

U.S. Supreme Court Holds That Private Company Can Exercise Federal Condemnation Authority Over State-Owned Land

By Jeremy S. Young

The U.S. Supreme Court shocked many observers with its recent decision in *PennEast Pipeline Co. v. New Jersey* by holding that sovereign immunity does not insulate State-owned land from being condemned by a private company in a federal lawsuit.

In *PennEast Pipeline*, the Federal Energy Regulatory Commission (“FERC”) granted the petitioner, PennEast Pipeline Co., a certificate of public convenience and necessity authorizing construction of a 116-mile pipeline from Pennsylvania to New Jersey. PennEast then sought to condemn parcels of land owned by the State of New Jersey pursuant to the Natural Gas Act, which authorizes the exercise of eminent domain by FERC certificate holders. New Jersey moved to dismiss PennEast’s complaints on the basis of sovereign immunity, which prevents States from being sued in federal court without their consent.

The District Court denied New Jersey’s motion and granted PennEast’s requests for a condemnation order. The Third Circuit Court of Appeals vacated the District Court’s order, concluding that PennEast was not authorized to condemn New Jersey’s property because § 717f(h) of the Natural Gas Act did not clearly delegate to certificate holders the Federal Government’s ability to sue nonconsenting States.

In a 5-4 decision, the U.S. Supreme Court reversed the Court of Appeals, holding that § 717f(h) of the Natural Gas Act authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States.

In reaching its holding, the Supreme Court reasoned that § 717f(h) is consistent with the federal government’s long history of exercising its eminent domain authority to connect the country through turnpikes, bridges, and railroads, and more recently through pipelines, telecommunications infrastructure, and electric transmission facilities. The Supreme Court also noted that it has upheld these exercises of the federal eminent domain power, regardless of whether:

- (1) It was exercised by the Government directly or by a private corporation to which the power had been delegated;
- (2) It was through the upfront taking of property, or through a condemnation action; and/or
- (3) It was against private property or State-owned land.

The Supreme Court rejected New Jersey’s position that sovereign immunity bars condemnation actions against a nonconsenting State. Although it recognized that immunity from suit is a fundamental aspect of State sovereignty, the Court also noted that a State may still be sued where Congress clearly abrogates the State’s immunity under the Fourteenth Amendment to the U.S. Constitution, and where a State implicitly

agreed to the suit in the Constitution. The Court then reasoned that both these exceptions to sovereign immunity applied, determining that:

- (1) § 717f(h) of the Natural Gas Act categorically delegates to FERC certificate holders the power to condemn any necessary rights-of-way, including on State-owned land; and
- (2) States implicitly consented to private condemnation suits when they ratified the Constitution, even though there existed no historical precedent supporting what PennEast was attempting to do.

In an interesting twist, after obtaining the favorable decision from the Supreme Court, PennEast announced that it was cancelling the project. In a letter response to a FERC request for a status update, PennEast indicated that challenges in acquiring necessary environmental permits for the New Jersey portion of the project had caused the company to abandon its plan to develop the pipeline. Despite the cancellation of the project that gave rise to the case, the *PennEast* decision stands as a significant victory for the gas pipeline industry, which no longer has to worry about crossing state-owned land when planning interstate pipeline projects.

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