



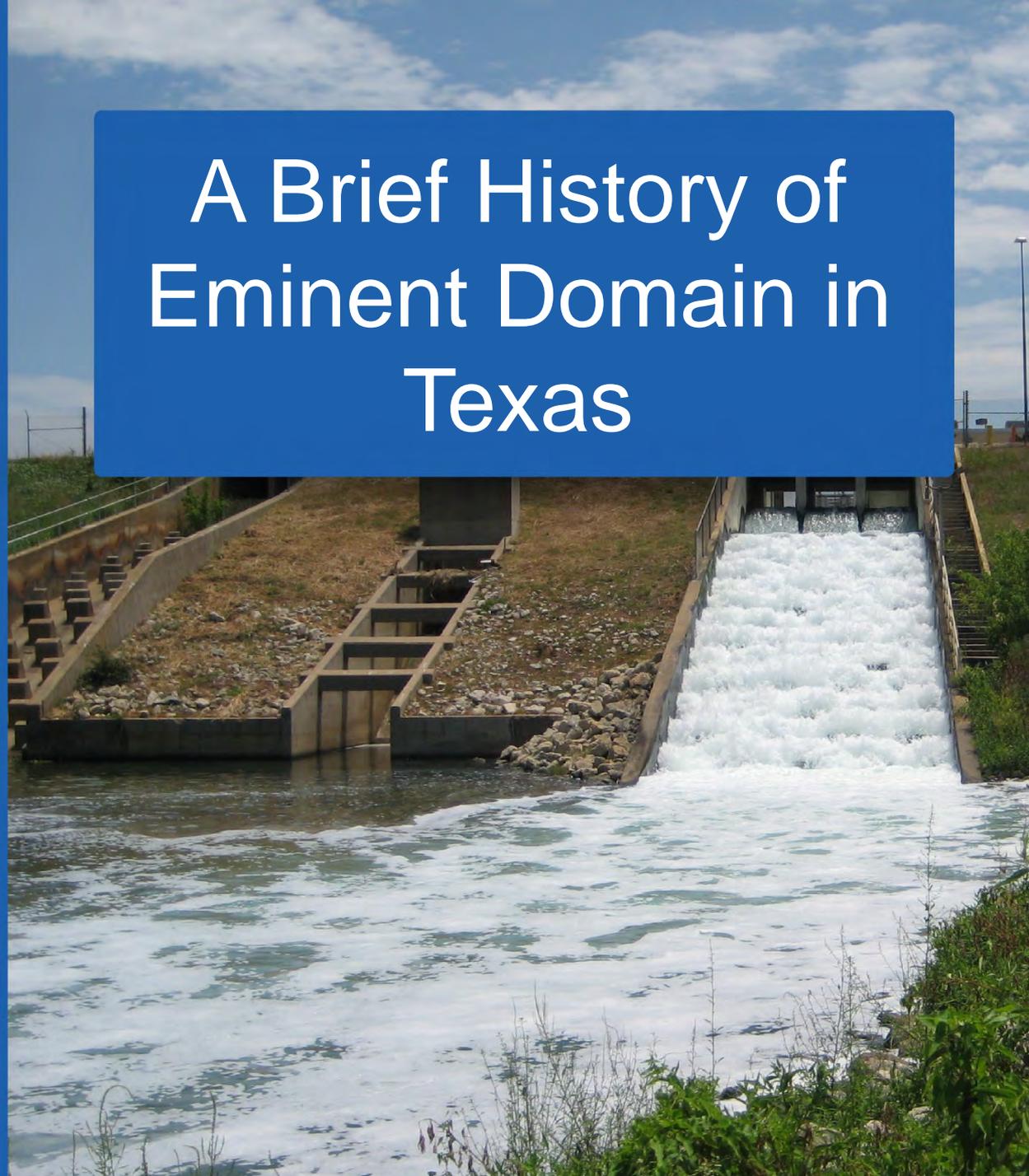
Trinity River Authority of Texas  
*Enriching the Trinity basin as a resource for Texans*

# TWCA/TRWA Water Law Seminar Condemnation & Eminent Domain Howard S. Slobodin

January 11, 2019



# A Brief History of Eminent Domain in Texas



# Eminent Domain

What is the power of eminent domain?

“Eminent domain is the right or power of a sovereign state to appropriate private property [without consent] for the promotion of the general welfare. . . . The power of eminent domain is an attribute of government, and is inherent in it.”

*Bryd Irrigation Company v. Smythe*, 146 S.W. 1064, 1065 (Tex. Civ. App.—San Antonio 1912, no writ).



# Eminent Domain

Why does it exist?

- All land titles may be retraced to the sovereign.
- Lands granted are subject to the eminent domain of the sovereign, and liable to be expropriated for public uses.
- Condemnor files a petition, a district court appoints special commissioners to hear evidence about the public need and value.
- *De novo* review by district court.



# Eminent Domain

But more importantly, why does it exist?

- For the benefit of the public.
- Public health: sanitation — clean water. Largest gain in life expectancy in the US occurred between 1880 and 1920.
- Economic health — ability to move water and commodities by pipeline, and commodities and people by vehicle and rail (efficiently, most places).
- Extension to common carriers and private interests.



# Eminent Domain

## Statutory procedures:

- Procedures largely unchanged in Texas since 1860.
- Act of Feb. 8, 1860, 8th Leg., R.S., ch. 51, § 2, 1860 Tex. Gen. Laws 60, 61.
- Now set forth in TEX. PROP. CODE Ch. 21.



# The Political Landscape



# What Utilities See



# What the Public Sees



# What the Fringe Sees





How did we get here?

# *Kelo v. City of New London*



Susette Kelo's "little pink house"



# *Kelo v. City of New London*

- New London used its eminent domain authority to seize private property to be transferred for private economic development.
- Connecticut law allowed eminent domain for “economic development” even in the absence of blight.
- 2005: U.S. S.Ct. upholds validity of public purpose.





# *Kelo v. City of New London*

- Was *Kelo* really a significant shift?

No. U.S. S.Ct. upheld a Hawaii law as satisfying the public purpose test that provided for taking of land from lessors and granting it to lessees in fee “to reduce the perceived social and economic evils of a land oligopoly traceable to [Hawaii’s] monarchs.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-42 (1984).

- Did *Kelo* trigger a nationwide attack of eminent domain hysteria?

You bet!



# Nationwide Response to *Kelo*

- 45 states enacted eminent domain reform laws, most in the first three years after the ruling.
- Supreme Courts of Ohio, Oklahoma, and South Dakota all rejected *Kelo*, holding that economic development takings violated state constitutional law even if permissible under the Fifth Amendment.
- Cross-ideological cooperation between left and right.

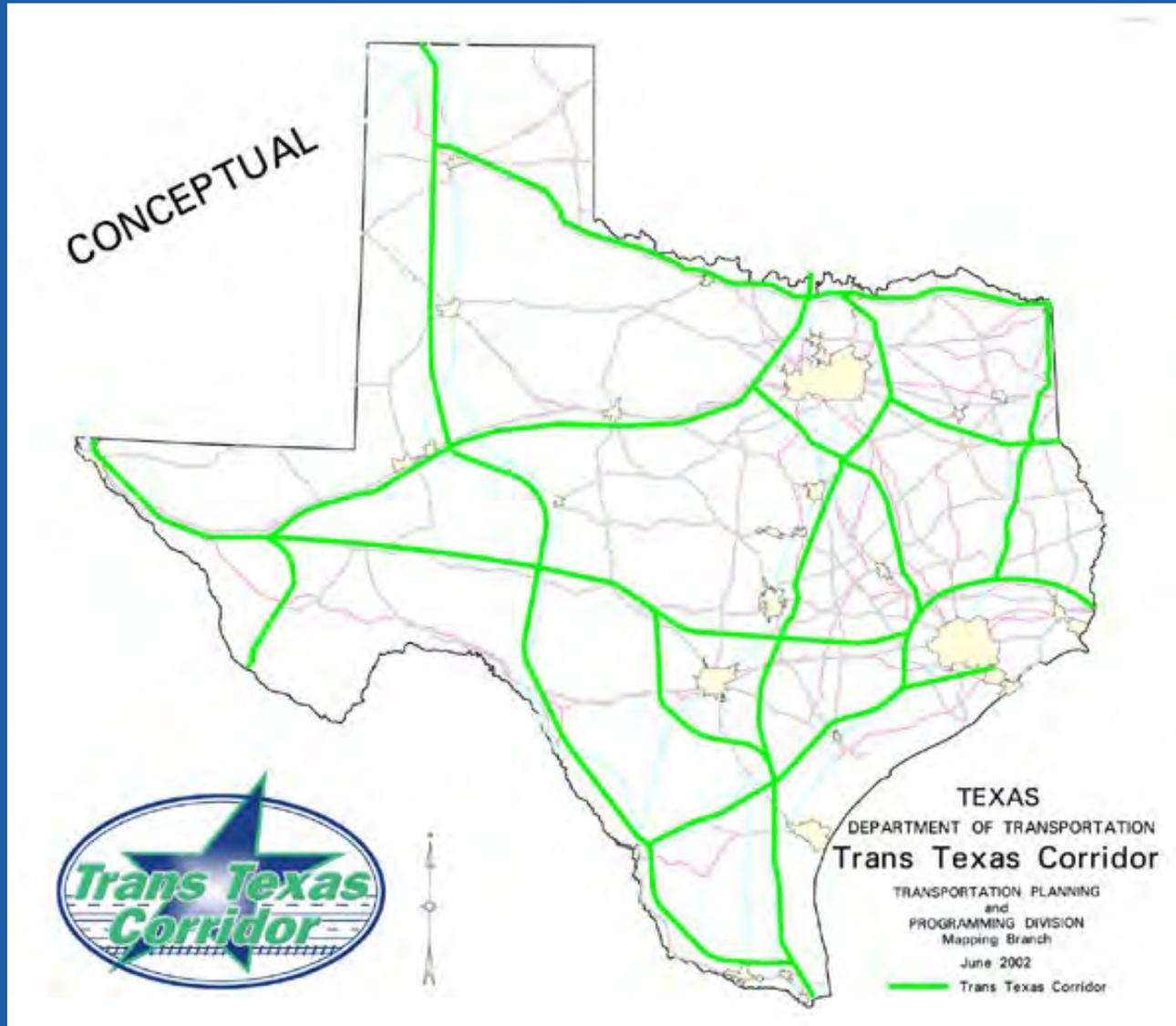


# Texas Response to *Kelo*

- On the agenda for two special sessions of the Texas legislature in 2005.
- Resulted in passage of SB 7 (2005), creating Gov't Code Chapter 2206, which prohibits *Kelo*-type takings.
- H.J.R. 14, Art. 1 and Amendment No. 11 (2009), which amended TEX. CONST. art. I §17 to exclude from “public use” takings for transfer to private entities for purpose of economic development or enhancement of tax revenues.
- Eminent domain bills each session.



# Recent History in Texas

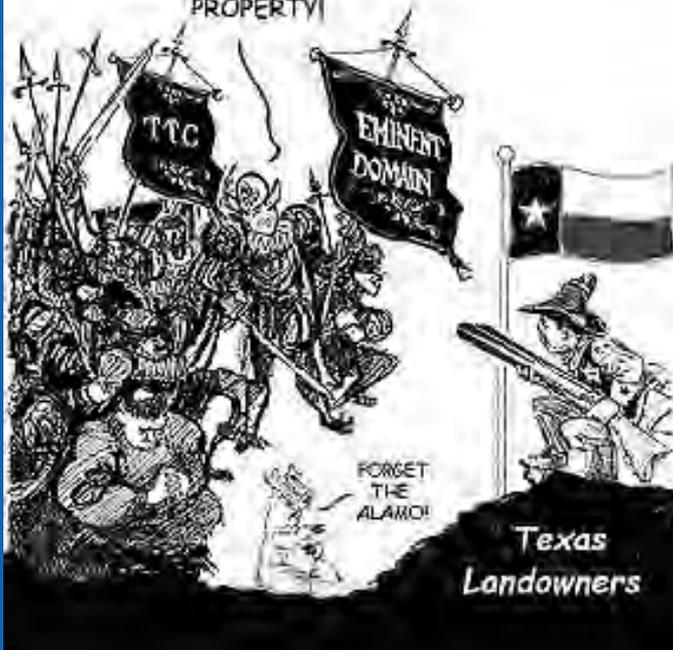


# Recent History in Texas

## Trans-Texas Corridor:

The largest land grab in Texas history...

IN THE NAME OF CINTRA CONCESIONES, MACQUARIE, FERROVIAL, ZACHRY, HNTB, ACTIVIDADES DE CONSTRUCCION Y SERVICIOS, NASCO, LOCKHEED MARTIN, PRICE WATERHOUSE COOPERS, JP MORGAN SECURITIES, FLUOR ENTERPRISES, HDR, GOLDMAN SACHS, A LARGER TAX BASE, AND THE U.S. SUPREME COURT I, RICK PERRY, CLAIM THIS PROPERTY!



# Recent History in Texas



# Recent History in Texas



# Recent Legislative Changes

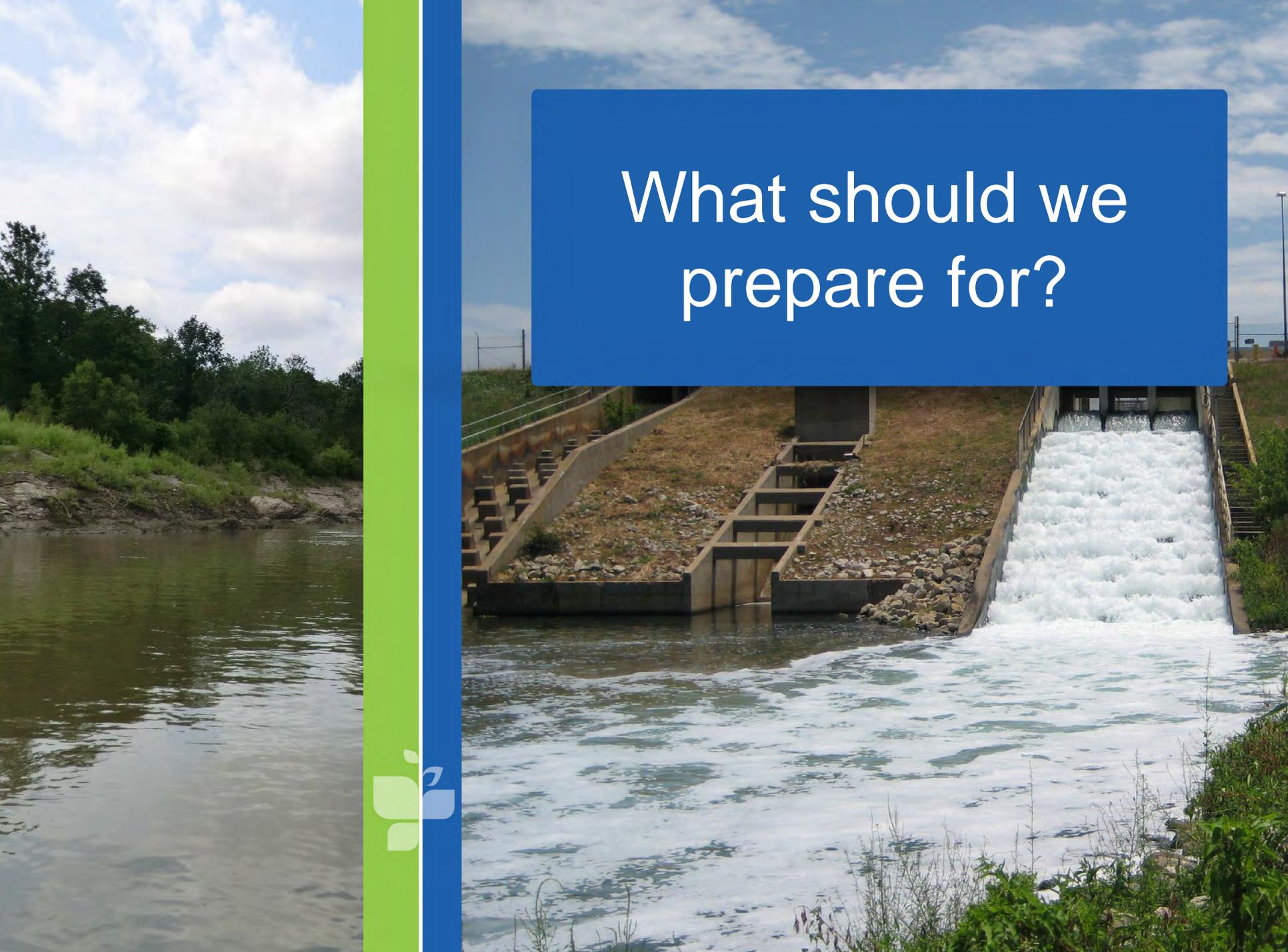


# Legislative Changes

Since *Kelo*, every session has seen statutory changes to restrict eminent domain:

- 2007: HB 1495, Landowner's Bill of Rights.
- 2009: HB 2685, expands LBoR requirements.
- 2011: SB 18, requires record vote by governing bodies, expiration of authority, appraisal disclosure, *bona fide* offer requirement, expands right of repurchase.
- 2013, SB 655, "public use" limit added to Water Code.
- And so on . . . .





What should we  
prepare for?

# What to Watch in the 86<sup>th</sup>?

No significant eminent domain bills filed yet.

The issues from the 85<sup>th</sup>:

- Actual progress” — right of repurchase, TEX. PROP. CODE Ch. 21, Subchapter E.
- Attorneys’ fees — triggered by percentage award or judgment exceeds final offer.
- Limits in easements — number of pipelines, construction method, maintenance.
- Relevant evidence — other acquisitions.
- *Bona fide* offer — more than the appraised value.



# “Actual Progress”

What is it and why do we care?

- Chapter 21 provides a right of repurchase.
- Condemnee or successors entitled to repurchase if public use cancelled, or if no “actual progress” is made before tenth anniversary of acquisition.
- Actual progress defined by accomplishment of two or more of the actions included in TEX. PROP. CODE § 21.101(b).
- Significant labor to develop property, significant work by professionals on plans, applications for permits.



# “Actual Progress”

Efforts to limit what constitutes “actual progress”:

- Require three rather than two criteria be satisfied.
- Eliminate criteria for acquisition of adjacent tracts for same project and adoption by governing body of a development plan.
- 85<sup>th</sup>: HB 528, HB 2076, SB 628 (Engrossed).
- Consequences? Ten years is a long time for *some* projects.



# Attorneys' Fees

Presently only authorized where:

- A condemnor dismisses a condemnation action under certain circumstances.
- Where right to condemn is denied.
- On a finding that condemnor failed to make *bona fide* final offer.



# Attorneys' Fees

Efforts to allow for landowner recovery of attorneys' fees:

- Authorize recovery of attorneys' fees by landowners where award of commissioners or judgment of district court is 20% greater than *bona fide* final offer.
- Final offer presently requires appraisal from certified appraiser, and offer must be at least the appraised amount.
- Also require payment of landowners' professional fees (appraisers, engineers).
- HB 2684.

# Attorneys' Fees



# Easement Mandates

Several bills required easements to include:

- Maximum number of pipelines that could be installed.
- Depth of pipeline.
- Require double-ditch construction if not bored.
- Limits on assignment.
- Reservation to grant additional easements.
- Covenant to maintain right-of-way.
- Right to damages associated with post-installation repairs.
- HB 2684, HB 2694, HB 3687, SB 740, SB 742.



# *Bona Fide Offer*

Changes to what constitutes a *bona fide* offer:

- In absence of an appraisal, an initial offer would be required to be 150% of tax value.
- Final offer to include cost of removal or replacement of structures.
- HB 2566, SB 740.



# Relevant Evidence

TEX. PROP. CODE § 21.041 defines evidence special commissioners may consider:

- Value of the property being condemned.
- Injury to the property owner.
- Benefit to the property owner's remaining property.
- Use of the property for the purpose of the condemnation.



# Relevant Evidence

Efforts to expand the evidence that may be considered:

- Price paid for easements in privately negotiated transactions in absence of a potential of condemnation.
- HB 2556, HB 3441, SB 741.



# 86<sup>th</sup> Session Other Issues

## Survey consent:

- Any form, if provided, must indicate landowner's right to negotiate survey terms.
- Form must indicate power to sue for court order.

## Misrepresentation:

- Criminal penalty for entry onto property under color of eminent domain authority where absent.

## Right-of-way agent licensing:

- Initial and continuing education.



# 86<sup>th</sup> Session “Also Ran”

Increased compensation for “heritage property”:

- Continuously owned in the same family for more than 100 years.
- *Bona fide* offer must be 150% of appraised value.

Commissioners court veto:

- On petition of landowner, commissioners court of jurisdiction must approve condemnation.



# QUESTIONS?





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