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The King can  
do no wrong,  
or can he?

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# Sovereign Immunity

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# Outline

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- Sovereign Immunity Background
- Federal Law
- Waivers of Sovereign Immunity
- Whether Sovereign Immunity Applies in Condemnation

# Sovereign Immunity

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- Derives in part from the old English saying that “the king can do no wrong”.
- Sovereign Immunity = protects the state and state agencies from lawsuits.
- Governmental Immunity = protects political subdivisions of the state, like cities and counties.
  - Both sovereign immunity and governmental immunity are treated similarly by case law, so the distinction is fading, but it isn't entirely obsolete.

# Sovereign Immunity

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- Purposes for sovereign immunity:
  - Shield the public from the costs and consequences of improvident actions of their governments.
  - Protect the public by preventing potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation.
  - Preserve separation-of-powers principles by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars.
- Two types of sovereign immunity protections:
  - Immunity from suit.
  - Immunity from liability.
- If the protections apply, there must be an unambiguous waiver to evade protections and sue or collect from a sovereign.

## Examples of Waivers of Sovereign Immunity



## Examples of Waivers of Sovereign Immunity

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- Chapter 271 Texas Local Government Code (breach of contract claims)
- Texas Tort Claims Act
- Takings Claims
- But what about suits to take government property?



# PennEast Pipeline Company, LLC v. New Jersey

141 S. Ct. 2244

Supreme Court of the United States

June 29, 2021

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## ■ Facts:

- PennEast sought to construct a 116-mile pipeline from Pennsylvania to New Jersey.
- FERC granted PennEast a CCN in January 2018. PennEast then attempted to condemn land owned by New Jersey.
- New Jersey moved to dismiss PennEast's complaints on sovereign immunity grounds. On appeal, the Third Circuit held that nothing in the Natural Gas Act indicates that Congress intended to clearly delegate to certificate holders the Federal Government's ability to sue nonconsenting states, and thus PennEast was not authorized to condemn New Jersey's property.



# PennEast Pipeline Company, LLC v. New Jersey

141 S. Ct. 2244

Supreme Court of the United States

June 29, 2021

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- Issue: Do the states have immunity from condemnation suits brought by private parties exercising federal eminent domain authority under the Natural Gas Act?
- Holding and Reasoning:
  - § 717f(h) of the NGA does not need “unequivocal textual evidence” demonstrating that Congress intended to delegate the power to condemn states’ property interests because the federal eminent domain power is complete in itself and the states consented to the exercise of that power-in its entirety when they adopted the Constitution.
  - PennEast's condemnation action to give effect to the federal eminent domain power falls comfortably within the class of suits to which States consented when they adopted and agreed to the terms and structure of the Constitution.
- Takeaway: The States “have no immunity left to waive or abrogate when it comes to condemnation suits by the Federal Government and its delegates.”

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- The contrary position would give rise to the dilemma of needing state consent in virtually all condemnations authorized by the federal government.
  
- How does governmental immunity affect public works projects undertaken by private companies, and even other government actors, in Texas?

# Oncor Elec. Delivery Co. LLC v. Dallas Area Rapid Transit

369 S.W.3d 845

Supreme Court of Texas

June 22, 2012

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## ■ Facts:

- Oncor Electric Delivery Company, an electric utility, sued Dallas Area Rapid Transit (DART) to condemn an easement across its land for use in constructing a transmission line approved by the Public Utility Commission (PUC).
- Initially, DART, a governmental entity, pleaded immunity from the suit. The court of appeals held that governmental entities are immune from suits for condemnation and dismissed the action.
- During the appeals process to the Texas Supreme Court, the Legislature passed Section 37.053(d) of the Utilities Code:
  - For transmission facilities ordered or approved by the [PUC], the rights extended to an electric corporation under Section 181.004 include all public land, except land owned by the state, on which the commission has approved the construction of the line.

# Oncor Elec. Delivery Co. LLC v. Dallas Area Rapid Transit

369 S.W.3d 845

Supreme Court of Texas

June 22, 2012

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- DART argued, among other things, that their property was still immune to condemnation because their immunity is derived from the state, so they should share in the exception for immunity for property owned by the state.
- Issue: Does the language in 37.053(d) waive governmental immunity for condemnation suits for property owned by the state's political subdivisions?
- Holding and Reasoning:
  - **The Texas Supreme Court held that the language in 37.053(d) waives governmental immunity for condemnation suits brought by electric corporations on public land not owned by the state on which the PUC has approved the construction of the line.**
  - The court held that the exception to the waiver of immunity is based on ownership, not the source of immunity, meaning that the **section waives immunity for political subdivisions and other entities that derive their immunity from the state.**
  - The court further noted that “if the exception applied to the property of every governmental entity with state-derived immunity, it would apply to all public land and would swallow the rest of the provision, denying it effect.”
- **“We assume, without deciding, that governmental entities are immune from condemnation suits.”**

# Paramount Public Purpose

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- Step One:

- Property owner shows (1) property is already devoted to a public use, and (2) the proposed condemnation would practically destroy or materially interfere with the current public use of the property.

- Step Two:

- If Step One succeeds, burden shifts to condemnor to show (1) new proposed use of the property is of paramount importance to the public, and (2) the new proposed use cannot be practically accomplished in any other way.

# Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Water Irrigation Dist. No. 1,

627 S.W.3d 529

Court of Appeals of Texas, Thirteenth District, Corpus Christi-Edinburg

May 27, 2021

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## Facts:

- Improvement District and Irrigation District were both political subdivisions of the state performing governmental functions, and both enjoyed eminent domain authority.
- Improvement District sought a permanent subterranean easement on Irrigation District's property for the purpose of installing a water pipeline.
- The easement would need to cross the right-of-way of the Irrigation District's canal.
- At the special commissioners' hearing, the Irrigation District was awarded \$1,900 in damages for the taking of its property.
- The Irrigation District objected to the award under the paramount purpose doctrine, alleging that the taking would materially interfere with its existing public use of the property: providing water and irrigation services to numerous residents of Hidalgo County.

# Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Water Irrigation Dist. No. 1,

627 S.W.3d 529

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May 27, 2021

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## Facts:

- Wait, we have governmental immunity. Let's try that.
- So the Irrigation District filed a plea to the jurisdiction based on governmental immunity from suit. The trial court latched on to that argument and granted the plea, dismissing the condemnation without the Irrigation District ever having to prove Step One of the Paramount Public Purpose Doctrine.

# Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Water Irrigation Dist. No. 1,

627 S.W.3d 529

Court of Appeals of Texas, Thirteenth District, Corpus Christi-Edinburg

May 27, 2021

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- Issue: Are governmental entities immune from condemnation suits?
- Improvement District's Argument:
  - Condemnation proceedings do not implicate immunity because they are in rem proceedings.
  - An in rem proceeding is limited to the property at issue and does not impose any personal liability on the property owner.
  - Governmental immunity exists to protect the public from the costs and consequences of improvident actions of their government, but because condemnation does not impose any personal liability on the government, the justification for governmental immunity does not exist.
  - Instead, condemnation proceedings actually benefit the public because it allows government entities to ensure adequate compensation for the taking of its property.

# Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Water Irrigation Dist. No. 1,

627 S.W.3d 529

Court of Appeals of Texas, Thirteenth District, Corpus Christi-Edinburg

May 27, 2021

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- Issue: Are governmental entities immune from condemnation suits?
- Improvement District's Argument:
  - If the court holds that immunity applies in eminent domain suits, governmental landowners may use the shield of immunity to charge a premium, leading to increased costs for public projects.
  - Condemnors may be motivated to route around public properties, which would disproportionately impact private landowners.

# Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Water Irrigation Dist. No. 1,

627 S.W.3d 529

Court of Appeals of Texas, Thirteenth District, Corpus Christi-Edinburg

May 27, 2021

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## ■ Holding and Reasoning:

- Governmental immunity applies in condemnation suits because it has been the law in Texas for years that governmental entities enjoy immunity from a suit for land.
- Condemnation suits are basically suits for land, such as trespass-to-try-title suits, and immunity should apply.
- Additionally, immunity preserves separation-of-power principles, and the court was not willing to exert its opinion by interfering with the Irrigation District's decision not to enter into an easement with the Improvement District.
- When a governmental landowner objects to an award in a condemnation suit on a non-monetary basis, the costs of defending the lawsuit constitutes unforeseen expenditures that could hamper governmental functions, and the governmental landowner retains immunity in the resulting lawsuit.
  - Immunity was applicable for the Irrigation District because it objected to the special commissioners' award under the paramount purpose doctrine (a non-monetary basis).
- Dicta: If the objection was on a monetary basis, the governmental entity may have waived immunity.
- Case is currently being briefed in front of the Texas Supreme Court

Getting tired of lawyers yet . . .

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## Process for Determining Whether Immunity is Applicable or Waived

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- First: the judiciary determines the applicability of immunity in the first instance and delineates its boundaries.
- Second: if immunity is applicable, then the judiciary defers to the legislature to waive such immunity.
- Immunity protects governmental entities from suit only when it is (1) applicable and (2) not waived by the Legislature.

# Harris Cnty. Fresh Water Supply Dist. No. 61 v. Magellan Pipeline Co., L.P.,

No. 01-20-00805-CV, 2022 WL 1144636

Court of Appeals of Texas, First District, Houston

April 19, 2022

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## ■ Facts:

- Magellan wanted to cross one of the District's detention ponds.
- The parties could not agree on terms but did agree to enter a right-of-entry agreement that would state that District did not dispute Magellan's right to take.
- Emails between the parties:
  - Magellan: Based on our last discussion, District's preference is for Magellan to file condemnation so the District can pursue scheduling a Commissioner's Hearing.
  - District responds: "Very good. Thank you."
- Moral of the story: Follow up phone conversations with emails.

# Harris Cnty. Fresh Water Supply Dist. No. 61 v. Magellan Pipeline Co., L.P.,

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April 19, 2022

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## ■ Facts:

- Parties later entered into the right-of-entry agreement.
- The ROE Agreement provided that:
  - District entitled to seek additional compensation.
  - District will not contest Magellan's authority to condemn.
  - Sole purpose of the condemnation will be to ensure the District has a means to pursue additional compensation.
- The District objected to the award of the special commissioners, arguing that it failed to adequately compensate the District. District filed a plea to the jurisdiction based on Paramount Public Purpose, not governmental immunity.

Harris Cnty. Fresh Water Supply Dist. No. 61 v.  
Magellan Pipeline Co., L.P.,

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Court of Appeals of Texas, First District, Houston

April 19, 2022

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## ■ Facts:

- Trial court found that the District waived the Paramount Public Purpose argument in the ROE Agreement and granted certain compensation amounts to the District.
- On appeal, the District argued for the first time that, as a subdivision of the state, it enjoyed governmental immunity from condemnation suits and that immunity was still applicable despite the District's entering into the ROE Agreement with Magellan.

# Harris Cnty. Fresh Water Supply Dist. No. 61 v. Magellan Pipeline Co., L.P.,

No. 01-20-00805-CV, 2022 WL 1144636

Court of Appeals of Texas, First District, Houston

April 19, 2022

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- Issue: Did the District’s negotiations and agreement with Magellan render its governmental immunity from condemnation suits inapplicable?
  
- Holding and Reasoning:
  - The court found that the condemnation proceeding in this case was filed, at the District’s request, precisely for the reason mentioned in Hidalgo County: the District and Magellan could not agree on the amount of just compensation, and the **District “made a calculated decision to expend resources to pursue additional compensation.”**
  - The court held that the District’s governmental immunity was inapplicable because the District (1) compelled the filing of the condemnation proceeding and contractually obligated itself to participate in it, (2) requested additional compensation above the amount it had already been paid and accepted, and (3) sought breach-of-contract damages in addition to “just compensation.”
  
- **Takeaway: Immunity from condemnation suits is inapplicable when political subdivisions compel condemnation proceedings in order to seek compensation greater than the offer of “just compensation” provided by the condemning party.**

# Wasson Interests, Ltd. v. City of Jacksonville

489 S.W.3d 427

Supreme Court of Texas

April 1, 2016

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## ■ Facts:

- City of Jacksonville leased lakefront lots of land to private parties, restricting the use of the lots to residential purposes only.
- Wasson used these leased lots for commercial purposes in violation of the lease. Despite some initial tries at a compromise between the City and Wasson, ultimately the City sent Wasson Interests an eviction notice.
- Wasson filed suit against the city, claiming the city breached the terms of the lease.
- The lower courts held that the city was immune from the suit because governmental immunity existed and no waiver applied.

# Wasson Interests, Ltd. v. City of Jacksonville

489 S.W.3d 427

Supreme Court of Texas

April 1, 2016

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- The proprietary-governmental dichotomy:
  - Sovereign immunity is inherent in the State, and all political subdivisions of the State share this immunity (i.e., governmental immunity).
  - But courts have distinguished between political subdivisions acting as a branch of the State vs. acting in a proprietary, non-governmental capacity.

# Wasson Interests, Ltd. v. City of Jacksonville

489 S.W.3d 427

Supreme Court of Texas

April 1, 2016

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- Issue: Does the proprietary-governmental dichotomy apply to breach-of-contract lawsuits?
- Answer: Yes
  - So if a political subdivision of the state is acting in a proprietary function, immunity may not exist in certain instances like breach of contract claims.
- Reasoning
  - Judiciary determine whether immunity is applicable in the first instance “and delineates its boundaries.”
    - The courts “prune and shape the doctrine of immunity.”
  - “Acts performed as part of a city’s proprietary function do not implicate the state’s immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign.”
- **Takeaway: Governmental immunity (i.e., against political subdivisions) is inapplicable for breach-of-contract suits arising out of an entity’s proprietary acts.**

# Wasson Interests, Ltd. v. City of Jacksonville

559 S.W.3d 142

Supreme Court of Texas

October 5, 2018

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- The previous Wasson case went back to the appellate court to determine whether the act of leasing in this case was governmental or proprietary.
- The appellate court initially held that the breach of contract claim arose from a governmental function, so governmental immunity applied to bar the claim.
- Wasson appealed again to the Texas Supreme Court.

# Wasson Interests, Ltd. v. City of Jacksonville

559 S.W.3d 142

Supreme Court of Texas

October 5, 2018

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- **The court used the following criteria to determine whether a municipality's activities are proprietary or governmental:**
  - Question 1: Is the activity mandatory or discretionary?
    - Leasing the lakefront property was discretionary because the city had no obligation to lease it and could have used it for many other governmental purposes.
  - Question 2: Is the act intended to benefit the general public or the municipality's residents?
    - Although some non-residents benefited from the leases, because the city's primary objective with the leases was to develop the lake and raise funds for the city's budget, the court held that the city executed the leases with the intent to primarily benefit its own residents.
  - Question 3: Is the act performed on the state's behalf or on the municipality's own behalf?
    - No facts to suggest that the city acted on the state's behalf.
  - Question 4: Is the act sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary?
    - Court held that a municipality's proprietary action may be treated as governmental only if it is essential to the municipality's governmental actions.
    - The city's leasing for the lakefront property was not essential to the city's operation or maintenance of the lake (a governmental function).
  
- **Proprietary functions are "usually activities that can be, and often are, provided by private persons."**

# Case Study

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- Pipeline company needs to install multiple pipelines across land owned by a municipality.
- No reroute is available to avoid this land.
- Land is being leased by the municipality for O&G production and has multiple pipelines crossing the property.
- The land is outside of the City and ETJ.
- The City has granted multiple pipeline leases over the land.
- The municipality took a take-it-or-leave-it attitude initially, forcing the pipeline company to condemn.
- Cases settled for now, but what would happen if it didn't?
  - Municipality had filed pleas to the jurisdiction asserting governmental immunity.

## Governmental Entity Terms

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Additionally, Licensor may terminate this License at will for any or no reason upon giving at least three hundred sixty-five (365) days' written notice to Licensee. The parties to this License understand and agree that it is in Licensor's sole discretion to cancel the License during the term of the License without penalty to Licensor. Licensee has no expectation and has received no guarantees that this License will not be terminated before the end of the License term. The parties have bargained for the flexibility of terminating this License upon tender of the requisite notice at any time during the term of the License. All work and services under the License shall be suspended upon termination of the License becoming effective.

## Governmental Entity Terms

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**A. License Fee.** The license fee in the amount of ONE MILLION SEVEN HUNDRED FIFTEEN THOUSAND SEVEN HUNDRED and 00/100 Dollars (\$1,715,700.00) shall be due and payable on or prior to the Commencement Date of this License (“License Fee”). Licensee’s failure to make the License Fee payment within thirty (30) days after the License Fee is due shall constitute a late payment and Licensee shall pay Licensor a late charge of five percent (5%).

- This amount is 10x University Lands Rates

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## Governmental Entity Terms

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Licensor reserves the right to lay and permit to be laid, sewer, gas, water, and other pipelines or cables and conduits, and to do and permit to be done, any underground or overhead installation or improvement that may be deemed necessary or proper by the governing body of Licensor, in, on, across, along, over, under, and through any property occupied by Licensee. In permitting such work to be done, Licensor shall not be liable to Licensee for any damage so caused to Licensee's system or property, **NOR SHALL LICENSOR BE LIABLE TO LICENSEE FOR ANY DAMAGES TO LICENSEE'S PIPELINE OR SURFACE SITE, ARISING OUT OF THE NEGLIGENCE BY LICENSOR, ITS EMPLOYEES, OFFICERS OR AGENTS, OR LICENSOR'S CONTRACTORS OR SUBCONTRACTORS.** If Licensor requires Licensee to remove, alter, change, adapt, or conform Licensee's facilities because of changes in the grade or construction of a street or in the location or manner of constructing a water pipe, sewer pipe, or other surface, underground or aboveground structure owned by Licensor, Licensee shall make the alterations or changes as soon as practicable, and in no event longer than one hundred eighty (180) days, when ordered in writing by Licensor, without claim for reimbursement for the cost of the relocation or for damages against Licensor. If these requirements impose a financial hardship upon Licensee, Licensee shall have the right to present alternative proposals for Licensor's consideration.

## Governmental Entity Terms

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**E. Waiver of Attorney Fees. BY EXECUTING THIS LICENSE, LICENSEE AGREES TO WAIVE, AND DOES HEREBY KNOWINGLY, CONCLUSIVELY, VOLUNTARILY AND INTENTIONALLY WAIVE, ANY CLAIM IT HAS OR MAY HAVE IN THE FUTURE AGAINST LICENSOR REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE LICENSE, THE CONSTRUCTION, OR INTERPRETATION, VALIDITY OR BREACH OF THE LICENSE. LICENSEE SPECIFICALLY AGREES THAT IF LICENSEE BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS LICENSE, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS LICENSE, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), OR CHAPTER 271 OF THE TEXAS LOCAL GOVERNMENT CODE, LICENSEE AGREES TO ABANDON, WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH LICENSEE MIGHT OTHERWISE BE ENTITLED.**

## Governmental Entity Terms

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**H. Governmental Immunity.** By executing this License, Licensor is not waiving its right of governmental immunity. Licensor is retaining its immunity from suit. Licensor is not granting consent to be sued by legislative resolution or action. **THERE IS NO WAIVER OF GOVERNMENTAL IMMUNITY.**

# Comments or Questions?

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