NEGOTIATING & DRAFTING A PIPELINE EASEMENT

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CHAPTER 11

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I. INTRODUCTION

Eminent Domain. The mere mention of this term, for many landowners, conjures up Orwellian visions of Jack Booted Thugs marching in lock step coming to deposes a person of their home and land. But what is the power of eminent domain and, by extension, what is condemnation?

The power of eminent domain is a misnomer of sorts. It is not a power in the traditional, constitutional since—it is not, for example, analogous to Congress's power to declare war or the President's power to negotiate treaties. In fact, the power of eminent domain has no constitutional basis. Rather, it is an inherent attribute of the sovereign.[1] Simply put, the power of eminent domain is the power to take private property and condemnation is the sword by which that power is wielded—circumscribed only by the mandate, found in the United States and Texas Constitutions, that the property being taken be put to a public use and that the landowner be paid just compensation.[2]

No doubt linked to the recent boom in the Texas oil and gas industry there has been a corresponding boom in companies seeking to acquire pipeline easements and, when necessary, doing so by utilizing the power of eminent domain. This proliferation of companies seeking pipeline easements appears unlikely to slow down anytime soon. To that end, this paper is broken into two overarching parts with the express purpose of providing landowners and practitioners with: (1) an overview of the Texas condemnation process; and (2) practical considerations when negotiating and drafting a pipeline easement.

II. CONDEMNATION PROCESS

Why discuss the condemnation process in a paper titled "Negotiating & Drafting a Pipeline Easement"? The answer is simple. Although the power of eminent domain is an inherent attribute of the sovereign, the State of Texas has seen fit to delegate this power to certain pipeline companies; provided, that they meet certain threshold requirements. These requirements will be addressed further in Section III and to be clear not all pipeline companies have the power of eminent domain. However, the reality is the vast majority due and the result of a failed negotiation is a trip to the courthouse.

A. Survey

Unlike companies seeking an easement for an electric transmission line, pipeline companies have the right to determine the route of the proposed pipeline without governmental oversight or input from the landowner. Thus, after the company has determined the route of the pipeline the company will generally hire an acquisition firm whose job is to determine the affected landowners and start the process of acquiring easements. This process is begun by a request for a survey or right of entry allowing the company to come onto the property to conduct a survey. Never forget, the right-of-way agent has one job and one job only: secure the broadest easement possible for the cheapest price.

Do you have to allow the survey? Unfortunately, the answer is yes. If the company has the power of eminent domain it also has the right to conduct the survey. *See I.P. Farms v. Exxon Pipeline Co*., 646 S.W.2d 544, 545 (the authority to enter upon the land and make a preliminary survey is ancillary to the power of eminent domain). In fact, if the landowner refuses to grant such access the company is generally entitled to seek an injunction allowing the survey to take place. But does the right to conduct a survey also extend to other studies, e.g., soil samples or environmental assessments? The courts appear to be split on this issue; however, best practice would dictate assuming that the pipeline company can conduct other studies and to plan accordingly. *See Puryear v. Red River Auth*., 383 S.W.2d 818 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e) (affirming the grant of a temporary injunction and allowing a river authority to conduct soil boring as an ancillary right of the river authority's power of eminent domain); and *Coastal Marine Serv. v. City of Port Neches*, 11 S.W.3d 509 (Tex. App.—Beaumont, 2000) (affirming the grant of a temporary injunction allowing the City of Port Neches to conduct a Phase I environmental site assessment); *But see Hicks v. Texas Municipal Power Agency*, 548 S.W.2d 949, 955 (Tex. Civ. App.—Houston, 1977) ("We do not agree, however, that appellee's right to survey necessarily includes the right to conduct core drilling operations."); and *Hailey v. Texas-New Mexico Power Co*., 757 S.W.2d 833, 835 (Tex. App.—Waco, 1988) ("we refuse to further erode the strict construction of our eminent domain statutes to permit core drilling or soil boring as incidental to a lineal survey").

Although a pipeline company can compel a survey (and possibly other studies) that does not mean the landowner should sign the company's request for entry—it is usually short and overly board and does not adequately protect the landowner. Instead, where the

[1] See *Boom Company v. Patterson*, 98 U.S. 403, 406 (1878) ("The right of eminent domain ... appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.")

[2] See U.S. CONST. amend V; and TEX. CONST. art 1. § 17 (a).

circumstances allow, best practices would dictate modifying the right of entry such that it is limited in time and scope and restricts the company's rights while at the same time providing protections for the landowner. For example, you may want to revise the right of entry to address, among other things, damage to the property or any improvements thereon (as well as indemnity language), damage to livestock or crops, introduction of noxious weeds or other vegetation, restrictions on "off-road" travel, notice requirements, assurances that all gates will be kept closed, language addressing removal of trash and debris, and language limiting the company's right to use the property to only those purposes reasonably necessary to conduct a survey. *Practice Point*: If the right of entry is going to be tweaked it is important to understand the landowner's use of the land and any other special circumstances that may apply, e.g., hunting, irrigation, grazing, etc.

B. Bona Fide Offer

Once the survey is complete, the negotiations begin and should never cease until an agreement is reached or a final judgment is rendered. In fact, many deals are cut on the courthouse steps.

Pursuant to the Texas Property Code "an entity with eminent domain authority … must make a bona fide offer to acquire the property from the owner voluntarily." TEX. PROP. CODE § 21.0113 (a). An offer is considered bona fide if the company satisfies the seven requirements set forth in subsection (b) of Section 21.0113 of the TEX. PROP. CODE.

Simplifying somewhat, for the purpose of this paper, an entity must first submit an initial offer to the landowner in writing, which the landowner has at least 30 days to consider. The initial offer is almost always less than what the company will agree to pay. Any time after 30 days the company can make a final offer (also in writing). When making the final offer the company must include a copy of a written appraisal, a copy of the proposed easement, and, to the extent not already provided[3], a copy of the landowner's bill of rights (as promulgated by the Attorney General's office). The final offer must be greater than or equal to the appraised value as set forth in the appraisal; however, frequently the final offer is substantially less than the initial offer. After sending the final offer the company must wait at least 14 days before filing their petition for condemnation. *Practice Point*: these minimum deadlines are rarely followed and there may be many months between each step, especially between the initial and final offers. However, the facts of each negotiation will dictate the speed of each step, e.g., construction deadlines, how willing each side is to work together and comprise, etc. Remember, if the company has the right to take the property and you refuse to work with them they will simply file their petition and start the condemnation process.

Practice Point: the best approach to negotiating a pipeline easement (or any agreement for that matter) is to understand what your client wants, what they are concerned with, and ultimately how far are they willing to go. Are they okay with taking it all the way through a condemnation proceeding, if necessary, or do they want the best deal possible short of the petition actually being filed? Likewise, you need to inform your client that just because they receive a final offer that does not mean negotiations have broken down. The last thing you want, is an angry landowner showing up waiving a certified packet wanting to know what is happening. Let the landowner know up front what the process will look like and let them know that if they receive a final offer not to panic and to simply bring it to your office.

C. Condemnation Proceeding

Once the negotiations break down the condemnation process begins.

Assuming the company has made a bona fide offer, the company is entitled to exercise its power of eminent domain by filing a petition for condemnation in the district court or the county court at law. TEX. PROP. CODE §21.001. County courts have no jurisdiction. *Id*. The requirements of the condemnation petition itself are found in section 21.012 of the TEX. PROP. CODE. Once the petition has been filed the judge of the court has the ministerial duty of appointing three special commissioners (disinterested property owners in the county) whose job is to determine the value paid to the landowner. TEX. PROP. CODE §21.014. It is worth noting that the trial court does not regain jurisdiction until after the commissioner's award has been issued and properly objected to. Hence, if either side is unhappy with the award they may object to the award by filing a written objection "on or before the first Monday following the 20th day after the day the commissioners file their findings with the court." TEX. PROP. CODE § 21.018 (a). Upon the filing of a proper objection the case becomes a regular civil case and a trial de novo is conducted. As such, the parties may, among other things, conduct discovery, file pretrial motions, and ultimately appeal the findings to a state appeals court and the Texas Supreme Court (appellate review is not mandatory, however).

Practice Point: a landowner is not required to participate in the special commissioners' hearing and

[3] See TEX. PROP. CODE § 21.0112 (a) ("an entity … shall provide a copy of the landowner's bill of rights … before or at the same time as the entity first represents in any manner … that the entity possesses eminent domain authority.")

whether to do so is often a strategic matter. For example, many practitioners, as a matter of practice, do not attend the commissioners' hearing and object to the award after it has been issued. If the decision is made to attend the hearing, do not file an answer, as you would in a regular civil case, as the commissioners have the purely administrative duty of determining the value paid to the landowner. Many factors can determine whether or not to participate in the hearing, e.g., do you know the commissioners, is the county generally favorable to landowners or pipeline companies, do you have complex theories of damages, etc.

To summarize, a typical condemnation process proceeds as follows:

- Survey.
- Initial Offer.
- Final Offer.
- Petition for Condemnation.
- Trial Court Appoints 3 Special Commissioners.
- Commissioners Award.
- Objection to Commissioners Award.
- Trial De Novo in Trial Court.
- Appeal Trial Courts Findings.

III. PRACTICAL CONSIDERATIONS

The above discussion has been meant to serve as an abbreviated overview of the condemnation process. If a landowner has been approached by a pipeline company with the power of eminent domain or has already had a petition for condemnation filed against them they should seek competent counsel. That said, to properly negotiate a pipeline easement counsel needs to have at least a working knowledge of the process as the result of a failed negotiation is a condemnation proceeding. With that said, the rest of this paper is intended to provide landowners and practitioners with considerations that they may want to include in their own negotiations.

A. Does the Company Have the Power of Eminent Domain?

As stated on the first page, the vast majority of pipeline companies do have the power of eminent domain but not all of them do. Accordingly, as a preliminary matter, the time should be taken to make an initial determination whether the company has the right to take the property. If the company does not have the power of eminent domain then the landowner has the upper hand in negotiations, i.e., if the landowner says no the pipeline is not coming.

In Texas, the most common means of a pipeline company acquiring the right of eminent domain is by qualifying as a common carrier under the Natural Resources Code; however, gas utilities are governed by a separate statute and do not have to qualify as a common carrier to exercise the right of eminent domain. TEX. NAT. RES. CODE § 111.002 (common carrier pipelines); TEX. UTIL. CODE § 181.004 (gas utilities). Section 111.002 of the Texas Natural Resources Code sets out seven different scenarios wherein a person can qualify as a common carrier but simply put a company qualifies as a common carrier if the company will own, operate, or manage a pipeline that transports crude, coal, carbon dioxide, hydrogen, or the products of carbon gasification to or for the public. *See also Denbury Green Pipeline-Texas, LLC v. Tex. Rice Land Partners, LTD*., 510 S.W.3d 909 (Tex. 2017).

Determining whether a company has the power of eminent domain is not always an easy task. One might consider asking the company for a copy of the statute that confers the power of eminent domain, a copy of their T-4 permit from the Railroad Commission, or even checking the Comptroller's eminent domain database. *See* TEX. GOV. CODE §2206.151-2206.157 (requiring all persons claiming the power of domain to report certain information to the Comptroller's office who is to maintain a database). Likewise, one might consider asking the company for evidence that supports their claim of eminent domain authority. It should be noted, however, that merely having a T-4 permit does not confer the power of eminent domain and the Railroad Commission requires most pipeline companies to obtain a T-4 permit, even those operating private lines. *See also Denbury*, 510 S.W.3d 909. Likewise, pipelines that do not leave an oil and gas lease, e.g., production and flow lines, are not required to obtain a T-4 permit. If there is a legitimate dispute over whether the company truly has the power of eminent domain legal intervention will likely be necessary.

B. Permanent or Temporary; Exclusive or Nonexclusive; Width of Easement

Generally speaking, there are two types of pipeline easements: permanent and temporary. It goes without saying who favors which type. A permanent easement is a perpetual easement that does not terminate or expire (unless the easement contains expressly stating otherwise), and the landowner receives a onetime lump sum payment. A temporary easement, on the other hand, introduces the concept of a renewal period, e.g., every 5 to 10 years. For example, if the company wishes to maintain the easement and the company's right thereunder then on or before the agreed upon renewal date the company has to pay the landowner an agreed upon sum. Generally, this sum will be the initial price paid, or the price paid for the previous renewal term, plus a percentage escalator. Whether a temporary easement can be secured is directly determined by each parties respective bargaining powers, e.g., does the company have the power of eminent domain; how much

of the landowner's land does the company need to cross? [4]

Regardless of whether you are negotiating a permanent or temporary easement, you should also ensure that the easement will be nonexclusive. An exclusive easement gives the company the exclusive right to use the easement and no other company can locate a pipeline within that easement. With a nonexclusive easement, on the other hand, the landowner has the ability to grant a second company the right to place their pipeline within the same easement. Thus, by granting nonexclusive easements the landowner is able to reduce the number of easements cutting across and through their property. This is especially important in areas with a high volume of pipelines, e.g., West Texas.

Similarly, special care and attention should be given to the width of the easement. A common problem with early pipeline easements involve the concept of the "blanket easement," wherein the company had an easement over the entire property and thereby the right to locate the pipeline anywhere on the property. Some particularly onerous easements also gave the company the right to place additional lines within this blanket easement. To avoid this, determine the width of the easement and require the company to specifically define the easement such that there is no question what land is burdened by the easement and where the pipeline is actually located. Regarding the width of the easement, limit the width to the narrowest width possible—a 20-inch pipeline, for example, does not require a 50-foot easement—with the width being defined as so many feet on either side of the centerline of the actual pipeline.

C. Number of Pipelines; Type of Substance

Many easements, especially older easements, have language granting the company the right to lay or construct one or more pipelines within the same easement. Likewise, they often include a lengthy list of substances that can be transported through the pipeline. Limit the company to one pipeline per easement and one substance per pipeline. This maximizes the landowner's potential profits, i.e., if the company wants to lay another line or use another substance then they will need to acquire a second easement or purchase that right.

D. Reservation of Rights; Above Ground Improvements

Always include language that expressly states that the landowner is reserving all rights to use the easement, including producing and developing the minerals beneath the pipeline, that do not materially interfere with the pipeline or the company's rights under the easement. No company is going to allow the landowner to place permanent structures on the easement. This presents a safety risk and the company will want to ensure they have the right to fully access the actual pipeline if the need arises. However, the landowner should be allowed to use the easement for normal agricultural purposes such as grazing and it may be beneficial to specify that temporary and movable improvements, e.g., temporary pins, may be placed on the surface of the easement. Likewise, the landowner should reserve the right to place roads over and across the easement.

The easement should also specify whether there will be any above ground improvements such as valve sites. Not all easements require above ground improvements but when they do additional compensation is generally available. Remember, what the easement says is binding. So, even though the company says no above ground improvements if the easement does not specify this the company may install above ground improvements without compensating the landowner.

E. Depth of Pipeline; Reclamation

How deep should the pipeline be buried? This is an important consideration for a variety of reasons. First, you do not want the pipeline buried so shallow that simple erosion will eventually bring the pipeline to the surface. Likewise, you do not want the pipeline to interfere with normal agricultural activities. Furthermore, consider, for example, a pipeline cutting through a landowner's watershed. What happens if the pipeline settles and leaves a depression thereby diverting the flow of water to stock tanks on either side of the easement? For all of these reasons, the easement should stipulate a minimum depth requirement and should require the company to maintain that minimum depth. 36 inches is fairly standard but I would advise requiring at least 48 inches. Companies frequently pushback on depth requirements asking for caveats such as they do not have to bury the line to the depth requirement in the event they encounter rock or other impenetrable surfaces. Consider these caveats carefully.

In the same vein, specify that the company shall use the "double ditch" method when constructing and repairing the pipeline. Sample language might read as follows:

> "*No ditch or trench may be left uncovered for more than sixty (60) consecutive days. Grantee agrees to utilize the "double ditch" method when digging any trench or ditch. Grantee agrees to segregate the top soil from*

[4] Pipeline permits and licenses exist but are rare, even more so than a temporary easement, which in and of themselves are difficult to secure.

the subsoil and to store the top 18 inches of top soil separate and apart from the subsoil. During backfill of the pipeline trench, the soil will be returned in such a way that the subsoil is placed in the trench first leaving room for all 18 inches of topsoil to be placed at the top of the trench. All of the backfill material will be compacted to restore the land, as much as practical, to its original condition. Unless instructed otherwise by Grantor, Grantee will remove all excess sub-soil from Grantor's lands. Grantee agrees to remove from the property all rocks with a diameter of four inches (4") or greater that are brought to the surface during construction."

Be sure to specify the standards by which the surface of the easement should be restored. Require the company to grade and level all areas disturbed by the company. Require them to reseed the easement and to undertake steps to ensure the reseeding takes effect. Likewise, require the company to undertake a program of weed control and to undertake steps to ensure the spread of unwanted and noxious weeds are prevented. Moreover, if trees over a certain diameter are removed require the company to replant at least an equal number of trees (of a smaller diameter naturally). Require the company to remove any excess soil or rocks over 4 inches and to otherwise restore the easement to its condition and contour prior to undertaking the construction activities.

F. Road Use; Fences

Where possible, negotiate into the easement a clause that prevents the company from using any roads belonging to the landowner or building new roads. If this is not possible, require the company to maintain and repair any roads they use during initial construction (if the landowner has specific specifications on how the roads are to be maintained include those in the easement). If the company wants or needs to use landowner roads consider negotiating a price for using such roads. Regardless, after the pipeline is installed expressly state that the company's right of ingress and egress are expressly limited to the easement and nowhere else.

For many landowners, the cutting of fences and installation of gates are of high importance. If fencing is an issue negotiate a clause wherein no fence can be altered or cut without landowner's prior written consent and without landowner being present. If the company cuts any fence make sure the company has the obligation to repair and replace the fence. Likewise, consider negotiating language that specifies the type of fence to be used and how the fence is to be cut and replaced. Sample language might read as follows:

"*Except where fences now cross the right of way, Grantee shall have no right to cut any fence surrounding or located on Grantor's property, without Grantor's prior written consent. In the event of Grantor's prior written consent, it is agreed that prior to cutting any such fence, Grantee shall brace the existing fence adequately and to the entire satisfaction of Grantor, or his agent, on each side of the proposed cut, and shall procure the approval of Grantor, or his agent, of such bracing prior to cutting such fence. In bracing such fence, it is provided that Grantee shall set not less than six (6) nine-foot (9') steel pipe posts, with tops not less than four-inches (4") in diameter, each buried four feet (4') into the ground with three (3) posts on each side of the proposed cut, the posts to be properly braced with horizontal braces, and wired so that when the fence is cut there will be no slackening of the wires. Grantee shall not maintain any openings in Grantor's fence without Grantor prior written consent. In the event of Grantor's prior written consent, Grantee shall install a metal gate capable of turning cattle, which gate shall, to the extent reasonably practicable, be constructed out of similar or better grade materials than already used for existing gates on the property and such other reasonable specifications required by Grantor. Likewise, in the event of Grantee's prior written consent, Grantee shall not install a single-gate larger than 12-foot in width with any opening larger than 12-foot requiring a double gate. Each entry and exit gate shall be securely closed and locked, except when Grantee or its authorized personnel are actually passing through the same.*"

If the landowner grazes cattle and is unable to move the cattle while the pipeline is being constructed consider requiring the company to temporary fence the trench or take other measures to ensure livestock will not be injured. Likewise, if the landowner is going to move cattle, negotiate a price to be paid as the landowner is sure to incur costs by relocating the cattle.

G. Crops, Livestock & Other Damages

Always address the payment of damages caused to growing crops, livestock or other valuable wildlife, hardwoods or other valuable trees, fences, buildings, irrigation systems, as well as damage to all other property suffered as a result of the installation, construction, operation, maintenance, repair, or removal of the pipeline. Consider negotiating the method of determining the amount of damages or including a fee schedule, i.e., if the company removes a tree over XX

diameter the company pays XXX or if a gate is left open and cattle escape the company pays XXX per animal. Above all else, make sure the company has the obligation to pay damages at all times and not just as a result of initial construction as it is just as likely that damages will be incurred if the pipeline needs to be repaired or removed. Sample language might read:

> "*Grantee agrees to pay all damages which may be caused to cattle, fences, buildings, crops or any other personal or mixed property of Grantor, his heirs, successors or assigns, and Grantor's tenants, in constructing, maintaining, repairing, replacing and/or removing said pipeline and in the exercise of any other rights herein granted. Grantee shall also pay Grantor, or Grantor's tenants, as their interests may appear, for all damages caused to their person or property from the leaking, seeping or exploding of gas, or the products thereof, or oil or other hydrocarbons, resulting from Grantee's use of said Easement, and for all damages caused by the stoppage or obstruction of water drainage at any time during the existence of this Agreement*."

If the landowner leases the property to a third party require the company to compensate that third-party directly for any damage to that person's interests.

Just as important, as the payment of damage, is ensuring that all damage capable of being repaired is in fact actually repaired.

H. Assignment; Abandonment; Termination

Companies typically request, in their form easement, the right to freely assign the easement without consent or approval of the landowner. However, most companies will agree to not assign the easement without landowner consent if the landowner is willing to agree that the company may freely assign the easement to an affiliate without landowner consent. Make sure to clearly define affiliate.

Consideration should be given to the topics of abandonment and termination of the easement. It is advisable to include a clause that states if the company fails to use the pipeline for so many consecutive days (months) then the pipeline shall be deemed abandoned and the easement terminated. Sample language might read:

> "*In the event that the pipeline is not used for any continuous period of six months, then the pipeline shall be deemed abandoned and this Easement terminated. The pipeline shall be considered to be "used" for purposes of this paragraph only if crude oil and/or associated hydrocarbons are being transported through the pipeline for sale or use in commercial quantities*."

I. Miscellaneous Considerations

The list of items that can or should be negotiated into a pipeline easement are endless and are dictated by the needs of the landowner. In addition to the issues highlighted above, always make sure the landowner is fully indemnified, including as a result of any violation of environmental laws. It is also advisable to require the company to maintain a minimum amount of insurance with the landowner being named as an additional insured. Along those same lines, include a choice of law provision that provides for local venue. If possible seek a waiver of the right to remove a dispute to federal court. Furthermore, always strike language that asks the landowner to give a warranty of title or make any other representations regarding the property. To that end, it is advisable to include a broad disclaimer that disclaims all warranties and puts the company on notice that the easement is being granted in "As Is" condition. Finally, the company will also ask for temporary workspace while constructing the pipeline. Make sure this workspace is clearly defined and specify that the temporary workspace terminates when the pipeline is installed or within so many months of starting construction.

IV. CONCLUSION

This paper has sought to provide landowners and practitioners with a primer on both the condemnation process in Texas and practical considerations when negotiating and drafting a pipeline easement. But this paper is just that, a primer, and the field of eminent domain and pipeline easements is an ever growing and complex arena. If a landowner is approached by a company seeking an easement to lay a pipeline competent counsel is required.