Tenth Annual Energy and Sustainability Moot Court Competition
West Virginia University College of Law
March 2020

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 19-02345

ORDER

Mammoth Pipeline, LLC,

Petitioner,

-v.-

Vandalia Department of Environmental Conservation and West Vandalia Division of Natural Resources,

Respondents,

Citizens Against Pipelines,

Intervenor.

C.A. No. 19-02345

State of Franklin,

Appellant,

-v.-

Mammoth Pipeline, LLC,

Appellee,

Citizens Against Pipelines,

Intervenor.

D.C. No. 19-0682

Citizens Against Pipelines,

Petitioner,

-v.-

U.S. Department of Agriculture,

Respondent,

Mammoth Pipeline, LLC,

Intervenor.

USDA Docket No. 17-031

This case involves two original actions filed in the United States Court of Appeals for the Twelfth Circuit and an appeal of a District Court order to the Twelfth Circuit:

1. An original action brought by Mammoth Pipeline, LLC ("Mammoth") against the Vandalia Department of Environmental Conservation ("DEC") and West Vandalia Division of Natural Resources ("DNR"), respectively, regarding each state's denial of Mammoth's requests for water quality certification under § 401 of the Clean Water Act.
2. An appeal from the order of the United States District Court of Franklin granting Mammoth's application for orders of condemnation and for preliminary injunctive relief.
3. An original action brought by Citizens Against Pipelines ("CAP") against the U.S. Department of Agriculture ("USDA") regarding the Secretary of Agriculture's authority to grant a right-of-way over the Homestead Farm.

These three actions—Mammoth's challenge of the denial of its § 401 certifications in the States of Vandalia and West Vandalia, the State of Franklin's appeal of the district court's decision regarding condemnation of state-owned land in Franklin, and CAP's action challenging the grant of a right-of-way over the Homestead Farm—all involve Mammoth's proposal to build an interstate natural gas pipeline. In addition, both Mammoth and CAP are parties to all three actions. This Court therefore granted the joint motion of Mammoth, CAP, Vandalia DEC, West Vandalia DNR, and Franklin (to which USDA did not object) to have the actions consolidated for decision, in an order issued on December 21, 2019.

It is further ordered that Mammoth and CAP[1] brief the following issues:

1) Whether Vandalia DEC waived its CWA § 401 authority when it asked Mammoth to withdraw and resubmit its request for water quality certification over a period of time greater than one year.
2) Whether the Army Corps of Engineers' interpretation of its own regulation regarding the amount of time within which a state must act on a CWA § 401 certification request is worthy of *Auer* deference[2] so that West Vandalia DNR did not waive its § 401 certification authority.
3) Whether Mammoth is precluded from condemning the land in the State of Franklin because of Franklin's Eleventh Amendment sovereign immunity.
4) Whether the Secretary of Agriculture had authority to grant Mammoth a right-of-way across the Homestead Farm.

SO ORDERED

Entered this 27th Day of December, 2019

[1] Vandalia DEC, West Vandalia DNR, the state of Franklin, and the USDA will not be represented in this case for the purposes of the briefs and oral argument. Participants will represent Mammoth Pipeline, LLC and Citizens Against Pipelines.
[2] Auer v. Robbins, 519 U.S. 452 (1997).

Factual Background

A. Mammoth Pipeline Project

In January 2015, the State of Franklin enacted its "Clean Energy Act" with a goal of increasing the percentage of its electricity supply generated from renewable energy sources each year until the year 2030, when a minimum of 25% renewable energy must be achieved. A second objective of the Act was the reduction of greenhouse gas ("GHG") emissions from electricity generation by 40% in 2030 relative to 2005 levels. At the time the Clean Energy Act was adopted, Franklin derived 82% of its electricity generation from coal, 8% from nuclear, 5% from wind, 4% from hydro, and 1% from solar. Policymakers in Franklin recognized that many of its coal-fired power plants were over forty years old and would either need extensive upgrades or be retired, and anticipated that there would soon be a federal requirement to reduce GHG emissions. Considering its high potential for wind power, Franklin wanted to incentivize development of zero- or low-carbon emission electricity generation.

Expecting that several natural gas-fired power plants would be built to replace the coal plants, Mammoth proposed an interstate pipeline to transport natural gas to Franklin. The "fracked" gas would come from the Maximus Shale, a major shale play within the mid-Atlantic region of the United States that covers five states, including West Vandalia and Vandalia, the two states lying immediately to the east of Franklin. Beginning in July 2016, Mammoth held two open seasons for two months each, giving potential customers an opportunity to enter into a nonbinding agreement to sign up for a portion of the pipeline capacity rights that would be available upon its completion, planned for 2021. Despite the absence of any natural gas power plants having yet been proposed for Franklin, when the open season closed in November 2016, Mammoth signed agreements for 90% of its anticipated capacity, primarily to provide fuel for natural gas-fired electric generating stations to be built within Franklin and throughout the Northeast, as well as for local gas distribution companies to replace the use of heating oil by their retail customers. Mammoth then began working out the details for the route of the pipeline for purposes of its application to the Federal Energy Regulatory Commission ("FERC") for a certificate of convenience and necessity under § 7(c) of the Natural Gas Act ("NGA").

The Mammoth Pipeline Project involves the construction, operation, and maintenance of 362 miles of 42-inch-diameter natural gas pipeline, three compressor stations, main line valves, pig launchers and receivers, and communication towers to control the pipeline system. The proposed facilities would be capable of transporting up to 1.1 billion cubic feet of natural gas per day. The pipeline would extend west from West Vandalia through Vandalia and into Franklin; the project's estimated cost is approximately $4.4 billion.

On September 1, 2017, FERC issued a certificate approving the Mammoth Pipeline Project ("Certificate Order"). The Certificate Order did not authorize Mammoth to begin construction immediately; it listed various conditions that the company would need to satisfy before construction could begin, including acquiring water quality certifications under § 401 of the CWA from each state through which the pipeline would pass.[3]

B. Mammoth's Request for § 401 Water Quality Certification from Vandalia

The longest part of the Mammoth Pipeline will be situated in the state of Vandalia, so Mammoth first sought § 401 certification from Vandalia DEC. On October 1, 2017, Mammoth filed its 18-page certification request with Vandalia DEC, which was received by Vandalia DEC on the same day. The submittal detailed the general route of the pipeline, the techniques Mammoth intended to use at stream crossings, and a general timeline of when Mammoth planned to install portions of the pipeline.

Vandalia DEC subsequently determined that Mammoth failed to provide enough information in its § 401 request to enable the agency to make an informed decision. On September 29, 2018, Vandalia DEC asked that Mammoth withdraw and resubmit a new request that provided more detail regarding the streams that would be crossed, the schedule for crossing such streams, and the location of such crossings. Specifically, Vandalia DEC also sought final surveyed plans for all wetland and stream crossings. Mammoth withdrew its request on September 30, 2018, and submitted a new request, which Vandalia DEC received on November 1, 2018. This November 1, 2018 request was 97 pages long (exclusive of appendices and maps) and provided all the additional details that Vandalia DEC had itemized.

On September 28, 2019, Vandalia DEC again asked that Mammoth withdraw and resubmit a § 401 request with additional information. After several communication exchanges (both emails and letters), however, Mammoth refused to withdraw and resubmit its § 401 request, taking the position that Vandalia DEC had failed to point to any additional specific information that the agency needed to make an informed decision. Because Mammoth refused to withdraw its request, Vandalia DEC denied Mammoth's § 401 request on October 31, 2019.

Vandalia DEC's decision to reject the necessary § 401 certification proved to be controversial. The Vandalia Oil & Gas Association immediately issued a press release attacking the decision "as just another example of [Vandalia] Governor Rossi's war on fossil fuels." Antonin Rossi was elected governor in November 2016, and within six months, Vandalia had enacted the Climate Leadership and Community Protection Act which, among

[3] The Franklin Department of Environmental Protection granted the requested § 401 certification to Mammoth in April 2019. Only the actions of Vandalia DEC and West Vandalia DNR with respect to § 401 certification are at issue on this appeal.

other things, committed the state to an 80% reduction in GHGs by 2050 and a zero- carbon electricity supply by 2045. Upon his election, Governor Rossi named Bea Greene, formerly the Executive Director of Environmental Advocates of Vandalia ("EAV"), as his Secretary of Vandalia DEC. Since she was confirmed in April 2017, Vandalia DEC has not issued any § 401 certifications for natural gas pipelines crossing Vandalia. Mammoth, for its part, also issued a press release reiterating its view that its original § 401 request to Vandalia DEC in October 2017 had included all the necessary documents, but that Vandalia DEC, under Secretary Greene's direction and consistent with Governor Rossi's anti-fossil fuel agenda, simply used the intervening months to consider how best to deny the permit in a manner that would withstand judicial review.

Environmental organizations, on the other hand, hailed Vandalia DEC's decision, citing the devastating impact that the Mammoth Pipeline would have on water quality in the state of Vandalia. A press release issued by EAV, for example, noted that the proposed pipeline would cross several pristine rivers that provide much of Vandalia's drinking water. CAP also commented on the decision to the press, noting that most § 401 requests include final surveyed plans for all wetland and stream crossings, and this information was missing from Mammoth's initial request.

C. Mammoth's Request for § 401 Water Quality Certification from West Vandalia

Mammoth pipeline also needed a § 401 certification from West Vandalia. Unlike the situation in Vandalia, a large portion of the pipeline in West Vandalia would require filling several large wetlands. Thus, the Army Corps of Engineers was involved in the § 401 permitting process in West Vandalia. West Vandalia Division of Natural Resources ("West Vandalia DNR") received Mammoth's § 401 certification request on January 8, 2018. Due to unforeseen problems in Vandalia, Mammoth subsequently modified its proposed route in West Vandalia, necessitating a minor amendment to its § 401 request; the amended request was received by West Vandalia DNR on July 8, 2018. Mammoth's original January 8, 2018 request was never withdrawn, consistent with the common practice for pipelines to simply update their § 401 requests if they modified their route. Similarly, West Vandalia DNR typically did not treat an amended § 401 request as triggering a restart of the one-year clock if the updates were relatively minor.

On July 7, 2019, West Vandalia DNR issued a written decision denying Mammoth's Request for § 401(a)(1) Water Quality Certification, finding that it was unable to conclude on the basis of the record before it that the Project would be carried out in compliance with West Vandalia water quality standards. West Vandalia DNR expressly identified four independent and alternative grounds for the denial: (1) Mammoth had not demonstrated that the Project would ultimately be managed to ensure compliance with water quality standards; (2) the Project would create additional deep water areas where dissolved oxygen levels would fail to meet West Vandalia water quality standards; (3) Mammoth failed to

provide final surveyed plans for all wetland and stream crossings; and (4) pending completion of the interagency consultations under § 7 of the Endangered Species Act, West Vandalia DNR could not conclude that the Project was consistent with West Vandalia water quality standards.

Without addressing the merits of West Vandalia DNR's decision denying the § 401 certification, Mammoth took the position that West Vandalia waived its authority under CWA § 401 by failing to respond to Mammoth's § 401 certification request by January 7, 2019. (If the amended § 401 request submitted to the West Vandalia DNR on July 8, 2018 restarted the one-year statutory clock, however, the January 7, 2019 date would not be the relevant deadline.)

The Army Corps previously issued regulations regarding the issuance of § 401 and § 404 permits, which in relevant part state:

> No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification.

33 C.F.R. § 325.2(b)(1)(ii).

On September 28, 2018, a public notice had been issued jointly by the Army Corps and FERC announcing the availability of a Draft Environmental Impact Statement for the Mammoth Pipeline Project, as required by the National Environmental Policy Act. That notice, published in the Federal Register on October 8, 2018, also included a statement from the Army Corps that West Vandalia DNR had one year from July 8, 2018, to consider Mammoth's § 401 certification request; the Army Corps determined that West Vandalia DNR did not receive a valid request for certification until July 8, 2018 inasmuch as prior to that date, Mammoth's request failed to provide the necessary and current information needed by West Vandalia DNR. The joint notice identified Colonel Emil Foley, a regional program director of the North Atlantic Division, as the official signing off on behalf of the Army Corps; neither the Chief of Engineers nor the Commanding General of U.S. Army Corps of Engineers was aware that Colonel Foley, in his mid-level position at the North Atlantic Division, had made such a determination, nor were they consulted about including such a statement in the public notice. At the same time, the finding was not inconsistent with positions that the Army Corps, under the direction of the Chief of Engineers and the Commanding General of U.S.

Army Corps of Engineers, had taken previously regarding the need for the certifying state agency to deem the certification request to be complete before the one-year clock started.

D. Mammoth's Attempted Condemnation of Land in the State of Franklin

The proposed route of the Mammoth Pipeline within the state of Franklin crosses several miles of state-owned land. Much of the affected property—approximately 20,000 acres, or 30 square miles—had been acquired by Franklin under the terms of a significant gift to the state from the Franklin Charitable Trust, an environmental organization established in the mid-1930s through a substantial bequest from an industrialist who led the expansion of the American steel industry that formerly dominated the Franklin economy. Most of this state-owned land, commonly referred to as the "Charitable Trust Property," or "CT Property," is very sensitive habitat that Franklin had acquired in the 1990s for its biodiversity and ecosystem services as a means of preserving its natural state. The CT Property is well known nationally for its biological diversity, and is home to several federally listed threatened or endangered species. The state of Franklin considers the CT Property to be so sensitive and ecologically important that the Property is not available to the public for recreational uses. None of the CT Property, however, has been officially established as a wildlife refuge under State or local law.

Under Mammoth's proposed route, the pipeline would cross the CT Property at its narrowest width, about three miles in length. Given the importance of the CT Property in maintaining biodiversity and providing ecosystem services throughout the surrounding region within Franklin, the State refused to grant the necessary property rights to allow the Mammoth Pipeline to cross the property.

Upon FERC's conditional approval of the Mammoth Pipeline, however, Mammoth was granted certain eminent domain rights under the NGA to enable it to acquire the rights of way necessary to construct its pipeline. (The right-of-way necessary for the Mammoth Pipeline is 75 to 100 feet wide during construction, although extra space may be required at road or stream crossings or because of soil conditions.) Section 7(h) of the NGA provides as follows:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain

> in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717f(h). Notably (and solely for purposes of this problem), Section 7(h) of the NGA was amended in 2017 to also include the following language, replicating the precise language from the Federal Power Act ("FPA"), 16 U.S.C. § 814:

> Provided further, that no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area, or wildlife refuge established under State or local law on or after October 24, 1992, no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.[4]

E. National Park Land

A portion of the proposed route for the Mammoth Pipeline is situated near the Shandaliah Trail, which is a 2,200-mile trail that stretches across the east coast of the United States through fourteen states. The Shandaliah Trail is part of the National Park System, and

[4] Inasmuch as the 2017 amendment to the NGA incorporates the precise language from the companion provision in the FPA, parties may treat the legislative history and precedent under U.S.C. § 814 as applicable to the NGA.

the Shandaliah Trail goes through Shandaliah National Park in an area near the proposed route of Mammoth's pipeline.

While the proposed route for the Mammoth Pipeline avoids crossing this historic trail, it would cross land near the Shandaliah Trail through a piece of property known locally as the Homestead Farm, which consists of a 340-acre lightly forested pasture and a large farmhouse and associated outbuildings constructed during the 1780s. The Homestead Farm is private property owned and maintained by the Homestead Preservation Trust, a 501(c)(3) organization established in 1983 for purposes of preserving the farmhouse and outbuildings on the Homestead Farm given their historic significance as examples of architecture during the late 18th century. The property is subject to a conservation easement held by the U.S. Department of Agriculture ("USDA"); this conservation easement was placed on Homestead Farm in 2015 in order to preserve the view from the Shandaliah Trail and Shandaliah National Park. A report prepared by the National Park Service at the time concluded that while it was unnecessary for the land itself to become a part of the Shandaliah Trail or Shandaliah National Park, some means of protecting the Homestead Farm from development should be pursued in order to preserve the viewshed from the Park and Trail and enhance the experience of visitors to the Park and this portion of the Shandaliah Trail. The report recommended a conservation easement that would prohibit development on the Homestead Farm and thereby preserve the natural view.

Both the Department of the Interior and the USDA are charged with administering the national trail systems. The Department of the Interior's National Park Service is the agency in charge of administering the Shandaliah Trail, while the USDA generally administers trails in the western United States. Given the Department of Interior's lack of experience with conservation easements—throughout its history, it had never participated in a conservation easement transaction—the USDA, with its expertise in securing conservation easements and a small staff devoted to such work, took the lead in negotiating and securing the conservation easement with the Homestead Preservation Trust, a process that took nearly two years to accomplish. Under the terms of the conservation easement, the USDA is obligated to conduct periodic monitoring checks (not less frequently than once each year) to ensure that Homestead Farm is not being developed and that the Homestead Preservation Trust is otherwise complying with the terms of the easement.

As the federal agency holding the easement on the Homestead Farm, Mammoth approached the USDA, as well as the Homestead Preservation Trust, to secure a right-of-way for its proposed pipeline to cross a portion of the Homestead Farm. While the farmhouse and associated outbuildings would be unaffected, the 75-feet wide right-of-way for constructing the pipeline would result in the removal of a path of trees from the property (resembling a right-of-way through a forest for an electric transmission line) and the temporary disruption of the pasture land for a quarter mile length of the property along its southern border. As a result, the right-of-way for the Mammoth Pipeline would clearly be visible from the

Shandaliah Trail and would destroy at least some of the benefits the conservation easement conferred on users of the Shandaliah Trail. The Homestead Preservation Trust was nonetheless open to allowing the easement, given that the compensation proposed by Mammoth would enable the Trust to undertake an extensive restoration project on the farmhouse. Faced with the lack of opposition by the Homestead Preservation Trust and the determination of the USDA staff that the impact of the right-of-way on the viewshed would not be unacceptable, the Secretary of Agriculture granted Mammoth a right-of-way over the Homestead Farm property in exchange for an undisclosed amount of compensation paid to the Homestead Preservation Trust.

F. Citizens Against Pipelines

CAP is a national environmental and public interest organization based in Vandalia. It was founded to oppose further fossil fuel development in the region, and specifically to stop the construction of interstate natural gas pipelines. CAP has been monitoring the plans for Mammoth Pipeline closely, given the impact on many CAP members who reside throughout the states of Vandalia, West Vandalia, and Franklin. In addition, some of the CAP members live next to the CT Property in Franklin and benefit from the ecosystem services that such protected areas provide, such as stormwater retention during flooding episodes. CAP members also frequently hike the portion of the Shandaliah Trail that overlooks the Homestead Farm.

Legal Background

A. Section 401 of the Clean Water Act

A FERC applicant building an interstate natural gas pipeline must obtain a § 401 certification from the relevant states if its activity "may result in any discharge into navigable waters." 33 U.S.C. § 1341(a)(1). The Supreme Court has found that this term "discharge" in § 401 "includes within its ambit the flowing or issuing out of water." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 376–87 (2006). Dredging is also a "discharge" because it "would undeniably cause the flowing of water into the places of navigable waters where the dredged material is removed (*i.e.,* displacing the dredged material)." *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731 (4th Cir. 2009).

The FERC applicant must provide FERC with such a "certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable" water quality standards of the State. 33 U.S.C. § 1341(a)(1). If a state "refuses to act" on a request for water quality certification ("WQC") "within a reasonable period of time (which shall not exceed one year) after receipt of such a request," the WQC requirements of § 401 are waived. *Id.* Only once the state has given the required § 401 permit or has waived its § 401 authority can FERC issue a final federal license or permit for a project.

If a state denies a § 401 permit, judicial review is governed by the Administrative Procedure Act. The state's interpretation of law is reviewed *de novo*. However, once it is clear the state interpreted the law correctly, its factual decisions are reviewed under the arbitrary and capricious standard of review.

B. The Natural Gas Act

Section 19(d)(2) of the NGA gives the D.C. Circuit "original and exclusive jurisdiction" to review "an alleged failure to act by a . . . State administrative agency acting pursuant to federal law to issue, condition, or deny any permit required under Federal law." 15 U.S.C. § 717r(d)(2). The NGA also provides that the "United States Court of Appeals for the circuit in which a facility subject to . . . section 717f of this title is proposed to be constructed . . . shall have original and exclusive jurisdiction" over any suit claiming that the state abused its discretion when denying a § 401 permit. *Id.* § 717r(d)(1).

The NGA also authorizes private gas companies to acquire "necessary right[s]-of-way" for their pipelines "by the exercise of the right of eminent domain," if three conditions are met. *Id.* § 717f(h). First, the gas company seeking to condemn property must have obtained a Certificate of Public Convenience and Necessity (a "Certificate") from the Federal Energy Regulatory Commission ("FERC"). *Id*. Second, it must show that it was unable to "acquire [the property] by contract" or "agree with the owner of property" about the amount to be paid. *Id.* Third and finally, the value of the property condemned must exceed $3,000. *Id*.

C. Mineral Leasing Act

The Mineral Leasing Act authorizes the "Secretary of the Interior or appropriate agency head" to grant gas pipeline rights of way across "Federal lands." 30 U.S.C. § 185(a). "Federal lands" means "all lands owned by the United States except lands in the National Park System." 30 U.S.C. § 185(b)(1). Pursuant to the Park Service's Organic Act, land in the National Park System includes "any area of land and water administered by the Secretary [of the Interior]" through the National Park Service. 54 U.S.C. § 100501.

D. National Trails System Act

According to the National Trails System Act, "[t]he Secretary of the Interior or the Secretary of Agriculture as the case may be, may grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system, respectively: Provided, That any conditions contained in such easements and rights-of-way shall be related to the policy and purposes of this chapter." 16 U.S.C. § 1248(a).

Procedural Background

A. Mammoth's Action Regarding Denial of § 401 Permits

The states of Vandalia, West Vandalia, and Franklin all fall within the jurisdiction of the Twelfth Circuit Court of Appeals. Pursuant to section 7 of the NGA, Mammoth filed suit in the Twelfth Circuit on December 1, 2019, to challenge both Vandalia DEC's and West Vandalia DNR's denial of its § 401 water quality certification. Mammoth alleged that both denials were untimely because the one-year statutory period had run in each case. CAP intervened in the suit to argue that both states' denials of § 401 certification were not untimely.

B. Franklin's Appeal from the District Court Ruling

1. Mammoth's District Court Action

Because the state of Franklin was unwilling to grant Mammoth a right of way over its state-owned lands, on May 30, 2019, Mammoth filed a condemnation action and an action for preliminary injunctive relief in the U.S. District Court of Franklin. Franklin sought dismissal of Mammoth's condemnation suits for lack of jurisdiction, citing the Eleventh Amendment to the United States Constitution. CAP also intervened and argued that notwithstanding the 2017 amendments to the NGA, the power to override a state's sovereign immunity cannot be delegated to Mammoth.

2. The District Court's Decision

On September 30, 2019, the District Court granted Mammoth's application for orders of condemnation and for preliminary injunctive relief. At the outset, the Court rejected Franklin's assertion of Eleventh Amendment immunity, finding that "Mammoth had been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign," making Eleventh Amendment immunity inapplicable. The District Court reasoned that, because "the NGA expressly allows any holder of a certificate of public convenience and necessity" to condemn property, Mammoth could do so here. The District Court also specifically pointed to the newly amended portion of the NGA as evidence that Congress intended to delegate its power to override a state's Eleventh Amendment immunity.

Franklin and CAP moved for reconsideration of the District Court's denial of sovereign immunity and sought a stay of the District Court's order to prevent Mammoth from taking immediate possession of the State's properties. Franklin and CAP argued that, based on the Supreme Court's decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the United States lacks the constitutional authority to delegate to private entities like Mammoth the capacity to sue a State. The District Court denied the requested relief,

concluding that *Blatchford* does not apply to condemnation actions brought pursuant to the NGA.

3. Franklin's Appeal and CAP's Intervention

Franklin filed a timely appeal and moved to stay the District Court's order pending resolution of this appeal and to expedite the Twelfth Circuit's consideration of the dispute. CAP joined this appeal as an intervenor. On December 1, 2019, the Twelfth Circuit granted that motion in part, preventing construction of the pipeline and expediting the appeal. After the Twelfth Circuit granted this preliminary motion, the Twelfth Circuit issued its procedural order directing the parties to argue the merits of the case regarding whether the District Court was correct in finding that Mammoth has been lawfully delegated the power to override a Franklin's Eleventh Amendment sovereign immunity.

C. CAP's Action Regarding the Shandaliah Trail

On December 1, 2019, CAP filed suit in the Twelfth Circuit to challenge the Secretary of Agriculture's approval of the right-of-way for Mammoth pipeline to cross the Homestead Farm. According to CAP, only the Secretary of the Interior, as head of the agency charged with administering the Shandaliah Trail, had the authority to grant the right-of-way across the Homestead Farm.

Mammoth intervened in the case to argue that the Secretary of Agriculture had the authority to grant a right-of-way over the Homestead Farm because the USDA held the conservation easement on the Homestead Farm. While both the USDA and Mammoth concede that the presence of a conservation easement on the Homestead Farm is enough to make it federal land, they both contend that the land is administered by the Secretary of Agriculture, not the Secretary of Interior.

Because CAP's action regarding the right-of-way over Homestead Farm, CAP's appeal of the district court's decision regarding condemnation of state-owned land in Franklin, and Mammoth's action regarding the denial of its § 401 certifications in Vandalia and West Vandalia all involve common parties (Mammoth and CAP) and common issues (Mammoth's ability to construct a pipeline in accordance with its proposed route), Mammoth, CAP, Vandalia DEC, West Vandalia DNR, and Franklin jointly filed a motion in the Twelfth Circuit Court of Appeals to have the actions consolidated for decision; USDA did not object to the joint motion. On December 21, 2019, the Twelfth Circuit granted the motion, and issued a subsequent order on December 27, 2019, setting forth the issues to be briefed and argued on appeal.

[NOTE: No decisions rendered or documents dated after December 27, 2019 may be cited either in briefs or in oral arguments. Further, all parties have consented to and waived any arguments concerning venue, jurisdiction, and standing, and the parties are directed to not make such arguments in their briefs or at oral argument.]