SPIVEY VALENCIANO PLLC

Dear Colleagues, Clients and Friends of the Firm,

Welcome to another issue of **Eminent Domain Plus+.**

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Today's Post: Bullet Trains & Border Walls

13th COA and Bullet Trains

James Miles owned property in Leon County that was in the path of a "high-speed bullet train" designed to connect Houston and Dallas. Miles refused to sign the survey permission form presented to him by Texas Central Railroad & Infrastructure, Inc. (TCRI). Miles eventually sued and requested declaratory relief on the right to survey and the scope of that survey. On summary judgement, Miles also argued that TCRI (and an intervenor, Integrated Texas Logistics, Inc. (ITL)) were not railroad companies or interurban electric railways, and therefore, did not have eminent domain authority. TCRI and ITL filed competing motions. Miles won every issue at the trial court level, including attorney's fees. It was a different story on appeal. **Read the entire opinion here.**

The opinion immediately caught our attention because both sides teed up *Denbury*, a Texas Supreme Court opinion that provides important language in the context of determining a ***pipeline's*** common carrier status. *See Tex. Rice Land P's, Ltd. v. Denbury Green Pipeline-Tex., LLC* , 363 S.W.3d 192, 204 (Tex. 2012) (Texas Rice I). Miles used *Denbury* to argue that the Texas Transportation Code must be "strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith." In this case, Miles was referring to how the Court should construe § 81.002(2) of the Texas Transportation Code, specifically the terms "railroad company" and "operating." TCRI/ITL relied on Denbury to argue that a company need not show it is currently operating, but only that "there is a reasonable probability in the future it would."

The Court relied on the Texas Code Construction Act instead of *Denbury*.

The Texas Code Construction Act states that "words in the present tense include the future tense," *See* Tex. Gov't Code Ann. § 311.012(a). Therefore, the Court declined to "focus on verb tense" in determining legislative intent because "words in the present tense include the future tense." And, "even strict construction of the statute does not require that [the Court] give the narrowest possible meaning to the words of the statute" to "carry out [the legislature's] manifest purpose and intention in enacting the statute." Therefore, although Miles brought forth evidence that only 1% of TCRI/ITL's overall budget had been spent, TCRI/ITL produced summary judgment evidence showing that they had coordinated with regulatory agencies; begun design, construction, and management operations; conducted land surveys; and entered into purchase agreements. The Court viewed TCRI/ITL's actions as ones related to "beginning to operate" a railroad (*i.e.*, "operating,") and thus, "railroad companies" under § 81.002(2).

On the issue of whether TCRI/ITL were interurban electric railroad companies under § 131.011 of the Texas Transportation Code, Miles once again relied on language from *Denbury*, this time related to the offensive simplicity of claiming the power of eminent domain. Miles contended that the mere act of filling out documents does not grant the right of eminent domain to appellants. *See Texas Rice I*, 363 S.W.3d at 199 ("[p]rivate property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more.").

Notably, in *Denbury*, the "core constitutional concern" was "the pipeline's public vs. private use" and the Texas Supreme Court analyzed whether the intended use of the pipeline was for public or private service to decide whether Denbury had been granted the power of eminent domain. Miles, however, did not challenge the public versus private intent of the bullet train. Ultimately, the Court once again relied on the Code Construction Act, holding that an "interurban electric railway company" is a "corporation chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state for the purpose of transporting freight, passengers, or both freight and passengers." See § 131.012. Miles contended that the statute did not extend to high-speed rails, a reading the Court of Appeals rejected, in part because it relied on reference to the long-repealed High-Speed Rail Act instead of the plain language of the statute.

The Court also rejected Miles' technical argument that § 2206 of the Texas Government Code required TCRI to file a certain letter with the Texas Comptroller, which it failed to do when it was initially chartered. (Notably, TCRI amended its charter a few years later.) The Court stated "TCRI could not have been expected to file a letter with

the comptroller purporting to have eminent domain powers that it had not yet acquired."

Miles also argued that he was not timely provided a copy of the Texas Landowner Bill of Rights. Although this argument was not preserved for review as to TCRI, as to ITL not timely providing it (but providing it nonetheless), the Court noted, "we find no statutory provision of authority that requires we deprive ITL of eminent domain authority." Because ITL cured the violation of the Property Code (and the proper remedy is to abate the proceedings until the violation is cured), remand was unnecessary as to this issue.

In all, the Court of Appeals reversed the trial court on all issues and remanded the issue of attorney's fees and costs in light of the appeal. The Court of Appeals also remanded so TCRI/ITL's remaining claims for injunctive relief could be addressed.

According to the *Houston Chronicle*, Texans Against High-Speed Rail, a group critical of the project who helped Miles on appeal, released a statement saying Miles intends to appeal to the Texas Supreme Court. "Based on this ruling, anybody with $300 and a computer can immediately obtain the extraordinary power of eminent domain by simply filing papers with the Texas Secretary of State self-declaring to be a railroad." **Read the article here**.

Border Walls

While the vast majority of eminent domain cases in Texas are filed in state court, federal courts will handle eminent domain actions related to the Border Wall. Although federal condemnations are dubbed "quick takes," federal condemnations in South Texas are often slow moving. On the one hand, most landowners do not want their land severed in this manner, so there is great opposition. On the other hand, determining all of the record owners of a property along the southern border can prove uniquely challenging. Nevertheless, there is progress, as shown on the U. S. Customs and Border Protection's recently-launched border wall system web page. The web page features construction video and an interactive map. New and existing border wall fencing is noted in blue and red, respectively. **Visit the web page here**.

Closing Thoughts:

As we all continue to work and weather through these unprecedented times, we hope you enjoyed a restful Memorial Day Weekend. Stay well!

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Issue 1 - Welcome to Eminent Domain Plus+

Issue 2 - What are the Supremes Up To?

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About SPIVEY VALENCIANO, PLLC

SPIVEY VALENCIANO, PLLC is a litigation boutique that represents property owners across the the State of Texas in complex eminent domain matters. The firm also represents property owners with significant holdings or affiliated property owners in contested PUC electric transmission line routing cases (CCN Applications). The firm also represents clients in select litigation matters and is frequently engaged to serve as trial co-counsel in pending jury trials. The firm provides complimentary case reviews for prospective eminent domain clients, which may be scheduled by contacting Jim or Soledad via email.

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Jim Spivey
Partner
San Antonio Office
(210) 416-3115
Email

Soledad Valenciano
Partner
Dominion Office
(210) 315-1657
Email