

In Pennsylvania, Road Construction Results in *de facto* Condemnation of Coal on Nonadjacent Parcel

Glenn A. W. Thompson
Steptoe & Johnson PLLC
Meadville, PA

Pennsylvania oil and gas producers who have their access to parcels cut off by highway construction may find an avenue to claim a *de facto* taking under a recent coal case. In *PBS Coals, Inc. v. Department of Transportation*, No. 140 C.D. 2018, 206 A.3d 1201 (2019), the Pennsylvania Commonwealth Court resurrected coal companies' *de facto* taking claim by reversing the trial court's dismissal of the Pennsylvania Department of Transportation's ("PennDOT") preliminary objections. A *de facto* condemnation occurs when an entity with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of property, as when the construction of a highway results in a landowner's property becoming landlocked.

In 2006, Pocahontas Coal Company obtained the right to mine all of the subsurface coal on Parcel 55. It then leased the right to mine all the coal underlying Parcel 55 to PBS Coals, Inc. (Pocahontas Coal Company and PBS Coals, Inc. collectively the "Coal Companies"). Parcel 55 has always been landlocked. PBS Coals Inc. also acquired a lease to mine all of the surface and subsurface coal on nearby Parcel 59 (the "Shaffer Lease"). Parcel 59 is located northwest of Parcel 55 but is not contiguous. The Coal Companies obtained a right-of-way east over Parcels 50 and 54 to provide Parcel 55 with road access. PennDOT later constructed limited-access Route 219 in a north-south direction, which bisected Parcels 50 and 54 and eliminated Parcel 55's road access.

The Coal Companies claimed a *de facto* condemnation of the coal on Parcel 55 and asked for the appointment of a board of viewers. PennDOT filed preliminary objections on the grounds that the Coal Companies had alternative access to Parcel 55 through the Shaffer Lease, and that the coal on Parcel 55 was not mineable because it was unlikely that the Pennsylvania Department of Environmental Protection ("DEP") would grant mining permits for Parcel 55.

After a three-day hearing, the trial court concluded that the Coal Companies had leasehold rights to extract and sell the coal under Parcel 55, that they had a right-of-way over Parcels 50 and 54 to the road, and that the construction of Route 219 precluded the removal of the coal over that right-of-way. However, the trial court granted PennDOT's preliminary objections. First, it interpreted the Shaffer Lease to permit coal from Parcel 55 to be removed over Parcel 59, even though such right was not expressly granted. Second, it held that the ability to obtain a surface mining permit for Parcel 55 was so speculative and uncertain that it did not support a *de facto* taking claim.

The Commonwealth Court reversed the trial court on both grounds.

First, the Commonwealth Court relied substantially on oil and gas case law and viewed the Lease as controlled by principles of contract law, in which the ultimate goal of contract interpretation is to ascertain and give effect to the parties' intent as reasonably manifested by the contract language. The Commonwealth Court concluded that because there was no explicit language in the Shaffer Lease that provides the Coal Companies a right-of-way across the surface of Parcel 59 to access Parcel 55, the trial court erred in concluding the Shaffer Lease gave the Coal Companies alternative access to Parcel 55. While the owner of a coal estate has the right to use the tunnels and passageways underlying the surface to transport coal from adjoining properties, as long as all the coal has not yet been removed, it has no implied right to use the surface to transport coal from adjoining properties. As there was no explicit language in the Shaffer Lease granting PBS Coals Inc. the right to use the surface of Parcel 59 to transport coal from either adjoining lands, or non-adjoining lands, such as Parcel 55, the Court concluded that the parties did not intend to grant the Coal Companies the right to transport coal from other properties across the surface of Parcel 59.

Second, the Commonwealth Court agreed with the Coal Companies' argument that the trial court erred in deciding at the preliminary objection stage that the coal underlying Parcel 55 was not mineable because it was unlikely to be permitted by DEP, and that the question should have been decided by the board of viewers at the valuation stage.

A *de facto* taking is not a physical seizure of property, but an interference with one of the rights of ownership that substantially deprives the owner of the beneficial use of his property. A property owner must establish three elements to prove a *de facto* taking. First, the condemnor must have the power to condemn the property. Second, the property owner must establish that there are exceptional circumstances that substantially deprive the property owner of the beneficial use and enjoyment of the property. Finally, the property owner must demonstrate that the deprivation is the immediate, necessary and unavoidable consequence of the exercise of the power to condemn.

The Commonwealth Court examined speculative and conjectural *de facto* taking cases. The three cases PennDOT relied on all hinged on the causation prong of the *de facto* taking test, *i.e.* whether the substantial deprivation of use was the "immediate, necessary and unavoidable consequence of the exercise of the power to condemn." In all the cited cases, the courts found that causation was too speculative because the owners still had access to their properties. In contrast, here, the construction of Route 219 resulted in the Coal Companies' complete loss of access to Parcel 55. Under the trial court and PennDOT's logic, the owners of a coal estate would never be able to demonstrate a *de facto* taking at the preliminary objection stage, unless they also were able to prove they were likely to obtain a mining permit. But that would place a higher burden of proof on owners of coal estates than surface owners who do not face any similar requirement to demonstrate a *de facto* taking at the preliminary objection stage, even if their property is relatively valueless or useless. Because PennDOT's actions resulted in the Coal Companies' loss of access to Parcel 55 and the property becoming landlocked, the Commonwealth Court concluded that a *de facto* taking occurred and that the trial court erred by requiring the Coal Companies to demonstrate that the coal was permissible and mineable at the preliminary objection stage. The Court concluded that PennDOT could later argue that the coal was unmineable to the Board of Viewers, and could dispute the volume of coal that was

extractable, the difficulty in obtaining a permit, or the cost incurred in mitigating environmental impact in determining the value of the coal, but not the occurrence of a *de facto* taking.

Road access still remains a critical issue in this era of horizontal drilling and multiple wells located on one well pad, though there are fewer well sites than with conventional drilling. One can certainly envision the construction of a new road stranding a unit's well pad site. If no other site can be obtained due to either topography or lease terms, a *de facto* taking of the entire unit may have occurred. Or imagine a smaller parcel which only has road access on one side, surrounded on the others by combinations of existing units of other lessees, navigable rivers, state or federal forests, or even the Appalachian Trail. The condemnation of that last side could well result in a *de facto* taking. But establishing the existence of a *de facto* taking only gets a company past preliminary objections to a board of viewers. The value of the stranded oil and gas after all costs of extraction, permitting, and environmental remediation, discounted by the likelihood of development would all be determined at a later time.

The Pennsylvania Supreme Court recently heard argument on PennDOT's appeal so we have not heard the last on this topic.

Glenn A. W. Thompson (glenn.thompson@StepToe-Johnson.com) is a Meadville-based member of Steptoe & Johnson PLLC in the Energy Department. Glenn has represented oil and gas clients for over 30 years predominately on title issues, and also advises rural electric cooperatives on right of way and other issues.

