

Energy Boom Tests State Eminent Domain Laws

By **Keith Goldberg**

Law360, New York (May 12, 2014, 2:16 PM ET) -- The U.S. energy boom is fueling new disputes over companies' ability to condemn private property through eminent domain for pipelines and other large projects, forcing developers to break new legal ground in states that aren't historic areas for energy development and lack sufficient statutes and case law to deal with the sudden surge.

Historic levels of U.S. oil and gas production have increased demand for new energy infrastructure, thrusting eminent domain issues into the spotlight. Recently The Williams Cos. Inc. and Boardwalk Pipeline Partners LP pulled the plug on a natural gas liquids pipeline project after a Kentucky court ruled they couldn't condemn land through eminent domain, though they said the ruling didn't affect their decision. Meanwhile, Illinois regulators gave Enbridge Corp. the go-ahead to pursue eminent domain takings for a long-contested crude oil pipeline, a ruling landowners vowed to fight in state court.

The most high-profile battleground might be the Keystone XL pipeline, whose route from the Canadian border to the Gulf of Mexico has been the subject of eminent domain fights from Nebraska to Texas.

"One of the things that happened is that the emergence of the Keystone XL pipeline has changed it from a regulatory issue to a political issue," said Locke Lord LLP litigation partner Ken McKay, who often represents pipeline companies in eminent domain cases. "At the same time, you've had the emergence of the shale plays ... and processes like fracking that are not familiar practices in many states. In states that are in the northern part of the country, there is a lot of uncertainty because they haven't had a lot of projects come through."

Experts say part of what's fueling the increased eminent domain scrutiny is the size of the energy projects themselves, such as pipeline networks being built from scratch and traversing hundreds of miles.

"When you increase the mass, you increase the impact and you increase the likely engagement level of the citizens," said landowner attorney Michael Coughlin of Virginia-based Walsh Colucci Lubeley Emrich & Walsh PC.

And landowners are increasingly willing to push back against companies looking to condemn their property, experts say.

"The larger the project, the cheaper it is to hire a lawyer, because he can represent a whole group of affected landowners," said Adam Zuckerman, who co-chairs Baker Donelson Bearman Caldwell &

Berkowitz PC's oil and gas industry service team. "Landowners are becoming much more savvy and taking the time to become much more informed."

Interstate natural gas pipelines are generally governed under the Natural Gas Act and subject to Federal Energy Regulatory Commission jurisdiction, so the eminent domain process is relatively uniform. But gas pipelines that don't cross state lines, or interstate pipelines that aren't shipping natural gas — such as Keystone XL — are subject to the eminent domain laws of the states they're sited in.

"Every state has their own, different condemnation process and different rules," McKay said. "You could have different results on the same project based on different laws in different states."

In most instances, experts say the ability to condemn land through eminent domain boils down to two questions: Does the project serve a public purpose under state law, and if so, how are landowners justly compensated for their property being taken?

"The issue is how those questions are applied in each state, and those vary," said landowner attorney Luke Ellis of Texas-based Johns Marrs Ellis & Hodge LLP, who in March secured a \$2 million judgment for client Eagle Ford Land Partners LP in a condemnation suit brought by Peregrine Pipeline Co. LP.

State variations include how, or if, private companies can be granted eminent domain authority, as well as what qualifies as just compensation for landowners.

"Some state constitutions will talk about compensations for taking, some have taking and damages clauses," said Stoel Rives LLP partner Michelle Rudd, who focuses on eminent domain and land use.

Navigating these variations can be a major headache for project developers, and when projects involve states that are relative newcomers to pipeline projects and don't have well-developed eminent domain procedures, the questions will lead to more legal and political battles, experts say.

"With the increasing reliance on natural gas ... this issue is going to continue to develop in states that don't have a long history of eminent domain for private companies," Zuckerman said. "Whether it be statutory or jurisprudential, having the certainty is important."

The major stumbling block for a pipeline project isn't a negative outcome in an eminent domain proceeding — it's uncertainty, according to McKay. In that sense, experts say battles over eminent domain playing out in state courts can provide rules of the road for pipeline companies and landowners, citing the Texas Supreme Court's landmark 2012 decision in *Texas Rice Land Partners v. Denbury Green Pipeline-Texas LLC* as an example.

The high court concluded that merely registering as a common carrier with the state is not sufficient when landowners challenge a pipeline company's condemnation right, and required a showing of "public use" to justify a seizure of private property. Subsequent state court rulings have further clarified the precedent set by the Denbury Green ruling.

"Now that the pipelines know what the rules are and what the standards are, they are doing the kinds of things that the Supreme Court says they need to do," McKay said.

--Additional reporting by Jess Davis. Editing by Elizabeth Bowen and Katherine Rautenberg.
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