

“WHO’S THAT IN MY PASTURE?”

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CHAPTER 4.1

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. SURVEY AND PRE-CONDEMNATION AUTHORITY (RIGHT TO ENTER)..... 1

 A. Scope of a Survey..... 1

 B. Obtaining Entry 1

 1. Negotiate..... 1

 2. Injunctive Relief 2

III. OBTAINING PROPERTY AFTER TRESPASSING 4

 A. Damages: 4

 B. Cases:..... 4

IV. TEMPORARY DAMAGES- TRESPASS 5

 A. Damages: 5

V. CAN A CONDEMNING AUTHORITY CONDEMN UNIVERSITY LANDS/LANDS
 THAT ARE OWNED BY A GOVERNMENTAL ENTITY?..... 6

“WHO’S THAT IN MY PASTURE?”

I. INTRODUCTION

This paper will cover several discussion topics surrounding rights-of-way and easement conflicts on private property. The topics are matters of recurring interest for energy companies, governmental entities and farm and ranch operators, including: 1) the authority providing the right of entry, the scope of that right and the different approaches to obtain entry onto private property prior to initiating eminent domain proceedings; 2) condemning in place and the concerns, damages and remedies that go with it; 3) temporary trespass damages; 4) whether a condemning authority can condemn University Lands or other lands that are owned by a governmental entity.

II. SURVEY AND PRE-CONDEMNATION AUTHORITY (RIGHT TO ENTER)

The authority of a governmental entity to enter private property for the purpose of inspecting and surveying for a potential acquisition is being challenged at a much higher frequency than this author has observed over the past twenty or so years. This challenge of authority is even greater when non-governmental entities such as electric utilities and oil and gas companies are seeking entry, rather than the State or a readily accepted governmental entity like a city, river authority, county or school district. The question is: Can a landowner keep out a condemning authority who wants to survey the property pre-condemnation?

Naturally, in order to locate and monument a proposed right-of-way or parcel of land for consideration for acquisition, a survey is required. The purpose of the acquisition may determine the level of surveying and sufficiency of the description for condemnation. In the late 1800s, the Texas Legislature enacted laws giving broad authority and discretion to the railroads to enable them to further develop their transportation infrastructure. One of those statutes provided:

Every railroad corporation shall have the right to cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route, and for such purpose may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damages that may be occasioned thereby. TEX. REV. CIV. STAT. ANN. art. 4424, repealed and now TEX. REV. CIV. STAT. ANN. art. 6318 (West 2007) (to be codified at TEX. TRANS. CODE § 112.051(a), eff. Apr. 1, 2011).

Current statutes such as the Natural Resources Code and the Utilities Code permit the condemning authority to “enter on and condemn” private property. TEX. NAT. RES. CODE ANN. § 111.019 (West 2001); TEX. UTIL. CODE ANN. § 181.004 (West 2007). Such language has been held to implicitly grant the power to make preliminary surveys. *See I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Civ. App.–Houston [1st Dist.] 1982, no writ) (Natural Resources Code); *Lewis v. Tex. Power & Light Co.*, 276 S.W.2d 950, 954 (Tex. Civ. App.–Dallas 1955, writ ref’d n.r.e.). Even though the courts are willing to find an implicit grant of authority for entry for preliminary surveys, they have been careful about extending the scope of that authority.

A. Scope of a Survey

While technology has advanced to a degree that locations and metes and bounds determinations can sometimes be done without actually entering the property, there are other considerations that may come into play. In addition to lineal surveys, a condemning authority may have reasonable justification to consider other features of the land, such as topography, which may have a direct effect upon slopes and structures for many types of improvements. So, specific locations may need to be analyzed based upon an engineering feasibility, tempered by efforts to minimize the invasion upon private property rights. The nature of the project may also require more information than would be revealed by a lineal survey. Also, the purpose and nature of the condemning authority may necessarily imply the right to conduct more invasive procedures. For this reason, courts have varied on how invasive “surveys” can be.

The implied right to enter and survey has generally not been sufficient to support injunctive relief allowing invasive measures, such as core drilling and soil sampling, and the courts have been cautious about extending an unqualified right to inspect and survey beyond conducting lineal surveys. The courts appear to require statutory language authorizing entry for such purposes and/or a clear connection between the condemning authority’s nature and purpose and the type of invasive measure being sought.

B. Obtaining Entry

There are two options in obtaining peaceful entry to conduct a pre-condemnation survey. 1) Negotiate and both parties agree to it; or 2) through injunctive relief

1. Negotiate

Condemning authorities often negotiate with landowners to obtain the right to enter upon their land and conduct surveying prior to any condemnation hearing or proceeding.

Although condemning authorities enjoy the privilege and authority to seek injunctive relief to gain

peaceful entry onto private property for surveying, there are many practical advantages in pursuing entry through agreed terms. The most notable of these advantages are: (1) the condemnor may gain more rights and privileges than it could acquire under equity or legal action and (2) the landowner may gain valuable protections not available through adverse litigation.

Important to the landowner is the assurance of protection from potential liabilities for injuries, claims, and damages sustained by the contractors, employees, and agents performing the surveys and inspections. By contract, the condemnor may offer reasonable protection and indemnification for the owners without sacrificing or reducing the scope of the needed entry.

By establishing a working relationship with the landowner, the authority may negotiate for additional privileges, such as boring, soil sampling, and other more invasive testing and inspection, than might not be available if the authority pursued injunctive relief. Also, the timing and terms and conditions of the entry may be made more flexible, affording reasonable inspections while minimizing the interference with the owner’s operations on the tract. Favorable terms might not only include unique hours of operation, but may include multiple points of access, temporary parking and storage, and preliminary site work for contemplated construction. Further, establishing good rapport between the owner and condemnor may facilitate future negotiations regarding compensation, should the property be damaged or need to be acquired for the project. If all else fails one can seek injunctive relief

2. Injunctive Relief

Should an owner refuse entry after permission is requested, a condemning authority may seek injunctive relief restraining the owner from interfering with the condemnor’s entry, and granting limited rights of access to the entity, depending upon the nature of the inspection or survey that is necessary. TEX. NAT. RES. CODE ANN. § 111.019 (West 2001); TEX. UTIL. CODE ANN. § 181.004 *See I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d at 545; *Lewis*, 276 S.W.2d at 954.

In *Coastal Marine Serv. of Texas, Inc. v. City of Port Neches*, 11 S.W.3d 509, 514 (Tex. App.—Beaumont 2000, no pet.), the court held that a condemning authority has the right to seek a temporary injunction for access to a private landowner’s tract for surveying purposes.

In the case of *Lewis v. Texas Power & Light Co.*, a Temporary Injunction was issued to allow the TP&L Co. engineers and surveyors to go upon the 300-acre Lewis Farm to establish field notes for an easement right-of-way later to be condemned. *Lewis*, 276 S.W.2d at 950. The Court held that the statute giving power companies the right to enter upon, condemn and appropriate lands also granted authority to such companies to enter upon privately owned land for the purposes of making preliminary surveys with a view to later acquisition of

easements rights for construction of its lines. Further, the Court in a good discussion of the law and equities pertaining to this matter held that the right of entry on private property in good faith for purposes of making preliminary survey and investigation with the view of condemnation is a necessary incident to the right to condemn.

The *Lewis* court stated:

“... the trial court no doubt weighed the relative convenience and inconvenience and the comparative injuries to the parties and to the public which would arise from the granting or refusal of this temporary injunction, and found the equities to lie with Appellee (Power Company). There can be little if any doubt that Appellee under the facts shown in this record is entitled to acquire easement rights over the Appellant’s land, either by voluntary conveyance or by condemnation. That being so, the injuries suffered by Appellant from the survey will be small compared with the injuries suffered by the Appellee and the public if Appellee were denied the right to proceed with its preliminary survey The continuing growth and development in recent years of the area it will serve through the contemplated transmission line are matters of common knowledge. It is the duty of the Appellee as a supplier of light and power to the public to make timely preparation to meet such increased demands on its facilities. It would be reprehensible of Appellee to wait until ‘brown-outs’ occur due to inadequate facilities before bestirring itself to expand and increase its plant and equipment to serve the public needs. In our opinion the trial court, after weighing the equities did not abuse its discretion in granting the temporary injunction.”

This rationale was followed by the Court in *Hicks v. Texas Municipal Power Agency*, 548 S.W.2d 949 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.). In *Hicks*, the condemning authority, an association of cities formed for the purpose of developing facilities to be used in generating and transmitting power, was seeking to enjoin certain landowners from interfering with their proposed survey of their property. The Court stated that even though the specific statutes granting the Appellee (Power Company) the right of eminent domain did not expressly grant the right to a preliminary survey prior to condemnation, its right to build necessarily implied the right to survey.

In *Puryear v. Red River Authority of Texas*, 383 S.W.2d 818 (Tex. Civ. App.—Amarillo 1964, writ ref’d n.r.e.), the Court held that the Red River Authority of Texas, which was authorized by statute to make surveys

and attend to other business of the Authority (water conservation), was duly authorized to enter upon lands and conduct operations necessary in determining a feasible location for a dam site on a creek. The Court said that these operations were an “essential step” in determining the location of proposed dams, and that the term “survey” necessarily implied that the Authority could engage in these preliminary operations.

Further, the Courts in *Lewis* and *Puryear* stated that because the entries upon these private lands were authorized and did not constitute a “taking” under eminent domain law, no money deposit or payment to the landowner is required before entry upon the property.

Regardless of the county, and whether there are specific provisions of the Texas Government Code limiting jurisdiction over eminent domain proceedings to a particular court, injunctive relief may be granted in a statutory county court pursuant to section 25.0004 of the Texas Government Code or in a district court pursuant to section 24.011 of the Texas Government Code. *See, e.g., Occidental Chem. Corp. v. ETC NGL Transp., LLC*, No. 01-11-00536-CV, 2011 WL 2930133, at *2-5 (Tex. App.—Houston [1st Dist.] July 20, 2011, no pet. h.) (citing *Lewis*, 276 S.W.2d at 954-55).

Generally, a movant qualifies for temporary injunctive relief by showing: (1) a probable right of recovery; (2) imminent, irreparable harm will occur in the interim if the request is denied; and (3) no adequate remedy at law exists. *Coastal Marine Serv. of Tex., Inc.*, 11 S.W.3d at 515. Under the Civil Practice & Remedies Code, a writ of injunction may be granted if “the applicant is entitled to the relief demanded and all of the relief requires the restraint of some act prejudicial to the applicant.” TEX. CIV. PRAC. & REM. CODE § 65.011(1) (West 2008 & Supp. 2010).

Landowners will often challenge this right. *I.P. Farms* and *Lewis* held that a common carrier is entitled to temporary injunctive relief in order to obtain access to property and conduct surveying work prior to initiating the condemnation process. Even though the courts are willing to find an implicit grant of authority for entry for preliminary surveys, they have been careful about extending the scope of that authority.

As far as injunctive relief, a condemning authority can obtain that relief through either a 1) Temporary Restraining Order (TRO) or 2) through a temporary injunction.

a. *A Condemning Authority may seek a TRO as a first option to attempt to gain peaceful entry to survey the property*

There is support in Texas case law authorizing the issuance of a temporary restraining order for entry and surveying, although some courts may disfavor ex parte orders granting an entity’s entry. Further, the grant or denial of a TRO is generally not appealable. *In re Tex.*

Nat. Res. Conservation Comm’n, 85 S.W.3d 201, 205 (Tex. 2002). This remedy allows Condemnor’s access to the property immediately and allows them to not have to wait for the injunction hearing to survey the land and often allows them to be able to skip the injunction hearing altogether.

The Court in *I.P. Farms*, held that a TRO was proper to allow a pipeline company to enter upon a landowner’s property to make a preliminary survey. *See* 646 S.W.2d at 544-46. The authority to enter upon land and make a preliminary survey was considered *ancillary* to the power of eminent domain.

A TRO is one entered as a part of a motion for temporary injunction, by which a party is restrained pending the hearing on the motion. *Del Valle I.S.D. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992). Under Rule 680, a TRO cannot be issued without notice to the adverse party unless it is shown “that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.” TEX. R. CIV. P. 680.

b. *If TRO is denied, a condemning authority can seek relief through a temporary injunction*

In the event a court declines to grant a temporary restraining order, the condemnor should proceed with its application for temporary injunction. “The purpose of a temporary injunction is to preserve the status quo of a litigation’s subject matter pending trial.” *Occidental Chem. Corp., LLC*, 2011 WL 2930133, at *5. Granting a temporary injunction where a condemnor has the right to enter onto a condemnee’s property to make its preliminary survey has been held to actually preserve, rather than disturb, the status quo, which in such a situation is one of action, not of rest. *See id.*, at *7.

A suit for injunctive relief, though often followed by condemnation proceedings, is itself not a condemnation proceeding. *See Occidental Chem. Corp.*, 2011 WL 2930133, at *4; *Hailey*, 757 S.W.2d at 834; *Lewis*, 276 S.W.2d at 954. Still, condemnation is normally the underlying basis for seeking the entry to survey, inasmuch as the property cannot be adequately defined for the condemnation, and a request for injunctive relief and a trial court’s order are considered “necessary incidents of the right to condemn.” *Coastal Marine*, 11 S.W.3d at 514.

The legislature’s intent in granting certain entities the power of eminent domain would appear to override the interest in protecting private property against invasion, at least with respect to surveying. Nevertheless, a condemning authority entering for the purpose of surveying is responsible for all damages caused by its conduct. *See Lewis*, 276 S.W.2d at 956; *I.P. Farms.*, 646 S.W.2d at 545-46. However, a survey is not a taking under the Texas Constitution and, thus, there is no requirement that a deposit be made because a survey is done. *Lewis*, 276 S.W.2d at 956. But, there

is a bond requirement with respect to seeking injunctive relief. TEX. R. CIV. P. 684.

In summary, condemners may gain entry for various surveys, depending upon their statutory purposes and enabling legislation, prior to instituting eminent domain proceedings as surveys are ancillary to and a necessary part of those proceedings. Although injunctive relief is available to enforce those rights of entry, negotiating the terms of entry by agreement may facilitate the survey, smooth relations between the owner and the condemner, and create a foundation for later negotiations in the event that acquisition of the property is needed.

III. OBTAINING PROPERTY AFTER TRESPASSING

One type of trespass of concern is when a pipeline is installed outside of the easement and is trespassing onto a landowner’s property. This could occur from one constructing out of the easement due to a survey error or other mistake. It could also occur from an expired term easement leaving a pipeline on a property without a valid easement or from trespassing pre-condemnation.

When this form of trespass occurs, a condemning authority may condemn the infrastructure in place. By condemning in place, a condemner can condemn an easement for a pipeline (or powerline) that has already been installed whether installed outside of an easement that has already been acquired from the landowner or installed on adjacent land belonging to another landowner or possibly partially outside a defined easement. The legal justification for the condemnation in place is that an entity with the power of eminent domain has the statutory power to “enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation.” TEX. UTIL. CODE § 181.004.

A. Damages:

Trespass damages in this instance always include the actual damages caused by the trespass, but they can also include exemplary, or punitive, damages. For example, the condemner will normally have to pay the reasonable rental value of the property taken by the trespass as part of actual damages. But the actual damages for trespass can also include damages for mental anguish. Of greater consequence is in the event where a landowner proves that the trespass was wanton or malicious or the result of evil intent, therefore enabling the landowner to recover exemplary, also called punitive, damages. See, e.g., *Moore v. Rotello*, 719 S.W.2d 372, 377 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.); *Teledyne Expl. Co. v. Klotz*, 694 S.W.2d 109, 110 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.). These damages can be several times as large as the landowner’s actual damages for the trespass. Further, loss of rentals can be an appropriate measure

of trespass damages for the temporary loss of the use of the land. *O’Neil Corp. v. Perry Gas Transmission, Inc.*, 648 S.W.2d 335 (Tex. App. Amarillo 1983),

B. Cases:

In *Nagel v. Texas Pipeline Co.*, 336 S.W.2d 265 (Tex. App.—Waco 1960, no writ) the company had built a pipeline across the plaintiff’s land. The plaintiff filed a trespass suit, alleging that the pipeline had been built without his consent and without condemnation. The company filed a separate suit to condemn an easement for its pipeline, which it obtained. The plaintiff alleged that he should be awarded title to the land and to the pipeline and should be awarded the rental value of the property from the date of the pipeline’s installation. The court gave the plaintiff the title to the land, subject to the company’s easement, and denied his claim to the pipeline and to rent. The court of appeals affirmed the decision to deny the claim to the pipeline and reversed the decision to deny rent, saying:

...Ordinarily, whatever a trespasser annexes to the land of another becomes the property of the owner of the land. There is, however, an exception to this rule. Where one with the right of condemnation, without consent of the owner or the condemnation, affixes improvements to the realty, the owner is not entitled to compensation for the improvements.

The landowner, upon subsequent condemnation, is only entitled to compensation for his land, together with the reasonable rental value of the land for the period such improvements were thereon without benefit of the condemnation. *Preston v. Sabine & E. T. Ry. Co.*, 70 Tex. 325, 7 S.W. 825; *City of San Antonio v. Grandjean*, 91 Tex. 430, 41 S.W. 477, 479; *Id.* at 266-267.

In *Glade v. Dietert*, 156 Tex. 382, 395 S.W.2d 642 (1956). a contractor for the city of Fort Worth entered property and bulldozed three trees, and the city later condemned an easement for the property. The court held that the landowner could recover trespass damages in the condemnation suit. In *State v. Lasiter*, 352 S.W.2d 915, 917-18 (Tex.Civ.App.—Waco 1961, writ dismissed), the city built a sewer line at the instruction of the highway department, which months later filed a condemnation suit for the sewer line easement. In that case, the highway department tried to argue that the condemnation damages should be determined by the value of the property with a sewer line on it, and the landowner successfully argued that evidence of the sewer line should not be admissible. *Id.* This in effect

allowed trespass damages because the land was valued in the condemnation suit as if no trespass had occurred. *Id.*

To summarize the holdings of the cases in support of condemning in place, the condemnation damages when condemning an easement for existing facilities are determined using the value of the property at the time of condemnation, without considering the value of the trespassing facilities. *See e.g. Alexander v. City of San Antonio*, 468 S.W.2d 797, 799 (Tex. 1971); *Nagel v. Texas Pipeline Co.*, 336 S.W.2d 265 (Tex. App.—Waco 1960 no writ). But it is important to note that the landowner can recover damages for the trespass that occurred from the time the facilities were installed until the easement was condemned. These damages can be hard to predict and could end up being much larger than the damages paid for the taking itself.

For these reasons, a condemning authority should not rely upon its remedy to condemn in place as a substitute for obtaining easements in advance and using prudent practices to install infrastructure within those easements. But, when inadvertent mistakes occur, condemnation in place is an available remedy, although it may cost more in damages.

IV. TEMPORARY DAMAGES- TRESPASS

Another issue to discuss is temporary trespass. In the scope of eminent domain, this can stem from temporary incidents like a right-of-way crew building, maintaining or repairing a line outside of the easement and damaging property outside the easement or violating a specific term in the easement. The damage can be from destroying a tree, a garden, some crops or some part of the property. It could also occur when there is an error in the survey plat that causes work outside of the easement, or just being negligent in leaving the easement.

An injury to real property from a trespass is considered temporary if (a) it can be repaired, fixed, or restored, *and* (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty.” *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014).

In a trespass situation, landowners are entitled to sue the entity or easement holder for damages if the entity trespassed on the property, the question then becomes what sort of damages are available to the landowners and what sort of defenses does the condemning authority have.

A. Damages:

The proper measure of damages for temporary injury to real property is the amount necessary to place the owner of the property in the same position he or she occupied prior to the injury. *Kraft v. Langford*, 565

S.W.2d 223 (Tex. 1978) (disapproved by, *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004)). If land is temporarily, but not permanently, injured by the negligent trespass, the owner is entitled to recover the amount necessary to repair the injury, and put the land in the condition it was at the time immediately preceding the injury, with interest thereon to the time of the trial.” *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014). Proper measure of damages for temporary injury is restorative and repair damages. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013).

In cases involving temporary injury, Texas courts have recognized the so-called economic feasibility exception to the general rule that the cost to restore is the proper measure of damages. This exception applies when the cost of required repairs or restoration exceeds the diminution in the property’s market value to such a disproportionately high degree that the repairs are no longer economically feasible. In those circumstances a temporary injury is deemed permanent, and damages are awarded for loss in fair market value. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481.

Loss of rentals is another appropriate measure of damages for the temporary loss of use of land occasioned by a trespass. *Bradley v. McIntyre*, 373 S.W.2d 389, 390 (Tex.Civ.App.-Houston 1963, writ ref’d n. r. e.); *Parker v. McGinnes*, 594 S.W.2d 550, 552 (Tex.Civ.App.-Waco 1980, no writ). Exemplary damages are also recoverable if the trespass was committed maliciously or in wanton disregard of the plaintiff’s rights. *Upham Gas Co. v. Smith*, 247 S.W.2d 133, 135 (Tex.Civ.App.-Fort Worth 1952, no writ);

Exemplary damages may not be awarded in a trespass case where it appears that the defendant or entity acted in good faith or without wrongful intention or in the belief that they were exercising their rights. *Wilén v. Falkenstein*, 191 S.W.3d 791, 797-798 (Tex. App.—Fort Worth 2006, pet. denied); *Mayflower Inv. Co. v. Stephens*, 345 S.W.2d 786, 793-94 (Tex. Civ. App.—Dallas 1960, writ ref’d n.r.e.). Thus, actual damages can still be awarded against a trespassing entity, but without some sort of fraud, malice, ill will or wanton disregard, exemplary damages are not available for the negligent or regular trespass of an employee of a corporation onto a land owner’s property. *Id.*

A trespasser can also use the defense of private or public necessity. *See Buffalo Marine Serv., Inc. v. Monteau*, 761 S.W.2d 416, 421-23 (Tex. App.—Houston [14th Dist.] 1988, no writ). One may still be civilly liable for any damages that result from one’s trespass. For example, if you drove onto someone else’s property to avoid an imminent crash with a falling tree branch and caused \$500 in damage to the property owner’s fence, you will have to pay for the actual damages you caused. However, you shouldn’t be liable

for any nominal damages for the trespass or punitive/exemplary damages for a willful trespass. *See e.g. Id* at 416, 423. For a public necessity defense to work it would likely have to involve a city or governmental entity, similar to *Steele v. City of Houston*, 603 S.W.2d 786, 788-90, 93 (Tex. 1980), where escaped prisoners took refuge in plaintiff’s house and in order to capture the escapees, police set fire to the house, destroying it and its contents. The Texas Supreme Court found that the house was taken for a public use and trespass damages are not applicable, but the Plaintiff is entitled to just compensation for their property that was taken. *Id* at 793.

V. CAN A CONDEMNING AUTHORITY CONDEMN UNIVERSITY LANDS/LANDS THAT ARE OWNED BY A GOVERNMENTAL ENTITY?

The question is whether a private entity with eminent domain authority may exercise its right of eminent domain against lands owned by the state or a governmental entity such as University Lands (UL).

UL is an entity charged with managing the surface and mineral interests of 2.1 million acres of land across nineteen counties in West Texas for the benefit of the Permanent University Fund. Just like the State, UL may avail itself of Sovereign Immunity.

This raises the question: Does the doctrine of sovereign immunity apply to eminent domain actions for oil and gas pipelines? Sovereign immunity protects the state and state agencies and their officers. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Governmental immunity, on the other hand, protects subdivisions of the state, including municipalities. *Id.* Both types of immunity afford the same degree of protection. *Sykes*, 136 S.W.3d at 638. The question arose, does this protect University Lands from being condemned?

This question was raised in *Oncor v. Dart*, 369 S.W.3d 845, 847 (Tex. 2012), where Dart and Fort Worth Transportation Authority are Regional Public Transportation Authorities, which are governmental entities. The Court examined Texas Utilities Code Section 181.004:

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. In short, the question was whether Section 181.004 clearly and unambiguously waives a government landowner's immunity and allows them to be condemned under this section. TEX. UTIL. CODE 181.004 (West).

37.053(d) of the Texas Utilities Code. Section 37.053(d) states: For transmission facilities ordered or approved by the PUC, the rights extended to an electric corporation under Section 181.004 include all public land, **except** land owned by the state, on which the commission has approved the construction of the line. The bill enacting Section 37.053(d) of the Texas Utilities Code was passed while *Oncor v. Dart* case was on appeal to Supreme Court of Texas. Thus, this issue did not require interpretation. Electric transmission companies cannot take University Lands according to section 37.053 of the Texas Utilities Code.

The question now presenting itself is, does Section 37.053 of the Texas Utilities Code apply to oil and gas pipelines or just to electric transmission lines? The statute only names electric corporations, but the legislative intent seems to prevent the taking of government/university lands by eminent domain.

This is a difficult question. However, it is one we need not answer here because our focus instead is on Section