

Energy, Utilities, Oil, and Gas ALERT

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Pipeline Companies Win Key Battles in War for Eminent Domain Rights

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On September 12, 2016, Ohio's Ninth District Court of Appeals in Akron decided the case of *Nexus Gas Transmission, LLC v. Donald R. Houston, et al.*, holding that Nexus Gas Transmission, LLC ("Nexus") has a statutory right of entry for the purpose of conducting survey activities to determine the suitability of particular properties for pipeline construction.

The case involved the property of Donald Houston, Adele Borling, Donald Borling, and Dorothy Morris ("landowners") in Medina County. In 2015, Nexus filed a complaint for declaratory judgment and injunctive relief against the landowners, alleging that the landowners refused to permit Nexus access to their land in order to conduct surveys to determine the suitability of the property for constructing a natural gas pipeline across the property.

The Medina County Common Pleas Court held on summary judgment that Nexus was entitled to the requested declaratory judgment because it had a statutory right of access to the property for survey activities under R.C. 1723.01 and R.C. 163.03. The court took no action on Nexus' injunctive relief claim. The landowners appealed the trial court's judgment to the Ninth District.

In affirming, the Ninth District held that R.C. 1723.01 authorizes Nexus to access the property for surveys because Nexus qualifies as "a company organized for the purpose of transporting natural gas through tubing, pipes, or conduits." R.C. 1723.01 provides that companies organized for the purpose of transporting natural or artificial gas or petroleum through tubing, pipes, or conduits "may enter upon any private land to examine or survey lines for its tubing, pipes, [and] conduits...and may appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building of such tubing, conduits, [and] pipes."

Although the landowners in *Houston* raised a number of arguments on appeal that related to this issue, the Court declined to entertain those arguments on the basis that they were either waived, because not raised in the trial court, or premature, because the trial court took no action on Nexus' injunctive relief claim.

The *Houston* case follows the June 27, 2016 decision of Ohio's Fifth District Court of Appeals in *Kinder Morgan Cochin LLC v. Simonson*, which similarly held that a pipeline company has a statutory right of entry for the purpose of conducting surveys in anticipation of pipeline construction. In so holding, the *Simonson* Court determined that "natural gas liquids," including ethane and propane, qualify as "petroleum" under R.C. 1723.01.

A similar result was also reached by the Harrison County Common Pleas Court on December 14, 2015 in *Sunoco Pipeline L.P. v. Teter*, in which the court held that "liquefied natural gas," including propane and butane, qualifies as "petroleum" under R.C. 1723.01. Accordingly, on January 5, 2016, the court issued an entry granting the pipeline survey access rights.

These cases constitute strong precedent upholding pipeline companies' right to enter property for surveying purposes in anticipation of constructing a pipeline. Although the separate issue of whether pipeline companies ultimately enjoy the power of eminent domain for pipeline purposes remains to be litigated, the reasoning of the cases weighs in favor of pipeline companies on that issue as well.

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