

Eminent Domain in Texas: A Landowner's Guide



Tiffany Dowell Lashmet, J.D.
Associate Professor & Extension Specialist
Texas A&M AgriLife Extension

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TABLE OF CONTENTS

- Introduction**..... 1
- What Is Eminent Domain**2
- Where Does the Power of Eminent Domain Arise?**2
- The Three Elements of Eminent Domain in Texas2
 - Authority.....3
 - Public Use.....3
 - Adequate Compensation3
 - Market Value of the Property4
 - Highest and Best Use4
 - Remainder Damages.....5
 - Moving/Relocation Expenses.....5
 - Costs Not Included.....5
- Condemnation Proceedings In Texas**6
 - Phase 1: Offer and Negotiations6
 - Eminent Domain Process in Texas *Figure 1*7
 - Phase 2: Condemnation Petition Filing8
 - Phase 3: Special Commissioner Appointment, Hearing, and Award8
 - Phase 4: Award Filing and Objection Permitted9
 - Phase 5: Trial by Judge or Jury and Appeals9

Selecting an Attorney	10
Key Terms to Consider	11
Right of Entry Permit	11
Easement Agreements	12
Determine Compensation Details	12
Require a Specific Easement	12
Identification of Parties	13
Exclusivity of Easement.....	13
Limit the Easement Agreement to a Single Line	13
Limit the Types of Products Running Through the Line	13
Determine the Permissible Pipeline Diameter and Pressure	13
Determine the Width of the Easement	14
Require a Specific Pipeline Depth.....	14
Specify the Type and Size of Transmission Line	14
Specify What Surface Facilities.....	14
Reserve Landowner Surface Use.....	14
Provide Property Access for Landowners	14
Limit Company Access to the Easement	14
Require the Use of the Double Ditch Method	15
Include the Right to Approve.....	15
Set Specific Restoration Standards	15
Request Payment for Damages	15
Specify Fencing and Gate Requirements	15
Include Repairs or Improvements to Existing Roadways.....	16
Define When the Easement Will Terminate	16
State the Requirement for Removing Facilities	16
Determine Remedies for Violating the Easement Agreement.....	16
Include Liability and Indemnification Provisions	17
List the Landowner as “Additional Insured” on the Company Insurance Policy	17
Delete Warranty of Title	17
Limit the Terms of Transferability	17
Request a Most-Favored-Nations Clause.....	17
Seek Payment for Negotiation Costs	18
Use a Choice-of-Of Law Provision.....	18
Include a Venue and Forum Clause.....	18
Understand Dispute Resolution Clauses	18
Include an Attorney Fee Provision	18
Additional Resources	19



Texas is a state with a rapidly increasing population, which leads to an increased need for more infrastructure like roads, highways, pipelines, and transmission lines. Texas is also a state that has championed the private property rights many hold so sacred. At the intersection of these two realities, the issue of eminent domain comes to the forefront.

Eminent domain. Takings. Condemnation. These words can invoke a number of emotions in Texas landowners, including fear, anger, and confusion. The decisions landowners make, including the financial compensation and terms of any written agreement, have the potential to last generations, making these decisions extremely important.

This handbook is intended to help educate Texas landowners on the laws regarding eminent domain, their rights in the process, and to empower landowners with additional resources to best protect their land, their operations, and their livelihood.

“ When you learn you are facing condemnation, take a day or two to be mad, but then get over it and start getting smart. ”

– Jim Bradbury,
Attorney, James D. Bradbury
PLLC, Austin, TX

WHAT IS EMINENT DOMAIN?

Eminent domain is the power of the government or a private entity acting upon power granted by the government to take private property for public use. Landowners may also see eminent domain referred to simply as “a taking.” Additionally, the phrases “condemn” or “condemnation” simply refer to the exercise of the power of eminent domain. These terms are often used interchangeably. Where the controversy lies, of course, is the power of eminent domain may be exercised without the consent of or permission from the landowner.

The entity seeking to condemn is known as the “condemnor.” For example, if TXDOT sought to condemn an easement to build a road, TXDOT would be the condemnor. Common instances of exercising eminent domain include roads, hospitals, schools, electric lines, and pipelines.

WHERE DOES THE POWER OF EMINENT DOMAIN ARISE?

The power of eminent domain is recognized in both the United States and Texas Constitutions. The Fifth Amendment of the United States Constitution provides private property may not be taken for public use without just compensation. Article I, Section Seventeen of the Texas Constitution, likewise, prohibits the taking, damaging, or destruction of property for public use without adequate compensation being made. These provisions are not a grant of power to the State, but are, instead, a limitation of power by imposing certain requirements. It is this Constitutional language upon which the law of eminent domain is built.

THE THREE ELEMENTS OF EMINENT DOMAIN IN TEXAS

Under Texas law, there are essentially three elements to eminent domain: (1) The condemnor must be authorized to exercise eminent domain; (2) the property may only be taken for a public use; and (3) the landowner must receive adequate compensation. Let’s discuss each of these individual elements.

The condemnor must be authorized to exercise eminent domain.

Under Texas law, only a governmental entity or a private entity granted the power of eminent domain under law is permitted to condemn property. Entities may only have the power of eminent domain when they are a governmental entity or a private authorized to do so by the Texas Legislature. Beginning in 2010, the Legislature may grant this power only upon a two-thirds vote of both houses. Examples of private entities authorized by law to condemn property include gas or electric corporations, groundwater conservation districts, and common carrier pipelines.

An example of a statute authorizing the right of eminent domain can be found in the Texas Natural Resources Code Section 111.019, which states:

- (a) Common carriers have the right and power of eminent domain.
- (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn 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.

Within this example is the phrase “common carrier” pipeline. This is one of the most controversial uses of eminent domain in Texas, so taking a moment to discuss the meaning of this phrase and implications for landowners may be helpful. Please note, there other types of pipelines, such as gas utilities, that may not meet this common carrier definition but would have eminent domain power under other statutory authority.

A “common carrier” is defined by statute as a person who owns or operates a pipeline that transports crude oil, coal, carbon dioxide or hydrogen for hire, or transports crude oil purchased from others. Further, common carrier pipelines in the business of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller’s earth, sand, clay, liquefied minerals, or other mineral solutions have eminent domain power. Pipelines transporting only their own product are not considered common carriers.

The Texas Railroad Commission has regulatory jurisdiction over oil and gas operations in Texas, including pipelines. In order to claim common carrier status, a pipeline company is required to file a Form T-4 with the Texas Railroad Commission. This form requires the company to declare it is either a common carrier or a private line by checking a box and providing certain information, including an affidavit from a company official.

The Railroad Commission is not authorized to investigate this status, meaning the representation of the company on the form is taken at face value. The Railroad Commission has no authority to determine if a company is, in fact, a common carrier. Landowners may challenge a pipeline company's designation of a common carrier during the condemnation proceeding, which will be discussed in detail below. The Texas Supreme Court, historically, has applied a fairly lenient, company-friendly standard in evaluating common carrier status. In *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners*, the Court held a pipeline company need only prove "by a reasonable probability" it is a common carrier. In that case, the Texas Supreme Court indicated the company's pre-construction intent to be a common carrier, post-construction contracts for transportation of third-party gas, the proximity of the line to potential customers, and the lack of other available pipelines to offer similar transportation services in the area was sufficient evidence to meet the "reasonable probability" standard.

Although there is no statute or regulation listing each of the entities in Texas having the right to eminent domain, the Texas Comptroller's Office maintains an online database of all entities with eminent domain authority in Texas. This database includes information such as the entity name, address, public contact information, type of entity, and the provision of law granting the entity eminent domain power. The database is updated annually.

The property may only be taken for a public use.

In order for property to be condemned, it must be taken for a "public use." The definition of "public use," however, is not as straightforward as one might expect. This term is defined in the Texas Constitution as the ownership, use, and enjoyment of the property by the State, a political subdivision of the State, or the public at large, or an entity granted the power of eminent domain under law or the elimination of urban blight. Courts generally decide whether a taking is for public use based upon the specific facts of a case.

Examples of projects found to be public uses include: transportation projects such as highways, bridges, railroads, airports; utility projects; oil and gas pipelines; water and sewer lines; electric lines; commercial structures such as stadiums, arenas, shopping centers; public projects such as schools, hospitals or public parks; or water-related projects such as water supply, drainage, and water reservoir infrastructures. The amount or type of property condemned depends on the specific public use, but it can include a taking of an entire parcel of land, an easement, and improvements such as houses or barns, just to name a few.

Texas statutes do provide certain situations that do not qualify as public use. Public use does not occur if a private benefit is conferred to a particular private party through the use of the party. A recent Texas Supreme Court opinion in *KMS Retail Rowlett v. City of Rowlett* again indicates this limitation has been broadly construed. In *KMS*, two private parties were unable to negotiate an agreement for an easement to extend a private drive owned by one business to allow access to a new business to be built next door. Then, the City of Rowlett condemned the drive, justifying the taking as a public use to provide cross-access, traffic circulation, and emergency vehicle access between retail centers. This taking by the City of Rowlett was allowed. Again, while "public use" is a limitation on takings and is an issue that may be challenged in court by a landowner, it has been quite broadly applied.

Additionally, the definition of "public use" does not include the taking of property for transfer to a private party for the primary purpose of economic development or enhancement of tax revenues. If, however, economic development or increased tax revenues is a secondary purpose, as opposed to the primary purpose of the taking, it may be considered public use.

The landowner must receive adequate compensation.

Although a Texas landowner cannot prevent an entity with eminent domain power from taking his or her property, the landowner is entitled to receive adequate compensation from the condemnor. A number of considerations are used to determine what satisfies the "adequate compensation" requirement.



MARKET VALUE OF THE PROPERTY

Adequate compensation is calculated based upon the market value of the property, which is defined as “the price the property will bring when offered for sale by one who desires to sell but is not obligated to sell and is bought by one who desires to buy but is under no necessity of buying.” This is known as the “willing buyer-willing seller” test. This market value is determined at the time of the taking (specifically, at the time of the special commissioners’ hearing, as discussed below), which can be important, particularly if property values in an area have significantly changed over time.

HIGHEST AND BEST USE

In determining the market value of the property, a landowner is entitled to receive the fair market value of the “highest and best use” to which the property could reasonably be put, rather than the value of the property for which the landowner actually used the land. This is defined by the Appraisal Institute and adopted by Texas courts as “the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.” Four factors are used in determining the highest and best use: (1) legal permissibility; (2) physical possibility; (3) financial feasibility; and (4) maximal productivity. This requires consideration of all uses to which the property is “reasonably adaptable” and for which it is or “is in all reasonable probability will become within the foreseeable future.” Importantly, this consideration cannot be based on uses which are “purely speculative or unavailable.”

For example, if a vacant lot is located in a commercially-zoned area, the highest and best use of the property would likely be the value of a commercially-developed property, rather than the value of a vacant lot. Similarly, in a situation where agricultural land may be surrounded by housing developments or commercial businesses, it may be the highest and best use of the property would justify a value based upon those residential or commercial uses, rather than agricultural use.

REMAINDER DAMAGES

For partial takings, the concept of remainder damages may be one of the most important considerations for landowners assessing the adequate compensation they are due. Although remainder damages will not exist in every partial taking, they certainly can and do exist under certain circumstances.

If a person's entire tract is taken, the payment owed to the landowner is the local fair market value of the property at the time of the special commissioners' hearing. If, however, a portion of a tract of land is taken, then adequate compensation should include not only the value of the portion taken but should also include "remainder damages," if they exist. These "remainder damages" are based upon any decrease in value to the "remainder," which is the portion of the property not taken by the condemnation. Typical damages falling into this category include loss of access to a road or highway, loss of economic uses, cost of fencing, loss of street frontage, or loss of water sources. Injuries shared by the landowner and general public (such as increased traffic), however, may not be considered in calculating a damage award.

Additionally, if there are any benefits to the landowner due to the taking, which actually increases the value of the remaining property, the amount of those benefits is deducted from the remaining property damages recoverable.

MOVING/RELOCATION EXPENSES

If a landowner is permanently displaced from his or her home or business and is not entitled to recover moving expenses under another law, he or she may recover reasonable moving expenses for a maximum distance of 50 miles. Additionally, under certain situations, relocation assistance, including relocation payments or housing assistance, may be available for landowners, including those moving their farming or ranching operation as a result of condemnation.

COSTS NOT INCLUDED

In reviewing this list of common damage considerations, one may note that attorney's fees or the cost of an appraiser utilized during the eminent domain process are not included. This has been a concern of various landowner and agricultural groups, including Texas Farm Bureau, for years. In the past, several bills have been introduced in the Texas Legislature to modify the existing law to allow a landowner to recover costs incurred in defending a condemnation action, specifically attorney and appraiser fees, if the landowner is successful in recovering a certain percentage above the initial offer from the condemnor. To date, none of these bills have been enacted in Texas.

Thus, under the current state of Texas law, landowners are generally unable to recover their attorney's fees, appraiser costs, and other expert witness fees they may incur in the process of condemnation. This is true even for a landowner who may successfully challenge the payment offered by a condemnor and is granted a substantially increased compensation award than what was offered by the condemnor.

The only situations in which a Texas landowner may recover his or her attorney's fees is if the condemnor fails to follow the proper procedures (discussed below and on next page) in making a bona fide offer to the landowner; if the condemnor moves to dismiss the condemnation proceeding or lacks the authority to condemn the property resulting in dismissal of the proceeding; or if the condemnor dismisses the proceeding and subsequently seeks to condemn the property a second time.

In 2017, the Texas A&M University School of Law published a resource guide titled "[A Survey of Eminent Domain Law in Texas and the Nation](#)." Forty other states allow the award of attorney's fees based on situations in which they would not be permitted in Texas.



CONDEMNATION PROCEEDINGS IN TEXAS

The Texas Attorney General's Office has published a document called the "[Texas Landowner Bill of Rights](#)" that is essentially the playbook about eminent domain proceedings for Texas landowners. A free copy may be downloaded in English or Spanish at the Texas Attorney General's website.

In Texas, condemnation proceedings have very different procedures than other civil cases. It is important for landowners to understand the condemnation process, in case they find themselves faced with a condemnation suit.

Given the complex nature of condemnation proceedings, the factual differences between every case and the potential long-term impacts of condemnation, it is highly recommended landowners seek advice from an attorney experienced in eminent domain during this process.

Condemnation proceedings are governed by Texas Property Code Chapter 21, which sets forth the procedure for all condemnation actions, regardless of the type of project at issue. For example, these provisions would apply whether the project was for a common carrier pipeline or a new highway. Generally, the condemnation process may be divided into five phases.

Phase 1: Offer and Negotiations

Before initiating condemnation proceedings, Texas law requires a condemnor to make a "bona fide offer" to purchase the property it seeks. In order to satisfy this bona fide offer requirement, the company seeking to use eminent domain must make an initial written offer to purchase the property, and they must obtain an appraisal from a certified appraiser of the value of the property, before making a final written offer that is greater than the amount of the appraiser's report. Importantly, landowners are protected by certain time requirements in the statute. There must be at least 30 days between the initial offer and the final offer, and the landowner must be given at least 14 days to respond to the final offer before a condemnation proceeding may be filed.

Eminent Domain Process in Texas

Figure 1



“One of the worst things Texas landowners can do is panic and sign the first document placed in front of them, because they fear that a lawsuit will be filed. Texas law affords the landowner time to consider the offer and consult with an attorney and other experts before responding.”

The condemnor is also required to provide landowners with certain information at the time of the final offer, including a copy of any appraisal related to the land prepared in the last 10 years. Additionally, the company must provide the owners with a copy of the Texas Landowner Bill of Rights (discussed on page 6). Landowners facing eminent domain should ensure they receive these documents to which they are entitled.

Between the initial offer and final offer, negotiations are generally ongoing between the condemnor and the landowner. During this time, a landowner may have an appraisal conducted by an appraiser of his or her own choosing but is required to provide the results to the condemnor. As will be discussed in more detail below, during negotiations, the landowner should keep in mind there is more to consider than just the dollar value received, and there well may be non-monetary terms actually more important to the landowner than an increased payment.

If an agreement is reached between the condemnor and the landowner during this phase, there is no need for a condemnation action, and the agreement will be drafted, signed, and recorded by the parties. It is critical all terms agreed to be included in the written easement agreement; no oral promises or assurances should be relied upon by a landowner.

If no agreement is reached, the company may then file a condemnation proceeding.

Texas courts have held the right to condemn land includes the right to enter onto the property to conduct surveys to select lands to be acquired. For companies with the power of eminent domain, landowners likely cannot prevent a survey from being done. “Ancillary to the power of eminent domain is the authority to enter upon the land to make a preliminary survey.” Courts have limited this right to visual inspections and lineal surveys, refusing to allow more invasive procedures like core drilling or subsurface soil testing. Landowners who seek to interfere with this right may be subject to a court injunction should the condemnor seek one. However, landowners can (and should) request a “Right of Entry Permit,” which is essentially a contractual agreement with the company, limiting their rights and imposing other protections for the landowners while the company is on the property. Key terms to include in a Right of Entry Permit are discussed on page 11.

Phase 2: Condemnation Petition Filing

If no agreement is reached between the parties, the condemnor will likely file suit against the landowner in either the district court or the county court of law in the county where at least part of the property is located. This is the beginning of the formal condemnation proceeding. The petition must contain a description of the property to be condemned, the public use for which the property is being taken, the name of the property owner, state the company and the landowner are unable to agree on the damages due, state the company provided the landowner with a copy of the Bill of Rights, and state the company made a bona fide offer, as required. The landowner will receive a copy of the petition and other information filed with the court.

Keep in mind, the filing of the condemnation action does not prevent the landowner from continuing negotiations with the condemnor. At least one landowner’s attorney in Texas has told me negotiations do not get good until the condemnation petition has been filed.

Phase 3: Special Commissioner Appointment, Hearing, and Award

Once the condemnor files the petition, the judge will quickly appoint three local landowners to sit as “special commissioners” to determine adequate compensation. Note that these “special commissioners” are not the same as the County Commissioners who serve in a county. Special commissioners are appointed by the judge to act only in a particular condemnation proceeding.

Both the landowner and the company have the right to strike one of the three local landowners, and if that right to

strike is exercised, the judge will appoint another special commissioner to replace the special commissioner who was stricken. Importantly, these three commissioners have no authority to consider legal issues such as whether condemnation is proper. Instead, they are only authorized to determine the proper monetary compensation owed to the landowner.

The special commissioners will schedule a hearing on the issue of adequate compensation. The hearing will be set at the earliest practical time but will not be sooner than 20 days after the commissioner appointment. The affected landowner will receive notice of the hearing. Hearings are informal with regard to the rules of evidence. The landowner has the right to attend the hearing and has the right to present evidence or call witnesses, if he or she desires to do so. Examples of evidence a landowner may wish to present can include testimony from an appraiser or comparable sales data from the area.

Importantly, the decision of whether to attend a special commissioners' hearing is an important one, both with regard to the landowner's right to make future challenges and with regard to litigation tactics. For example, there is at least a concern that by appearing at a special commissioners' hearing and submitting to the jurisdiction of the special commissioners, a landowner could potentially risk waiving his or her right to challenge the condemnor's right to take.

At the hearing, the special commissioners shall consider evidence of the value of the property being condemned, the monetary damage to the property owner, the benefit to the owner's remaining property, and the use of the property for the purpose of the condemnation.

After the hearing, the special commissioners will issue an award stating the value of adequate compensation to be paid by the condemnor to the landowner for the easement. This compensation award is then filed with the court.

Importantly, once the commissioners have made an award, the condemnor may take possession of the property pending results of further litigation, if the condemnor pays the amount set forth in the special commissioners' award to the landowner, to the court, or posts a bond in that amount to secure the payment of damages. This can be a frustrating situation for the landowner—as this right to possession would allow a pipeline company, for example—to immediately begin construction of the line, even though the case was still pending on appeal and even though the landowner had not yet been able to challenge the pipeline's right to condemn.

Phase 4: Award Filing and Objections Permitted

If either the landowner or company is dissatisfied with the special commissioners' award, an objection may be filed with the court on or before the first Monday following the 20th day after the day the commissioners' determination is filed with the court.

Phase 5: Trial by Judge or Jury and Appeals

If either party objects to the special commissioners' award, the case will proceed to a trial. This is the point in time in which a landowner may challenge issues other than compensation, such as whether the entity is entitled to use eminent domain or whether the land will be taken for a public use. Unlike the special commissioners, the court has the power to consider these issues. Additionally, either the landowner or the condemnor has the right to challenge the amount of the special commissioner's award at this trial.

After the trial occurs and a verdict is entered, either party has the right to appeal the decision, and the case would proceed through the appellate process like any other litigation and could include an appeal to an appellate level court and, potentially, even a petition for review before the Texas Supreme Court.



SELECTING AN ATTORNEY

Landowners facing the threat of eminent domain should strongly consider hiring an attorney to represent their interests. Many times, an easement will last in perpetuity, meaning the terms and compensation agreed to will affect not only the landowner who signs the agreement but also future generations.

Generally, it may be helpful to engage an attorney as soon as possible, rather than waiting until a landowner is preparing for trial. An attorney experienced in negotiating easement agreements can likely help the landowner obtain more favorable terms in an easement because of experience and knowledge. Additionally, there are nuances with regard to the law that lay people may not recognize. For example, an attorney can help analyze the costs and benefits of attending the special commissioners' hearing and help the landowner make the best decision in his or her specific case.

Eminent domain is a specialized area of the law. The procedures and considerations are different than with other civil litigation matters. Because of this, landowners should seek attorneys who have experience representing landowners in eminent domain situations. As with any attorney, landowners should ensure they are able to communicate well with the attorney and ensure they understand the payment structure to which they agree. Some attorneys do this type of work on an hourly basis, while others do a type of modified contingency fee basis, where the attorney gets a certain percentage of any increase in monetary compensation they are able to negotiate for the landowner.



KEY TERMS TO CONSIDER

As previously noted, it is recommended landowners consult an attorney for assistance in negotiating an easement agreement or dealing with a condemnation suit. The following checklists offer some key considerations to keep in mind when negotiating common agreements.

Right of Entry Permit

If a landowner is contacted by a company or entity with eminent domain authority about conducting a survey on the land, the landowner should seek a Right of Entry Permit. These permits set forth the rules and limitations regarding the survey to be conducted. Some of the key terms to consider in drafting a Right of Entry Permit include:

- Requiring a set amount of notice prior to entering the property pursuant to the permit
- Requiring access at a mutually agreeable time for company and landowner
- Limiting the right of entry to only the property to be affected by the project
- Limiting the allowed entry to the purpose of conducting surveys
- Prohibiting cutting, removing, or relocating any fences
- Requiring restoration of land to original condition prior to the survey
- Requiring all equipment and tools to be removed by a certain date
- Requiring the company to promptly repair or remediate any damage caused while on the property
- Providing an indemnification provision in favor of the landowner
- Requiring the landowner be provided all non-privileged information gathered such as surveys, reports, maps, and photographs from the company at no charge
- Setting an expiration date

EASEMENT AGREEMENTS

Whatever the type of project threatening to condemn a landowner's property, there are a number of key considerations to be undertaken related to drafting easement terms. Importantly, the landowner should keep in mind there is much more to consider than just the monetary payment offered. Certainly, the monetary considerations are important, but including terms to protect the quality of the land and the ability of the landowner to use the property are critical, as well. In the words of one Texas eminent domain attorney, "Your grandkids probably aren't going to see the dollars but will be saddled with the terms of the easement."

This list is not exhaustive but seeks to address some of the key terms to consider in negotiating an easement agreement for a pipeline or powerline across a landowner's property.

• **Determine compensation details**

A number of considerations should be kept in mind when working to determine an agreeable compensation amount and structure. If the company does not have eminent domain power, the landowner is in the driver's seat in regard to what he or she believes the property is worth. If the company does have the power to condemn, as discussed in Chapter 8, there are a number of factors involved in calculating what constitutes "adequate compensation" under Texas law. Ensuring proper consideration of concepts like highest and best use and remainder damages can be extremely important.

Generally, payment for pipeline easements will be made either on a per foot, per acre, or per rod (16.5 feet) basis. Landowners may benefit from seeking payment based on the square foot, which takes into account both the length and width of the easement, in terms of compensation. Keep in mind the concept of remainder damages if a pipeline or transmission line company's easement will diminish the value of the remainder of the property owned by the landowner.

Landowners should also consider seeking additional compensation for any temporary work easement sought by the company. For example, if a company seeks a 50-foot pipeline easement but also seeks a 150-foot temporary work easement for four months, the landowner should be paid for the use of his or her additional property during that four-month time period.

Finally, discuss with an accountant how the payment will be described or structured. The payment description as an easement purchase versus a payment combined with remainder damages may have tax consequences. Discussing these issues with a tax attorney or accountant before a final agreement is signed and payment is made is important to minimize potential tax liability.

• **Require a specific, not a blanket, easement**

Easement agreements, historically, were extremely broadly drafted and are sometimes referred to as "blanket easements." For example, an easement might simply provide the company has the right to lay pipelines over and through the landowner's property. This type of blanket easement lacks the specificity desired in a strong easement agreement.

An easement expressly stating details such as the location of the easement, setback distances from structures, and the other terms included in this chapter are much preferred. Landowners should request a survey of the property and an as-built drawing of where the easement will be located as part of the final easement agreement. In considering easement location, be sure to check any restrictive covenants in the deed records that might specify the required location of pipelines or powerlines.

One key difference between a pipeline easement and a powerline easement is the routing process. For pipelines, the company essentially has free reign to select the route it wants to take. For transmission line easements, the routing process is governed by the Public Utility Commission (PUC). A company seeking to build a transmission line must apply for a "Certificate of Convenience and Necessity" with the PUC, explain the need for an additional line and provide several proposed routes for the PUC to consider. All landowners along any proposed route will receive notice from the PUC about the application. Landowners may then elect to participate, if they wish, as either a protestor or an intervener. The PUC may hold a public hearing and will select the specific route the transmission line will be required to follow.



- **Identification of the parties**

Require the condemner to designate a specific contact person, in case issues arise, and to provide written notice to the landowner within a set time period (i.e. 30 days).

- **Exclusivity of easement**

Landowners may want to seek a non-exclusive easement, thereby allowing the landowner to grant additional easements to other parties within the easement area. For example, if another pipeline company wants to place a line through the property, the landowner may want the right to have the second line placed within the same easement designated to the first company, rather than having two separate easements across the property.

- **Limit the easement agreement to a single line**

Many proposed easement agreements seek to allow the company to “lay lines” or “construct pipelines” across the property. Limit the easement agreement to allow only one pipeline or one powerline to be permitted under this agreement. This term allows a landowner to retain the right to negotiate and receive additional payments for any additional lines the company may seek to add on the property rather than receiving a one-time easement that could allow additional lines in the future.

- **Limit the types of products running through the line**

In addition to restricting the easement to a single line, seek to limit the line to carrying a single product. For example, a landowner might grant the right to lay a natural gas pipeline, but if the company later wants to flow carbon dioxide through the line, a second easement would be necessary. At minimum, a landowner should know what products are running through the line.

Issues related to the type of products are not just theoretical. Recently, the meaning of the term “oil and gas” in a pipeline easement was the subject of a case before the Fourteenth Court of Appeals in Houston. In that case, a 1919 pipeline agreement allowed a company to transport “oil and gas.” When the company began transporting diesel through the pipeline, the landowners filed a lawsuit nearly a century later claiming the company was exceeding the scope of the easement agreement. The Court of Appeals relied upon various treatises and definitions from the time when the easement was signed in ruling that “oil and gas” included both refined and natural states.

- **Determine the permissible pipeline diameter and pressure**

Generally, a landowner wants a smaller, lower-pressure line, and a company wants the right to place the largest, highest-pressure line it may ever need. During negotiations, seek an agreement stating the line will not exceed a certain diameter and specific pressure to help alleviate safety concerns.

• Determine the width of the easement

Widths are often described in two measurements—a temporary construction easement (generally 50 feet or wider) and a permanent pipeline easement (typically ranging from 20 to 50 feet). Limit both of these measurements to the narrowest width possible to control the amount of land used or damaged by the easement. Also, determine a date by which the temporary pipeline easement will terminate and provide for damages, if the company extends this deadline.

Disputes over the permissible width of an easement frequently arise where an easement agreement is silent on this issue. Currently pending before the Texas Supreme Court is a case addressing this very issue. A 1949 easement allowed a company to construct, service, and maintain an electric transmission line on the property. The line was built in 1949, and the company historically used and maintained a 30-foot easement. In 2014, the company argued that it had the right to use a much wider easement—100 feet—based on the initial easement agreement. The Texarkana Court of Appeals held that based on the specific language in the easement agreement, the width was limited to the historic use, because once the company selected its location, “its rights then become fixed and certain.” The Texas Supreme Court has accepted the petition for review in this case in 2019 and a decision will likely occur in 2020.

• Require a specific pipeline depth

In the past, many easements stated the pipeline would be “plow depth.” Avoid this type of nonspecific, subjective term. Easements usually stipulate the line will be buried 36 inches below the ground, the depth requirement of Texas law. If a pipeline is buried at 36 inches, erosion will eventually make the line too shallow to comply with state law. In light of this, have the line buried to at least 48 inches deep or stipulate for the company to maintain the 36-inch depth.

• Specify the type and size of transmission line

Spell out details, including the type and size of poles, foundations, concrete pads, footings, and guide wires.

• Specify what surface facilities, if any, are permitted

Even underground pipelines require some surface facilities such as cleaning stations, compressor units, and pump stations at points along the line. Transmission lines will likely require electric transmission towers and lines, substations, and other structures. Require a pipeline company or transmission line company to either waive all surface facilities on the property or specify exactly how many surface facilities will be allowed, their size, type, and location. If surface facilities will be placed on the property, negotiate additional compensation.

• Reserve landowner surface use

Retain the right to use as much of the easement area, as necessary. For example, once an underground pipeline is in place, the landowner may want to graze cows on the property, including the surface above the pipeline. Similar consideration applies to the landowner’s ability to place roadways, ponds or tanks, and water lines across the easement.

• Provide property access for the landowner

It is not uncommon to install a pipeline beneath an entry road or driveway to the landowner’s property. State in the agreement the company will provide access to the landowner’s property during the pipeline installation, as well as after the construction is completed.

• Limit company access to the easement

Although a company has the right to enter the easement, a landowner can limit the company’s access to the easement in a number of ways:

- Require notice be given before entry
- Set certain times or days when entry is not permitted
- Determine where company employees may enter and exit the property
- Designate what roads may be used while on the property
- Prohibit any undesirable activities on the easement or on any of the landowner’s property by the company or any of its employees, agents, or contractors without landowner permission, such as fishing, hunting, smoking, or other fire hazardous activities, for example.



- **Require the use of the double ditch method**

The double ditch method requires the company to dig the pipeline trench so the topsoil remains separate from the subsurface soil and is placed back on top of the subsoil when the construction is completed and the line is buried.

- **Include the right to approve schedule and damages for construction, maintenance, repair, replacement, and removal**

Require the company to be responsible for damages caused not only during construction but also during future maintenance, repair, and replacement activities. Also, include any limitations or notice requirements desired for the company's maintenance schedule. For example, a farmer growing crops near the pipeline may want written notice before any pesticide or herbicide is sprayed on the easement area. Another common example is a landowner who leases hunting rights may want to ensure routine maintenance, such as mowing, is not scheduled during deer season or that the landowner is compensated for any hunting income lost.

- **Set specific restoration standards**

To ensure the easement area is properly restored, state the company's responsibilities regarding repairs. How will the disturbed area over the pipeline or around the transmission line be treated after the line has been installed? Will the operator remedy any changes to the slope of the land or replace the topsoil? Will the reseeding be done with native grass or is a special type of seed required? Address these issues in detail. Consider setting a measurable standard to ensure repairs are adequate, or appoint a neutral third party to inspect the land after the damages have been repaired to determine if the repairs are sufficient.

- **Request payment for damages**

Because these easements generally last a long time, request an up-front payment for damages, or require the company to post a bond so money is available for future damages. This provides some protection to the landowner in the event the company disappears before making damage repairs. Additionally, require repairs to the surface of the easement be done when the construction is completed, as well as when the easement terminates.

- **Specify fencing and gate requirements**

Require the pipeline or transmission line company to fence the easement area according to specifications, such as the type of fence to be built, the width and details of gates to be placed, the number and type of H-braces to be installed, and the tinsel strength of the wire. The landowner may also want to specify a specific contractor who will do any fence-building work.

- **Include repairs or improvements to existing roadways**

Constructing a pipeline or transmission line requires significant equipment and vehicle traffic. If the company will use any roads owned by the landowner or will construct roads across the landowner's property, seek compensation, and require the company to restore or improve the roads when the construction is finished.

- **Define when the easement will terminate**

From a landowner's perspective, this is perhaps one of the most important provisions of an easement agreement. There are several circumstances under which an easement might terminate under Texas law, but abandonment is the most common concern for a landowner with pipeline easements. Under Texas law, an easement is considered abandoned if there is non-use by the company (an objective test) and if the company indicates an intent not to use the line in the future (a subjective test). Under this rule, it is difficult for a landowner to prove the subjective test in order to have the easement terminated due to abandonment. Instead of relying on the general rule, set a specific, objective standard for when the easement will end. This could be a specific time in the future (for example, the easement will last for 10 years) or may be a statement if the pipeline company does not flow product through the line for a certain period (for example, one year), it is considered abandoned, and the easement terminates. Whatever the standard, including it in the agreement prevents easements from lasting into eternity. Further, require the company provide a release of the easement, so it can be recorded in the public record when the easement ends.

- **State the requirements for removing facilities**

Require the company to remove all lines and structures after termination of the easement or forfeit them to the landowner. Also, state any damages caused by this removal will be the responsibility of the company.



- **Determine remedies for violating the easement agreement**

If a company violates the easement agreement, the landowner can file a lawsuit to terminate the agreement, but the court will require the violation is "material" before granting termination of the agreement. Whether or not a violation is material is determined on a case-by-case basis on the specific facts at issue. This causes two potential problems: (1) the landowner must go to court, which is expensive and time-consuming, and (2) the violation must be material for termination to be permitted.

To avoid these issues, consider two options: First, the landowner may be able to define what violations are deemed material and state that in the agreement. For example, the agreement could provide, "Employees shall be permitted on the easement only, and if they leave the easement and enter the landowner's property, this shall constitute a material breach." This material breach would likely permit the landowner to terminate the agreement without court action.



Second, require conditions in the agreement by stating, “or the agreement shall terminate without further action by the landowner.” For example, the agreement could say, “Employees shall be permitted on the easement only. If they leave the easement and enter the landowner’s property, this shall constitute trespass, and the agreement shall terminate.” Under either of these scenarios, the landowner knows precisely when he or she may terminate the agreement, rather than having to wait for a judicial determination of “material” breach.

- **Include liability and indemnification provisions**

Incorporate liability and indemnification responsibility in the easement agreement. Provide the landowner is not liable for any acts, omissions, or damages caused by the company, its agents, contractors, or employees. Further, stipulate if any claim is made against the landowner by any party related to the pipeline, transmission line, other surface facilities, any of the company’s activities, or any environmental laws, the company will hold the landowner harmless, including the payment of any judgments against the landowner and providing a defense to the landowner without charge.

- **List the landowner as “additional insured” on the company insurance policy**

Require the company carry liability insurance and provide a copy of the policy to the landowner. Also, request the company list the landowner as an “additional insured” on its insurance policy. This is not usually a major cost to the company, and it may allow the landowner the protections of the company’s insurance policy, if he or she is sued based on something related to the pipeline.

- **Delete warranty of title**

Frequently, easement agreements require the landowner to warrant title (the landowner promises there are no other unknown owners or encumbrances on the property). Because the company is in a better position to conduct a title search and make sure they are negotiating with all the right parties, the landowner should not take the risk of warranting title. If the company goes through the condemnation process, Texas law does not allow it to obtain a warranty of title, so there should be no reason to require this term in a negotiated agreement.

- **Limit the terms of transferability**

Specify whether the company can assign its rights under the agreement to a third party. Request no assignment be made without prior written consent of the landowner, state any assignee will be held to the terms of the original agreement between the landowner and the company, and state the company will remain liable in the event of a breach of the agreement by the assignee. At a minimum, require notification before an assignment occurs.

- **Request a most-favored-nations clause**

Although companies dislike these requests and are unlikely to agree to this term, ask for a most-favored-nations clause. This provides if any other landowner in the area negotiates a more favorable deal within a certain timeframe, the landowner is given the benefit of the more favorable deal.

- **Seek payment for negotiation costs**

Because the landowner may incur significant costs during the negotiation process, including appraiser costs, fees for forestry or agricultural experts, surveyor expenses, and attorney's fees, require the company to pay all or a portion of these costs.

- **Use a choice-of-law provision**

A choice-of-law provision allows the parties to determine which state's law will govern the agreement in the event of a dispute. For example, a pipeline company headquartered in another state may try to require the laws in its home state apply to any dispute involving the easement agreement. Generally, courts enforce these clauses, as long as they are not against public policy and are reasonably related to the contract. Because many laws vary by state and a choice-of-law provision could significantly impact rights under the agreement, consult with an attorney to determine which options are the most advantageous to the landowner.

- **Include a venue and forum clause**

A venue and forum clause provides a dispute over the agreement will be heard in a particular location or court. Include a requirement stating any lawsuit will be filed in the county where the land is located or where the landowner lives. This can significantly lower litigation and travel costs and ensures if a jury trial occurs, the jury will be made up of local citizens.

- **Understand dispute resolution clauses**

These types of clauses limit the time and expense of a court action in the event of a dispute. There are two primary types of dispute resolution: arbitration and mediation. In arbitration, a third-party arbitrator (usually an attorney) hears evidence and delivers a decision. If the arbitration is "binding," this judgment is final, absent evidence of fraud by the arbitrator. Mediation involves a neutral third party who works with the landowner and the company to reach a mutually-acceptable resolution. If both parties refuse to agree to settle, the case goes to court. Understanding the difference between these options is important. Consult with an attorney to determine which option is best. A dispute resolution clause should identify how the arbitrator or mediator is selected.

- **Include an attorney fee provision**

Generally, each side to litigation pays for his or her own attorney, regardless of the outcome of the dispute. One way to change that general rule is by contract. Provide that in the event of a dispute regarding the easement, the prevailing party may recover his or her reasonable attorney's fees and costs from the other party.

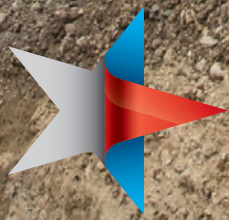


ADDITIONAL RESOURCES

There are a number of additional resources available for Texas landowners seeking more information on the topic of eminent domain.

- <https://texasfarmbureau.org/eminentdomain>
- [Attorney General of the State of Texas, Texas Landowner Bill of Rights](#)
- [Texas A&M University School of Law, A Survey of Eminent Domain Law in Texas and the Nation](#)
- [Ag Law in the Field Podcast Episode #52–Zach Brady \(Eminent Domain FAQs\)](#)
- [Ag Law in the Field Podcast Episode #18–Luke Ellis \(Eminent Domain in Texas\)](#)
- [U.S. Constitution, amend. V](#)
- [Texas Constitution, Article I, Section XVII](#)
- [Texas Government Code § 2206](#)
- [Texas Property Code § 21](#)

NOTES



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For more eminent domain information and resources, visit texasfarmbureau.org/eminentdomain