

**THE INTERSECTION BETWEEN TEXAS CONDEMNATION LAW
AND WATER RIGHTS**

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CHAPTER 17

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THE INTERSECTION BETWEEN TEXAS CONDEMNATION LAW AND WATER RIGHTS

I. INTRODUCTION

As the population of Texas continues to grow, and if the current drought persists as projected, the importance of careful water resource management over the next few decades cannot be overstated. According to the Texas Water Development Board (the “Board”), the State’s population is projected to increase 82 percent between the years of 2010 and 2060, growing from 25.4 million to 46.3 million people.¹ The Board estimates that water usage in this state will increase from about 18,000,000 acre-feet per year in 2010 to about 22,000,000 acre-feet in 2060.² Existing water supplies, however, are projected to decrease about 10 percent, from about 17,000,000 acre-feet in 2010 to about 15,300,000 acre-feet in 2060.³ If Texas cannot meet its water supply needs, economic losses “could result in a reduction in income of approximately \$11.9 billion annually if current drought conditions approach the drought of record, and as much as \$115.7 billion annually by 2060, with over a million lost jobs.”⁴ Based on these projections, there is little doubt that governmental entities and the private sector are looking at all available options to ensure that Texans have adequate water resources in the years to come. One of these options is the use of eminent domain.

Many issues arise with the use of eminent domain for the acquisition and transportation of water, and this article will attempt to address those. There are questions about whether water corporations can get around certain limitations imposed on them under the Water Code for condemnation of groundwater. Private operators have recognized the voracious appetite brewing for water and are proposing the public/private partnerships to acquire and build water systems. Are they legal? Do they satisfy public use requirements under the Texas and United States Constitutions? Are there political restraints limiting the use of eminent domain, as the dearth of cases in which eminent domain has been exercised for the use of water suggests? Will recent legislation by the Texas legislature limiting what is considered a “public use” affect acquisition of water rights?

¹ Texas Water Development Board, *2012 State Water Plan* (Draft), available at <http://www.twdb.state.tx.us/wrpi/swp/draft.asp>.

² *Id.*

³ *Id.*

⁴ *Id.*

II. TEXAS LAW REGARDING WATER RIGHTS AND EMINENT DOMAIN

2.1 Water Rights in Texas: An Overview

In Texas, water is considered a real property right.⁵ However, a landowner’s rights to water differ depending on a water resource’s classification as “surface” or “ground” water.

2.1.1 Surface Water

Surface water is the “[t]he water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state.”⁶ It is expressly the property of the state, but is held in trust for the people.⁷ Exceptions to state ownership include diffused surface water (e.g., water that has collected but has not yet entered a “watercourse”),⁸ developed water or “reused” water (water legally possessed by a landowner and made artificially into surface water, e.g., groundwater pumped to the surface), and domestic or livestock reservoirs up to 200 acre-feet in capacity.

2.1.2 Groundwater

Groundwater is water percolating below the surface of the earth.⁹ It includes water normally considered well water, but does not include the underflow of a watercourse.¹⁰ Underground water is presumed to be groundwater for ownership purposes unless proven otherwise.¹¹

Traditionally, Texas adhered to the “rule of capture” regarding ownership of groundwater; that is, a landowner may pump and use as much groundwater as he wishes, regardless of the reasonableness of the use or the effect upon neighboring landowners’ rights

⁵ *Goodwin v. Hidalgo County Water Control & Improvement Dist. No. 1*, 58 S.W.2d 1092 (Tex. App.—San Antonio 1933), writ granted, (June 7, 1933) and writ dismissed by agreement, (July 15, 1936).

⁶ TEX. WATER CODE § 11.021.

⁷ *See In Re Adjudication of Water Rights of the Upper Guadalupe Segment*, 642 S.W.2d 438, 444 (Tex. 1982).

⁸ Navigable streams are generally synonymous with watercourses. See TEX. NAT. RES. CODE § 21.001(3) (defining “navigable stream”).

⁹ TEX. WATER CODE § 36.001(5).

¹⁰ *Texas Company v. Burkett*, 296 S.W. 273, 276 (Tex. 1927).

¹¹ *Id.* at 278.

to the same groundwater source.¹² The landmark case of *Houston & Texas Central Railway Co. v. East*¹³ established the rule of capture under which landowners may pump as much groundwater as they want from their land without regard to harming their neighbors. In practice, the rule has been mitigated by the regulatory effect of water districts, which are governmental entities authorized by the Texas Constitution to regulate the taking of groundwater.¹⁴

2.2 Authority for the Power of Eminent Domain over Water Rights

A host of governmental and quasi-governmental entities draw on the state's eminent domain authority to exercise some form of condemnation power, but authority broad enough to condemn water rights is rare. Moreover, because the use of eminent domain to acquire water rights is an emerging field in Texas law, in many cases the statutory authority which ostensibly would allow condemnation of water rights remains largely untested. That said, Texas law is replete with examples of the use of the power of eminent domain to manage water rights that political subdivisions and water districts already possess.

2.2.1 Texas Constitution

Article 16, Section 59 of the Texas Constitution provides for the creation of "conservation and reclamation districts" . . . "with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law."¹⁵ The subject matter referred to is the "control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes" . . . "the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State."¹⁶

The Constitution further mandates that private property may only be taken by the government for a *public use*.¹⁷ It is fundamental that a person's

property cannot be taken for another individual's private use and benefit.¹⁸

2.2.2 General Provisions Regarding Eminent Domain Power Under the Water Code

The Texas Water Code generally defines the limits of condemnation power over water resources in a "default-rule" fashion, but defers to the particular enabling legislation of a given governmental entity in the event of a conflict. The Wagstaff Act, enacted in 1931 and codified under section 11.033 of the Water Code, remains the law. It states:

The right to take water necessary for domestic and municipal supply purposes is primary and fundamental, and the right to recover from other uses water which is essential to domestic and municipal supply purposes is paramount and unquestioned in the policy of the state. All political subdivisions of the state and constitutional governmental agencies exercising delegated legislative powers have the power of eminent domain to be exercised as provided by law for domestic, municipal, and manufacturing uses and for other purposes authorized by this code, including the irrigation of land for all requirements of agricultural employment.¹⁹

Section 11.033 applies only to surface rights,²⁰ and may be trumped by more specific limits on a given governmental entity.²¹

Section 49.222 of the Water Code governs all general and special law districts created under the Texas Constitution,²² and provides general eminent domain authority for all general or special law districts or water supply corporations to acquire by condemnation:

¹² *Houston & Tex. Cent. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904).

¹³ *Id.*

¹⁴ See *Sipriano v. Great Spring Waters of Am., Inc. a/k/a Ozarka*, 1 S.W.3d 75, 80 (Tex. 1999).

¹⁵ TEX. CONST. art. 16, § 59(b).

¹⁶ TEX. CONST. art. 16, § 59(a).

¹⁷ *Id.* at art. 1, § 17.

¹⁸ *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958).

¹⁹ TEX. WATER CODE § 11.033.

²⁰ See TEX. WATER CODE § 11.002 (5).

²¹ See TEX. WATER CODE § 49.002 ("This chapter applies to all general and special law districts to the extent that the provisions of this chapter do not directly conflict with a provision in any other chapter of this code or any Act creating or affecting a special law district. In the event of such conflict, the specific provisions in such other chapter or Act shall control.")

²² See *Id.*

[A]ny land, easements, or other property inside or outside the district boundaries, or the boundaries of the certificated service area for a water supply corporation, necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes, and may elect to condemn either the fee simple title or a lesser property interest.²³

Section 49.222 specifically prohibits the use of condemnation to acquire groundwater or other water rights.²⁴

Despite this default rule, section 49.002(b) of the Water Code specifies that its rules defer to the enabling legislation of a particular governmental entity, which may trump section 49.222's general prohibition on groundwater condemnation. While the state clearly has the right to regulate the use of underground water,²⁵ and the power to condemn it,²⁶ the question of who may take it is often unclear.

III. THE POWER TO CONDEMN—WHO HAS IT AND TO WHAT EXTENT?

3.1 Express Authority of Legislature Required

The power of eminent domain is vested in the Legislature. No taking of property may be had without a grant of authority by the Legislature.²⁷ Stated another way, “the power of eminent domain claimed by any agency of the State must be conferred either expressly or by necessary implication by the Texas Legislature.”²⁸ As shown below, a great variety of “conservation and reclamation districts” have been authorized under the general charter of Article 16, Section 59 of the Texas Constitution. Several types of general law districts (i.e., those created under existing statutes) and special law districts (i.e., created by special legislation) are relevant to water resources management.

²³ TEX. WATER CODE § 49.222(a).

²⁴ TEX. WATER CODE § 49.222(c).

²⁵ See *Friendswood Dev. Co. v. Smith-Sw. Indus.*, 576 S.W.2d 21, 29–30 (Tex. 1978).

²⁶ See *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 630-31 (Tex. 1996).

²⁷ *Saunders v. Titus County Fresh Water Supply District No. 1*, 847 S.W.2d 424, 427 (Tex. App.—Texarkana 1993, no writ).

²⁸ *Id.*

3.2 General Law Districts

As previously stated, general law districts are those that are created under the existing statutes found in the Water Code. The Water Code provides for a variety of districts that may be created by filing a petition, serving the proper notices, and a holding a hearing before either the county commissioners court or the Texas Commission on Environmental Quality on the feasibility and the need of creating a conservation district. The following is a sampling of general law districts and their respective eminent domain powers.

3.2.1 Groundwater Conservation Districts

A Groundwater Conservation District, chartered under Chapter 36 of the Texas Water Code, is a general law district and has eminent domain power including fee simple acquisition,²⁹ but does not have the power of eminent domain over surface or groundwater:

The power of eminent domain authorized in this section may not be used for the condemnation of land for the purpose of: (1) acquiring rights to groundwater, surface water or water rights; or (2) production, sale, or distribution of groundwater or surface water.³⁰

3.2.2 MUDs, SUDs, WCIDs, etc.

General law districts, such as Municipal Utility Districts (“MUDs”), Special Utility Districts (“SUDs”), and Water Control and Improvement Districts (“WCIDs”), are granted condemnation authority by Water Code Section 49.222, which provides:

(a) A district or water supply corporation may acquire by condemnation any land, easements, or other property inside or outside the district boundaries, or the boundaries of the certificated service area for a water supply corporation, necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes, and may elect to condemn either the fee simple title or a lesser property interest [. . .]

(c) The power of eminent domain may not be used for the condemnation of land for the purpose of acquiring rights to

²⁹ See TEX. WATER CODE § 36.105.

³⁰ *Id.* at § 36.105(b).

underground water or of water or water rights.³¹

MUDs chartered under Chapter 54 of the Texas Water Code are created under Article 16, Section 59 of the Constitution and have the general eminent domain powers of section 49.222 that specifically exclude condemnation of water rights. Additionally, some tangential limitations apply to a municipal utility district's exercise of eminent domain, such as limits on placing water supply facilities outside their boundaries.³²

General law SUDs may be created under Chapter 65 of the Water Code.³³ They are typically created by customer-owned rural water supply corporations that have chosen to form a political subdivision. While they have the power to "purchase, construct, acquire, own, operate, maintain, repair, improve, or extend" property to accomplish their purposes, they too fall under the Water Code's general prohibition on the exercise of eminent domain to acquire water rights. Accordingly, SUDs' eminent domain powers may only be used for the purposes announced in Section 49.222.

The general law requirements for the creation of WCIDs are found in Chapter 51 of the Water Code. Chapter 51 states that WCIDs may be created under and subject to the authority, conditions, and restrictions of either Article III, Section 52, of the Texas Constitution, or Article XVI, Section 59, of the Texas Constitution, and like the previous general law districts are subject to the eminent domain rules announced in section 49.222.

3.2.3 Fresh Water Supply Districts

Fresh Water Supply Districts ("FWSDs") are created under Chapter 53 of the Water Code. Like MUDs and SUDs, FWSDs are creatures of Article 16, Section 59 of the Constitution³⁴ and have the eminent domain powers of section 49.222 discussed above. Fresh Water Supply Districts may be created to conserve, transport, and distribute fresh water from any sources for domestic and commercial purposes.³⁵

³¹ Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995.

³² TEX. WATER CODE, § 54.209(1) (Stating that a municipal utility district may not use eminent domain to acquire "a site for a water treatment plant, water storage facility, wastewater treatment plant, or wastewater disposal plant" outside its boundaries).

³³ See TEX. WATER CODE § 65.012.

³⁴ *Matlock v. Dallas Arcadia Fresh Water Supply Dist. No. 1*, 14 S.W.2d 360, 362 (Tex.App.—Dallas 1929, no writ).

³⁵ TEX. WATER CODE § 53.101.

While a general law FWSD cannot condemn water rights, it may "acquire water rights and privileges in any way that an individual or corporation may acquire them," and "may hold those rights and privileges, either by gift, purchase, devise, appropriation, or by other means."³⁶ A FWSD could then use its power of eminent domain to acquire the right-of-ways necessary to transport its water.

3.2.4 Water Supply Corporations

Water supply corporations are non-profit corporations created under Chapter 67 of the Water Code. They exist to provide water service to "a municipality, a private corporation, an individual, or a military camp or base" and have narrower powers than general law districts.³⁷ They are subject to the default rules on exercise of eminent domain powers under section 49.222, which excludes the power to condemn water rights.

3.3 Special Law Districts

Conservation and reclamation districts may also be created by independent special acts of the legislature. Numerous MUDs, SUDs, FWSDs, and Ground Water Conservation Districts have been created in this manner. As previously stated, special law districts' powers of eminent domain are prescribed and limited by Section 49.222 of the Water Code, unless the enabling legislation of the district provides otherwise.³⁸ This means that some special law districts may have lesser or greater condemnation powers than a twin district that was created under the general laws and procedures described above. For example, the Crane County Water District, a special law FWSD, has the power of eminent domain to acquire "fee simple title to land or any other interest in land and other property and easements, including water rights, land, or any other interest in land needed for water fields, water wells, or reservoirs...,"³⁹ whereas its general law counterparts may not condemn water rights.

3.3.1 River Authorities

River Authorities⁴⁰ are special law districts that have an independent legislative pedigree, often

³⁶ TEX. WATER CODE § 53.104.

³⁷ TEX. WATER CODE § 67.002.

³⁸ See TEX. WATER CODE § 49.002.

³⁹ TEX. SPECIAL DISTRICT LOCAL LAWS CODE § 6902.117.

⁴⁰ E.g., the Angelina-Neches River Authority, Brazos River Authority, Upper, Central and Lower Colorado River Authorities, Guadalupe-Blanco River Authority, Upper Guadalupe River Authority, Lavaca-Navidad River

dating to the early 1900s, which trumps the Water Code and entitles them to such additional eminent domain powers, as granted by their enabling legislation, up to and including acquisition of fee simple title and condemnation of groundwater rights.

Their eminent domain powers are granted in their enabling statutes in addition to those granted under the Water Code. For example, in spite of the Water Code's general prohibition, the Guadalupe-Blanco River Authority is authorized to exercise eminent domain over "water supply facilities and conservation storage capacity within or without the District from any person, including the State or any of its agencies and subdivisions and the United States of America and any of its agencies and subdivisions[.]"⁴¹

3.3.2 Special Law Districts Without the Ability to Condemn Water Rights

Not all special law districts have as broad a grant of eminent domain power over water rights. By way of example, the Edwards Aquifer Authority is expressly prohibited from exercising its eminent domain power to acquire water rights of any kind.⁴²

3.4 Municipalities

Municipalities have broad authority to utilize the power of eminent domain for water resource management under the Local Government Code:

Authority, Neches River Authority, Palo Duro River Authority, Red River Authority, Sabine River Authority, San Antonio River Authority, San Jacinto River Authority, Sulphur River Authority, Trinity River Authority.

⁴¹ Guadalupe-Blanco River Authority Act, Art. 8280-106, § 2 (c). Vernon's Civil Statutes, Texas Acts 1933, 43rd legislature, First Called Session, Page 198, Chapter 75, as amended by Acts 1935, 44th Legislature, First Called Session, Page 615, Chapter 410, as amended by Acts 1969, 61st Legislature, Regular Session, Page 1465, Chapter 432 and as amended by Acts 1975, 64th Legislature, Page 1149, Chapter 433.

⁴² Edwards Aquifer Authority Act, § 1.11 (g); Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350; as amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60–2.62 and 6.01–6.05, 2001 Tex. Gen. Laws 1991, 2021–22 and 2075–76; and Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01–2.12, 2007 Tex. Gen. Laws 4612, 4627; Act of May 28, 2007, 80th Leg., R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901; and Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818.

(a) When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public purpose to acquire public or private property, whether located inside or outside the municipality, for any of the following purposes: (1) the providing, enlarging, or improving of a [. . .] water works system, including reservoirs, other water supply sources, watersheds, and water storage, drainage, treatment, distribution, transmission, and emptying facilities; sewage system including sewage collection, drainage, treatment, disposal, and emptying facilities []; (2) the determining of riparian rights relative to the municipal water works; (3) the straightening or improving of the channel of any stream, branch, or drain; [] and (5) for any other municipal purpose the governing body considers advisable.

(b) A municipality condemning land under this section may take a fee simple title to the property if the governing body expresses the intention to do so.⁴³

Subject to the Property Code restrictions discussed later in this paper, municipalities have statutory authority to exercise eminent domain over water rights as well as other rights referenced above.⁴⁴

Additionally, under the Water Code, municipalities with populations exceeding 500,000 may condemn certain substandard water systems and facilities:

In addition to any other rights provided by law, a municipality with a population of more than 500,000 may exercise the power of eminent domain in the manner provided by Chapter 21, Property Code, to acquire a substandard water or sewer system if all the facilities of the system are located entirely within the municipality's boundaries. The municipality shall pay just and adequate compensation for the property. In this subsection, "substandard water or sewer system" means a system that is not in compliance with the municipality's

⁴³ TEX. LOC. GOV'T. CODE § 251.001.

⁴⁴ *Id.*; see also TEX. WATER CODE § 11.033.

standards for water and wastewater service.⁴⁵

IV. PUBLIC USE: THE CONSTITUTIONAL LIMITATION OF EMINENT DOMAIN

The Federal⁴⁶ and Texas⁴⁷ Constitutions require that eminent domain powers be exercised only for public uses. The determination of whether a condemnation is for public use is a question of law, and courts give great weight to any declaration by the legislature that the condemnation is for a public use.⁴⁸

4.1 Texas Courts Adopt Liberal View of “Public Use”

Generally, Texas courts take a liberal view in determining whether a condemnation is for a public use.⁴⁹ Two Texas Supreme Court cases which illustrate how Texas courts have liberally construed the “public use” requirement are *Borden v. Trespalacios Rice and Irrigation Co.*⁵⁰ and *Davis v. City of Lubbock*.⁵¹

In *Borden*, the condemnees contended that the condemnation of their property by an entity otherwise authorized to condemn property was not for a public use and was, therefore, unlawful.⁵² The Court restricted the definition of “public use” to those uses that result in the public acquiring some definite right or use in the undertaking to which the property is devoted.⁵³ The Court reasoned that when the character of the use is not plainly expressed by the statute granting the power of eminent domain, courts must look at the laws authorizing the creation of the

condemning entity.⁵⁴ The act creating the canal entity entitled any adjoining landowners of the canal to the supply of water in accordance with terms of a contract between the condemning entity and the landowner. The Court held the condemnation of private property by a private canal corporation to be for a public use where the corporation had a duty to contract to deliver water to adjoining landowners of the canal.⁵⁵ The Court, however, went on to state that this power to contract does not result in an absolute determination that the taking is for public use. The Court stated that the power to contract could not be used to absolve common carriers and others engaged in activities for the public interest from the duties these entities owe to the public.⁵⁶

In *Davis*, the landowner asserted that the taking by the City of Lubbock and its Urban Renewal Agency of slum and blighted areas was not a taking for “public use.” The act creating the Urban Renewal Agency allowed land to be acquired by condemnation and then leased or sold to private entities under conditions designed to prevent the recurrence of slums. The Court addressed the constitutional provisions, stating that great weight is to be given to the legislature’s determination of public use. The Court reviewed the evolution of its rulings on “public use,” including *Borden*, and noted that the Court’s prior rulings had adopted a rather liberal view as to what is or is not a “public use” and upheld a liberal reading of “public use.” The Court reasoned that the purpose for which property had been condemned was to rid cities of blighted and slum sections, and, therefore, the condemnation of private property and the subsequent sale of that property to private individuals subject to certain deed restrictions effectuated the purposes of the legislation and was for the public use.⁵⁷

4.2 Courts Generally Look at Purpose of Condemnation in Determining Public Use

The majority of Texas cases have found that a condemnation is valid when the primary purpose is for a public use even if some incidental private use is made of the condemned property rights.⁵⁸ For example, in *Coastal States Gas Producing Co. v.*

⁴⁵ TEX. WATER CODE § 13.247(d).

⁴⁶ U.S. CONST. AMEND. 5; *Kohl v. United States*, 91 U.S. 367, 374 (1875).

⁴⁷ TEX. CONST. art. 1, § 17; *Davis v. City of Lubbock*, 326 S.W.2d 699, 702-03 (Tex. 1959).

⁴⁸ *Housing Authority of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 84 (Tex. 1940).

⁴⁹ See e.g., *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958); *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 719 (Tex. App.—Corpus Christi 2000, review denied); *Higginbotham*, 143 S.W.2d at 88; *But see e.g. Loesch v. Oasis Pipe Line Co.*, 665 S.W.2d 595, 596 (Tex. App.—Austin 1984, writ ref’d n.r.e) (stating that “public use” will be found only when some definite right or use in the business or undertaking to which the property is devoted to the public).

⁵⁰ 86 S.W. 11 (Tex. 1905), *aff’d* 204 U.S. 667 (1907).

⁵¹ 326 S.W.2d 699 (Tex. 1959).

⁵² *Borden*, 86 S.W. at 14.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 15.

⁵⁶ *Id.*

⁵⁷ *Davis*, 329 S.W.2d at 708. The Court reasoned the purpose of the legislation was to prevent the reoccurrence of unwholesome and unsanitary conditions. *Id.*

⁵⁸ See e.g., *Freeman v. Cherokee Water Co.*, 11 S.W.3d 480, 484 (Tex. App.—Texarkana 2000, pet. denied).

Pate,⁵⁹ a lessee on state lands sought to condemn the property of an adjoining landowner in order to erect power machinery and construct storage tanks to ultimately drill a directional well from the constructed machinery and storage tanks. Although the condemnee did not expressly appeal to the court to consider whether the property was being condemned for a public use, the Supreme Court, on its own initiative, examined the record to determine whether another ground existed for upholding the condemnation. The Supreme Court stated that a condemnation by the State for purposes of mineral production would be for the public use and that the same rule would be applied to a lessee of the State.⁶⁰ Applying this rule, the Supreme Court upheld the taking because under the terms of Coastal State's lease with the State a portion of the production was dedicated to the Permanent School Fund. The fact that the condemnor had the possibility of making a profit from the venture by retaining and selling a majority of the production was not enough in *Coastal States* to turn a public use into a private use. That said, a corporation may lose its power to condemn when its use of property is no longer for the accomplishment for which it was organized, even though it continues to provide a service to private parties generally provided to the public.⁶¹

4.3 Cases Where No Public Use Found

*Franklin County Water District v. Majors*⁶² and *Brazos River Conservation and Reclamation Dist. v. Harmon*⁶³ are two examples of cases in which courts held that the uses for which two water district entities condemned property did not constitute public uses. In both *Majors* and *Harmon*, the water districts in question condemned land for the construction of dams and lakes as well as land to be used for campsites, cabin sites, parks and other recreational purposes. The respective courts held that the districts had the statutory authority to condemn property necessary for the construction of dams and reservoirs but lacked statutory authority to condemn for the purpose of subletting to private individuals for profit.

⁵⁹ 309 S.W.2d 828 (Tex. 1958).

⁶⁰ *Id.* at 832.

⁶¹ *Wise v. Abilene Water Co.*, 261 S.W. 549 (Tex. App.—El Paso 1924, writ dismissed w.o.j.).

⁶² *Franklin County Water Dist. v. Majors*, 476 S.W.2d 371 (Tex. Civ. App. —Texarkana 1972, writ ref'd n.r.e.).

⁶³ *Brazos River Conservation & Reclamation Dist. v. Harmon*, 178 S.W.2d 281 (Tex. Civ. App. —Eastland 1944, writ ref'd w.o.m.).

4.4 Public Necessity

In any condemnation, not only must the taking be for a public use, but the taking must also be necessary to achieve the declared public purpose. While this requirement is equally as fundamental as “public use,” the level of judicial scrutiny is low. The condemnor’s discretion to determine public necessity is nearly absolute.⁶⁴ Courts only review the exercise of that discretion if there is a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously.⁶⁵

In the case of *Malcomson Road Utility District v. Newsom*,⁶⁶ private developers seeking to acquire property owned by Newsom asked the Harris County Flood Control District (“HCFCD”), which also had a need to construct flood control measures on the property, to condemn the portions of Newsom’s land that they had failed to purchase. After determining the drainage ditch and retention pond were a public necessity and would serve the public purpose of drainage, the HCFCD made an offer to Newsom. When Newsom rejected the offer, the HCFCD filed condemnation proceedings.

Newsom argued that the HCFCD’s determination of public use and necessity were arbitrary and capricious, resulted from fraud or bad faith, or were abuses of discretion. The HCFCD claimed that it chose Newsom’s land for the pond because doing so would increase the tax base more than if Newsom had been allowed to keep his land and develop it for himself.⁶⁷ However, the HCFCD did none of its own investigation of this claim but relied on the information received from one developer, whose interest was clearly adverse to Newsom.⁶⁸ Additionally, HCFCD only required easements be taken for ditch expansions.⁶⁹ The HCFCD, however, took Newsom’s land in fee simple for the expansion of the ditch even though the sole alleged basis for the taking was that HCFCD required the ditch expansion.⁷⁰ The court found this evidence raised a fact issue as to whether the HCFCD reached its condemnation decisions arbitrarily and capriciously or by abusing its discretion.⁷¹ While the HCFCD’s

⁶⁴ See *Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610, 614 (Tex. App. —Corpus Christi 1989, writ denied).

⁶⁵ *Id.* at 614.

⁶⁶ 171 S.W.3d 257 (Tex.App.—Houston [1st Dist.] 2005, pet. denied).

⁶⁷ *Id.* at 273.

⁶⁸ *Id.*

⁶⁹ *Id.* at 272–73.

⁷⁰ *Id.*

⁷¹ *Id.*

failure to investigate the scope of the taking may not be enough to amount to a finding that the taking was arbitrary and capricious, it was enough to overcome summary judgment on the issue.

4.5 The *Kelo* Decision

In June of 2005, the United States Supreme Court held that a taking for economic development purposes is an allowed “public use” under the Fifth Amendment to the United States Constitution in *Kelo v. City of New London, Connecticut*.⁷²

In that case, the City of New London, Connecticut, approved a development plan that was projected to generate jobs, increase tax revenues and revitalize an economically distressed city. The development plan included a waterfront hotel, restaurants and shopping, a pedestrian river walk, eighty new residences and a 90,000-square-foot drug company research facility. The City of New London had been in an economic decline and, in fact, was declared a “distressed municipality” by a state agency. The government began to invest in this area of New London in an effort to revitalize the city, and Pfizer, Inc., announced that it would build a \$300 million research facility in the area. The plan was to revitalize New London, create jobs, generate tax revenue and make the city more attractive for leisure and recreational activities on the waterfront.

The Supreme Court, by a narrow majority, allowed the condemnations to go forward on the basis of economic development because the area was distressed, there was an overall economic development plan, there was a State statute that authorized condemnation to promote economic development, and because the project had to be executed as a whole in order for the plan to be successful. The United States Supreme Court found that promoting economic development was a traditional function of government.

Following *Kelo*, there was an outcry in numerous states across the country, including Texas, to protect property owners from condemnations for economic development. Many states adopted legislation to restrict condemnations for economic development purposes. In Texas, the result of this effort was Senate Bill 7, which was enacted and partially codified at Section 2206.001 of the Texas Government Code:

(b) A governmental or private entity may not take private property through the use of eminent domain if the taking: (1) confers a private benefit on a particular private party through the use of the

property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas [. . .]; or (4) is not for a public use.

(b -1) Subsection (b)(3) does not prohibit the taking of private property through the use of eminent domain for economic purposes if the economic development is a secondary purpose resulting from the elimination of urban blight under Subchapter I, Chapter 214, Local Government Code. This subsection expires December 31, 2016.

(c) This section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for: (1) transportation projects [. . .]; (2) entities authorized under Section 59, Article XVI, Texas Constitution, including: (A) port authorities; navigation districts; and (C) any other conservation or reclamation districts that act as ports; (3) water supply, wastewater, flood control, and drainage projects; (4) public buildings, hospitals, and parks; (5) the provision of utility services; (6) a sports and community venue project [. . .]; (7) the operations of: (A) a common carrier pipeline; or (B) an energy transporter [. . .]; (8) a purpose authorized by Chapter 181, Utilities Code; (9) underground storage operations [. . .]; (10) waste disposal projects; or (11) library, museum, or related facility and any infrastructure related to the facility.

(d) This section does not affect the authority of a governmental entity to condemn a leasehold estate on property owned by the governmental entity.

(e) The determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstance prohibited by Subsection (b) does not create a presumption with respect to whether the taking involves that act or circumstance.

⁷² 545 U.S. 469 (2005).

Given the critical and inherent need for water for domestic and municipal purposes, it is unlikely that any such condemnation would fall under the “economic development purpose.” That said, Senate Bill 7 and its progeny could lead to fact intensive litigation when public and private entities partner together and eminent domain is exercised in furtherance of that partnership.

**V. ROADBLOCKS AND ICEBERGS:
ISSUES TO LOOKOUT FOR WHEN
EXERCISING THE POWER OF
EMINENT DOMAIN**

5.1 Public Use Restrictions: Use of Public-Private Partnerships to Acquire Water Rights by Eminent Domain

5.1.1 General Principle: Private Property May Not Be Taken for Private Gain

As discussed in the preceding section, the power to condemn generally may not be contracted away in a bargain with a private interest, because such an abdication is a violation of the public interest in a governmental function.⁷³ Texas courts have, however, allowed public-private partnerships and the use of eminent domain in water-related matters.⁷⁴

5.1.2 Condemnation Agreements

In the case of *Malcomson Road Utility District v. Newsom*,⁷⁵ a Texas court had occasion to discuss a public/private condemnation agreement. The condemnation agreement before the court provided:

If the condemnation of the above referenced tract is held to be invalid either judicially or otherwise, you will not be reimbursed by the District for any of the costs associated with the condemnation.⁷⁶

This condemnation agreement differed from a traditional pre-funding agreement in that it essentially indemnified the Harris County Flood Control District from any costs should the condemnation fail for any

reason. This is evident from the fact that the developers fronted all the costs of the condemnation and would only be reimbursed if the condemnation was completed and bonds were sold and approved. The eminent domain statutes place certain burdens on a condemnor to discourage the condemnor from seeking condemnation unfairly or irresponsibly. The Texas Property Code either requires or allows the trial court to award damages against the condemnor and in favor of the landowner when a condemnation is voluntarily or involuntarily dismissed or when the trial court denies the right to condemn. By removing this statutory deterrent, the District had no incentive to ensure the condemnation was undertaken in the most fair and responsible manner.

While questioning the wisdom of the condemnation agreements, the court failed to rule on the legality or propriety of the agreements. The court only noted that “the condemnation agreements, when viewed in the required light, and when considered with the other evidence that Newsom adduced, raise a fact issue on whether the District arbitrarily and capriciously determined that the takings were necessary.”⁷⁷ Thus, the question is left open as to whether such agreements may be viable options for developers to use in persuading a condemning authority to condemn certain property.

5.1.3 Practical Considerations

In light of the concerns discussed by the court in *Malcomson*, a public/private partnership seeking to use eminent domain should have the public entity participate in the project as much as possible in order to successfully fend off a challenge to the right to condemn. Such efforts on the part of the public entity should include the following: (1) acquiring easements, including negotiation; (2) owning easements; (3) owning the physical appurtenances of the project; (4) acquiring/identifying customers to be served by the line; (5) utilizing condemnation agreements that do not indemnify the District for opposing party’s attorney’s fees should the Court find no right to condemn; (6) making engineering decisions on location of the project; and (7) hiring an appraiser.

5.2 Condemnation of Other Public Uses

When one governmental entity desires to condemn a property right that is already in use by another governmental entity, it must show that its use is “paramount” to the other’s use. More particularly, the rule is stated by the courts as follows: “If property is already devoted to public use, a condemning authority may not seek to condemn that property if doing so would practically destroy the property’s

⁷³ *Gay Inv. Co. v. Tex. Turnpike Auth.*, 510 S.W.2d 147 (Tex. App.—Dallas 1974, writ ref’d n.r.e.).

⁷⁴ It is arguable that joint power agencies created under Chapter 163 of the Texas Utilities Code could use their condemnation powers to condemn land for the building of cooling pools or reservoirs necessary to meet their purpose of providing power.

⁷⁵ 171 S.W.3d 257 (Tex.App.—Houston [1st Dist.] 2005, pet. denied).

⁷⁶ *Id.* at 274.

⁷⁷ *Id.*

existing use unless the condemning authority shows that its intended use is of paramount public importance and that its purpose cannot be otherwise accomplished.”⁷⁸

This rule was recently discussed by the Texas Supreme Court in *Canyon Regional Water Authority v. Guadalupe-Blanco River Authority*.⁷⁹ In that case, the Canyon Regional Water Authority (“CRWA”) operated a facility that pumped water from Lake Dunlap which was owned by Guadalupe-Blanco River Authority (“GBRA”). CRWA was operating under a contract to purchase water from GBRA and had an easement for its pipeline and intake into the lake.⁸⁰ In 2004, the CRWA ran a new pipeline to and under Lake Dunlap and constructed a new intake structure in the lake based on the assumption that it already had the necessary land rights. The GBRA disagreed and sued to restrain the CRWA. The CRWA counterclaimed by petitioning to condemn the subject property. In relevant part, the trial court found that the CRWA’s proposed use was paramount. The Court of Appeals reversed, however, because the CRWA had not met its burden to show that its use could not be accomplished by other means.⁸¹ CRWA appealed this decision to the Texas Supreme Court.

The Texas Supreme Court agreed that CRWA did not have the authority to construct a new intake structure in the Lake under its existing easement and quickly turned its attention to the paramount public use test. In discussing the paramount public use test, the Court stated that GBRA would be required to show that CRWA’s proposed condemnation would “practically destroy or at least materially interfere with the existing public use” of the lake in order for CRWA to be required to demonstrate that its purpose was paramount and could not be accomplished in any other way.⁸² The Court further held that “one must look to the entire use of the affected property, and not a portion of its use, when considering practical destruction or material interference.”⁸³ The Court held that, because the new intake would only prevent access to less than one half of one percent of Lake Dunlap, it would not “practically destroy or materially interfere” with the existing public use of recreation.

⁷⁸ *Sabine & E.T. Ry. v. Gulf & I. Ry.*, 46 S.W. 784, 786 (Tex. 1898); *Central Power & Light Co. v. Willacy County*, 14 S.W.2d 102, 103 (Tex. App.—San Antonio 1929, no writ).

⁷⁹ 258 S.W.3d 613 (Tex. 2008).

⁸⁰ *Id.* at 614-15.

⁸¹ *Id.* at 615.

⁸² *Id.* at 617.

⁸³ *Id.* at 617.

In effect, the Court avoided the question of whether the new intake was of paramount importance to the existing use.⁸⁴

5.3 7 U.S.C. § 1926(b): Federal Debt and Rural Water Associations

Under 7 United States Code, Section 1926, the Farmer’s Home Administration (“FHA”) provides credit to non-profit rural water associations nationwide for various purposes, including maintaining water supply services in rural areas. One significant side effect of this aid is that the federal statute prohibits any effort by other governmental entities to acquire assets or service areas from borrowers under the statute. This results in a general protection of rural water associations which carry federal debt from condemnation or other interference, in that any transfer of the rural debtor’s water rights or service areas must be approved by the FHA.

The Fifth Circuit has upheld the strong language of Section 1926(b) against would-be condemners. In *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*,⁸⁵ the Court found a city’s effort to condemn the facilities of a rural water association to be prohibited by the statute, stating: “[t]o read a loophole into this absolute prohibition, as [the city] would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b).”⁸⁶

This policy-driven measure was designed to protect farmers from having to bend to municipal authorities for water supply. However, some argue that the statute is often used offensively to effectively game rural property values against urban expansion. As one author notes:

The City of Belton, located in central Texas along IH-35, has also been frustrated by a protected water supplier in its efforts to attract outside economic investment in its community. In 1997, the City of Belton’s Economic Development Corporation purchased 190 acres to develop an industrial park on a site that had no water customers at that time. A portion of the proposed site was part of the certified area of the Dog Ridge Water Supply Corporation, which had a small three-inch water line along the boundary of the site. When

⁸⁴ *Id.* at 619.

⁸⁵ 816 F.2d 1057 (5th Cir. 1987).

⁸⁶ 816 F.2d at 1059.

approached by the City about purchasing the right to serve the tract, Dog Ridge asked for \$3 million. Eventually, the two sides agreed on a \$100,000 payment to transfer the CCN to the City. Two years later, a large corporation dropped its option on a 450-acre tract near Belton, partially because Dog Ridge demanded nearly \$400,000 for the right to serve the site despite the fact that its facilities did not meet the state's water-pressure requirements.⁸⁷

The federal protection of 7 U.S.C. 1926(b) serves as additional leverage for landowners and agricultural interests in resisting municipal expansion over rural water rights.

5.4 Regulatory Takings

While not an actual exercise of eminent domain authority, groundwater rights may be affected, and in a sense "taken," by the action of regulatory agencies such as water districts. In 1996, the Texas Supreme Court addressed a constitutional challenge to a water district's regulatory power over groundwater in *Barshop v. Medina County Underground Water Conservation District*.⁸⁸

In *Barshop*, the Medina County Underground Water Conservation District joined with the Uvalde County Underwater Conservation District and several cattle interests to challenge the constitutionality of the act which created the Edwards Aquifer Authority⁸⁹ on the basis that it allowed the Edwards Aquifer Authority "to regulate groundwater withdrawals by well from the aquifer," including imposing an aquifer-wide cap on water withdrawals by wells of 450,000 acre-feet of water per year through the year 2007 and 400,000 acre-feet per year thereafter.⁹⁰

The plaintiffs challenged the Act on numerous grounds. The overall thrust of their claim was that the groundwater was a vested right that was being taken without due process or compensation. The Supreme Court dodged the issue of whether groundwater vested before or after it was captured by the landowner,

instead upholding the constitutionality of the Act on the grounds that: (1) the Act affected the use of water, not title to it and (2) even if plaintiffs were divested of a real property right, the state has condemnation power to do so as long as just compensation was paid, and the Act expressly provided for just compensation if a taking resulted,⁹¹ and (3) the administrative process set forth in the Act was adequate due process in that it provided for "contested case hearings and judicial review of the findings from such hearings."⁹²

Challenges to the operation of water districts such as the Edwards Aquifer Authority based on a regulatory taking theory are on the rise in Texas, but are largely uncharted territory.

5.5 Private Real Property Rights Preservation Act

The Texas Private Real Property Rights Act, or "Property Rights Act," allows a private property owner to file suit to determine if a subdivision of the state has taken his property. The Property Rights Act creates two causes of action in favor of real property owners: (1) a statutory cause of action for taking; and (2) a cause of action based on governmental action taken without preparing a "takings impact assessment" ("TIA") if the Property Rights Act requires one.⁹³ The Property Rights Act applies to "governmental entities," including political subdivisions such as constitutional water authorities.⁹⁴ A water regulating authority's actions are generally subject to the requirements of the Property Rights Act unless an exception to that Act's coverage applies.⁹⁵

Routine permitting by the Edwards Aquifer Authority was found not to trigger the TIA requirement in *Bragg v. Edwards Aquifer Authority*.⁹⁶

VI. VALUATION OF WATER RIGHTS

In *Duer Wagner & Co. v. City of Sweetwater*,⁹⁷ the landowner, Duer Wagner, owned a 40% undivided interest in a 1,800 acre tract near the City of Sweetwater. For many years, Sweetwater had purchased groundwater from wells located on the

⁸⁷ Scott Hounsel, *Note: Water Associations and Federal Protection Under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status*, 80 TEXAS L. REV. 155, 173-74 (2001).

⁸⁸ 925 S.W.2d 618, 626 (Tex. 1996).

⁸⁹ Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.06, 1993 Tex. Gen. Laws 2355, as amended by Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505.

⁹⁰ *Barshop*, 925 S.W.2d at 624; Edwards Aquifer Authority Act at §§ 1.02, 1.14.

⁹¹ *Id.* at 631-632.

⁹² *Id.* at 633.

⁹³ TEX. GOV'T CODE §§ 2007.021, 2007.044.

⁹⁴ *Clear Lake City Water Auth. v. Clear Lake Util. Co.*, 549 S.W.2d 385, 391 (Tex. 1977).

⁹⁵ *See* TEX. GOV'T CODE §§ 2007.003(b)-(e) (excepting certain governmental actions); *Id.* at § 2007.043(a) (requiring TIA only for governmental actions described in sections 2007.003(a)(1)-(3)).

⁹⁶ 71 S.W.3d 729, 738 (Tex. 2002).

⁹⁷ 112 S.W.3d 628 (Tex. App.—Eastland 2003, no pet.).

land. When Mr. Wagner decided to significantly increase the price for the water, the city responded by simply condemning the entire tract in order for the City to obtain water from the underlying aquifer.

Traditionally, the three methods for determining the market value of property are the comparable sales method, the cost method and the income method. At issue in *Duer Wagner* was the use of the income method of valuation, that is, whether Mr. Wagner could value his land based on the income he received from the sale of his groundwater. The trial court ruled that the income method was invalid as a matter of law for determining the market value of the property at issue. However, the trial court still considered the excluded evidence based on the income method when reaching its findings of facts and conclusions of law.⁹⁸ The Eastland Court of Appeals found that it was reversible error for the court to, on the one hand exclude evidence, but on the other hand, base its ruling on the very same excluded evidence. On June 18, 2003, the court issued its opinion remanding the case to the trial court.

In reaching its holding, the Court of Appeals did not decide whether *Duer Wagner*'s theory of the case was correct. In the aftermath of the opinion it was uncertain whether evidence of the income stream generated by groundwater wells would be admissible to prove the fair market value of land taken to acquire and operate the wells.

About two months after the *Duer Wagner* opinion, the Texas Legislature's enactment of two new provisions to the Texas Property Code became effective. These provisions addressed both the procedure for condemnation of groundwater and the valuation of groundwater.

6.1 Texas Property Code Section 21.0121: Condemnation to Acquire Water Rights

Texas Property Code section 21.0121 now reads as follows:

(a) In addition to the contents prescribed by Section 21.012(b), a condemnation petition filed by a political subdivision of this state for the purpose of acquiring rights to groundwater or surface water must state the *facts to be proven* are that the political subdivision has:

- (1) prepared a drought contingency plan;
- (2) developed and implemented a water conservation plan that will result in

the *highest practicable levels* of water conservation and *efficiency achievable* in the political subdivision's jurisdiction;

- (3) made a *bona fide good faith effort* to obtain *practicable alternative water supplies* to the water rights the political subdivision proposes to condemn;
- (4) made a *bona fide good faith effort* to acquire the rights to the water the political subdivision proposes to condemn by voluntary purchase or lease; and
- (5) made a showing that the political subdivision needs the water rights to provide for the *domestic* needs of the political subdivision within the next *10-year period*.

(b) A court shall deny the right to condemn unless the political subdivision *proves* to the court that the political subdivision has met the requirements of Subsection (a).

Notice that in subsection (b) the court must dismiss the condemnation unless all seven of the requirements are *proven* to the satisfaction of the court.

Are the same levels of scrutiny to be given to the five new statutory requirements as is given to other statutory requirements or is a higher, more fact-intensive review by the trial court required? At least four arguments can be made that the trial court is obligated to conduct a more intensive investigation into the new requirements.

As we have seen, the phrase "bona fide offer" has evolved to a defined term of art in condemnation law. The Legislature chose not to use that phrase or the "unable to agree" language of § 21.012. Instead, the Legislature twice uses the phrase "bona fide good faith effort." Traditional condemnation law confines use of the words "bona fide" to the offer of money. However, in § 21.0121, the "bona fide good faith effort" obligation applies not only to negotiations with the landowner, but also to whether the condemner has exercised the appropriate effort "to obtain practicable alternative water supplies" before deciding to condemn the landowner.

Notice that under the fifth requirement, the condemner must make some showing that it needs the water rights being condemned "to provide for the *domestic* needs of the political subdivision within the next *10-year period*." A board resolution or ordinance from the condemning authority should give a description of the need for the water.

⁹⁸ See *Id.* at 631.

The italicized phrases above (i.e., “highest practicable levels,” “efficiency achievable,” and “practicable alternative water supplies”) suggest an extremely fact intensive inquiry. We can easily envision the landowner presenting its own expert witnesses to testify that the city’s water conservation plan fails to promote conservation of water to the highest practicable level. The landowner’s expert may be able to challenge the efficiency of the city’s plan. We might also expect the landowner’s witnesses to testify about other alternative water supply sources that the city did not consider or disregarded.

Finally, subsection “a” speaks of “the facts to be proven” and subsection “b” says the political subdivision must “prove.” This language is not present in Section 21.012. The use of the word “prove” suggests a fact-intensive inquiry.

All of this language suggests that the Legislature intended for the courts to engage in a high level of scrutiny for condemnation of these rights.

6.2 Section 21.0421 Assessment of Damages: Groundwater Rights

Section 21.0421 governs the procedure for the assessment of damages in cases involving condemnation of groundwater rights. Note what this statute expressly says the landowner is entitled to recover. The statute reads as follows:

(a) In a condemnation proceeding initiated by a political subdivision under this chapter, the special commissioners or court shall admit evidence relating to the market value of groundwater rights as property apart from the land in addition to the local market value of the real property if:

- (1) the political subdivision proposes to condemn the fee title of real property; and
- (2) the special commissioners or court finds based on evidence submitted at the hearing, that the real property may be used by the political subdivision to develop or use the rights to groundwater for a public purpose.

(b) The evidence submitted under Subsection (a) on the market value of the groundwater rights as property apart from the land shall be based on generally accepted appraisal methods and techniques, including the methods of appraisal under Subchapter A, Chapter 23, Tax Code.

(c) If the special commissioners or court finds that the real property may be used by the political subdivision to develop or use the rights to groundwater for a public purpose, the special commissioners or court may assess damages to the property owner based on:

- (1) the local market value of the real property, excluding the value of the groundwater in place, at the time of the hearing; *and*
- (2) the market value of the groundwater rights as property apart from the land at the time of the hearing.

(d) In assessing damages based on the market value of groundwater rights under Subsection (c)(2), the special commissioners or court shall consider:

- (1) the amount of groundwater the political subdivision can reasonably be expected to produce from the property on an annual basis;
- (2) the number of years the political subdivision can reasonably be expected to produce groundwater from the property;
- (3) the quality of the groundwater;
- (4) the location of the real property in relation to the political subdivision for conveyance purposes;
- (5) any potential environmental impact of producing groundwater from the real property;
- (6) whether or not the real property is located within the boundaries of a political subdivision that can regulate the production of groundwater from the real property;
- (7) the cost of alternative water supplies to the political subdivision; and
- (8) any other reasonable factor that affects the market value of a groundwater right.

(e) This section does not:

- (1) Authorize groundwater rights appraised separately from the real property under this section to be appraised separately from real property for property tax appraisal purposes; or
- (2) subject real property condemned for the purpose described by Subsection

(a) to an additional tax as provided by Section 23.46 or 23.55, Tax Code.

It is clear under this statute that Duer Wagner would recover not only for the land value of his ranch based on comparable sales, but also the market value of his groundwater rights based upon whatever valuation method is acceptable under this statute. There is likely to be a great deal of disagreement and future jurisprudence on the appropriate method of valuing these groundwater rights. At present there is no case law to provide guidance on this.

VII. OVERVIEW OF THE CONDEMNATION PROCESS

Chapter 21 of the Texas Property Code governs eminent domain actions. The Code provides an administrative process designed to enable the condemner to gain relatively quick access to condemned property. The administrative process utilizes special commissioners to determine the value of the condemned property and damages to the remainder, if any. Either side may appeal the award rendered by the special commissioners. Such appeal converts the administrative proceeding into a judicial one, and results in a trial de novo in the appropriate trial court.

Importantly, on May 19, 2011, Governor Rick Perry signed Senate Bill 18 (“SB 18”), which significantly changed many aspects of the procedure governing eminent domain.⁹⁹ The changes enacted by SB 18 took effect on September 1, 2011 and apply to all condemnation petitions filed on or after that date. Condemnation petitions filed prior to September 1, 2011, however, continue to be governed by the law in effect prior to SB 18.

7.1 Passage of Corporate Resolution

Prior to instituting an eminent domain action against a landowner, the condemning entity’s board of directors must pass a corporate resolution authorizing the condemnation of the property in question. The resolution should manifest in some form that the condemnation of the property is necessary to advance a specific, identifiable, public purpose.¹⁰⁰ The Board of Directors decision is presumed valid absent a finding of fraud, abuse of discretion, or capricious action.

⁹⁹ Act of May 19, 2011, 82nd Leg., ch. 81 (S.B. 18), § 9, eff. Sept. 1, 2011.

¹⁰⁰ *Whittington v. City of Austin*, 174 S.W.3d 889, 905 (Tex.App.—Austin 2005, pet. denied)

7.2 Negotiations with Landowner

Section 21.0113 of the Texas Property Code holds that “an entity with eminent domain authority that wants to acquire real property for a public use *must* make a bona fide offer to acquire the property from the property owner voluntarily.”¹⁰¹ Section 21.0113 states that a bona fide offer is made only if seven requirements are fulfilled:

- (1) An initial offer is made in writing to a property owner;
- (2) A final offer is made in writing to the property owner;
- (3) The final offer is made on or after the 30th day after the date on which the entity makes a written initial offer to the property owner;
- (4) Before making a final offer, the entity obtains a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any, to any of the property owner’s remaining property;
- (5) The final offer is equal to or greater than the amount of the written appraisal obtained by the entity;
- (6) The following items are included with the final offer or have been previously provided by the entity: (A) A copy of the written appraisal; (B) a copy of the deed, easement, or other instrument conveying the property sought to be acquired; and (C) the landowner’s bill of rights statement prescribed by Section 21.0112; and
- (7) The entity provides the property owner with at least 14 days to respond to the final offer and the property owner does not agree to the terms of the final offer within that period.¹⁰²

Furthermore, a condemner’s petition must state both that “the entity and the property owner are unable to agree on the damages” and that “the entity made a bona fide offer to acquire the property from the property owner voluntarily as provided by Section 21.0113.”¹⁰³

Finally, under Section 21.0113, a condemner must wait at least 30 days after making an initial offer before making a final offer, and a condemner must allow a landowner at least 14 days to respond to a

¹⁰¹ TEX. PROP. CODE § 21.0113(a).

¹⁰² TEX. PROP. CODE § 21.0113(b).

¹⁰³ TEX. PROP. CODE § 21.012(b).

final offer before the condemnor can take any further action.

7.3 What Rights Are to Be Acquired?

In the condemnor's determination of the rights that should be sought in a condemnation proceeding, the condemnor should survey the projected uses of the condemned property for both current and foreseeable future use. The condemnation of property for a limited number of uses that does not include required future needs could present serious obstacles for the condemnor in the future. For condemnation of a water supply, it should be a fairly simple acquisition that is either in fee simple or provides all rights to drill for groundwater and any appropriate facilities in connection with it. That said, a majority of future water-related condemnations will not be for the rights themselves, but for the easements and right-of-ways that will allow the condemnor to move its resource. Listed below are specific rights that are essential to a condemnor in a water pipeline proceeding.

7.3.1 Width of Easement

The width of the easement will need to be of sufficient capacity in order to provide for any present and future uses of the easement. The width of the easement will determine the rights of the condemnor and those rights will not be able to be expanded absent additional authority from and/or compensation to the landowner.¹⁰⁴

The condemnor should also consider whether it will need temporary additional space during the construction of the pipeline.¹⁰⁵ The condemnor should condemn a sufficient amount of the landowner's property in order to construct the pipeline and maintain the pipeline without trespassing on the landowner's remaining property due to being outside the easement.

7.3.2 Right to Add Additional Lines, Upgrade and Rebuild

In conjunction with appropriating a sufficient amount of space within the easement to provide for present and future uses by the condemnor, the condemnor must also consider whether the need will arise in the future to add additional lines or to upgrade the pipeline laid within the easement. The failure to provide sufficient language within the petition for

condemnation that enables the condemnor to remove and replace the pipeline initially laid could have negative ramifications severely limiting the uses to which the condemned property can be applied to by the condemnor.

7.3.3 Ingress/Egress

The condemnor must also determine whether it will be able to access all parts of the easement by traversing over only the easement tract or whether access to the remainder of the landowner's property will be required in order to access the easement tract. It is wise to limit the ingress and egress to the remaining property as much as possible to minimize payment of compensation to the landowner for damage to the remainder.

7.4 How Long Does It Take? A Review of the Condemnation Process

7.4.1 Venue and Jurisdiction: Where to File Suit

Mandatory venue of a condemnation proceeding exists in any county in which part of the property is located.¹⁰⁶ If the property being condemned is located in more than one county and the landowner resides in one of those counties, the proper county in which to file suit is the county in which the landowner of the property being condemned resides.¹⁰⁷ If a landowner does not reside in one of the counties in which the property is located, the general rule prevails and suit may be brought in any of the counties containing the property in question.

District courts and county courts at law possess concurrent jurisdiction in eminent domain cases.¹⁰⁸ However, the determination that a case involves issues of title or any other matter that could not be fully adjudicated by a county court at law requires the proceeding be transferred to a district court.¹⁰⁹ If a county maintains a county court at law with jurisdiction, the petition for condemnation must be filed with the county clerk authorized to process such filings.¹¹⁰ If the county with proper venue does not maintain a county court at law, then the petition must be filed with the district court.¹¹¹ The failure, however, to file a condemnation petition in the county's county court at law does not deprive the

¹⁰⁴ DeWitt County Elec. Co-op, Inc. v. Parks, 1 S.W.3d 96, 103 (Tex. 1999).

¹⁰⁵ *But see* Phillips Pipe Line Co. v. Clear Creek Properties, Inc., 553 S.W.2d 389, 391 (Tex. Civ. App. —Austin 1977, writ ref'd n.r.e.) (holding that pipeline company could not condemn for a temporary working space).

¹⁰⁶ TEX. PROP. CODE § 21.013(a).

¹⁰⁷ *Id.*

¹⁰⁸ TEX. PROP. CODE § 21.001.

¹⁰⁹ TEX. PROP. CODE § 21.002.

¹¹⁰ TEX. PROP. CODE § 21.013(b).

¹¹¹ TEX. PROP. CODE § 21.013(c).

district court of subject matter jurisdiction over the case.¹¹²

7.4.2 The Petition

After it has been determined by the condemning entity that the entity and the landowner are unable to agree as to the amount of compensation due to the landowner for the taking of the landowner's property, the condemning entity may institute a condemnation proceeding by filing a petition in the proper court. All condemnation petitions must (1) describe the property to be condemned; (2) state with specificity the public use for which the entity intends to acquire the property; (3) state the name of the owner(s) of the property, if known; (4) state that the entity and the landowner are unable to agree as to the amount of compensation due to the landowner; (5) if applicable, state that the entity provided the property owner with the landowner's bill of rights statement in accordance with Section 21.0112;¹¹³ and (6) state that the entity made a bona fide offer to acquire the property from the property owner voluntarily as provided by Section 21.0113.¹¹⁴ Furthermore, an entity that files a condemnation petition must provide a copy of the petition to the property owner by certified mail, return receipt requested.¹¹⁵

In all water condemnation cases, the petition must also demonstrate that the political subdivision has:

- (1) prepared a drought contingency plan;
- (2) developed and implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable in the political subdivision's jurisdiction;
- (3) made a bona fide good faith effort to obtain practicable alternative water supplies to the water rights the political subdivision proposes to condemn;
- (4) made a bona fide good faith effort to acquire the rights to the water the political subdivision proposes to condemn by voluntary purchase or lease; and
- (5) made a showing that the political subdivision needs the water rights to provide for the domestic needs of the

political subdivision within the next 10-year period.¹¹⁶

The description of the property to be condemned in the petition should be sufficiently certain to identify the portion of the property being condemned. The description must describe the property with such particularity that a surveyor could go out on the land and locate the tract to be condemned.¹¹⁷ A slight misdescription, however, will not render a judgment void where the field notes contained in the petition as a whole sufficiently locate the tract.¹¹⁸

In *Ludewig v. Houston Pipeline Co.*, the condemnor condemned the landowner's property and took possession of the property to begin construction. Later, the condemnor was informed that the location of the pipeline under construction was not on the property described in the condemnor's original petition.¹¹⁹ The condemnee thereafter filed a trespass to try title action to recover possession of the land where the pipeline had actually been built. The Corpus Christi Court of Appeals, however, denied the condemnee's claims and allowed the condemnor to amend the description of the land taken.¹²⁰ The court, citing *State v. Nelson*,¹²¹ stated that an amendment after the commissioners' award is settled is proper when the amendment does not inject entirely new subject matter into the proceedings thereby prejudicing the landowner.¹²² The court found that, in *Ludewig*, no new matters were inserted as "only one right of way was sought, one taken, one path cleared and one pipeline laid."¹²³ Therefore, the court allowed the condemnor to amend the description of the centerline of the right of way.¹²⁴

7.4.3 Appointment of Special Commissioners

After the petition has been filed and the condemnation proceeding has been assigned to a

¹¹² *State v. Gracia*, 56 S.W.3d 196, 202 (Tex. App.—Ft. Worth 2001, no pet. h.).

¹¹³ TEX. PROP. CODE § 21.012

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ TEX. PROP. CODE § 21.0121(a).

¹¹⁷ See *Smith v. Gulf States Utilities Co.*, 616 S.W.2d 300, 304 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

¹¹⁸ *Boone v. Panola County*, 880 S.W.2d 195, 196 (Tex. App.—Tyler 1994, n.w.h.).

¹¹⁹ 773 S.W.2d 610, 614 (Tex.App.—Corpus Christi 1989, writ denied).

¹²⁰ *Id.* at 613.

¹²¹ *State v. Nelson*, 334 S.W.2d 788 (Tex. 1960).

¹²² *Ludewig*, 773 S.W.2d at 613.

¹²³ *Id.*

¹²⁴ *Id.*

specific judge, the assigned judge must appoint three disinterested real property owners who reside in the county in which the lawsuit was filed as special commissioners.¹²⁵ The special commissioners will be charged with the task of assessing the damages owed to the landowner for the condemnation of the landowner's property.¹²⁶ In making the determination of damages owed to the landowner, the special commissioners are bestowed with the authority of a county judge and may therefore compel the attendance of witnesses and the production of testimony, administer oaths, and punish for contempt.¹²⁷

In the appointment of special commissioners, the judge is to give preference to those persons agreed to by the landowner and the condemning entity.¹²⁸ Moreover, a judge must "provide each party a reasonable period to strike one of the three commissioners appointed by the judge."¹²⁹ If a party strikes one of the three appointed commissioners, the judge shall appoint a replacement.¹³⁰

The local practice of appointing special commissioners differs from county to county. For example, some judges have their own list of special commissioners, while others request several recommendations from each side. The court is not obligated to consult with the landowners prior to the appointment of the special commissioners, and the failure to do so will not invalidate the court's appointment.¹³¹

As a practical matter, it often falls to the condemnor to move the appointment of special commissioners through each trial court's unique administrative process. In urban counties where eminent domain cases are more commonplace, usually due to the expansion of roads and other infrastructure, the judges responsible for appointments may have a list that they use time and time again of potential commissioners. In rural counties where eminent domain proceedings are a rarity, getting commissioners appointed often begins with educating the trial judge about the process and the role of both the court and the special commissioners. It seems the only certainty in such situations is that each judge will likely employ a slightly different process for appointing commissioners.

¹²⁵ TEX. PROP. CODE § 21.014(a).

¹²⁶ TEX. PROP. CODE § 21.014(a).

¹²⁷ TEX. PROP. CODE § 21.014(c).

¹²⁸ TEX. PROP. CODE § 21.014(a).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Dueitt v. Harris County*, 249 S.W.2d 636, 639 (Tex. App.—Galveston 1952, writ ref'd).

7.4.4 Hearing by the Special Commissioners

Section 21.015(a) states that special commissioners must schedule a hearing on condemnation matters at the earliest practical time and at a place that is as near as practical to the property being condemned (or at the county seat of the county in which the proceeding was being held).¹³² However, special commissioners "may not schedule a hearing to assess damages before the 20th day after the date the special commissioners were appointed."¹³³

Each party to a condemnation proceeding is entitled to notice of the time and place of the hearing by written notice issued by the special commissioners.¹³⁴ Notice of the hearing "must be served on a party not later than the 20th day before the day set for the hearing."¹³⁵

The procedures for notice of the condemnation hearing must be strictly followed and every protection will be afforded to the landowner.¹³⁶ The condemnor will be deemed to have strictly followed the required notice provisions where the landowner stipulates receiving written notice of the hearing.¹³⁷ Condemnation notice requirements have been construed quite strictly, consistent with the rule that condemnation procedures must be strictly construed in the landowner's favor. For example, it has been held that service on the condemnee landowner's wife will not constitute service on the condemnee husband.¹³⁸ Additionally, service on the landowner's attorney will not constitute service on the landowner unless it is clear that the attorney was authorized by the landowner to accept service on his behalf in the condemnation proceeding.¹³⁹ If the landowner appears at the hearing, then the landowner waives any right to claim that it did not receive proper

¹³² TEX. PROP. CODE § 21.015(a).

¹³³ *Id.*

¹³⁴ TEX. PROP. CODE § 21.016(a). Ordinarily, it is also best practice to serve notice on lien holders and any other recorded real property interest holders.

¹³⁵ *Id.*

¹³⁶ *John v. State*, 826 S.W.2d 138, 140 (Tex. 1992).

¹³⁷ *Matador Pipelines of Texas, Inc. v. Martin*, 684 S.W.2d 165, 167 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

¹³⁸ *Rotello v. Brazos County Water Control & Improvement Dist.*, 574 S.W.2d 208, 210-12 (Tex. App.—Houston [1st Dist.] 1978, no writ) *disapproved on other grounds in State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 641 (Tex.2002).

¹³⁹ *Id.*

notice and further waives any right to complain that the condemnor did not negotiate in good faith.¹⁴⁰

7.4.5 Damage Calculations by Special Commissioners

In determining the damages to the landowner due to the condemnation, the special commissioners are to admit evidence on (1) the value of the property being condemned; (2) the injury to the property owner; (3) the benefit to the property owner's remaining property; and (4) the use of the property for the purpose of the condemnation.¹⁴¹ Furthermore, special provisions now apply to groundwater rights, discussed in § 6.1 *infra*.

7.4.6 Possession Pending Litigation

Once the special commissioners have rendered an award of damages in the condemnation proceeding, the condemnor is entitled to possession of the condemned property pending the results of further litigation.¹⁴² In order to take possession, however, the condemnor must (1) pay the landowner the amount of damages and costs awarded by the special commissioners or deposit the award with the court subject to the order of the landowner or (2) deposit the award into the registry of the court or a surety bond in the same amount issued by a surety company qualified to do business in the State of Texas. The condemnor must also execute a bond that has two or more good and solvent sureties approved by the judge of the court in which the condemnation matter is pending.¹⁴³

Absent an agreement of the parties to the contrary, the deposit of the award of the special commissioners with the court fixes the date of the taking of the property.¹⁴⁴

VIII. CONCLUSION

Professor Corwin Johnson's words written almost thirty years ago continue to be true: "For municipalities and most water districts, the meaning of [the Wagstaff Act], when finally construed, will be of critical importance. One may cautiously predict that municipalities and most water districts will be adjudged to have [the power to condemn water rights], but that some districts, individuals, and corporations not obligated to serve the public will be held not to have it, or to have it only to a severely limited extent.

The existence of authority to condemn water rights is probably sufficiently widespread in Texas to set the stage for frequent resort to eminent domain as an alternative means of obtaining water supply."¹⁴⁵ As the population and demand for water continues to grow, we will likely see greater use of eminent domain powers to acquire and distribute water resources.

¹⁴⁰ *Lin v. Houston Comm. College Sys.*, 948 S.W.2d 328, 336-37 (Tex. App.—Amarillo 1997, writ denied).

¹⁴¹ TEX. PROP. CODE § 21.041.

¹⁴² TEX. PROP. CODE § 21.021(a).

¹⁴³ *Id.*

¹⁴⁴ *City of Ft. Worth v. Corbin*, 504 S.W.2d 828, 830 (Tex. 1974).

¹⁴⁵ Johnson, *Condemnation of Water Rights*, 46 TEX. L. REV. 1054, 1071-72 (1968).