



# Pipelines & Eminent Domain

THE PROPOSED KINDER MORGAN PERMIAN HIGHWAY PIPELINE

OCTOBER 29, 2018

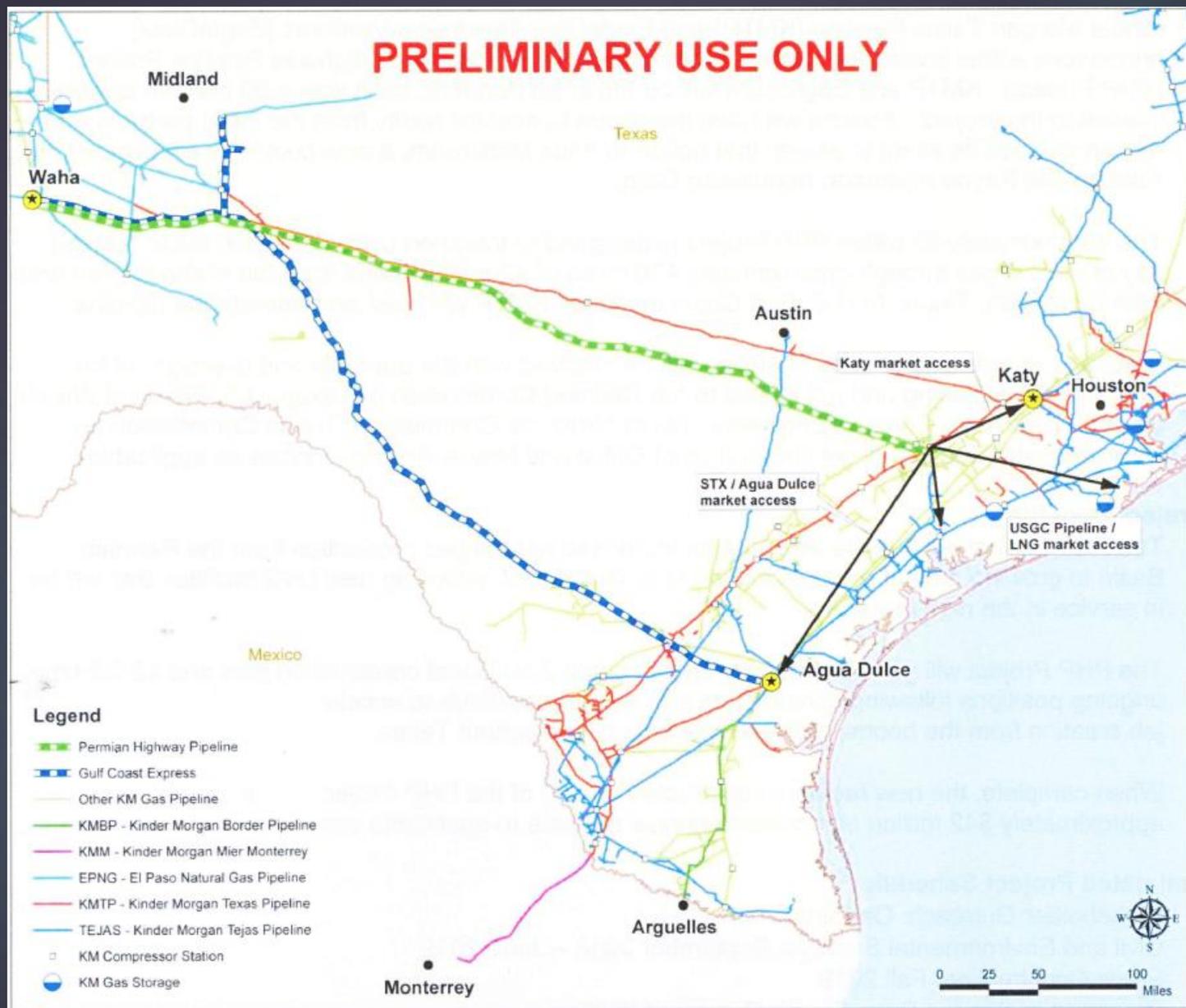
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# The Kinder Morgan Permian Highway Pipeline Project

# PRELIMINARY USE ONLY



# Permian Highway Project

- ▶ \$2 billion pipeline
- ▶ Intended to transport up to 2 billion cubic feet per day of natural gas
- ▶ 42-inch pipeline
- ▶ Spans 430 miles from the Waha to Katy, Texas
- ▶ Initial Partners: Kinder Morgan Texas Pipeline (KMTP) and EagleClaw (50% ownership each)
- ▶ Shippers committed to the project include: EagleClaw, Apache Corporation, XTO Energy Inc.
- ▶ KMTP will build and operate the pipeline

# Permian Highway Project

- ▶ KMTP projects PHP will generate 2,500 local construction jobs and 18 full-time ongoing positions following construction
- ▶ KMTP projects, once complete, PHP will generate approximately \$42 million of increased annual revenue for state and local taxing bodies

# Permian Highway Project



- ▶ Estimated Project Schedule:
  - ▶ Stakeholder Outreach: Ongoing
  - ▶ Civil and Environmental Surveys: September 2018 – June 2019
  - ▶ Begin Construction: Fall 2019
  - ▶ Proposed In-Service Date: Fourth Quarter of 2020



Eminent Domain

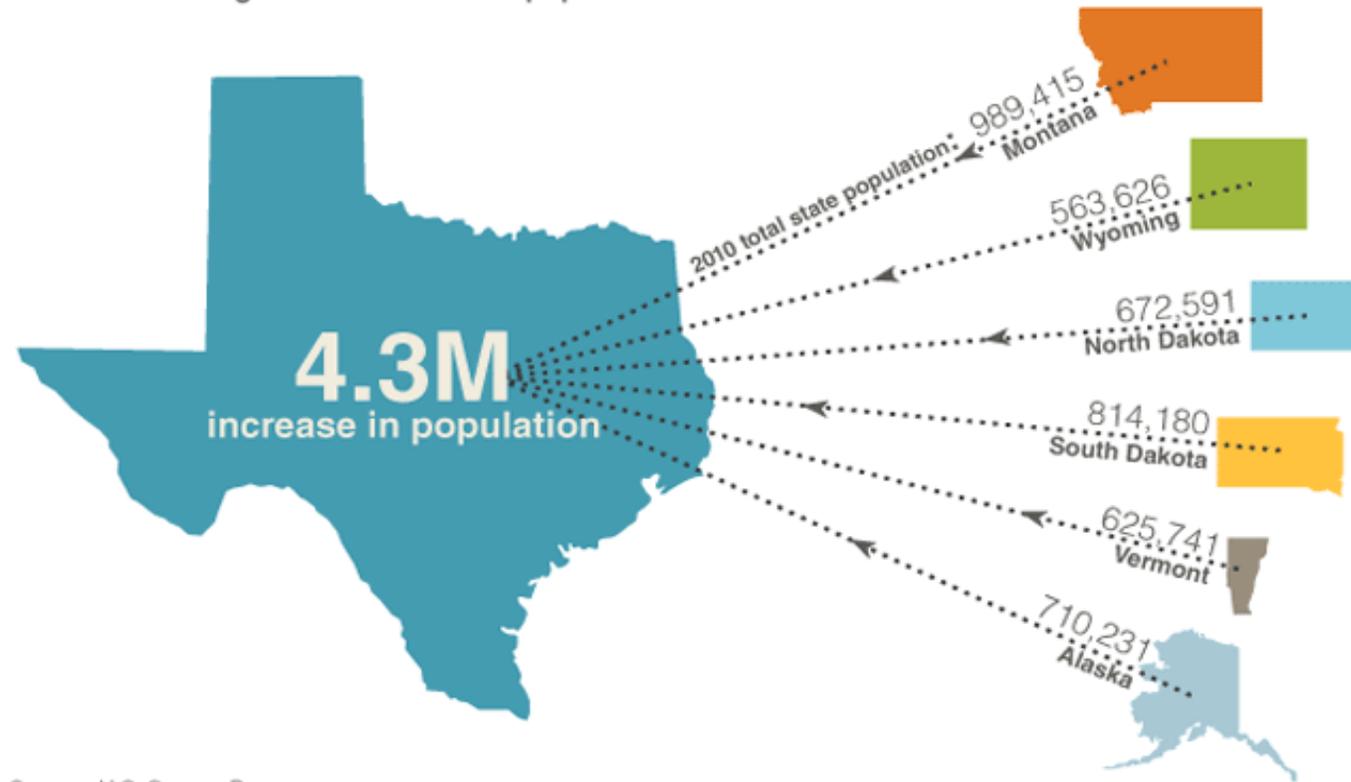
# Eminent Domain: Taking Property

- ▶ Unique area of law where the government can take property of its citizens
- ▶ Protected by the US Constitution
- ▶ Law has evolved to allow condemnation by private corporations
- ▶ Modern era has enabled the taking of property for a wide array of purposes
- ▶ The needs of growth and development have expanded the scope of private property takings
- ▶ But, it's now on many people's radar
- ▶ A key political issue in Austin and the media

# Texas Growth = Increased Infrastructure

## The state's population increased 4.3M since 2000.

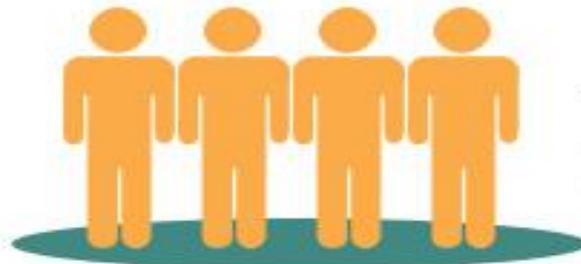
That's like adding the combined 2010 populations of six states.



Source: U.S. Census Bureau.

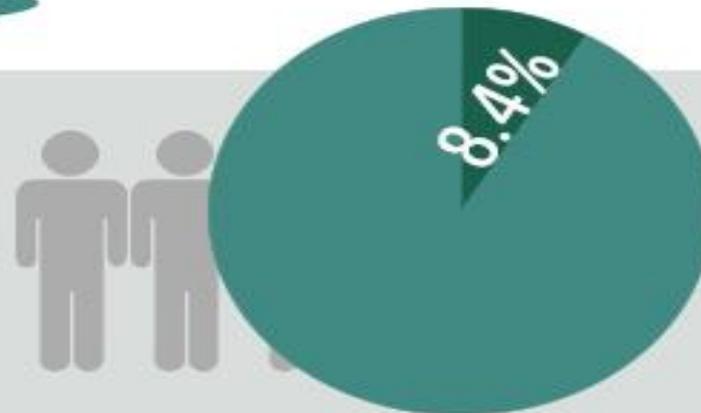
# Texas Growth = Increased Infrastructure

3 of the top 10 most populous cities in the US are found within Texas's borders.



As of 2014, the state is home to 26.5 million people,

giving it 8.4 percent of the national population.



# Who is Eligible to Condemn?

- ▶ Entities to which the Texas Legislature has expressly given the power of eminent domain include:
  1. **Government entities** – State (TxDOT), Counties, and Municipalities. (Tex. Local Gov't Code Ann. §§251.000 and 280.000; Tex. Gov. Code §1505.114).
  2. **Utilities** (Tex. Utilities Code §181.004).
  3. **Drainage Districts** (Tex. Water Code §49.22; Tex. Gov't Code Ann. §411.004 (providing eminent domain authority to counties for drainage)).
  4. **Other** - Municipal Utility Districts (“MUDs”). See Tex. Water Code §54, Common Carriers. See Tex. Nat. Res. Code §111.019, Railroads. See Tex. Rev. Civ. Stat. art. 6336.

# For What Purpose?

- ▶ Taking must be for a public purpose.
  - ▶ Highway
  - ▶ Utility right of way (electricity, water, gas, cable)
  - ▶ School
  - ▶ Library
  - ▶ Railroad track
  - ▶ Oil and gas pipeline
  - ▶ Sports Stadium
  - ▶ Recreational and housing development?
  - ▶ Groundwater or surface water by a political subdivision for the domestic needs of the subdivision?

# Preliminary Planning

- ▶ Prior to any formal proceedings, there exists a period of planning, initial contacts by condemnor, and negotiations.
  - ▶ Involves visit from negotiation agent or landman to discuss scope of taking and payment.
- ▶ When negotiations start to become futile, landowner will receive a “Last Offer” letter.
  - ▶ For highway condemnation, there will also be an appraisal. Appraisals are unlikely, however, for pipelines.
- ▶ Last Offer may actually be less than previous offers.
- ▶ If no response or agreement, condemnor will file an action in the county where the property is located.

# The Rules of the Game

- ▶ All takings in Texas are governed by Chapter 21 of the Property Code
  - ▶ Most transfers of property take place in a negotiation outside formal proceedings
- ▶ Entity seeking to acquire property must negotiate in good faith for the value before filing any action
- ▶ If no result, may file an action in the county where the property is located
  - ▶ No immediate notice to landowner
  - ▶ Judge appoints three special commissioners (not lawyers) to set value

# Pre-Hearing Process

- ▶ The Commissioners will select a time and place for a hearing on value (not on validity of taking)
  - ▶ Then the landowner will get notice (usually 3-4 weeks)
  - ▶ Have the right to object and replace a commissioner
- ▶ Entity seeking to acquire must provide appraisal with offer and ahead of hearing
- ▶ Landowner has the same obligation in advance of hearing
  - ▶ But landowner may testify to value without appraisal

# The Special Commissioners Hearing

- ▶ Hearing is short and reasonably informal
- ▶ Each side has the right to question any witness
- ▶ Commissioners will confer and make an “award”
- ▶ Either side may appeal to a jury trial on issue of value or possibly “right to take” (rare)
  - ▶ Regardless of appeal, Condemnor gets the property
- ▶ Money is on deposit and may be withdrawn by landowner
  - ▶ At time money is deposited, property belongs to Condemnor
- ▶ Costs can go either way-set by Commissioners



Photo by Phillip C. Marshall

# What are Landowners Entitled To?

- ▶ Damages are:
  - ▶ The value of the part taken (land lost times value); and
  - ▶ The value of the damage to the “remainder” (what landowner keeps).
  - ▶ Landowners do not generally get attorneys fees back
- ▶ Does the taking lower the value of the remainder?
- ▶ Cannot be damages that are general to the public.
- ▶ If the case proceeds to a jury trial, these are the issues to be answered by the jury.
- ▶ If landowner withdraws the money, there is a true up after the verdict.
- ▶ Judge can determine the legal right to take property.

Part  
Taken

Remainder

Home

# Issues for the Taking

- ▶ Condemnor has the right to enter and survey property
  - ▶ No destructive testing
- ▶ Consult with an attorney
- ▶ Good faith negotiations required
- ▶ Landowner's Bill of Rights explaining rights is required



# Texas Pipeline Easement Negotiation Checklist

# Texas Pipeline Easement Negotiation Checklist

- ▶ Prior to beginning negotiations, find out if the Pipeline Company has eminent domain powers. If the company does not have these powers, it cannot legally acquire the property through a condemnation hearing, which puts the landowner in a much stronger bargaining position.
- ▶ Clearly establish how compensation will be calculated, when it will be paid, and what damage payments will be included for use or depreciation of the property.
- ▶ Define a specific area where the pipeline will be laid and consider requiring setback distances from the pipeline to any buildings or structures on the property.
- ▶ Reserve the right to grant additional easements on the property by pipeline to enter into an exclusive easement with any one company.
- ▶ Check Restrictive Covenants on the property, as these may impact the required locations and depths of the pipeline.

To find out more about this valuable information, please visit

<https://agrilifecdn.tamu.edu/texasaglaw/files/2016/08/Texas-Pipeline-Easement-Negotiation-Checklist.pdf>

# Texas Pipeline Easement Negotiation Checklist

- ▶ Negotiate the easement agreement to only allow one pipeline to be laid and one product to be carried down that pipeline. This will require the company to secure a second easement, if it wishes to lay an additional line or add or change the product flow on the pipeline.
- ▶ Require the pipeline company to either waive surface facilities or specify exactly what facilities will be allowed on the property and where these facilities will be located.
- ▶ Negotiate the size, diameter and pressure capacity of the line to be installed to mitigate potential safety issues on the property.
- ▶ If surface facilities will be on the property, negotiate for additional compensation.
- ▶ Require the pipeline company to either waive surface facilities or specify exactly what facilities will be allowed on the property and where these facilities will be located. If surface facilities will be on the property, negotiate for additional compensation.
- ▶ Specify in the agreement that the company will provide the landowner full access to their property during the pipeline installation and after the construction is completed.
- ▶ Retain the right to use as much of the easement area as necessary and the right to place roadways, ponds or tanks, and water lines across the easement.
- ▶ Specify in the agreement that the company will provide the landowner full access to their property during the pipeline installation and after the construction is completed.

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- ▶ Landowners should be able to limit the company's access to the easement by (1) requiring notice to be given prior to entry; (2) setting dates and times when entry will not be permitted; (3) determining where company employees may enter and exit; (4) designating which roads are to be used on the property; (5) prohibiting any recreational activities, such as hunting and fishing, on the easement without express landowner permission. Such limitations are important because the company can enter the easement at any time and for any purpose, if no limitations are in place.
- ▶ Landowners should request up-front payment for damages caused while constructing the pipeline and during future maintenance, repair, and replacement activities.
- ▶ Use on the property: easement area should not contain any recreational activities the company will have regarding repairs. Also, include a measurable standard to ensure repairs are properly performed, such as appointing a neutral third party to inspect the work and determine if the damage repairs are sufficient.
- ▶ On the length of time pipeline easements generally last, landowners should request up-front payment for damages or require the company to post a bond that will make money available for future damages. This protects the landowner if the company disappears prior to completing damage repairs.

# Texas Pipeline Easement Negotiation Checklist

- ▶ Clearly define when and how the easement will terminate by setting out objective, clear-cut standards, such as a specific period of time or based on certain actions (or inaction) of the pipeline company. This provision prevents the easement from lasting into eternity and requires the company to provide a release of the easement that can be recorded in the public record after the easement ends.
- ▶ Require the company to remove all lines and structures after terminating the easement or forfeiting title and pay for all costs that any damages caused by removal are the sole responsibility of the company.
- ▶ If a company violates an easement agreement, the landowner can bring suit and seek to terminate the agreement. Prior to granting an agreement's termination, courts require the violation to be "material," which is a fact-specific case-by-case determination. To avoid the expensive and time-consuming process of going to court and having to prove the violation is material, landowners should seek to define what violations will be deemed material in the agreement and may cause the agreement to terminate.

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# Texas Pipeline Easement Negotiation Checklist

- ▶ Landowners should not take the risk of warranting title, because pipeline companies are in a better position to conduct title searches and verify they are negotiating with the right parties.
- ▶ Require the company to pay all or a portion of the negotiation costs, such as appraisal costs, fees for forestry or agricultural experts, surveyor expenses, and attorney's fees.
- ▶ ~~Require the company to pay all or a portion of the~~ **Require the company to pay all or a portion of the negotiation costs, such as appraisal costs, fees for forestry or agricultural experts, surveyor expenses, and attorney's fees.** This provision allows the parties to determine what state's law will govern the agreement. Courts usually enforce these clauses as long as they result in a public policy and are reasonable. ~~It is important to consult with an attorney on this provision, as many laws vary widely by state and the law that governs the agreement significantly impacts the landowner's rights.~~
- ▶ Include a forum selection clause. This provision predetermines the particular location and court where a dispute in the agreement will be heard. Require that any lawsuit related to the agreement be filed in the county where the land is located or the landowner lives. This will lower litigation and travel costs and ensure that if a jury trial occurs, the jury will be local citizens.

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# Texas Pipeline Easement Negotiation Checklist

- ▶ It is important to understand dispute resolution clauses and to include the process best suited to the landowner's position. There are two primary types of dispute resolution: arbitration and mediation.
  - ▶ A licensed attorney that is familiar with easement negotiations should review all pipeline easement agreements. Although hiring an attorney that specializes in representing landowners in these types of transactions may be an additional cost on the front-end, it could save money in the long run by preventing a dispute from arising due to unclear or unfavorable language being included in the easement agreement.
  - ▶ In binding arbitration, a third party arbitrator hears evidence and delivers a decision that is final, absent evidence the arbitrator manifestly disregarded the law or committed fraud.
  - ▶ Mediation involves a neutral third party working with both the landowner and the company to reach a resolution. If the parties refuse to settle, the case goes to court.
- ▶ Landowners should consult with an attorney to determine which dispute resolution is best suited for them and what information should be included in these clauses.
- ▶ A licensed attorney that is familiar with easement negotiations should review all pipeline easement agreements. Although hiring an attorney that specializes in representing landowners in these types of transactions may be an additional cost on the front-end, it could save money in the long run by preventing a dispute from arising due to unclear or unfavorable language being included in the easement agreement.

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Checklist.pdf

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