

Federal Appellate Court Rejects Argument That TX Eminent Domain Procedure Violates Due Process

**Tiffany Dowell Lashmet, J.D., Asst. Professor & Extension Specialist
Texas A&M Agrilife Extension**

Last week, the United States Court of Appeal for the Fifth Circuit considered a legal dispute between a landowner and the Trans-Pecos Pipeline project, *Boerschig v. Trans-Pecos Pipeline, LLC*, No. 16-50931. Specifically, the landowner claims that Texas eminent domain procedure violates the Due Process Clause of the United States Constitution. The court declined to issue an injunction to stay the state court eminent domain proceedings, finding that the landowner was unlikely to succeed on the merits of his claim.

Background

The Trans-Pecos Pipeline project is currently under construction and will result in 148-mile gas pipeline from the Permian Basin to Mexico. Under Texas law, a natural gas utility, even though privately owned, has the right to condemn land for "public use." It is up to the gas utility to determine whether the project meets the required public use standard, and the judicial review of that determination is "conclusive, absent fraud, bad faith, abuse of discretion, or arbitrary or capricious action."

John Boerschig owns a ranch along the route of the pipeline project. Trans-Pecos sought to negotiate an easement with Mr. Boerschig for a 50' easement through his ranch. The two were unable to come to an agreement on the terms of the easement, and Trans-Pecos instituted eminent domain proceedings against Mr. Boerschig in state court. As provided for by the eminent domain statutes in Texas, the state court appointed three special commissioners to conduct a hearing to award Mr. Boerschig just compensation for his property being taken by the easement.

Mr. Boerschig filed a federal lawsuit in order to stop the state court eminent domain process. He claimed that Texas eminent domain procedure violates Due Process because it is an overly broad delegation of power to a private party and because it fails to provide a pre-deprivation hearing to the landowner. The federal trial court did not issue an injunction, holding that doing so would violate the Anti-Injunction Act, a federal law prohibiting federal courts from enjoining ongoing state court proceedings unless expressly authorized to do so by Congress, where necessary in aid of jurisdiction, or to protect or effectuate judgments. Mr. Boerschig appealed the denial of his injunction to the Fifth Circuit.

Because the trial court did not issue the injunction, the state court eminent domain proceedings continued. The special commissioners awarded Mr. Boerschig \$664,625 as compensation. He filed objections to this award in the state trial court. However, under Texas law, Trans-Pecos was able to post a bond for the amount of the special commissioner's award and take control of the property to begin the project. Thus, while the federal case was pending on appeal and the state court case had pending objections to the special commissioners' award, Trans-Pecos already completed the construction of the pipeline on Mr. Boerschig's ranch.

Opinion

On October 3, 2017, the US Court of Appeals for the 5th Circuit upheld the denial of an injunction but did so for different reasons than the federal trial court.

First, the Court addressed Trans-Pecos' argument that because the pipeline construction was already complete, the request for an injunction was too late, making it moot under the law. The Court explained that while generally, a request for an injunction is moot when the event sought to be enjoined occurs, there is an exception that allows a case to go forward if the defendant completed the act with notice of the request for injunctive relief. Further, the court could still offer effective relief and would have the ability to order Trans-Pecos to return the ranch land to pre-condemnation state were it to choose to do so. Because of this, Mr. Boerschig's request was not moot.

Next, the Court turned to an interesting issue--whether the special commissioner's role in eminent domain proceedings in Texas is judicial (in which case the Anti-Injunction Act could ban federal jurisdiction) or non-judicial (in which case the Anti-Injunction Act would not apply). The Court found this to be "a difficult question given the unusual nature" of the Texas eminent domain process. The Court, however, did not need to make a decision on which category the special commissioner's hearing would fall, as it was able to affirm the trial court's denial of the injunction on other grounds. The question of whether the Anti-Injunction Act applies to the special commissioner's role in Texas eminent domain law was left for another day

The Court based its analysis and decision in this Opinion on whether Mr. Boerschig could meet the standard necessary to obtain an injunction. Namely, the element at issue was whether he could show "a substantial likelihood of success on the merits." Because the Court found he could not do so, it affirmed the injunction denial. "Boerschig's constitutional challenge is a longshot at best," said the Court. It reached this conclusion for two reasons.

First, Texas eminent domain procedure has been longstanding and numerous courts have rejected the argument that Due Process requires Texas to afford Mr. Boerschig a court hearing prior to his property being taken. The Texas procedure--allowing the condemnor to take possession after the special commissioner's hearing but before a court has reviewed any appeal--has repeatedly been upheld against due process challenges.

Second, the Court rejected Mr. Boerschig's argument that Texas' eminent domain approach is an unconstitutional delegation of power to a private entity. This argument, the Court found, had not been made previously regarding the eminent domain process in Texas. Due Process prohibits the government from delegating too much power to private entities, but this portion of the Fourteenth Amendment not been used by the United States Supreme Court to strike down a statute "since the early decades of the last century." The Court here looked at three cases U S Supreme Court cases, ranging in dates from 1912 - 1936, all in which the Court found a violation of the non-delegation clause. In each case, the private party delegated power was given complete discretion, was not bound by official duty or standard, and had no provision for review of the private party's decision. Such was not the case here. Texas eminent domain law allows for judicial review of the pipeline company's determination of "public use," albeit

deferential. Further, the requirement of public use is a standard that private gas utilities must follow in exercising eminent domain. This was the type of standard found missing in the Supreme Court cases.

Thus, the Court found that Mr. Boerschig's request for an injunction was not moot. It did not rule on whether his claim was barred by the Anti-Injunction Act. But, it did find that Mr. Boerschig failed to prove an essential element required to obtain an injunction: the likelihood of success on the merits of the case. Without this element, the denial of his injunction was affirmed.