

IN THE SUPREME COURT OF TEXAS

No. 02-0213

THELMA BLAHUTA HUBENAK, PETITIONER

v.

SAN JACINTO GAS TRANSMISSION COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

- consolidated with -

No. 02-0214

THELMA BLAHUTA HUBENAK AND EMIL BLAHUTA, PETITIONERS

v.

SAN JACINTO GAS TRANSMISSION COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

- consolidated with -

No. 02-0215

ROSIE WENZEL, WILMA MCANDREW, BETTY MCCLENEY, AND TILFORD SULAK,
PETITIONERS

v.

SAN JACINTO GAS TRANSMISSION COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

- consolidated with -

No. 02-0216

KUTACH FAMILY TRUST, DARRYL WAYNE KUTACH, TRUSTEE, PETITIONER

v.

SAN JACINTO GAS TRANSMISSION COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

- consolidated with -

No. 02-0217

CUSACK RANCH CORPORATION, PETITIONER

v.

MIDTEXAS PIPELINE COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

- consolidated with -

No. 02-0320

MIDTEXAS PIPELINE COMPANY, PETITIONER

v.

WILBERT O. DERNEHL, JR. AND THE FIRST NATIONAL BANK OF BELLVILLE,
RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

- consolidated with -

No. 02-0321

MIDTEXAS PIPELINE COMPANY, PETITIONER

v.

WALTER ROY WRIGHT, JR. AND ROBBIE V. WRIGHT, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

- consolidated with -

No. 02-0326

MIDTEXAS PIPELINE COMPANY, PETITIONER

v.

WALTER ROY WRIGHT, III, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

- consolidated with -

No. 02-0359

MICHAEL F. CUSACK, TRUSTEE OF THE MICHAEL F. CUSACK SPECIAL TRUST NO.
ONE, PETITIONER

v.

MIDTEXAS PIPELINE COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 19, 2003

JUSTICE OWEN delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE SMITH, JUSTICE WAINWRIGHT and JUSTICE BRISTER joined, and in which JUSTICE JEFFERSON joined as to Parts I, II and III.

JUSTICE JEFFERSON filed a concurring opinion.

JUSTICE O'NEILL and JUSTICE SCHNEIDER did not participate in the decision.

In these nine consolidated condemnation cases, we must determine whether (1) provisions in Texas Property Code section 21.012 permitting a condemning authority to begin condemnation proceedings if it is “unable to agree with the owner of the property on the amount of damages” and requiring a condemnation petition to contain a statement that it has been unable to agree are jurisdictional;¹ and (2) the condemning entities in these cases satisfied section 21.012’s requirements. We hold that the “unable to agree” requirement is not jurisdictional and that the

¹ TEX. PROP. CODE § 21.012(a), (b).

condemning entities have satisfied their burden to show that they and the landowners were unable to agree on the damages for the properties described in the underlying condemnation petitions. Accordingly, we (1) affirm the courts of appeals' judgments in *Hubenak v. San Jacinto Gas Transmission Co. (Hubenak 1)*,² *Hubenak v. San Jacinto Gas Transmission Co. (Hubenak 2)*,³ *Wenzel v. San Jacinto Gas Transmission Co.*,⁴ *Kutach Family Trust v. San Jacinto Gas Transmission Co.*,⁵ and *Cusack Ranch Corp. v. MidTexas Pipeline Co.*,⁶ (2) affirm the court of appeals' judgment in *Cusack v. MidTexas Pipeline Co.*⁷ and remand that case to the trial court for further proceedings consistent with this opinion; and (3) reverse the court of appeals' judgments in *MidTexas Pipeline Co. v. Dernehl*,⁸ *MidTexas Pipeline Co. v. Wright (Wright 1)*,⁹ and *MidTexas Pipeline Co. v. Wright (Wright 2)*¹⁰ and remand those cases to their respective trial courts for further proceedings consistent with this opinion.

² 65 S.W.3d 791 (Cause No. 02-0213 in this Court).

³ *Id.* (Cause No. 02-0214 in this Court).

⁴ *Id.* (Cause No. 02-0215 in this Court).

⁵ *Id.* (Cause No. 02-0216 in this Court).

⁶ 71 S.W.3d 395 (Cause No. 02-0217 in this Court).

⁷ ___ S.W.3d ___ (Cause No. 02-0359 in this Court).

⁸ 71 S.W.3d 852 (Cause No. 02-0320 in this Court).

⁹ ___ S.W.3d ___ (Cause No. 02-0321 in this Court).

¹⁰ ___ S.W.3d ___ (Cause No. 02-0326 in this Court).

I

San Jacinto Gas Transmission Co. and MidTexas Pipeline Co. are unrelated gas utility companies possessing eminent domain power.¹¹ Their respective boards of directors authorized them to construct natural gas pipelines. Some of the landowners across whose property a pipeline was to be built¹² challenged the validity of the condemnation proceedings. The affected properties are located in several Texas counties, including Fort Bend, Colorado, and Gonzales counties. Because the issues in each of the cases are the same, we will refer to the landowners collectively and to the gas utility companies as the “condemnors.”

Before instituting condemnation proceedings, the condemnors hired certified real estate appraisers to appraise the proposed easements across the landowners’ properties. In each case, the condemnors made at least two offers to the landowners to purchase their property. Each offer exceeded the appraised value of the easements, including a final offer that contained the following statement: “If you elect to reject this offer, [the condemnor] may institute a condemnation suit in [a designated court], to acquire the rights described in the Right of Way Agreement.” The right-of-way agreements attached to all of the final offers included the following terms:

(1) the condemnor would receive the right to transport “gas, oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipeline”;

(2) the condemnor would receive the right to assign the easement to any person or entity; and

¹¹ TEX. UTIL. CODE §§ 181.004, .008.

¹² Thelma Blahuta Hubenak, Darryl Wayne Kutach, Emil Blahuta, Rosie Wenzel, Wilma McAndrew, Betty McCleney, Tilford Sulak, the Kutach Family Trust, Michael F. Cusack, Cusack Ranch Corp., Walter Roy Wright, Jr., Robbie V. Wright, Walter Roy Wright, III, and Wilbert O. Dernehl, Jr.

(3) the landowners would be obligated to warrant and defend title to the easement.

The landowners repeatedly informed the condemnors during negotiations that they simply did not want a pipeline located on their properties, and in many cases, the landowners stated they would agree to sell the easements only at prices far above the appraised values, if at all. Ultimately, the landowners in each case either rejected or ignored the condemnors' final offers. The condemnors then sought condemnation in the appropriate trial courts.

Section 21.012 of the Texas Property Code provides:

- (a) If the United States, this state, a political subdivision of this state, a corporation with eminent domain authority, or an irrigation, water improvement, or water power control district created by law wants to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.
- (b) The petition must:
 - (1) describe the property to be condemned;
 - (2) state the purpose for which the entity intends to use the property;
 - (3) state the name of the owner of the property if the owner is known; and
 - (4) state that the entity and the property owner are unable to agree on the damages.¹³

The condemnation petitions filed in the trial courts contained all the foregoing statutory allegations, including a statement that the condemnors and the landowners were unable to agree on the damages for the properties to be condemned. The petitions, however, did not expressly seek to condemn or otherwise address the three matters contained in the right-of-way agreements regarding the

¹³ TEX. PROP. CODE § 21.012.

transportation of oil and other substances, the right to assign the easement, and the landowners' obligations to warrant title.

In each case, the trial court appointed special commissioners to assess damages, and the special commissioners awarded the landowners less than the condemnors had offered for the easements, with the exception of the awards in *Cusack* and *Cusack Ranch*.¹⁴ The landowners timely filed their objections to the commissioners' awards, and in *Dernehl*, *Wright 1*, and *Wright 2*, the landowners also filed counterclaims for possession of their land and damages for wrongful taking. In all of the cases, the condemnors responded by filing motions for partial summary judgment, asserting that they had satisfied all prerequisites to bringing the condemnation actions and that the amount of damages was the only issue pending before the court. In support of their motions, the condemnors attached affidavits from David M. Dunwoody on the issue of inability to agree. Dunwoody oversaw the negotiations between the condemnors and landowners in each of the nine cases. His affidavits recount obtaining independent appraisals, the offers made to the landowners, and the parties' failure to agree. In most of the cases, Dunwoody's affidavit also authenticates correspondence that passed between the condemnors and the landowners, including the condemnors' final offers, and the right-of-way agents' notes about landowner contacts.

¹⁴ The condemnors' highest offers and commissioners' awards were:

| | | |
|--------------------------------|-------------------|-------------------|
| <i>Hubenak 1</i> (02-0213): | offer-\$6,089.80 | award-\$2,918.00 |
| <i>Hubenak 2</i> (02-0214): | offer-\$24,602.65 | award-\$8,843.00 |
| <i>Wenzel</i> (02-0215): | offer-\$14,620.38 | award-\$4,606.00 |
| <i>Kutach</i> (02-0216): | offer-\$6,360.00 | award-\$2,670.00 |
| <i>Cusack Ranch</i> (02-0217): | offer-\$25,000.00 | award-\$25,836.24 |
| <i>Dernehl</i> (02-0320): | offer-\$13,331.00 | award-\$6,000.00 |
| <i>Wright 1</i> (02-0321): | offer-\$17,000.00 | award-\$10,000.00 |
| <i>Wright 2</i> (02-0326): | offer-\$18,000.00 | award-\$12,500.00 |
| <i>Cusack</i> (02-0359): | offer-\$13,941.00 | award-\$15,328.56 |

In all the cases, the landowners filed cross-motions for partial summary judgment and pleas to the jurisdiction, arguing that the trial courts lacked jurisdiction over the condemnation proceedings because the condemnors failed to comply with section 21.012's "unable to agree" requirement. The landowners argued that the condemnors could not satisfy the "unable to agree" requirement unless they established that they had engaged in "good faith" negotiations with the landowners before initiating condemnation proceedings. The landowners asserted that the condemnors' offers were not "bona fide" or made in good faith because the offers were subject to the landowners' executing the right-of-way agreements attached to the final offer letters, which included the three additional matters that the condemnors had not explicitly sought to condemn and that the landowners maintained the condemnors could not legally condemn. The landowners also objected to Dunwoody's affidavits as hearsay, conclusory, and incomplete. The landowners' summary judgment evidence consisted primarily of the condemnors' admissions that the landowners had to sign the proposed right-of-way agreements in order to accept the offers.

The trial court in each of the cases initially granted the condemnors' motions for partial summary judgment and overruled the objections to Dunwoody's affidavits. Five of the cases – *Hubenak 1*, *Hubenak 2*, *Wenzel*, *Kutach*, and *Cusack Ranch* – then went to trial on the amount of damages. The juries in *Hubenak 2* and *Kutach* awarded damages to the landowners that were less than what the condemnors had offered them,¹⁵ and the juries in *Hubenak 1*, *Wenzel*, and

¹⁵ The jury awards were:

| | |
|-----------------------------|------------|
| <i>Hubenak 2</i> (02-0213): | \$4,331.00 |
| <i>Kutach</i> (02-0216): | \$1,247.00 |

Cusack Ranch awarded more than what the condemnors had offered for the easements.¹⁶ The landowners in the other four cases, however, filed supplemental pleas to the jurisdiction based on *Hubenak v. San Jacinto Gas Transmission Co.*,¹⁷ in which the First Court of Appeals in Houston reversed the trial courts' judgments in *Hubenak 1*, *Hubenak 2*, *Wenzel*, and *Kutach* and held that the trial courts lacked jurisdiction because the condemnor did not negotiate for the same rights it sought to condemn.¹⁸ As a result, the trial courts in *Cusack*, *Dernehl*, *Wright 1*, and *Wright 2* granted the landowners' jurisdictional pleas and dismissed the proceedings for want of jurisdiction. The Houston court of appeals, however, thereafter withdrew its original opinion in *Hubenak v. San Jacinto* on rehearing and held that the "unable to agree" requirement had been satisfied.¹⁹

Accordingly, in the five cases that proceeded to trial, the courts of appeals ultimately affirmed the summary judgments in favor of the condemnors.²⁰ Although the courts applied different standards of review,²¹ the courts agreed that section 21.012's requirements are jurisdictional and that there is legally sufficient evidence to support the trial courts' implied findings

¹⁶ The jury awards were:

Hubenak 1 (02-0213): \$9,395.00
Wenzel (02-0215): \$15,879.00
Cusack Ranch (02-0217): \$30,000.00

¹⁷ 2000 WL 1056416 (Tex. App.–Houston [1st Dist.] 2000), *opinion withdrawn on reh'g*, 65 S.W.3d 791 (Tex. App.–Houston [1st Dist.] 2001, pet. granted).

¹⁸ *Id.* at *5.

¹⁹ *Hubenak*, 65 S.W.3d at 794.

²⁰ *Cusack Ranch*, 71 S.W.3d at 396; *Hubenak*, 65 S.W.3d at 794.

²¹ *Cusack Ranch*, 71 S.W.3d at 398 (applying a *de novo* standard of review to the trial court's application of the law to the undisputed facts); *Hubenak*, 65 S.W.3d at 798 (applying a "no evidence" standard of review).

that the condemnors satisfied the “unable to agree” requirement by negotiating in good faith and making bona fide offers to purchase the easements before instituting the underlying condemnation proceedings.²² These courts also held that including the three additional matters in the final offers did not negate good faith because there was no evidence that inclusion of the additional matters was an impediment to the parties’ ability to agree on damages.²³ Rather, the courts noted, the landowners simply did not want a pipeline located on their properties.²⁴ Both courts further stated that futility is an exception to the requirement of good faith negotiations, and in *Hubenak 1*, *Hubenak 2*, *Wenzel*, and *Kutach*, the court reasoned that further negotiations with the landowners were futile because they objected to the construction of a pipeline on their properties under any circumstances.²⁵

The results on appeal differed with regard to the four cases dismissed for want of jurisdiction. The court of appeals in *Cusack* reversed the trial court’s dismissal for want of jurisdiction, holding that the condemnor’s offer was virtually identical to the offer in *Cusack Ranch* and that the offer was legitimate and showed that the parties were unable to agree despite having participated in good faith negotiations.²⁶ The court of appeals in *Dernehl*, *Wright 1*, and *Wright 2*, however, affirmed the dismissals, applying a legal sufficiency standard of review and holding in

²² *Cusack Ranch*, 71 S.W.3d at 400 (“We find the evidence, as a whole, establishes that MidTexas engaged in good faith negotiations sufficient to satisfy the requirement that it was unable to agree with Cusack on the amount of damages prior to instituting the condemnation proceeding.”); *Hubenak*, 65 S.W.3d at 801 (holding that the evidence was sufficient to show that the condemnor satisfied section 21.012’s requirements “not only because negotiations with the Landowners were in fact futile, but also because San Jacinto made bona fide offers to them”).

²³ *Cusack Ranch*, 71 S.W.3d at 400; *Hubenak*, 65 S.W.3d at 800-01.

²⁴ *Cusack Ranch*, 71 S.W.3d at 399; *Hubenak*, 65 S.W.3d at 799.

²⁵ *Hubenak*, 65 S.W.3d at 799.

²⁶ ___ S.W.3d at ___.

each case that the condemnor did not conclusively establish that the parties were “unable to agree.”²⁷ The court said that in each case there was some evidence to support the trial court’s dismissal because the condemnor’s only offers to the landowners included property rights that the condemnor did not ultimately seek to condemn.²⁸ None of the courts of appeals considered whether the condemnors could legally have sought to condemn the three additional matters, and none considered the landowners’ objections to Dunwoody’s affidavits.

We granted the petitions for review in all nine cases and consolidated them because they involve substantially similar facts, arguments, and briefing.

II

Before we consider whether the “unable to agree” requirement contained in section 21.012 of the Texas Property Code²⁹ implicates subject matter jurisdiction, or the other issues in these consolidated cases, it is helpful to understand the procedural steps in a condemnation proceeding. The filing of the petition required by section 21.012 in either a district court or county court at law³⁰ is the first step. When a petition is filed, the judge of the court appoints “three disinterested freeholders who reside in the county as special commissioners to assess the damages.”³¹ These commissioners convene a hearing and determine the value of the property condemned and any

²⁷ *Dernehl*, 71 S.W.3d at 858; *Wright 1*, ___ S.W.3d at ___; *Wright 2*, ___ S.W.3d at ___.

²⁸ *Dernehl*, 71 S.W.3d at 858; *Wright 1*, ___ S.W.3d at ___; *Wright 2*, ___ S.W.3d at ___.

²⁹ TEX. PROP. CODE § 21.012.

³⁰ *Id.* § 21.001.

³¹ *Id.* § 21.014.

damage to the remainder.³² Any party may object to the special commissioners' findings, and if there are objections, "the court shall cite the adverse party and try the case in the same manner as other civil causes."³³

Over the years, the courts have interpreted these Property Code provisions and their statutory predecessors. This Court has described the initial filing of the petition and the commissioners' hearing as an "administrative proceeding" that "converts into a normal pending cause" when objections to the commissioners' award are filed.³⁴ We have also said that filing objections "vacate[s] the award of the special Commissioners."³⁵ A number of courts of appeals have held that objections that the condemnor did not make an effort to agree cannot be raised during the administrative phase before the special commissioners, but must be raised in the trial court after the commissioners' award has issued.³⁶ This Court, as well as courts of appeals, have further held that if a landowner participates in the hearing before the special commissioners, the landowner waives the right to complain that the condemnor did not make an effort to agree.³⁷

³² *Id.* §§ 21.015, .016.

³³ *Id.* § 21.018.

³⁴ *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 242 (Tex. 1984).

³⁵ *Id.* at 243 (quoting *Denton County v. Brammer*, 361 S.W.2d 198, 200 (Tex. 1962)).

³⁶ See, e.g., *Seiler v. Intrastate Gathering Corp.*, 730 S.W.2d 133, 137-38 (Tex. App.–San Antonio 1987, no writ), *overruled on other grounds by Schumann v. City of Schertz*, 100 S.W.3d 361 (Tex. App.–San Antonio 2002, no pet.); *City of Houston v. Plantation Land Co.*, 440 S.W.2d 691, 694-95 (Tex. Civ. App.–Houston [14th Dist.] 1969, writ ref'd n.r.e.); *City of Dallas v. Crawford*, 222 S.W. 305, 307 (Tex. Civ. App.–Amarillo 1920, writ dismissed); *Rabb v. La Feria Mut. Canal Co.*, 62 Tex. Civ. App. 24, 130 S.W. 916, 918 (1910, writ ref'd).

³⁷ See, e.g., *Jones v. City of Mineola*, 203 S.W.2d 1020, 1023 (Tex. Civ. App.–Texarkana 1947, writ ref'd); *Brown v. Lower Colo. River Auth.*, 485 S.W.2d 369, 371 (Tex. Civ. App.–Austin 1972, no writ); *City of Austin v. Hall*, 446 S.W.2d 330, 336 (Tex. Civ. App.–Austin 1969), *rev'd on other grounds*, 450 S.W.2d 836 (Tex. 1970); *Lohmann v. Natural Gas Pipeline Co. of Am.*, 434 S.W.2d 879, 882 (Tex. Civ. App.–Beaumont 1968, writ ref'd n.r.e.); *Aronoff*

None of the landowners in the cases before us today participated in the hearings held by the special commissioners. They first raised their respective contentions that there were no good faith negotiations in the trial court, after the commissioners' awards were issued.

III

Section 21.012(a) states that a condemning entity “may begin a condemnation proceeding” if it is “unable to agree with the owner of the property on the amount of damages.”³⁸ Section 21.012(b) also states that a petition commencing a condemnation proceeding “must”:

- (1) describe the property to be condemned;
- (2) state the purpose for which the entity intends to use the property;
- (3) state the name of the owner of the property if the owner is known;
and
- (4) state that the entity and the property owner are unable to agree on the damages.³⁹

We note at the outset that the condemnation petitions in these cases all include affirmative statements that there has been compliance with these requirements, including the “unable to agree” requirement. The landowners contend, however, that beyond merely “stat[ing]” that the parties were unable to agree, the condemnors were required to plead and prove that the parties were unable to agree after having engaged in “good faith” negotiations. The landowners argue – and the courts of appeals agreed – that failure to both plead and prove compliance with section 21.012’s requirements

v. *City of Dallas*, 316 S.W.2d 302, 306 (Tex. Civ. App.–Texarkana 1958, writ ref’d n.r.e.).

³⁸ TEX. PROP. CODE § 21.012(a).

³⁹ *Id.* § 21.012(b).

deprives the trial court of jurisdiction over the condemnation proceedings. The condemnors respond that the “unable to agree” requirement is not jurisdictional. For the reasons considered below, we conclude that this statutory requirement is mandatory, but failure to satisfy it does not deprive courts of subject matter jurisdiction.

There is no language in section 21.012 indicating that the “unable to agree” requirement is jurisdictional. Nor did section 21.012’s statutory predecessors indicate by the language used that the “unable to agree” requirement was jurisdictional.⁴⁰ Nevertheless, in 1943, *Brinton v. Houston Lighting & Power Co.* held that the “provisions for the condemnation of private property for public use are special and summary in character, hence must be strictly complied with by the condemning authority, any ignoring thereof rendering the proceedings wholly void.”⁴¹ That decision concluded that the “statute seems to be explicit in its requirement that there must have been in advance of condemnation proceedings at least a bona fide effort on the part of the condemnor to agree with its adversary, the land owner, in advance ‘upon the value of the land or the damages.’”⁴² Five years later, the court of appeals in *City of Houston v. Derby* said in dicta that for the condemnor “to vest the county court with *jurisdiction* to condemn appellees’ land, it had to first allege, and then during the proceedings prove, that it had failed to agree with the appellees on the value of their land to be

⁴⁰ See Act of Aug. 28, 1961, 57th Leg., R.S., ch. 105, § 1, 1961 Tex. Gen. Laws 203, 203; Act of Mar. 7, 1934, 43d Leg., 2d C.S., ch. 37, § 1, 1934 Tex. Gen. Laws 89, 89; Act of Apr. 22, 1905, 29th Leg., ch. 73, §§ 2-13, 1905 Tex. Gen. Laws 101, 101-02; Act of Apr. 28, 1903, 28th Leg., 1st C.S., ch. V, §§ 2-3, 1903 Tex. Gen. Laws 10, 10-11; Act of Mar. 26, 1885, ch. 56, 1885 Tex. Gen. Laws 54, 54; TEX. REV. CIV. STAT. arts. 4182-92, p. 603 (1879); Paschal’s Ann. Digest, 5th ed., art. 4922 (Laws of Tex. Vol. 1, p. 822).

⁴¹ 175 S.W.2d 707, 709 (Tex. Civ. App.–Galveston 1943, writ ref’d w.o.m.).

⁴² *Id.* at 710.

taken.”⁴³ This Court refused the application for writ of error in *Derby*, giving that opinion the same force and effect as an opinion of this Court. A number of other courts of appeals have similarly held or said in dicta that the “unable [or failure] to agree” provision is jurisdictional or that failure to comply renders the condemnation proceeding void.⁴⁴

Other decisions of this Court, however, are inconsistent with the proposition that compliance with the “unable to agree” provision is necessary to bestow subject matter jurisdiction. Subject matter jurisdiction cannot be waived.⁴⁵ But we have indicated that a landowner can waive any right to complain that there was no effort to agree. We have said that if the owner has accepted the commissioners’ award and withdrawn the money from the registry of the court, the court has

⁴³ 215 S.W.2d 690, 692 (Tex. Civ. App.–Galveston 1948, writ ref’d) (emphasis added).

⁴⁴ *ExxonMobil Pipeline Co. v. Harrison Interests, Ltd.*, 93 S.W.3d 188, 192 (Tex. App.–Houston [14th Dist.] 2002, pet. filed); *McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 83 S.W.3d 205, 208 (Tex. App.–Dallas 2002, no pet.); *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 720 (Tex. App.–Corpus Christi 2000, pet. denied); *Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 89 (Tex. App.–Houston [14th Dist.] 1997, pet. denied); *Precast Structures, Inc. v. City of Houston*, 942 S.W.2d 632, 636 (Tex. App.–Houston [14th Dist.] 1996, no writ); *State v. Schmidt*, 894 S.W.2d 543, 545 n.1 (Tex. App.–Austin 1995, no writ); *Tex.-N.M. Power Co. v. Hogan*, 824 S.W.2d 252, 254 (Tex. App.–Waco 1992, writ denied); *Schlottman v. Wharton County*, 259 S.W.2d 325, 330 (Tex. Civ. App.–Fort Worth 1953, writ dism’d); *Gill v. Falls County*, 243 S.W.2d 277, 280 (Tex. Civ. App.–Waco 1951, no writ); *Doughty v. Defee*, 152 S.W.2d 404, 410 (Tex. Civ. App.–Amarillo 1941, writ ref’d w.o.m.); *Cook v. Ochiltree County*, 64 S.W.2d 1018, 1020 (Tex. Civ. App.–Amarillo 1933, no writ); *Watt v. Studer*, 22 S.W.2d 709, 711 (Tex. Civ. App.–Amarillo 1929, no writ); *Clements v. Fort Worth & D.S.P. Ry. Co.*, 7 S.W.2d 895, 897 (Tex. Civ. App.–Amarillo 1928, no writ); *Porter v. City of Abilene*, 16 S.W. 107, 107 (Tex. Ct. App. 1890, no writ); see also *Jenkins v. Jefferson County*, 507 S.W.2d 296, 298 (Tex. Civ. App.–Beaumont 1974, writ ref’d n.r.e.) (stating that courts have “no authority to enter a decree of condemnation” unless the condemnor has made a “bona fide attempt” to agree with the landowner); *Isaac v. City of Houston*, 60 S.W.2d 543, 545 (Tex. Civ. App.–Galveston 1933, writ dism’d) (holding that court was “without authority” to render a judgment in a condemnation proceeding when there was no proof that parties were unable to agree on damages).

⁴⁵ *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000); *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943).

jurisdiction to adjudicate either the landowner's or the State's contest of the commissioners' award,⁴⁶ even though there was no proof of an effort to agree with the owner.⁴⁷ Another decision, in which we refused the application for writ of error, said that if "the owner of the land sought to be condemned makes his appearance before the special commissioners and resists the condemnation proceedings upon the merits, he thereby waives whatever lack of efforts to reach a settlement there might have been."⁴⁸ Several other courts of appeals have likewise said that a landowner can waive the right to complain about the existence or adequacy of an effort to agree by appearing before the commissioners and resisting condemnation or contesting the amount of damages,⁴⁹ or by withdrawing the Commission's award from the court's registry.⁵⁰ In those cases, the only issue to be tried was the owner's complaint that the damages were inadequate.⁵¹ At least two decisions have

⁴⁶ *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 242 (Tex. 1984); *State v. Jackson*, 388 S.W.2d 924, 925 (Tex. 1965); see also *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597, 599 (Tex. 1979) (landowner who withdrew the special commissioners' award from the court's registry waived its challenge to the condemnor's right to take the subject property but could continue to litigate the issue of compensation).

⁴⁷ *Jackson*, 388 S.W.2d at 925.

⁴⁸ *Jones v. City of Mineola*, 203 S.W.2d 1020, 1023 (Tex. Civ. App.—Texarkana 1947, writ ref'd).

⁴⁹ *Brown v. Lower Colo. River Auth.*, 485 S.W.2d 369, 371 (Tex. Civ. App.—Austin 1972, no writ); *City of Austin v. Hall*, 446 S.W.2d 330, 336 (Tex. Civ. App.—Austin 1969), *rev'd on other grounds*, 450 S.W.2d 836 (Tex. 1970); *Lohmann v. Natural Gas Pipeline Co. of Am.*, 434 S.W.2d 879, 882 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); *Aronoff v. City of Dallas*, 316 S.W.2d 302, 306 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.).

⁵⁰ *McConnico v. Tex. Power & Light Co.*, 335 S.W.2d 397, 400 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.).

⁵¹ See *supra* notes 49-50; see also *Coastal Indus. Water Auth.*, 592 S.W.2d at 599.

also held that any complaint about efforts to agree is a matter that must be plead by the owner or it is waived,⁵² even if the evidence establishes as a matter of law that there was no effort to agree.⁵³

The inconsistency between decisions saying that the “unable to agree” provision implicates subject matter jurisdiction and those saying failure to comply can be waived may have led this Court to note in *State v. Dowd*,⁵⁴ forty-five years after the decision in *Derby*,⁵⁵ that “[w]e express no opinion on whether the trial court would have lacked jurisdiction of the action had the State failed to negotiate in good faith.”⁵⁶ In *Dowd*, the court of appeals had concluded that, absent pleading and proof that the parties were “unable to agree,” the trial court lacked jurisdiction, and that a fact question existed that should be resolved by the trial judge.⁵⁷ The trial court had dismissed the proceedings. This Court held that there was no fact question and that the trial court should not have dismissed the proceedings.⁵⁸

⁵² *Jenkins v. Jefferson County*, 507 S.W.2d 296, 298 (Tex. Civ. App.—Beaumont 1974, writ ref’d n.r.e.); *Dyer v. State*, 388 S.W.2d 226, 230 (Tex. Civ. App.—El Paso 1965, no writ).

⁵³ *Dyer*, 388 S.W.2d at 230. *But see County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ) (holding that it was incumbent on the condemnor to plead that the owner waived lack of efforts to agree).

⁵⁴ 867 S.W.2d 781 (Tex. 1993).

⁵⁵ 215 S.W.2d 690, 692 (Tex. Civ. App.—Galveston 1948, writ ref’d).

⁵⁶ 867 S.W.2d at 783 n.1.

⁵⁷ *State v. Hipp*, 832 S.W.2d 71, 75 (Tex. App.—Austin 1992), *rev’d in part sub. nom.*, *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993).

⁵⁸ *Dowd*, 867 S.W.2d at 783.

If the “unable to agree” requirement were necessary to confer subject matter jurisdiction, then judgments in condemnation proceedings would be subject to collateral attack.⁵⁹ In construing other mandatory statutory provisions, we have observed that “the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.”⁶⁰ We thus held in *Dubai Petroleum Co. v. Kazi* that section 71.031(a) of the Texas Civil Practice and Remedies Code, which permits foreign plaintiffs to sue in Texas courts for personal injuries or wrongful death occurring in a foreign state or country if the decedent or injured party’s country of citizenship has “equal treaty rights” with the United States,⁶¹ was not jurisdictional, but was a requirement that should be met before a trial court proceeds.⁶²

In so holding, we acknowledged that some of the Court’s earlier opinions, including *Mingus v. Wadley*,⁶³ differentiated between common-law claims and statutory claims when considering whether a trial court had jurisdiction over a particular matter:

“The general rule is where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable.” . . . “[T]here is no presumption of jurisdiction where a court, although it is one of general jurisdiction, exercises special statutory powers in a special statutory manner or otherwise than according to the courts of the common law, since under such circumstances the court stands with reference to the special

⁵⁹ See *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000); see also RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b (1982).

⁶⁰ *Dubai*, 12 S.W.3d at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982)).

⁶¹ *Id.* at 73-74 (citing TEX. CIV. PRAC. & REM. CODE § 71.031(a)).

⁶² *Id.* at 76-77.

⁶³ 285 S.W. 1084 (Tex. 1926), overruled by *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000).

power exercised on the same footing with courts of limited and inferior jurisdiction.”⁶⁴

We determined, however, that this dichotomy between common-law and statutory actions was antiquated and problematic, stating: “When, as here, it is difficult to tell whether or not the parties have satisfied the requisites of a particular statute, it seems perverse to treat a judgment as perpetually void merely because the court or the parties made a good-faith mistake in interpreting the law.”⁶⁵ We overruled *Mingus* “to the extent that it characterized the plaintiff’s failure to establish a statutory prerequisite as jurisdictional.”⁶⁶

We see no substantive distinction between the nature of the statutory requirement at issue in *Dubai* and section 21.012’s “unable to agree” requirement. As at least one other court has recognized, in construing a statutory requirement that a condemning authority make reasonable, good faith efforts to negotiate as a prerequisite to commencing condemnation proceedings, “‘jurisdiction’ has proven to be a ‘word of elastic, diverse, and disparate meanings.’”⁶⁷ That court likewise concluded that a requirement for negotiations “is not a restriction on the court’s subject matter jurisdiction.”⁶⁸ Thus, although section 21.012’s requirements are mandatory, the trial courts in these consolidated cases had jurisdiction over the condemnation proceedings regardless of

⁶⁴ *Kazi*, 12 S.W.3d at 75-76 (quoting *Mingus*, 285 S.W. at 1087, 1089 (Tex. 1926) (quoting 15 CORPUS JURIS Courts, § 148(c), at 831-32)).

⁶⁵ *Id.* at 76.

⁶⁶ *Id.*

⁶⁷ *Minto v. Lambert*, 870 P.2d 572, 575 (Colo. Ct. App. 1994, cert. denied).

⁶⁸ *Id.* at 576.

whether the condemnors satisfied the requirement that the parties “are unable to agree on the damages.” We therefore disapprove of those court of appeals decisions that have held or suggested that these statutory requirements are jurisdictional.⁶⁹

Having determined that section 21.012’s requirements are not jurisdictional, we must determine the appropriate remedy when a condemnor fails to meet those requirements and a landowner has timely objected. Because the statute is silent as to the consequences for noncompliance, we look to the statute’s purpose in determining the proper remedy.⁷⁰ The purpose of section 21.012’s “unable to agree” requirement is to “forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties.”⁷¹ In considering the remedy for noncompliance with the requirements of statutes with similar purposes, we have repeatedly held that dismissal is not necessary to achieve such a purpose.⁷² Rather, the statute’s goal – avoidance of protracted litigation – can be accomplished by requiring an abatement of the proceeding until the requirement that the parties “are unable to agree” has been

⁶⁹ See cases cited *supra* note 44.

⁷⁰ *Albertsons, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) (citing *Hines v. Hash*, 843 S.W.2d 464, 467 (Tex. 1992), and *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex. 1983)).

⁷¹ *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.–Eastland 1957, no writ) (citing *Fort Worth Indep. Sch. Dist. v. Hodge*, 96 S.W.2d 1113 (Tex. Civ. App.–Fort Worth 1936, no writ)); see also *Schlottman v. Wharton County*, 259 S.W.2d 325, 330 (Tex. Civ. App.–Fort Worth 1953, writ dism’d) (purpose of requirement is to save time and expense when agreement is possible); *Clements v. Fort Worth & D.S.P. Ry. Co.*, 7 S.W.2d 895, 897 (Tex. Civ. App.–Amarillo 1928, no writ).

⁷² See, e.g., *Hines*, 843 S.W.2d at 468-69 (purpose of Deceptive Trade Practices Act’s notice requirement is “to discourage litigation and encourage settlements of consumer complaints”); *Schepps*, 652 S.W.2d at 938 (purpose of the Medical Liability and Insurance Improvement Act’s pre-suit notice requirement is “to encourage pre-suit negotiations so as to avoid excessive cost of litigation”).

satisfied.⁷³ While the condemnation proceedings are abated, the parties can engage in negotiations for the land to be condemned, just as they would have done before the proceedings were initiated. We therefore conclude that if a landowner objects in a pleading that there has been no offer, and a trial court finds that the requirement that the parties are “unable to agree on the damages”⁷⁴ has not been met, the trial court should abate the proceedings for a reasonable period of time to allow the condemnor to satisfy the “unable to agree” requirement. If at the end of a reasonable period of time, the condemnor has not made an offer, the condemnation proceeding should be dismissed.

IV

The procedural vehicle chosen by the condemnors to determine whether they were “unable to agree” with the landowners in the cases before us was a motion for partial summary judgment. Trial courts can, however, resolve “unable to agree” issues through other procedural vehicles, as they resolve many threshold pre-trial matters, including ruling on a plea in abatement.⁷⁵ Because the issue was raised in the present cases in motions for partial summary judgment asserting that the condemnors established as a matter of law that they were “unable to agree” with the landowners, we must determine whether there are any questions of fact.

⁷³ *Sinclair*, 984 S.W.2d at 961-62 (holding that failure to comply with statutory requirement that a petition for judicial review of a workers’ compensation decision be filed simultaneously with the court and the Workers’ Compensation Commission warrants abatement, not dismissal, of the action); *Hines*, 843 S.W.2d at 469 (holding that abatement is the appropriate remedy for plaintiff’s failure to comply with the Deceptive Trade Practices Act’s pre-suit notice provision); *State v. \$435,000.00*, 842 S.W.2d 642, 645 (Tex. 1992) (holding that compliance with the statutory requirement that a hearing be conducted within 30 days of the filing of an answer in a forfeiture action was mandatory, but noncompliance did not necessitate dismissal of the action); *Schepps*, 652 S.W.2d at 938 (holding that abatement is the appropriate remedy for a plaintiff’s failure to comply with the Medical Liability and Insurance Improvement Act’s pre-suit notice requirement).

⁷⁴ TEX. PROP. CODE § 21.012.

⁷⁵ See, e.g., *Anderson v. Clajon Gas Co.*, 677 S.W.2d 702, 706 (Tex. App.–Houston [1st Dist.] 1984, no writ).

The landowners contend that there is a fact question in each case about whether the condemnors made a “good faith” effort to agree on the damages. Some cases have used the terms “good faith” negotiation⁷⁶ and “bona fide” effort⁷⁷ in conjunction with the “unable to agree” requirement. However, with some exceptions,⁷⁸ the case law has required minimal evidence to satisfy the “unable to agree” requirement. For example, in *Schlottman v. Wharton County*, the court held that an offer by the condemnor that is rejected or ignored is enough:

[A]ll that is required to comply with the statute is the making of an offer by a county, and . . . nothing affirmative is required to be done by the landowner. In other words, in a case where the landowner “stands mute” and neither accepts nor rejects the offer so made to him by or in behalf of a county, the law will construe his silence [as] a rejection of the offer, and that such a showing constitutes “a failure to agree” on the part of the parties.⁷⁹

Similarly, the court in *Malone v. City of Madisonville* held:

If the law required that both the landowner and the party desiring to condemn should make an effort to agree on the amount of damages, before such condemnation proceedings could be instituted, then all the landowner would have to do to avoid

⁷⁶ See, e.g., *Lapsley v. State*, 405 S.W.2d 406, 411 (Tex. Civ. App.—Texarkana 1966, writ ref’d n.r.e.).

⁷⁷ See, e.g., *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 720 (Tex. App.—Corpus Christi 2000, pet. denied); *State v. Hipp*, 832 S.W.2d 71, 78 (Tex. App.—Austin 1992), *rev’d on other grounds sub. nom.*, *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993); *Jenkins v. Jefferson County*, 507 S.W.2d 296, 298 (Tex. Civ. App.—Beaumont 1974, writ ref’d n.r.e.); *Curfman v. State*, 240 S.W.2d 482, 484 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e.).

⁷⁸ In dicta, the court in *Lapsley v. State* said: “This statute contemplates good faith negotiation. Such negotiation would require an effort by the condemnor to investigate all aspects of value and prepare work sheets and recapitulation sheets when necessary or convenient in furtherance of the statutory settlement objective.” 405 S.W.2d at 411; see also *Precast Structures, Inc. v. City of Houston*, 942 S.W.2d 632, 635-36 (Tex. App.—Houston [14th Dist.] 1996, no writ) (examining validity of condemnor’s legal theory regarding damages and evidence consistent with that theory in determining if a “bona fide” offer was made by the condemnor); *Hipp*, 832 S.W.2d at 78-79 (same).

⁷⁹ 259 S.W.2d 325, 330 (Tex. Civ. App.—Fort Worth 1953, writ dismissed); see also *Pete-Rae Dev. Co. v. State*, 353 S.W.2d 324, 325 (Tex. Civ. App.—Eastland 1962, writ ref’d n.r.e.); *Curfman*, 240 S.W.2d at 484.

condemnation would be to refuse to make any effort to agree with the party desiring to condemn on the damages.⁸⁰

In *McKinney Independent School District v. Carlisle Grace, Ltd.*, the court held that the fact that a condemning authority did not wait for a counteroffer from the landowner is “no evidence to support the trial court’s non-finding on the unable-to-agree requirement.”⁸¹ That court also held, “We likewise reject [landowners’] contention that [condemnor’s] failure to provide them with the appraisal . . . supports a negative finding on the unable-to-agree requirement.”⁸² The landowners in the current proceedings argue that there is at least an inference that they were willing to continue to negotiate, even though they either rejected or ignored offers that the condemnors made. But we, like the court in *McKinney*, reject such a contention.⁸³

We are also persuaded that the dollar amount of the offer generally should not be scrutinized. The decisions that have implicitly or explicitly concluded that the dollar amount of the condemnor’s offer should not be compared with other indications of value are consistent with the statutory scheme, which does not contemplate such an examination.⁸⁴ Nor does the statute contemplate a

⁸⁰ 24 S.W.2d 483, 485 (Tex. Civ. App.—Waco 1929, no writ); *see also* *W.T. Waggoner Estate v. Townsend*, 24 S.W.2d 83, 86 (Tex. Civ. App.—Amarillo 1929, no writ) (holding that when owner was asked “what he was willing to settle the matter for” and the price was more than the condemnor would pay, this satisfied statutory requirement).

⁸¹ 83 S.W.3d 205, 209 (Tex. App.—Dallas 2002, no pet.).

⁸² *Id.*

⁸³ *Id.* (rejecting argument that because landowners “continued to express an interest in negotiating,” the parties were not unable to agree).

⁸⁴ *See, e.g., City of Houston v. Derby*, 215 S.W.2d 690, 693 (Tex. Civ. App.—Galveston 1948, writ ref’d) (“The only purpose for which the sums offered during negotiations can be looked to is to determine how the costs shall be cast.”). *But see Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 720 (Tex. App.—Corpus Christi 2000, pet. denied) (finding that because condemnor’s offer was twice the Appraisal District’s appraisal, the offer was “bona-fide”).

subjective inquiry into “good faith.” As discussed earlier, the purpose of the statute is “to forestall litigation and to prevent needless appeals.”⁸⁵ An inquiry into the subjective “good faith” of a condemnor’s offer would be antithetical to this purpose. First, independent commissioners will have reached a determination of damages before the landowner may even raise the “unable to agree” objection. If the landowner accepts the commissioners’ assessment, the matter is at an end. It is only after the landowner has rejected any offer by the condemnor, and after independent commissioners reach a conclusion and it is clear that litigation is going to proceed, that the landowners can raise the “unable to agree” issue.⁸⁶ Second, whether an offer by a condemning authority was made in “good faith” would, in most cases, be determined in large measure by the reasonable market value of the property sought to be condemned or the amount of inverse condemnation damages, or both. The inquiry in the trial court’s condemnation proceeding – to determine the reasonable market value of the property sought to be condemned and any inverse condemnation damages – would thus be largely duplicative. The purpose of section 21.012’s requirement that the parties be “unable to agree” is not to require a trial on reasonable market value before the condemnation trial may begin. The condemnation trial will determine the property’s value and any damage to the remainder. No purpose would be served by delaying that determination to first decide whether the condemning authority’s offer was so low and made under such circumstances that it could not have been made in “good faith.” At the end of the day, the result

⁸⁵ *Hubenak*, 65 S.W.3d at 797 (quoting *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.–Eastland 1957, no writ)).

⁸⁶ *See* cases cited *supra* note 36.

would be the same if two trials rather than just one were held. The landowner will receive no more and no less than the amount awarded as a result of the condemnation proceedings, even if the condemnor's pre-suit offer was not made in "good faith." It is not necessary to have two trials to reach the ultimate and only determination contemplated by the statute, which is a determination of the value of the property condemned.

The condemnors have established that they made offers to each of the landowners before filing condemnation proceedings. Those offers were rejected or ignored by the landowners. That is enough to satisfy section 21.012's requirement that the parties were "unable to agree." For the reasons to which we now turn, we find no merit in the landowners' remaining bases for contending that the condemnors have not established as a matter of law the "unable to agree" requirement.

V

The landowners do not contend that the condemnors' final offers included land or physical property in addition to or different from that described in the condemnation petition. But the landowners have consistently pointed to the fact that the condemnors' final offers all included three matters that were not explicitly included in the condemnation petitions and have argued that the condemnors could not legally acquire them by condemnation. Thus, the landowners contend, the condemnors never made offers for what they actually sought to condemn or could legally condemn, and therefore, have not met section 21.012's "unable to agree" requirement. The three matters at issue are the right to transport oil and other products, the right to assign the easements, and a warranty of title to the easement.

We have found only one Texas decision that bears directly on the question raised by the landowners, and that case was decided after, and relies on, some of the court of appeals decisions under review here.⁸⁷ However, decisions from other jurisdictions are instructive. The Illinois Supreme Court held that a condemnor had shown “a good faith attempt to negotiate” in spite of the fact that the condemnor had sought greater rights through negotiations than it condemned.⁸⁸ That court said:

It is true that the instrument which the plaintiff first sought the defendants to execute was broader than the ultimate right condemned, in that it involved possible damage to, and entry upon the surface of defendants’ land. Nevertheless, on this record, we think plaintiff has shown a good faith attempt to negotiate. The wide spread between the offering price of the plaintiff and the demand of the defendants, based on their differing theories of value for the storage rights, shows that no practical solution could have been reached through further negotiation.⁸⁹

The Oregon Supreme Court held that an “unable to agree” requirement was met even though the condemnor offered to pay for easements that only permitted the owner to cross and recross the road, but in the condemnation proceedings, the owner was permitted to use the road through a reservation.⁹⁰ The Oregon court concluded that it was evident from the litigation itself that the parties could not agree, and the court also noted that the owner had demanded \$70,000 while the

⁸⁷ *ExxonMobil Pipeline Co. v. Harrison Interests, Ltd.*, 93 S.W.3d 188, 196-97 (Tex. App.–Houston [14th Dist.] 2002, pet. filed).

⁸⁸ *Peoples Gas Light & Coke Co. v. Buckles*, 182 N.E.2d 169, 174 (Ill. 1962).

⁸⁹ *Id.*

⁹⁰ *Moore Mill & Lumber Co. v. Foster*, 336 P.2d 39, 60 (Or. 1959).

condemnor offered \$4,000, concluding, “it is hard for us to believe that there is any chance that the parties could reach an agreement outside of court.”⁹¹

The New Jersey Supreme Court held that a challenge to the “bona fides of the offer to purchase” had no merit even though the pre-condemnation offer was to purchase a fee simple interest and the law did not allow a fee simple estate to be acquired by condemnation.⁹²

An Indiana court has held that statutory requirements were met even though the condemnor’s offer would have required an express merger of a former easement, with all rights under it to be governed by the new easement.⁹³ The landowners argued that the condemnor was attempting to “winkle [sic] . . . away” the landowners’ rights in “old litigation.”⁹⁴ The court said that the “obvious purpose of the language [in the pre-condemnation offer] was to clear up title problems growing out of the previous easements,” which could be accepted or rejected by the landowners, and that this additional matter did not render the offer “inadequate.”⁹⁵

That same Indiana court held that a condemnor had met statutory requirements even though the condemnation complaint was specific that there would be four towers, while the pre-litigation offer was not specific as to the number of towers and required certain rights of ingress and egress

⁹¹ *Id.*

⁹² *Camden Forge Co. v. County Park Comm’n of Camden County*, 186 A. 519, 520-21 (N.J. 1936).

⁹³ *Oxendine v. Pub. Serv. Co. of Ind.*, 423 N.E.2d 612, 621-22 (Ind. Ct. App. 1980).

⁹⁴ *Id.* at 622.

⁹⁵ *Id.*

and removal of endangering obstructions, none of which were part of the condemnation proceedings.⁹⁶

The concurring opinion in the instant case cites another Indiana case, *Dzur v. Northern Indiana Public Service Co.*,⁹⁷ and another New Jersey Supreme Court case, *State v. The Hudson Terminal Railway Co.*,⁹⁸ for the proposition that a pre-condemnation offer must mirror the rights described in the condemnation petition before it can be said that the parties were unable to agree on the damages for the property to be condemned.⁹⁹ Those cases, however, are distinguishable because the condemnors sought to purchase more land than they were legally entitled to condemn. In *Dzur*, the condemnor offered to purchase a 200-foot-wide utility easement and later sought to condemn the same property. The Indiana Supreme Court determined that the condemnor was only entitled to a 150-foot-wide easement and held that the condemnation proceedings could not recommence until the condemnor made a separate offer for a 150-foot-wide easement.¹⁰⁰ In *Hudson Terminal*, the New Jersey court determined that a statute only authorized a railroad to condemn land up to 100 feet in width, but the condemnor had sought to condemn much more land. The court said that the condemnation proceedings could not commence until the condemnor made an offer for only a 100-

⁹⁶ *Blaize v. Pub. Serv. Co. of Ind.*, 301 N.E.2d 863, 865-66 (Ind. Ct. App. 1973).

⁹⁷ 278 N.E.2d 563 (Ind. 1972).

⁹⁸ 46 N.J.L. 289 (N.J. 1884).

⁹⁹ ___ S.W.3d at ___ (JEFFERSON, J., concurring).

¹⁰⁰ 278 N.E.2d at 566.

foot strip of land.¹⁰¹ Unlike *Dzur* and *Hudson Terminal*, the tracts of land subject to condemnation in the cases before us today are the same tracts of land identified in the condemnors' final offers to the landowners.

In the consolidated cases before us, the condemnors offered summary judgment evidence of their contacts with and offers to the landowners, counter-offers by the landowners in some cases, and the fact that none of the landowners accepted any offer.¹⁰² None of the three matters in the

¹⁰¹ 46 N.J.L. at 294.

¹⁰² In the interest of brevity, the offers in each case are summarized:

- Hubenak 1* (02-0213): Condemnor's highest combined offer was \$6,089.80. The landowners indicated they *might* sell for significantly more.
- Hubenak 2* (02-0214): Condemnor's highest combined offer was \$24,602.65. The landowners indicated they *might* sell for significantly more.
- Wenzel* (02-0215): Condemnor's highest offer was \$14,620.38. The landowners refused to sell regardless of any offer.
- Kutach* (02-0216): The landowner said it would sell for \$500.00 per foot. The condemnor countered with \$6,360.00 and then offered to re-route the pipeline and pay \$4,632.00.
- Cusack Ranch* (02-0217): Condemnor offered the landowner \$17,655.00, but the landowner objected to the amount offered and demanded a re-routing of the pipeline. Condemnor would not agree to re-route, but increased its offer to \$25,000.00, which the landowner did not accept.
- Dernehl* (02-0320): Condemnor offered \$11,333.00, landowners countered with \$120,000.00, and condemnor countered with \$13,331.00.
- Wright 1* (02-0321): Condemnor offered \$16,228.80 and \$17,000.00. The landowners refused to sell despite the offers.
- Wright 2* (02-0326): Condemnor's highest offer in this case was \$18,000.00. The landowners refused to sell despite the offer.
- Cusack* (02-0359): Condemnor's highest offer was \$13,941.00. The landowners countered that they wanted approximately \$35,000.00 and the line buried 48 inches deep.

proposed right-of way agreements that are at issue in this appeal were at issue when the pre-condemnation negotiations took place. The condemnors thus met their burden of submitting evidence that the parties were unable to agree. The landowners did not respond with any contention or evidence of the value of the three matters about which they now complain or evidence that the owners would have accepted the offers if those matters had been omitted from the offers. This lack of controverting evidence was noted by the courts of appeals in *Cusack Ranch*¹⁰³ and the consolidated *Hubenak* cases (*Hubenak 1*, *Hubenak 2*, *Wenzel*, and *Kutach*).¹⁰⁴

The concurrence suggests that our holding today would allow a condemnor to offer to buy 500 acres and then condemn “only a small strip in the corner of the property.”¹⁰⁵ We disagree. It is the law in this state that the offer must be for the same tract of land described in the condemnation petition.¹⁰⁶ In the cases before us today, the parcels of land sought in the pre-condemnation negotiations were the same parcels that were the subject of the subsequent condemnation proceedings. The only difference between the offers and the condemnation petitions was that the three matters identified in the proposed right-of-way agreements were not expressly

¹⁰³ 71 S.W.3d at 400.

¹⁰⁴ 65 S.W.3d at 799, 801.

¹⁰⁵ __ S.W.3d at __ (JEFFERSON, J., concurring) (quoting *Dernehl*, 71 S.W.3d at 861).

¹⁰⁶ See, e.g., *Brinton v. Houston Lighting & Power Co.*, 175 S.W.2d 707, 709-10 (Tex. Civ. App.–Galveston 1943, writ ref’d w.o.m.) (holding that an offer to purchase an easement that did not mention any width but merely was for sixty cents per rod did not establish the inability to agree on damages for an eighty-foot wide easement); see also *Blaize v. Pub. Serv. Co. of Ind.*, 301 N.E.2d 863, 865 (Ind. Ct. App. 1973) (indicating that before instituting condemnation proceedings, there must be negotiations for the property to be condemned, which requires a “meeting of the minds” as to the physical property “and not necessarily upon any of the more incorporeal rights”).

included in the latter. There is, however, no indication that these three matters were material to the negotiations or played any part in the parties' inability to agree "on the amount of damages."¹⁰⁷

The condemnors' proposed right-of-way agreements would have given the condemnors the right to transport "gas, oil, petroleum, products, or any other liquids, gases or substances which can be transported through a pipeline." The condemnors sought to condemn only a natural gas pipeline. We note, however, that a common carrier who owns, operates, or manages a pipeline for the transportation of crude oil has the right of eminent domain,¹⁰⁸ and the transportation of natural gas as opposed to oil was not at issue in the negotiations. The concurrence implies that the condemnors could have utilized the pipeline to transport radioactive material even though the landowner might not have consented to a pipeline carrying such a substance.¹⁰⁹ The concurrence provides no authority that would support such a broad construction of the right to transport "gas, oil, petroleum, products, or any other liquids, gases or substances which can be transported through a pipeline." Indeed, the authority and general principles of contract interpretation applicable to the construction of private easements suggest the contrary.¹¹⁰

¹⁰⁷ TEX. PROP. CODE § 21.012(a).

¹⁰⁸ TEX. NAT. RES. CODE §§ 111.002(1), (2), (3), .019(a).

¹⁰⁹ ___ S.W.3d at ___ (JEFFERSON, J., concurring).

¹¹⁰ See *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701-02, 706 (Tex. 2002) (outlining the basic principles for construing and interpreting a private easement and holding that an easement permitting its holder to use private property to construct and maintain "an electric transmission or distribution line or system" did not allow the easement to be used for cable-television lines); *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 157 S.W. 737, 739-40 (Tex. 1913) (applying the *ejusdem generis* rule of construction to conclude that the phrase "all the timber, earth, stone and mineral existing or that may be found within the right of way" in a private deed did not include oil where the purpose of the grant was "constructing, operating and maintaining" a railroad and the general words "and mineral" were preceded by the more specific terms "timber, earth, stone"); cf. *Hilco Elec. Coop. v. Midlothian Butane Gas Co., Inc.*, 111 S.W.3d 75, 81 (Tex. 2003) (observing that the rule of "ejusdem generis" "provides that when words of a general

The concurrence would nevertheless hold that a condemnor cannot establish that it was “unable to agree” with the landowner on damages unless the physical property and intangible property rights the condemnor sought to purchase mirror the exact physical property and intangible property rights explicitly included in a subsequent condemnation proceeding. The concurrence says “[t]his requirement is neither burdensome nor complex.”¹¹¹ We disagree.

While it is a simple matter to describe with precision the physical property that would be subject to the condemnation proceeding, inclusion of intangible property rights in a condemnation petition does not easily lend itself to the “bright-line rule” proposed by the concurrence. The intangible rights a condemnor could obtain by an agreement with the landowner may not always parallel the rights the condemnor would obtain by virtue of a judgment (and vice versa) because a contract and a judgment are different animals. For example, although one might not be able to obtain a landowner’s obligation to warranty and defend title by condemnation (which we do not decide), a final judgment is in and of itself a degree of warranty,¹¹² and a condemnor could not precisely capture that type of warranty in a private agreement. With regard to assignments of easements, an easement for a pipeline obtained by a common carrier in an eminent domain proceeding could, at a minimum, be transferred, sold, or conveyed to another common carrier to operate a pipeline as a common carrier without an explicit request for such a right in the

nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation”).

¹¹¹ ___ S.W.3d at ___ (JEFFERSON, J., concurring).

¹¹² See TEX. PROP. CODE § 21.065 (“A judgment of a court under this chapter vests a right granted to a condemnor.”).

condemnation petition.¹¹³ Thus, to require exact symmetry between the purchase offer and the property rights to be condemned could create an impediment to the condemnation process that is not contemplated by the purpose of the “unable to agree” requirement. Generally, it is sufficient that the parties negotiated for the same physical property and same general use that became the subject of the later eminent domain proceeding, even if the more intangible rights sought in the purchase negotiations did not exactly mirror those sought or obtainable by condemnation.

VI

For the foregoing reasons, we conclude that section 21.012’s requirements are not jurisdictional. But, if a condemning entity files a condemnation petition without meeting section 21.012’s requirements, and a landowner opposing condemnation timely requests abatement, the trial court should abate the proceedings for a reasonable time to permit the condemnor to satisfy the statutory requirements. We conclude, however, that the condemnors in the cases before us today complied with section 21.012’s requirement that the parties be “unable to agree on damages.” Accordingly, we (1) affirm the judgments of the courts of appeals in *Hubenak 1*, *Hubenak 2*, *Wenzel*, *Kutach*, and *Cusack Ranch*; (2) affirm the court of appeals’ judgment in *Cusack* and remand that case to the trial court for further proceedings; and (3) reverse the court of appeals’ judgments in *Dernehl*, *Wright 1*, and *Wright 2* and remand those cases to their respective trial courts for further proceedings.

¹¹³ See TEX. NAT. RES. CODE § 111.0194(a) (describing presumption applicable to certain grants or condemnation judgments pertaining to easements held by a “common carrier pipeline, or a successor in interest to the common carrier pipeline”); TEX. PROP. CODE § 12.014 (governing transfer of a judgment or cause of action); see also *Valero Eastex Pipeline Co. v. Jarvis*, 990 S.W.2d 852, 855 (Tex. App.–Tyler 1999, pet. denied) (stating that “pipeline easements are assignable in Texas” and holding that condemnor could assign its interest in a condemnation proceeding or judgment pursuant to TEX. PROP. CODE § 12.014).

Priscilla R. Owen
Justice

OPINION DELIVERED: July 2, 2004