

Eminent domain fight pits two of Texas' sacred cows against each other

Houston is on track to log \$11.6 billion in sales for this year

By L.M. Sixel | May 12, 2017

Richard Thorpe III knew he had to sell a section of his western Texas ranch for a line of electric transmission towers. But he also knew that the utility taking his property under eminent domain was lowballing him, offering less than \$50,000 for mile-long swath of pasture and oak trees that abuts the family cemetery.

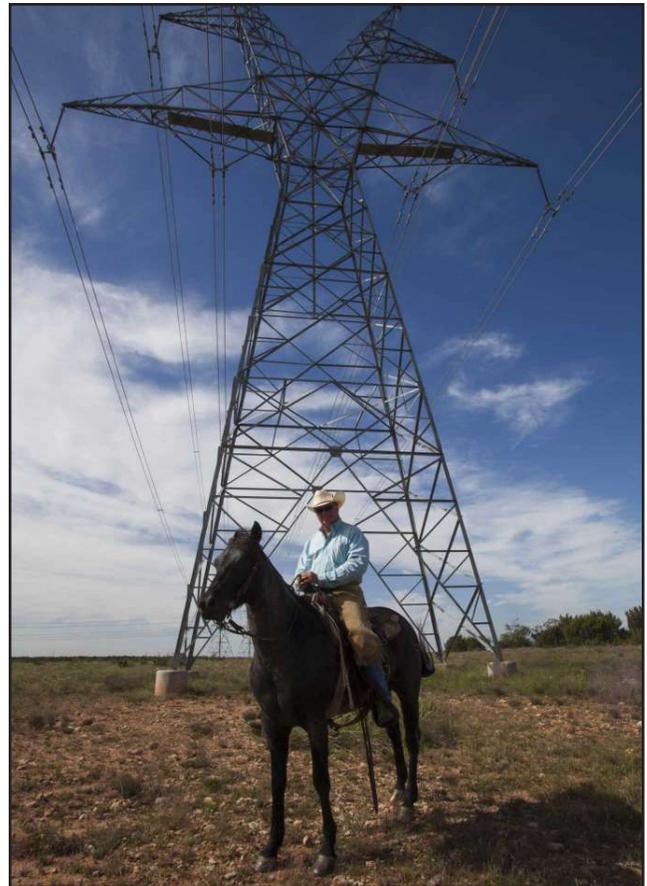
Thorpe appealed that price to a special commission of landowners, which pegged the value in excess of \$600,000. Still, it was at best a partial victory for the cattle rancher, who spent more than half that amount on lawyer's fees, appraisals and other expenses to contest the utility's valuation.

"You are at a huge disadvantage," said Thorpe, who is also president of the Texas and Southwestern Cattle Raisers Association which represents 17,500 beef cattle operations. "The landowner loses and the condemning entity wins and we're stuck looking at an eye sore."

Thorpe is among the landowners who have found they can't recover their legal costs even if they win their cases, a provision of Texas law that they say provides incentives for utilities, pipeline companies and government entities to undervalue properties in eminent domain takings, discourages landowners from challenging low prices and ultimately leaves them with less than the full value of their property because of high costs of litigation.

The issue, which pits two of the sacred cows of Texas politics -- property rights and the energy industry-- against each other, has long simmered in Austin, where ranchers, farmers and other landowners have battled pipeline and transmission companies, as well as government agencies, which argue that allowing the recovery of legal expenses would only encourage more lawsuits and raise the cost of projects.

The debate has taken on increased urgency in recent years as economic and population growth has created a need for more transmission, more pipelines and new transportation projects -- all of which could require land takings. Those projects include a 240-mile high speed rail line from Houston to



Rancher Richard Thorpe, owner of the Mesa T Ranch, poses underneath one of the towers installed on his land. (Photographer: Gary Rhodes)

Dallas, the widening of Interstate 45 to the Sam Houston Tollway, and the expansion of Highway 249 to College Station to create a tollway known as the “Aggie Expressway.”

The drilling boom in West Texas’ Permian Basin has also increased the need for new and expanded pipelines to move crude and natural gas to Gulf Coast refineries, petrochemical plants and liquefied natural gas terminals. For example, Kinder Morgan of Houston and DCP Midstream of Denver, recently announced plans to build the new Gulf Coast Express Pipeline Project that would move natural gas from the Permian to the Gulf over 430 miles.

Kinder Morgan spokeswoman Melissa Ruiz said the project, if it attracts enough customers, would require easements -the right to use pieces of property for infrastructure improvements -from a variety of private landowners, she said. Eminent domain would come into play, she said, only if the company fails to negotiate agreements with landowners.

Eminent domain is the power of government to take private property for public use, such as building roads, building schools and laying water and sewer lines. In Texas, private companies approved by the Texas Legislature also have the power to take private property under eminent domain for projects in the public interest. The most common taking, according to the Texas A&M’s Agrilife Extension Service, is to build oil and gas pipelines.

The entities taking the property -- whether private companies or government agencies - are required to compensate land owners for the market value of the property. In Texas, market value is the price property would fetch if both buyers and sellers were willing participants and both were free to walk away if they didn’t like the price.

Landowners in Texas who believe they’re not getting what the property is worth can appeal to special commissions of local landowners to contest the value, but they also have to factor in the cost of the legal fight. In Texas, unlike about half the states, the legal fees of landowners won’t be reimbursed, even if they prove the offer was wildly off the mark.



Rancher Richard Thorpe rides past electric utility towers on part of the 10,000 acres he operates outside of Winters, TX. (Photographer: Gary Rhodes)



Rancher Richard Thorpe rides behind a monument erected on land he set aside for his family cemetery. He has buried his own mother as well as his wife’s parents and brother on the plot of land. Electric towers sit just a short distance from their headstones. (Photographer: Gary Rhodes)

In Texas, about 85 percent of landowners accept the last offer in eminent domain takings, said Justin Hodge, a Houston lawyer who specializes in eminent domain cases. But when those offers are challenged, the special commissions that hear the appeals typically find the property is worth significantly more, according to a survey by a coalition of landowners groups.

Texans for Property Rights polled three of its largest member organizations, including the Texas and Southwestern Cattle Raisers Association, the Texas Farm Bureau and the Texas Wildlife Association and found that 77 percent of the respondents who had contested property values reported they received at least 20 percent more than their final offer.

A study of nationwide eminent domain practices by Texas A&M School of Law found that landowners in Texas are in a “precarious position” from the onset. While Texas entitles landowners to recover the market value of their property, landowners -- not the entities taking the land -- have to pay for appraisals to determine the value.

“Landowners who challenge just compensation are often never made whole when their property is taken for public use,” the report concluded, “because any amount they receive will be reduced by the fees needed to win the suit.”

Property rights groups have tried for years to change state law to allow landowners to recover legal costs if their challenges in eminent domain cases succeed. A bill that would have done that during the 2015 session passed the Senate, but died in the House.

This session, landowners got behind proposed legislation that would have required utilities, pipeline companies and governments and utilities to reimburse legal fees if the special commissions of landowners assess values at 20 percent or more than the final offer.

The bill was fiercely opposed by some of the most powerful business interests in the state. Among those lobbying against the bill were BP America, a subsidiary of the British oil major, Enbridge Energy, a Canadian pipeline company, and Anadarko, The Woodlands oil and gas company, according to state lobbying records.

BP America and Enbridge declined comment; Anadarko did not respond to a request for comment.

Over the past few weeks, however, reimbursement of legal fees was stripped out of a broader eminent domain bill that would impose new requirements for land dealers and new regulations to tie offers to county tax valuations. The revised bill passed the Senate earlier this month and has been referred to the House Land and Resource Management Committee.

Opponents of the bill said that reimbursing landowners for legal costs would only increase the number of lawsuits, with most of the benefits going to lawyers instead of landowners. The Austin-based Texas Civil Justice League, which advocates for damage award limits in lawsuits, estimated that as many as 50 percent of landowners would challenge eminent domain values if the bill became law.

Julia Rathgeber, chief executive of the Association of Electric Companies of Texas, a trade group representing transmission and other power companies, agreed that reimbursing legal costs would lead



Rancher Richard Thorpe, owner of the Mesa T Ranch, poses underneath one of the towers installed on his land. (Photographer: Gary Rhodes)

to a burst of litigation that would slow projects, increase costs and lead to higher rates for customers. She said a better approach would be to provide more information to landowners so they can negotiate better.

But Hodge, the Houston eminent domain lawyer, said there's little evidence that allowing landowners to recover legal costs hurts development. Florida, for example, has continued to grow robustly despite an eminent domain law that permits reimbursement of legal costs, he said.

Hodge has a personal stake in the debate. On his family's land in central Texas, Hodge's grandfather struck water and began selling it to local municipalities, setting aside the income to pay for college for his descendants.

But the Texas Department of Transportation, planning to build a rest stop between Austin and Waco, offered the Hodge family \$350,000 for 28 acres, including the area with the water. The family fought back, and a jury in Bell County determined in 2009 that it was worth \$5.9 million, including \$4.5 million for the groundwater.

The state of Texas appealed the following year to the Third Court of Appeals in Austin, arguing that future income from groundwater should not be part of the calculation to determine market value, according to a brief filed by then- Attorney General Greg Abbott. The Hodge family, after spending more than \$1 million on lawyers, hydrologists, appraisers and other experts over six years, eventually ended up settling with the state for a confidential amount.

"I can look at a landowner in the eye," said Hodge, "and I can understand how you feel."

