

IN THE DISTRICT COURT IN AND FOR OSAGE COUNTY
STATE OF OKLAHOMA

District Court, Osage County, Okla.
FILED
FEB - 7 2022
CV-2020-7
By [Signature] Court Clerk Deputy

City of Enid, Oklahoma)
)
) Plaintiff)
)
) vs.)
) James Merrifield, Chaparral Energy, L.L.C.,)
) Perdue Petroleum LLC, and OSAGE)
) COUNTY BOARD OF COUNTY)
) COMMISSIONERS,)
) Defendants.)

ORDER ON JAMES MERRIFIELD'S EXCEPTIONS TO COMMISSIONERS REPORT

The Petition for Condemnation was filed on January 17, 2020. Exceptions to the Commissioners Report were filed on September 21, 2020. The hearing on the exceptions was held over several days concluding on January 6, 2022.

Defendant, James Merrifield's Exceptions to the Commissioners Report object to the Public Necessity or Purpose of the water pipeline, that it is an unconstitutional taking, and that the Court lacks jurisdiction.

City of Enid filed this condemnation proceeding pursuant to 66 O.S. §53, 11 O.S. §37-117 and 27 O.S. §5. Enid is a Municipality located in Garfield County, Oklahoma. Defendant, Merrifield, owns real property in Osage County. The property subject to this condemnation action was part of the original allotment made pursuant to the 1906 act to an enrolled and recognized member of the Osage tribe. Merrifield is not an Osage Indian.

Merrifield asserts the State of Oklahoma lacks jurisdiction for several reasons:

- 1. The real property is located on an Indian reservation,
- 2. Federal statutes, and thus the Federal courts, govern the proposed condemnation, and
- 3. Osage Tribe owns the mineral estate and ownership was not transferred when the surface was allotted.

The question of whether or not the historical boundaries of the Osage Indian tribe constitute a current reservation is irrelevant to this controversy. Merrifield has not produced evidence he is an Indian of a federally recognized tribe or that he has some quantum of Indian blood. Yes, it is true

that the real property (surface only) which Merrifield now owns was originally allotted under the 1906 act which reserved the mineral estate to the Osage Indian Tribe and allotted the surface lands to individual tribal members, however, current ownership in fee is with Merrifield, a non-Indian, and he has not alleged his fee ownership is subject to restrictions against alienation. Assuming *arguendo*, the surface real property were to be determined to be reservation, it would not change the analysis here. In order to invoke the federal condemnation procedure under 25 U.S.C. §§ 323 to 328 and §357, the real property must be “held in trust by the United States for individual Indians...” There has been no showing Merrifield is an Indian, and no showing the real property is now owned by an “individual Indian, Indian Tribe[], communit[y], band[], or nation[] ...” *Id.* Merrifield has not alleged or shown his real property is subject to tribal or federal superintendence. Federal jurisdiction and federal procedure regarding condemnation would not be invoked regardless of reservation status under this set of facts.

Merrifield next claims the condemnation and subsequent construction of the water pipeline would impact the Osage Nation and that without a permit the right to use and remove roadbuilding material would be in contravention of *United States v. Osage Wind*, 871 F.3d 1078 (10th Cir. 2017) *cert denied*, 139 S.Ct. 784 (Mem), 202 L.Ed.2d 621(2019) and constitute mining. All parties agree Merrifield does not own or have control over the subsurface estate. Plaintiff points to no authority which would grant him standing in this action to assert this issue. Additionally, testimony pointed to a waiver that had been granted by the Osage Minerals Council authorizing the pipeline project which makes the argument moot. Subject matter jurisdiction of this condemnation action is proper in this forum.

Merrifield argues this condemnation proceeding violates 27 O.S. § 5 as well as the Oklahoma and United States Constitutions. The City of Enid relies not only on the referenced statute, but also 66 O.S. §53 and 11 O.S. §37-117. Merrifield’s basis for unconstitutionality partially rests in the fact that a municipality in Garfield County is exercising jurisdiction over property in Osage County, three counties removed, pursuant to the statutorily authorized condemnation scheme and no benefit is conferred on the Osage County landowner. A state statute is presumed to be valid and constitutional. It is presumed that the legislative body has acted within its constitutional powers. “A duly-enacted statute will be presumed to conform to the state and federal constitutions and will be upheld unless it is clearly, palpably and plainly inconsistent with the Constitution.” *Liddell v. Heavner*,

2008 OK 6., *Reherman v. Okla. Water Res. Bd.*, 1984 OK 12. “A heavy burden rests on the party challenging a statute’s constitutionality to establish that its enactment is in excess of legislative power.” *In re Askins Properties*, 2007 OK 25, *Liddell v. Heavner*, 2008 OK 6.

Merrifield objects to the public purpose/public necessity espoused by the City of Enid as to three main points:

1. Enid has an ample supply of water at this time and doesn’t need more,
2. Enid will appropriate the water for an unlawful purpose by selling it to third party private individuals and/or entities, and
3. The project is predominantly for economic benefit of the City and any public purpose is incidental.

Enid relies on a water study from 2009 with several supplements through 2014, which conclude that the existing water supply consisting of a number of wells tapping aquifers in and around the Enid area are insufficient to accommodate future needs of the service area. The study recommends based on projections extending decades into the future that alternative sources of water should be obtained. Merrifield counters that the current supply of water meets current demand, that there has been no substantial increase in population, and that the quality of the data underlying the water study was flawed and should not be relied upon. Testimony was offered that peak or maximum daily demand exceeded the sustainable capacity of the current aquifer well system.

Whether condemnation is a ““Necessity” does not mean an absolute but only a reasonable necessity,” and the power may be “properly exercised in the absence of fraud, bad faith or an abuse of discretion.” *Public Service Company of Oklahoma v. Willis*, 1997 OK 78. Here, Enid has taken the appropriate legislative steps to declare a necessity and there had been no showing of actual fraud, bad faith, or an abuse of discretion. See *OK Const. Art. 2 §§ 23,24*, *Rueb v. Oklahoma City*, 1967 OK 233 and *Luccock v. City of Norman*, 1978 OK 66.

Koch industries uses a significant amount of the total water sold by Enid. In addition to Koch, Enid also sells water to other municipalities, Vance United States Air Force Base, and other businesses outside the municipal limits of the City of Enid. Merrifield argues this is unlawful. Merrifield also asserts the project is an unconstitutional exercise of eminent domain because the project is almost exclusively for the benefit of Koch industries and any benefit to the public is

incidental. He relies on *Luccock v. Norman*, 1978 OK 66 and *Board of County Commissioners of Muskogee County v. Lowery*, 2006 OK 31. *Luccock* instructs the appropriate analysis is a question to be determined from the attendant facts and circumstances developed by the evidence. *Id.* Looking at the present case, Merrifield points to Koch as a primary beneficiary of the project and the de facto reason Enid wants the water pipeline from Kaw Lake. The testimony does not bear this out. While Koch certainly is a large user of water, this case is distinguishable from the situation found in *Lowery*. There, a private entity was intended to be the sole user of two out of three pipelines to be placed, the private entity was to obtain the right of way, and pay the construction costs. *Id.* None of those factors are present in the instant case. The City of Enid followed mandated legislative steps to authorize the project, the project is financed through the Oklahoma Water Resources Board, and Enid has pursued right-of-way acquisition. There is no evidence Koch or any other entity or individual is either improperly or unlawfully participating in the pipeline project.

Both parties agree the Osage Nation reservation consists of the mineral estate underlying Osage County. A forbearance agreement was entered into between the City of Enid and the Osage Nation regarding this pipeline project. Merrifield asserts this constitutes an economic purpose benefitting the Osage Nation which does not have condemnation authority. Enid counters that the agreement sets to rest opposing legal claims in order to allow the project to move forward. The Osage Nation claims authority over the bed and banks as well as the water in the Arkansas River and Enid disagrees. The agreement avoids litigation of the opposing legal claims, protracted delay, and contains contractually binding terms with consideration. It is analogous to the purchase of necessary right-of-way without resorting to condemnation.

Statutory authority under 11 O.S. §37-117 specifically states “[a]ny municipality owning and operating or proposing to own and operate a system of waterworks to supply the municipality, and the inhabitants thereof with water may provide for its contemplated future water and waterworks requirements, in advance of its immediate needs. For that purpose the governing body may acquire lands and water both within and without the corporate limits of the municipality and within the State of Oklahoma. Such municipalities are vested with the power of eminent domain for that purpose, such power to be exercised in the manner provided by law for the condemnation of lands by municipalities for waterworks purposes. It shall be no defense against the exercise of such power or eminent domain that the municipality is selling and furnishing water to other municipalities or to

persons, firms or corporations without the corporate limits of the municipality.” (emphasis added)
Water sold to Koch, Vance, municipalities, and others outside the corporate limits of Enid is specifically authorized pursuant to this statute. As none of Enid’s water will be sold to Osage Nation, this statutory provision is not implicated.

The Court finds:

1. Jurisdiction is proper in Osage County, State of Oklahoma,
2. Enid followed the proper legislative process to determine a reasonable necessity,
3. Condemnation of the subject property was properly authorized by Enid,
4. There has been no showing Enid has engaged in actual fraud, bad faith, or an abuse of discretion,
5. Statutory procedures have been properly followed by Enid in this condemnation proceeding,
6. No unlawful violation of statutory authority has been shown,
7. No violation of the Oklahoma or United States constitutions has occurred.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED, the Exceptions of James Merrifield are DENIED.

Dated this 4th day of February, 2022.

IT IS SO ORDERED.


Stuart L. Tate

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of February 2022 I mailed by first class mail postage prepaid a copy of the foregoing instrument to:

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