

# Pipeline & Gas Journal

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**Interstate Pipeline Companies:**

## Condemning the State in Federal Court

By **Richard G. Scott**, Attorney, **Rutter & Roy, LLP**

**I**n New Jersey, it is almost impossible for an interstate pipeline company to build a significant pipeline project without crossing state-owned land or land in which the state holds some form of interest.

Several of our clients have had facilities in the state since the 1950s and, since that time, as they revisit properties for looping projects, they find that some of these properties have become state parks, preserved open space or even preserved farmland. In each of these instances, when attempting to negotiate for additional right-of-way, the company must deal with the fact that the state holds an interest in the property.

But what happens if the company cannot acquire the necessary rights in these properties through negotiation? Does the state's sovereign immunity prevent an interstate natural gas company, with eminent domain power pursuant to a certificate of public convenience and necessity and the Natural Gas Act, 15 U.S.C. §717 et. seq., from condemning the state in federal court?

Typically, our firm has been able to navigate this issue by acknowledging the public purposes for which the state holds interests

in the lands to be acquired, and by working with the state (and counties, municipalities and other stakeholders) to minimize the pipeline project's impacts on the state's holdings. For instance, municipally owned parkland in New Jersey is almost always green acres restricted, which prevents the property from being used for other than recreation and conservation purposes.

The state has the authority to enforce these restrictions. In order to obtain an easement across these properties, the municipality is required to go through an onerous public process, known as the diversion process, before it can grant an easement to the pipeline company. This process involves the submittal of an application to the New Jersey Department of Environmental Protection's (NJDEP) Green Acres Program, the holding of two public hearings, and approval from the commissioner of the NJDEP and the State House Commission.

Our clients seek to assist the municipality in going through the diversion process in order to expedite the acquisition of the necessary easements. However, since the diversion process can take up to 18 months

to complete, there are instances when it cannot be completed in time for the start of project construction.

Typically, the municipality and the pipeline company have gone through the diversion process and all that remains is approval from the State House Commission (i.e., commission that controls the sale and leasing of state-owned properties). In this scenario, we typically file a "friendly" condemnation action, naming the municipality and the state (through the NJDEP, Green Acres Program).

Our clients will honor the compensation agreed to during the diversion process but will rely on the court's granting of immediate possession to allow construction to begin on time. Once the State House Commission approves the diversion application *nunc pro tunc* (now for then), we dismiss the condemnation action.

Another common scenario is when a municipality refuses to go through the diversion process since it is unpopular with its residents. In this instance, the condemnation is adversarial with the municipality or county, but the NJDEP Green Acres Program has generally been comfortable with our client's good faith efforts to go through the diversion process.

Another example is when our clients must cross preserved farmland. In New Jersey, landowners can sell or donate their non-agricultural development rights to municipalities, counties, or the state of New Jersey, by the secretary of the Department of Agriculture (state Agriculture Development Committee) and record a deed of easement against the property that prohibits non-agricultural uses.

These easements are usually held by the municipality or county, with the State holding certain enforcement rights. Unfortunately, there is no mechanism by which an interstate natural gas pipeline company can obtain (and perfect) easements from the landowner without condemnation. For easements across preserved



farms, we developed the strategy of good faith negotiations which include working with the landowner, holder of the non-agricultural development rights and the State to compensate all parties and address concerns.

This strategy will usually accommodate all parties, so that when we do file a condemnation action, none of the parties will oppose the request for immediate possession. Once we obtain an order from the court, we settle the condemnation action.

These scenarios are typical for most projects and for almost 30 years our office has been assisting our clients condemn properties in which the state holds an interest. While we have been successful, we have always been aware that the state could raise a sovereign immunity defense to the condemnation actions.

While the state has generally not pursued the sovereign immunity defense with regard to our clients' projects, it has vigorously defended its interests in connection with numerous condemnations filed by PennEast Pipeline Company.

Early last year, PennEast filed over 100 condemnation actions in the U.S. District Court for the District of New Jersey in connection with its pipeline project. Almost two dozen of those actions involved properties in which New

Jersey held an interest. The state moved to dismiss, claiming it was immune from suit under the 11th Amendment to the U.S. Constitution as it had not waived its sovereign immunity and that, as an indispensable party, the cases should be dismissed in their entirety.

For some background, the 11th Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State. [U.S. Const. amend. XI].

The 11th Amendment was ratified in response to *Chisholm v. Georgia*, 2 U.S. 419 (1793), a case in which the Supreme Court held that Article III, Section 2 of the U.S. Constitution abrogated state sovereign immunity. In that case, the Supreme Court allowed a resident of South Carolina to sue the state of Georgia for debts owed by the state.

The 11th Amendment was ratified to overrule the Supreme Court's decision in *Chisholm*, thereby prohibiting federal courts from hearing cases between a state and residents of another state. However, the Supreme Court has not limited the scope of the 11th Amendment to only those cases but has held that the amend-

ment also bars suits involving citizens of a state against their own state in federal court under federal question jurisdiction.

Importantly, the Supreme Court has held that states enjoyed sovereign immunity prior to the ratification of the Constitution and retained that immunity afterward. Sovereign immunity is neither derived from nor limited by the 11th Amendment, but the structure of the Constitution, its history and Supreme Court interpretation. The Supreme Court has stated, "[t]he text and history of the 11th Amendment also suggest that Congress acted not to change but to restore the original constitutional design." *Alden v. Maine*, 527 U.S. 706, 722 (1999).

In the context of the PennEast condemnations, New Jersey argued that it is immune from suit under the 11th Amendment and that the District Court lacked jurisdiction without the state's consent. The state noted that, while there are exceptions to state sovereign immunity, none of them applied to these condemnations.

For instance, while Congress may abrogate a state's sovereign immunity from suit in federal court pursuant to its enforcement power under the 14th Amendment, it cannot do so pursuant its authority under Article I of the Constitution. Moreover, the state may waive its sovereign immunity by consenting to be sued in federal court. However, New Jersey argued it had not consented to the condemnation actions filed by PennEast and, therefore, did not waive its sovereign immunity.

Here, PennEast's argument is fairly straightforward: Since the federal government can exercise eminent domain over state-owned lands, and since PennEast is vested with the federal power of eminent domain through the Certificate of Public Convenience and Necessity, then PennEast stands in the shoes of the federal government and can condemn property in which the state holds an interest.

The New Jersey District Court agreed with this rationale and ruled in PennEast's favor, holding that the pipeline company stands in the shoes of the federal government when it condemns property under its delegated authority under the Natural Gas Act.

Interestingly, the District Court noted that it was also persuaded by the fact that the state had not raised the 11th Amendment argument in prior pipeline condemnation actions brought under the Natural Gas Act. (Note: We believe the condemnations referenced by the court are the more than 30 condemnations filed by our office in which we named the state.) The district court ultimately granted

PennEast's application for immediate possession and denied the state's motion to dismiss.

It should be noted that in 2017, a district court judge in the Eastern District of Texas came to the opposite conclusion. In *Sabine Pipe Line, LLC v. A permanent East of 4.25 +/- Acres*, 327 F.R.D. 131 (E.D. Tx 2017), the court rejected the pipeline company's claim that it has been delegated the federal government's authority to condemn the state in federal court.

The court noted "by ratifying the constitution, the state consented to suits brought by other States or by the Federal Government," and that "the federal government's right to condemn state lands in federal court is not an inherent attribute of its sovereignty, but ... a permission granted to it by the states. *Id.* at 140, quoting *Alden v. Maine*, 527 U.S. at 755. The Court further held that, even if the power to sue states in federal court could be delegated, the Natural Gas Act could not be read to exempt the pipeline company from 11th Amendment immunity. *Id.* at 141.

New Jersey has appealed the New Jersey District Court's decision to the U.S. Court of Appeals for the 3rd Circuit. The 3rd Circuit just recently granted in part the state's motion for a stay pending the appeal, allowing PennEast to continue surveying activities, but preventing the company from going to construction until the appeal has been decided. The 3rd Circuit also granted the state's request to expedite the appeal, and at the time of writing, has set a briefing schedule that would conclude briefing by all parties by May 19.

The 3rd Circuit's ultimate decision on the 11th Amendment will be significant to the pipeline industry. This is especially true in New Jersey where, inevitably, the alignment of any given project could easily cross properties in which New Jersey holds some kind of property interest. **P&GJ**

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