



U.S. Supreme Court Upholds Natural Gas Pipelines' Authority to Exercise Eminent Domain Power over State Land

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The U.S. Supreme Court held in [PennEast Pipeline Co. v. New Jersey](#) that natural gas pipeline companies with a certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission ("FERC") may condemn State lands.

In the June 29, 2021 decision, the Supreme Court overturned a ruling by the U.S. Court of Appeals for the Third Circuit that held the pipeline developer PennEast Pipeline Company could not seize land owned by the State of New Jersey. The Court held, in a 5-4 split ruling, that Section 7(h) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(h), properly allowed FERC to confer to natural gas pipeline companies the authority to file lawsuits condemning State lands, and that a State cannot use its sovereign immunity under the Eleventh Amendment as a defense to condemnation proceedings.

While all justices agreed that the Federal Government could itself condemn State lands and delegate its eminent domain authority to private entities, the Court split over whether certificate holders can sue nonconsenting States to condemn State property.

In the majority opinion, written by Chief Justice Roberts, and joined by Justices Breyer, Alito, Sotomayor, and Kavanaugh, the Court explained that "when the States entered the federal system, they renounced their right to the 'highest dominion in the lands comprised within their limits'" and that States' eminent domain power "yield[ed] to the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'" The Court explained that PennEast's condemnation action fell within the Court's precedent that contemplates Congress using its eminent domain power either directly or indirectly through private corporations. Accordingly, the Court held that a natural gas pipeline company can file suit to condemn State-owned land to build a FERC-certificated project.

The dissent, penned by Justice Barrett, and joined by Justices Thomas, Kagan, and Gorsuch, argued that the NGA was enacted pursuant to the Commerce Clause, and did not permit Congress to strip the States of their sovereign immunity.¹ Under the dissent's view, Congress cannot authorize private suits against a nonconsenting State pursuant to its Commerce Clause power, and the Commerce Clause did not abrogate State sovereign immunity. The Court found the dissent's reasoning flawed because "the eminent domain power is inextricably intertwined with the ability to condemn" and that "[a]n eminent domain power that is incapable of being exercised amounts to no eminent domain power at all."

The case confirms that States cannot "veto" a pipeline on grounds that it crosses State lands and clears up uncertainty—created by the Third Circuit—regarding whether natural gas pipeline companies may bring condemnation actions against State lands. In handing down its decision, the Court reinforced the intent behind the NGA's eminent domain authority that certificate holders must be able to secure the property rights necessary to build pipelines found by FERC to be required by the public convenience and necessity. As the Court pointed out, by enabling FERC to vest natural gas pipeline companies with the eminent domain power, Congress ensured that certificates of public convenience and necessity could be given effect. Otherwise, a certificate without the right of eminent domain would be "only an illusory right to build."

¹ In a separate dissent, Justice Gorsuch, joined only by Justice Thomas, highlighted the differences between "structural immunity" that derives from the dual sovereignty inherent in the constitutional design and the explicit immunity provided by the Eleventh Amendment. This dissent argued that the Court only addressed structural immunity and defied the plain language of the Eleventh Amendment.

A contrary determination by the Court could have added substantial costs to natural gas pipeline projects by requiring re-routing to avoid State lands. For projects unable to avoid State land, a contrary decision could have led to them being canceled altogether. The Court concluded its opinion by highlighting the importance of the federal eminent domain authority, crediting it with “connecting our country through turnpikes, bridges, and railroads—and more recently pipelines, telecommunications infrastructure, and electric transmission facilities,” and signaling that Congress is well within its power to delegate the federal eminent domain authority in these contexts.

For More Information

Van Ness Feldman’s nationally recognized natural gas pipeline practice regularly counsels pipeline companies on pipeline certificate issues arising under the Natural Gas Act. If you have questions on the implications of the SCOTUS decision on your business, please contact [Michael Pincus](#) or [Michael Diamond](#).

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