



# Protecting Property Rights: Just Compensation or Just Take It?

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## Key Points

- Not paying for condemned land is “constitutionally insufficient.”
- Texas courts should ensure that condemners cannot use legal maneuvering or other processes to avoid payment of just compensation for taken land.
- Failure to ensure just compensation will lead to more private entities with eminent domain authority attempting to take property without paying compensation.

## Executive Summary

Peregrine Pipeline Co., L.P., condemned a pipeline easement on land owned by Eagle Ford Land Partners in 2007 and since then has operated and profited from a pipeline on the property. Eagle Ford Land Partners contested the compensation offered by Peregrine Pipeline, and was subsequently awarded \$1,633,000 by a jury in district court. Peregrine Pipeline has appealed the award, refused to pay the judgment or to provide any security for the condemnation award during the appeal, and has said that Eagle Ford Land Partners must undertake collection efforts to obtain the compensation.

Eagle Ford Land Partners was able to obtain an order from the district court requiring Peregrine Pipeline to post bond or make a deposit with the court as part of its appeal, but the Tenth Court of Appeals set aside the district court’s order without explanation. Eagle Ford Land Partners has filed a *Writ of Mandamus* with the Texas Supreme Court asking that it reinstate the district court’s order.

At stake in this case is the constitutional right that just and adequate compensation be paid for any property taken under the government’s “inherent sovereign power of eminent domain.” In this instance, the state of Texas has extended to power of eminent domain to a private entity, a pipeline company. It is therefore incumbent upon the government to ensure that protections are in place which ensure that property owners are fully compensated for any property taken by a private condemner. Failure to do so will undermine one of the most sacred of American rights under both the United States and Texas constitutions, and will undoubtedly lead to additional attempts by private entities with eminent domain authority to take property without paying compensation.

## The Importance of Private Property

The protection of private property represents a foundational principle of constitutional governance, long established in Anglo-American law and recognized by its earliest writings as an inaugural and indispensable step in human history’s march towards a just society. “[O]ur Constitution and laws enshrine landownership as a keystone right rather than one ‘relegated to the status of a poor relation.’” *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas LLC*, 363 S.W.3d 192, 204 (Tex. 2011).

Indeed, our inherited legal tradition can be summarized as the gradual and reasoned realization that energetic property rights is what enables individuals to attain self-sufficiency and assert their independence as well as that it is the principal duty of the law to safeguard those rights from man’s covetous nature. John Adams, for instance, cautioned that “The moment the idea is admitted into society that property is not sacred as the laws of God; and there is not a force of law and public justice to protect it, anarchy and tyranny commence” (Charles Francis Adams, *The Works of John Adams*, 1850) John Locke concurred, adding that “The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property” (John Locke, *Two Treatises on Government*, 1689)

What is important to recognize, however, is that the government’s charge to defend private property means more than shielding citizens from external threats or even adjudicating disputes between neighbors; it also means checking the government’s own inclination to act against an individual’s property rights. Democratic government is not exempt from the temptation to circumvent the boundaries of private property rights for the sake of expe-

diency. Rather, the same covetous nature that incites men to violate the property of others also can coax men to co-opt the powers of government and confiscate by fiat what they could not acquire through the voluntary market.

As a consequence, state and local governments, as well private entities entrusted with the awesome power of eminent domain, must closely conform to parameters and prerequisites overseeing its use. The courts, likewise, must enforce those limits firmly lest that power is abused and private property rights eroded. “[Government] can never have a Power to take to themselves the whole or any part of the Subjects Property, without their own consent,” wrote Locke, “for this would be in effect to leave them no Property at all” (Locke *Two Treatises*).

In both the United States Constitution: “No person shall ... “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;” and the Texas Constitution: “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made,” three protections against the abuse of eminent domain by the state have been enshrined: 1) that property may only be taken for a public use, 2) that property may only be taken through due process, and 3) that property may only be taken if the owner receives just and adequate compensation.

The Texas Constitution “does not grant power to the government but limits the inherent sovereign power of eminent domain by imposing the requirements that government take property only for ‘public use’ and pay ‘adequate compensation’ when doing so.” *City of Carrollton v. Singer*, 232 S.W.3d 790 (Tex. App.—Fort Worth 2007, *pet. denied*).

Unfortunately, the protection of private property from government takings has taken a turn for the worse. As the United States Supreme Court noted in *Kelo v. City of New London*, “our jurisprudence has recognized that the needs of society have ... evolved over time in response to changed circumstances” (*Kelo et al. v. City Of New London et al* 2005).

In both New London, Connecticut and Freeport, Texas, economic development was used to justify government attempts to take property from one owner and then transfer the property to another private owner. Texas has rightfully taken steps to curtail this practice, though unfortunately not to end it; cities can still use blight designations and zoning to effect—directly or indirectly—a transfer of private land from one owner to another. An example of the latter is Dallas’ decision to rezone Ross Avenue from commercial use to residential use. As can



Woodard Paint and Body: Before and After Rezoning

be seen nearby, Woodard Paint and Body Shop was one of the casualties.

### Private Condemnation in Texas

There is one other way in Texas of using eminent domain to transfer private property from one owner to another. Texas has granted the power of eminent domain to electric transmission utilities and pipeline companies operating as a common carrier. Sec. 111.019, Natural Resources Code, states: “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.”

But not just any pipeline company can operate as a common carrier and exercise the power of eminent domain. The Texas Supreme Court explains under what circumstances pipeline companies—in this case a CO<sub>2</sub> pipeline—may exercise eminent domain:

The Texas Constitution safeguards private property by declaring that eminent domain can only be exercised for “public use.” Even when the Legislature grants certain private entities “the right and power of eminent domain,” the overarching constitutional rule controls: no taking of property for private use. Accordingly, the Natural Resources Code requires so-called “common carrier” pipeline com-

panies to transport carbon dioxide “to or for the public for hire.” In other words, a CO<sub>2</sub> pipeline company cannot wield eminent domain to build a private pipeline, one “limited in [its] use to the wells, stations, plants, and refineries of the owner.” A common carrier transporting gas for hire implies a customer other than the pipeline owner itself (*Texas Rice Land Partners v. Denbury Green*).

The granting of eminent domain to private entities—even in the case of activities considered to be public use—expands the possibilities of abuse of the eminent domain process. One of these possibilities is on display in petition for *writ of mandamus* (*In re Eagle Ford Land Partners*) recently filed with the Texas Supreme Court by Eagle Ford Land Partners.

### In re Eagle Ford Land Partners

One of the pipeline companies granted the power of eminent domain, Peregrine Pipeline Co., L.P., condemned a pipeline easement on land owned by Eagle Ford Land Partners back in 2007. A dispute over the compensation required for the condemned property led to a jury trial where the jury awarded Eagle Ford Land Partners \$1,633,000, plus interest.

Peregrine Pipeline refused to pay the judgment and filed a notice of appeal while also “informing Eagle Ford that it would instead have to pursue ordinary collection procedures—such as attachment or garnishment—to obtain the compensation it was due” (*Eagle Ford Land Partners Writ of Mandamus*).

The question currently before the Supreme Court is whether trial court can order Peregrine Pipeline to post a supersedeas bond or deposit the amount of the judgment into the trial court’s registry in order to ensure that, once the compensation has been finally determined, Eagle Ford Land Partners is paid for the condemned land on which Peregrine Pipeline has been operating a pipeline since 2007.

As previously noted, the Texas Constitution states that “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .” This sets up a straightforward situation: the government takes land from a private property owner than pays the property owners the amount determined through negotiations, the local appraisal district process, or the Texas courts. While the amount of compensation may be in question, there is never a question of whether the compensation is going to be paid.

Adequate compensation forces the public to confront the actual costs of the proposed public use, and also prompts con-

demning entities to exercise more caution before unleashing its eminent domain power and respect the frustration and anxiety that power saddled on Texas land owners. As Justice Black held, “[It] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This duty of just and adequate compensation is not diminished where the condemning entity is a private, for-profit company—rather, it is enhanced. However, that could change if Peregrine Pipeline is allowed to pursue its current course.

By extended the power of eminent domain to private entities, the government has introduced greater uncertainty for landowners into the eminent domain process when it comes to just and adequate compensation. Governments generally don’t go broke and have nowhere to hide their assets in order to avoid paying its bills. And while collecting money due from the government can sometimes be problematic, that is not the case when it comes to eminent domain. Payment for condemned land is a basic constitutional right.

Courts generally have the discretion to determine whether or not a bond or deposit is should be made upon an appeal of a judgment. But in this case, it would be an abuse of discretion for the courts not to require a bond or deposit. As the Texas Constitution requires, “When a person’s property is taken under Subsection (a) of this section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money.” There should be no question whether or not a property owner is paid for land condemned by the state or its agents. Yet the situation is bad enough today where a property can be condemned and put to use by the condemnor in 2007, yet in 2014 the previous owners have not been compensated for the land by the condemnor. And may never be, unless the Texas Supreme Court intervenes.

In a similar situation, the Texas Supreme Court weighed in where pipeline companies were abusing the eminent domain process by claiming to be common carriers without actually using pipelines for a public use. In *Texas Rice Land Partners v. Denbury Green*, the Court opined:

This property-rights dispute asks whether a landowner can challenge in court the eminent domain power of a CO<sub>2</sub> pipeline owner that has been granted a common carrier permit from the Railroad Commission. The court of appeals answered no, holding that (1) a pipeline owner can

conclusively acquire the right to condemn private property by checking the right boxes on a one page form filed with the Railroad Commission, and (2) a landowner cannot challenge in court whether the proposed pipeline will in fact be public rather than private. We disagree. Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings.

Similarly, not paying for condemned land is “constitutionally insufficient.” Texas courts should recognize this and ensure that condemnors cannot use legal maneuvering or other processes to avoid payment of just compensation for taken land. Failure to do so will undermine one of the most sacred of American rights under both the United States and Texas constitutions, and will undoubtedly lead to additional attempts by private entities with eminent domain authority to take property without paying compensation. ★

## About the Author



**Bill Peacock** is the vice president of research and director of the Texas Public Policy Foundation’s Center for Economic Freedom. He has been with the Foundation since February 2005. Bill has extensive experience in Texas government and policy on a variety of issues including, economic and regulatory policy, natural resources, public finance, and public education. His work has focused on identifying and reducing the harmful effects of regulations on the economy, businesses, and consumers.

Prior to joining the Foundation, Bill served as the Deputy Commissioner for Coastal Resources for Commissioner Jerry Patterson at the Texas General Land Office. Before he worked at the GLO, he was a legislative and media consultant, working with groups like Citizens for a Sound Economy and Putting Children First. Bill also served as the Deputy Assistant Commissioner for Intergovernmental Affairs for Commissioner Rick Perry at the Texas Department of Agriculture, as a legislative aide to Rep. John Culberson in the Texas House of Representatives, and as an analyst for the Texas Senate Committee on Education.

