

SCOTUS: AUTHORIZED PIPELINE DEVELOPERS CAN EXERCISE FEDERAL EMINENT DOMAIN OVER STATE, MUNICIPAL LAND

By Thomas Dougherty and James Voyles on 07/1/2021
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On Tuesday, June 29, 2021, the U.S. Supreme Court voted 5-4 to reverse the Third Circuit and affirm that authorized natural gas pipeline developers have the ability to exercise federal eminent domain over state and municipal lands.

As a basis for the dispute between the PennEast Pipeline Company (PennEast) and the State of New Jersey, §717f(c) of the Natural Gas Act (NGA) directs the Federal Energy Regulatory Commission (FERC) to issue a Certificate of Public Convenience and Necessity (Certificate) to pipeline developers whose interstate projects are or will be “...required by the present or future public convenience and necessity...”.

§717f(h) of the NGA further grants Certificate holders who cannot obtain all property necessary to construct a project the authority to exercise “...the right of eminent domain in the district court of the United States...”.

PennEast first proposed the 116-mile PennEast Pipeline (Project) in 2014 to carry natural gas from its origination point in Luzerne County, Pennsylvania to its termination point near Trenton, New Jersey.

In 2018, FERC issued a Certificate for the Project because it found a clear need and public benefit for a natural gas pipeline in capacity-constrained New Jersey.

PennEast sought to obtain rights-of-way along the FERC approved Project route by filing complaints in the District of New Jersey to condemn parcels of land within the state.

New Jersey’s motion to dismiss PennEast’s condemnation complaints were based on the state’s 11th Amendment sovereign immunity rights but were denied and the District Court granted PennEast’s request for a condemnation order and a preliminary injunction.

The Third Circuit vacated the District Court’s order because it did not find that §717f(h) of the NGA plainly delegated its eminent domain authorities to Certificate holders, nor did it find that the NGA allows Certificate holders to sue nonconsenting states in condemnation proceedings.

Because the Third Circuit’s opinion seemed to break with nearly 80 years of industry practice and jurisprudence, the Court granted PennEast’s petition for writ of certiorari and heard the case in April 2021.

In his majority opinion, Chief Justice Roberts reversed the Third Circuit’s ruling by finding that, on its face, the NGA gives the federal government the authority to delegate its condemnation powers to pipeline developers seeking to procure rights-of-way on state and private land. The Court quickly dismissed the state’s sovereign immunity claims by

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determining that New Jersey surrendered its 11th Amendment immunity from federal eminent domain proceedings when it ratified the Constitution.

Writing on behalf of the minority, Justice Barrett disagreed with the majority's opinion by asserting that Congress cannot bless private actions against states without their consent pursuant to the Constitution's Commerce Clause because the Commerce Clause does not "...abrogate state sovereign immunity."

The closing words in Justice Robert's opinion invoked images of the constitutional framers meeting in 1787 to "...create a cohesive national sovereign..." wherein the "...the Federal Government and its delegates have exercised the eminent domain power to give effect to that vision, connecting our country through turnpikes, bridges, and railroads—and more recently pipelines, telecommunications infrastructure, and electric transmission facilities."

He further writes that "...we have repeatedly upheld these exercises of the federal eminent domain power— whether by the Government or a private corporation, whether through an upfront taking or a direct condemnation proceeding, and whether against private property or state-owned land..." and that the "...NGA fits well within this tradition."

If you have any questions regarding this decision, its impact on your pipeline project, or its potential implications on other forms of infrastructure development, please feel free to reach out to Lewis Roca Regulatory and Government lawyers Tom Dougherty or James Voyles.

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