



West

THE COUNCIL OF STATE GOVERNMENTS

Can a Private Entity Exercise Eminent Domain on State Owned Land?

By Lisa Soronen, Executive Director, State & Local Legal Center (SLLC)

In [*PennEast Pipeline Co. v. New Jersey*](#) the U.S. Supreme Court will decide whether a private natural gas company may use the federal government's eminent-domain power to condemn state land.

The Natural Gas Act (NGA) authorizes private gas companies like PennEast to obtain necessary rights of way through eminent domain to build pipelines. PennEast asked a federal district court to condemn 42 properties which belong to New Jersey to build a pipeline.

New Jersey claims that Eleventh Amendment sovereign immunity prevents a private company from haling it into court as it prohibits states from being sued in federal court unless they have consented to suit. An exemption applies to the federal government. New Jersey argues that “the federal government cannot delegate its exemption from state sovereign immunity to private parties like PennEast.”

The Third Circuit agreed and offered three reasons why it “doubt[ed]” the federal government can delegate its exemption. First, the court reasoned case law doesn't support the “delegation” theory of sovereign immunity. Second, “fundamental differences” between lawsuits brought by “accountable federal agents” versus private parties weigh against allowing the federal government to delegate to private parties its ability to sue states. “Finally, endorsing the



delegation theory would undermine the careful limits established by the Supreme Court on the abrogation of State sovereign immunity.”

In its [petition](#) asking the Supreme Court to hear this case PennEast repeatedly cites to the Third Circuit “recogniz[ing] that our holding may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.”

According to the Third Circuit, there is a “work-around.” “Accountable federal official[s]” may “file the necessary condemnation actions and then transfer the property to the natural gas company.” PennEast pushed back at this suggestion claiming the NGA doesn’t allow the federal government to condemn property. To this Third Circuit responded: “But one has to *have* a power to be able to delegate it, so it seems odd to say that the federal government lacks the power to condemn state property for the construction and operation of interstate gas pipelines under the NGA.”

At the request of the Court, the United States government [filed](#) an *amicus* brief at the petition stage. It encouraged the Court to hear the case and reverse the Third Circuit. The United States’ brief argues that the “text, structure, and history of the NGA make clear” natural gas companies may “acquire State-owned property necessary for constructing” approved interstate pipelines.”

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