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Pipeline Developers Beware: Third Circuit Disallows Eminent Domain Over State Lands Under Natural Gas Act - Duane Morris

In a unanimous, precedential opinion issued on September 10, 2019, the United States Court of Appeals for the Third Circuit held that the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.*, does not abrogate state sovereign immunity and does not give private pipeline companies the power in federal court proceedings to condemn property owned by states. *See* In re PennEast Pipeline Co., *F.3d , Nos. 19-1191 through 19-1232, 2019 WL 4265190 (3d Cir. Sept. 10, 2019)*. This decision—the first on this topic by any federal appellate court—may have far-reaching implications for pipeline development and other infrastructure projects in Pennsylvania, New Jersey, Delaware and beyond.

The Third Circuit's decision redefines the relationships among private parties, states and the federal government in this region with respect to pipeline development. The opinion also gives states, and potentially private parties, a new tool with which to obstruct future pipeline projects. Although the precedential value of the decision could be short-lived if, for example, the Third Circuit agrees to rehear the case en banc or the Supreme Court of the United States grants a petition for certiorari and reverses, the opinion will likely have an immediate impact on parties' strategies in developing and opposing energy infrastructure development in the Northeast. Pipeline companies should therefore consider the potential ramifications of the Third Circuit's decision for ongoing and future pipeline projects in this area.

Background

The case arose after PennEast Pipeline Company, LLC obtained Certificates of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC) to build a natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey. Under the NGA, once a private pipeline company obtains such certificates and meets other requirements, the company can acquire "necessary right[s]-of-way" for such pipelines through "the exercise of the right of eminent domain." 15 U.S.C. § 717f(h). PennEast sought to use this provision to condemn 131 properties along the proposed pipeline route. Although most of the properties through which PennEast planned to build were owned by private or other nonstate parties, the state of New Jersey claimed an interest in 42 of the properties. Specifically, New Jersey asserted possessory interests in two of those properties and nonpossessory interests, in the nature of conservation and farmland preservation easements, in another 40 properties.

PennEast filed complaints in the U.S. District Court for the District of New Jersey seeking orders of condemnation and other relief. The state objected to PennEast's actions with respect to the 42 properties in which the state claimed an interest, arguing that the state's sovereign immunity barred such suits from proceeding in federal court. The district court disagreed, holding that the NGA vested power in private pipeline companies like PennEast to use the federal government's power of eminent domain to condemn state lands.

The Court Distinguishes Between the Power of Eminent Domain and the Power to Obviate

State Immunity

On appeal, the Third Circuit reversed the district court in a forceful opinion. The court first explained that the district court and PennEast failed to differentiate between the powers at issue in the case: "the federal government's eminent domain power and its exemption from Eleventh Amendment immunity." Opinion at 15. The issue presented by New Jersey's objection to federal jurisdiction was, the court explained, whether there was any authority allowing a private company to hale a state into federal court. This issue was wholly separate, in the court's view, from whether the NGA delegated eminent domain power to PennEast.

Once focused on the question of a state's sovereign immunity, the court explained that it is unlikely that the federal government can delegate its power to abrogate a state's sovereign immunity. Nevertheless, relying on the canon of constitutional avoidance, the court determined it did not need to decide that issue. The court instead held that, even assuming such power could be delegated, the NGA lacked unequivocal language demonstrating that such delegation was intended by Congress. Accordingly, the court held, private parties cannot condemn land in which the state has an interest—whether that interest is possessory or nonpossessory—through proceedings initiated in federal court.

Notably, the court failed to address why a state's nonpossessory interests in land, including the conservation and farmland preservation easements here, implicate sovereign immunity to the same extent as land held by a state in fee simple. Instead, the court treated all of the state's interests equally, without explanation or analysis, and directed the district court to dismiss all 42 condemnation complaints challenged on appeal.

The Third Circuit's Decision Leaves Unresolved Whether Pipeline Siting Must Avoid State Lands Altogether

Although the court claimed that it was "not insensitive" to the concern that states now have "unconstrained veto power over interstate pipelines," and to the disruption to the natural gas industry that the court's decision may cause, see Opinion at 33, the court did little to guide pipeline companies in the future. For example, the court noted that the federal government may be able to bring condemnation claims on behalf of pipeline companies in federal court against states, as such actions would not run afoul of the Eleventh Amendment. The court, however, did not grapple with the language in the NGA giving eminent domain power to holders of certificates of public convenience, not to FERC. The court instead offhandedly noted that the federal government may need to employ some other procedural mechanism separate from the NGA to condemn state lands for pipeline development. The court, however, did not provide any guidance as to what that procedural mechanism might be.

The court also did not address whether pipeline companies can condemn state lands in state court. The NGA provides for this possibility, under 15 U.S.C. § 717f(h) (holders of Certificates of Public Convenience and Necessity may acquire needed properties by eminent domain in federal district court "or in the State courts"); however, states generally cannot be sued in their own courts without waiving sovereign immunity. Thus, pipeline companies may run into similar obstacles in state courts as this decision creates in federal courts. If courts consider the state government to be immune from condemnation suits in state court, the result may be that pipelines can never be constructed under state lands without the state's consent.

Although the court held that private companies can no longer condemn land in which a state has an interest in federal court proceedings, such companies may still retain the ability to initiate federal court proceedings to condemn land controlled by political subdivisions of a state, such as counties or

municipalities. Political subdivisions do not enjoy Eleventh Amendment immunity, and courts have generally been reluctant to extend state immunities to political subdivisions. Nevertheless, political subdivisions may attempt to use the court's analysis in this case in future challenges to the condemnation power of private pipeline companies.

Considerations for the Future

Going forward, pipeline companies may want to consider avoiding the use of eminent domain to acquire state-owned lands when siting pipelines, thereby circumventing the question of state sovereign immunity altogether. In many cases, this would result in more condemnations of private and municipal property, which may have negative political ramifications for states that refuse to consent to pipeline development on state lands. Pipeline companies may similarly face political repercussions from increased use of eminent domain on privately and municipally owned properties.

Pipeline companies should also be cautious when siting in states where there is substantial public or political sentiment against pipeline development. Private citizens and environmental groups may respond to this opinion by offering conservation easements to states, on favorable terms, for the sole purpose of thwarting pipelines. Although New Jersey, in the In re PennEast case, asserted that it had spent more than $1 billion obtaining conservation and preservation easements such as those implicated by the PennEast project, property owners may be much more willing to convey such interests in the future as a result of the Third Circuit's decision if they believe that such an action could hinder pipeline development. Pipeline companies would be advised to consult legal counsel and to formulate arguments to combat such attempts in order to prevent the Third Circuit's interpretation of the NGA from nullifying the otherwise broad eminent domain power granted to pipeline companies by Congress.

The Third Circuit is the first federal appellate court to consider whether private parties can sue a state in federal court as part of a condemnation proceeding. However, other circuits will likely face similar issues soon. In fact, another pipeline company, Columbia Gas Transmission, LLC, has just appealed a Maryland district court order holding that Eleventh Amendment immunity prevents federal court jurisdiction over condemnation proceedings against state property. This appeal will be heard by the Fourth Circuit, which may choose to follow the Third Circuit's lead or may reverse the district court, resulting in a split among the circuits. The Supreme Court may wait to grant a petition for certiorari on this question until such a split occurs (by the Fourth Circuit or any other circuit court), or may accept review of the Third Circuit's decision in the near future. Pipeline companies therefore should carefully monitor developments in the Third and Fourth Circuit cases, as well as future litigation addressing the many questions the Third Circuit's decision left open.

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