Sabine Pipe Line, LLC v. A Permanent Easement

United States District Court for the Eastern District of Texas

September 6, 2017, Decided; September 6, 2017, Filed

CIVIL ACTION NO. 1:16-CV-383

Reporter
327 F.R.D. 116 *; 2017 U.S. Dist. LEXIS 222325 **

SABINE PIPE LINE, LLC, Plaintiff, versus A PERMANENT EASEMENT OF 4.25 +/- ACRES OF LAND IN ORANGE COUNTY, TEXAS, J.P. MORGAN CHASE BANK, N.A., GEORGE L. WINTER, trustee of the George L. Winter Revocable Trust, JAMES L. NEGLEY, H.L. BROWN MANAGEMENT LLC, A PERMANENT EASEMENT OF 2.88+/- ACRES OF LAND IN ORANGE COUNTY, TEXAS, TEXAS PARKS AND WILDLIFE DEPARTMENT, A PERMANENT EASEMENT OF 5.53 +/- ACRES OF LAND IN ORANGE COUNTY, TEXAS, and HAWK CLUB, LTD., Defendants.

Prior History: *Sabine Pipe Line, LLC v. J.P. Morgan Chase Bank, N.A., 2016 U.S. Dist. LEXIS 189654 (E.D. Tex., Sept. 22, 2016)*

Counsel: [**1] For Sabine Pipe Line LLC, Plaintiff: Thomas Alan Zabel, LEAD ATTORNEY, Thomas A. Zabel (Trial Counsel), Houston, TX.

For Texas Parks and Wildlife Department, Defendant: Thomas H Edwards, LEAD ATTORNEY, Office of the Attorney General, Austin, TX; Mary Elizabeth Smith, Office of the Attorney General - Administrative Law Division, Austin, TX; Shelly Magan Doggett, Texas Office of the Attorney General, Austin, TX.

Judges: MARCIA A. CRONE, UNITED STATES DISTRICT JUDGE.

Opinion by: MARCIA A. CRONE

Opinion

[*135] **MEMORANDUM AND ORDER**

Pending before the court is Defendant Texas Parks and Wildlife Department's ("TPWD") *Rule 12* Motion to Dismiss (#28), wherein TPWD requests the court dismiss Plaintiff Sabine Pipe Line, LLC's ("Sabine") claims against it and its property. Also pending before the court is Sabine's Motion to Strike the Texas Parks and Wildlife Department's *Rule 12*

Motion to Dismiss (#33), wherein Sabine contends that TPWD's motion should be dismissed as improper pursuant to *Federal Rule of Civil Procedure 71.1*. Having considered the pending motions, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that Sabine's motion should be denied and TPWD's motion should be granted.

I. Background

Sabine is a company engaged in the [**2] transmission of natural gas in interstate commerce. As such, Sabine is a "natural gas company" under the *Natural Gas Act ("NGA")* and subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). *See* *15 U.S.C. § 717a(6)*.

On March 25, 1964, FERC's predecessor, the Federal Power Commission, issued Sabine a Certificate of Public Convenience and Necessity (the "Certificate"). The Certificate granted Sabine the power to construct, operate, and maintain an interstate natural gas pipeline with necessary appurtenances consisting of approximately 131 miles of 24-inch pipeline and related facilities for the transportation of natural gas from Vermillion Parish, Louisiana, to plants in Jefferson County, Texas. This pipeline is known as the Sabine Pipeline.[1] The Certificate was amended in 1965, 1984, and 1986 to allow acquisition and construction of additional pipelines. The Certificate remains in full force, as amended.

The plans for the Sabine Pipeline required it to be routed through several privately-owned properties. Hence, on September 14, 1966, Sabine entered into a Right-of-Way Agreement ("ROW Agreement") with the Donner Corporation ("Donner"), the landowner. The ROW Agreement granted Sabine [**3] permanent and temporary easements across three tracts of land identified as Tracts 1, 2, and 3. Thereafter, in 1991, the ROW Agreement was renewed and continued until it expired by its express terms on September 14, 2016.

At some point while the ROW Agreement was in effect, Donner sold the tracts of land. Sabine made offers to the new landowners to renew the ROW Agreement in order to retain the rights to the tracts that the Sabine Pipeline traverses. The parties, however, were unable to reach an agreement. Thus, on September 7, 2016, Sabine filed a verified complaint for condemnation in this court, seeking to exercise its right of eminent domain under the NGA and to condemn a permanent easement. *See* Doc. No. 1. Sabine named as defendants the three tracts of land as well as the landowners. On that same day, Sabine filed an application for injunctive relief, requesting the court to grant a temporary restraining order and a preliminary injunction for immediate possession of the easements described in the ROW Agreement. *See* Doc. No. 6. The court granted a temporary restraining order on September 12, 2016, before the easements expired. *See* Doc. Nos. 7, 8. Thereafter, on September 22, 2017, [**4] after a hearing on the matter, the court granted the preliminary injunction, finding that Sabine had demonstrated a likelihood of success on the

[1] The Sabine Pipeline interconnects as many as 32 other interstate and intrastate pipelines.

merits as well as irreparable injury if immediate possession of the easement was not granted. *See* Doc. No. 27. Subsequently, Sabine reached agreements with the owners of Tracts 1 and 3, and those [*136] landowners were dismissed as defendants. *See* Doc. Nos. 44, 45. Sabine has been unable to reach an agreement with the purchaser of Tract 2, TPWD.[2]

TPWD filed the instant *Rule 12* Motion to Dismiss and Answer (#28) on September 30, 2016, asserting that the *Eleventh Amendment to the United States Constitution* bars Sabine's condemnation suit against it and its property. Therefore, according to TPWD, the court should dismiss Sabine's complaint.[3] On November 17, 2016, in response, Sabine filed its Motion to Strike TPWD's Motion to Dismiss (#33) in which it maintains that TPWD's motion is not authorized under *Rule 71.1(e) of the Federal Rules of Civil Procedure* and, thus, should not be considered by the court.

II. Analysis

A. Motion to Strike

Rule 71.1 of the Federal Rules of Civil Procedure governs proceedings to condemn real and personal property by eminent domain. *FED. R. CIV. P. 71.1(a)*. Under this rule, a defendant can respond to the filing of a condemnation action by either: (1) serving a notice of appearance if it has no objection [**5] or defense to the taking of its property; or (2) serving an answer if it has an objection or defense to the taking. *FED. R. CIV. P. 71.1(e)*. "A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an *additional* objection or defense is allowed." *Id.* (emphasis added).

Certain courts have interpreted the rule as creating a "rather summary procedure" for condemnation actions where "[o]ne pleading to raise all objections and defenses to the taking and one hearing to dispose of them are contemplated" instead of "successive pleadings and successive hearings spanning a much longer period of time." *Atl. Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455, 458 (4th Cir. 1963)*; *accord Maun v. United States, 347 F.2d 970, 973 (9th Cir. 1965)*, *superseded on other grounds by statute*, Atomic Energy Act, *42 U.S.C. § 2018*; *Sabal Trail Transmission, LLC v. 7.72 Acres of Land, No. 3:16-CV-173-WKW, 2016 U.S. Dist. LEXIS 74538, 2016 WL 3248666, at *3 (M.D. Ala. June 8, 2016)*; *City of Davenport v. Three-Fifths of an Acre of Land, 147 F. Supp. 794, 796 (S.D. Ill. 1957)*. Indeed, the Advisory Committee's note explains that *Rule 71.1* departs "from the scheme of *Rule 12*" and "does not authorize a preliminary motion." *FED. R. CIV. P. 71.1* advisory committee's note. The drafters of the rule anticipated that "[t]here is little need for [preliminary motions] in condemnation proceedings." *Id.* Here, Sabine contends

[2] On December 21, 2017, pursuant to the parties' request, the court referred the case to mediation with Magistrate Judge Zack Hawthorn. *See* Doc. No. 50. The court deferred ruling on the instant motions while the parties mediated the case. The parties mediated for six months, to no avail. Thus, on June 23, 2017, Judge Hawthorn declared an impasse. *See* Doc. No. 56.

[3] TPWD and its property are the only remaining defendants to this action.

that TPWD's motion to dismiss is exactly the type of preliminary motion that *Rule 71.1* aims [**6] to prevent.

TPWD counters that its motion falls outside the scope of *Rule 71.1*'s bar on preliminary motions because immunity from suit entitles it to early adjudication of its defense. In fact, more recent decisions on this subject have allowed motions to dismiss in condemnation actions, particularly where immunity from suit was at issue.[4] *See, e.g.,* *Enable Okla. Intrastate Transmission, LLC v. A 25 Foot Wide Easement, No. CIV-15-1250-M, 2016 U.S. Dist. LEXIS 109854, 2016 WL 4402061, at *1, *6 (W.D. Okla. Aug. 18, 2016)* (considering and granting defendant's motion to dismiss for lack of subject matter jurisdiction based on defendant's claim to sovereign immunity); *Davilla v. Enable Midstream Partners, L.P., No. CIV-15-1262-M, 2016 U.S. Dist. LEXIS 109844, 2016 WL 4402064, at *1 (W.D. Okla. Aug. 18, 2016)* (granting motion to dismiss based on Kiowa Tribe's sovereign immunity); *Sabal Trail Transmission, LLC v. 13.386 Acres of Land*, No. 5:16-CV-147-OC-41PRL, 2016 WL 2758913, at *1 (M.D. Fla. May 12, 2016) (considering defendant's motion to dismiss a condemnation action for lack of subject [*137] matter jurisdiction); *Pub. Serv. Co. of N.M. v. Approximately 15.49 Acres of Land, 155 F. Supp. 3d 1151, 1160-61 (D.N.M. 2015)* (considering and granting Defendant Navajo Nation's motion to dismiss for lack of subject matter jurisdiction based on Defendant's sovereign immunity); *EQT Gathering, LLC v. A Tract of Property, No. 12-58-ART, 2012 U.S. Dist. LEXIS 132840, 2012 WL 4321119, at *2-6 (E.D. Ky. Sept. 18, 2012)*; *Village of Wheeling v. Fragassi, No. 09 C 3124, 2010 U.S. Dist. LEXIS 80753, 2010 WL 3087462, at *3 (N.D. Ill. Aug. 2, 2010)* (denying plaintiff's motion to strike defendant's [**7] motion to dismiss under *Rule 71.1* and granting defendant's motion to dismiss on the basis of sovereign immunity).

For example, in *Village of Wheeling*, the Northern District of Illinois noted that the language of *Rule 71.1(e)* bars only motions "asserting an *additional* objection or defense," other than those listed in the defendant's answer. *2010 U.S. Dist. LEXIS 80753, 2010 WL 3087462, at *3*. In that case, the defendant had filed both an answer and a motion to dismiss asserting the affirmative defense of sovereign immunity. *Id.* Thus, the district court denied the plaintiff's motion to strike the motion to dismiss, holding that striking the motion to dismiss "would only serve to unnecessarily delay [the] proceedings, thus defeating one of the major purposes of *Rule 71.1*." *Id.* The theory outlined in *Village of Wheeling* finds further support in language contained later in the rule. In *subsection (i)*, the rule states that "at any time before compensation has been determined and paid, the court may, after a *motion* and hearing, dismiss the action as to a piece of property." *FED. R. CIV. P. 71.1(i)* (emphasis added). Therefore, it is apparent that the drafters of the rule contemplated motions such as the one at issue being ruled on prior to a hearing on compensation.

In the case at bar, TPWD filed a joint motion [**8] to dismiss and answer, both of which asserted its claim to *Eleventh Amendment* immunity. Thus, the court finds this case analogous to *Village of Wheeling* and determines that striking TPWD's motion to dismiss

[4] Significantly, none of the cases cited by Sabine dealt with motions to dismiss based on immunity from suit.

would unnecessarily delay the proceedings and frustrate the purposes of both *Rule 71.1* and the doctrine of *Eleventh Amendment* immunity. Accordingly, Sabine's Motion to Strike is DENIED.

B. Motion to Dismiss

TPWD contends that the claims asserted against it should be dismissed pursuant to *Rules 12(b)(1)* or *12(b)(6)*. The Supreme Court of the United States has not yet determined whether *Eleventh Amendment* immunity is grounds for dismissal under *Rule 12(b)(1)* or *Rule 12(b)(6)*. *Wis. Dep't of Corrs. v. Schacht, 524 U.S. 381, 389-92, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)*. The United States Court of Appeals for the Fifth Circuit, however, has repeatedly held that the *Eleventh Amendment* creates restrictions on subject matter jurisdiction. *See United States v. Tex. Tech Univ., 171 F.3d 279, 286 n.9 (5th Cir. 1999)* (collecting cases), *cert. denied*, *530 U.S. 1202, 120 S. Ct. 2194, 147 L. Ed. 2d 231 (2000)*; *see also Cephus v. Tex. Health & Human Servs. Comm'n, 146 F. Supp. 3d 818, 825 (S.D. Tex. 2015)* (stating that claims barred by *Eleventh Amendment* immunity can be dismissed only under *Rule 12(b)(1)*); *Jackson v. Tex. S. Univ., 997 F. Supp. 2d 613, 648 (S.D. Tex. 2014)*. Accordingly, the court will analyze TPWD's motion under *Rule 12(b)(1)*.

A motion to dismiss filed under *Rule 12(b)(1)* challenges the subject matter jurisdiction of the federal district court. *See Fed. R. Civ. P. 12(b)(1)*. "Federal courts are courts of limited jurisdiction." *Gunn v. Minton, 568 U.S. 251, 256, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)* (quoting *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*; *Rasul v. Bush, 542 U.S. 466, 489, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004)*; *accord Energy Mgmt. Servs., LLC v. City of Alexandria, 739 F.3d 255, 257 (5th Cir. 2014)*; *Halmekangas v. State Farm Fire & Cas. Co., 603 F.3d 290, 292 (5th Cir. 2010)*. "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial [**9] decree." *Rasul, 542 U.S. at 489* (quoting *Kokkonen, 511 U.S. at 377* (citations omitted)). The court "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co., 243 F.3d 912, 916 (5th Cir.)* [*138] (citing *Kokkonen, 511 U.S. at 377*), *cert. denied*, *534 U.S. 993, 122 S. Ct. 459, 151 L. Ed. 2d 377 (2001)*; *see Hertz Corp. v. Friend, 559 U.S. 77, 96, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010)*; *Clayton v. ConocoPhillips Co., 722 F.3d 279, 290 (5th Cir. 2013)*, *cert. denied*, *571 U.S. 1156, 134 S. Ct. 906, 187 L. Ed. 2d 833 (2014)*; *SmallBizPros, Inc. v. MacDonald, 618 F.3d 458, 461 (5th Cir. 2010)*. "A *Rule 12(b)(1)* motion should be granted only if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction." *Davis v. United States, 597 F.3d 646, 649 (5th Cir. 2009)*, *cert. denied*, *559 U.S. 1008, 130 S. Ct. 1906, 176 L. Ed. 2d 367 (2010)*; *see Young v. Hosemann, 598 F.3d 184, 188 (5th Cir. 2010)*; *Ramming v. United States, 281 F.3d 158, 158 (5th Cir. 2001)*.

C. *Eleventh Amendment* Immunity

It is well recognized that "[f]ederal court jurisdiction is limited by the Eleventh Amendment and the principle of sovereign immunity that it embodies." Vogt v. Bd. of Comm'rs of the Orleans Levee Dist., 294 F.3d 684, 688 (5th Cir.), *cert. denied*, *537 U.S. 1088, 123 S. Ct. 700, 154 L. Ed. 2d 632 (2002)*; *see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); Union Pac. R. Co. v. La. Pub. Serv. Comm'n, 662 F.3d 336, 340 (5th Cir. 2011); Almond v. Tarver, 468 F. Supp. 2d 886, 893 (E.D. Tex. 2006). The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Absent waiver by the state of sovereign immunity or a valid congressional override, the Eleventh Amendment bars the institution of a damages action in federal court against a state or state instrumentality. *See* Schacht, 524 U.S. at 389; Kentucky v. Graham, 473 U.S. 159, 169, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); Union Pac. R. Co., 662 F.3d at 340; Meyers ex rel. Benzing v. Texas, 410 F.3d 236, 240-41 (5th Cir. 2005), *cert. denied*, *550 U.S. 917, 127 S. Ct. 2126, 167 L. Ed. 2d 862 (2007)*; Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 279 (5th Cir.), *cert. denied sub nom. La. State Bd. of Elementary & Secondary Educ. v. Pace, 546 U.S. 933, 126 S. Ct. 416, 163 L. Ed. 2d 317 (2005)*. For over a century, the Supreme Court has "made clear that the Constitution [**10] does not provide for federal jurisdiction over suits against nonconsenting States." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

Eleventh Amendment immunity extends to suits brought in federal court against a state by its own citizens as well as by citizens of another state or foreign country. *See* Tennessee v. Lane, 541 U.S. 509, 517, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004); Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002); Pennhurst State Sch. & Hosp., 465 U.S. at 98-99; Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 450-51 (5th Cir. 2005), *cert. denied*, *547 U.S. 1098, 126 S. Ct. 1888, 164 L. Ed. 2d 568 (2006)*. In other words, the Eleventh Amendment bars federal jurisdiction over suits by any private citizen against a state. *Jachetta v. United States, 653 F.3d 898, 908 (9th Cir. 2011)*. The Eleventh Amendment does not, however, preclude federal jurisdiction over suits by the federal government against a state. Principality of Monaco v. Mississippi, 292 U.S. 313, 329, 54 S. Ct. 745, 78 L. Ed. 1282 (1934); *Jachetta, 653 F.3d at 912*.

Furthermore, "[t]he reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." Sw. Bell Tel. Co. v. City of El Paso, 243 F.3d 936, 937 (5th Cir. 2001) (citing Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)); *accord* P.R. Aqueduct & Sewer

*Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 113 S. Ct. 684, 121 L. Ed. 2d 605 [*139] (1993)* ("[a]bsent waiver, neither a State nor agencies acting under its control may 'be subject to suit in federal court'"); *Chun-Sheng Yu v. Univ. of Houston at Victoria, No. H-16-3138, 2017 U.S. Dist. LEXIS 135310, 2017 WL 3620637, at *3 (S.D. Tex. Aug. 23, 2017)*. Thus, "[e]ven in cases where the State itself is not a named defendant, the State's *Eleventh Amendment* immunity will extend to any state agency or other political entity that is deemed the 'alter ego' or an 'arm' of the State." *Vogt, 294 F.3d at 688-89* (citing *Doe, 519 U.S. at 429*); *see Raj v. La. State Univ., 714 F.3d 322, 328-29 (5th Cir. 2013)*; *Perez v. Region 20 Educ. Serv. Ctr., 307 F.3d 318, 326 (5th Cir. 2002)*. "In other words, the *Eleventh Amendment* will bar a suit if the defendant state [**11] agency is so closely connected to the State that the State itself is 'the real, substantial party in interest.'" *Vogt, 294 F.3d at 689* (quoting *Hudson v. City of New Orleans, 174 F.3d 677, 681 (5th Cir.)*, *cert. denied*, *528 U.S. 1004, 120 S. Ct. 498, 145 L. Ed.2d 385 (1999)*); *Fairley v. Louisiana, 254 F. App'x 275, 277 (5th Cir. 2007)*. In the case at bar, it is undisputed that TPWD is a state agency deemed an arm of the State of Texas.

There are three exceptions to the general rule that a state may not be haled into federal court under the *Eleventh Amendment*. First, "a state may consent to suit in federal court." *Pace, 403 F.3d at 277*. Second, Congress may abrogate the state's sovereign immunity through an action under § 5 of the Fourteenth Amendment. *See id.* Third, under *Ex parte Young*, suits may be brought against state officers for prospective injunctive relief based on an ongoing constitutional violation. *209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*; *see K.P. v. LeBlanc, 729 F.3d 427, 439 (5th Cir. 2013)*.

Here, TPWD maintains that it is entitled to immunity pursuant to the *Eleventh Amendment*.[5] In response, Sabine does not assert that Texas or TPWD, as an arm of the State of Texas, waived its immunity. Further, Sabine did not sue any state officers, such that the *Ex parte Young* doctrine would be applicable. Rather, Sabine's argument is two-fold. First, Sabine contends that the *Eleventh Amendment* "is not at issue here, as the practical effect of the NGA is to treat holders of FERC certificates . . . as delegees of the federal government, with the unquestionable right to [**12] file a condemnation case in federal court." Thus, according to Sabine, this is a matter of federal supremacy rather than the *Eleventh Amendment*. Second, Sabine avers that Congress abrogated the states' sovereign immunity through enactment of the NGA.

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[5] In its motion, TPWD argues that although this is a suit for declaratory and injunctive relief, it nonetheless falls under the *Eleventh Amendment* even if it is not technically a suit for damages. In support, TPWD cites several cases holding that the *Eleventh Amendment's* protection extends to suits seeking declaratory and injunctive relief against states and state officials that would strip a state of an interest in real property. *See Idaho v. Coeur d'Idaho, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997)*; ***Baker Farms, Inc. v. Hulse, 54 F. App'x 404 (5th Cir. 2002)***; *Ysleta Del Sur Pueblo v. Raney, 199 F.3d 281, 286 (5th Cir.)*, *cert. denied*, ***529 U.S. 1131, 120 S. Ct. 2007, 146 L. Ed. 2d 957 (2000)***. In its response, Sabine does not address this argument. Thus, the court presumes that Sabine concedes that its suit for declaratory and injunctive relief is not outside the parameters of the *Eleventh Amendment*.

1. The Federal Government's Exemption to *Eleventh Amendment* Immunity and its Power of Eminent Domain

Sabine maintains that because the federal government can exercise its right of eminent domain against state land in federal court, so can a delegee of the federal government's power of eminent domain. In Sabine's own words, "if the federal government were in the pipeline business, [TPWD's] sovereign immunity claim would fail as a matter of federal supremacy—there is no reason to treat a delegation of the same authority any differently." Sabine, however, is not the federal government. It is a delegee of the federal government's power of eminent domain, which dictates that its exercise of the delegated power should, indeed, be treated differently. In order for the court to rule in Sabine's favor, one would have to operate under the mistaken belief that the federal government's ability to condemn state land in federal court is an inherent attribute [**13] of its [*140] right of eminent domain. Sabine's theory, thus, conflates two separate rights held by the federal government: the right to exercise eminent domain and the right to sue states in federal court.

Eminent domain is the power of a sovereign to appropriate or condemn lands or other property for its own use. *United States v. Jones, 109 U.S. 513, 518, 3 S. Ct. 346, 27 L. Ed. 1015 (1883)*; *Kohl v. United States, 91 U.S. 367, 371, 23 L. Ed. 449 (1875)*; *see United States v. Carmack, 329 U.S. 230, 236, 67 S. Ct. 252, 91 L. Ed. 209 (1946)*; *United States v. 32.42 Acres of Land, 683 F.3d 1030, 1034 (9th Cir. 2012)*. "The right is the offspring of political necessity; and it is inseparable from sovereignty." *Kohl, 91 U.S. at 371-72*; *accord Carmack, 329 U.S. at 236*. As sovereigns, both the federal and state governments possess the inherent power of eminent domain. *Jones, 109 U.S. at 518*; *Cty. of Ontonagon v. Land, 902 F.2d 1568, 1990 WL 66813, at *2 (6th Cir. 1990)* (per curiam). Nevertheless, it is well established that the federal government's power of eminent domain is supreme above the states' power. *Carmack, 329 U.S. at 240*; *Kohl, 91 U.S. at 371-75*; *32.42 Acres of Land, 683 F.3d at 1034*. Hence, "[t]he right of the federal government to condemn property within the state for public use has been sanctioned by history and precedent throughout the years." *West, Inc. v. United States, 374 F.2d 218, 221 (5th Cir. 1967)*; *accord Kohl, 91 U.S. at 371*.

It is equally acknowledged that the federal government may exercise its right to condemn state lands in federal court. *Kohl, 91 U.S. at 375*; *accord Chappell v. United States, 160 U.S. 499, 509-10, 16 S. Ct. 397, 40 L. Ed. 510 (1896)*; *see generally 32.42 Acres of Land, 683 F.3d 1030*; *United States v. 16.92 Acres of Land, 670 F.2d 1369 (7th Cir. 1983)* (per curiam). This ability, however, is not due to the supreme sovereign's right to condemn state land. Rather, it is because the federal government enjoys [**14] a special exemption from the *Eleventh Amendment*. *Blatchford v. Native Village of Noatak, 501 U.S. 775, 785, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)*; *Principality of Monaco, 292 U.S. at 329*; *Jachetta, 653 F.3d at 912*. "It is well established that 'the States entered the federal system with their sovereignty intact,' and that this sovereignty limits the 'judicial authority in Article III' unless the states have 'consented to suit' in court, 'either expressly or in the plan of the

convention.'" *Oneida Indian Nation of N.Y. v. Cty. of Oneida, 617 F.3d 114, 131 (2d Cir. 2010)* (citing *Blachford, 501 U.S. at 779*; *Principality of Monaco, 292 U.S. at 313, 322-23)*; *Tenn. Dep't of Human Servs. v. U.S. Dep't of Educ., 979 F.2d 1162, 1166 (6th Cir. 1992)*. Nevertheless, it is understood that "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Alden v. Maine, 527 U.S. 706, 755, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)*; *accord Oneida Indian Nation of N.Y., 617 F.3d at 131*; *Tenn. Dep't of Human Servs., 979 F.2d at 1167*. Therefore, unlike the federal government's right to exercise eminent domain, its right to sue the states in federal court is not an inherent attribute of its sovereignty, but, rather, a permission granted to it by the states. *See Alden, 527 U.S. at 755*.

Sabine's theory of the case erroneously assumes that by delegating one power, the government necessarily also delegated the other. The Supreme Court, however, has doubted that the federal government's exemption to the *Eleventh Amendment* can be delegated. *Blatchford, 501 U.S. at 785*.[6] In considering the proposition, the Supreme Court stated: "The consent, 'inherent in the convention,' to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone [**15] whom the United States might select." *Id.* Since *Blatchford*, circuit courts have taken that doubt further by holding that the United States absolutely cannot delegate its exemption. For example, the D.C. Circuit has stated that "[t]o assume that the United States possesses plenary [*141] power to do what it will with its *Eleventh Amendment* exemption is to acknowledge that Congress can make an end-run around the limits that the Amendment imposes on its legislative choices." *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc., 173 F.3d 870, 883, 335 U.S. App. D.C. 331 (D.C. Cir. 1999)*, *cert. denied*, *530 U.S. 1202, 120 S. Ct. 2194, 147 L. Ed. 2d 231 (2000)*. More significantly, the Fifth Circuit has held that "the United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the *Eleventh Amendment*. Only 'responsible federal officers,' or those who act at their instance and under their control, may exercise the authority of the United States as sovereign."[7] *Tex. Tech Univ., 171 F.3d at 294*; *accord United States v. Baker, 213 F.3d 638, 2000 WL 554644, at *1 (5th Cir. Apr. 13, 2000)* (per curiam). Thus, contrary to Sabine's position, a private party does not become the sovereign such that it enjoys all the rights held by the United States by virtue of Congress's delegation of eminent domain powers.

In any event, assuming, *arguendo*, the doubtful proposition that the power to sue states in federal [**16] district court can be delegated, the court holds that the NGA does not embody such a delegation. "[S]tatutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted." *N. Border Pipeline Co. v. 127.79*

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[6] Several circuit courts have similarly expressed this doubt. *See* ***Jachetta, 653 F.3d at 912***; *Oneida Indian Nation of N.Y., 617 F.3d at 135*; *Chao v. Va. Dep't of Transp., 291 F.3d 276, 282 (4th Cir. 2002)*; *Tenn. Dep't of Human Servs., 979 F.2d at 1167*.

[7] This court has followed the Fifth Circuit's ruling in Texas Tech University. See *United States v. Univ. of N. Tex., No. 4:13-CV-734, 2016 U.S. Dist. LEXIS 11311, 2016 WL 379613, at *4 n.1 (E.D. Tex. Feb. 1, 2016)*.

Acres of Land, 520 F. Supp. 170, 172 (D.N.D. 1981) (citation omitted); *accord Transwestern Pipeline Co. v. 17.19 Acres of Prop., 550 F.3d 770, 774 (9th Cir. 2008)*; *E. Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 826 (4th Cir. 2004)*; *Moore v. Equitrans, L.P., 49 F. Supp. 3d 456, 474 (N.D.W.V. 2014)*. Moreover, there is an important difference between the two types of delegation statutes that Congress may enact. The first type authorizes a governmental officer or agency to take property on behalf of and in the name of the United States government.[8] The Supreme Court has stated that "[t]his is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication." *Carmack, 329 U.S. at 243 n.13*. The second type delegates the power of eminent domain to private entities, such as natural gas companies, to take property in their own name and on their own behalf.

> These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over [**17] conflicting public uses reflects an absence of such superiority.

Id.; *accord Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405, 414 n.9 (W.D.N.Y. 2000)*.

The NGA authorizes natural gas companies to acquire property rights "by the exercise of the right of eminent domain in the district court of the United States for the district court in which such property may be located, or in the State courts." *15 U.S.C. § 717f(h)*. While the statute does, in fact, confer federal jurisdiction where the amount in controversy exceeds $3,000, it would be quite a leap to imply into this grant of jurisdiction the delegation of the federal government's exemption from the *Eleventh Amendment*. *See id.* Nowhere in this provision, or in other sections of the NGA, is *Eleventh Amendment* immunity mentioned. *See id.* Consequently, the court is without the authority to read this exemption into the statute. *See Blatchford, 501 U.S. at 786* (refusing to read a delegation of the *Eleventh Amendment* exemption where the statute did not contain the word "delegate" or "the slightest suggestion of such an analysis").

2. Condemnation of Lands Owned by Sovereign Entities

Sabine cites several cases which it claims demonstrate that "federal courts have [*142] uniformly allowed taking of state lands pursuant to the NGA." This proposition is inaccurate and misrepresents the cases proffered. First, Sabine cites three [**18] cases in which the land being condemned belonged to cities or counties. *See Kern River Gas Transmission Co. v. 8.47 Acres of Land, No. 2:02-CV-694 TC, 2006 U.S. Dist. LEXIS 32719, 2006 WL 1472602 (D. Utah May 22, 2006)* (land owned by Salt Lake City); *Tenn.*

[8] An example of such a delegation statute is *10 U.S.C. § 2663*, which authorizes the secretary of a military department to "have proceedings brought in the name of the United States, in a court of proper jurisdiction, to acquire by condemnation any interest in land."

Gas Pipeline Co. v. Mass. Bay Transp. Auth., 2 F. Supp. 2d 106 (D. Mass. 1998) (land owned by the City of Malden); *Kern River Gas Transmission Co. v. Clark Cty., 757 F. Supp. 1110 (D. Nev. 1990)* (land owned by Clark County, City of Las Vegas, and City of North Las Vegas). It is well settled that the protection of the *Eleventh Amendment* does not extend to local governments. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)*; *Evans v. City of Bishop, 238 F.3d 586, 589 (5th Cir. 2000)* (per curiam). Thus, these cases are inapposite to the case at bar.

Second, Sabine cites a state court case in which the holder of a FERC certificate was able to condemn state land. *See Tenn. Gas Pipeline Co., LLC v. Commonwealth of Mass.*, Civ. No. 16-0083 (Berkshire Super. Ct. Mass. 2016).[9] Nonetheless, the *Eleventh Amendment* only protects states from suit in *federal court*. *U.S. CONST. amend. XI*. Therefore, a state court suit is entirely irrelevant, as the question presented here is not whether Sabine can condemn state land, but whether it can do so in federal court.

Finally, Sabine directs the court to a single federal court case in which land owned, at least in part, by a state was at stake. *See USG Pipeline Co. v. 1.74 Acres of Land, 1 F. Supp. 2d 816 (E.D. Tenn. 1998)*. This case appears to be the most relevant to the case at bar. Nevertheless, the issue of *Eleventh Amendment* immunity was not raised in *USG Pipeline Co. [**19]* [10] Sabine appears to maintain that because the federal court there allowed the condemnation of state land, all natural gas companies are entitled to exercise the right of eminent domain with respect to state land under the NGA. The more reasonable explanation for this result, however, is that the state waived its entitlement to *Eleventh Amendment* immunity by submitting itself to the federal court's jurisdiction. *See Kermode v. Univ. of Miss. Med. Ctr., 496 F. App'x 483, 2012 WL 5688987, at *4 (5th Cir. Nov. 16, 2016)* (per curiam); *Meyers ex rel. Benzing, 410 F.3d at 241*; *Martinez v. Tex. Dep't of Crim. Justice, 300 F.3d 567, 575 (5th Cir. 2002)*. Hence, this case, too, is inapplicable.

Contrary to Sabine's assertion, it appears that when faced with an attempted condemnation of land owned by a sovereign entity, federal courts typically dismiss in favor of the sovereign's immunity. Although the issue has not been directly addressed in the context of states, there are several cases discussing this specific issue with regard to tribal Indian lands. For instance, in *Enable Oklahoma Intrastate Transmission, LLC*, the Western District of Oklahoma held that it lacked subject matter jurisdiction over the condemnation action because the tract at issue was tribal land and, thus, could not be condemned in federal court. *2016 U.S. Dist. LEXIS 109854, 2016 WL 4402061, at *3*. Similarly, in *Public Service of New Mexico*, the District of New Mexico granted the Navajo Nation's ("Nation") [**20] motion to dismiss a condemnation action for lack of subject matter jurisdiction due to the Nation's sovereign immunity from suit. *155 F. Supp. 3d at 1161*.

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[9] Sabine did not provide the court with a copy of this case, and the court was unable to locate it.

[10] Curiously, none of the cases cited by Sabine dealt with the *Eleventh Amendment*. Thus, the court fails to see their significance to this case.

While neither of these cases involved the NGA, the court finds them instructive as to the question presented here.

3. Abrogation of *Eleventh Amendment* Immunity

Therefore, to avoid dismissal, Sabine must establish that Congress abrogated the states' *Eleventh Amendment* immunity through enactment of the NGA. One of the determinations a court must make in an abrogation inquiry is whether Congress has "acted pursuant to a valid grant of constitutional authority." *Kimel, 528 U.S. at 73* (citing *Seminole Tribe of Fla., 517 U.S. at 55*); *accord Tex. Tech Univ., 171 F.3d at 283*. The Supreme Court has held that Congress cannot abrogate [*143] *Eleventh Amendment* immunity simply by enacting legislation under its general grant of Article I legislative powers. *See Kimel, 528 U.S. at 78* (citing *Seminole Tribe of Fla., 517 U.S. at 72-73*); *accord Tex. Tech Univ., 171 F.3d at 283*. Controlling Supreme Court precedent has recognized only one valid source of Congressional power that would allow the abrogation of a state's immunity from suit by its citizens—Section 5 of the Fourteenth Amendment. *See Coleman v. Court of Appeals of Md., 566 U.S. 30, 35, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012)*; *Kimel, 528 U.S. at 80*; *Seminole Tribe of Fla., 517 U.S. at 59, 72-73*. Section 5 of the Fourteenth Amendment—referred to as the Enforcement Clause—states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

The NGA, however, was not enacted pursuant to the Enforcement Clause. Rather, Congress enacted the NGA pursuant to its *commerce clause* power. *See 15 U.S.C. § 717*; *Ill. Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498, 506, 62 S. Ct. 384, 86 L. Ed. 371 (1942)*; *Nat'l Steel Corp. v. Long, 718 F. Supp. 622, 628 n.6 (W.D. Mich. 1989)* (discussing *Panhandle E. Pipe Line Co. v. Michigan Public Serv. Comm'n, 341 U.S. 329, 334, 71 S. Ct. 777, 95 L. Ed. 993 (1951)*). It is [**21] well established that Congress cannot abrogate the states' *Eleventh Amendment* immunity by legislating according to Article I powers, such as the *commerce clause*. *Seminole Tribe of Fla., 517 U.S. at 55*; *Rodgers v. La. Bd. of Nursing, 665 F. App'x 326, 329 (5th Cir. 2016)* (per curiam); *Texas v. United States, 497 F.3d 491, 494 (5th Cir. 2007)*; *Rodriguez v. Tex. Comm'n on the Arts, 199 F.3d 279, 281 (5th Cir. 2000)*; *Ysleta del Sur Pueblo, 199 F.3d at 288*. Hence, Sabine's argument that Congress abrogated the states' *Eleventh Amendment* immunity through the NGA is misplaced. Accordingly, just as federal courts have refused jurisdiction over condemnation actions involving sovereign Indian tribes, this court declines to exercise jurisdiction over the instant condemnation action involving an arm of the sovereign State of Texas.

D. TPWD as a Necessary Party

TPWD also asserts that this suit may not be maintained against its property pursuant to *Federal Rules of Civil Procedure 12(b)(1)*, *12(b)(6)*, *12(b)(7)*, and *19*. Essentially, TPWD relies on the fact that *Rule 71.1* makes it a required party and that, due to its immunity, it

cannot be joined in this action. The court agrees that the entire case, including the claims against TPWD's property, must be dismissed due to Sabine's inability to join a necessary party—namely, TPWD itself.[11]

Under *Rule 12(b)(7)*, a claim may be dismissed for "failure to join a party under *Rule 19*." *Rule 19* provides, in relevant part:

> (a) Persons Required to Be Joined if Feasible. (1) Required Party. A person who is subject to service of process *and whose joinder will not deprive the [**22] court of subject-matter jurisdiction* must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (2) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations [*144] because of the interest. (2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. . . .
>
> (b) When Joinder Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions [**23] in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19 (emphasis added). If the court determines that there is a party who should be joined if feasible, but joinder is not possible, the court will proceed if it finds that the party is only "necessary" or dismiss if it finds that the party is "indispensable." *See Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)*; *Cornhill Ins. PLC v. Valsamis, 106 F.3d 80, 84 (5th Cir.)*, *cert. denied*, *522 U.S. 818, 118 S. Ct. 69, 139 L. Ed. 2d 30 (1997)*; *In re Chinese Manufactured Drywall Prods. Liab. Lit., 273 F.R.D. 380, 384 n.7 (E.D. La. 2011)*.

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[11] The court finds that the cases cited by both parties regarding *Rules 12(b)(1)* and *12(b)(6)* and TPWD's property are lacking. Moreover, the court was unable to unearth any cases directly discussing whether the *Eleventh Amendment* extends to an *in rem* proceeding, such as condemnation. Nevertheless, under the doctrine of "hypothetical jurisdiction," the court can consider a procedural issue that affects subject matter jurisdiction before proceeding on the issue of subject matter jurisdiction itself. *BHTT Entm't, Inc. v. Brickhouse Café & Lounge, L.L.C., 858 F.3d 310, 314 n.8 (5th Cir. 2017)*. The Supreme Court has "recognized that a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)*. Therefore, because the court finds that the case must be dismissed in its entirety, the court need not address the subject matter jurisdiction issue.

Further, *Rule 71.1* states:

> When the action commences, the plaintiff *need* join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff *must* add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search . . . .

Fed. R. Civ. P. 71.1(c)(3) (emphasis added). Thus, it is evident that TPWD is an indispensable party to this case. Specifically, the court notes that *Rule 71.1(c)(3)* expressly requires that TPWD be joined as a party in this case. Moreover, in TPWD's absence, the court cannot accord complete relief among the existing parties [**24] because Sabine would not be able to enter Tract 3 without a right-of-way easement that is binding on its owner. *See* Enable Okla. Intrastate Transmission, LLC, 2016 U.S. Dist. LEXIS 109854, 2016 WL 4402061, at *4. Further, the court finds that TPWD's interest in its land and in not having it involuntarily taken by eminent domain would certainly be impaired or impeded if this action commences without it. *See* Pub. Serv. Co. of N.M., 155 F. Supp. 3d at 1171. Nonetheless, while TPWD is certainly an indispensable party to this case, as explained above, it cannot be joined due to its *Eleventh Amendment* immunity, which deprives the court of subject matter jurisdiction.

Therefore, the court must determine whether *Rule 19(b)* requires dismissal of the entire action. "[W]hen a necessary party under *Rule 19(a)* is immune from suit, there is very little room for balancing of other factors set out in *Rule 19(b)*, because immunity may be viewed as one of those interests compelling by themselves." Enable Okla. Intrastate Transmission, LLC, 2016 U.S. Dist. LEXIS 109854, 2016 WL 4402061, at *5 (quoting Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989)). Nevertheless, the court finds that the equity and good conscience factors also mandate that this action be dismissed.

First, a judgment rendered without TPWD's presence would be prejudicial to Sabine. For the right-of-way to be enforceable, it must be binding on the landowner, which the court would be unable to accomplish without the landowner as a party to the suit. *See* 2016 U.S. Dist. LEXIS 109854, [WL] at *4. Thus, the [**25] judgment would be inadequate. Similarly, the judgment would be prejudicial to TPWD because it would affect its right to its own land as well as its right to *Eleventh Amendment* immunity. *Id.* Additionally, there is no manner in which to lessen the above prejudices. It would be impossible to tailor the relief to protect TPWD's right to *Eleventh Amendment* immunity because it is the prosecution of this action itself that violates that right. *See id.* Finally, Sabine is not without a remedy. Ideally, the parties could continue negotiations [*145] over the easement at issue. In fact, the court urges the parties to do so. Otherwise, the NGA vests jurisdiction over condemnation actions in state court as well as federal court. *15 U.S.C. § 717f(h)*. Therefore, Sabine may attempt to proceed in another forum. Consequently, under *Rule 19(b)*, the court, in equity and good conscience, must dismiss this action.

III. Conclusion

Consistent with the foregoing analysis, Sabine's Motion to Strike (#33) TPWD's motion to dismiss is DENIED. TPWD's Motion to Dismiss (#28) is GRANTED in light of TPWD's entitlement to *Eleventh Amendment* immunity and the fact that it is an indispensable party to this action. Accordingly, this action is DISMISSED. A final judgment will be issued separately.

SIGNED at Plano, [**26] Texas, this 6th day of September, 2017.

/s/ Marcia A. Crone

MARCIA A. CRONE

UNITED STATES DISTRICT JUDGE

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