

RANCH AND FARM LAND CONDEMNATION 101

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CHAPTER 9



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RANCH AND FARM LAND CONDEMNATION 101

I. INTRODUCTION

While closely related legal concepts, eminent domain and condemnation are distinct ideas. On the one hand, eminent domain refers to the governmental power to take private property and apply that property to public use, provided compensation is paid for the taking. On the other, condemnation is the *process* by which the governmental taking occurs. Texas has utilized the governmental power of eminent domain since its early acts as a sovereign.¹

The U.S. Supreme Court has explained that "[t]he power of eminent domain is essential to a sovereign government."² But the prospect of an individual being forced to give up his property is obviously concerning to many private citizens. Because of the vast consequences eminent domain creates for private citizens, both the United States and the Texas Constitutions contain takings clauses with limitations on the use of eminent domain. Among such limitations is the requirement that just compensation be paid.³

The purpose of this paper is to provide a primer on condemnation law in Texas, specifically with regards to ranch and farm land. The article first sets forth a general outline of the condemnation process in Texas, including a discussion of Texas reforms to the process and the different types of condemnation authority in the state. Based on this discussion, the article concludes with practical tips for Texas farm and ranch landowners facing condemnation.

II. OUTLINE OF CONDEMNATION PROCESS

Following is a discussion of what to expect during each phase of the Texas condemnation process. For a flow chart that tracks these steps and provides a typical timeline, please see Appendix 1.

A. Build up to an offer

1. Background Work

During the first steps of the condemnation process, the condemning authority must make certain investigations into the property at issue. This includes performing a title search and identifying the landowners of the property in question. Once this step is complete, the condemning authority obtains access to the relevant property, surveys, and appraisals. This background work is important to ensure that the condemning authority deals with the correct property owner(s) and has an accurate idea of the value of the property at issue.

2. Negotiations and Initial Offer

After the background work is complete, then negotiation may take place. Items that are frequently the subject of negotiation at this stage include the price to be paid for the property, as well as such items relating to land improvements, property modifications, and maintenance of the property. The typical time frame for background work and negotiations to be completed is around 45 days, though this will vary depending on the number of parcels the condemnor is seeking, as well as the urgency of the project for which the property is being taken.

Based on how the negotiations at this stage go, the condemning authority will make an initial offer to the property owner(s). Texas Property Code Section 21.0111(a) provides that at the time an initial offer is made, the potential condemnor must disclose to the property owner by certified mail, return receipt requested, "any and all appraisal reports produced or acquired by the entity relating specifically to the owner's property and prepared in the 10 years preceding the date of the offer." Further, Section 21.0111(c) provides that the offer may not include a confidentiality provision and that the property owner must be informed of his right to discuss the offer with others or keep the offer confidential (unless subject to Chapter 552, Government Code).

In turn, Section 21.0111(b) requires the property owner to disclose to the entity seeking the property "any and all current and existing appraisal reports produced or acquired by the property owner relating specifically to the owner's property and used in determining the owner's opinion of value." This disclosure must take place by the earlier of: (1) the tenth day after receipt of an appraisal report, or (2) the third business day before the date of a special commissioner's hearing (if an appraisal report is to be used at the hearing).

3. "Bona Fide" Offer

Texas Property Code Section 21.0113(a) provides that "[a]n entity with eminent domain authority that wants to acquire real property for a public use must make a bona fide offer to acquire the property from the property owner voluntarily." Under Texas Property Code Section 21.0113(b), seven requirements must be met for an offer to be considered "bona fide:"

1. An initial offer is made in writing to the 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

¹ See *Davis v. City of Lubbock*, 326 S.W.2d 699, 704-05 (Tex. 1959) (discussing how "[o]ne of the early acts of the Republic of Texas was to condemn land for resale.").

² *United States v. Carmack*, 329 U.S. 230, 236 (1946).

³ U.S. CONST. amend. V; TEX. CONST. art. I, § 17.

- 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.

Note that the Landowner's Bill of Rights ("Bill of Rights") is a document prepared by the Texas Attorney General that informs property owners of the law regarding eminent domain, the condemnation process, and landowner rights.⁴ Specifically, the Bill of Rights contains the obligations owed to the landowner by the condemning authority and all options the landowner has during the condemnation process.

Most importantly, the Bill of Rights lists the landowner's right to the following: notice that the landowner's property is to be acquisitioned; a bona fide good faith effort to negotiate by the condemning authority; an assessment of the landowner's damages resulting from the condemnation; a hearing before a court-appointed panel of three special commissioners to determine compensation; and the possibility to appeal the commissioners' decision.⁵

As such, the Landowner's Bill of Rights sets out to educate landowners and allow them to protect their property rights. It is highly recommended that any property owner in Texas faced with the threat of condemnation carefully review the information therein.

B. After the offer: Acceptance or a Condemnation Hearing

If the offer is accepted, then the matter is settled and both parties go to closing according to the terms of the deal that has been struck. However, if the offer is rejected or is not accepted, then the condemnation process begins. The typical steps of the condemnation process are as follows:

1. Condemning authority files "Petition in Condemnation" in county court at law or district court. Texas Property Code Section 21.012 provides that the petition must: describe the property to be condemned; state with specificity the public use for which the property is required; identify the owner of the property, if known; state that the entity and property owner are unable to agree on the damages; state that the entity provided the property owner with the landowner's bill of rights statement, if applicable; and state that the entity made a bona fide offer to acquire the property from the property owner voluntarily. A copy of the petition must be sent to the property owner by certified mail, return receipt requested.
2. Condemning authority has the citation issued and the parties served.
3. Judge appoints three non-interested landowners who reside in the county as "Special Commissioners."
4. Special Commissioners take an oath, set a hearing date, and send notice at least 20 days before the hearing.
5. Both sides prepare witnesses and evidence. During this time, the property owner(s) must provide the condemning authority with appraisals of the property at issue conducted within 10 days of receipt or three days before the hearing.
6. Commissioners hear evidence and issue a written decision on value.
7. Clerk files award with the Court.

The above process is frequently referred to as a "condemnation hearing" and typically takes about 120 days from the filing of the petition to the award (though it is not unheard of for the process to take anywhere from 75 to 150 days).

⁴ TEX. GOV'T CODE § 402.031.

⁵ Office of the Attorney General of Texas, *The State of Texas Landowner's Bill of Rights*,

https://texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf.

C. Objections to award

After the award issued by the Commissioners has been filed with the Court, the parties have an opportunity to object thereto. The deadline for written objections is the first Monday following the twentieth day after the commissioners file their findings with the court.⁶

If there is no objection by this deadline, then a final judgment (confirming the award and granting rights) is issued and the parties go to closing. However, if there is an objection within the statutory time frame, then the next steps depend on whether or not the condemning authority needs immediate possession of the land.

If the condemning authority does not need immediate possession of the land, then the matter proceeds to trial. The trial will proceed like a normal civil case with discovery, trial, verdict, and a judgment. Among the issues to be determined at trial is the value of the property or easement, as well as the amount of damage to remainder property. Any testifying appraiser must be a qualified expert, and it is also important to note that at this stage, judges often require additional mediation. The matter will be decided by a jury if either side requests one.

On the other hand, if the condemning authority does need immediate possession of the land, then the condemning authority will file a writ of possession to take control. In this scenario, local counsel will file the writ, make a cash deposit for the alleged value of the property, and take possession. The property owner is able to withdraw money from the deposit, but risks owing money if it is finally determined that the valuation was too high. Once the writ is complete, then the matter will proceed to trial. However, if the landowner believes that the condemning authority is using the land improperly after taking possession, then the property owner can ask for an injunction and significantly delay the trial process.

D. Appeals

As is the case with an ordinary civil trial, parties may have a right to appeal the decision handed down by the court in the context of a condemnation case. If either side does appeal, then the matter will go to a state court of appeals, and if further appealed then the case may go to the Texas Supreme Court.⁷ Eventually, a judgment will become final and the parties will proceed to closing.

E. Closing

After the judgment becomes final, then the parties go to closing on the condemnation transaction. At this phase, parties should ensure that any outstanding option agreements, tentative deals, etc., are resolved. The final step in the condemnation process is for the conveyance, easement, or other right granted by the final judgment or negotiated transaction to be recorded.

III. TEXAS REFORMS TO EMINENT DOMAIN LAW: SENATE BILL 18 (2011), SENATE BILL 1812 (2015), AND FUTURE LEGISLATION

The state of Texas has gone to great lengths to secure and protect property owners' rights. Following is an overview of one reform unique to Texas of which all property owners should be aware: Texas Government Code Chapter 2206 and Texas Property Code Chapter 21, as amended by Senate Bill 18, 82nd Legislature, 2011.

A. Senate Bill 18

1. Overview

In furtherance of the Texas legislature's goal to overhaul Texas' eminent domain law to better protect landowners, the legislature passed Senate Bill 18 ("S.B. 18") on May 23, 2011, striving to make the condemnation procedure more straightforward and fair to landowners. S.B. 18 was adopted in response to the United States Supreme Court decision of *Kelo v. City of New London*⁸ and the recurrent conflict between landowners and energy development.

A significant aspect of S.B. 18 concerns the implications of using the words "public use" versus "public purpose" as the limitation on eminent domain authority. Both the United States and Texas Constitutions prohibit the taking of private property for "public use" without just compensation. However, before S.B. 18, in both Texas and on a national scale the distinction between the terms "public use" and "public purpose" blurred.⁹ This blurring culminated in the U.S. Supreme Court holding in *Kelo* that that "public purpose" was the limitation to be placed on the takings clause. The Court's use of "public purpose" as the limitation resulted in an incredibly broad use of eminent domain authority—under such an interpretation, economic development could qualify as a valid public purpose for which to exercise eminent domain authority, rather than limiting the power to public *uses* like building public structures.

⁶ TEX. PROP. CODE § 21.018(a).

⁷ However, note that the value of most condemnation cases is unlikely to warrant multiple appeals.

⁸ *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding the use of eminent domain for economic development because such development satisfies the "public use"

requirement found in the Takings Clause of the Fifth Amendment to the U.S. Constitution).

⁹ Before S.B. 18, Texas statutes did not expressly ban takings that were not necessary for a public use.

S.B. 18 amended Texas Government Code Section 2206.001 by adding a new subsection providing that a government or private party may not take private property if the taking “is not for a public use.”¹⁰ S.B. 18 also replaced references to “public purpose” in several provisions with “public use.”¹¹ While the bill did not specifically define “public use,” the deliberate choice of the words “public use” over “public purpose” signals that the Texas Legislature is striving to reintroduce a stricter limitation on eminent domain use in the state.¹² Data on whether this change has had a meaningful impact on takings within the state since the enactment of S.B. 18 is not yet conclusive. However, the Texas Supreme Court has recognized that “[t]here is no question that S.B. 18 was intended to increase the rights of property owners facing condemnation proceedings.”¹³

2. Improved Compensation

S.B. 18 contains two provisions which aim to provide for improved compensation to landowners.

First, the bill revised the standard for access impairment compensation for property owners. Based on S.B. 18, Tex. Prop. Code Sec. 21.042(d) now reads as follows:

In estimating injury or benefit under Subsection (c), the special commissioners shall consider an 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, including a material impairment of direct access on or off the remaining property that affects the market value of the remaining property, but they may not consider an injury or benefit that that property owner experiences in common with the general community, including circuitry of travel and diversion of traffic. In this subsection, “direct access” means ingress and egress on or off a public road, street, or highway at a location where the remaining property adjoins that road, street, or highway.

¹⁰ *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 197 n. 13 (Tex. 2012).

¹¹ *Id.*

¹² See Bill Peacock, *Bill Analysis: What's Next for Senate Bill 18?*, TEX. PUB. POL'Y FOUND., <http://www.texaspolicy.com/center/economic-freedom/reports/what's-next-senate-bill-18>.

¹³ *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 197 n. 13 (Tex. 2012).

¹⁴ *State v. Heal*, 917 S.W.2d 6, 9-10 (Tex. 1996) (“[N]o right to compensation extends to a property owner who has

As can be seen above, the current standard for awarding compensation is “material impairment of direct access” to the property. The old standard for compensation was a “material and substantial impairment of access,” which courts interpreted as requiring loss of reasonable access to the property.¹⁴ While there is little guidance from the courts interpreting the new direct access standard, a Texas Court of Appeals has noted since the S.B.18 amendment that “section 21.042 does not address the material and substantial impairment standard and does not alter the well-established rule that a property owner cannot recover for a change in the circuitry of travel.”¹⁵

Second, relocation assistance when landowners are forced to move off of their property is no longer permissive, as it was under the old Texas Property Code. Specifically, Texas Property Code Section 21.046(b) now reads:

This state or a political subdivision of this state ~~may~~ *shall*, as a cost of acquiring real property, pay moving expenses and rental supplements, make relocation payments, provide financial assistance to acquire replacement housing, and compensate for expenses incidental to the transfer of the property if an individual, a family, the personal property of a business, a farming or ranching operation, or a nonprofit organization is displaced in connection with the acquisition.

Data on whether the above provisions have actually resulted in improved compensation to landowners since the implementation of S.B. 18 is still unclear. While there are reports of an upward trend in recent jury verdicts in eminent domain cases, there is uncertainty as to the explanation, with some experts attributing it to the rise in land value driven by population growth, rather than the additional landowner protections in place as a result of S.B. 18.¹⁶

3. Enhanced Notice and Disclosure of Information

S.B. 18 has brought about changes regarding notice and disclosure of information for both condemning

reasonable access to his property after the construction of the public improvement because the benefits of private ownership have been preserved.”)

¹⁵ *State v. Momin*, 409 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2013, pet. filed).

¹⁶ Gilad Edelman, *Pipeline Companies Paying More to Cross Private Land*, THE TEXAS TRIBUNE (2014), <https://www.texastribune.org/2014/06/18/pipeline-companies-paying-more-cross-private-land/>.

authorities and property owners. These aspects of S.B. 18 aim to increase the instances in which a property owner may buy back his or her property and allow landowners to do so at the purchase price rather than at fair market value.

Disclosure of Appraisal Reports. Before S.B. 18, the condemning authority was only required to disclose to the property owner the appraisal used to determine the final offer. Now, at the time of an offer to purchase or lease the property, the condemning authority is required to disclose by certified mail, return receipt requested, to the property owner all appraisals “produced or acquired by the entity relating specifically to the owner’s property and prepared in the 10 years preceding the date of the offer.”¹⁷ On the other hand, property owners are still only required to disclose to the condemning authority “current and existing appraisal reports produced or acquired by the property owner relating specifically to the owner’s property and used in determining the owner’s opinion of value.”¹⁸

Subsequent experience since S.B. 18’s implementation suggests that this added transparency has done little to affect the condemnation process. This is due mainly to the fact that property appraisers can reach vastly different opinions of value on every piece of property—in some cases, different appraisals can result in figures hundreds of thousands of dollars apart. Thus, unless multiple appraisals have been done on a piece of property and reached similar conclusions as to the value thereof, S.B. 18’s requirement of disclosing appraisals has little impact on the ability to resolve a case prior to the presentation of evidence.

Disclosure of Right to Repurchase and Progress Toward “Public Use” of the Property. At the time of acquisition of the property, the condemning authority must disclose in writing to the property owner that he/she or his/her heirs, successors, or assigns may be entitled to repurchase the property.¹⁹ The right to repurchase exists if:

- (1) the public use for which the property was acquired through eminent domain is canceled before the property is used for that public use;
- (2) no actual progress is made toward the public use for which the property was acquired

between the date of acquisition and the 10th anniversary of that date; or

- (3) the property becomes unnecessary for the public use for which the property was acquired, or a substantially similar public use, before the 10th anniversary of the date of acquisition.²⁰

The repurchase price is the price paid by the condemning authority when it acquired the land through condemnation.²¹ In support of this right of repurchase, at the time the property is acquired, the condemning authority must also disclose in writing that the property owner may be entitled to request “certain information relating to the use of the property and any actual progress made toward that use.”²²

Legislative activity subsequent to S.B. 18 shows that there is a persisting perspective that the repurchase right is not yet strong enough. In an effort to expand the repurchase right in 2013, House Bill 476 proposed that condemnors should be required to not only identify the planned public use for the land, but also that landowners should subsequently be able to buy back their land if the land was not used for the identified purpose at first.²³ The bill also set forth that condemnors should be required to make annual reports of work done toward the identified public use, rather than merely allow landowners to request such reports ten years after the condemnation occurred. This bill was not enacted, but its existence shows that there is continued interest in expanding the rights set forth in S.B. 18.

4. Required Bona Fide Offer

The most significant procedural change S.B. 18 produced was the process by which offers are made to landowners before their properties are condemned.²⁴ Before an entity may exercise its powers of eminent domain, it must first attempt to purchase the property from the landowner voluntarily.²⁵

Before S.B. 18, entities with eminent domain authority could give the landowner a “lowball” offer, knowing that the landowner either must accept the offer or be subjected to condemnation proceedings. In an attempt to give the offer process actual significance, S.B. 18 requires that

¹⁷ TEX. PROP. CODE § 21.0111(a).

¹⁸ TEX. PROP. CODE § 21.0001(b). Note that under the new law, the property owner must disclose appraisal reports no later than the earlier of: the tenth day after receipt of an appraisal report or the third business day before the special commissioners’ hearing. *Id.*

¹⁹ TEX. PROP. CODE § 21.023(1).

²⁰ TEX. PROP. CODE § 21.101(a).

²¹ TEX. PROP. CODE § 21.023(2).

²² TEX. PROP. CODE § 21.023(1)(B).

²³ Jess Davis, *Texas Bill Would Expand Buyback Right After Eminent Domain* (2013), <http://www.law360.com/articles/406977/texas-bill-would-expand-buyback-right-after-eminent-domain>.

²⁴ S.B. 18’s provisions regarding bona fide offers have been codified in Tex. Prop. Code 21.0113.

²⁵ In reality, entities with eminent domain authority have much greater bargaining power than landowners and typically have more expertise in condemnation proceedings, more money, and more leverage to force the landowner to accept the offer.

entities with eminent domain authority make a “bona fide” offer to purchase the landowner's property.²⁶ A bona fide offer consists of a written initial and final offer, delivered to the property owner. Based on a certified appraiser's written appraisal of the value of the property to be purchased, the final offer must be “equal to or greater than the amount of the written appraisal obtained by the entity.” The entity must also provide a copy of the appraisal, the instrument conveying the property, and the landowner's bill of rights to the landowner, and it must allow the landowner fourteen days to respond to the final offer. If a court hearing a lawsuit finds that the condemning authority did not make a bona fide offer in compliance with Texas Property Code Section 21.0113, then the court must abate the suit, order the condemnor to make a bona fide offer, and order the condemnor to pay costs and reasonable attorney's fees directly related to the violation.²⁷

These added protections of S.B. 18 aim to allow landowners and entities attempting to purchase the property before condemnation to negotiate on a more level playing field.

5. Comptroller's List

Another important aspect of S.B. 18 was the introduction of eminent domain reporting to the Texas Comptroller's office. The bill “required public and private entities in Texas claiming eminent domain authority to submit a letter to the Comptroller's office by certified mail, return receipt requested, on or before December 31, 2012” outlining “whether they were authorized by the State to exercise eminent domain authority and identify the provisions of state law granting that authority.”²⁸ If an entity failed to report its status as required, then its eminent domain authority expired on September 1, 2013.

In compliance with S.B. 18, the Comptroller's office submitted a report summarizing the responses from entities regarding eminent domain authority in 2013.²⁹ Below is a list of significant findings in the report:

- Total submission received: 9,245 (81 claimed no eminent domain authority; 6,911 complied with statutory requirements; 2,253 did not meet statutory requirements).
- 82% of total submissions from governmental entities; 18% from non-governmental entities.

- Submissions from governmental entities fell into various categories, with most coming from municipalities (19%), utility districts (18%), school districts (18%), counties (10%), water districts (5%), housing authorities (4%), economic development corporations (3%), and hospital districts (2%).
- Non-governmental entities included water supply companies; oil, gas and pipeline companies; electric cooperatives; telecommunications companies; and other private entities.
- Most frequently cited provisions of Texas law granting eminent domain authority: Texas Water Code (54%), Local Government Code (49%), Texas Constitution (36%), Texas Utility Code (24%), Texas Property Code (21%), Texas Transportation Code (20%), and the Texas Education Code (19%).

B. Senate Bill 1812

A new law passed by the Texas legislature in 2015, S.B. 1812, now requires the Texas Comptroller to collect information on public and private entities with eminent domain power *and provide it to the public via a publically accessible online database.*³⁰ While S.B. 18 required these entities to identify themselves and their legal authority for eminent domain power, S.B. 1812 requires them to elaborate on the scope of their powers and applies to entities formed after December 31, 2012. The Comptroller will make its S.B. 1812 list publically available by September 2016. From that point on, the public will have an annually-updated list available to confirm that any would-be condemnor is properly registered.

S.B. 1812 may assist landowners because the Comptroller's List required by S.B. 18 was not updated after its initial creation. Going forward, the S.B. 1812 list will allow landowners to search a relatively current list to verify a would-be condemnor's authority.

C. Future Legislation?

In March 2016, the Texas Senate State Affairs Committee hosted a hearing on eminent domain to gather and review data on the compensation provided to private property owners faced with condemnation— “[a]s one would expect, landowners testified that awards should be higher, and condemning entities testified that

²⁶ TEX. PROP. CODE § 21.0113. For a detailed discussion of bona fide offers, *see supra* Section II.A.3.

²⁷ TEX. PROP. CODE § 21.047(d).

²⁸ Texas Comptroller of Public Accounts, *Senate Bill 18: Eminent Domain Reporting*, http://comptroller.texas.gov/specialrpt/eminent_domain/. It is important to note that those entities that were created or that

acquired eminent domain authority after December 31, 2012 were not subject to the reporting requirement. The online list can be accessed at <http://www.trackingtx.org/index.php/sb18report/search>.

²⁹ *Id.*

³⁰ The new database will be available later in 2016.

the process is working as it should.”³¹ Testimony for landowners characterized Texas eminent domain law as exacerbating an inherently unequal relationship by which “[p]roperty owners walk in to a negotiation with a sword dangling over their head.”³² On the other side, representatives pushed back by describing eminent domain proceedings as “rare but necessary.”³³ Nevertheless, testimony at the hearing indicated that “[w]hether they wish to sell or not, 80-90 percent of Texas landowners accept offers from oil-and-gas pipelines, electric companies or other entities with eminent domain powers rather than endure uphill battles and costly legal bills.”³⁴

Based upon this hearing, there may be support for legislation in the next legislative session to make landowner protections in the condemnation process more effective. Preliminary discussions suggest procedural changes similar to S.B. 18 regarding offers, disclosures, appraisals, and the like.

This is an important development that should be monitored closely by all Texas landowners faced with the prospect of condemnation. If future legislation is passed, it is recommended that potentially affected landowners consult an attorney to ensure that any offers received from condemning authorities are appropriately handled in the best interest of the landowner. Our office regularly handles these types of matters and will be watching for further developments in future legislation, so do not hesitate to contact us should you have any questions.

IV. COMMON TYPES OF FARM AND RANCH CONDEMNATION

A. Water Resources

Article 16, section 59 of the Texas Constitution provides for the creation of “conservation and reclamation districts” with “the authority to exercise

such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.” Most water districts have the right of eminent domain, meaning they have the power to condemn “any land, easement, or other property inside or outside the district’s boundaries when the district needs that property for any district project or purpose—for example, a water, sewer, storm drainage, flood drainage, or flood control project.”³⁵ As noted above, 5% of entities reporting eminent domain authority in Texas pursuant to S.B. 18 came from water districts.

In Texas, Groundwater Conservation Districts and General Law Districts have eminent domain power including fee simple acquisition, but do not have the power of eminent domain over water rights. Special Law Districts have condemnation authority, but may have broader power if enabling legislation provides as such. Additionally, River Authorities have additional eminent domain powers, as granted by their enabling legislation, up to and including acquisition of fee simple title and condemnation of groundwater rights.³⁶

B. Oil and Gas Pipelines

The Texas legislature has granted oil and gas companies a great deal of power, including eminent domain. Nevertheless, pipeline condemnation rarely involves dispossessing landowners of land—rather, easements are much more typical in this arena.³⁷

Eminent domain for oil and gas pipelines is available only to pipeline companies that are deemed “common carriers”³⁸—companies that own or operate a pipeline that transports crude oil, coal, carbon dioxide or hydrogen for hire, or transports crude oil purchased from others. Natural gas pipelines are not governed by the same statutes as crude oil pipelines, but are considered to be common carriers if they transport

³¹ Senate State Affairs Committee Revisits Eminent Domain, TEXAS MUNICIPAL LEAGUE (2016), http://www.tml.org/legis_updates/senate-state-affairs-committee-revisits-eminent-domain.

³² Jim Malewitz, *Lawmakers Mull Tweaks to Eminent Domain Law to Favor Landowners*, THE TEXAS TRIBUNE, <https://www.texastribune.org/2016/03/29/eminent-domain-hearing-texas-lawmakers-mull-landow/>.

³³ *Id.*

³⁴ Polly Ross Hughes, *Texas Energy Report: Texas Landowners Decry Forced Sales, Lowball Offers* (2016), http://www.quorumreport.com/Quorum_Report_Daily_Buzz_2016/texas_energy_report_texas_landowners_decry_forced_buzziid25123.html.

³⁵ *Texas Water Districts: A General Guide*, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, 3 (2004), <http://www.highpointedrippingsprings.com/twd.pdf>. See also TEX. WATER CODE § 49.222.

³⁶ Robert B. Neblett, *Condemnation Proceedings, Public Purpose, and Changes to Eminent Domain Law*,

<https://www.google.com/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj3w4T9zt7KAhWE6iYKHRq0B-gQFggcMAA&url=http%3A%2F%2Fimages.jw.com%2Fcom%2Fpublications%2F1382.ppt&usg=AFQjCNFmCDyqgwVPNQYnHEWJuuCIORdKaQ>.

³⁷ Michael B. Lee, *Pipelines and Eminent Domain in Texas*, BEIRNE, MAYNARD & PARSONS, L.L.P., <http://www.bmpllp.com/files/1202248447.pdf>; Judon Fambrough, *Understanding the Condemnation Process in Texas*, TEXAS A&M REAL ESTATE CENTER (2015), <https://assets.recenter.tamu.edu/documents/articles/394.pdf> (“Significantly, a Texas statute limits the type of estate that can be condemned. Section 21.045 of the TPC provides that, as a general rule, no fee-simple estate may be condemned except where expressly provided by law. For pipeline and utility companies, this rule generally limits condemnation to no greater interests than an easement.”).

³⁸ TEX. NAT. RES. CODE §§ 111.002, 111.003, and 111.0013

natural gas for hire.³⁹ Currently, oil and gas companies indicate common carrier status themselves by marking a form that they submit to the Railroad Commission notifying the agency of the pipeline's construction.⁴⁰ Thus, the current law puts landowners at a distinct disadvantage in relation to oil and gas companies seeking to assert eminent domain authority. However, it was indicated in April 2016 that the conditions under which oil and gas pipelines claim common carrier status will be examined as part of the Sunset Commission's next review of the Texas Railroad Commission.⁴¹ Therefore, some of these considerations may be impacted by legislative action in 2017.

Common carriers may condemn all or part of "the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline."⁴² With the institution of S.B. 18, landowners are now permitted to construct streets and roads above pipeline easements.⁴³ Such roads may be constructed across oil and gas pipelines only if they meet the following requirements: (1) the roads cross the easement at (or near) 90 degrees; (2) the roads are no more than 40 feet wide; (3) the roads do not violate pipeline regulations; and (4) the roads do not interfere with operation and maintenance of pipeline.⁴⁴

C. Transmission Lines

Texas law expressly provides that "[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."⁴⁵ Utility district made up 18% of submissions by entities claiming eminent domain authority pursuant to S.B. 18.

In a typical situation, electric utility companies purchase land outright for substations and will take only an easement for transmission lines. This means that the landowner retains fee simple to the land under the line (but is usually paid 100% of its value). Transmission line easements for 345 kV lines are typically 150-200

feet wide. Trees and tall vegetation are typically removed from the right-of-way (ROW) but most farming and grazing can continue. Companies will not have buildings such as homes in the ROW, but may span structures such as irrigation equipment.

D. Roads

Unlike other common scenarios in which eminent domain power is exerted, condemning land for transportation purposes generally requires fee simple, rather than only an easement. Impaired access to remainder can mean higher compensation to landowners.

As such, it is important to understand relocation assistance programs to which landowners are entitled. With respect to transportation projects, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 provides for certain benefits to landowners displaced from real property as a result of land acquisition for transportation matters. There are three such types of relocation assistance programs: (1) for individuals; (2) for business, farms, or non-profit organizations; and (3) for those who are not physically displaced by projects, but are required to relocate personal property they own from the acquired right of way.⁴⁶

1. Relocation Assistance for Individuals.

Relocation assistance for individuals consists of either a replacement housing payment (for home owners) or a rental assistance payment (for tenants). The amount of the replacement payment is equal to the difference between the acquisition amount of the dwelling and the cost of "decent, safe and sanitary comparable replacement housing."⁴⁷ Rental assistance supplements are set at the difference in cost between the current rent and utilities and that of a decent, safe and sanitary comparable replacement for a 42-month period.⁴⁸

³⁹ Tiffany Dowell, *Eminent Domain in Texas (Part 3) – Oil and Gas Pipelines* (2014), <http://agrillife.org/texasaglaw/2014/03/31/eminent-domain-in-texas-part-3-oil-and-gas-pipelines/>. It is also important to note that pipelines that transport only their own product are *not* common carriers.

⁴⁰ Landowners can challenge a pipeline's designation as a common carrier. *Id.*

⁴¹ Polly Ross Hughes, *Texas Energy Report: Sen. Nichols Tells RRC that Sunset Commission Will Tackle Thorny Pipeline Issue* (2016), http://www.quorumreport.com/Quorum_Report_Daily_Buzz_2016/texas_energy_report_sen_nichols_tells_rrc_that_sun_buzziid25137.html.

⁴² TEX. NAT. RES. CODE § 111.019.

⁴³ TEX. GOV'T CODE § 2206.002.

⁴⁴ Judon Fambrough, *Understanding the Condemnation Process in Texas*, TEXAS A&M REAL ESTATE CENTER (2015), <https://assets.recenter.tamu.edu/documents/articles/394.pdf>.

⁴⁵ TEX. UTIL. CODE § 181.004.

⁴⁶ *Eminent Domain*, TEXAS DEPT. OF TRANSP. (2015), http://ftp.dot.state.tx.us/pub/txdot-info/sla/education_series/eminent-domain.pdf.

⁴⁷ According to the Texas Department of Transportation, a displaced owner/occupant "may also be eligible for a lump-sum payment for any increased interest required in financing a replacement dwelling, if necessary. Incidental expenses associated with purchasing replacement housing are also reimbursable under this program." *Id.* at 6.

⁴⁸ The tenant may use the rental supplement as a down payment for replacement housing and for related replacement expenses.

2. Relocation Assistance for Businesses, Farms or Non-Profit Organizations.

When it comes to non-residential entities, such as businesses, farms, and non-profit organizations, relocation assistance covers expenses to disconnect, move and reinstall personal property. Moving expense payments cover items that were not purchased as part of the real property (for example, furniture, inventory and equipment), as well as reasonable and necessary modifications to accommodate the personal property at the replacement location⁴⁹ and expenses associated with searching for a replacement location.⁵⁰

3. Relocation Assistance for those who are not physically displaced by the project but are required to relocate personal property they own from within the acquired right of way.

In these types of cases, the property owner is entitled to “reimbursement for the reasonable cost of moving the property from within the acquired right of way.”⁵¹

V. SPECIAL CONSIDERATION: CONSERVATION EASEMENTS

Owners of rural land sometimes consider granting conservation easements to preserve their land. Conservation easements consist of restrictions placed on property to protect its resources—they can be either voluntarily donated or sold by the landowner.⁵² In Texas, such easements are most commonly donated to land trusts, which are non-profit conservation organizations.⁵³ Conservation easements exist in perpetuity and bind subsequent owners of the property.

The overall appeal of granting a conservation easement is obvious: not only do such easements seem to ensure that the resources associated with a particular piece of property will be enjoyed by future generations, but there are potential tax benefits as well.⁵⁴ However, conservation easements are permanent and may

undoubtedly conflict with the public interest at some point in the future.⁵⁵

When the prospect of condemnation is on the horizon, it is important to consider the impact that granting conservation easements can have on land value. Conservation easements limit how landowners may use their property. In this way, the easement affects the highest and best use of the land, which in turn could translate into a condemning authority acquiring the land for less money, as the land is valued in condemnation proceedings based on uses available to the landowner rather than to the condemner.⁵⁶ Accordingly, while some may find that the benefits of conservation easements outweigh this risk overall, it is prudent to consider the potential impact on property valuation before granting a conservation easement.

VI. CONCLUDING REMARKS: PRACTICAL STEPS TO TAKE WHEN FACING CONDEMNATION

Though the power of eminent domain is entrenched in the Texas legal system, individual landowners may be resistant when personally faced with condemnation. The Texas legislature’s moves to increase transparency in the condemnation process are a welcome change from a landowner’s perspective, and further legislative changes may continue to make the power of eminent domain, the condemnation process, and property valuation more apparent to landowners who may not have first-hand experience on the subject.

The following are recommended steps to take upon receipt of notice that your property is being condemned:

1. Verify the condemner is registered with the Comptroller and has eminent domain authority at <http://www.trackingtx.org/index.php/sb18report/>.⁵⁷
2. Confirm your name and property descriptions are correct—any notice errors could cause

⁴⁹ This is called a “re-establishment” payment.

⁵⁰ In addition, moving expenses for these entities includes the cost to “hire professional move consultants, replace letter or card stock, re-letter signs, run utilities to the replacement site, one-time impact or usage fees, storage, loss or replacement of tangible personal property and professional fees associated with the purchase or lease of a replacement site.” *Eminent Domain*, TEXAS DEPT. OF TRANSP. 7 (2015), http://ftp.dot.state.tx.us/pub/txdot-info/sla/education_series/eminent-domain.pdf.

⁵¹ *Id.*

⁵² *Conservation Easements*, THE NATURE CONSERVANCY, <http://www.nature.org/about-us/private-lands-conservation/conservation-easements/what-are-conservation-easements.xml>.

⁵³ *Conservation Easements: A Guide for Texas Landowners*, TEXAS LAND TRUST COUNCIL (2009),

<http://www.gbrtrust.org/documents/easements/ConservationEasements.pdf>.

⁵⁴ *Id.* at 9-12.

⁵⁵ Derrick P. Fellows, Kelo, *Conservation Easements, and Forever: Why Eminent Domain is not a Sufficient Check on Conservation Easements’ Perpetual Duration*, 32 WM. & MARY ENVIRON. L. & POL’Y REV. 625, 625-26, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1520&context=wmelpr>; Kioren Moss, *Understanding Conservation Easements*, INT’L RIGHT OF WAY ASS’N 22 (2003), <https://www.irwaonline.org/eweb/upload/0303a.pdf>.


⁵⁶ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893); Moss, *supra* note 47, at 16-17.

⁵⁷ In accordance with S.B. 1812, this list will be updated after September 1, 2016. Accordingly, this URL is subject to change.

delays and put additional pressure on condemnor.

3. If there is shared ownership, contact the other owners to ensure no duplication of efforts.
4. Contact the condemning entity to ensure you understand the land rights being sought. Be sure to request appraisals and other records relevant to your property.
5. Search your records for appraisals performed in the last 10 years and be prepared to defend your valuation—you may need to retain an appraiser to prepare a report and/or serve as a witness during the hearing.
6. Information is key. Ask what is being offered to others—ask everyone and ask often.
7. **NEGOTIATION is key**—During any negotiations, be mindful of all potential sources of damages (loss to remainder, crops or grazing losses, moving costs, etc.) and mitigation you might appreciate (minor route modifications, the installation of certain fencing or gates, right of entry, grading, reseeding, etc.). In some situations, you may be able to negotiate for concessions that are not always be available during a condemnation hearing.

POWERPOINT PRESENTATION





Ranch and Farm Land Condemnation 101

Dennis W. Donley, Jr.
May 26, 2016

Lubbock, Texas

NAMAN HOWELL
SMITH & LEE
ATTORNEYS AT LAW



Disclaimers

- This is a summary. There are details omitted that could be important in any particular case.
- This is not legal advice or the rendition of legal services.
- The statements contained herein are not to be deemed the position of law firm or clients.

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What are condemnation and eminent domain?

- Eminent domain is the power of the government to take private property for a public use.
- Condemnation is the *process* by which the taking occurs.
 - Of course, land is not “taken” without compensation.
 - Condemnors will take only what is necessary: roads require fee simple, but transmission lines require only an easement.

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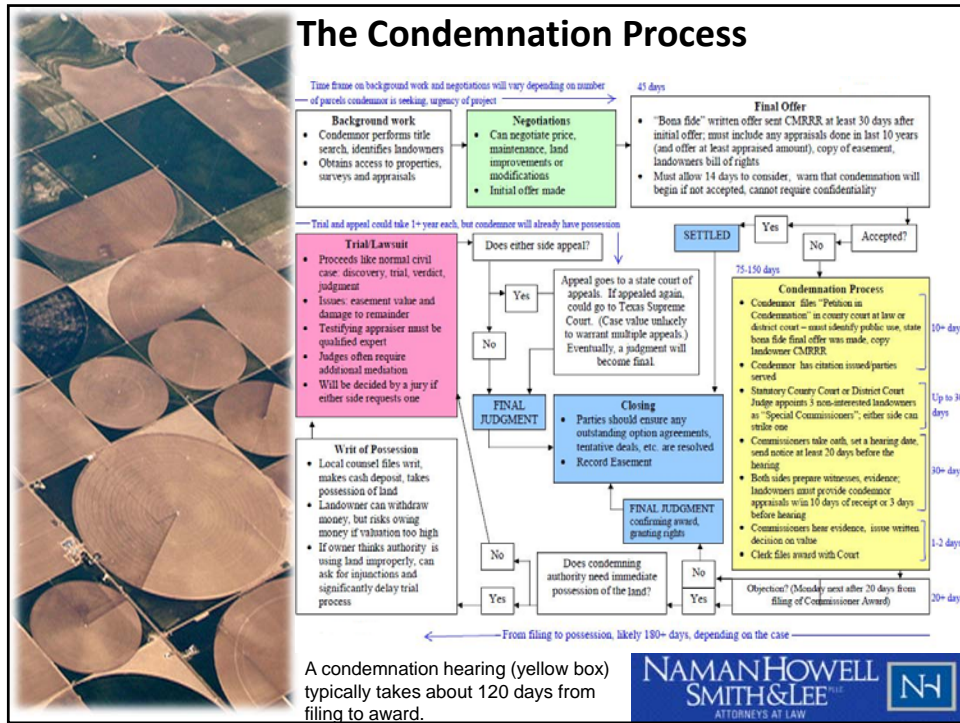


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Senate Bill 18

- Those who have not dealt with condemnation in a number of years should become familiar with S.B. 18's comprehensive condemnation reforms, which were effective September 1, 2011.
- "There is no question that S.B. 18 was intended to increase the rights of property owners facing condemnation proceedings." *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012).
- Stricter limitations on eminent domain authority
 - "Public Use" vs. "Public Purpose"



Senate Bill 18

- Improved Compensation
 - Jury awards in eminent domain proceedings have been trending up, but difficult to say whether S.B. 18 is responsible or increased compensation simply due to increased land value
- Enhanced Notice and Disclosure of Information
 - Disclosure of appraisal reports (but appraisals can vary widely from appraiser to appraiser)
 - Disclosure of right to repurchase and progress report toward "public use" of the property
 - There has been subsequent effort to expand on these landowner rights (H.B. 476 in 2013)
- Required Bona Fide Offer
 - Most significant procedural change in S.B. 18
 - Intended to level the negotiating playing field, but landowners still feel they walk into the negotiation with a "sword dangling over their head"
- Comptroller's List
 - All entities with eminent domain authority had to register with the Comptroller by December 31, 2012





Senate Bill 1812

- S.B. 1812 in 2015 goes beyond the S.B. 18 one-time list of registered condemners.... It further requires that the Comptroller create a publicly-accessible database of entities with eminent domain authority by September 1, 2016 and update it annually
- Landowners should check to verify that a condemning entity is registered/has authority to condemn

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Future Legislation?

- On March 29, 2016, the Texas Senate State Affairs Committee hosted an interim hearing regarding eminent domain
- Landowners want more compensation
 - “Whether they wish to sell or not, **80-90 percent** of Texas landowners accept offers from oil-and-gas pipelines, electric companies or other entities with eminent domain powers rather than endure uphill battles and costly legal bills.”
- Condemners say that eminent domain proceedings are “rare but necessary”
- Interim activity indicates possible further legislative action next session

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Common Types of Farm & Ranch Condemnation

Water Resources (5% of reporting entities)

- Groundwater Conservation Districts and General Law Districts
- Special Law Districts
- River Authorities

Oil and Gas Pipelines

Eminent domain available only to pipeline companies that are deemed "common carriers"

- Conditions for common carrier status will be examined as part of the Sunset Commission's next review of the Texas Railroad Commission
- Pipeline companies may condemn land, rights-of-way, easements, and property necessary to build/operate common carrier pipelines





Common Types of Farm & Ranch Condemnation

Transmission Lines

- Companies typically purchase land outright for substations, but only take an easement for transmission lines.
 - Landowner retains fee simple to the land under the line
 - Transmission line easements for 345 kV lines are typically 150-200 feet wide



- Trees and tall vegetation are typically removed from the right of way (ROW) but most farming and grazing can continue
- Cannot have buildings such as homes in the ROW, but may span structures such as irrigation equipment



Common Types of Farm & Ranch Condemnation

Roads

- Landowners entitled to relocation assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970
- Fee simple needed for roadway condemnors
- Impaired access to remainder can mean higher compensation to landowner



- Relocation assistance available for:
 - Individuals (owners and renters)
 - Businesses, farms, or non-profit organizations
 - Those not physically displaced by the project but required to relocate personal property they own from within the acquired right of way








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Conservation Easements

- Conservation Easements are permanent restrictions on property to protect resources
- Consider the impact before entering into a conservation easement if condemnation is expected
 - They limit how landowner can use property, which affects the highest and best use of the land
 - Might translate into condemnor acquiring land for less money

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Practical Steps for Landowners Facing Condemnation

I received a notice, what now?

- Verify the condemner is registered with the Comptroller and has eminent domain authority at <http://www.trackingtx.org/index.php/sb18report/> (will be updated annually after September 1, 2016, link may change)
- Confirm your name and property descriptions are correct—any notice errors could cause delays and put additional pressure on condemner
- If there is shared ownership, contact the other owners to ensure no duplication of efforts
- Contact the condemning entity to ensure you understand the land rights being sought; request appraisals and other records

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Practical Steps for Landowners Facing Condemnation (contd.)

I received a notice, what now?

- Search your records for appraisals performed in the last 10 years, be prepared to defend your valuation – you may need to retain an appraiser to prepare a report and/or serve as a witness during the hearing
- Information is key. Ask what is being offered to others—ask everyone and ask often.
- **NEGOTIATION is key.** During any negotiations, be mindful of all potential sources of damages and mitigation.
 - You may be able to settle not just on the value of condemned land/loss to remainder, but also obtain minor route modifications, the installation of certain fencing or gates, right of entry, grading, reseeding, specific payments for crop or grazing losses, or any manner of special concessions that will not be available at a hearing.
 - Consider contacting an attorney to ensure interests are fully represented.

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