

261ST DISTRICT COURT

LORA J. LIVINGSTON

Judge
(512) 854-9309

BRENT D. MCCABE

Staff Attorney
(512) 854-9625

MARY JANE LAWSON

Court Operations Officer
(512) 854-9337

TRAVIS COUNTY COURTHOUSE

P. O. BOX 1748
AUSTIN, TEXAS 78767
FAX (512) 854-9332

RUBEN TAMEZ

Court Clerk
(512) 854-9457

LA SONYA THOMAS

Official Court Reporter
(512) 854-9331

June 25, 2019

Dan Richards
Clark Richards
Richards Rodriguez & Skeith, LLP
816 Congress Ave., Suite 1200
Austin, Texas 78701
Via email: drichards@rrsfirm.com
Via email: crichards@rrsfirm.com

Renea Hicks
Law Office of Max Renea Hicks
P.O. Box 303187
Austin, Texas 78703-0504
Via email: rhicks@renea-hicks.com

Shelly M. Doggett
Office of the Attorney General of Texas
Environmental Protection Division
P.O. Box 12548 (MC-066)
Austin, Texas 78711
Via email: shelly.doggett@oag.texas.gov

Bill Kroger
James H. Barkley
Amy Pharr Hefley
Baker Botts L.L.P.
910 Louisiana Street
Houston, Texas 77002
Via email: bill.kroger@bakerbotts.com
Via email: james.barkley@bakerbotts.com
Via email: amy.hefley@bakerbotts.com

Thomas R. Phillips
Gavin R. Villareal
Baker Botts L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
Via email: tom.phillips@bakerbotts.com
Via email: gavin.villareal@bakerbotts.com

Re: Cause No. D-1-GN-19-002161; *Andrew Samson et al. v. Texas Railroad Commission, et al.*; In the 345th District Court of Travis County, Texas



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Dear Counsel:

Before the Court are three matters in this cause: (1) Agency Defendants'¹ Plea to the Jurisdiction and Supplemental Plea to the Jurisdiction, (2) Pipeline Defendants'² Motion for Summary Judgment, and (3) Plaintiffs'³ Request for a Temporary Injunction against the Pipeline Defendants. I have considered each motion, response, reply, the evidence and the arguments of counsel⁴ and provide the following:

To simplify, Plaintiffs' claims are essentially that Defendants have acted unconstitutionally because the system that grants the power of eminent domain to gas utilities lacks constitutionally mandated safeguards for a private delegation of legislative authority and provides insufficient due course of law.

For the Agency Defendants, Plaintiffs assert that the Railroad Commission, by implementing Rule 3.70, have implemented "toothless," non-substantive standards for issuing the T-4 permit, which, Plaintiffs allege, grants a gas utility the right to exercise eminent domain. The Agency Defendants respond that the Railroad Commission has no authority to implement rules or regulations regarding a gas utility's exercise of eminent domain, and that a T-4 permit does not grant a gas utility the power of eminent domain. Also, the Agency Defendants assert that Plaintiffs' rule challenge is improper because Plaintiffs are not challenging a particular rule but the absence of rules.

For the Pipeline Defendants, Plaintiffs do not appear to allege that the Pipeline Defendants have not complied with the applicable law and procedures. Instead, they allege that

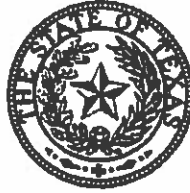
¹ The Agency Defendants consist of the Texas Railroad Commission and Christi Craddick, Ryan Sitton, Wayne Christian, Wei Wang, and Kari French, in their official capacities.

² The Pipeline Defendants consist of Permian Highway Pipeline, LLC and Kinder Morgan Texas Pipeline, LLC.

³ Plaintiffs consist of Andrew Sansom, Heinz Stefan Roesch, Bee Spring, Ltd., Hays County, and City of Kyle.

⁴ The Court has also received amicus curiae briefs from Gillespie County Economic Development Commission, Inc. and the Texas Pipeline Association. However, the Texas Pipeline Association appears through its president, Thure Cannon, who does not provide a Texas bar number or any indication that he is a practicing attorney in the state of Texas. Generally, to appear before a district court, a representative for a party must be a practicing member of the bar. The Court sees no reason why that requirement should be lessened for a nonparty seeking to file a brief in support of a party's position. Therefore, the Court exercises its discretion to not consider the amicus briefing from the Texas Pipeline Association.

Additionally, the Court has received—but has not considered—several *ex parte* letters and phone calls from various members of the public regarding the substance of this cause.



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the law and procedures are unconstitutional, and the Pipeline Defendants have acted wrongfully by following these unconstitutional provisions. The Pipeline Defendants respond that they have acted constitutionally as the process they have followed does not violate separation of powers or due course of law provisions and is not an improper delegation of legislative authority.

The Court recognizes the important interests at stake for both sides of this dispute. Plaintiffs are facing an unwanted invasion onto their property along with fears of explosions and other potentially dangerous conditions. The Pipeline Defendants point to their \$2 billion investment and the public's much-needed increase in accessible natural gas from the Permian Basin. Of course, the decisions in this case and the consideration of the impact on Texas citizens must be more than just a business decision. The Court is concerned with a power that, when exercised by a governmental entity, must be done in the harsh light of public scrutiny of open meetings and public notice, but, when exercised by a private entity, may be determined without public notice by a select few driven primarily by their financial interests.

However, the Court must also be conscious of its role to apply the law and not to dictate the policy of the State. Thus, the question before this Court is a legal one: Is the process by which the Pipeline Defendants exercise eminent domain constitutional or is more required of either the Agency Defendants or the Pipeline Defendants? If unconstitutional, no amount of investment by the Pipeline Defendants can render it appropriate. If constitutional, the harm alleged by Plaintiffs cannot be redressed by the relief sought in this case, and Plaintiffs must seek relief from the legislative branch of our government.

Plea to the Jurisdiction. First, the Court addresses the Plea and Supplemental Plea to the Jurisdiction filed by the Agency Defendants. The Court finds the Agency Defendants' arguments persuasive. The Court finds no authority for the proposition that the Legislature has granted authority to the Commission to oversee the rights granted by Section 181.004 or that the T-4 Permit grants gas utilities the right of eminent domain. The power of eminent domain flows to the gas utilities through the Art. I, Section 17 of the Texas Constitution and the Legislature's delegation in Section 181.004. Therefore, the Agency Defendants' Plea to the Jurisdiction is GRANTED. Because the Agency Defendants are without authority, Plaintiffs cannot cure the lack of jurisdiction through repleading. Plaintiffs' claims against the Agency Defendants are DISMISSED.

Motion for Summary Judgment. Next, the Court addresses the Pipeline Defendants' Motion for Summary Judgment because, if granted, judgment would be rendered in favor of the Pipeline Defendants and the request for injunctive relief would be moot. Against the Pipeline



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Defendants directly, Plaintiffs assert that Defendants have acted unconstitutionally by proceeding under unconstitutional statutory provisions including a lack of due course of law, an uncontrolled grant of privilege by the Legislature, and an impermissive delegation by the Texas Legislature.

As noted by previous courts, Texas's eminent-domain laws are longstanding. Section 181.004 has remained relatively unchanged for several decades. These provisions have previously been held constitutional under due course or due process challenges, and this Court will not revisit those decisions.

As for the uncontrolled grant of privilege in Article I, Section 17(d) of the Texas Constitution, the Supreme Court has noted that "this particular clause of the constitution was intended to prohibit the legislature from granting any 'special privilege or immunity' in such way, or of such character, as that it could not be subsequently annulled or declared forfeited for such causes as might be defined by the law, or condemned in the exercise of eminent domain" *City of Hous. v. Hous. City St. Ry. Co.*, 19 S.W. 127 (Tex. 1892). The provision does not appear to be a mandate for the Legislature to control each and every aspect of a grant of special privileges but prevents the Legislature from granting an irrevocable right that would not be subject to its revocation and control. The Legislature is, of course, able to specifically outline any condition on its grants, as it deems appropriate. Therefore, the Legislature's grant of eminent-domain authority does not violate Article I, Section 17(d) of the Texas Constitution.

Finally, as for Plaintiffs' argument that the delegation of eminent-domain authority violates the separation of powers provision, the Texas Constitution expressly grants the right of delegation from the Legislature to private entities in its takings clause, Article I, Section 17 of the Texas Constitution. After receiving this authority from the Legislature, a private entity must comply with the procedures for condemnation required for all takings. The proceedings are then subject to judicial review to ensure that the process and procedures have been met and that the entity is entitled to the taking. The right of a gas utility to exercise eminent domain does not violate the separation of powers provision of the Texas Constitution.

Having reviewed the filings and applicable caselaw, the Court concludes that Section 181.004 is not an impermissible delegation of legislative power to gas utilities. Therefore, the Court GRANTS the Pipeline Defendants' Motion for Summary Judgment.

Request for Temporary Injunction. Lastly, the Court turns to Plaintiffs' Request for a Temporary Injunction against the Pipeline Defendants. Because the Court has granted Pipeline Defendants' Motion for Summary Judgment—rendering judgment in favor of the Defendants, the Court does not reach Plaintiffs' Request for an Injunction. It is, therefore, DENIED AS MOOT.



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Now that you have my ruling, please prepare an order, circulate it for approval as to form, and submit it for signature at your earliest convenience. If you have any questions, please contact my Staff Attorney, Brent McCabe.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lora J. Livingston".

Lora J. Livingston

Judge, 261st District Court

cc: Ms. Velva L. Price, Travis County District Clerk