

# 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 incorrectly and unfairly like to 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. We go to court only 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 a state, municipality, private person or corporation authorized 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 that just compensation be paid to the landowner for their property. In some cases, private property owners can actually receive more for their property than it may be worth.<sup>1</sup>

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.

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<sup>1</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875412).

## 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 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 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 ground-breaking protection was a reaction to the absolute power of overseas 18<sup>th</sup> 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 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’s 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.

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.

### **CURRENT CONTROVERSY**

In 2023, Navigator CO<sub>2</sub>'s Heartland Greenway Project, which intended to capture 15 million metric tons of CO<sub>2</sub> 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 cancellation 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 cancellation 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.<sup>2</sup> However, continued controversy surrounding eminent domain will delay the development of much needed infrastructure in a lower carbon future.

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<sup>2</sup> [Princeton's Net-Zero America Report](#)

### **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 pipeline facilities, any landowner-concerns and considerations, and the rights necessary to construct, maintain and operate a proposed pipeline.



Agents also discuss a number of issues, including 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
- its size in relation to other area properties;
- any current unique 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.”<sup>3</sup>

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 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, and these properties sell at similar rates as properties farther from the pipeline, indicating 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 a 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 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

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<sup>3</sup> [http://www.kindermorgan.com/content/docs/NED\\_ResearchReport\\_11-12-15.pdf](http://www.kindermorgan.com/content/docs/NED_ResearchReport_11-12-15.pdf)

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.

### **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. Member companies subsequently trained 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 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 listen and strive to understand and negotiate in good faith. We 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 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 respond to landowner concerns in a timely fashion. To enhance direct communications and timely responses, we 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 engage with and promote awareness on the part of affected stakeholders early in the planning process. In broadening our outreach, we 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 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 train our new 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 also conducted.

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 – would we 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

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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 the parcel 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, 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 constructed, 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.