



This Land Is Your Land? Eminent Domain Under the Natural Gas Act and State Sovereign Immunity

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In passing the [Natural Gas Act of 1938](#), Congress acknowledged that interstate natural gas pipelines and other natural gas transmission facilities serve [the public interest](#). To facilitate the land acquisition process for pipelines, Congress [amended](#) the Natural Gas Act in 1947 to permit natural gas companies to exercise the power of federal eminent domain. But pipeline routes can require more than just privately owned property. In 2018, a pipeline construction company sought to exercise eminent domain over land set aside by the State of New Jersey for agriculture, conservation, and recreation. When New Jersey opposed the eminent domain action, the ensuing court battle set up a clash of two powers: the pipeline company’s eminent domain power and New Jersey’s power to control state lands and retain its [sovereign immunity](#) against the pipeline company.

The Third Circuit’s opinion in [PennEast Pipeline Company, LLC v. New Jersey](#) calls into doubt whether the Natural Gas Act permits natural gas companies to condemn state lands—or whether such a grant of authority would even be constitutional. The issue is poised to reach another court of appeals in the coming months and may find its way to the Supreme Court.

Section 7 of the Natural Gas Act

Congress passed the [Natural Gas Act of 1938](#) to regulate the then-emerging natural gas industry. [Section 1 of the Act](#) declares that the transportation and sale of natural gas “is affected with a public interest,” and that regulation of the industry is therefore “necessary in the public interest.” [Section 7 of the Act](#) establishes a federal framework for permitting the construction and abandonment of interstate natural gas transportation facilities such as pipelines.

The [Takings Clause](#) of the Fifth Amendment provides that private property may not be acquired for “public use” without “just compensation.” Implicit in the Takings Clause is that the federal government [possesses the power to take private property for public use](#) through the exercise of eminent domain so long as the property owner receives “just compensation.” Recognizing that the construction of natural gas pipelines benefits the public, Congress [amended](#) Section 7 of the Natural Gas Act in 1947 to authorize

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natural gas companies in possession of a Section 7 permit to exercise eminent domain when they are unable to acquire necessary rights-of-way by contract or negotiation with the property owner.

The PennEast Decision

In 2018, a pipeline construction company known as the PennEast Pipeline Company initiated condemnation proceedings in the United States District Court for the District of New Jersey after obtaining a Section 7 permit to exercise eminent domain over 131 properties along the proposed pipeline route. The State of New Jersey held interests in 42 of these properties, including possessory interests in two of the properties and non-possessory interests, such as easements governing the property's use, in the rest. After PennEast initiated the proceedings, the district court requested that affected property owners present any arguments against permitting PennEast to construct its pipeline over the 131 properties.

Invoking the [Eleventh Amendment](#), New Jersey argued that the state's sovereign immunity barred PennEast from bringing an eminent domain action to condemn state lands. The [Eleventh Amendment](#) declares that "[t]he 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" The Supreme Court has clarified that the states' immunity "[neither derives from, nor is limited by, the terms of the Eleventh Amendment](#)," but rather is an attribute of the states' sovereignty. The states' immunity from suit, however, is not absolute. A state may voluntarily waive its immunity by [consenting to suit](#). In addition to this waiver, the United States has the power to sue states, a power that the Supreme Court describes as "[inherent in the constitutional plan](#)."

Following a series of hearings, the district court granted PennEast's condemnation applications. The court first noted that the Eleventh Amendment does not shield states from suits brought by the United States. The court reasoned that, because PennEast's eminent domain power derived from a grant of federal authority contained in Section 7 of the Natural Gas Act, PennEast [stood "in the shoes of the sovereign"](#) and therefore the Eleventh Amendment could not bar eminent domain proceedings brought against New Jersey.

In an opinion filed on September 10, 2019, the U.S. Court of Appeals for the Third Circuit [reversed](#) the district court's decision. Writing for a unanimous panel, Judge Jordan first [noted](#) that the District Court had conflated two separate federal powers: the power of eminent domain and the power to sue states. While Section 7 of the Natural Gas Act speaks to the former, it says nothing about the latter. The Third Circuit [observed](#) that no case law supports the theory that the United States may delegate its power to sue states, and further reflected that were such a delegation even permissible, [nothing in the text of the Natural Gas Act](#) clearly evinced congressional intent to make such a delegation. Accordingly, the Third Circuit vacated the district court's judgment as it applied to the state-controlled properties.

On October 8, New Jersey's Department of Environmental Protection [closed](#) PennEast's application for required state permits, citing the Third Circuit's decision. PennEast has said that it is "[confident the legal actions will be resolved favorably](#)" and has petitioned the Third Circuit for rehearing.

Issues in the PennEast Case

The Third Circuit confronted two issues pertaining to New Jersey's invocation of sovereign immunity. One issue is whether the Natural Gas Act delegates to natural gas companies the federal government's power to sue states. The court observed that Section 7 of the Natural Gas Act makes no explicit mention of the Eleventh Amendment or state sovereign immunity, and in fact [does not explicitly mention the states at all](#). Without any evidence that Congress intended to delegate the federal government's authority to pursue legal action against states, the Third Circuit refused to "[assume that Congress intended – by its silence – to upend a fundamental aspect of our constitutional design](#)."

The Third Circuit also addressed whether the federal government *can* delegate its authority to sue states to private parties. Judge Jordan relied principally on the Supreme Court’s decision in *Blatchford v. Native Village of Noatak*, in which Native American tribes argued that Congress had delegated to the tribes the federal government’s ability to sue states via a [statute](#) providing for federal jurisdiction over civil actions brought by tribes. The *Blatchford* court expressed doubt that this power was delegable, arguing that the federal exception to sovereign immunity does not extend to “[anyone whom the United States might select](#),” which the Third Circuit found persuasive in the *PennEast* matter. The Third Circuit also observed “[meaningful differences](#)” between suits brought by private parties and suits brought by the United States that supported the non-delegability of the federal power to sue states, such as the lack of a constitutional duty for private parties to “[take Care that the Laws be faithfully executed](#)[.]”

Considerations for Congress

The Third Circuit’s decision in *PennEast* provides states with an additional tool to affect construction of natural gas pipelines. However, this decision is unlikely to be the last word on the topic. Another pipeline company recently filed an appeal in the Fourth Circuit after a Maryland district court summarily dismissed its eminent domain actions against the state. Should the Fourth Circuit decide that the Natural Gas Act allows pipeline companies to exercise eminent domain over state lands, two federal courts of appeals will have reached conflicting decisions on a constitutional issue. This could increase the likelihood that the Supreme Court will hear one of the cases and resolve the circuit split.

Should other courts agree that the lack of a clear delegation of the federal exemption from state sovereign immunity does not allow pipeline companies to exercise eminent domain with respect to state-controlled lands, Congress could potentially authorize them to do so. The *PennEast* Pipeline court’s [emphasis](#) on the Natural Gas Act’s “silence” suggests that Congress could amend Section 7 to delegate federal power to sue states. However, a delegation would not obviate constitutional concerns if the power to sue states is nondelegable, as the *Blatchford* court suggested, and Congress would be unable to remedy such a constitutional problem through statutory amendment. As an added wrinkle, courts hearing eminent domain challenges based on state sovereign immunity may decline to reach the constitutional issue based on the [canon of constitutional avoidance](#). Avoiding the issue would leave the constitutionality of any express delegation susceptible to judicial challenges in the future.

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