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The Right to Take Pipeline Easements

Delivery of Barnett Shale natural gas to buyers and users requires pipelines. Pipelines require easements for construction, maintenance and operation. Pipelines have to be laid across all kinds of private property - residential, commercial and agricultural.

Pipelines are usually owned and operated by affiliates or subsidiaries of natural gas producers. These natural gas transporters normally are legally independent of natural gas producers. A landowner's first contact with the pipeline company is normally with an independent contractor known as a “landman.” The landman likely is part of a separate company doing independent contractor work for the pipeline company. In the Barnett Shale, the pressing need for new pipelines also means that these landman companies and staffs come and go without warning, often leaving the landowner bewildered, confused and angry.

The first question the landowner asks is: “Can they take my land and put a pipeline anywhere they choose?” With a few limitations, the unsatisfactory but correct answer is “Yes.”

Pipeline companies have the statutory right in Texas to condemn private property for pipeline easements. The Texas Utilities Code §181.004, the Texas Business Corporation Act, article 2.01, B(3)(b), and the Texas Natural Resources Code §111.000 et seq. give both “common carriers” and “gas utilities” the power of eminent domain (the legal phrase for condemnation).

The next question usually asked by the dumbfounded landowner is “But why does a private, for-profit company have the right to put a pipeline across my land and put it anywhere it chooses?”

Both the Texas and the U.S. constitutions permit such takings.[i] A 2005 U.S. Supreme Court decision upheld the right of a Connecticut city to take blighted private property for the purpose of re-selling or leasing of the condemned property to other private parties.[ii] Although the Texas Legislature, after the Kelo case, attempted to limit “a governmental or private entity” from taking “private property through the use of eminent domain if the taking confers a private benefit on a particular private party through the use of the property,” the legislature also exempted from this new Texas statute “the operations of (A) a common carrier... or (B) an energy transporter, as that term is defined by Section 186.051, Utilities Code,” as well as “a purpose authorized by Chapter 181, Utilities Code.”[iii] The Texas Railroad Commission maintains a list of pipeline companies who have condemnation power.[iv]

This eminent domain power also includes the pipeline company's right to enter the landowner's property to conduct surveys for the pipeline route and construction planning.[v]

The U.S. and Texas constitutions also require the pipeline company taking such easements to pay “adequate compensation” to the landowner. This adequate compensation in Texas includes the market value for the property interest taken, valued as of the date of taking, plus damages to the remainder of

the property from which the easement has been taken.[vi] This process is governed by chapter 21 of the Texas Property Code. But neither the landowner nor the pipeline company, except in rare circumstances, have the right to obtain attorney's fees incurred in the condemnation lawsuit.[vii]

The most important part of this process is the pre-lawsuit negotiation stage. Both parties can obtain critical protections and conditions that make for the least intrusive and damaging installation and operation when the parties communicate and negotiate in good faith. The pipeline easement terms either agreed by the parties or decreed by a judge usually remain effective and controlling for years of operations. Extreme caution and thoughtfulness should be used to make sure that both parties' needs are satisfied in the easement terms.[viii]

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[i]See U.S. Const., 5th and 14th Amendments; Tex.Const. art. 1, §17.

[ii]See *Kelo v. City of New London*, 545 U.S. 469, 483-486 (2005).

[iii]Tex.Gov'tCode §2206.001.

[iv]List available at 512-463-7022 or at <http://www.rrc.state.tx.us/divisions/gs/lpg/operators/pipelinecontact.pdf>.

[v]See *IP Farms v. Exxon Pipeline Co.* 646 S.W.2d 544 (Tex.App. - Houston [1st District] 1982, no writ).

[vi]These damages may include additional compensation for temporary work spaces, temporary or permanent access, lost crops, damage to livestock, fencing, timber, and above-ground construction and objects ("appurtenances").

[vii]Tex.Prop.Code §21.019.

[viii]See *DeWitt County Elec. Co-op, Inc. v. Parks*, 1 S.W.3d 96, 103 (Tex.1999); *Marcus Cable Associates, L.P. v. Krohn*, 90 S.W.3d 697, 701-02 (Tex.2002).