2021 Year in Review – Texas

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2021 was another big year in the agricultural law world here in Texas. From key legal decisions to new laws passed during the legislative session, there was no shortage of information to discuss in this year in review. As you will see, many of the key updates involve actions taken by the Texas Legislature.

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Texas Farm Animal Liability Act Amendment

This is easily the issue on which I have had the most presentation requests and questions this year. The Texas Farm Animal Liability Act is designed to ensure that, subject to certain limitations, farm animal owners are not liable for injuries caused by inherent risks of farm animal activities. For example, if you get on a horse, there is just an inherent risk you could get bucked off. This statute has been in place for decades, but it was amended by the Texas Legislature as of September 1, 2021. The

amendments came as a result of a Texas Supreme Court decision last year which held that the Act did not apply to ranchers or ranch hands. The Legislature expressly modified the language of the Act to make clear it is to apply to working ranches. From a practical perspective, the most important change is that farm and ranch owners and lessees need to hang up the Farm Animal Liability Act sign at or near their stable, corral or arena. This is a simple, yet important, step for liability protection. In January, we will be releasing a podcast episode with Trace Blair discussing the three Texas landowner liability statutes.

Brand Registration Expiration

Every ten years, all brand registrations in Texas expire. This happened on August 31, 2021. This means that all horse and livestock owners need to register their brands in the County Clerk's office in each county where the animals are located. Animal owners have until February 28, 2022, to do so. Keep in mind that the use of a brand without registration constitutes a misdemeanor offense punishable by up to a $500 fine.

Prescribed Burn Liability Statute Amendments

Another change to come out of the 2021 Texas Legislature was amendments to the limited liability offered for people involved in conducting prescribed burns. There are different liability protections for landowners, lessees, and occupiers, Certified and Insured Prescribed Burn manager, burn bosses, and participants in a burn. For landowners, lessees, or occupiers of agricultural or conservation land, the statute provides they are not liable if the burn is conducted by a Certified and Insured Prescribed Burn Manager who maintains the required insurance coverage. Because of this protection, I always recommend that landowners conducting prescribed burns consider using a Certified and Insured Prescribed Burn Manager.

Eminent Domain Law Changes

Another bill from the Texas Legislature this session had to do with eminent domain reform. House Bill 2730 made numerous changes to the eminent domain statutes in Texas. In particular, there were additional requirements added to what condemnors must do in order to make the required "bona fide offer," including providing information to landowners as to whether their offer includes any damages to the remainder. Additionally, for private entities exercising eminent domain power to obtain a pipeline right-of-way easement or an electric transmission line right-of-way easement, there are no certain required minimum terms that must be included in the written easement document such as terms regarding limitations on the number, types, and sizes of lines, location of the

easement, restoration, and repair obligations, and more. While these required terms are not exhaustive, they are certainly a starting point for a landowner negotiating a pipeline or transmission line easement. As always, I recommend that landowners seek an attorney when negotiating a pipeline or transmission line easement.

Texas Supreme Court to Hear High Speed Rail Suit

Also related to eminent domain is a case involving a landowner challenging the right of the proposed high-speed rail to utilize eminent domain power to condemn property for the railway. Texas Central Railroad and Infrastructure plans to build a high-speed rail from Dallas to Houston and has sought easements from landowners along their route in order to do so. Some landowners have refused, and the company has filed condemnation suits seeking to condemn the property. In *Texas Central Railroad & Infrastructure v. Miles*, a landowner facing condemnation challenged the company's ability to use this power. Specifically, the question at issue is whether Texas Central is a "railroad company" or "interurban electric railway" to which eminent domain power is granted by statute. Texas Central argues they are given their plans to build the high-speed rail. Miles argues they are not as they own no trains or tracks and are not operating as a railroad as required. The trial court agreed with Miles, but the El Paso Court of Appeals reversed, finding that Texas Central did meet the requirements to use eminent domain authority. Miles appealed to the Texas Supreme Court, which initially denied the petition, but then granted a motion for rehearing. Currently, oral argument on the case is set for January 11. Just last week, the Texas Solicitor General, who was asked to write a brief by the Supreme Court, indicated that the State agrees with Mr. Miles and does not believe Texas Central qualifies to exercise eminent domain power.

Solar/Mineral Owner Dispute

An interesting case out of the El Paso Court of Appeals addresses an important issue in Texas: The relationship between a solar lessee and mineral owner of property. In this case, the mineral owner filed suit against a surface owner and the solar company who built solar facilities on 215 acres of the 315 acre property at issue. The mineral owner claimed that the solar company trespassed on his mineral estate and breached the lease by denying reasonable access to the mineral estate. The El Paso Court of Appeals dismissed the case, holding that an attempt to develop the minerals was required for a legal remedy to be available. Here, the mineral owner had made no attempt to drill or otherwise produce the mineral

estate. This case was appealed to the Texas Supreme Court, but that petition was denied in November. A motion for rehearing on that denial has been filed and remains pending. This exact issue–the relationship between solar and mineral interests–has been a topic of concern for solar developers across Texas. Many developers require a surface owner to either own or control the minerals before entering into a solar contract, or require surface waivers be obtained from the existing mineral owners. As we see more and more solar development across Texas, it will be interesting to see how these issues play out.

Other Cases Pending Supreme Court Review

There are two other cases potentially pending Texas Supreme Court review that are worth mentioning.

Hlavinka v. HSC Pipeline Partnership, LLC is a case involving a landowner challenging condemnation by a pipeline company. Specifically, the First District Court of Appeals in Houston held that HSC did not conclusively establish its status as a common carrier pipeline as required to qualify to exercise eminent domain authority. Moreover, the court held that the landowner could offer lay testimony regarding other private pipeline sales on the property and about his belief that the highest and best use of the property was for pipeline developments. Currently, this case is pending review before the Texas Supreme Court. The Court did require briefing on the merits, but no oral argument has been set or ruling made at this time.
Huynh v. Blanchard is a case from the Tyler Court of Appeals involving a nuisance lawsuit against a chicken farm. The Tyler Court of Appeals affirmed the trial court's nuisance verdict and issued a permanent injunction against the farm. The chicken farm filed a petition for review with the Texas Supreme Court in November and briefing is ongoing at this point. If the Court accepts the petition for review, the question of whether a permanent injunction prohibiting agricultural operations on the farm is the appropriate remedy in this type of lawsuit.