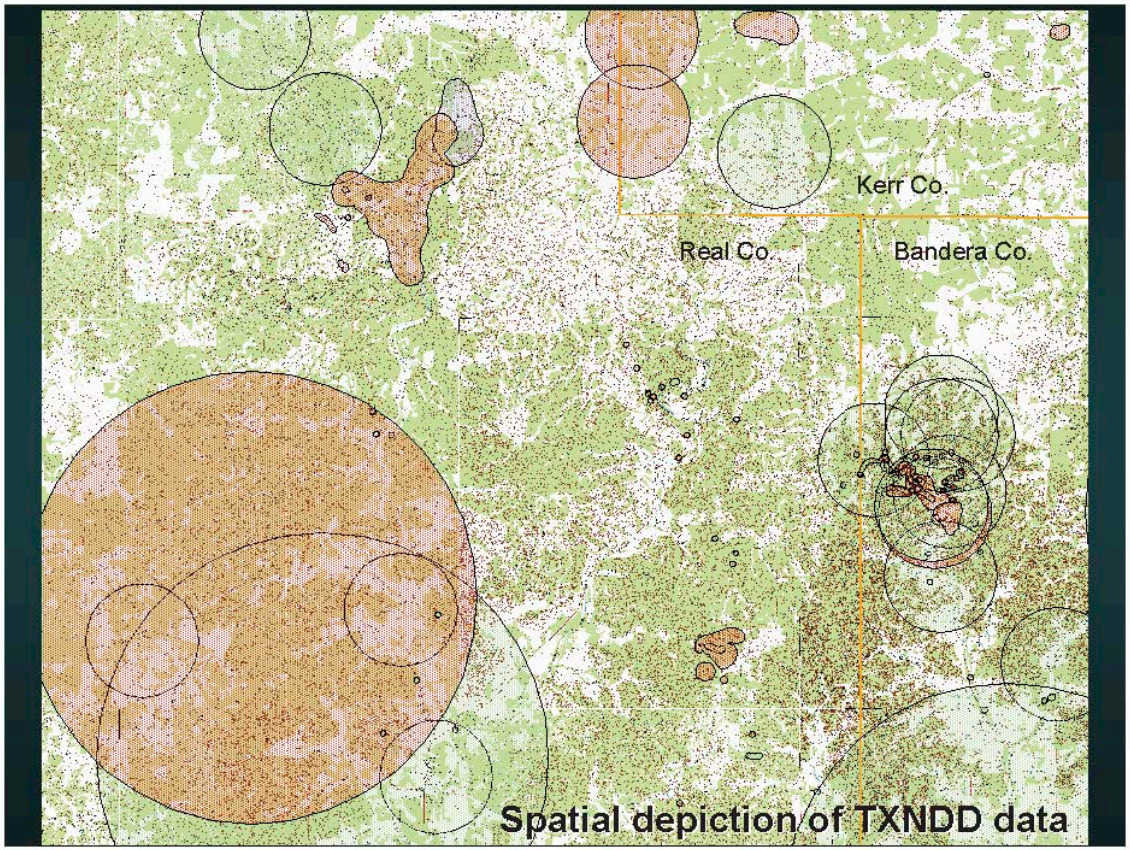
Spatial depiction of local TXNDD data



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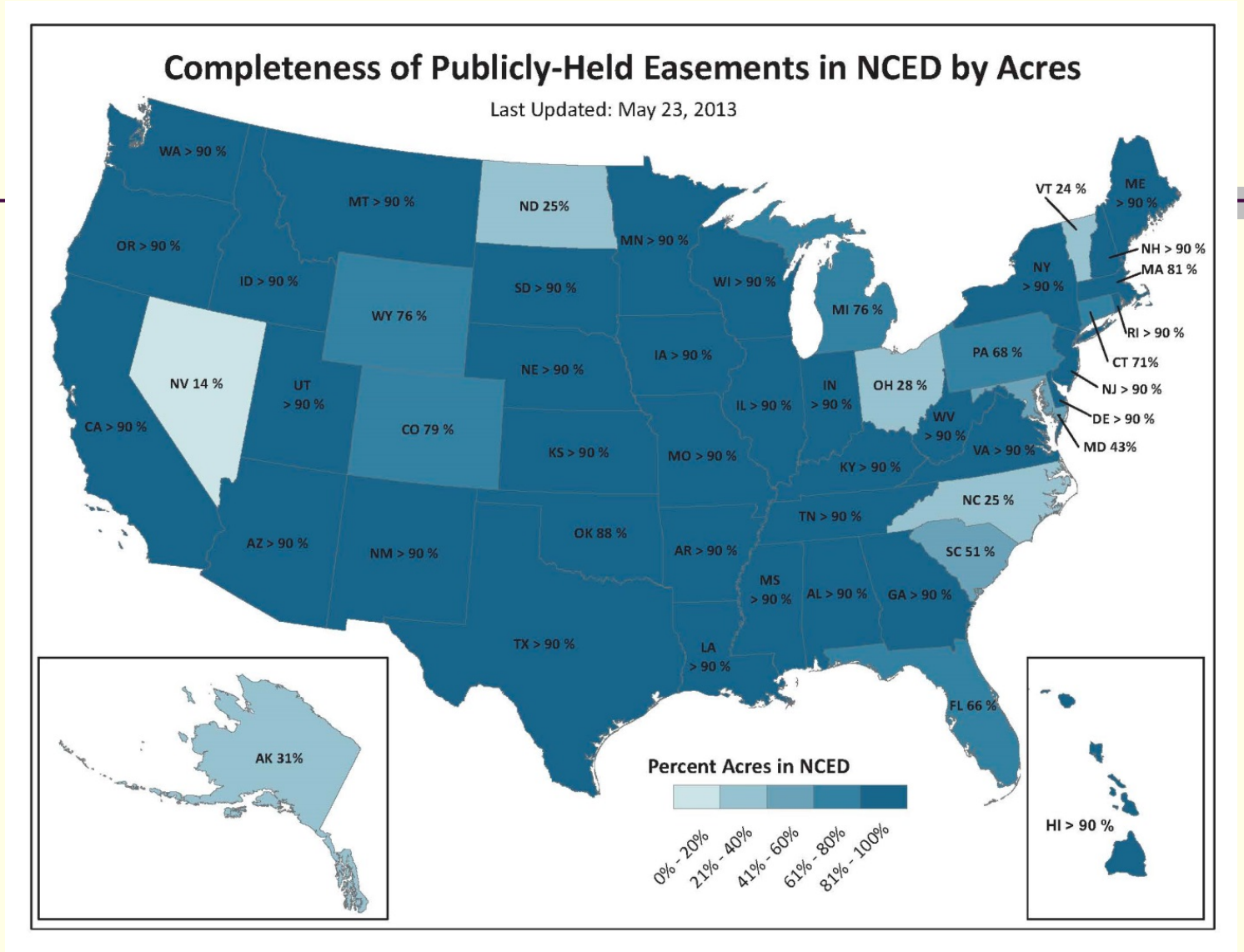
What is the NCED?

- National Conservation Easement Database
- First national database of conservation easement information, compiling records from land trusts and public agencies throughout the United States
- Goals - In collaboration with land trusts and public agencies, create a single, up-to-date, sustainable nationwide system for managing and accessing data about conservation easements.
- Five conservation organizations developed the NCED:
  - Conservation Biology Institute, Defenders of Wildlife, Ducks Unlimited, NatureServe, and Trust for Public Land



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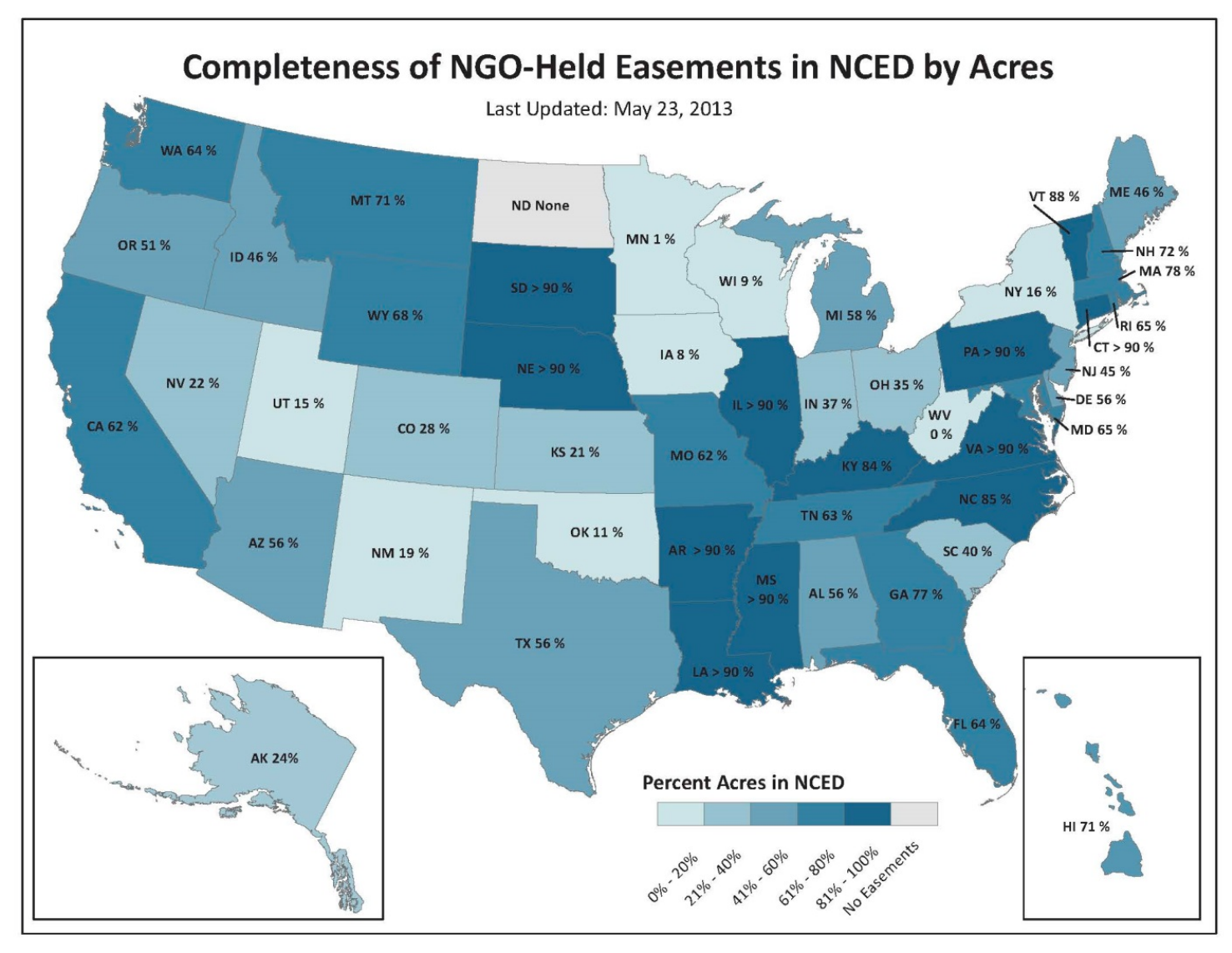

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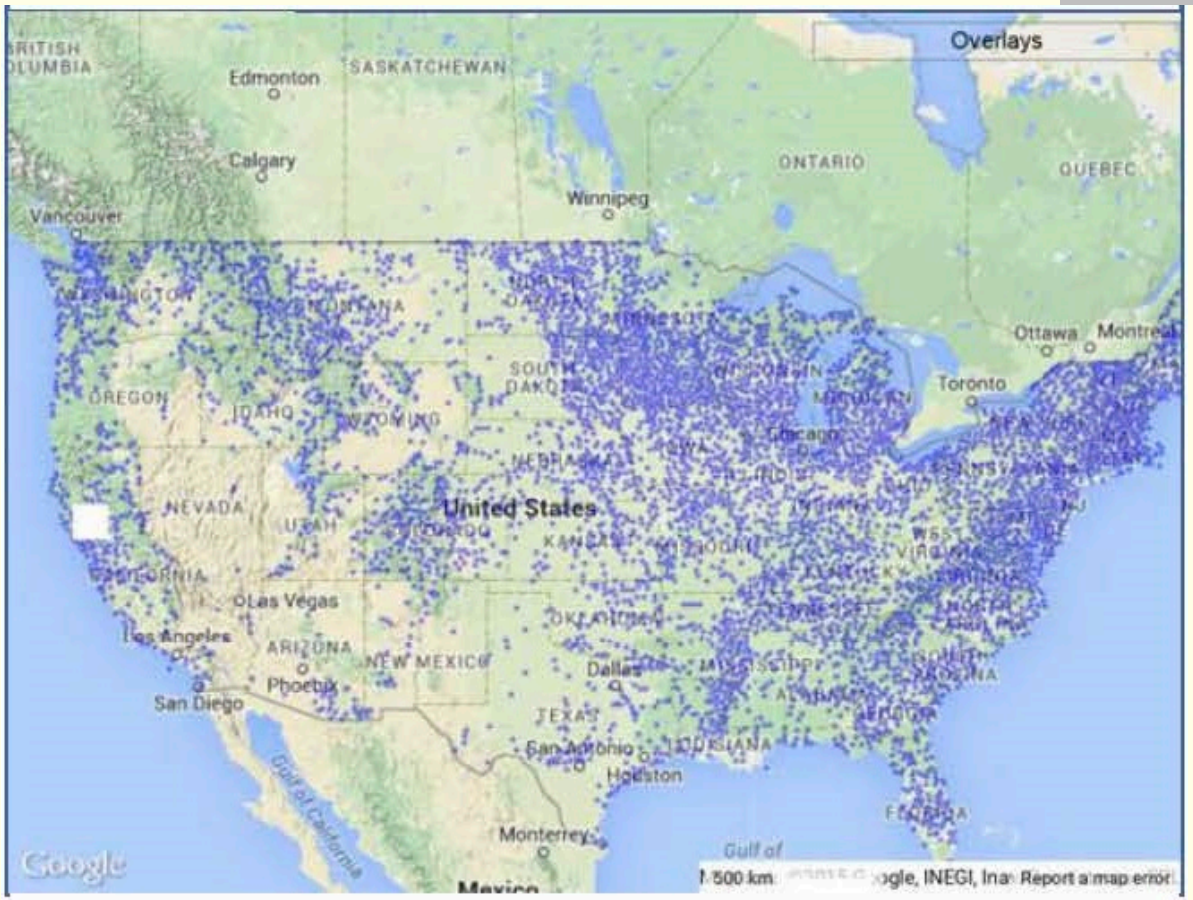
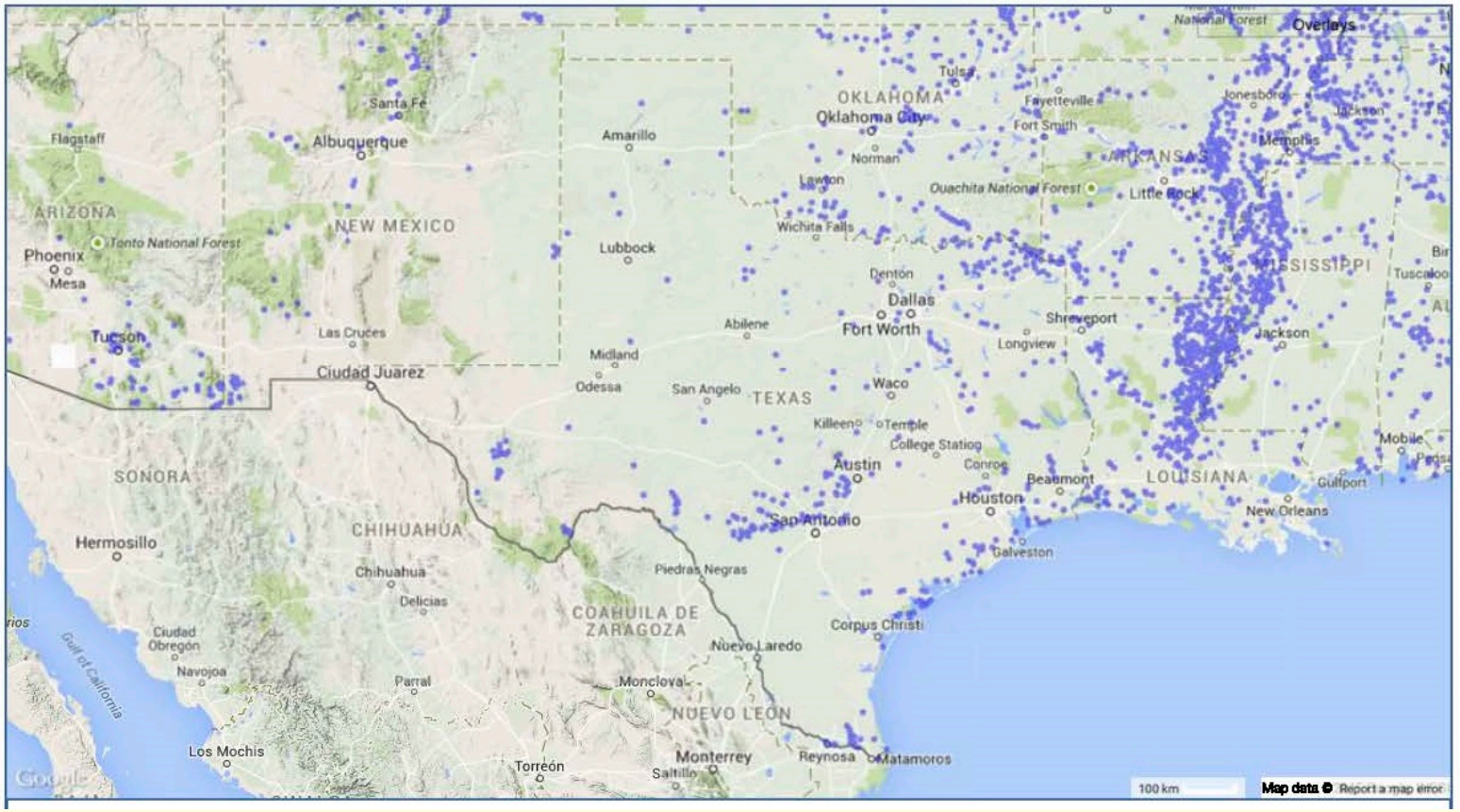
NCED United States data depiction



NCED Texas data depiction



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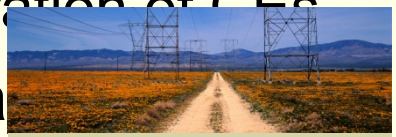
Why register with the NCED?

- There is no requirement that federal or Texas energy planners consider conservation easements or land trust preserves when siting new transmission facilities
  - There also is no requirement that land trusts be allowed a voice in the planning process
- Reliable data about protected lands and their locations is essential to good planning and policy-making
  - Complete/accurate data improves decision makers' knowledge
- Significant public investments have been made in the federal, state and local programs that encourage and incentivize this conservation. We must make sure that our energy policies recognize the public's stake in lands protected by conservation easements and aim to avoid all unnecessary impacts on these la

Conclusion and “take homes”

- There is a PUC process for fair and impartial review
  - Although some factors tend to have more influence on the Commission than others, there is no silver bullet that will stop the project or route it away from conservation easements
- There are some federal protections, but they have limited applicability in Texas, especially in the ERCOT region
- Use Prior Public Use and environmental laws to discourage routes and focus on less damaging sites
- Need improvements to statutes, PUC’s rules, and utility company policies – ask for consideration of CEs
- Register in the National Conservation Ea
  Database



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