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The 9th Circ. Stance On Transwestern Pipeline

Law360, New York (April 07, 2009) -- A recent decision by the Court of Appeals for the Ninth Circuit will have a major impact on condemnation actions brought under the Natural Gas Act.

In *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*, 550 F.3d 770 (9th Cir. 2008), the Ninth Circuit set forth a procedure that will allow pipeline companies to obtain possession of the property interests necessary for a pipeline project at an early stage of the condemnation process.

The decision addresses an issue that divided courts in the past, and, while binding only in the Ninth Circuit, is likely to be highly persuasive in other courts.

The decision adds certainty to pipeline companies' ability to start construction quickly and complete projects within Federal Energy Regulatory Commission (FERC) deadlines.

Natural gas transmission pipelines are enormous endeavors that cost hundreds of millions of dollars, require careful compliance with FERC regulations and involve scores of contractual commitments with contractors and utilities.

Their construction involves hundreds of workers and requires carefully sequenced activity. Timing is everything. Even small changes in a project schedule can cost millions of dollars.

Given the cost and complexity, it is crucial that pipeline companies have a clear idea of when they can start construction. Ideally, companies would like to start work as soon as FERC approves the project. But the law is unsettled regarding how and when companies can obtain possession of the properties on which the pipeline will be built.

The Natural Gas Act (NGA), 15 U.S.C. § 717(h), grants natural gas transmission companies the right to condemn property to build pipelines and related facilities.

However neither the NGA nor Fed. R. Civ. P. 71.1 — which prescribes condemnation procedure in federal courts — state when a condemnor can take possession of condemned property.

Unlike the Declaration of Takings Act, 40 U.S.C. § 3114, which governs condemnation actions brought by the federal government, the NGA does not contain a “quick take” provision that expressly permits possession of condemned property prior to final judgment.

As a result, the issue of when a pipeline company could obtain possession so as to begin construction was left to the courts, with inconsistent results.

While some courts held that companies could obtain “immediate possession” of the properties within weeks of filing suit, others held that companies could not obtain possession until title transferred at the end of just compensation proceedings, which could take years.

Federal district courts that allowed natural gas transmission pipeline companies to obtain early possession of condemned property typically utilized a preliminary injunction process.

Companies would be awarded possession if they satisfied the standard preliminary injunction factors: likelihood of success on the merits, irreparable harm, no adequate remedy at law, balance of harms favoring the condemnor, the injunction being in the public interest and posting an adequate bond.

Pipeline companies generally had little trouble establishing those factors. Their likelihood of success on the merits was usually 100 percent, because as long as they were condemning property approved by FERC, there was no question they would eventually succeed in obtaining the necessary property interests.

Companies typically could show irreparable harm and no adequate remedy at law, as the FERC certificate requires that the pipeline be built within a year of issuance, and delays associated with protracted condemnation litigation could jeopardize the project or cost millions of dollars in additional construction expenses that could not be recovered from the condemnees.

The balance of harms favored the condemnor because the harm suffered by the landowner was the same regardless of when the company obtained possession. The public interest plainly favored an injunction, because FERC approved projects are, by definition, in the public interest. And a bond equal to the fair market value of the property interests condemned would adequately secure the immediate possession order.

But not all courts followed that approach, and denial of an immediate possession could place a project in limbo and delay property acquisition for years.

The most prominent example is Northern Border Pipeline Company v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998). In that case, Northern Border had obtained FERC approval to extend its existing pipeline more than 200 miles through Iowa and Illinois.

Northern Border sought a preliminary injunction granting it immediate possession of the necessary property to start construction. The district court denied the request and the Seventh Circuit Court of Appeals affirmed that denial on appeal.

The Seventh Circuit reasoned that Northern Border was not entitled to prejudgment possession because that relief is only available when a party has a “pre-existing entitlement to the property” “grounded in substantive law,” and Northern Border had not made that showing.

In other words, Northern Border could not obtain a preliminary injunction granting it possession of property which it neither owns nor had established any other legal rights.

The NGA did not grant Northern Border a right to immediate possession and its property interests would not vest until final judgment at the conclusion of the condemnation proceedings.

Accordingly, immediate possession was denied and Northern Border could not begin construction on condemned properties until the legal actions had proceeded to a final judgment, which could take several years because of the multitude of property valuation issues that needed to be resolved.

By creating uncertainty as to when construction of a pipeline could begin, the Northern Border decision created tremendous logistical and financial problems for pipeline companies.

Accordingly, some district courts — including courts within the Seventh Circuit — allowed pipeline companies to avoid the harsh consequences of Northern Border by obtaining a court order that confirmed their condemnation authority before seeking immediate possession.

For example, in Guardian Pipeline LLC v. 295.49 Acres of Land, 2008 WL 1751358 (E.D. Wis. 2008), the district court permitted a pipeline company to obtain immediate possession after obtaining an order of condemnation.

The district court distinguished the case from Northern Border because “[h]ere, the court has determined that Guardian is entitled to condemn the defendant parcels of land for purposes of constructing its pipeline.”[1]

The Fourth Circuit Court of Appeals followed that same approach, ruling that companies could obtain immediate possession if they first obtained an order from the district court confirming the company’s condemnation rights. See East Tennessee Natural Gas LLC v. Sage, 361 F.3d 808, 828 (4th Cir. 2004).

Unfortunately, however, that decision did not clearly set forth the procedure for pipeline companies to follow to obtain the necessary condemnation and immediate possession orders.

The unsettled state of the law was reinforced by the district court decision in *Transwestern*, which rejected the holding of *East Tennessee* and denied prejudgment possession to the pipeline company. *Transwestern Pipeline Company LLC v. 9.32 Acres of Land*, 544 F.Supp.2d 939 (D. Az. 2008).

The district court found the *Northern Border* decision more persuasive and denied *Transwestern's* request for a preliminary injunction on the grounds that the NGA did not provide “quick take” powers and the court should not use its equitable power to confer “a right that Congress has chosen to withhold.”

That decision delayed work on at least 129 parcels of land on which the pipeline was to be built.

Although the Ninth Circuit’s decision in *Transwestern's* appeal affirmed the district court decision on the ground that the pipeline company had not followed the proper procedure to obtain an immediate possession order, it confirmed a pipeline company’s right to prejudgment possession and laid out a clear procedure for doing so.

First, the pipeline company must move for summary judgment ordering condemnation of the property interests at issue. To obtain summary judgment, the pipeline company must show that:

- 1) it holds a FERC certificate authorizing the relevant project;
- 2) the land to be taken is necessary to the project; and
- 3) the company and the landowners have failed to agree on a price for the taking.

Obtaining summary judgment and the resulting order of condemnation gives the company the “substantive right” to the property that the *Northern Border* court found necessary for prejudgment possession.

Once it obtained the condemnation order, the company could seek a preliminary injunction granting it immediate possession of the property interests. The preliminary injunction analysis is the same one used in prior immediate possession cases, as described above.

The *Transwestern* court explained that “[t]his approach strikes the correct balance of requiring the gas company to satisfy all elements of the statute, but does not require it to wait for the full determination of just compensation for each parcel before the district court uses its equitable powers to grant possession.”

Because Transwestern had not obtained an order of condemnation before it sought immediate possession, the appeals court upheld the district court's denial of prejudgment possession.

However, it made clear that prejudgment possession would be allowed if the proper procedure were followed and an order of condemnation obtained prior to an immediate possession order.

While Transwestern is not binding outside of the Ninth Circuit, it is a well-reasoned and clearly written opinion that should be persuasive in other jurisdictions, especially when combined with the Fourth Circuit's decision in East Tennessee.

The case should go far in reducing the uncertainty created by Northern Border as to a condemnor's right to prejudgment possession of properties necessary for a natural gas pipeline.

Getting the maximum benefit out of the Transwestern decision requires pipeline company attorneys to be fast and efficient. The goal is to obtain possession as quickly as possible. Attorneys should be ready to file motions for summary judgment and a preliminary injunction at the earliest possible time.

Ideally, the motions should be filed at the same time, so that if the court grants the motion for summary judgment confirming the condemnor's right to condemn the property, it can immediately rule on the motion for preliminary injunction. The client should be prepared to post an appropriate bond promptly upon issuance of the immediate possession order.

Early education of the district court is the key to success. Few federal district courts are familiar with federal condemnation procedure and granting a pipeline company "immediate possession" of a landowner's property prior to a final judgment can sound like a drastic remedy.

If a district court's local rules or practices permit, attorneys should request an early status conference and expedited briefing, so that they begin the education process, impress on the court the urgency of having these issues resolved, and explain that there is an established process for doing so.

The published decisions show that district courts are generally receptive to pipeline companies' need for immediate possession of property, if that need and the procedure for addressing it are properly explained and the court understands the extensive pre-filing review that FERC provides prior to issuing its certificate to allow construction to begin.

Effective advocacy on these issues can save a pipeline company tens of millions of dollars.

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The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] The authors represent Guardian Pipeline LLC in that action.