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# **TSCRA Hears Update On Eminent Domain Bills; Action Is Needed**

**By Colleen Schreiber**

SAN ANTONIO — According to the U.S. Census Bureau, between 2000 and 2010, more people moved to Texas than the populations of Montana, Wyoming, both Dakotas, Vermont, and Alaska combined. The same thing is predicted from 2010 to 2020.

Of the 15 fastest-growing cities in the U.S., eight are located in Texas. Additionally, Hays County, just south of Austin, is the fastest-growing county in the U.S. on a percentage basis, and Williamson County, just north of Austin's Travis County, is the third fastest-growing county in the entire U.S.

Though these statistics are frequently bandied about, many in the rural areas of the state may have a tendency to think "That doesn't impact me." They should perhaps reconsider, because with all this growth comes the need for infrastructure, such as roads and high-voltage powerlines. In Texas, though, that's not all. Now there is the possibility of high-speed rail, and a plethora of new pipelines. So why is this important to rural communities? Two words: eminent domain.

For the last year and a half, the Texas and Southwestern Cattle Raisers Association and a coalition of other landowner organizations including the Texas Wildlife Association and Texas Farm Bureau, have worked to put together legislative language designed to create a more level playing field for landowners whose property is being condemned, while still allowing for the necessary infrastructure in the state to continue.

Efforts in the Texas legislature are being headed by TSCRA's government public affairs team in the Austin office with assistance from a team of attorneys including Jim Bradbury, Zach Brady and Luke Ellis.

An update on these eminent domain activities was front and center during the recent TSCRA annual convention here. Already multiple eminent domain reform bills have been taken up in several legislative committees, and TSCRA members were encouraged to get involved, to let their voices be heard.

Luke Ellis, a statewide practitioner of eminent domain, told listeners that he currently has clients stretching from the Red River to the Rio Grande, now that a border wall is a possibility.

"Those who say, 'Well, I don't live in a city, so all this growth doesn't impact me' — that line of thinking doesn't hold water," Ellis told listeners.

“None of us like eminent domain, and we wish it would go away,” added Jim Bradbury. “That’s not going to happen. But there are things we can do, and at the top of the list is to understand the issue.”

These two attorneys, along with attorney Tiffany Lashmet, the agricultural law specialist for Texas A&M AgriLife Extension Service who authors the award-winning Texas Agriculture Law Blog, offered the basics and more during two eminent domain sessions at the convention.

Bradbury started with an overview of what’s in the state legislation now working its way through the appropriate channels in both the House and the Senate. The formation of the legislation began with a landowner survey sent to members of TSCRA, TWA and TFB. That data was collected and analyzed.

The organizations primarily were interested in learning from members their personal experiences and problems they’ve had with eminent domain so the legislation could be “fine-tuned” in a way that would be meaningful and helpful to landowners.

“We understand that eminent domain is an important part of our state economy,” said Bradbury, “but how it works is out of balance. So we devised a legislative package that was a function of the problems that you all identified to us that need to be solved.”

One piece of the package, a “favorite” of Bradbury’s, is the minimum lease terms. Instead of allowing condemnors to get away with “back porch deals”, this piece of the bill would require any entity presenting an easement to a landowner to have minimum terms, “protected” terms.

“Right now there is no such requirement,” said Bradbury.

Some of these “protected” terms would include such things as access.

“How are the easement employees going to come onto your property? Right now that’s open season. Unless you specify, they can come on almost anywhere on the property to get to their easement.”

Other minimum lease terms would include specifications on maintenance of the easement, and in the case of a pipeline, the number of lines in the easement.

“Some of you who are dealing with old easements are experiencing this problem, as these old easements use the plural. They put one in the ground and then they come back maybe 10, 20 or 30 years later and say they’re going to put another line in and they don’t have to pay you because it said ‘pipelines’ instead of ‘pipeline’.”

The bill would also require that condemnors specify how big the pipeline is to be and the product to be carried. The same kinds of principles would apply to electric transmission lines.

Still more specifications would be required with respect to gates, and more on surface use, particularly restoration stipulations for the surface once the project is complete.

Another piece of the legislation, Bradbury said, is meant to stop the “games played.” For example, the company seeking the easement is obligated to bring an appraisal to the landowner when they make their last offer.

“Oftentimes what happens is if the landowner takes them to commissioner’s court, they show up with an entirely new set of numbers and call it the supplement,” Bradbury told listeners. “This piece of the legislation deals with the timing of the appraisal and requires that the landowner be given a fair amount of time to review the appraisal.”

Still another piece of the legislation includes the ability to utilize sales information from transactions where the entity has no power of eminent domain.

“If an entity does not have the power of eminent domain, you know the price they will pay is much higher than if they have the power of eminent domain,” said Bradbury. “The sales from those who don’t use eminent domain are out there, but right now the law prevents a landowner from bringing those true arm’s-length sales into the commissioners’ hearing. This would fix that.”

Also within the proposed legislation is a piece dealing with attorney fees. Specifically, in the event that a landowner goes to a commissioners’ hearing or to court and ultimately recovers 20 percent more than the last offer made by the condemnor, the landowner is entitled to get attorney fees back, paid for by the condemnor.

It is not really a surprise that this piece of the pending legislation has drawn the greatest ire from the opposition.

“This is very, very important, because the landowner ought not to have his property taken and lose attorney fees as well.”

Another critically important piece requires that a company that exercises eminent domain and intends to appeal an award put down a bond in the amount of the award issued.

The proposed legislation also has language that addresses possession and use agreements commonly used by the Texas Department of Transportation and other government entities. It’s essentially a contract that the condemnor gets the landowner to agree to which allows them to come onto the property in advance of the commissioners’ hearing. They then take the position that they’re immune as a sovereign and therefore don’t have to honor the terms of the agreement.

“If a landowner is condemned, the appraiser should make an allocation on the date of the taking so that the landowner does not have to pay taxes on that portion of the property that is taken.”

Finally, there is language that talks about royalties.

“We have no hope of making royalties mandatory,” Bradbury told listeners, “but we wanted to include language calling for a voluntary right so that it is at least in the legislative

conversation. We think it is a fair discussion; it's something that will take some time, but we want to get the conversation started."

Ranchers Leslie Kinsel and Gerald Nobles described how their families have been impacted by eminent domain.

Kinsel ranches with her husband, Dan, and his family in South Texas. In the heart of the Eagle Ford oil and gas development, near Cotulla, Kinsel Cattle Company has been in the hotbed of eminent domain issues for many years. Thus far, they've had land condemned on two different occasions, one for a major pipeline and the second, which is still being litigated, for a transmission line.

"I've learned much," Kinsel told fellow landowners. "I've learned that one of the strengths is having a good cow trader on your team. I have that in my husband."

She also noted that while she is an attorney, she does not practice law, and an eminent domain case is something she would never take on for the family.

"As a lawyer, I'm telling you, get a good lawyer. It is so important; there are so many intricacies in the battle, and it is important to have qualified advice."

She encouraged landowners to know their rights and know what options are available.

"Don't let someone intimidate you into that back-porch deal," said Kinsel.

In both condemnation cases the Kinsels went to commissioners' court.

In one of the cases the special commissioners awarded the Kinsels three times the final offer made by the condemnor. The pipeline company came to court fully prepared to file an appeal. The Kinsels, however, after more discussions with the pipeline company, made the decision to settle the matter for two times the final offer.

In the other case the special commissioners said the Kinsels were entitled to seven times the final offer. This is the one that is still on appeal.

Though the cases have already cost the family "quite a bit" in attorney fees, Kinsel says they fight on because it's not so much about the here and now but rather past generations and the generations yet to come.

A long-time Permian Basin resident, Gerald Nobles moved home to the family ranch at 24. While running the family ranch he had to deal with the Texas Department of Transportation and two municipal water lines to bring water to Midland. At a young age he also learned the challenges of dealing with pipeline companies.

“The young land men want to get the deal done, and they will tell you what you want to hear,” said Nobles. “What ends up is in reality probably not very close to what you agreed upon. The older ones with more experience, if they smell a rookie, they’ll go for the throat.”

He told listeners that the omission or addition of a few words in a contract can change things dramatically.

“It may not affect you, but it could affect the generations following you.”

Nobles encouraged fellow landowners to weigh the importance of the payout versus how a settlement would impact the long-term value of the property.

“You’re not only protecting yourself, but those who follow you,” he reiterated. “I can’t stress that enough.”

Kinsel agreed, but warned that when a landowner stands his ground, he also gives up some protections.

“If you agree to work with them, they’ll give you a better agreement. If you take them to court, then they throw out that so-called better deal and you get the ugly agreement. That’s why it matters so much what we’re doing at the legislature.”

After dealing with all these easements for all these years, Nobles made the decision to sell the family land. It was already an incredibly emotional decision, but after hiring a realtor he learned that the city re-zoned the property for housing and retail. That was initially a good thing in that it mean a lot more money, but that kind of buyer had to be found. Such a buyer was found but then they couldn’t proceed with the sale because the City of Midland had decided to put in a spaceport. Nobles’ property was in the runway of the spaceport.

“They condemned my property to agriculture use, so now the value had gone from housing to retail back to ag, and there were no buyers,” said Nobles.

The city wouldn’t buy him out, so he began looking for an attorney to take his case. He had to go outside of Midland to find an attorney willing to pursue a takings case against the City of Midland. Before he proceeded, however, the attorney offered some cautionary advice. He explained that it would be a drawn-out process and that it would not be cheap.

“I was told the attorney fees alone could be half a million, and he said that I’d be made out to be a greedy rancher and a villain among the people I grew up with,” said Nobles. “That was not a good day.”

In the end Nobles was able to get the city to re-zone the property to industrial use. A buyer was secured and the property sold. He did a 1031 exchange, and after four generations of the family making a living in the Permian Basin, he made another extremely difficult decision to buy in McCulloch County.

“It was so painful ... and I left there bitter. I hope that by passing a bill like this no others will have to endure something like this,” said Nobles.

Kinsel added that at the end of the day in these kinds of transactions, the landowner is not a willing seller, nor is the landowner ever made whole.

“Our land is being taken from us, and no matter what we might get in the way of reimbursement, we are not made whole by any measure.”

During the more in-depth workshop session, Lashmet and Ellis described some of the basics of eminent domain as it stands today. As for who is eligible to condemn land, Lashmet told listeners that in Texas alone, more than 5000 entities have been given the power of eminent domain. Those entities include, for example, TxDOT, counties and cities as well as utilities, drainage districts, and municipal utility districts.

Common carrier pipelines also have the right of eminent domain. Lashmet explained that a common carrier is essentially a pipeline for hire.

“Because they have opened the pipeline up for hire, that is considered a public use, a public benefit, so we call them a common carrier and they have the right of eminent domain.”

Prior to the last legislative session, to qualify as a common carrier pipeline and have the right of eminent domain, the only requirement was that the pipeline had to check a box on a Railroad Commission form. The Railroad Commission did not investigate or ask questions of the pipeline company. Now the pipeline company has to not only check the box but provide some evidence that they are indeed a common carrier, though as evidenced by a recent Texas Supreme Court ruling, the required evidence is minimal at best.

Lashmet stressed that the first question to ask when someone shows up on the doorstep to talk about an easement is whether or not they have the power of eminent domain. The next step is to do the necessary checking to find out if they truly do. Landowners may challenge this in court.

“Your negotiating power changes based on whether or not the entity has the power of eminent domain,” she stressed.

Ellis explained some of the technicalities of eminent domain. First, he pointed out that in Texas, condemnation is governed by Chapter 21 of the Property Code. He broke the basic procedures of eminent domain into three categories — the offer phase, the administrative phase, and the litigation phase.

In the offer phase the condemnor sends a letter making an initial offer for what they’re willing to pay for the easement. The condemnor is required to give the landowner 30 days to consider that initial offer.

They may or may not provide an appraisal. An appraisal is only required when the final offer is made.

With the final offer, landowners must be given 14 days to review the offer. Once the initial and final offers have been made, only then may the condemnor file a lawsuit. That moves things into the administrative phase.

That lawsuit, Ellis said, is almost always going to be filed in state court in the county where the condemnation takes place. If there is not a state court, then it goes to the district court.

He pointed, however, to a rather new phenomenon whereby some pipeline companies who go to the RRC and go through the T4 permitting process (common carrier process) have opted to go to the Federal Energy Regulatory Commission. In this situation the case is litigated in federal court.

Once the lawsuit is filed, the only responsibility of the judge is to appoint the three special commissioners. To qualify to serve as a special commissioner, an individual must be 18 years of age and own property within the county where the condemnation takes place. The commissioners are paid hourly fees for their time and service by the condemnor.

Ellis also pointed out that up until 2011 the judge appointed these three commissioners and neither party had a say in the matter. In 2011 SB 18 changed the process so that both parties may strike one commissioner within a reasonable period of time if they find them to be objectionable for any reason.

Both parties have the right to call witnesses; the condemnor goes first. After a period of deliberation, the commissioners issue an award.

Either party may appeal the award. The window for filing an appeal is that it must be done by the first Monday 20 days after the special commissioners' award is rendered. One other stipulation is that if the condemnor chooses to appeal the award, the condemnor must first deposit the amount of the commissioners' award or a bond securing payment of that amount into the court's registry.

The day the money is deposited into the court's registry, Ellis said, is important for two reasons. First, it establishes the date of value in the case.

“That’s important, because if we litigate the case for months or years, that’s the date by which the appraisers have to go back and value the taking — the day the deposit occurred,” he explained.

The second reason the deposit is important is because that’s the day in the case that the entity taking property gains the legal right to possess that portion of the property.

In the trial phase of a condemnation case, there is typically testimony from the appraisers, sometimes land planners and the landowner, but Ellis said the appraisers are typically the “stars” of the trial.

It was pointed out that in Texas, landowners are constitutionally entitled to recover money not just for the actual land taken but also for the reduction in the value to the remaining land. However, Ellis also acknowledged that valuing property is “hugely subjective.”

“A lot of appraisers don’t understand that concept or they are more on the conservative side and just don’t think that some of the easements reduce the overall value of the land,” he added.

Lashmet offered a few other key points. For one, if someone is going to use eminent domain to take property, they cannot use a confidentiality clause in that agreement.

“Talk to your neighbors,” Lashmet encouraged. “Find out what they’ve been offered.”

She also reiterated that landowners need to know their rights.

“Never sign the first agreement they hand you, and don’t just get stuck on that dollar figure.”

Additionally, she said, never sign a blanket easement.

“If you have easements on your property done in the 1930s, 40s or 50s, you know what a blanket easement is; it’s going to say something like ‘X Company has an easement across your land.’ That’s a disaster, because it answers no questions — how wide is the easement, how many pipelines can they put in, how deep can they be, what kind of product can they run?

“You want a descriptive easement.”

Get everything in writing, she advised, echoing the need to get an experienced eminent domain attorney involved early in the process.

Another tip is to set a termination standard. The general rule in Texas is that an easement continues until it is abandoned.

“The problem is, abandoned doesn’t mean what you think it means,” Lashmet told listeners. “The owner of the easement not only has to not use it, but show an intent never to use it again.”

The problem, she added, is that the condemnor will never say that in the agreement.

“The way to remedy it is by setting a specific objective standard of when it’s going to end. In the case of a pipeline, say something like ‘the easement will end when X Company fails to move oil or gas through the line for X amount of time.’ The reason I say ‘move product through the line’ instead of saying ‘use’ the pipeline is because they could come out with their mowing crew and say, ‘Well, we’re using that easement’ even when they haven’t moved product through the line in years.”

If it’s an oil or gas pipeline, the Railroad Commission keeps records on product being transported through pipelines and the landowner can access that information through them.



Ellis summed up what other panelists implied.

“The system has been rigged against the landowners. Right now it’s very difficult for the property owner to be made whole.”

Bradbury added that the opposition is highly motivated, and he encouraged landowners again to get involved. The text for SB 740 and the companion bill, HB 2684, may be found on the Texas legislature online website. TSCRA’s website is another source where landowners may access the latest information on eminent domain.

“For years and years and years we in the cattle industry have talked about eminent domain,” said Bradbury. “Now is the time. Call your neighbors and your friends and get them involved.”