

States' Power to Block Pipeline Land Grabs Debated at Supreme Court

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WASHINGTON (CN) — A law that has been the key to the development of natural gas pipelines for 80 years was challenged by New Jersey at the nation's highest court Wednesday.

The founding fathers' understanding of federal land takes and the role private companies have in executing those seizures were central themes during the virtual U.S. Supreme Court hearing.

"This court has said repeatedly that taking land is under common law, why doesn't this fall within the 11th Amendment itself?" asked Justice Neal Gorsuch, a Donald Trump appointee, who appeared concerned at the idea of the private gas company PennEast being allowed to bring a lawsuit against the state of New Jersey, which might otherwise be shielded by sovereign immunity granted by the constitution despite powers given to companies under the Natural Gas Act of 1938.

"PennEast is suing as an agent [of the federal government], or however you want to describe it," responded Deputy U.S. Solicitor General Edwin Kneedler. The Justice Department joined in on the suit to defend the authority of the Federal Energy Regulatory Commission's, or FERC.

Kneedler and Kirkland Ellis attorney Paul Clement, who argued on behalf of the energy company, often got stuck on the question of what to call a third party suing a state over FERC-certified eminent domain and whether that should be allowed.

"Help me with that; a suit against the state is a suit in equity, and that's a taking," Gorsuch said, noting conditions when a lawsuit may be blocked by 11th Amendment immunity. "The state is entitled to compensation? How is it not a suit against the state under common law?"

"It is a suit against the state but the point is this is a proceeding of a distinct character," Kneedler responded, stressing the unique nature of a land take granted under federal authority, something both the DOJ and PennEast argue should be allowed on other constitutional grounds like the supremacy clause, which says federal law takes precedent over state law.

The heart of the dispute is the fate of a 116-mile natural gas pipeline project that would link Pennsylvania's resource-rich hills to New Jersey's processing operations.

PennEast applied for a certificate to build the project in 2015. After review by the FERC, it was approved and the company was given certification to take land along the planned route. But it didn't take long for New Jersey to push back. The state's refusal turn over land via the Natural

Gas Act's eminent domain powers led the pipeline company to bring federal claims over 42 of 49 properties.

"Eventually, PennEast was forced to bring a series of condemnation actions as to those properties in federal court," Clement wrote in PennEast's petition asking the U.S. Supreme Court to take the case.

New Jersey argues companies like PennEast are barred under the 11th Amendment from condemning property through eminent domain if a state holds any type of interest in that property. In its response to PennEast's petition, the state said the land at issue holds "recreational, conservation, and/or agricultural uses." It also claimed the company failed to try to negotiate the land taking and instead went straight to federal court.

Though the state lost in district court, the Third Circuit reversed — a decision the three-judge panel conceded "may disrupt how the natural gas industry" has operated for the past 80 years. "New Jersey's sovereign immunity has not been abrogated by the NGA, nor has there been — as PennEast argues — a delegation of the federal government's exemption from the state's sovereign immunity," wrote U.S. Circuit Judge Kent Jordan, a George W. Bush appointee, in the September 2019 ruling.

While some of the conservative justices on Wednesday hammered the question of how to define PennEast in the dispute, Justice Stephen Breyer, a Bill Clinton appointee, took a more contextual approach.

"[The Natural Gas Act] was passed to build a pipeline," he said, pointing to research he'd done about how the law was enacted to empower gas companies to build pipeline infrastructure across state lines as the nation's power demands grew. And more importantly to the case at hand, the companies themselves handled the condemnation disputes when states refused to comply with land take requests.

"I don't understand how any reasonable person would have delegated any power under the Natural Gas Act without the power to proceed against the state. Why in heaven's name can't then FERC have done the same thing?" Breyer asked before pointing to other instances where third parties are empowered by governments, like Mississippi's use of private prosecutors, to handle functions otherwise reserved for the government.

"Where that authority is delegated under supervision... It's very historical," he added. "But that's been the understanding for the last 80 years."

Justice Sonya Sotomayor, a Barack Obama appointee, asked about the principle of the role of the designation — if the private party is suing, it doesn't have the same interest as the government. New Jersey argued this could run afoul of the "good faith" requirement in FERC's eminent domain rules, but Sotomayor noted the lower court found no bad faith on the part of PennEast.

"A company can fight tooth and nail to keep away the money entitled to us," New Jersey Assistant Attorney General Jeremy Feigenbaum said.

Sotomayor also noted the lack of other states trying to resist third party eminent domain claims. Feigenbaum offered a few examples in the last 20 years, but he said the judges should go back even further, to the creation of the U.S. Constitution, to find their answer.

“Modern practice can’t overcome founding-era consent,” he argued. “In the context of sovereign immunity itself, where the company is pointing can’t overcome [this rule].”

In a statement following the hearing, New Jersey Attorney General Gurbir S. Grewal doubled down on that theory.

“Private companies do not have the authority to condemn New Jersey’s sovereign land without our consent, and PennEast is no exception,” he said. “Every other industry has been able to move forward without the right to take our land in federal court over our objection, and the natural gas industry is no different.”

Lawyers for PennEast did not return requests for comment by press time. But in a statement after the Supreme Court agreed to hear the case, PennEast board chair Tony Cox expressed hope that the high court would uphold “Congress’ clear charge to FERC to ensure the availability of affordable domestic energy.”

Cox also pointed to the mix of labor and manufacturing groups that have expressed concerns over upending the longstanding practice of FERC-approved eminent domain.

“Federally approved pipeline projects undergo an extensive review process, and support jobs, reliable energy systems, a cleaner environment, and lower energy bills, which together, benefit our region’s families and businesses,” he said.

William Yeatman, a research fellow at the Cato Institute’s Robert A. Levy Center for Constitutional Studies, said the questions lobbed by the judges didn’t offer a clear outcome for either side. He pointed to concerns expressed by judges from across the ideological spectrum, Congress’s authority to “deputize” a private party and the fallout of the high court possibly nixing a decades-old federal scheme as making the tea leaves even harder to read.

“I suspect the court is working its way through a very difficult legal question with an open mind,” he said.