

Eminent Domain: When Can Pipeline Companies Condemn Your Land?

Eric Opiela, JD

Texas/Mexico Border Coalition
Landowner Issues & Opportunities Workshop

Property

- What is Property?
- *Black's Law Dictionary*
 - “external thing over which the rights of possession, use, and enjoyment are exercised.”
 - “the right to possess, use, and enjoy a determinate thing” or “the right of ownership.” Black's Law Dictionary 1232 (7th ed. 1999).
- Property is usually thought of in terms of a bundle of rights:
 - Universality—all portions of the resource are held by the owner
 - Exclusivity—all benefits and costs accrued as a result of owning and using the resource should accrue to the owner, and only to the owner, either directly or indirectly by sale to others
 - Transferability—all property rights should be transferable from one owner to another in a voluntary exchange
 - Enforceability—property rights should be secure from involuntary seizure or encroachment by others. [control and use of property
- How are those rights protected?

Property Rights

- Property rights have been protected and valued since ancient times.
 - **Cyrus Cylinder**
 - First Recorded Laws-Cyrus of Persia, Babylon
 - First Charter of Human Rights—including the right to property
- Protected to this day
 - **United Nations Universal Declaration of Human Rights, Article 17**
 - **French Declaration of the Rights of Man and of the Citizen, Article XVII**
 - **European Convention on Human Rights (ECHR), Protocol 1**
 - **United States Constitution, Fifth Amendment**

United States Constitution, Amendment V

- “nor shall private property be taken for public use, without just compensation.”
- The Founding Fathers respected the right to keep private property.
- “The Common Law”--Justice Oliver Wendell Holmes describes property as having two fundamental aspects.
 - Possession “Control over a resource based on the practical inability of another to contradict the ends of the possessor.”
 - Title “The expectation that others will recognize rights to control resource, even when it is not in possession.”
- Locke-“The reason why men enter into society is the preservation of their property.”

Texas Constitution, Article I

"Sec. 17. TAKING, DAMAGING, OR DESTROYING PROPERTY FOR PUBLIC USE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES. (a) No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:

(1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:

(A) the State, a political subdivision of the State, or the public at large; or

(B) an entity granted the power of eminent domain under law; or

(2) the elimination of urban blight on a particular parcel of property.

(b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

(c) On or after January 1, 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to an entity only on a two-thirds vote of all the members elected to each house.

(d) When a person's property is taken under Subsection (a) of this section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof." ...

"Sec. 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

What is “eminent domain”?

The term “eminent domain” generally refers to a governmental entity’s legal authority to force a private landowner to sell his or her real property for public use. When the government exercises its eminent domain authority and takes a landowner’s private property, the governmental entity must pay the landowner just compensation. *City of Austin v. Nalle*, 120 S.W. 996 (Tex. 1909). The State’s eminent domain authority is delegated by specific legislatively enacted statutes to state agencies, political subdivisions (i.e. cities, counties, and special districts) and even some private entities.

What is “condemnation”?

Condemnation refers to the procedure that governmental bodies and authorized private entities must follow when they exercise their eminent domain authority to force the sale of a landowner's private property.

Chapter 21, Property Code

Chapter 21 of the Property Code governs the process by which authorized entities exercise their eminent domain authority. In order for an entity to exercise its eminent domain authority, it must do so in a manner that complies with the Property Code.

1. **Bona Fide Offer to Purchase Required** – Section 21.0113, Property Code, requires Condemning Entities to make a bona fide offer. An entity with eminent domain authority has made a bona fide offer if:

- (1) an initial offer is made in writing to a property owner;
- (2) a final offer is made in writing to the property owner;
- (3) the final offer is made on or after the 30th day after the date on which the entity makes a written initial offer to the property owner;
- (4) before making a final offer, the entity obtains a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property;
- (5) the final offer is equal to or greater than the amount of the written appraisal obtained by the entity;
- (6) the following items are included with the final offer or have been previously provided to the owner by the entity:
 - (A) a copy of the written appraisal;
 - (B) a copy of the deed, easement, or other instrument conveying the property sought to be acquired; and
 - (C) the landowner's bill of rights statement prescribed by Section 21.0112; and
- (7) the entity provides the property owner with at least 14 days to respond to the final offer and the property owner does not agree to the terms of the final offer within that period.

Chapter 21, Property Code

2. Under Texas law, condemning authorities are required to negotiate with landowners. *Lapsley v. State*, 405 S.W.2d 406 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.) To satisfy the legal requirements, condemnation authorities must be able to demonstrate a good faith attempt to reach an agreement for the sale of the property. *City of Houston v. Plantation Land Co.*, 440 S.W.2d 691 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); see *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993).

3. If the condemning entity is unable to reach an agreement on the damages (purchase price), the condemning entity must file a condemnation petition. The petition must:

- (1) describe the property to be condemned;
 - (2) state with specificity the public use for which the entity intends to acquire the property;
 - (3) state the name of the owner of the property if the owner is known;
 - (4) state that the entity and the property owner are unable to agree on the damages;
 - (5) if applicable, state that the entity provided the property owner with the landowner's bill of rights statement in accordance with Section 21.0112; and
 - (6) state that the entity made a bona fide offer to acquire the property from the property owner voluntarily as provided by Section 21.0113.
- (c) An entity that files a petition under this section must provide a copy of the petition to the property owner by certified mail, return receipt requested.

Sec. 21.012, Tex. Prop. Code

Landowner's Bill of Rights



THE STATE OF TEXAS LANDOWNER'S BILL OF RIGHTS

PREPARED BY THE



OFFICE OF THE
ATTORNEY GENERAL OF TEXAS



STATE OF TEXAS LANDOWNER'S BILL OF RIGHTS

This Landowner's Bill of Rights applies to any attempt by the government or a private entity to take your property. The contents of this Bill of Rights are prescribed by the Texas Legislature in Texas Government Code Sec. 402.031 and Chapter 21 of the Texas Property Code.

1. You are entitled to receive adequate compensation if your property is taken for a public use.
2. Your property can only be taken for a public use.
3. Your property can only be taken by a governmental entity or private entity authorized by law to do so.
4. The entity that wants to take your property must notify you that it wants to take your property.
5. The entity proposing to take your property must provide you with a written appraisal from a certified appraiser detailing the adequate compensation you are owed for your property.
6. The entity proposing to take your property must make a bona fide offer to buy the property before it files a lawsuit to condemn the property - which means the condemning entity must make a good faith offer that conforms with Chapter 21 of the Texas Property Code.
7. You may hire an appraiser or other professional to determine the value of your property or to assist you in any condemnation proceeding.
8. You may hire an attorney to negotiate with the condemning entity and to represent you in any legal proceedings involving the condemnation.
9. Before your property is condemned, you are entitled to a hearing before a court appointed panel that includes three special commissioners. The special commissioners must determine the amount of compensation the condemning entity owes for the taking of your property. The commissioners must also determine what compensation, if any, you are entitled to receive for any reduction in value of your remaining property.
10. If you are unsatisfied with the compensation awarded by the special commissioners, or if you question whether the taking of your property was proper, you have the right to a trial by a judge or jury. If you are dissatisfied with the trial court's judgment, you may appeal that decision.

CONDEMNATION PROCEDURE

Eminent domain is the legal authority that certain entities are granted that allows those entities to take private property for a public use. Private property can include land and certain improvements that are on that property.

Private property may only be taken by a governmental entity or private entity that is authorized by law to do so. Your property may be taken only for a public purpose. That means it can only be taken for a purpose or use that serves the general public. Texas law prohibits condemnation authorities from taking your property to enhance tax revenues or foster economic development.

Your property cannot be taken without adequate compensation. Adequate compensation includes the market value of the property being taken. It may also include certain damages if your remaining property's market value is diminished by the acquisition itself or by the way the condemning entity will use the property.

Chapter 21, Property Code

4. **Jurisdiction and Venue** - Section 21.001 of the Property Code states that district and county courts at law have concurrent jurisdiction over eminent domain proceedings. However, not all county courts at law have jurisdiction over eminent domain proceedings because the statute authorizing their creation does not authorize them to hear these types of proceedings. See, i.e., Tex. Gov't Code Secs. 25.1032, 25.2293 (special provisions for Harris and Travis County courts). Additionally, questions of title must be resolved by district courts. *Zucht v. City of San Antonio*, 698 S.W.2d 168 (Tex. App.—San Antonio 1984, no writ). If the defendant landowner is an estate, the proceeding must be held in the probate court handling the probate of the estate. Tex. Probate Code § 4B. If none of these restrictions apply, if there is a county court at law in a county, the condemnation proceeding must be filed in that court. Sec. 20.013, Tex. Prop. Code. The proper venue for a condemnation proceeding is the county in which the property owner resides—if the owner resides in the same county as the property. If the property owner does not reside in the same county as the property, proper venue lies in any county in which at least part of the condemned property is located. *Id.*

5. **Special Commissioners** – Sec. 21.014, Tex. Prop. Code:

(a) The judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned shall appoint three disinterested real property owners who reside in the county as special commissioners to assess the damages of the owner of the property being condemned. The judge appointing the special commissioners shall give preference to persons agreed on by the parties. The judge shall provide each party a reasonable period to strike one of the three commissioners appointed by the judge. If a person fails to serve as a commissioner or is struck by a party to the suit, the judge shall appoint a replacement.

(b) The special commissioners shall swear to assess damages fairly, impartially, and according to the law.

(c) Special commissioners may compel the attendance of witnesses and the production of testimony, administer oaths, and punish for contempt in the same manner as a county judge.

Chapter 21, Property Code

6. **Hearing Procedures** - Once appointed, the commissioners must schedule a hearing for the parties. Tex. Prop. Code Sec. 21.015. Written notice informing the parties of the time and place of the hearing must be given at least 20 days prior to the hearing. Id. Sec. 21.016(b). Notice of the commissioners' hearing may be served by anyone competent to testify (and therefore prove the notice was delivered). Id. Notice is accomplished, usually by the condemning entity acting for the commissioners:

1. By delivering a copy of the notice to a party, the party's agent or to the party's attorney;
2. If the property belongs to a deceased's estate, a minor or an otherwise legally disabled person and that person or estate has a legal representative, by delivering a copy to that representative; or
3. If the property belongs to a non-resident and such resident has not been personally served, the commissioners may use service by publication if the owner is unknown or if the owner of the property is avoiding service of process. Id. Sec. 21.016(d).

Unless the Property Code specifies otherwise, the Rules of Civil Procedure generally do not apply to service of notice for the commissioners' hearing.

Once proper notice has been served upon all potential parties, the special commissioners may convene a hearing and consider the evidence presented by each party. Id. Sec. 21.015(b). A landowner who makes an appearance before the special commission during the special commissioners' hearing waives any ability to subsequently claim that service was defective. *Jones v. City of Mineola*, 203 S.W.2d 1020 (Tex. Civ. App.—Texarkana 1947, writ ref'd). The special commissioners' hearing is an administrative proceeding, not a judicial proceeding.

Chapter 21, Property Code

Special commissioners have no authority to rule on questions of law, such as whether the condemning entity has the right to condemn the property at all. *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240 (Tex. 1984). As a result, the hearings are not required to follow strict rules of evidence and other procedures observed in a trial court. *Dueitt v. Harris County*, 249 S.W.2d 636, 639 (Tex. Civ. App.—Galveston 1952, writ ref'd). Special commissioners may compel the attendance of witnesses, necessitate the production of testimony, administer oaths, and punish parties for contempt in the same manner as a county judge. Tex. Prop. Code Sec. 21.014(c). The principal responsibility of the special commissioners is to assess the economic damages a landowner will incur as a consequence of the taking of the property. This duty involves a determination of the value of the land taken and the amount of consequential damages suffered by the landowner. *Texas Elec. Service Co. v. Perkins*, 23 S.W.2d 320 (Tex. 1930). The commissioners' authority over the condemnation proceedings ends once they file their decision with the appointing judge. The judge may not interfere with the proceedings before a decision has been filed, because the court has no such authority during the administrative proceedings. *Peak Pipeline v. Norton*, 629 S.W.2d 185, 186 (Tex. Ct. App.-Tyler 1982).

7. **How are damages valued?** - In fairly and impartially assessing damages, the special commissioners are governed by Sections 21.041 and 21.042 of the Property Code.

Section 21.041 provides that the commissioners shall admit evidence on the following topics:

- a. The value of the property being condemned;
- b. Any injury to the property owner;
- c. Any benefit to the property owner's remaining property; and
- d. The use of the property by the condemning entity seeking to acquire the property.

Tex. Prop. Code Sec. 21.041

Chapter 21, Property Code

Section 21.042 sets out the parameters under which the special commissioners are to make their assessments:

1. Special commissioners shall assess the damages according to the evidence presented.
2. If an entire tract of land is taken, the damage to the property owner is the fair market value of the property at the time of the special commissioners' hearing.
3. If a portion of a tract of land is condemned, the commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner. The special commissioners must also take into account the effect of the condemnation on the value of the property owner's remaining property. (The damages will be the fair market value of the portion taken and the damages, if any, to the remainder property as a result of the taking.) *State v. Carpenter*, 89 S.W.2d 194 (Tex. Comm'n App. 1936, opin. adopted).
4. When estimating injury or benefit, the special commissioners shall consider injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property—now or in the reasonable, foreseeable future. The commissioners may not consider injury or benefit that the property owner is likely to experience in common with the general public.
5. If a portion of a tract or parcel of real property is condemned for use in conjunction with a highway project, the special commissioners shall consider the special and direct benefits that arise from the project that are peculiar to the property owner and that relate to the property owner's use, ownership, and enjoyment of a particular parcel or the remaining property. Tex. Prop. Code Sec. 21.042(e)

Any valuation must always consider the highest and best use of the property—both immediately or in the reasonable, foreseeable future. *City of Austin v. Cannizzo*, 267 S.W.2d 808 (Tex. 1954).

Chapter 21, Property Code

8. **Who pays for the condemnation proceeding?** - After assessing damages (the appropriate compensation for the property), the special commissioners must then determine the cost of the condemnation proceeding. Section 21.047(a) of the Property Code states:

Special commissioners may adjudge the costs of an eminent domain proceeding against any party. If the commissioners award greater damages than the condemnor offered...the condemnor shall pay all costs. If the commissioners' award...is less than or equal to the amount the condemnor offered before proceedings began, the property owner shall pay the costs. Tex. Prop. Code Sec. 21.047(a).

Section 21.047(d) of the Property Code states:

If a court hearing a suit under this chapter determines that a condemnor did not make a bona fide offer to acquire the property from the property owner voluntarily as required by Section 21.0113, the court shall abate the suit, order the condemnor entity to make a bona fide offer, and order the condemnor to pay (1) all costs as provided by Subsection (a); and (2) any reasonable attorney's fees and other professional fees incurred by the property owner that are directly related to the violation. Tex. Prop. Code Sec. 21.047(d).

Chapter 21, Property Code

9. **How do you appeal a Special Commissioner's Decision?** - A condemnation proceeding only becomes a civil litigation subject to the courts' jurisdiction if objections to the commissioners' Award are filed with the appropriate court within the time prescribed by Section 21.018 of the Property Code.

Section 21.018 states that a party in a condemnation proceeding may object to the findings of the special commissioners by filing a written statement detailing both specific objections and the ground for these objections. The statement must be filed with the court that has jurisdiction over the condemnation proceeding. This filing must occur on or before the first Monday following 20 days from the date that the commissioners' findings were filed with the court. Tex. Prop. Code Sec. 21.018. However, the amount of time allotted to object the filing is tolled until the court clerk sends notice of the commissioners' award by certified or registered U.S. mail—return receipt requested—to the parties involved in the proceedings or their attorneys of record at their addresses of record. *John v. State*, 826 S.W.2d 138 (Tex. 1992). If no party files objections to the special commissioners' award within a timely manner, the decision of the commissioners becomes final and the court is without authority to try the case. *Sinclair v. City of Dallas*, 44 S.W.2d 465 (Tex. Civ. App.—Waco 1931, writ ref'd). The court must adopt the commissioners' award as a judgment of the court. Tex. Prop. Code Sec. 21.061. A party who files an objection to the special commissioners' award must ensure that notice of the citation (the appeal) is issued to the adverse party. If the objecting party fails to secure service of citation to the other party within a reasonable time, the trial court must dismiss the objections for want of prosecution and must also reinstate the special commissioners' award. *State v. Ellison*, 788 S.W.2d 868 (Tex. App.—Houston [1st Dist.] 1990, writ denied). However, some circumstances, such as filing one's own objections, may submit a party to the jurisdiction of the court even if a party has not been formally served. *City of Tyler v. Beck*, 196 S.W.3d 784 (Tex. 2006).

If objections to the commissioners' award are filed in a timely matter, the county court at law or district court at law would try the case "de novo." A trial de novo is a judicial proceeding in which the entire case is reconsidered. Neither party is limited to the claims or evidence presented during the special commissioners' hearing.

Chapter 21, Property Code

10. **Then what?** - After the commissioners make their decision, the condemnor may start construction of the project by posting adequate security with the court. The construction continues even though either party might appeal. If neither party appeals, the process concludes. If appealed, landowners' attorney fees and appraiser fees cannot be recovered as part of a judgment even when the landowners prevail.

Chapter 111, Natural Resources Code

"Common carriers" are defined in Texas Natural Resources Code (Section 111.002(6)) as a company that "owns, operates, or manages, wholly or partially, pipelines for the transportation...to or for the public for hire..."

Section 111.019, Natural Resources Code states in part: "(a) Common carriers have the right and power of eminent domain."

Natural Resources Code, Sec. 111.003(a) expressly provides that the common carrier chapter does not apply to pipelines that are limited in their use to wells of the owner.

"Check the Box" Form (T-4)

APPLICATION FOR PERMIT TO OPERATE A PIPELINE IN TEXAS <small>(See 16 TAC 5.70)</small>		FORM T-4 <small>(8/06)</small>
Railroad Commission of Texas Gas Services Division License & Permits Section		Permit No. _____
ORGANIZATION INFORMATION		
1. Operator (Applicant) (See Instruction 1) PSE: _____		Address _____
2. Does the above named operator own pipeline? <input type="checkbox"/> Yes <input type="checkbox"/> No If "No", give name and address of owner.		
3. Does the above named operator conduct or control the economic operations on the pipeline? <input type="checkbox"/> Yes <input type="checkbox"/> No If "No", give name, address and PSE of economic operator. (See Instruction 2)		
PIPELINE INFORMATION		
1. Mark appropriate block for each of the following questions: a) Are the pipelines covered under this permit <input type="checkbox"/> Interstate <input type="checkbox"/> Intrastate b) Fluid transported: <input type="checkbox"/> Gas <input type="checkbox"/> Condensate <input type="checkbox"/> Gas (*) <input type="checkbox"/> Products (*) <input type="checkbox"/> Full Gas Well Stream <input type="checkbox"/> Full Oil Well Stream <input type="checkbox"/> Other (*) * Specify _____ ppm c) Does fluid contain H ₂ S? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, at what concentration? _____ ppm d) Pipeline classification: If answer to (b) is other than natural gas, will the pipeline be operated as a <input type="checkbox"/> common carrier or as a <input type="checkbox"/> private line? If answer to (b) is natural gas, will the pipeline be operated as a <input type="checkbox"/> gas utility or as a <input type="checkbox"/> private line? <small>(Ch. 111, Texas Natural Resources Code)</small> <small>(Texas Utilities Code)</small> NOTE: A natural gas pipeline permit will not specify whether the pipeline is a gas utility or a private line. The Gas Services Division Gas Utility Audit Section will make that determination and notify the operator of its status. e) Does pipeline use any public highway or road, railroad, public utility, or other common carrier right-of-way? <input type="checkbox"/> Yes <input type="checkbox"/> No f) Will the pipeline carry only the gas and/or liquids produced by pipeline owner or operator? If answer to (f) is "No", is the gas and/or liquids: <input type="checkbox"/> Purchased from others. <input type="checkbox"/> Owned by others, but transported for a fee. <input type="checkbox"/> Both purchased and transported for others.		
2. a) New installation? <input type="checkbox"/> Yes <input type="checkbox"/> No New Construction Report Number _____ b) Renewal for same operator? <input type="checkbox"/> Yes <input type="checkbox"/> No (see 16 TAC 8.115 for applicability) c) Extension or modification? <input type="checkbox"/> Yes <input type="checkbox"/> No If there has been a change in operator or ownership, give name and address of previous operator, owner, or lessor. (Attach form T4B)		
3. Check detailed purpose(s) for which described pipeline will be used: <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Transmission <input type="checkbox"/> Gathering <input type="checkbox"/> Gas Injection </div> <div> <input type="checkbox"/> Terminal (Storage Field) <input type="checkbox"/> Gas Lift <input type="checkbox"/> Gas Plant </div> <div> <input type="checkbox"/> Industrial Distribution <input type="checkbox"/> Manufacturing Feed Stock (Own Consumption) <input type="checkbox"/> Other (explain) _____ </div> </div>		
4. U.S.G.S. 7.5 Minute Quad attached? (Scale 1" = 2,000 feet) <input type="checkbox"/> Yes <input type="checkbox"/> No Overview map (24" x 24" / 1" = 20 miles or less) attached and digital data sent? <input type="checkbox"/> Yes <input type="checkbox"/> No		
I declare, under penalties prescribed in Sec. 91.143, Texas Natural Resources Code, that I am authorized to make this report, that this report was prepared by me or under my supervision and direction, and that data and facts stated therein are true, correct, and complete, to the best of my knowledge.		
(Type or Print Name of Person) _____		(Date) _____
(Title) _____		(Signature) _____
Inquiries regarding this application should be directed to:		
Name _____ Address _____		Phone: (A/C) _____
Fax: () _____ E-mail _____		
The Railroad Commission does not discriminate on the basis of race, color, national origin, sex, religion, age, or disability in employment or the provision of services. TDD/TTY (512) 463-7284		

Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas LLC (09-0901)

In *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas LLC*, (09-0901) the Texas Supreme Court this year reversed a court of appeals decision allowing Denbury Resources, Inc. ("Denbury") to use the power of eminent domain to condemn private property for a carbon dioxide pipeline. At issue was whether a common carrier permit granted by the Texas Railroad Commission (the "Railroad Commission") automatically granted a pipeline company the right to use eminent domain and whether a landowner could challenge the eminent domain power of a pipeline company in court.

The dispute arose when the landowner, Texas Rice Land Partners, Ltd. ("Texas Rice Land"), denied Denbury access to their land in order to survey Denbury's proposed pipeline route. Denbury sued claiming that it qualified as a common carrier by virtue of a permit granted by the Railroad Commission and therefore, Denbury had the right to take private property for a public use pipeline and Texas Rice Land could not challenge the taking in court.

The court of appeals held that under Texas law (1) a pipeline owner could obtain the right to condemn private property by selecting a box designating itself as a common carrier on a form filed with the Railroad Commission, and (2) a landowner could not challenge whether the proposed pipeline would in fact be for public rather than private use in court.

In reversing the court of appeals decision, the Texas Supreme Court noted that the Railroad Commission's common carrier permit was issued without confirming that Denbury's pipeline would actually be for public, rather than private, use and without notice to the landowners. Therefore, the permit alone did not conclusively establish Denbury's status as a common carrier because there was no inquiry as to Denbury's qualification as a common carrier. Denbury asserted that making the pipeline accessible for public use was sufficient to establish common carrier status. However, Denbury had not identified potential customers that owned carbon dioxide near the Denbury pipeline route. Therefore, it was unlikely that the pipeline would be for public use.

Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas LLC (09-0901)

The Texas Supreme Court did not permit Denbury to declare that its proposed pipeline would be available to the public in order to circumvent the public use requirement and held "unadorned assertions of public use are constitutionally insufficient." Denbury merely registered as a common carrier by checking a box on a form filed with the Railroad Commission. This did not conclusively convey the "extraordinary power of eminent domain." Furthermore, landowners were not barred from contesting in court whether a proposed pipeline meets statutory common carrier requirements. Writing for the majority, Justice Willett said, "even when the Legislature grants certain private entities 'the right and power of eminent domain,' the overarching constitutional rule controls: no taking of property for private use."

The Natural Resources Code provision interpreted by the Supreme Court in *Denbury* only applies to petroleum and carbon dioxide. It is unclear how the Texas Supreme Court's decision could affect natural gas pipelines governed by different statutory provisions, such as the gas utility statute, which provides in part, "a gas or electric corporation has the right and power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation." (See Texas Utilities Code Section 181.004). However, this issue has been addressed by lower courts. In *Thedford v. County of Jackson*, the court held that gas pipeline companies transporting gas produced from their own wells to distant markets are not engaged in the business of transporting gas for hire or of purchasing gas from other producers and are not common carriers or common purchasers of gas. *Thedford v. County of Jackson*, 502 S.W.2d 899 (Tex. Civ. App. Corpus Christi 1973, writ ref'd n.r.e.).

Transcanada Corp. v. Crawford



Transcanada Corp. v. Crawford

- Case involving the Keystone XL pipeline which will run from Canada to Texas. Crawford is challenging TransCanada's "common carrier" status. Crawford questions whether there will be any points of entry for any Texas petroleum products along the entire length of the Texas portion of TransCanada's line
- Landowner Crawford sought and obtained a Temporary Restraining Order in February preventing access to her property for surveying, but the Lamar County District Court lifted the order later that month (Feb. 24, 2012) and permitted access to TransCanada for the purposes of constructing the pipeline.
- On March 2, 2012 the 6th Court of Appeals reinstated the restraining order after an appeal by Crawford, preventing construction from taking place. But on March 9, 2012 it was dissolved yet again for a final time by the Court of Appeals.
- Friday, August 10, 2012, the Lamar County Court at Law granted a "Writ of Possession" to TransCanada to allow them access to the property for the purposes of laying the pipeline.
- Trial is set for September. Case is likely to go up on appeal yet again.

Transcanada Corp. v. Crawford

Keystone Pipeline Map



Negotiation Tips

- **Never grant an exclusive easement.** Always retain the right to grant joint use or occupancy of the easement as long as it does not unreasonably interfere with the condemnor's usage. Never grant a permanent, perpetual or irrevocable easement.
- If the proposal allows the installation of communication equipment or facilities (telecommunication or otherwise), limit them to private, nonpublic use. Otherwise, commercial use is allowed without additional compensation.
- Terminate the easement if not used continuously for a specific number of months. Never rely on abandonment to terminate the easement. The legal definition of the term includes more than just nonuse. Require the condemnor to remove all equipment and fixtures and reclaim the land and pay damages, once the easement ends.
- In addition to payment for the easement, include compensation for each structure placed on the property. If not, limit permitted structures to those placed within the easement during the construction phase. After that, require compensation for any structures added. Limit surface structure placement (including signage) to fence-lines.
- In all likelihood, the condemnor will assign the easement to another entity in the future. Require notification of the assignment as a condition for it to become binding on the landowner.
- What must the condemnor do with trees and brush removed from the easement? Must they be stacked and burned, shredded or buried? Must larger trees be cut and piled for firewood? Require that rocks exceeding a certain diameter be removed and stacked at locations designated by the landowner.
- Require that berms and terraces be constructed on steep slopes to prevent erosion. Require reconstruction of terraces.
- Do not allow the condemnor to enter and leave the premises wherever and whenever it pleases. Limit access solely to and through the easement. Temporary access outside the easement may be granted for additional compensation during the construction phase.
- After the construction phase ends, require the condemnor to change the locks on all gates and give 24- to 48-hour advance notice of any subsequent entry except during emergencies.

Negotiation Tips

- Require welding crews to carry firefighting equipment or be accompanied by water trucks with high-pressure sprayers to prevent range fires. Make the condemnor liable for any fire damage resulting from its operations.
- Get an indemnification agreement for tort and environmental liability caused by the condemnor's activities.
- Require inclusion as an additional insured under the condemnor's liability policy.
- Insert "Time is of the Essence" in the agreement. Without this language, there are no hard and fast deadlines for compliance with agreement provisions.
- Insert a "Favored Nations Clause" to ensure no other landowner gets a better deal in the area. (This provision is difficult to get.)
- Deny any rights to hunt and fish on the property.
- Require all fences be braced before cutting. Specify how the braces will be constructed. Require corner post bracing
- Require the condemnor to install and maintain gates where fences are cut. Landowners may require a specific local contractor to do all fence work, gate installation and other similar work.
- Require the landowner's permission to remove deer blinds and feeders from the easement during the construction period. Otherwise, they could be bulldozed or destroyed.
- Specify that the condemnor takes subject to any and all existing easements, both visible and those of record. Also, it takes subject to all surface, wind, water and mineral leases on the property.
- Never agree that the initial, lump-sum payment for the easement covers all damages. Present damages may be covered but not future damages. Make sure compensation includes damages outside the easement. Blasting, use of heavy equipment or both may collapse shallow aquifers, cause springs and wells to go dry and pond and tank dams to leak. For this reason, blasting may be prohibited.

Negotiation Tips

- Require compensation for all livestock killed or injured as a result of the condemnor's operations. Compensation should include damages for any livestock or trophy game animals that escape when a fence is cut or a gate is left open, especially in cases of properties with high fences. Include the cost of rounding up the livestock and resulting damages from any diseases introduced into the herd.
 - Require restoration of the land within the easement at the end of the construction phase. Specify grass will be restored to the satisfaction of landowner. Also, specify how frequently the easement must be maintained.
 - Some landowners may wish to deny the use of all chemicals (or certain chemicals) to control weeds and brush (no broad-spectrum herbicides to prevent loss of grass, otherwise a large "dead-zone" could be created along ROW).
 - Require all trucks to be washed before entering the premises to prevent the spread of noxious weeds.
 - Include specific monetary fines to be paid to landowner for each act of noncompliance.
 - Never warrant title to the land. Specify the condemnor takes the title to the easement solely at its risk. If title fails, the landowner will not be required to return any consideration.
 - Recent jury verdict: LaSalle Pipeline LP in McMullen County \$600,000 for 14 acres. \$625/rod. A rod=16.5 ft.
- Special thanks to The Office of the Texas Attorney General; and the Real Estate Center at Texas A&M University for some of the content of this presentation.*