Eminent Domain

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KINDER MORGAN

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

Opponents of energy projects sometimes label eminent domain a “seizure” or a “land grab,” but that is far from the truth. Eminent domain condemnation actions are used as a last resort and always include just compensation to the landowner. Court hearings only occur if all attempts to obtain easements for rights-of-way are unsuccessful and mutually beneficial agreements with landowners cannot be reached.

Understanding the process is important to help all parties reach reasoned solutions, mitigate 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 an authorized entity, such as a state, municipality, private person, or corporation, to provide just compensation to purchase private property or certain property rights from a landowner for a need beneficial to the public. 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 to due process. However, eminent domain does not authorize the seizure of someone’s property without compensation – in fact, it requires the payment of “just compensation,” generally based on the property’s fair market value. In some cases, negotiated settlements may exceed the government’s initial appraisal or offer.[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 this commitment, and we expect our employees and contractors to uphold these standards every day.

[1] https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-07-28/html/GAOREPORTS-GAO-07-28.htm

HISTORICAL CONTEXT

Eminent domain is based on historical precedent and legal case law. In some of its earliest uses, and even to present day, eminent domain has been used by the government to acquire private property for public use, typically for transportation, infrastructure and water supply projects, national parks, construction of public buildings, and national defense, to name a few. The simple fact is that key public infrastructure – such as highways, rail lines, and airports – are vital to modern mobility and cannot be constructed without using some private lands. Eminent domain, therefore, is necessary to ensure that no single landowner can block infrastructure benefiting the public as a whole, and the impacted landowner is provided just compensation to ease their financial burden.

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Without eminent domain, we might not have the public parks, forests, lakes, rivers, or state and national buildings and monuments we enjoy today. Our communications infrastructure was built using eminent domain; without it, we could not talk to distant relatives and friends or have reliable access to the internet. Similarly, without eminent domain for energy infrastructure projects, only those communities that happened to be near energy sources would benefit from fuel and power resources needed to power our modern lives.



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 groundbreaking protection was a reaction to the absolute power of overseas 18th century monarchs who could 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 public interest 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. Just as the Fifth Amendment limits the federal government's power to take property, the Fourteenth Amendment extends the federal guarantee of just compensation to 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 house and post office.

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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 September 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.[2]

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 authority for intrastate natural gas pipelines or common carrier liquids pipelines. Instead, those are governed by state eminent domain law, which varies from state to state.

RECENT CONTROVERSY

In 2023, Navigator CO_2's Heartland Greenway Project, which intended to capture 15 million metric tons of CO_2 annually from ethanol plants and store it permanently underground, was canceled because of the unpredictable nature of the regulatory and government processes involved.

Particularly in South Dakota and Iowa, pipeline opponents argued that the carbon capture, usage, and storage (CCUS) project did not serve a public purpose that deserved the use of eminent domain to construct them. This cancelation resulted in the loss of hundreds of millions of dollars that were already invested in developing the project and paying landowners for pipeline route easements.

Ethanol producers, who believe CCUS projects are key to lowering their greenhouse gas emissions, considered the cancelation a major setback. In fact, research shows that net-zero emissions scenarios will require a substantial increase in CCUS project investments in order to progress toward climate goals.[3] However, continued controversy surrounding eminent domain will delay the development of much needed infrastructure in a lower carbon future.

[2] https://www.justice.gov/enrd/condemnation/land-acquisition-section/history-federal-use-eminent-domain

[3] https://netzeroamerica.princeton.edu/img/Princeton%20NZA%20FINAL%20REPORT%20SUMMARY%20(29Oct2021).pdf

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 agents contact and meet with all landowners affected by a project to discuss the civil, cultural, environmental, and geological surveys, the proposed routing of pipelines facilities, any landowner-concerns and considerations, and the rights necessary to construct, maintain, and operate a proposed pipeline.

Agents also discuss permanent and temporary easements, road access, right-of-way agreements, compensation, and damage payments. Kinder Morgan then works with landowners regarding the rights required to support the project. When an agreement is reached on a voluntary 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 reviews 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:

- property location
- size in relation to other area properties;
- current unique uses or property attributes (e.g., 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

Integra Realty Resources (IRR) conducted a study to evaluate whether natural gas pipelines affect surrounding residential property values. Its findings were contained in a 2016 report, "Pipeline Impact to Property Value and Property Insurability,"[4] prepared on behalf of the INGAA Foundation.

IRR compared and analyzed prices paid for residences across the country - in the Midwest, Northeast, Mid-Atlantic, and Southeast - and found that "the presence of pipelines does not affect the value of a property, its insurability, its desirability or the ability to obtain a mortgage." More specifically, it found no statistically significant difference between prices paid for homes located along a pipeline and those located away from it. In addition, data from the study found that:

- Homes located "on" a pipeline sold at a similar frequency as homes located "off" the pipeline.
- There was no impact on demand or development in areas along natural gas pipelines compared with areas away from them.
- There was no sign that proximity to a pipeline affects a buyer's ability to obtain property insurance or increased insurance premiums.
- There was no sign that age or size of a natural gas pipeline affects a property's sale price.

It is also 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.

Inspections are even 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.

[4] https://ingaa.org/foundation/resources/pipeline-impact-to-property-value-and-property-insurability/

A COMMITMENT TO LANDOWNERS



In an industry-wide effort to address property owners' concerns, the Interstate Natural Gas Association of America (INGAA), of which Kinder Morgan is a member company, in 2019 approved its "Commitments to Landowners,"[5] a standardized approach designed to improve interactions between natural gas pipeline companies and landowners. Below is an abbreviated version of the text.

1. ***Respect and Trust***
   Positive, lasting relationships are built on mutual respect and trust. We will strive to understand landowners' perspectives and help them understand ours through meaningful engagement.

2. ***Accurate and Timely Information***
   We will answer landowners' questions, including the reason and need for the proposed project; the processes in place governing easement acquisition, certification, environmental review/permitting, construction, operation and maintenance of our facilities; safety; and the particulars of individual projects.

3. ***Negotiate in Good Faith***
   It is the responsibility of the project sponsor to work with landowners to attempt to reach a mutually agreeable easement. We will listen and strive to understand landowner concerns, and we will work to address those concerns in good faith. We will attempt to reach agreement with landowners in an honest, fair and reasonable fashion.

[5] https://ingaa.org/stay-current/commitments-to-landowners/

4. ***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 point of contact within the company, early in the project, to convey their questions and concerns. The point of contact will answer landowners' questions or concerns and provide general or project-specific information.

5. ***Respect the Regulatory Compact***

   Final approval for a project is not certain, 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 because there is no guarantee the project will be approved.

6. ***Eminent Domain***

   We will begin every easement negotiation with the expectation that a mutual agreement can be reached and eminent domain rights will not need to be exercised. Further, we will be clear in communicating that federal eminent domain will not be exercised unless FERC grants a certificate. Eminent domain will only be exercised as a means of last resort.

7. ***Outreach***

   We will engage with affected stakeholders to garner input early in the project and strive to build relationships. We will introduce our industry to those who might not otherwise know about our industry's benefits to the community and dedication to safety.

8. ***Industry Ambassadors***

   We recognize that each company employee and representative is viewed as an ambassador for the industry. Our employees and representatives are trained to interact with stakeholders in accordance with these commitments.

9. ***Ongoing Commitment to Training***

   We will routinely evaluate our landowner outreach and communication efforts to drive continuous improvements in our interactions, processes, policies, and procedures. Natural gas will remain a foundation of our energy economy and there will continue to be the need to construct, operate and maintain natural gas pipeline and storage infrastructure to meet the nation's energy demand.

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 also conducted.

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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, only after a Certificate of Public Convenience and Necessity is issued by the FERC for a particular project would we have the right to file an eminent domain action in federal court.

Under any circumstance, the use of eminent domain is a last resort...

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 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 to conduct surveys, other means must be used to try to obtain the necessary data, such as referencing existing maps and aerial imagery, in an effort to determine whether the parcel is needed for the project.

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, 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 constructed, the debate will continue over project requirements versus private property rights. Eminent domain remains a key tool to protect 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.