

# **LESSONS LEARNED IN EMINENT DOMAIN**

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Lubbock – May 24-25, 2018

**CHAPTER 4.2**

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## LESSONS LEARNED IN EMINENT DOMAIN

### I. INTRODUCTION

Landowners do not like the power of eminent domain or being forced to go through the condemnation process. When I receive calls from landowners, I often hear: “Can they do this?” “Can we fight them?” “How much money will I receive?” “I don’t want to go to court, but I want the most money.” “How much will it cost to fight?”

This paper focuses on answering a landowner’s questions when they first call me. It summarizes my first 30 to 45 minutes of visiting with a landowner about the Texas statutory scheme for condemnation in dealing with pipelines and electric transmission lines (ETLs) primarily in West Texas. It will cite to relevant case law and statutes when necessary. But this paper is more tailored to providing attendees with practical “lessons learned” while representing landowners.

### II. DON’T IGNORE THE FIRST LETTER

In most cases, a landowner receives a letter from an ETL company or a pipeline right-of-way (ROW) agent company that their land is targeted for an ETL or a pipeline. What should a landowner do? Do not throw that letter in the trash. Participate in the process; do not ignore it.

#### A. The Letter from the Pipeline Company

##### 1. Pipeline companies select pipeline routes without any governmental or landowner input

Texas has delegated the power of eminent domain to private pipeline companies. Tex. Nat. Res. Code Ann. § 111.019 (West 2018) (common carrier pipelines); Tex. Util. Code Ann. § 181.004 (West 2018) (gas utility pipelines). Unlike selecting the route of an ETL, pipeline companies enjoy the right to select the route for its pipeline without governmental or landowner input.

But the pipeline company must complete and file a Form T-4 with the Railroad Commission of Texas. See 16 Tex. Admin. Code § 3.70 (2018) (Tex. Railroad Comm., Pipeline Permits Required). The pipeline company must check the box in the T-4, among other things, as to what type of pipeline it will be operating as: (1) a common carrier; (2) a gas utility; or (3) a private line. See *id.* at § 3.70(b)(2). The T-4 gives the landowner some indication as to what type of product will be carried through the pipeline and if the company has fulfilled its minimal obligations to operate a pipeline in Texas.

##### 2. A pipeline company with the power of eminent domain has the right to conduct a lineal survey before filing a condemnation lawsuit

Generally, the pipeline company will retain a ROW acquisition firm to start the process of acquiring ROW for the pipeline. The ROW agent will mail a letter similar to the redacted one attached as Appendix 1. In that letter, the ROW agent asks for permission to survey and to conduct other studies on the landowner’s land. It sometimes includes a Right of Entry (ROE) form allowing the pipeline company to begin conducting as many tests as it wants. This letter usually includes the Landowner’s Bill of Rights emphasizing the pipeline company’s power of eminent domain.

A pipeline company with the power of eminent domain has the right to survey land that is in the pipeline’s path before any legal condemnation process starts. The right to conduct a lineal survey is an ancillary right to the pipeline company’s power of eminent domain. See *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ). The ancillary right to survey has been extended to conducting soil borings on a case by case basis. See *Puryear v. Red River Auth.*, 383 S.W.2d 818, 821 (Tex. Civ. App.—Amarillo 1964, writ ref’d n.r.e.) (extending the right to conduct soil borings to a river authority); but see *Hailey v. Texas-New Mexico Power Co.*, 757 S.W.2d 833, 835 (Tex. App.—Waco 1988, writ dismissed w.o.j.) (refusing to extend the right to conduct soil borings or other subsurface testing beyond the right to conduct lineal survey to an ETL company). A Texas court also has allowed a municipality to conduct an environmental Phase I inspection to turn over rocks as part of the City’s ancillary right to survey. See *Coastal Marine Serv. v. City of Port Neches*, 11 S.W.3d 509, 514 (Tex. App.—Beaumont 2000, no pet.). Pipeline companies have the right to conduct lineal surveys and can usually make the argument to conduct soil borings and Phase I environmental inspections.

##### 3. Recommended course of action

If the landowner calls me after receiving a similar letter to Appendix 1, I recommend that the landowner not sign the pipeline company’s ROE. It is usually too short and too broad in scope. In addition, I recommend that the landowner ask the ROW agent for a copy of the pipeline company’s T-4. I also tell the landowner that it cannot prohibit the pipeline company from surveying. That usually draws the question: “What do you mean I can’t keep them off my property; isn’t that trespassing?” The pipeline company will file an Application for Temporary Restraining Order to survey if the landowner continues to bar entry to their land.

In my opinion, it is best to enter into a ROE that adequately protects the landowner and limits the surveyor’s activities and access to only parts of the land.

Attached as Appendix 2 is a ROE that I use when engaged at the beginning. This ROE is tailored to the western edges of the Hill Country and southwest Texas where ranchers still run sheep and goats. It is common practice for any company, oilfield or condemning authority, to conduct “bitterweed washes” before entering a ranch. The key to recommending that clients sign a ROE is to protect their land and to keep them out of the courthouse prematurely.

### **B. The Letter from an Electric Transmission Line Company**

One of the differences between ETL and pipeline cases is who sends the first letter. The first letter a landowner receives is usually from the ETL company with an invitation to attend an open house in their town.

#### 1. Administrative hearings before the Public Utility Commission of Texas and the State Office of Administrative Hearings

Unlike pipeline companies, the routes for ETLs are selected in an administrative hearing in Austin. These “routing” hearings are either contested and first heard and ruled on by an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), or through an uncontested hearing before the Public Utility Commission of Texas (PUCT). After a contested hearing before SOAH, the PUCT Commissioners will hold at least one open meeting to approve, modify, or reject the ALJ’s Proposal for Decision. This paper will not address the intricacies of the Texas ETL route selection process or participating in a contested hearing before SOAH.

#### 2. What should a landowner do upon receiving the ETL company’s invitation to attend an open house?

That first packet a landowner receives from the ETL company will include the invitation to attend the open house. It will also include several maps with all kinds of lines drawn on it depicting proposed alternative routes from Point A to Point B. The landowner’s ranch or farm will fall under one of the proposed alternative routes.

I recommend that clients attend these open houses. It will be the landowner’s first opportunity to oppose the ETL. I recommend landowners leave comments or provide alternative routes. Sometimes, landowner comments at these open houses persuade the company to create a new proposed alternative route or to bypass the landowner’s land altogether.

I further recommend that the landowner intervene in the PUCT case when the ETL company files its Application to Amend its Certificate of Convenience and Necessity. In most cases, the routes for the ETLs go where there is the least landowner opposition. These routing cases can be expensive and commonly require experienced attorneys familiar with PUCT rules and

law. I encourage landowners to join up with their neighbors similarly impacted by the same alternative route to share costs. It will be the landowner’s only opportunity to have some say in where the ETL route will be.

#### 3. What does a landowner do upon receiving a letter from a ROW agent to survey for the ETL?

The simple answer is to follow the same recommendations as in dealing with pipeline companies. That is, enter into a ROE before allowing the ETL company to survey and to conduct other legally permitted studies.

### **III. NEGOTIATIONS NEVER STOP**

Shortly after the ETL company or the pipeline company (generally referred to as the condemning authority unless stated otherwise) asks to survey your client’s land, the ROW agent who has been assigned to your client will try to get your client to sign an easement. The ROW agent has one job to do—get the landowner to sign the broadest easement agreement possible at the lowest price. Like everyone else attending this course, I tell clients to never sign anything first prepared by a condemning authority.

At that point, the negotiating process begins and never stops until the parties agree on an easement agreement or a final judgment has been entered. The negotiating process may speed up, stall out, but it does not stop. Many times, the condemning authority dictates the timing of negotiations and, ultimately, the condemnation process. It has a schedule as to a date it needs to be transporting hydrocarbons or transmitting electricity. The condemning authority’s schedule works backwards from that date. But before a condemning authority can condemn your client’s land, it must follow the statutory negotiations process. See Tex. Prop. Code Ann. § 21.011 (West 2018).

#### **A. Statutory Requirements for Negotiations**

A condemning authority starts the condemnation process by mailing a written initial offer letter (IOL) to a landowner. See *id.* at § 21.0111(a). The condemning authority must wait at least 30 days after the IOL’s date before it can mail a final offer letter (FOL). See *id.* at § 21.0113(b)(3). The condemning authority must include with the FOL an appraisal, a copy of the Landowner’s Bill of Rights, and a proposed deed or easement. See *id.* at § 21.0113(b)(6). The final offer cannot be less than the appraisal. See *id.* at § 21.0113(b)(5). In addition, the FOL must give the landowner 14 days to consider the final offer before it can file a condemnation petition. See *id.* at § 21.0113(b)(7).

In my experience, the condemning authority’s IOL is usually more than its FOL. Sometimes, the appraisal is substantially lower than the final offer. Rarely does a condemning authority strictly adhere to the minimum time-periods. There is usually more time between the

IOL, the FOL, and when the condemning authority files its condemnation petition than is statutorily required.

### **B. Negotiating Pipeline Easements**

In the oil patch where pipelines are common, the range of prices paid to landowners varies from county to county, company to company, and year to year. One company may be willing to pay \$X.XX/rod in Crockett County, Texas and \$(X - \$10)/rod in Fisher County, Texas.<sup>1</sup> A landowner may have negotiated a sophisticated easement agreement with one company and be forced to accept another company's broad easement agreement.

Moreover, prices paid by an entity with the power of eminent domain are inadmissible to prove damages in a pending condemnation case. See *Austin v. Capitol Livestock Auction Co.*, 453 S.W.2d 461, 465 (Tex. 1970). Just because Company A paid \$X.XX/rod last year does not mean Company B will pay the same price using the same easement agreement this year. In my experience, however, pipeline companies with the power of eminent domain have more discretion to pay the "going rate" and agree to favorable surface protection terms. They generally want to build the pipeline as fast as reasonably possible so they can start transporting hydrocarbons.

### **C. Negotiating Electric Transmission Line Easements**

Negotiating ETL easements usually are more difficult than pipeline easements. ETL companies are stingier in price negotiating and in agreeing to favorable to landowner terms. The PUCT regulates the rates that ETL companies charge retail customers. See Tex. Util. Code Ann. §§ 31.002; 36.001 & .003 (West 2018). ETL companies argue that the cost of acquiring easements is a component of the costs the ETL company seeks to recover in the rate the PUCT approves. ETL companies further argue they must look out for the public's interest in how much they pay to landowners. In my experience, it is usually preferable to force the ETL company to condemn your client's land.

### **D. Recommended Practice**

ROW agents have a job to do. But they usually have limited authority. In my experience, asking the ROW agent to pass my cases on to the condemning authority's attorneys yields better results for my clients and saves time. Usually, the condemning authority attorney is in closer contact with the final decision maker. Furthermore, I know many of the condemning authority law firms and have worked with them in the past. It usually makes for easier negotiations.

## **IV. WHAT DOES A LANDOWNER DO WHEN A CONDEMNATION PETITION IS FILED?**

After a condemning authority files its condemnation petition, a landowner should take the process seriously. There are a number of factors to consider at this point. The factors discussed below are not a step-by-step guideline on what to do when your client receives the condemnation petition. Instead, it identifies some questions to ask, legal steps to consider or avoid, and lessons learned.

### **A. Should You Strike a Special Commissioner?**

In 2011, the Texas Legislature enacted a number of condemnation reforms. One of those reforms allows each party to strike, after a reasonable time has passed, one of the three appointed special commissioners. See Tex. Prop. Code Ann. § 21.014(a) (West 2018). The question is, however, should a landowner strike a special commissioner? It depends.

The lawyers for the condemning authority customarily prepare the Order Appointing Special Commissioners. It is rare that the parties confer to select special commissioners any longer. In most Orders Appointing Special Commissioners, there are three blank lines for the three special commissioners' names and two additional blank lines for two alternates to be inserted.

In cases where alternate special commissioners are identified in the Order Appointing Special Commissioners, you know who will succeed the one you strike. Do you or your client know the special commissioners? Will the alternate be worse than the one you strike? These are some of questions that should be answered before exercising that strike.

In cases where no alternate special commissioners are listed, it is a crap shoot as to who will be the replacement. Tread carefully in these situations. It may become a situation where you decide not to appear at the special commissioners' hearing, as discussed in the next section.

### **B. Decide Whether to Attend the Special Commissioners' Hearing**

It is common practice for a landowner to participate in the special commissioners' hearing. By doing so, however, the landowner waives any objection: (1) to improper notice of the hearing; See *Union Fraternal Latino Americana v. San Antonio*, 315 S.W.2d 68, 70 (Tex. Civ. App.—San Antonio 1958, no writ) and (2) that the condemnor failed to enter into good faith negotiations. See *Hubenak v. San Jacinto Gas Trans. Co.*, 141 S.W.3d 172, 180 (Tex. 2004). Many times, if the landowner receives a high special commissioners' award, the landowner is in a better bargaining position to settle with more money in the bank. But as explained below, there

<sup>1</sup> A rod is a unit of length equal to 16.5 feet. A mile is 320 rods.

may be other reasons for not attending the special commissioners' hearing. No law requires a landowner to attend a special commissioners' hearing.

1. Consider entering into a Possession and Use Agreement when the condemning authority's right to take is unchallengeable

When the condemning authority's right-to-take is unchallengeable, it may be advantageous to enter into a Possession and Use Agreement (PUA). The PUA gives the condemning authority immediate possession of the taking. It also delays the special commissioners' hearing, if any, to a more convenient date. Usually, the landowner negotiates an up-front non-refundable payment from the condemning authority as consideration for entering into the PUA. Attached as Appendix 3 is a redacted PUA. As with any contract, the parties negotiate the PUA's various terms. But the condemning authority insists that the landowner waive any jurisdictional challenges to its right-to-take. Enter into PUAs cautiously.

I frequently recommend clients enter into PUAs. The landowner gets to photograph the construction process and the construction company's mess-ups. And they generally always mess up.

2. Learn if the County is favorable to landowners

In my experience, it is wise to learn about special commissioners' tendencies in whatever county the condemnation case is pending. For example, I recently learned the hard way that special commissioners in a West Texas county biased heavily towards the oilfield industry overwhelmingly will side with a pipeline company. I knew the award likely would be low, but not as low as the actual award. Fortunately for my client, the pipeline company settled for a much higher amount than the award. There are other counties, like Runnels County, where the special commissioners consistently gave high awards to landowners when an ETL came through it. That ETL company quickly settled every case and did not take a single condemnation case to trial. Every county is different, and special commissioners' panels can be different, too. Study where your case is pending and who the special commissioners are, if you can, before you take a case to a special commissioners' hearing.

3. There may be strategic reasons for not attending a special commissioners' hearing

In some cases, there may be strategic reasons for not attending the special commissioners' hearing. At least one leading landowner attorney in Texas rarely, if ever, attends special commissioners' hearings. The simple reason is that he prefers to not let the condemning authority learn how he will defend the case early on. In some cases, there may be complicated damages calculations that require more time to develop.

C. **Don't File an Answer; File an Objection to the Special Commissioners' Award**

Do not file an answer with the clerk when the client comes to your office with a copy of the condemnation petition. At the condemnation case's inception, a Texas court must appoint three disinterested resident landowners as special commissioners. See Tex. Prop. Code Ann. § 21.014(a) (West 2018). It has long been understood that trial courts do not have the power to enjoin the administrative phase (the special commissioners' hearing). See *Ex parte Edmonds*, 383 S.W.2d 579, 580 (Tex. 1964). Likewise, it has been settled law that a trial court does not gain jurisdiction until after a party files a proper objection to the special commissioners' award. See *Pearson v. State*, 315 S.W.2d 935, 936–37 (Tex. 1958). The first pleading a landowner files in a condemnation suit is an objection to the award. See Tex. Prop. Code Ann. § 21.018(a) (West 2018). The condemnation case then becomes a regular civil case. See *id.* at § 21.018(b).

It is common practice in condemnation cases to challenge a trial court's subject matter jurisdiction after a party objects to the special commissioners' award. But in late 2016, the Texas Supreme Court somewhat turned that practice on its head. See *In re Lazy W*, Dist. No. 1, 493 S.W.3d 538, 544 (Tex. 2016). *Lazy W* involved the unusual situation where one governmental entity with the power of eminent domain attempted to condemn an easement through another governmental entity's land. See *id.* at 539. The condemnee filed a plea to the jurisdiction invoking its governmental immunity before the trial court appointed special commissioners. See *id.* The trial court declined to appoint special commissioners. See *id.* at 541. The condemnor sought mandamus relief from the court of appeals, which held that the trial court must wait until after the special commissioners' hearing and ruling on the condemnee's plea. See *id.* The condemnee then petitioned the Texas Supreme Court for mandamus relief. See *id.*

The *Lazy W* opinion proceeded to summarize the Texas statutory condemnation scheme and prior case law. Ultimately, the Court held that the trial court did not abuse its discretion granting the condemnee governmental entity's plea to the jurisdiction before the special commissioners' hearing was held. See *id.* at 544. The Court reasoned that a trial court has the obligation to rule on the condemnee's plea to the jurisdiction when it was filed. See *id.* Interestingly, the Court expressly refused to hold that a trial court must make an early determination of subject matter jurisdiction in every situation. See *id.* The Court also refused to take up the issue whether a governmental entity is immune from having its land condemned. See *id.*

In spite of *Lazy W*, it is probably better practice to wait until after the special commissioner's hearing to challenge the trial court's subject matter jurisdiction in most condemnation cases. The reasoning is that a trial court's subject matter jurisdiction can be challenged at

any time as in all other civil cases. See generally, Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 445 (Tex. 1993).

**D. The Condemning Authority Retains Experienced Lawyers and Appraisers; Shouldn't the Landowner?**

Eminent domain is a specialized area of the law, no different than complex tort litigation. The eminent domain bar in Texas is relatively small compared to other practice areas. ETL and pipeline companies retain experienced attorneys in eminent domain to condemn land in Texas.

Condemnation cases are a battle of experts. These same experienced condemnor attorneys retain appraisers experienced in condemning land. There are few appraisers in Texas knowledgeable of the condemnation process. In most condemnation cases, the battle is between the lawyer and the opposing appraiser. The lawyer should know the relevant law and the facts in order to properly cross-examine the opposing appraiser.

Landowners have the right to defend their condemnation case. They have the right to testify about their estimate of damages if they know land values in the area. In many cases, however, landowners offer little input into the value of their land or to the damages to their land when and if they testify. Will that landowner have the knowledge and training that an attorney who regularly practices in the eminent domain area? Probably not. Most landowners take care of their land; they know their land; and they want the best for their land. So why should a landowner not hire an experienced eminent domain attorney and appraiser who can help them obtain more money for their condemned land?