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Houston, Texas**Recent Developments in Eminent Domain Proceedings:  
Shale Oil, CREZ, Senate Bill 18 and a Proposed Taking by the U.S. Army**

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## **RECENT DEVELOPMENTS IN EMINENT DOMAIN PROCEEDINGS:**

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Proposed Taking by the U.S. Army

### **I. Introduction**

Proceedings in eminent domain are on the rise in Texas.<sup>1</sup> Without question, the increase is in large part due to the number of new pipeline easements required to exploit the Barnett Shale<sup>2</sup> and Eagle Ford Shale<sup>3</sup> formations.<sup>4</sup> The increase is also due to the number of easements required to complete the expansive Comprehensive Renewable Energy Zone (CREZ) Project, a

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<sup>1</sup> As of August 19, 2011, pipeline companies have filed 184 lawsuits in four South Texas counties, up from only 28 in 2010. In Lavaca County, Texas, pipeline companies have filed 62 lawsuits, up from 18 in 2010. See Gilbert, Daniel. "Lawsuits Flow Over Texas Pipelines," *The Wall Street Journal*, Aug. 19, 2011.

<sup>2</sup> According to the Texas Railroad Commission, "[s]ome experts say that the Barnett Shale is the largest onshore natural gas field in the United States." See <http://www.rrc.state.tx.us/barnettshale/index.php>, updated August 4, 2011.

<sup>3</sup> There were 72 producing oil leases related to the Eagle Ford Shale in 2010, up from 40 in 2009. There were 158 producing gas wells related to the Eagle Ford Shale in 2010, up from 67 in 2009. See <http://www.rrc.state.tx.us/eagleford/index.php>, updated August 3, 2011.

<sup>4</sup> In 2008, the Texas Public Utility Commission issued order 33672 and assigned \$4.93 billion of CREZ (competitive renewable energy zone) transmission projects to be constructed by seven transmission and distribution utilities. The project will eventually transmit 18,456 megawatts (MW) of wind power from West Texas and the Panhandle to highly populated metropolitan areas of the state. See "PUCT – CREZ Home Page" at <http://texascrezprojects.com>.

taking of over 2,000 miles of electric transmission line easements by select electric utility companies to bring wind-produced energy to market.

Adding fuel to the filing frenzy was the race to the courthouse brought about by the recent passage of Senate Bill 18, which places more onerous requirements on entity's with the power of eminent domain who fail to file the relevant petition in eminent domain proceedings until after the new law's effective date of September 1, 2011.

This paper discusses the requirements that must be met in order for takings to occur, including that such takings be for public use, sources of eminent domain power, and the effects of recent legislation, including the omnibus Senate Bill 18. While much of the media attention surrounding the debate and ultimate passage of Senate Bill 18 focuses on whether the new law benefits landowners and levels the playing field in eminent domain proceedings, it should not be overlooked that Senate Bill 18 subtly reminds Texans that the public use requirement remains critical to the exercise of the power of eminent domain. This paper concludes with a discussion of the U.S. Army's intent to condemn 22,232 acres of land over the Eagle Ford Shale in South Texas in order to build a training center for area battalions.

## II. Eminent Domain and Public Use: The U.S. Constitution

The Fifth Amendment to the United States Constitution states: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."<sup>5</sup> The exercise of the power of eminent domain under the Fifth Amendment obligates the federal government to pay just compensation when it takes another's property for public use.<sup>6</sup> The public use clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>7</sup>

However, what constitutes "public use" hasn't always been straightforward. In *Berman v. Parker*, 348 U.S. 26 (1954), the United States Supreme Court defined the contours of the power of eminent domain. There, the Supreme Court reviewed the District of Columbia Redevelopment Act of 1945 which permitted the taking of buildings and land solely for commercial purposes under the power of eminent domain. The takings at issue occurred under a comprehensive plan prepared by an administrative agency for the

redevelopment of a large area of the District of Columbia with an eye toward eliminating and preventing slum and substandard housing conditions. Even though such property could later be sold or leased to other private interests, the Act was declared constitutional.<sup>8</sup>

*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), involved a challenge to a state statute designed to undercut the landowning oligopoly enjoyed by select families. The statute gave lessees of single family homes the power of eminent domain to purchase the land they leased from such landowners, even over the landowner's objection. Indeed, the landowners objected because the takings were not for public use. Instead, the property became that of the lessee. In an 8-0 opinion delivered by Justice O'Connor, the majority held that the statute did not violate the "public use" requirement of the Fifth Amendment and that the Court "will not substitute its judgment for a legislature's judgment as to what constitutes „public use“ unless the use is palpably without reasonable foundation."<sup>9</sup> According to the Court, that the property taken by eminent domain is transferred to private beneficiaries did not transform that taking as having only a private purpose. "Government does not itself have to use property to legitimate the taking; it is only the

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<sup>5</sup> U.S. Const. Amend. V.

<sup>6</sup> *United States v. Carmack*, 329 U.S. 230, 241-42 (1946).

<sup>7</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

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<sup>8</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>9</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).