

The Power Of Eminent Domain And California Farmers And Ranchers Today

The government's power of eminent domain is the power to condemn private property for a public purpose. While this requires compliance with certain procedures, the government's power of eminent domain is otherwise quite broad and is shared by many governmental bodies and agencies at the federal, state, and local levels.

The government's power to condemn and take property is essential for many beneficial public infrastructure projects. However, the government's legitimate exercise of the power of eminent domain for the public good must be balanced against the rights of private property owners and individuals. The basic limitations on the government's power of eminent domain are the statutory procedures that the government must follow and a landowner's constitutional right to just compensation and due process.

With several large regional or statewide infrastructure projects in the planning stages, government eminent domain issues have surfaced for rural landowners in many parts of California. Public works under consideration range from water and flood-control projects to utility upgrades to major transportation projects such as California High Speed Rail, a statewide train system for which construction is slated to start in the Central Valley.

The "Overview of the Eminent Domain Process" provided below and available in [PDF form](#) here is intended to serve as a resource and general starting point for Farm Bureau members and others who wish to gain a better understanding of the eminent domain process. For private landowners who may be impacted by a proposed public infrastructure project, an understanding of the process is necessary to ensure that one's legal rights, property, family, and farming or ranching operation are adequately protected.

Overview Of The Eminent Domain Process

While a private landowner may not be able to stop the government from using the power of eminent domain to condemn the landowner's property, in many instances getting **competent legal representation early** and gaining **familiarity with the eminent domain process** may help to ensure that the landowner receives fair compensation for loss or depreciation of his or her property, relocation expenses, and other impairments of the landowner's business or operation.

¹ This "Eminent Domain Summary" is not intended in any way to substitute for detailed legal advice from a private attorney. Individuals should consult a private attorney for guidance on their particular facts and circumstances. This information is provided as a general overview of the eminent domain process. While the information is believed to be generally correct, CFBF makes no representation as to this information's legal or factual accuracy. In making this information available, CFBF disclaims any and all liability for any party's reliance on the information provided.

Finding And Retaining Competent Legal Representation Early

In all cases, landowners facing a potential condemnation action will be well-served to obtain legal counsel experienced in eminent domain law as early in the process as possible. The process begins with the very first letter from the government requesting access to the landowner's property in connection with a proposed public project.

For landowners who already have an attorney whom they consult for advice on general legal matters, a good starting point in the search for competent legal representation in this specialized area of the law is this existing attorney. An existing attorney can likely help a landowner to locate a competent eminent-domain attorney and appraiser (assuming this attorney does not possess the expertise to represent the landowner directly).

Local knowledge and expertise is typically a bonus in eminent domain proceedings due to a local attorney's greater familiarity with the locale, with land values and the local economy, with local appraisers, the local court, and the like. On the other hand, landowners impacted along with many other similarly situated landowners by a single large project may see advantages to a mix of coordinated local representation on an individual basis, in combination with some form of collective representation by a firm specializing in eminent domain law, including potentially a firm or firms with exceptional credentials from outside of the local area. Groups of landowners who are impacted by a single project can potentially reduce costs by pooling resources and coordinating actions.

For projects impacting large numbers of property owners in the same county, landowners may contact their local county Farm Bureau to determine whether eminent domain workshops may be conducted or other assistance provided.

Basic Steps In The Eminent Domain Process

1. Initially, the government advises the landowner in a letter that the landowner's property, or a portion of that property, is being considered for a public purpose. The government agency provides a **notice of decision to appraise** and seeks a **temporary entry permit (T.E.P.)** to enter property to conduct an appraisal, surveys, and other necessary studies for the proposed project. The landowner is advised that he or she will be indemnified against potential harm, but is also advised that if the landowner does not sign the **T.E.P.** that he or she may be taken to court.
2. Landowners facing possible condemnation should obtain **competent legal advice** and representation **as early in the process as possible**. Landowners are strongly advised **against** proceeding or communicating with the agency regarding their property without legal representation.
3. If the landowner withholds consent to enter the property (or simply fails to respond), the government must seek a **court order** to enter the property. If such an order is obtained, it **should include court-imposed protections** for the property owner. On the other hand, landowners should also be aware that in the event it is denied access, the government may opt to prepare its appraisal remotely or indirectly, by means of aerial photographs, roadside surveys and photographs, comparison to comparable properties, etc.
4. After obtaining a signed T.E.P. or court order, a government appraiser may enter the property. For highly controversial and contentious projects, landowners should not be

surprised or intimidated if government surveyors and appraisers are accompanied by law enforcement personnel. Interactions with agency representatives and their agents can be emotionally distressing and unpleasant. However, it is important that landowners in this situation **keep a level head**, remain calm, and rely on advice of their counsel.

5. The government conducts an **appraisal**:
 - a. The landowner should **consult with counsel before** meeting with a government appraiser.
 - b. The landowner has a right to **walk the property** with his or her legal counsel and **provide input on the property value** for the government's appraisal. However, **information volunteered by the landowner may be cited by the government or agency** later on, and so the advice of counsel is again key.
6. The landowner may (and normally does) conduct his or her **own appraisal** (reimbursable by statute up to \$5,000).
7. The government makes a **written offer**, including a **summary appraisal** and, often, a **pre-prepared grant deed for signature**.
8. **Settlement / Acceptance of Offer?** (The landowner may at this point **accept a written offer** from the government, but in this event may be accepting a **lesser amount** for his or her property than would be the case if the landowner were to reject the offer and present additional information supporting a higher value of the property as part of the more extended eminent process provided for by law.)
9. If no settlement is reached, the government must hold a **public hearing** and adopt a **"resolution of necessity,"** including the following **mandatory findings**:
 - a. That the **"public interest and necessity"** require the project;
 - b. That the particular location secures the **"greatest public good and least private injury"**;
 - c. That condemnation of the property is **"necessary" for the proposed project**; and
 - d. That the government has made the required **written offer of compensation**.

Note: Some **defenses** must be raised at the hearing on the agency's resolution of public necessity or may be **waived**. Therefore, both as a general matter and to preserve the right assert certain defenses, the landowner should consult with his or her attorney and **appear in person** with his or her attorney at the agency's hearing on its resolution of public necessity. If the landowner cannot attend the hearing in person, the landowner should at least **respond in writing**, again with the advice or representation of an attorney.

10. Absent a settlement, the government files a **condemnation action** in Superior Court of the county where the subject land is located ("**complaint in eminent domain**").
11. The landowner has **30 days from the date of service** to answer the complaint. Importantly, **to avoid waiver**, the landowner's answer must include **all relevant claims and allegations** pertaining to the property and the eminent domain action against the landowner.
12. In addition to filing a complaint, the agency ("condemnor") typically makes a **"deposit of probable compensation"** with the State Treasurer's Office concurrently with the filing

of its complaint. This amount corresponds to the anticipated amount of just compensation due the landowner, according to the government's initial appraisal.

13. A "deposit of probable compensation" may entitle the agency to seek **immediate possession** of the property by motion ("**quick take**"). By filing an **opposition** to the agency's **motion for immediate possession** with his or her answer, the landowner will be entitled to a hearing on the motion **90 days** from the filing of the agency's motion. (Thus, in this scenario, the **soonest** that the government agency could **take possession** of the landowner's property is **120 days** after the filing of the agency's motion.)
14. **Trial** follows, typically **12-18 months** after filing (although this may depend on many factors, including length of discovery, complexity of issues, coordination of similar actions, etc.).
15. In the interest of efficiency, similar cases involving a common right-of-way or large project crossing numerous parcels, or even multiple counties, may be **consolidated or coordinated** in one or more courts.
16. **90 days before trial**, the parties **submit evidence** and the **names of experts** in support of their respective appraisals. As part of the litigation, the parties may **depose** the other side's opposing experts and conduct other **discovery** to obtain information that can be used in supporting their case.
17. **Mediation** is required, including presentation of competing **expert evidence and negotiations** between the parties, leading to **possible settlement**.
18. **20 days before trial**, if there is no mediated settlement, the government submits a **final offer** of settlement and the landowner submits a **final demand**. Most eminent domain cases settle at this stage or earlier, **before reaching trial**.
19. Unless the landowner waives his or her **right to a jury trial** (in which case, a judge will decide the case), a jury determines **just compensation** based on the evidence presented in court. The landowner is entitled to a **trial by a jury** of local peers, unless this right is waived.
20. The court may award **litigation expenses** to a **reasonable** owner where the government's offer is **unreasonable**. In contrast, if the government's offer is determined to be **reasonable** and the landowner has been **unreasonable**, then the court may **not** award litigation expenses. Litigation expenses can be costly and, therefore, the **likelihood of reimbursement**, the **potential for settlement** before trial, and the **amount of probable compensation** upon determination by a judge or jury are all important considerations.

² This summary was prepared in partial reliance on a 2010 The Law Journal article ("Protecting Property Against Eminent Domain") by John L.B. Smith of the Fresno law firm Baker, Manock & Jensen, PC and on the October 13, 2010, "Eminent Domain" presentations of Mr. Smith and A. George Zengel of Zengel & Associates to the Tulare County Farm Bureau. Information from Mr. Smith's Law Journal overview has been supplemented with additional detail from a February 19, 2012 workshop, by Andrew Turner of Turner Law at the Madera County Farm Bureau. Additionally, CFBF spoke with Thomas Keeling of the Freeman Firm in Stockton. CFBF wishes to express its acknowledgement and appreciation to the Madera County Farm Bureau, the Tulare County Farm Bureau, and to Mr. Turner, Mr. Smith, Mr. Keeling, and Mr. Zengel.

Elements Of Compensation

- Fair Market Value of property as determined by appraisal(s), settlement, or judge/jury

- Severance Damages for "incurable" takings resulting in reduced value of remaining land and improvements
- Cost to "Cure" impairments to value in lieu of "severance damages" (for example, through replacement or relocation), so long as equivalent "severance damages" are not exceeded
- Loss of Goodwill, such as intangible or ancillary benefits of a unique location to a business
- Relocation Benefits, such as costs to move a residence or business not captured or duplicated in other elements of compensation

Items Potentially Reflected In Valuation And Compensation (Taking, Plus "Severance Damages" Or "Cost To Cure")

- Land
- Improvements (buildings)
- Fencing
- Irrigation Systems
- Roadways
- Signage
- End row/turn row areas, loss of trees
- Losses to remaining parcel, including shape, size, loss of use, impaired access, increased operating expenses, loss of income (including temporary construction impacts)