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RECENT DEVELOPMENTS: CURRENT EMINENT DOMAIN ISSUES

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PROCEDURAL MATTERS

Authority of a new Railroad Company

Texas Central Railroad & Infrastructure, Inc. v. Miles, 2020 WL 2213962 (Tex.App.--Corpus Christi-Edinburg May 7, 2020, pet. filed)

Facts: Texas Central Railroad and Infrastructure, Inc. (TCR) sent out an information packet and survey permission form to approximately 2000 owners along the proposed high-speed rail project between Dallas and Houston. One landowner, Miles, took issue with the survey permission form and filed suit seeking a declaratory judgment that TCR could not survey his property and later amended the suit to seek a judgment that TCR did not eminent domain authority. TCR filed a cross-motion for summary judgment that it was a railroad company under Texas Transportation Code §81.002 and that it qualified as an interurban electric railway giving it eminent domain authority under Transportation Code §131.011. The trial court denied Miles's motion for summary judgment and rendered judgment in favor of TCR declaring that TCR was an interurban electric railway under the Transportation Code and had the right to survey Miles property.

Corpus Christi Court of Appeals Holding: Reversed as to TCR's summary judgment and remanded as attorney's fees.

Court of Appeals Rationale: The court first looked to §81.002 of the Transportation Code to determine if TCR was a railroad company. This section defines a railroad as "*any other legal entity operating a railroad, including an entity organized under the Texas Business Corporation Act or the Texas Corporation Law provisions of the Business Organizations Code*." While Miles argued that TCR could not be a railroad company because they were not yet operating any railroad, the Court disagreed and determined that the legislative's intent of a statute includes the future tense and that this statute allows for an entity that was created to operate a railroad to qualify as a railroad company. Because TCR was created to operate a railroad, they qualified as a railroad company under that statute. The court then addressed whether TCR had the right of eminent domain. TCR argued that it had such right under Transportation Code §131.011, which provides eminent domain authority to a "*corporation chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both freight and passengers...*" TCR argued that it was an electric railway. Under the same analysis of the 81.002, the court determined that because TCR's corporate charter was for an electric railway, they qualified as such and thus had eminent domain authority under the statute.

Fact Question on Common Carrier; Per Rod Valuation

Hlavinka v. HSC Pipeline Partnership, LLC., 2020 WL 3393540 (Tex. App.--Houston [1st Dist.] June 18, 2020)

Facts: The Hlavinkas own over 15,000 acres in four tracts in Brazoria County, purchased in 2002-2003 to generate income from pipeline easements. At the time they bought the tracts, the land already had more than

25 pipelines traversing it. HSC owns pipelines in Texas used for transporting various products. In April 2016, HSC's sole manager, Enterprise, applied for a permit to operate a pipeline known as the "Oyster Creek Lateral Project". This pipeline would travel across Brazoria County and terminate at a plant owned by Braskem America, an Enterprise customer. In July 2016, HSC contacted the Hlavinkas about acquiring a 30-foot permanent right of way and easement and temporary workspace easements across the four tracts. Unable to reach an agreement, HSC filed condemnation proceedings to acquire the easements sought. The Hlavinkas filed a plea to the jurisdiction claiming HSC was not a common carrier and did not have the power to condemn their property. They argued that the product being conveyed, "propylene," did not qualify as crude petroleum under the Natural Resource Code nor as an oil product or liquified mineral per the Texas Business Organizations Code, and that the pipeline would not be used for public use. HSC filed a motion for partial summary judgment claiming its product fell within the authority granted by both § 111.002(1) of the Natural Resources Code and § 2.105 of the Business Organizations Code. The pipeline was available to anyone who wanted to use it, and it had a contract with Braskem, an unaffiliated third party. In May 2018, the trial court granted HSC's motion and denied Hlavinkas' plea. HSC also moved to exclude one of the Hlavinka property owner's testimony because he was using a per rod valuation method. The trial court granted HSC's motion. The parties then entered into a Rule 11 agreement preserving certain points for appeal and the trial court entered a judgment granting the easements sought.

Court of Appeals Holding: Affirmed in part, reversed in part.

Court of Appeals Rationale: The Court concluded that the propylene being transported was an "oil product" for purposes of exercising condemning authority pursuant to § 2.105 of the Business Organizations Code. Regarding the Hlavinkas' public use argument, the Court reiterated that the public use mandate originates from the Texas Constitution, and the T-4 permit is to operate a pipeline, not a finding of common carrier status. As held in the *Denbury* case, there must be a reasonable probability that after construction someone other than the carrier will make use of the pipeline for its own products or for others besides the pipeline owner, with the burden on the Hlavinkas to make this showing. Although the *Denbury* holding was limited to CO2 pipelines, later courts have held it applicable to crude petroleum and natural gas pipelines as well. HSC argued it had a contract with a third-party, Braskem, who retained title to the product at all times during transport, and Braskem received the product at its plant. The Court disagreed since it was merely the parties by contract transferring title to the customer prior to transport through the pipeline. In this case, the pipeline connects to only one facility, and that facility is owned by a pipeline customer with no interconnections. There was no evidence the pipeline was being marketing to other marketers of this product in the vicinity. HSC was not able to identify any other potential pipeline customers who might transport their product through the pipeline aside from Braskem. Based on these facts the Court held the trial court erred in granting HSC a summary judgment on the right to take, but also found there to be a fact question on the issue, such that Hlavinkas' plea was properly denied.

As for the propriety of the proposed per rod valuation testimony which the trial court excluded, the Court began by acknowledging that expert testimony on valuation is not required, and a property owner may offer testimony as to his property's value. A property owner offering value testimony is subject to the same rules for opinion evidence as experts, and testimony based on improper or unauthorized methodology should not be allowed. Hlavinka argued that while most of the tract had an agricultural use, the easement area had been sold for pipeline easements on many prior occasions and was a separate economic unit for pipeline development. He asserted the income from the sale of pipeline easements far exceeded the income generated from other uses of the property. Hlavinka arrived at his value "per rod" by referring to prior sales of pipeline easements he had been a party to, adjusting for inflation, and taking into consideration what other improvements previous pipeline companies had done as part of the sales price along with any attendant rights they were also acquiring. He determined fair market value of $3,383,160, and then a "per acre" price of $528,000 per acre. HSC argued that the property did not have an established pipeline corridor and claimed the evaluation by rod was flawed. Their experts determined the highest and best use to be either agricultural/recreational or rural residential. The Court noted prior case law holding a "per rod" valuation method inappropriate, but in this case, Hlavinka

proffered that his valuation was also based on other data including the type and location of easement. Under the facts of this case, using a "per rod" price as a factor in determining market value was not improper, and that the trial court erred in excluding this testimony. Finally, HSC also argued Hlavinka's value methodology violated the project enhancement rule, but the Court disagreed. The previous existence of multiple pipelines in a defined area different than the area being condemned here supported a finding that the easement area had value as a pipeline corridor separate and apart from the HSC condemnation at hand.

Amendment to Declaration of Taking and Severance

United States v. 0.2853 Acres of Land, More or Less, Dallas County, Texas, 2019 WL 5000161 (N.D. Tex. Sept. 16, 2019)

Facts: The United States filed a complaint and declaration of taking to acquire 0.2853 acres in Dallas, Texas for the Federal Aviation Administration's continued operation of a Terminal Doppler Weather Radar facility ("TDWR"). The land acquisition was initiated in 2016, but the complaint and declaration of taking was amended in 2019 to add an easement acquisition over 2,639 square feet of a road to access the TDWR facility. Defendants argued that the easement should be severed from the .2853 acres of land on which the TDWR facility is located.

District Court Holding: Defendants argued that the land acquisition is a separate and independent taking from the easement acquisition and trying the land and easement acquisitions together will be unduly prejudicial as it will force the fact finder to assess the value of two separate takings on two separate dates. Defendants further argued that Federal Rule of Civil Procedure 71.1(f) does not authorize the United States to amend its original declaration of taking. A "court may ... sever any claim against a party," Fed. R. Civ. P. 21, but the movant bears the burden to show that it will be severely prejudiced without a separate trial; the issue to be severed is so distinct and separable from the others that a trial of that issue alone may proceed without injustice. Under Rule 71.1(b) of the Federal Rules of Civil Procedure, "[a] district court has wide discretion to sever a claim in condemnation proceedings." The United States "may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use." *Id.* The court analyzed five factors to determine if severance was warranted: (1) whether the claims arose out of the same transaction or occurrence, (2) whether the claims present common questions of law or fact, (3) whether settlement or judicial economy would be promoted, (4) whether prejudice would be averted by severance, and (5) whether different witnesses and documentary proof are required. Here, the claims involved the same property and project: the government has accessed the property using the same access road for over two decades under prior lease agreements, and the access road is the only point of ingress and egress to the TDWR facility. The court held that the TDWR facility and the access road are inextricably tied together, as the taking of one is useless without the taking of the other. The date of valuation is the only instance in which the two claims do not share a common question, and it is not necessary for the land acquisition and easement to have every factual or legal issue in common in order for the claims to be heard jointly. Therefore, the court determined the factors did not warrant severance.

Emails were not Accepted Offer

Copano Energy, LLC v. Bujnoch, 593 S.W.3d 72163 (Tex. 2020)

Facts: Landowners in Lavaca and Dewitt Counties were approached by Copano Energy to obtain an easement to construct a pipeline on their properties. The record includes a series of e-mails about the proposed easement, which is the focus of the dispute as to whether those e-mails amount to a contract to purchase the proposed easement and satisfy the statute of frauds. One email states: "Copano agrees to pay your clients $70/ft. and asks for access". In January 2013, Bujnoch responded "…In reliance on this representation we accept your offer and you are authorized to proceed with the survey." In the meantime, Percheron, acting for Copano, offered $15 or $25/ft. Percheron then followed up in March of 2013, when Kinder Morgan was buying Copano, with a "compensation proposal" offering compensation of $20 to $40/ft. The pipeline was never built. The Landowners sued Copano for breach of contract, alleging a contract to sell an easement to the Landowners.

The Landowners sued defendant Kinder Morgan for breach of contract on the theory that Kinder Morgan assumed Copano's contract obligations when it merged with Copano. They also sued Kinder Morgan for tortious interference with the contract. The defendants moved for summary judgment, arguing in part that the statute of frauds barred the contract claim. The trial court granted summary judgment and rendered a take-nothing judgment on all claims. The court of appeals affirmed summary judgment on the tortious interference claim but reversed summary judgment on the breach of contract claim. Copano petitioned for review on the contract claim.

Supreme Court Holding: Reversed as to the breach of contract claim, take-nothing judgment rendered on all claims.

Supreme Court Rationale: A contract for the sale of real estate is not enforceable unless the promise or agreement, or a memorandum of it, is in writing and signed by the person to be charged, commonly called the statute of frauds. To satisfy the statute of frauds, "there must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony." Though not required to be in a single document, when considering multiple writings proffered as a single contract, the essential elements of the agreement must be evident from the writings themselves. Here, the emails, relied upon by the Landowners, even when considered together, did not satisfy the statute of frauds. Although the Landowners appeared to accept an offer at $70/ft, other essential elements of the agreement were not discussed such as location and length, thus it is incomplete. The writings must evidence the "*agreement* ... so that the *contract* can be ascertained" from the writing. Later emails presented by the Landowners did not satisfy the statute of frauds' bar; they confirm that the alleged agreement was never reached. As such, there is no way for a court to piece together the essential terms of a contract and the parties' agreement to be bound by those terms. Under the statute of frauds, the contract "is not enforceable," and Copano cannot be liable for breach of it.

Blanket Easement

Atmos Energy Corp. v. Charles Paul, 598 S.W.3d 431 (Tex. App. 2020)

Facts: A 1960 easement agreement granted a right-of-way to Atmos to construct, maintain, and operate pipelines over and through 137 acres of property. The easement provides that all pipes are buried and also payment for damages to crops or fences. If a new pipeline is laid, then the owner is entitled to one dollar per linear rod. At some point, the 137 acres were subdivided, and Paul purchased 64 acres. Atmos attempted to pay Paul payment of $70.31 for a new pipeline. Atmos sued Paul for violating the easement agreement after he denied Atmos access to construct a new pipeline. The trial court granted summary judgment in Paul's favor and rendered judgment that Atmos takes nothing.

Supreme Court Holding: Reversed and remanded.

Supreme Court Rationale: Atmos argued that the easement was unambiguous and is a blanket easement that permitted Atmos to construct a new pipeline anywhere on the property, subject to the requirement that the use of the right does not unreasonably interfere with the property rights of the owner of the servient estate. Paul claimed that the first pipeline set the easement's location and new pipelines must parallel the first pipeline. He claimed an Atmos agent told him that he could not place any structure within Atmos's easement that was fifty-feet wide. Atmos also installed a pipeline between 2003 and 2004, which was parallel to and approximately ten feet south of the original pipeline. Paul argued that *Houston Pipe Line Company v. Dwyer*, 374 S.W.2d 662 (Tex. 1964) supported his argument, but *Dwyer* held that the location and size of an easement may become fixed once it is installed under a blanket easement that authorizes only one pipeline. Under Texas law, a "blanket easement" is "[a]n easement without a metes and bounds description of its location on the property." Here, the easement is a blanket easement and authorized multiple pipelines. The Court agreed with Atmos and ruled that the easement granted Atmos a multiple pipeline blanket easement over the property, which was not limited to a corridor where the original pipeline was located. Additionally, past statements or conduct by Atmos was not admissible to vary the terms of an unambiguous easement. The grant of a multiple pipeline blanket easement does not mean, however, that Atmos may use Paul's property however it deems fit without

regard to the burden it places upon Paul's use of his land. Under Texas law, "[a] grant or reservation of an easement in general terms implies a grant of unlimited *reasonable use* such as is *reasonably necessary and convenient and as little burdensome as possible to the servient owner*." This reasonable-use requirement does provide the owner recourse if Atmos uses the land in an unreasonable or unnecessary manner. However, Paul had to prove as a matter of law that the path that Atmos selected for the new pipeline unreasonably interferes with his property interests, and he did not meet that burden.

Authority to "Quick Take"

Mangal v. City of Pascagoula, Jackson County, MS, 426 F. Supp. 3d 274 (U.S.D.C., S.D. Mississippi, Dec. 12, 2019)

Facts: Mangal owned a four-plex property in Pascagoula, Mississippi. Mangal alleges that the City of Pascagoula attempted to exercise eminent domain and take the property under a "quick take" procedure for the purpose of expanding city-owned athletic fields. The City filed suit in the Special Court of Eminent Domain of Jackson County, paid 85% of a court-appointed appraiser's determined value for their property into the court's registry, and gained immediate possession of Mangal's property. Mangal asserts that the City had no right to utilize the statutory "quick take" procedure, arguing the "quick take" procedure was inapplicable under the circumstances, but nonetheless did so and mailed Mangal's four-plex tenants a letter advising that they should vacate the premises. The Special Court entered an agreed judgment on all counts except the claims regarding the removal of their tenants and the use of 'quick take' by the City. Mangal alleges that the City "engaged in a course of conduct that resulted in the violation of the Plaintiffs' right[s]" to equal protection under the law and procedural and substantive due process of law pursuant to the Fifth and Fourteenth Amendments and the Mississippi state constitution. They also reassert a takings claim under the Fifth and Fourteenth Amendments and corresponding provisions of the Mississippi constitution. The City filed a Motion to Dismiss and argued (1) that Mangal's claims are barred by the doctrines of *res judicata* and claim splitting, and (2) that Mangal's claims fail to state a violation of their constitutional rights.

US District Court's Holding: Defendant's Motion to Dismiss is denied as it pertains to a takings claim under the 5th Amendment, otherwise it is granted.

US District Court's Rationale: The doctrine of *res judicata* has two primary functions: bar, which precludes claims that were actually litigated in a previous action, and merger, which prevents litigation of any claim that should have been litigated in a previous action. However, only unasserted claims that *could* have been brought in the prior action are barred. As to the claims that Mangal's claims are barred by *res judicata*, the violation of rights claims could not have been brought in the Special Court of Eminent Domain because such claims are not within that court's jurisdiction. The Mississippi Supreme Court has explicitly upheld a special court of eminent domain's dismissal of due process and civil rights claims, asserted in an inverse-condemnation action, for lack of subject matter jurisdiction. There is similarly no reason to conclude that a special court of eminent domain has jurisdiction to hear a claim that the property subject to condemnation was actually taken by earlier government action. Because Plaintiffs could not have raised their constitutional violations as counterclaims to the condemnation proceeding in the Special Court of Eminent Domain, their claims, in this case, are not barred by *res judicata.* Plaintiffs reassert a takings claim under the Fifth and Fourteenth Amendments and corresponding provisions of the Mississippi constitution, but sending letters to tenants was not a taking under the Fifth Amendment. The Special Court of Eminent Domain entered an Order on August 2, 2018, that granted the City "the right of immediate title and possession and entry upon" Mangal's four-plex, dependent only on the City first depositing 85% of an appraiser's valuation of the property. Thus, by court order, the City acquired title to and possession of Mangal's property. This is the very definition of a classic taking: "a transfer of property to the State ... by eminent domain." *Stop the Beach Renourishment*, 560 U.S. at 713, 130 S.Ct. 2592. It is of no matter that the order was set aside slightly more than a month later, or that it was likely contrary to law. The City still acquired title to and possession of the property prior to the Agreed Final Judgment. The City argues that any damages stemming from an earlier taking have already been paid because Mangal is only entitled to the fair market value of their property, regardless of whether it is taken through traditional eminent

domain proceedings or use of the quick take procedure. It is true that the remedy for a taking is the property's fair market value, but the property owner is due that just compensation at the time the property was taken. "If disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." Mangal asserts that the City "engaged in a course of conduct that resulted in the violation of the its' right[s]" to equal protection under the law and procedural and substantive due process of law pursuant to the Fifth and Fourteenth Amendments and the corresponding provisions of the Mississippi state constitution. However, Plaintiffs' factual allegations do not establish any such violation of their constitutional rights but offer nothing besides conclusory allegations as to the intent behind the City's actions. Mangal also did not show how it was treated differently from those similarly situated, or who those similarly situated would be. Finally, Plaintiffs do not contend that no rational basis supports their treatment by the City. It is undisputed that Plaintiffs had a property interest in their four-plex and that they also were given a procedure attendant upon the taking of their four-plex. The City initiated an eminent domain proceeding to which Plaintiffs were a party, and Plaintiffs objected (with success) to the City's use of the "quick take" procedure. Accepting Plaintiffs' allegations as true, the state process afforded them the opportunity to contest the deprivation of their property interest. Where a plaintiff alleges a takings claim and a substantive due process claim together, courts must determine the extent to which the due process claim "rests on protections that are also afforded by the Takings Clause." Plaintiffs' allegations are "simply a takings claim under a substantive due process label." Therefore, the substantive due process claim is not "sufficiently independent from the takings claim to stand on its own."

VALUATION MATTERS

Attempt to Realign Project supported Project Influence damages

State of Texas v. CC Telge Road, L.P., 2020 WL 2782370 (Tex. App. –Houston [1st Dist.] May 28, 2020)

Facts: In 2005, Royce Homes obtained City of Houston approval for a high-density site plan on 600-plus acres of land in northwest Harris County, which included 1,000 plus residential lots. Royce also received State approval for a municipal utility district, built a water plant capable of serving the proposed homes it planned, and received a TCEQ Discharge Permit for the disposal of sewage and wastewater. It also made efforts to incorporate the wetland area into its development scheme and spent 2006 - 2007 obtaining entitlements for the tract in furtherance of its development plan. In 2008, Segment F-1 of the Grand Parkway was approved, which bisected a portion of the Royce property. Aware of the Grand Parkway, CC Telge Road L.P. ("Telge") and its partner, Caldwell Companies, began attending public meetings concerning the project, which included the Grand Parkway Association, seeking a modification of the road alignment so that it would not cross the Royce property. The current alignment traversed an existing watershed and did not allow direct access to Telge's property.

In April 2010, Telge bought the Royce property and began the process of getting its development plan approved with the City. Telge proposed a high-density residential development similar to the Royce plan. During the approval process, the Grand Parkway Association objected to the proposed plan because it was located within the path of the Grand Parkway, and the plan was denied. Telge then chose an alternate, large lot development by buying an additional 103 acres and adopting Covenants and Restrictions restricting the number of lots to 300. This alternate development, known as "Willowcreek Ranch" opened in October 2013. In 2014, State filed a condemnation proceeding, seeking to acquire a 40-acre strip of property for construction of the Grand Parkway and easements. After the special commissioners' hearing, the commissioners awarded Telge $18,000,000. Both sides objected.

At trial, Telje argued the highest and best use of the whole property was for high-density residential development, as originally intended, and compensation was over $28 million. Prior to trial, the State objected to such evidence as violating the project influence rule, *Sharboneau*, principles of highest and best use (legal permissibility), and the rule against compensability for community damages. The trial court denied these

challenges and allowed Telge's evidence. The State offered evidence that the whole property's highest and best use was its existing use for large acreage lots. After a two-week jury trial, Telge was awarded $28,883,041 in compensation for the acquisition. The State appealed.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: On appeal, the State raised several challenges to the admission of evidence as well as to the sufficiency of the evidence. The State claimed the trial court rulings violated the project influence rule, highest and best use principles, the law regarding non-compensability of community damages, and that the evidence was insufficient generally. Under *Westgate,* until a direct restriction on or taking of property occurs, the negative effects on property value from the announcement of a project are not compensable. Once a taking occurs, however, the project influence rule applies. That rule requires that any impact on value caused by the project itself be excluded. To aid in this determination, the Court must determine the date the condemnor manifested a definite intent to take the particular property, and the jury should be instructed to eliminate all impacts of the project on value from that date until the date of taking. One of the project impacts may be State restrictions imposed on the property prior to condemnation. Citing the Texas Supreme Court in the *Caffe Ribs* case, the Court stated evidence should be allowed as to negative impacts on value caused by the project itself, including State interference with development. This is necessary because the condemnor should not be allowed to take advantage of depressed market values caused by the project when it buys land for that project. Here, the Grand Parkway Association was seen by the Court as interfering with Telge's realignment efforts and the approval process for its site plan. This interference resulted in Telge putting the property to a less profitable use and thus lowered its market value. The court also discussed *Sharboneau*, which holds that to admit evidence of a highest and best use other than the existing use, the landowner must show the property is adaptable to the proposed use; the proposed use is reasonably probable within the immediate time frame or reasonable time; and that the proposed used results in a higher market value. The Court found Telge had offered ample evidence that its initial use for high-density subdivision development was feasible and that this use was thwarted by State interference in the approval process and refusal to realign the path of the Grand Parkway. Therefore, the project influence rule and *Sharboneau* justify admission of Telge's evidence so the jury can determine the property's market value without influence from the project. Concerning community damages, the State argued that the damages complained of (no one wants to live next to an elevated freeway - noise and traffic proximity) were community damages and not compensable. The Court acknowledged that damages suffered generally by the community are not compensable, but found that the Grand Parkway, having destroyed the watershed made the focal point of the prospective development, caused the property's highest and best use to change to large lot development in the remainder. The Court found this change to be unique to Telge's property and thus compensable. Lastly, regarding the State's sufficiency challenge, the Court, having held the complained of evidence was admissible, found ample evidence in support of the verdict. It thus overruled the State's sufficiency challenge and affirmed the trial court's judgment.

Proper Billboard Valuation, Again

Gunnarson v. State, 2020 WL 913050 (Tex.App.-- Austin Feb. 26, 2020, rule 53.7(f) motion granted)

Facts: In 2015, the State acquired 0.413 acres along SH Loop 82 in San Marcos, Texas. The property contained two double-sided billboards. Both the property owner and State valued the property as best suited for outdoor advertising. Prior to trial, the Supreme Court ruled in *State v. Clear Channel Outdoor, Inc*. that the loss of the advertising business was not compensable and could not be used to determine the value of the billboard structure. The State produced two appraisals for trial, both of which had not valued the loss of advertising revenue as a portion of the compensation due the landowner. The landowner produced one appraisal and landowner testimony that both included the loss of advertising revenue as a portion of the compensation due for the State's taking. After a hearing on cross-objections to the witnesses and cross-motions for summary judgment, the trial court struck the landowner's appraisal witness and the landowner's testimony for conflicting with the ruling in *Clear Channel*. The landowner did not produce alternative evidence and the trial court issued its summary judgment order awarding the landowner compensation between the two-state

appraisals. The landowner appealed the trial court's striking of its witnesses and the issuance of the summary judgment.
Court of Appeals Holding: Affirmed as to the exclusion of the landowner's two witnesses, but reversed and remanded the trial court's summary judgment order.
Court of Appeals Rationale: The appellate court determined that the trial court's striking of the landowner's witnesses was supported by the Supreme Court's ruling in Clear Channel and within the trial court's discretion. However, the appellate court found that the State's evidence alone created a genuine question of fact as to the compensation due the landowner and thus reversed the trial court's summary judgment order and remanded the case back to trial on that issue.

"Low Bar" for Property Owner Testimony
Sabal Trail Transmission, LLC v. 18.27 acres, Cause No. 19-10705 (11th Cir. August 3, 2020) (unpublished)
Summary: This case involves the propriety of landowner testimony in a natural gas pipeline easement acquisition. The pipeline crossed the landowners' farms. One landowner proffered that he had a degree in agricultural economics, that he was trained as an appraiser and lender for farm property, and that throughout his life he had bought and sold property in the county. He testified that after the pipeline his property would be viewed as less useful and valuable because of the possibility of workers appearing for maintenance and the potential for danger from the pipeline. Another landowner testified he was a farmer and crop advisor, and that he held a bachelor's degree in food and resource economics. He had worked with his father in the past to both buy and sell property in the county. He testified that parts of the farm are less productive due to water issues caused by the pipeline, and his home was now visible from the highway after certain trees were removed during pipeline construction. He testified he believed people would not want to live within 300 feet of the pipeline for fear of what might happen. Both witnesses estimated damage to their farm property of 12%, and one claimed his residence had been damaged by 60%. Sabal objected to this testimony to the extent the property owners attempted to quantify the impact of the pipeline on their property because the witnesses had never bought or sold pipeline-encumbered property.
Court of Appeals Holding: Affirmed.
Court of Appeals Rationale: On review, the Court stated that a landowner is competent to testify as to the value of his property provided the testimony has some basis and is not speculative. The court noted the "low bar" an owner must satisfy to testify, having "some basis" for the testimony. Here, the landowners met the "low bar" because one had been trained as an appraiser, both had bought and sold property in the county, and they each offered examples of the negative impacts the pipeline would have on their property. Although the landowners provided little explanation for the specific values they testified to, the court stated that the testimony was not purely speculative and the district court did not abuse its discretion in admitting it.

Manager Testimony as to Value
In Re Edukid, 2020 WL 1283924 (Tex.App.-- Dallas. March 17, 2020, no pet.)
Facts: Edukid, LP wanted to use the Property-Owner Rule to allow a manager to testify as to value in a condemnation case against the City of Plano and requested a protective order that the manager not be deposed on the opinions of Edukid's experts. The City argued that the manager should not be allowed to testify as to value because she was not named as an expert. The trial court agreed and struck the manager from testifying as to value. The City also argued that while the manager was not timely listed, she was still an expert and should have to testify as to opinions, including that of other experts. The court, siding with the City, would not issue the protective order. Edukid seeks a writ of mandamus compelling the trial court to: (1) vacate its order striking the property-value testimony of Edukid's manager; and (2) enter a protective order stating that Edukid's corporate representative cannot be deposed on certain expert-witness issues.
Court of Appeals Holding: Mandamus relief conditionally granted, a writ will issue if the trial court does not vacate order and fails to issue protective orders.

Court of Appeals Rational: As to the manager testifying to value, generally, a property owner is qualified to testify to the value of her property even if she is not an expert and would not be qualified to testify to the value of other property. Organizations are the same as natural persons for purposes of the Property-Owner Rule. The entity can prove the value of its property through certain officers or employees whose management positions warrant applying a presumption that they are familiar with the entity's property and its value. The manager's testimony is "subject to Rule 701," at least in part, and there is no requirement that her fair-market-value testimony be treated like expert testimony. Property-Owner Rule is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values. Parties seeking to include Property-Owner Rule witnesses as part of their evidentiary presentation must do only as much disclosing or designating of these witnesses as they would of any other lay-opinion witness. Because the manager was not required to be designated as an expert or to provide an expert report to testify as to the market value of the property as a property owner under Rule 701, the trial court clearly abused its discretion by prohibiting her from testifying at trial as to fair market value pursuant to the Property-Owner Rule. As to the requested protective order, Edukid's complaint is focused on should the manager be deposed as an expert. Because she is testifying as a lay witness under Rule 701, the manager cannot be deposed as an expert and should only be deposed as a fact witness on otherwise permissible topics. Also, the City may not use the corporate representative's deposition to learn the bases for the experts' opinions of Edukid. The Texas Rules of Civil Procedure allow expert discovery only through requests for disclosure, expert reports, and expert depositions. It was an abuse of discretion for the trial court to permit discovery beyond that allowed under the rules of civil procedure.

INVERSE CONDEMNATION

Statute of Limitations for Personal Property

Tucker v. City of Corpus Christi, 2020 WL 948364 (Tex.App. Feb. 27, 2020, no pet.)

Facts: The Tuckers sued the City of Corpus Christi for improperly seizing their antique automobiles pursuant to the City's junked vehicles ordinance, which was ordered by a City municipal court judge in 2013. The Tuckers originally filed suit in 2015, but it was dismissed for want of prosecution. They again filed suit in 2017, alleging conversion, trespassing, invasion of privacy, due process violations, fraudulent misrepresentation of the City's municipal code, and the taking of personal property without just compensation. The trial court granted the City's plea to the jurisdiction and dismissed their claims, holding they were barred by a two-year statute of limitations.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: In addition to arguing governmental immunity, the City alleged that the Tuckers' claims were barred by the two-year statute of limitations. Noting that the first lawsuit may have been timely filed, the second suit was untimely because a suit dismissed for want of prosecution does not toll the limitations period. Section 311.034 of the Government Code provides that "statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." Tex. Gov't Code Ann. § 311.034. The limitations period is a statutory requirement that must be met before suit is filed. The Tuckers argue that their takings claim is governed by a ten-year statute of limitations; therefore, their suit was timely filed. A takings claim premised on a governmental entity's taking of real property is governed by the ten-year limitations period to acquire land by adverse possession. The Tuckers' takings claims are governed by Section 16.003 of the Civil Practice and Remedies Code, which provides for a two-year statute of limitations because it concerns personal property.

No Vested Right for Road not Built

Starbright Car Wash LLC v. City of Belton, 2019 WL 6711398 (Tex. App. – Houston [14th Dist.] Dec. 10, 2019)

Facts: In 2005, the City adopted an ordinance approving a change to a proposed retail zoning district to provide for a car wash and lube center. This change allowed for the extension of Sparta Road and a temporary access point to the proposed site. In November 2010, the City revised the plat and eliminated the extension of Sparta Road. Starbright purchased the property in December 2010, with the revised plat recorded in 2012. Starbright brought an inverse claim against the City claiming a vested right to access to the Sparta Road extension based on the 2005 ordinance. The City filed a no-evidence motion for summary judgment claiming that Starbright could not prove such a vested right, and even if it did, reasonable access remained and thus no inverse claim could stand. Starbright filed a motion for partial summary judgment seeking a judgment on the City's liability. The trial court granted the City's motion.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: A no-evidence motion is reviewed for legal sufficiency and is essentially a pre-trial directed verdict. The elements of an inverse claim are 1) the governmental entity intentionally performed some act while exercising its lawful authority; 2) which resulted in a taking, damaging, or destroying of someone's property; 3) for public use. The U.S. Supreme Court has defined two categories wherein regulatory action may be compensable: 1) where the property owner is required to suffer some type of physical invasion of his property, and 2) when the government regulation deprives the property owner of all economical use of his land. Although a property's value may be reduced due to a road closure, such injury does not become compensable if reasonable access remains. Likewise, reduction in value caused by the diversion of traffic, reduced exposure, or changed accessibility does not rise to the level of a material and substantial impairment of access. In this case, Starbright retained reasonable access to Main Street following the plat revision. Thus, the City's decision not to expand a public street which would have provided Starbright additional access to its property was not a compensable taking.

No action is No Intent

Texas General Land Office v. La Concha Condominium Association, 2020 WL 2610934 (Tex.App.-- Corpus Christi-Edinburg, May 21, 2020, no pet.).

Facts: The City of South Padre Island issued a building permit to build a wooden walkway over the dunes adjacent to La Concha condominium complex (Condo Complex) providing public access to the beach. The Condo Complex sued the city alleging that the construction of the walkway materially diminished their property and constituted an unconstitutional taking. The Condo complex amended their petition to add the General Land Office (GLO) as a defendant. The GLO moved to dismiss under Texas Rules of Civil Procedure 91a contending that the Condo Complex had no basis in law or fact because (1) the GLO has sovereign immunity; (2) the Condo Complex failed to exhaust their administrative remedies prior to suit; and (3) there is "no basis" for injunctive or declaratory relief or attorney's fees. The trial court denied the GLO's rule 91a motion.

Court of Appeals Holding: Reversed the trial court's dismissal of the Rule 91a motion and rendered judgment granting GLO's motion and dismissing the Condo Complex's claims against the GLO.

Court of Appeals Rationale: The appellate court determined that the GLO's rule 91a Motion was equivalent to a plea to the jurisdiction and was thus entitled to an interlocutory appeal. As to the issue of sovereign immunity, the Court determined that the GLO did not take any affirmative, direct action related to the building of the walkway and thus the GLO did not have any intent to take the Condo Complex's property and the Condo Complex's claim against the GLO must be dismissed.

Harris County Jurisdiction over Inverse Cases

San Jacinto River Authority v. Ogletree, 594 S.W.3d 833 (Tex App.--Houston [14th Dist.] Jan. 28, 2020, no pet).

Facts: Homeowners whose property flooded when water was released from a Lake Conroe Dam after Hurricane Harvey sued the San Jacinto River Authority (SJRA) and the Texas Water Development Board (TWDB) in Harris County district court for inverse condemnation. Both SJRA and the TWDB filed motions to dismiss under Texas Rule of Civil Procedure 91a and pleas to the jurisdiction. The trial court granted TWDB's motion and denied SJRA's motion.

Court of Appeals Holding: Affirmed the trial court's order dismissing TWDB and reversed the trial court's order denying SJRA's motion and entered a judgment dismissing the homeowners' claims against SJRA for lack of subject matter jurisdiction.

Court of Appeals Rationale: Texas Government Code §25.1032(c) grants the county civil courts at law with exclusive jurisdiction over all inverse condemnation claims filed in Harris County. The court ruled that the amount controversy exception that allows claims in which the amount in controversy is over $200,000 to be filed in Harris County District Court only applies to statutory condemnation actions brought under Chapter 21 of the Texas Property Code. This determination was based on the language in Gov't Code §25.1032(c) which states that "*the amount in controversy is the amount of the bona fide offer made by the entity with eminent domain authority to acquire the property from the property owner voluntarily"*. Because in an inverse condemnation claim there is no bona fide offer made by the condemning authority, the exception to provide the district court with jurisdiction over the case does not apply to inverse cases. The disposition of the case was without prejudice to the homeowners' right, if any, to refile the claims in the proper court.

For Discussion: *Kelo* Update

City of Swansea, MA and Walmart: City seeks to use eminent domain to remove covenants that run with land.

Summary: Walmart was approached by the owners of Swansea Mall to purchase excess land to build a store. As part of the purchase, Walmart also bought covenants on the land the mall did not sell. The mall eventually, due to economic issues by the owners, closed. The new purchaser asked the City of Swansea to put in place an economic redevelopment authority with the power of eminent domain to remove the covenants so the purchaser could develop the property as it sees fit. This request was made prior to the sale and was the only way the new purchaser would buy the mall. Justification for eminent domain would be to eliminate what is fast becoming a blighted property as well as to benefit the town and region "by continuing to be an economic engine that drives the local economy." Also, the idea of relocating the town hall to the new development has been raised. The city, through its authority, is currently pressing towards a lawsuit but is trying to work with Walmart to remove the covenants.

St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC, No. 2017-C-0434 (La. Jan 30, 2018), Petition for certiorari denied on Oct. 15, 2018

Summary: St. Bernard Port leased its terminal for 10% of the proceeds to an outside vendor that wanted to expand its operations due to increased traffic. Upon realizing that the expansion would be costly, St. Bernard looked down the river to other locations. Violet Dock was a privately owned port with over 40 years of business history that, amongst other things, had contracts with the US Navy, and more importantly, had six piers with a vast amount of river frontage. St. Bernard Port used its condemnation authority to take over Violet Dock, and placed the same with its vendor. A Louisiana appellate court upheld the condemnation as a valid "public use" because the government argued it would help the area's economic development. The Louisiana Supreme Court (after Violet lost at the trial and appellate level) citing *Kelo*, found St. Bernard Port's use of expropriation (LA's term for condemnation) to be fair and in the best interest of the State. The US Supreme Court denied Cert.

Note: After remand, the case went to trial and the trial court awarded $16,000,000 for the port. On appeal, the Louisiana Court of Appeals, *St. Bernard Port v. Violet Dock Port, Inc.*, 255 So. 3d 57 (La. Ct. App. 2018), noted that precedent recognized that the full extent of loss is not always satisfied by an analysis based on comparable sales or other methods to determine fair market value. The Court of Appeals held that the replacement value of $28,764,685, presented by Violet Dock was a credible and accurate valuation of the property, and it rendered judgment on that amount plus attorney's fees and interest.

For Discussion: Update on *Knick v. Township of Scott, Pennsylvania*, 588 U.S. ____; 139 S.Ct. 2162 (2019) Federal Court §1983 Takings Claim Can Proceed Without Prior State Court Action

Facts: Knick owned 90 acres of agricultural land in Scott Township, Pennsylvania, with a residence and the balance of the property for grazing farm animals. There is a small graveyard on the property supposedly containing the graves of Knick's neighbors' ancestors. In December 2012 the township passed an ordinance requiring all cemeteries to remain open to the public during daylight hours. In 2013, Knick was cited by township officials for violating the ordinance. Knick sought injunctive and declaratory relief claiming the ordinance was a taking of her property, but she did not include an inverse condemnation action under state law. The township withdrew the notice of violation and agreed to suspend enforcement of the ordinance while the state court proceedings were pending. The trial court declined to rule on her request for injunctive and declaratory relief because no irreparable harm could be shown. Knick then filed a §1983 suit in federal district court claiming the ordinance was a taking under the 5th Amendment. The District Court dismissed Knick's takings argument under *Williamson County v. Hamilton Bank* because she did not first proceed with an inverse claim in state court.

Court of Appeals Holding: Affirmed.

United States Supreme Court Holding: A property owner has a §1983 claim in federal court under the Takings Clause as soon as his property is taken for public use by a government without compensation. This is true regardless of subsequent proceedings in state court. A §1983 action alleging a constitutional claim may be brought in federal court without first pursuing available state remedies. *Williamson County* is overruled.

Selinger v. City of McKinney, 2020 WL 3566722 (Tex. App. – Dallas July 1, 2020)

Facts: Selinger owns property it intended to develop in Collin County within the City's ETJ. The developer contracted to buy the tract for development for subdivision into 331 lots, and he submitted his proposed plans to the City. Since the City had no plans to extend utilities to the property, the developer planned to construct a plant for sewage and contracted with a local Special Utility District for water. When the developer refused to agree to pay the City $482,000 if the City ever extended utilities to the property, his plat application was denied. Plaintiffs sued the City claiming it unlawfully denied the developer's subdivision plat application, which resulted in a compensable regulatory taking. The City responded with a plea to the jurisdiction on several grounds including ripeness, lack of standing, and mootness. After a hearing, the trial court granted the City's plea and dismissed the case for lack of subject matter jurisdiction.

Court of Appeals Holding: Affirmed as to no jurisdiction for attorney's fees on the takings claim, reversed on the remaining claims.

Court of Appeals Rationale: This case contains a variety of challenges to the justiciability of Plaintiffs' claims, including mootness, standing, and ripeness. As to standing, the test is whether a real controversy exists between the parties which can be resolved by court action. The developer's claim that the City denied his plat unlawfully after he expended funds to have it prepared for review constituted a sufficient injury to have standing in this case. Ripeness concerns whether an injury has or is about to occur, as opposed to being remote or contingent. Pursuant to the US Supreme Court's holding in *Knick*, takings are ripe without having first adjudicated them in state court. On the mootness claim, the City asserts in its brief that on the same day Selinger filed its appeal, a substantially similar plat request was submitted under the name of a different entity, one in which the developer was the entity's organizer and manager. This request did not seek a variance as to utilities and agreed to pay the impact fees. The City contends this moots the appeal, but the Court held the appeal is

not moot because the new plat application was submitted by a separate entity and will have no effect on this controversy. An exaction occurs when the government requires some action by a landowner as a prerequisite to the approval of a requested development plan. Exactions are compensable takings unless the government requirement has an essential nexus to advancing a legitimate interest of the government and is roughly proportional to the proposed development's anticipated impact. In this case, the Court held an exaction occurred by the City demanding the commitment for payment of $482,000, even though said payment was contingent on the City's extension of utilities sometime in the future.

MISCELLANEOUS CASES

Interpretation of a Partition Agreement and Continuation of Lignite Lease

Lee Wheeler, Trustee of L&P Children's Trust, and Nancy Wheeler Plumlee v. San Miguel Elec. Coop., Inc., 2020 WL 3547987 (Tex.App.—San Antonio July 1, 2020)

Facts: The Wheelers are surface owners of the San Miguel Ranch, and San Miguel Electric Cooperative is the mineral lessee over the Ranch. The larger property covering over 30,000 acres had been partitioned when it transferred to the heirs of the original owners, with Nancy Wheeler Plumlee acquiring all of the Ranch's surface estate. The mineral lease, covering the entire Ranch, was executed in 1954 and was for "only the coal, lignite, and other minerals (except oil or gas) down to a depth of 350 feet below the surface. Even if no minerals were produced, the Lease would "remain in force so long as the [delay] rentals hereinafter provided for are paid." In 2012, Wheeler granted DCP Sand Hills, LLC, an easement to lay a pipeline across parts of the Ranch, but it crossed parts San Miguel intended to strip mine. The pipeline would prevent San Miguel from mining under or near the pipeline. In 2017, the Wheelers sued San Miguel seeking a declaration that the Lease was invalid, arguing that the coal and lignite remained with the surface estates after a partition agreement and that the lease expired because San Miguel did not properly pay the delay rentals. San Miguel counterclaimed for breach of the lease, arising from the easement granted by the Wheelers to lay pipeline that would prevent strip mining by lessee. A jury determined the Wheelers breached the Lease and awarded San Miguel $16,000 in actual damages. The trial court granted San Miguel's motion for a directed verdict against the Wheelers on their claims and rendered judgment on the jury's verdict.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The Court first addressed the partition agreement, which the Wheelers argued was ambiguous and included the mineral estate. The partition agreement describes how the lands will be partitioned and expressly excludes the mineral estate from being partitioned with the corresponding partitioned surface estates. Although coal and lignite are generally part of the surface estate when those minerals are within 200 feet of the surface, the general rule does not apply if the conveyance severing the mineral estate affirmatively states otherwise. The court held that the heirs owned undivided interests in the entire mineral estate, which expressly included the coal and lignite, and the minerals were expressly excluded from the partitioned surface estates. The coal and lignite are part of the mineral estate held in undivided interests by the heirs and their successors. Next, the Wheelers argue that San Miguel waited an unreasonable amount of time to develop the lease, and because the contract does not fix a time for performance, a reasonable time is implied. However, the lease expressly states its duration: "this lease shall remain in force so long as the rentals hereinafter provided for are paid and/or so long as the coal, lignite [are produced]," and expressly states that it "shall not be forfeited for any failure to prosecute mining operations on the [property]." Finally, the Wheelers assert that San Miguel failed to properly pay the delay rentals since 2013. The Court held that San Miguel presented evidence that it tendered delay rentals payments, and even if they had not, the statute of limitation had run if the argument was that the payments had not paid since 2013. Additionally, the court dismissed the Wheelers' claim that the evidence was legally and factually insufficient to support the jury's finding that they breached the lease with San Miguel because they failed to properly brief the claim.

Paramount Purpose Doctrine – which Use is more Important?

DCP Sand Hills Pipeline, LLC v. San Miguel Electric Cooperative, Inc., 2020 WL 4607062 (Tex.App.-San Antonio Aug. 12, 2020)

Facts: San Miguel is a nonprofit electric cooperative that owns and operates a power plant that furnishes electricity to South Texas Electric Cooperative, Inc. The only source of fuel for San Miguel's power plant is the lignite it strip mines. San Miguel's predecessor entered into a mineral lease in 1954 with the Wheeler property (see case above) and was for the exclusive right to "only the coal, lignite, and other minerals (except oil or gas) down to a depth of 350 feet below the surface. It reserved the Wheelers' right to explore oil, gas, and other minerals below 350 feet so long as such exploration did not interfere with the strip mining operations, which was later amended to all the Wheelers the right to use the surface for grazing and agriculture as long as it did not interfere with the strip mining operations. DCP San Hills Pipeline is a common carrier, operating a twenty-inch pipeline that is part of a larger pipeline system that transports 20% of all the natural gas liquids produced in the Permian Basin and Eagle Ford Shale to the Gulf Coast for processing. In 2011, DCP agents negotiated a pipeline easement over the Wheeler Tract, and DCP was told about the lignite lease. DCP met with San Miguel to discuss the pipeline's proposed route, and DCP and San Miguel agreed on a route that would not interfere with San Miguel's planned mining operations. Later in 2011, DCP began negotiating with the Wheelers for a second pipeline, which was installed in 2013, which was over 4,000 feet north of the first pipeline, but DCP did not discuss this second pipeline with San Miguel. In 2014, San Miguel discovered the second pipeline and notified DCP that the pipeline interfered with its future mining operations. DCP refused to move the second pipeline so San Miguel sued seeking: (1) a declaration that the pipeline easement granted by the Wheelers to DCP was invalid, void, or voidable since it interfered with San Miguel's rights under the lignite lease; (2) a declaration that San Miguel's rights under the lignite lease were superior to DCP's rights under the pipeline easement; (3) a permanent injunction requiring DCP to relocate the pipeline; and (4) attorney's fees. DCP counterclaimed for condemnation of a pipeline easement but also argued the lignite lease was invalid and that San Miguel was not entitled to attorney's fees. The trial court granted San Miguel's motion for summary judgment and denied DCP's motions. After a bench trial on San Miguel's requests for an injunction and attorney's fees, the court entered a judgment declaring San Miguel's rights under the lignite lease superior to DCP's pipeline easement rights, declaring DCP's pipeline easement void, invalid, and/or voidable, awarding attorney's fees to San Miguel, and ordering DCP to remove the sections of its pipeline that interfered with San Miguel's strip mining operations. DCP relocated the second pipeline.

Court of Appeals Holding: Reversed and remanded.

Court of Appeals Rationale: The Court first looked at whether DCP's claims regarding its condemnation were moot because it had relocated the pipeline and was no longer seeking the easement. Because the opinion would affect DCP's rights, the court held those claims were not moot. Second, the Court reviewed San Miguel's declaratory judgment claim that San Miguel's rights under the lignite lease were superior to DCP's rights under the pipeline easement, voiding the pipeline easement. DCP argued this claim sought to determine title to real property and should have been raised as a trespass to try title action. The Court agreed with San Miguel that it was not required to bring its claims as a trespass to try title action because it was not seeking to establish its ownership or possessory right in the disputed land. After San Miguel requested injunctive relief requiring DCP to move its pipeline, DCP asserted an alternative counterclaim for condemnation. San Miguel argued the land was already dedicated to public use, so under the paramount importance doctrine, DCP could not condemn the land for a different public use. Under the paramount importance doctrine, a party may prevent a condemnation by showing: (1) the property is already devoted to a public use; and (2) the condemnation would practically destroy or materially interfere with the use to which it has been devoted. *Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613, 616–17 (Tex. 2008). If the proposed condemnee makes that showing, then the burden shifts to the proposed condemnor to establish that the necessity for the condemnation is "so great as to make the new enterprise of paramount importance to the public, and it cannot be practically accomplished in any other way." *Id.* at 617. Additionally, the Texas Supreme Court has stated that we "must look to the entire use of the affected property, and not a portion of its use, when considering

practical destruction or material interference." *Id.* If the practical destruction test only applied to a part of the affected property, then "[e]very utility pole, railroad, highway, or storm drain" would practically destroy the existing public use of a small portion of the land, and a condemnee would "always shift" the burden. *Id.* at 618. Assuming without deciding San Miguel's use constitutes an existing public use, the Court held there were fact issues about whether DCP condemning the land for the pipeline would practically destroy or materially interfere with San Miguel's existing public use. San Miguel was not actually mining the property in 2012 when DCP acquired the easement for the second pipeline. San Miguel did expend significant amounts of money on environmental, archeological, anthropological, and aerial studies, conducting flood surveys, and drilling and extracting on the tract. While San Miguel argues it intended to mine the area around the pipeline, it did not apply for a permit until after DCP installed the second pipeline. Similarly, to defeat DCP's condemnation counterclaim, San Miguel had to prove that DCP's condemnation of the easement would practically destroy or materially interfere with San Miguel's strip mining operations as a matter of law. San Miguel presented evidence that not being able to mine the land covered by DCP's pipeline easement would sterilize 743,919 tons of lignite, but DCP presented conflicting evidence. Because San Miguel did not conclusively establish that the paramount importance doctrine prohibited DCP from condemning the land covered by its pipeline easement for a different public use, the Court reversed the summary judgment. As for attorney's fees, the trial court did grant a declaratory judgment for San Miguel that the DCP easement was void, but because the Court concluded the trial court erred in granting summary judgment in favor of San Miguel, it remanded for reconsideration as to whether an award of attorney's fees is equitable and just.

Local Regulation of Reservation

Oneida Nation v. Village of Hobart, No. 19-1981 (7th Cir. July 30, 2020)

Facts: The Oneida Nation has a Big Apple Fest each year which has become a point of contention between it and the Village of Hobart. In 2016, the Village demanded the Nation get a permit and comply with certain ordinances. The Nation refused and sought declaratory and injunctive relief, arguing the Village cannot require compliance with local law on its own reservation. The Nation continued withholding the festival, and the Village issued it a citation for violating the ordinance. The Village argued at the trial court that Congress had diminished the reservation piece by piece when it allotted it to individual members and when parts were sold off to non-Indians. The district court granted summary judgment in favor of the Village.

Court of Appeals Holding: The Court of Appeals held that if the reservation remains intact, federal law treats it as an Indian country and it is exempt from most state and local regulation. Only Congress has the power to diminish Indian reservation land, even if portions of the reservation have been sold, and Congress's intent to do so must be clear. The Court found no evidence of such express intent regarding the Oneida Nation in this case. Therefore, Court reversed the district court judgment and ordered judgment for the Oneida Nation.

Interpretation and Application of Easement that did not Specify Width or Location

Southwestern Electric Power Company v. Lynch et al., 595 S.W.3d 678 (Tex.2020)(Update).

Facts: The Lynches own certain tracts of real property in Bowie County encumbered by utility easements granted to SWEPCO in 1949, and the operative language in each of the easements is identical. The easements state:

> [A]n easement or right-of-way [is granted to Southwestern Gas & Electric Company] for an electric transmission and distributing line, consisting of variable numbers of wires, and all necessary or desirable appurtenances (including towers or poles made of wood, metal or, other materials, telephone and telegraph wires, props and guys), at or near the location and along the general course now located and staked out by the said Company over, across and upon the following described lands. . .

None of the 1949 easements contain a metes and bounds description of the easement. The easement has been continuously utilized by SWEPCO to construct, service, and maintain electric transmission lines along the same general paths across the property since the construction of the lines in 1949. Between 2014–2015, SWEPCO rebuilt the transmission lines, which included replacing the existing wooden pole support structures

with steel pole structures along the existing route. SWEPCO sent letters to landowners along the electric transmission line route prior to the rebuild to inform them of the project, offer $1,000 to each of the current property owners "to supplement the existing easement on [the] property to bring the rights and restrictions to SWEPCO's standing right of way requirements," and to provide a supplemental easement form. The offered supplemental easement and plat sought to "revise[ ], modif[y] and clarif[y]" the "width, and boundaries" of SWEPCO's easement then-unspecified width to a specific width of one hundred feet (fifty feet on each side of the centerline of the existing line). The Lynches refused to grant the supplemental easements, but SWEPCO entered their properties and completed the upgrade under the 1949 right-of-way deeds.

The owners allege that during the rebuild, SWEPCO and its agents "took the position that [under the 1949 right-of-way deeds,] it had previously acquired a blanket easement over" the properties. On October 19, 2015, after the rebuild was complete, the owners filed a declaratory judgment action against SWEPCO, alleging that SWEPCO was unilaterally attempting to broaden the easement and its easement rights and asking the trial court to declare that SWEPCO's easement under the general terms of the 1949 right-of-way deeds was limited to fifteen feet on each side of the transmission poles because it is sufficient for operating and maintaining the lines and it is the width and path of the easement SWEPCO "utilized and maintained" during its years of prior use. SWEPCO filed a plea to the jurisdiction, entered a general denial, and made special exceptions, asserting various affirmative defenses. SWEPCO also filed counterclaims against the owners, alleging that under its interpretation of the deeds, they had trespassed with the construction of a house, allowing trees to grow, and constructing and maintaining a pond within the 100–foot easement. The trial court denied the plea to the jurisdiction, and after a bench trial, the trial court found for the owners, declared that SWEPCO's prior use of the easement limited its present and future use to thirty feet width, and awarded attorney's fees and costs.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: This case concerns the interpretation of a 1949 utility easement deed's grant of a utility easement that did not specify the width, location, or other boundaries of the easement. On appeal, SWEPCO argued that the trial court improperly limited its long-held easement for its electric transmission line, arguing that the court looked past the actual language of the easement and improperly considered historical uses. The company argued there was no such limitation in the easement and that "there is no evidence to support the finding that 30 feet was a reasonable space in which to operate its transmission line." The owners countered that the company was trying to argue that they had an easement over the entire property, which was "in excess of those originally granted." First, SWEPCO argued that the trial court erred in denying its plea to the jurisdiction because there is no justiciable controversy as the owners did not allege that any action or proposed action by SWEPCO violated the 1949 right-of-way deeds or that SWEPCO was preventing them from taking any present or proposed action on their properties. As to whether there was a justiciable controversy, "a declaratory judgment action does not vest a court with the power to pass upon hypothetical or contingent situations." Under the Uniform Declaratory Judgments Act (UDJA), "[a] person interested under a deed ... may have determined any question of construction or validity arising under the instrument ... and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a). Owners countered that due to SWEPCO's position that the deeds allow it to use as much of the servient property as is reasonably necessary, SWEPCO could raise its nonsuited trespass claims against them at any time in the future. Also, because of the uncertainty created by SWEPCO's position under the deeds, they are effectively being denied the full use of their property, as they do not know the extent to which they can use their properties in the future without risking possible opposition or trespass claims by SWEPCO. Because the current property owners are the ones "concerned" that even though they face no current opposition to their present or proposed property usage, SWEPCO "may choose to pursue enforcement" of its interpretation of the 1949 right-of-way deeds to oppose the owners' future usage and SWEPCO can also argue trespass at any time, even though it nonsuited the trespass claims here. Therefore, the court agreed with the trial court that this case presents a present, justiciable controversy. SWEPCO then argued that the trial court improperly allowed the extrinsic testimony and evidence regarding its prior use of the easement to limit it to 30 feet in width. Here, the terms of the 1949 right-of-way deeds granted an easement in general terms but did not specify

the width of the easement so SWEPCO was entitled to use as much of the property as is reasonably necessary, while being as little of a burden as possible. The court agreed that the trial court could resort to extrinsic evidence in order to determine the width of the easement. SWEPCO did not dispute that the evidence, admitted over its objection, supports the trial court's judgment that "a thirty (30) foot easement is reasonably necessary for the operation, use and maintenance of the transmission line across the Plaintiffs' respective properties." Testimony included a neighbor that testified that agents of SWEPCO told him they were instructed to trim his pecan trees back fifteen feet from the center of the transmission line. Lynch testified and produced photographs showing that after the rebuild, the new poles and transmission line were within a thirty-foot-wide area. Another neighbor testified that a portion of the rebuilt line ran through a pine thicket, where the line had "15 or 20 foot on either side, probably." Another neighbor presented photos that showed the rebuilt line used approximately the same width-area as the old line. The court rejected SWEPCO's argument that because 1949 right-of-way deeds granted it a right to use as much property as was reasonably necessary, it did not lose that right by only using a thirty-foot-wide portion of the property in the past. Instead, the court affirmed the trial court found that under a general easement, once the location of the easement is selected by the grantee, its rights then become fixed and certain. Therefore, once SWEPCO built and maintained the transmission lines, its rights became fixed and certain.

Supreme Court Holding: Reversed in part, Affirmed in part.

Supreme Court Rationale: The Supreme Court agreed with the lower courts that the landowners' action was ripe, and thus presented a justiciable controversy. However, the Supreme Court held that the easements were general easements that did not include a fixed width. If the easement's terms can be given a definite or certain meaning, "then the language is not ambiguous, and the court is obligated to interpret the contract as a matter of law." As the court held in *Coleman v. Forister*, 514 S.W.2d 899 (Tex. 1974), "[a] grant or reservation of an easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." If the easement's terms are ascertainable and can be given legal effect, courts will not supplant the easement's express terms with additional terms nor consult extrinsic evidence to discern the easement's meaning. The property remains burdened by general easements with no defined width, and the holder of a general easement must utilize the land in a reasonable manner and only to an extent that is reasonably necessary and is as less burdensome as possible to the owner.

Note: The easement did not grant the additional right of the relocation of the transmission line.

For Discussion: Takings in the Era of COVID-19

As the pandemic proceeds and government shutdowns or restrictions continue, scholars across the country have weighed in on whether these shutdowns and restrictions constitute compensable takings. A shortlist of some scholarly works, presentations, or discussions is below.

1. For an exhaustive, detailed, and ongoing chronology of Covid-19 Takings challenges, please refer to the website of Professor Robert Thomas: inversecondemnation.com. Professor Thomas's website is a thorough gathering of materials and cases discussing whether pandemic orders constitute compensable takings.
2. Professor Thomas has drafted a law review article titled "Evaluating Emergency Takings: Flattening the Curve." In it, he discusses the issues related to this Takings question and provides a summary of historical case law dealing with these matters. The draft is available on his website.
3. The Federalist Society offered a podcast dated May 15, 2020, discussing whether pandemic shutdowns and restrictions constitute compensable takings. It can be downloaded for free from the Federalist Society website.
4. Episode 50 of Clint Schumacher's Eminent Domain podcast has Professor Thomas as a guest. These pandemic Takings issues are discussed. It is available from the Eminent Domain Podcast website.
5. Elizabeth Wolstein, a partner with Schlam, Stone & Dolan, wrote an article titled "Do State Shutdown Orders effect a taking for which the State must pay just compensation?" The article is available from Law.com.