

EMINENT DOMAIN

How do project developers and landowners reach common ground when the dreaded term “eminent domain” is raised as an issue?

Opponents of energy projects incorrectly and unfairly like to label eminent domain a “seizure” or a “land grab,” but that is far from the truth. The use of eminent domain condemnation actions, always with just compensation to the landowner, is a rare last resort. We go to court only if all attempts to obtain easements for right-of-way are unsuccessful and mutually beneficial agreements with landowners cannot be reached.

Understanding the process can, hopefully, help all parties reach reasoned solutions, avoid acrimony and impasse, and avoid the use of eminent domain.

WHAT EXACTLY IS EMINENT DOMAIN?

From a purely legalistic view, the term eminent domain refers to the power of a state, municipality, a private person or a corporation authorized to exercise functions of public character to purchase private property or certain property rights by the payment of just compensation to the owner of the property. A variety of property rights are subject to eminent domain actions, including air, water and land rights.

The government, or other authority, obtains property rights through condemnation proceedings, in which the landowner has the right of due process. However, eminent domain does not authorize the seizure of someone’s property without compensation – in fact, it requires that just compensation be paid to the landowner for his or

her property. And, in some cases, private property owners can actually receive more for their property than it may be worth.¹

In landowner and other interactions, Kinder Morgan and its businesses are committed to doing business the right way, every day. We strive to be a responsible corporate citizen that safely operates assets that benefit our customers and our neighbors, in full compliance with rules and regulations. Our Code of Business Conduct and Ethics outlines that commitment and we expect our employees and contractors to uphold these standards every day.

http://www.kindermorgan.com/content/docs/KM_CODE_OF_BUSINESS_CONDUCT_AND_ETHICS.pdf

HISTORICAL CONTEXT

Eminent domain is based on historical precedent and legal case law. In some of its earliest uses, and even to the present day, eminent domain has been used by the government to acquire needed private property for public use, notably for such things as transportation, infrastructure and water supply projects, national parks, construction of public buildings and national defense, to name a few. The simple fact is that our key public infrastructure – such as highways, rail lines and airports – are vital to our modern mobility. But, at the same time, they cannot be constructed without using some private lands. Eminent domain, therefore, is necessary to ensure that no single landowner can block infrastructure of benefit to the public at-large.



The power of eminent domain was established to authorize the government or condemning authority to conduct a compulsory sale of property for the common welfare, such as health or safety. Just

¹ Garnett, The Neglected Political Economy of Eminent Domain, U. of Notre Dame Law School, accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875412.

compensation is required to ease the financial burden on the landowner. Further, eminent domain helps ensure that a project that benefits the public as a whole cannot be blocked by one recalcitrant.

Without eminent domain, we might not be enjoying public parks, forests, lakes or rivers, or have had the opportunity to construct state and national buildings and monuments. Our communications infrastructure was built using eminent domain; without it we could not talk to distant relatives and friends. Similarly, without eminent domain for energy infrastructure only those communities that happened to be near energy sources would benefit from fuel and power.



A key part of the Bill of Rights, the Fifth Amendment to the U.S. Constitution, establishes the requirement that privately held land cannot be taken without just compensation. That ground-breaking protection was a reaction to the absolute power of overseas 18th century monarchs to seize private property without compensation or consent.

America was founded on the firm bedrock of private property rights, and the principle of eminent domain is intended to strike an appropriate balance between the public interest commonly held and the protection of those private property rights.

The relevant language of the Fifth Amendment states: “. . . nor shall private property be taken for public use, without just compensation.” The power of eminent domain is an outgrowth of that Fifth Amendment requirement. And just as the Fifth Amendment limits the federal government’s power in taking property, the Fourteenth Amendment makes the federal guarantee of just compensation binding on state and local governments as well.

In one of the earliest cases involving eminent domain, the U.S. Supreme Court in 1876 reviewed and upheld federal eminent domain power in a landowner case challenging the government’s authority to “condemn” land (i.e., require sale at fair market value) for use as a custom’s house and post office.

Later, in another case, the nation’s highest court again acknowledged the existence of condemnation authority involving the Gettysburg Electric Railroad Company when the government needed land owned by the railroad to preserve portions of the Gettysburg Battlefield site. In its opinion, the Supreme Court held that the federal government had the power to condemn property “whenever. . . necessary or appropriate. . . in the execution of any of the powers granted to it by the constitution.” *United States v. Gettysburg Electric Ry.*, 160 U.S. 668, 679 (1896).

In the 1930s, eminent domain was used by the federal government to acquire land for the Mammoth Cave, Shenandoah and Great Smoky Mountains national parks, and later for military bases and naval stations during World War II. Also, it was used after the Sept. 11, 2001, terrorist attacks to obtain space for federal agencies whose offices were demolished when terrorists flew airliners into the World Trade Towers. Land has also been acquired along the United States-Mexico border to improve inspection and enforcement and provide additional border facilities for use by U.S. government agencies.

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Eminent domain for interstate natural gas pipelines dates back to the Natural Gas Act of 1938 (NGA). Section 7 of the NGA authorizes the Federal Energy Regulatory Commission to issue “certificates of public convenience and necessity” for an interstate natural gas pipeline project. Once issued, that certificate provides the project developer with the right to use eminent domain along the pipeline route.

There is no federal eminent domain for intrastate natural gas pipelines or common carrier liquids pipelines. Instead, those are governed by state eminent domain law, which varies across the country.

CURRENT CONTROVERSY

In 2005, the U.S. Supreme Court upheld a city’s right to take property (with compensation, of course) as part of an economic redevelopment plan.² The *Kelo* case has become a rallying cry in certain libertarian circles, and an issue in the 2016 Republican presidential primaries, but the facts of the case clearly distinguish it from cases involving pipelines and other common carriers.

The petitioner in the *Kelo* case sought to constrain the use of eminent domain because their property was to be transferred to an entity called the New London Development Corporation – a private party, albeit one created by the state of Connecticut.

The petitioner advanced the argument that only government action resulting in a use by the general public should qualify for eminent domain, not building for economic redevelopment. The high court, however, chose to rely on long-standing precedent in deferring “to the city’s findings that the area required economic development and upheld the exercise of the city’s police power.”³

² *Kelo v. City of New London*, 125 S. Ct. 2655 (2005)

³ *Id.*, at 683

At the same time, the Supreme Court made clear that states could limit eminent domain via the legislature. In essence, the court said to the states that this decision was a matter of policy and that in addressing this policy question, legislatures should consider their constituents' outrage as part of the democratic process. Such consideration is not within the purview of the courts.⁴

It is instructive to note that in the 10 years after *Kelo*, 45 states have considered or enacted legislation to limit the use of eminent domain. One limitation often proposed is to limit transfers in commercial projects to private parties that are common carriers – such as pipelines.

KINDER MORGAN'S APPROACH: OBTAINING A PIPELINE RIGHT-OF-WAY EASEMENT

In pipeline project development, Kinder Morgan works with landowners along the proposed route to secure rights-of-way for pipeline infrastructure to be constructed on a voluntary basis. As part of the right-of-way acquisition process, Kinder Morgan Land/Right-of-Way personnel contact and meet with all landowners affected by a project to discuss the civil, cultural, environmental and geological surveys, the proposed routing of pipeline facilities, any landowner-concerns and considerations, and the rights necessary to construct, maintain and operate a proposed pipeline.



Agents will discuss a number of issues, including such things as permanent and temporary easements, road access, right-of-way agreements, compensation and damage payments. Kinder Morgan then will work with landowners regarding the rights required to support the project. When an agreement is reached on a voluntary

⁴ Id.

basis, right-of-way agents provide compensation to the affected landowners for the rights granted.

To determine the fair market value of the needed right-of-way for pipeline facilities, Kinder Morgan relies on a variety of sources, including appraisals, to provide information about the current value of the permanent and temporary easements that may be needed. Kinder Morgan will review market data to confirm that the value being offered for the right-of-way is consistent with current usage, factoring in sales of comparable properties, including:

- location of the property in question;
- its size in relation to other area properties;
- any unique current uses or property attributes (i.e., farming/agricultural use, trees, part of an orchard, etc.);
- existing and area zoning; and,
- other pertinent real estate and commercial market factors.

In some situations, land and property studies and/or appraisals must be commissioned and used as an aid in determining fair market value and, hopefully, reaching the point of mutually agreeable, just compensation for the easement. All offers are then based on the market data.

PIPELINES AND PROPERTY VALUES

In 2015, to better understand property valuations in various portions of New England, Kinder Morgan/Tennessee Gas Pipeline commissioned LPC Commercial Services of Boston to research the issues. Its conclusions were contained in a November 2015 report, “A Study of Natural Gas Pipelines and Residential Property Values.”⁵

The report covered some 1,000 transactions in a 35-year period. The purpose of the study was to research and analyze actual market transactions to evaluate the effects of natural gas transmission

⁵ http://www.kindermorgan.com/content/docs/NED_ResearchReport_11-12-15.pdf

pipelines on residential property values, notably in New Hampshire. The report also examined the impact of pipelines on land use patterns, sales activity and real estate tax revenue.

Among the study's conclusions:

- The data conclusively indicates that, while proximity to a pipeline might be viewed negatively by some, over the last 35 years there has always been a sufficient number of buyers willing to acquire properties located near pipelines, that these properties sell at similar rates as properties farther from the pipeline, and that there is no measurable difference in the prices paid for properties located in close proximity to a pipeline.
- The data indicates that even the easements associated with these pipelines have limited impact on residential property values and that this impact, if measurable, is likely less than the price pipeline companies typically pay to acquire the rights associated with the easements.
- Pipelines have no measurable impact on land uses, as land uses along existing pipelines are similar to land uses in other areas of these (study) towns.

It is important to note that pipeline easements are far less burdensome on landowners than most other easements. The construction period is usually short and is the only significant interference with the surface by a pipeline company, except for any ongoing right-of-way maintenance or pipeline repairs.

Even inspections are done using technologies that are internal to the underground pipe. Contrast this with a highway, power line, rail line, park or other use of the surface where the landowner gives up his or her exclusive and competing use completely.

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A COMMITMENT TO LANDOWNERS

In an industry-wide effort to address property owners' concerns, the Interstate Natural Gas Association of America (INGAA), in 2009, approved the "Natural Gas Transporters Commitment to Landowners," a standardized approach designed to



improve interactions between natural gas pipeline companies and landowners. Training was conducted subsequently by the member companies for their land/right-of-way staffs, and the following commitments were adopted by participating companies, including Kinder Morgan:

1. Respect and Trust

Positive, lasting relationships are built on mutual respect and trust. We will strive to understand issues from the landowners' perspective and help them understand ours.

2. Accurate and Timely Information

Providing natural gas transportation and storage services to the nation may create concerns. We will provide landowners with information regarding the importance of energy infrastructure, the reason and need for the proposed project, and the processes in place governing easement acquisition, certification, construction, operation and maintenance of our facilities, and the particulars of our project.

3. Negotiate in Good Faith

We will listen and strive to understand and negotiate in good faith. We will make every attempt to reach agreement with landowners in an honest, fair and reasonable fashion.

4. Respect the Regulatory Compact

Final approval for a project is not a certainty, and our interactions with landowners will reflect that understanding. Prior to a Federal

Energy Regulatory Commission (FERC) decision, actions taken to negotiate easements or options are at the company's risk as there is no guarantee the project will be approved. We will communicate clearly that federal eminent domain cannot be exercised unless a Certificate is granted by the FERC and will distinguish clearly when, and if, eminent domain is exercised pursuant to state law.

5. Responding to Issues

We will respond to landowner concerns in a timely fashion. To enhance direct communications and timely responses, we will provide landowners with a single point of contact within the company to answer any question or concern and to provide general or project-specific information.

6. Outreach

We will engage with and promote awareness on the part of affected stakeholders early in the planning process. In broadening our outreach, we will develop relationships with, and introduce our industry to, those who might not have otherwise known about its benefits to the community and our dedication to safely providing these services.

7. Industry Ambassadors

Each company employee and representative is an ambassador for the industry. We will ensure our employees and representatives interact with stakeholders in accordance with these commitments.

8. Ongoing Commitment to Training

We believe in continuous improvement in all aspects of our business. With the demand for natural gas increasing and many new people entering the industry, we will train our representatives to interact positively and productively with landowners and other stakeholders.

Kinder Morgan and its natural gas pipeline subsidiaries follow the tenets of the INGAA Landowner Commitment. As new personnel

come onboard, they receive initial training and must certify that they have received it. Refresher training is conducted, also.

The essential point, as noted above, is that the commitment begins on the basis of mutual respect and trust to build solid and lasting working relationships between companies and landowners.

NEGOTIATION OUTCOMES – WHAT CAN HAPPEN

Through the negotiation process with a landowner, Kinder Morgan anticipates that it will successfully enter into an arms-length transaction. But if no agreement is reached after extensive negotiations with the landowner, an eminent domain action may be brought by Kinder Morgan. The action would be filed in the appropriate jurisdiction under either federal law or applicable state law and in a court that has jurisdiction over the dispute.



Kinder Morgan does not have an independent right of eminent domain if applicable federal or state law does not provide the authority to pursue an eminent domain action. Further, we may only initiate a condemnation action under the applicable federal or state law in either a federal or state court. For example, if the pipeline in question is a FERC-regulated jurisdictional pipeline under the Natural Gas Act – and only after a Certificate of Public Convenience and Necessity is issued by the FERC for a particular project – we would then have the right to file an eminent domain action in federal court.

If the pipeline is a non-FERC-regulated pipeline, qualified under state law as a common carrier pipeline, Kinder Morgan could file a petition for eminent domain in state court in accordance with the applicable state law governing such actions.

Under any circumstance, the use of eminent domain is a last resort and is only used by Kinder Morgan and its businesses when all other avenues of discussion and negotiation are not successful. At all times, our overarching goal is to arrive at mutually beneficial terms and conditions regarding the fair market value of property with landowners, so that eminent domain and condemnation can be avoided.

OTHER FACTORS – A PIPELINE PROJECT SNAPSHOT

The easement process to obtain rights-of-way is just one element that needs to be considered when pipeline/energy projects are proposed. Development, permitting and construction of projects involve a number of elements, including:

- obtaining customers and the capital to fund a project;
- bearing the financial and operational risk of the project;
- seeking stakeholder approvals;
- guiding the project through the typical multi-year siting/permitting process;
- responding to opposition (including legal challenges) throughout the process; and,
- obtaining state and/or federal regulatory approvals to begin the project in order to place it in operation.

Additionally, as part of this lengthy and challenging process, energy companies have to obtain access to properties to conduct on-site civil and environmental surveys on properties where the project is proposed. This is done to obtain data that will be used as part of the permitting process for the project.

If a landowner refuses a company access to his/her property for conducting surveys, other means must be used to try to obtain needed data, such as referencing existing mapping and reviewing new or existing aerial imagery, in an effort to determine whether a parcel needed for the project would, in fact, be suitable.

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During the siting/permitting process, companies and landowners have the opportunity to work together on specific issues relating to properties and company right-of-way needs. Also, during this time, companies have the ability to make refinements to proposed routing, potentially enabling more efficient permit reviews by regulators and, hopefully, resulting in a speedier process with fewer hurdles to overcome for all parties.

Landowners can also benefit during this time. Landowner issues can be identified and addressed, and easement agreements can be better designed with the landowner's needs and pertinent issues factored into the process.

CONCLUSION

As energy projects are proposed and move toward completion or rejection, the debate will continue over project requirements versus private property rights. Eminent domain remains a key tool protecting both sides in the process. Without eminent domain, some of our nation's most important infrastructure projects such as roads, bridges, power plants, dams, etc., might never have been built – and our country would be the poorer for that. Yet, thanks to the country's Founders and the Bill of Rights, citizens are guaranteed that fair market value will be paid and uncompensated seizures of property are prohibited.