

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
3 NORTHERN DIVISION

3 COLUMBIA GAS TRANSMISSION, LLC,)
4)
4 Plaintiff,)
5 vs.)
5) CIVIL NO.:
6 0.12 ACRES OF LAND, More or Less,) 1:19-cv-01444-GLR
6 in Washington County, Maryland,)
7 State of Maryland, Department of)
7 Natural Resources,)
8)
8 Defendants.)
9 _____)

10 August 21, 2019
11 Courtroom 7A
11 Baltimore, Maryland

12 **MOTION FOR PRELIMINARY INJUNCTION - VOLUME II**

13
14 BEFORE: THE HONORABLE GEORGE LEVI RUSSELL, III

15
16 For the Plaintiff:

17 David M. Fedder, Esquire
18 Arnold M. Weiner, Esquire

19 For the Defendant:

20 Adam D. Snyder, Esquire
21 John B. Howard, Jr., Esquire

22 Proceedings recorded by mechanical stenography,
23 transcript produced by computer.

24 _____
25 Patricia G. Mitchell, RMR, CRR
Federal Official Court Reporter
101 W. Lombard Street, 4th Floor
Baltimore, Maryland 21201

P R O C E E D I N G S

(2:51 p.m.)

THE COURT: Good afternoon, everyone. You can go ahead and have a seat. Madam Deputy, do you want to call the case for me.

THE CLERK: Yes, Your Honor. The matter now before this Court is Civil Docket Number GLR-19-1444, Columbia Gas Transmission versus .12 Acres of Land. Counsel for the Plaintiff is Arnold Weiner and David Fedder. Counsel for the Defendant is Adam Snyder and John Howard, Jr.

This matter comes before the Court for a continued preliminary injunction hearing.

THE COURT: I want to thank everyone for coming to this hearing. As indicated at the previous hearing, this Court received argument, received additional authority from the parties, considered other additional arguments as well in this matter and indicated to the parties that it intended on issuing an oral opinion for the purposes of the preliminary injunctive relief that is being sought by Columbia Gas through its motion for an order of condemnation in this case.

At the outset, I will state prior to reviewing the basis of the opinion that although the Natural Gas Act certainly does grant Columbia Gas Transmission, LLC the power of eminent domain to condemn land, the Court finds for reasons that will be stated later that the Natural Gas Act does not

1 abrogate state sovereign immunity or delegate the United
2 States' state sovereign exemption to permit Columbia to sue
3 the State of Maryland for an order of condemnation without
4 Maryland's consent. Thus, Columbia has not established
5 three -- which will be outlined in detail below -- three of
6 the four mandatory requirements for obtaining preliminary
7 injunctive relief, most notably, a likelihood of success on
8 the merits simply because the Eleventh Amendment precludes the
9 State from being sued by Columbia as a private party, given
10 this Court's opinion of the current case law.

11 By way of background, this action arises from a
12 condemnation dispute over a tract of land owned by the
13 defendant, the State of Maryland Department of Natural
14 Resources, in the path of a natural gas pipeline project
15 planned by Columbia. Columbia is indeed a natural gas company
16 within the meaning of the Natural Gas Act, and as the owner
17 and operator of one of the largest underground natural gas
18 storage and transmission systems in North America, Columbia
19 transports approximately 3 billion cubic feet of natural gas
20 per day.

21 On July 19, 2019, the Federal Energy Regulatory
22 Commission granted Columbia a certificate of public
23 convenience and necessity certificate pursuant to Section 7 of
24 the Natural Gas Act. The certificate itself approves the
25 construction and operation of approximately 3.37 miles of

1 8-inch diameter natural gas pipeline, extending from existing
2 20-inch and 24-inch pipelines in Fulton County, Pennsylvania
3 to a site in Morgan County, West Virginia. Between
4 Pennsylvania and West Virginia, the pipeline will cross
5 Washington County, Maryland and travel under the Potomac
6 River.

7 The project route includes .12 acres of land owned
8 by the Maryland Department of Natural Resources for which
9 Columbia needs a right-of-way easement and other necessary
10 property interests. The easement will allow a portion of
11 approximately 4,200 or 4,300 horizontal -- will allow a
12 portion of an approximately 4,300-foot horizontal directional
13 drill to pass between -- beneath the tract and at
14 approximately 175 feet below the surface and beneath the
15 Potomac River at a depth of approximately 114 feet. The tract
16 is an integral part of the project route approved by the
17 certificate as necessary for construction, maintenance,
18 operation, alteration, testing, replacement and repair of the
19 project.

20 Columbia agreed to pay the Maryland Department of
21 Natural Resources \$5,000, an amount more than the easement's
22 appraised value, to drill through the tract. However, the
23 State Board of Public Works rejected the Maryland Department
24 of Natural Resources' agreement with Columbia, denying
25 conveyance of the easement, and subsequent negotiations

1 between Columbia and the State failed.

2 As a result, Columbia has not commenced the project.
3 Columbia has a contractually committed service deadline of
4 November 1, 2020, and Columbia's certificate expires on July
5 19, 2020. Columbia therefore undertook to condemn the
6 easement by authority of the certificate and pursuant to
7 Section 717f(h) of the Natural Gas Act.

8 Out of the 22 tracts that the project route impacts,
9 Columbia has negotiated voluntary acquisition of easements
10 through 18 privately-owned tracts. In addition to the tract,
11 Columbia has yet to secure easements through three other
12 tracts owned by the National Park Service.

13 On May 16, 2019, Columbia sued Maryland Department
14 of Natural Resources, filing its Complaint in Condemnation and
15 a Motion for an Order of Condemnation and for Preliminary
16 Injunction and a Memorandum in Support. Columbia seeks an
17 order of condemnation for the easement, the ascertainment and
18 award of just compensation, and damages properly attributable
19 to Columbia's acquisition of the easement, and finally an
20 order granting Columbia immediate access to and use of the
21 easement pursuant to that order of condemnation.

22 On June 17, 2019, Maryland Department of Natural
23 Resources filed its opposition, and on June 8, 2019, Columbia
24 filed its reply.

25 A preliminary injunction is an extraordinary remedy

1 involving the exercise of far-reaching power which is to be
2 applied only in limited circumstances which clearly demand it.
3 The purpose of a preliminary injunction is to protect the
4 status quo and to prevent irreparable harm during the pendency
5 of the lawsuit, ultimately to preserve the Court's ability to
6 render meaningful judgment on the merits. An application of
7 the following factors is used to determine whether a
8 preliminary injunction is warranted: The likelihood of success
9 on the merits, whether the movement will face irreparable harm
10 in the absence of preliminary relief, whether the balance of
11 the equities favors preliminary relief, and whether an
12 injunction is in the public interest.

13 In this case Columbia must meet all four of these
14 requirements to prevail on the motion for preliminary
15 injunction. When the balancing the hardships does not tilt
16 decidedly in favor of the plaintiff, the plaintiff must
17 demonstrate a strong showing of likelihood of success or a
18 substantial likelihood of success by clear and convincing
19 evidence to obtain relief. The Court will analyze, in turn,
20 each of the four *Winter* factors in this case that Columbia
21 must establish.

22 Now before the district court can exercise its
23 equitable power in granting a preliminary injunction and a
24 condemnation action by a natural gas company, the Court must
25 first determine whether the company has a substantive right to

1 condemn the property under the Natural Gas Act. Here there
2 appears to be no dispute that a substantive right exists.
3 Indeed, first it is a matter of public record that Columbia
4 holds a certificate of public convenience and necessity issued
5 by the federal government that actually approves the project.
6 The certificate is valid and does not expire until July 19,
7 2020.

8 Second, the easement Columbia is seeking is
9 necessary to the project. The easement is part of a
10 FERC-approved project route and specifically necessary for the
11 operation of the project that will pass beneath the tract.

12 Third, Columbia has been unable to acquire the
13 easement by agreement as shown by the offer for \$5,000 for the
14 easement which was denied by the Maryland Department of
15 Natural Resources. A formal denial of that conveyance was
16 made by the board. And finally, the unsuccessful negotiations
17 with the Board or Maryland Department of Natural Resources
18 after the denial of the conveyance. Therefore, Columbia
19 certainly has a substantive right, but that doesn't end the
20 analysis here.

21 Maryland Department of Natural Resources argues that
22 sovereign immunity, that bars Columbia's suit notwithstanding
23 Columbia's alleged substantive right. This is a
24 jurisdictional issue for this Court which can be raised sua
25 sponte and indeed can be raised, should be raised by the Court

1 sua sponte when such an issue arises. Neither the United
2 States Supreme Court, the U.S. Court of Appeals for the Fourth
3 Circuit, nor this Court has confronted an issue like this.
4 Upon consideration of the statute and the case law in this
5 case, the natural gas companies do not appear to have the
6 authority under the Natural Gas Act or the Constitution to
7 overcome the state sovereign immunity. As a result, Columbia
8 cannot and is not likely to succeed on the merits of the
9 condemnation action.

10 Columbia does not have a likelihood of success on
11 the merits because the Maryland Department of Natural
12 Resources' Eleventh Amendment immunity bars suits against
13 states in federal court. A state's immunity from suit is a
14 fundamental aspect of the sovereignty which the state enjoyed
15 before the ratification of the Constitution and which they
16 retain today.

17 The Eleventh Amendment to the United States
18 Constitution provides that judicial power of the United States
19 shall not be construed to extend to any suit in law or in
20 equity, commenced or prosecuted, against one of the United
21 States by the citizens of another state. Notwithstanding the
22 Eleventh Amendment explicit mention of only citizens of
23 another state, the Supreme Court of the United States has
24 construed the Eleventh Amendment as also protecting states
25 from federal court suits brought by its own citizens. Thus,

1 the Eleventh Amendment bars actions by any private citizen
2 against the state.

3 Additionally, state's immunity extends to agents in
4 state instrumentalities. Although the state retains immunity
5 from suit, this constitutional bar is not absolute and is
6 subject to three exceptions. First, Congress may abrogate the
7 state's Eleventh Amendment immunity when it both unequivocally
8 intends to do so in acts pursuant to a valid grant of
9 constitutional authority.

10 Second, the Eleventh Amendment permits suits for
11 prospective injunctive relief against state officials acting
12 in violation of federal law.

13 Third, the state remains free to waive its Eleventh
14 Amendment immunity from suit in federal court.

15 In its opposition, the Maryland Department of
16 Natural Resources argues that the first exception does not
17 apply because Congress has not abrogated the state's immunity
18 from such suit; second exception doesn't apply because this
19 suit is not an action against state officials for alleged
20 violations of law; and the third exception doesn't apply
21 because the state has not consented to such suit.

22 Columbia argues that Congress delegated the power of
23 eminent domain to natural gas companies, including the federal
24 government exemption from state sovereign immunity. The Court
25 finds the Maryland Department of Natural Resources' argument

1 more persuasive.

2 Out of due concern for the Eleventh Amendment's role
3 as an essential component of our constitutional structure, the
4 Court indicated the Supreme Court has prescribed a stringent
5 two-part test for determining whether Congress has abrogated
6 the state's sovereign immunity, whether Congress has
7 unequivocally expressed its intent to abrogate the immunity,
8 and whether Congress has acted pursuant to a valid exercise of
9 power, citing the *Seminal Tribe of Florida* case. Thus,
10 Congress must make its intention unmistakably clear in the
11 language of the statute. To determine whether or not Congress
12 has acted pursuant to a valid exercise of its power, the Court
13 must answer this question: Was the act in question passed
14 pursuant to a constitutional provision granting Congress the
15 power to abrogate?

16 This Court determines that the only constitutional
17 provision that grants Congress the power to abrogate state
18 sovereign immunity is the Enforcement Clause of Section 5 of
19 the Fourteenth Amendment. No longer does the Supremacy
20 Clause, nor the enumerated powers of Congress, confer
21 authority to abrogate the state's immunity from suit in
22 federal court.

23 The Fourth Circuit did have occasion to apply the
24 *Seminal Tribe* case last year. In *Allen v. Cooper*, the
25 plaintiffs argue Congress clearly intended to abrogate the

1 North Carolina's Eleventh Amendment immunity in enacting a
2 Copyright Remedy Clarification Act and did so through
3 Article I Patent and Copyright Clause power.

4 Focusing on the second prong of the *Seminal Tribe*
5 test, the Fourth Circuit held the CRCA did not abrogate North
6 Carolina's sovereign immunity because Congress's ability to
7 enact legislation through its Article I powers has been
8 foreclosed by *Seminal Tribe* and its progeny which makes clear
9 that Congress cannot rely upon its Article I powers to
10 abrogate Eleventh Amendment immunity. Additionally, the
11 Fourth Circuit explained that the Supreme Court has held that
12 Congress must make it clear it is relying upon the Fourteenth
13 Amendment as a source of its authority within the statute at
14 issue and the statute's legislative history. Neither the
15 circa provision at issue nor the legislative history relied on
16 in Section 5 of the Fourteenth Amendment as the statutory
17 source of authority, rather the legislative history made it
18 readily apparent that it was being enacted pursuant to the
19 Copyright Clause in Article I of the Constitution.

20 Columbia argues that the Maryland Department of
21 Natural Resources asserting sovereign immunity to prevent the
22 project is a de facto violation of the Supremacy Clause of the
23 United States Constitution. However, neither the Supremacy
24 Clause nor the enumerated powers may authorize abrogation of
25 the state's sovereign immunity. Congress enacted the Natural

1 Gas Act pursuant to the Commerce Clause which is an Article I
2 enumerated power.

3 The provisions of the Natural Gas Act that grant
4 natural gas companies the power of eminent domain does not
5 state that the companies are being granted its authority
6 pursuant to Section 5 of the Fourteenth Amendment. Thus,
7 Congress did not make its intent unmistakably clear in the
8 statute. Nevertheless, even if 717 stated that the states
9 were not immune from suit, the Supreme Court and the Fourth
10 Circuit have concluded that that language is not enough
11 because the act in question was not passed pursuant to the
12 sole constitutional provision granting Congress the power to
13 abrogate, namely Section 5 of the Fourteenth Amendment.
14 Congress did not, therefore, unequivocally express its intent
15 to abrogate.

16 As to delegation, this Court finds and determines
17 for this preliminary injunctive relief that Congress did not
18 delegate the federal government's exemption to state sovereign
19 immunity. Since the ratification of the Constitution, the
20 states' sovereign immunity has been preserved, and the states
21 only consented to suits brought by other states or by the
22 federal government, and to some suits pursuant to subsequent
23 constitutional amendments. The states, however, remained
24 immune to suits brought by private parties and did not consent
25 to suit by anyone whom the United States might select. This

1 is language directly from *Blatchford v. Native Village*.

2 Thus, as stated in the most recent case of *Sabine*
3 *Pipe Line, LLC*, a private party does not become a sovereign
4 such that it enjoys all rights held by the United States by
5 virtue of Congress's delegation of eminent domain power.

6 In *Blatchford*, Alaska native villages brought suit
7 against a state official for money allegedly owed to them
8 under a state revenue-sharing statute. To avoid the
9 difficulty of arguing abrogation, the native villages argued
10 instead that the provision at issue delegated the federal
11 government's sovereign immunity exemption to the natives
12 themselves. The Supreme Court rejected this argument,
13 expressing doubt that the sovereign exemption can be
14 delegated, even if one limits the delegation to persons on
15 whose behalf the United States itself might sue. The Court
16 went on further to say that even assuming the delegation of an
17 exemption from state sovereign immunity was theoretically
18 possible, there was no reason to believe that Congress ever
19 contemplated such a strange notion.

20 More recently, as indicated, the District Court for
21 the Eastern District of Texas considered these questions in an
22 almost identical case. *Sabine*, a natural gas company, sought
23 to renew a right-of-way agreement that it had with a previous
24 landowner over three tracts of land. The landowner over one
25 tract of land was the Texas Parks and Wildlife Department

1 which did not agree to give Sabine the right-of-way. Sabine
2 had a valid certificate of public convenience and necessity
3 that had been issued by the commission, issued in 1964 -- I'm
4 sorry, issued in 1964 and sought to exercise eminent domain
5 under the Natural Gas Act to condemn state land, arguing that
6 it was, in fact, a delegee of the federal government.

7 The district court held that *Sabine* was conflating
8 two separate rights held by the federal government: the right
9 to exercise eminent domain and the right to sue states in
10 federal court. The Court explained that the federal
11 government may exercise eminent domain over state land, not
12 due to the supreme sovereign's right to condemn state land but
13 because the federal government enjoys a special exemption from
14 the Eleventh Amendment. Thus, the suit was barred by the
15 Texas sovereign immunity.

16 Conversely, as pointed out by Columbia, the United
17 States District Court for the District of New Jersey held last
18 year that a suit for condemnation of state land was not barred
19 by New Jersey's sovereign immunity because the natural gas
20 company stood in the shoes of the sovereign as a result of
21 being vested with the federal government's eminent domain
22 powers. This particular case does not address *Seminal Tribe*,
23 *Alden*, *Blatchford* or *Sabine*, instead simply noting that the
24 Natural Gas Act expressly granted natural gas companies the
25 right of eminent domain. The Court concludes that there are

1 two separate and distinct rights, only one of which eminent
2 domain the federal government can delegate.

3 In *Chao* the Fourth Circuit discussed a
4 constitutional alternative to a private party, seeking to sue
5 the state and show there were private parties collectively
6 sued the Virginia Department of Transportation under the Fair
7 Labor Standards Act for alleged nonpayment of certain work.
8 The suit was dismissed twice. Because of the dismissal, the
9 Secretary of Labor intervened. The Virginia Department of
10 Transportation raised its sovereign immunity defense, arguing
11 that the suit was essentially a private suit.

12 The Fourth Circuit held that Virginia's sovereign
13 immunity was not a bar to the federal government suit because
14 the federal government exercised its political responsibility
15 for the suit, which is within the federal government's
16 exemption from sovereign immunity. The Court compared the
17 importance of a case where the federal government decides to
18 take action against a state on behalf of employees, which the
19 state consented to when ratifying the Constitution, with one
20 in which the individuals take action against the state to
21 which the state did not consent.

22 Fourth Circuit also noted the Supreme Court's doubts
23 in *Blatchford* as to whether or not the federal court exemption
24 from state sovereign immunity can be delegated to private
25 individuals.

1 Certainly Columbia reminds the Court that *Sabine* is
2 not binding, but *Sabine* is persuasive especially in light of
3 the Fourth Circuit's conclusion in *Chao* which is binding. If
4 the federal government deems it important to condemn the
5 Maryland Department of Natural Resources' land, it is within
6 the federal government's right to bring such an action.
7 Indeed, based upon the arguments, it appears no dispute with
8 the federal government's power to do such. However, a private
9 party like Columbia Gas does not hold the same political
10 responsibilities or any political responsibilities of the
11 federal government. As the federal government would do the
12 same. Because the Maryland Department of Natural Resources
13 did not consent to the condemnation by private parties under
14 the Natural Gas Act and because Columbia is not constrained by
15 any political responsibility like the federal government would
16 be, the present suit is barred by the Maryland Department of
17 Natural Resources for the purposes of this preliminary
18 injunctive relief. In essence, the Columbia Gas is not likely
19 to succeed on the merits of the case.

20 As far as the irreparable harm is concerned, there's
21 no question, and I don't believe there's any dispute, that
22 there has been significant losses or will be significant
23 losses if the injunctive relief is not granted in this matter.
24 Indeed there are significant contractually committed services
25 that are issued, there are easements and other forecasted harm

1 which Columbia ends up making, and indeed much of that is not
2 disputed. Some of this is tempered by the fact that Columbia
3 has still not obtained the rights to the National Park Service
4 tracts, but nevertheless, especially if you put that aside,
5 there is a likelihood of irreparable harm had an injunction
6 not been granted.

7 The balancing of the equities here really tips the
8 scales here. Columbia argues that the balance of the equity
9 is in its favor because, of course, in condemnation cases,
10 the -- typically balancing the equity favors the natural gas
11 company. However, in this particular instance, the Maryland
12 Department of Natural Resources counters that the harm to the
13 state's sovereign immunity outweighs any business disruption
14 or cost to Columbia in this case.

15 Considering these arguments, losing the Eleventh
16 Amendment immunity from suit to which it did not consent would
17 diminish Maryland's sovereignty. This is a significant equity
18 concern, and as a result, the Court concludes that the balance
19 of hardships does not weigh decidedly in Columbia's favor, and
20 as a result, Columbia must make a strong showing of a
21 substantial likelihood of success which I have already
22 indicated that they have not done.

23 Certainly as far as the public interest is
24 concerned, there is a public interest in having this project.
25 However, there's also a public interest in protection of the

1 state's sovereignty, especially before a final determination
2 on the merits in this action. And as a result, for these
3 aforementioned reasons and for the reasons I previously
4 stated, I'm going to deny the motion for preliminary
5 injunctive relief.

6 Now Mr. Fedder, Mr. Weiner, at the outset here, I've
7 already made a determination that I do not believe -- I think
8 Eleventh Amendment immunity applies. So in concluding that,
9 the issue I have before you is that Columbia Gas, I am
10 prepared at this point in time to dismiss this case on
11 jurisdictional grounds to afford Columbia the ability to be
12 able to take an expedited appeal up to the Fourth Circuit,
13 given the time constraints that we're under here. That way
14 the Fourth Circuit can tell me -- tell Judge Russell whether
15 or not he's got it right or whether or not he got it wrong
16 because this is not particularly clear in this circumstance.

17 So I take it, Mr. Fedder, given the Court's ruling
18 and strong ruling regarding the likelihood of success on the
19 merits in this case, I'm prepared right now for the reasons
20 that I previously stated to dismiss your case based upon
21 jurisdictional grounds on Eleventh Amendment action and based
22 upon the briefing and argument in this case and allow you the
23 opportunity to file, note an immediate appeal to the Fourth
24 Circuit on an expedited basis, given what I've already said
25 about the potential irreparable harm that would be suffered.

1 MR. FEDDER: Thank you, Your Honor. Given where you
2 are as a legal conclusion on the Eleventh Amendment, its
3 applicability to the facts as stated on the record, I don't
4 think there's any alternative but for the Court to dismiss on
5 that basis. And then as you said, we'll note an appeal.

6 THE COURT: Absolutely. Of course, the Secretary of
7 the Interior could just file a lawsuit, and we wouldn't be
8 here. But I understand that would be an interesting
9 precedent. So we'll have the Fourth Circuit take a look at
10 what I've determined and written.

11 So based upon this, I'm going to go ahead and deny
12 the preliminary injunction relief for the reasons that I
13 stated on the record in finding that Columbia Gas cannot
14 succeed on the merits of this case for the reasons that I
15 stated and the reasons in the brief. I'm going to go ahead
16 and dismiss this case sua sponte on a jurisdictional ground.

17 I'm going to deny the State's motion as moot at this
18 point in time because I exercised my individual authority.

19 Counsel, is there anything else that needs to be
20 placed on the record before we conclude?

21 MR. FEDDER: No. Thank you, Your Honor.

22 THE COURT: I hope you have a safe journey back.
23 Thank you very much for your argument. Welcome to Baltimore.
24 I want to thank the State as well for the arguments. It was
25 an extraordinarily well-argued case, and I really enjoyed the

1 briefings and the challenge. Thank you.

2 MR. FEDDER: Thank you, Your Honor.

3 MR. SNYDER: Thank you.

4 THE CLERK: All rise. This Honorable Court now
5 stands adjourned.

6 (Proceedings concluded at 3:22 p.m.)

7
8 I, Patricia G. Mitchell, RMR, CRR, do hereby certify
9 that the foregoing is a correct transcript from the
10 stenographic record of proceedings in the above-entitled
matter.

11 Dated this 23rd day of August 2019.

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14 _____
15 Patricia G. Mitchell
16 Official Court Reporter
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