

Railroad Permitting Issues

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Can the railroad require utility to permit?

- Railroad's rights vis-à-vis utility depends on railroad's rights in the land:
 - Fee simple ownership
 - Right-of-way easement
 - License

Nature of Railroad Easement

- Under Alabama law, a railroad right-of-way is treated differently from normal easement, at least in part:

A railroad right of way is more than a mere easement, and includes the actual possession, or right to the actual possession, **of the entire surface**, for every proper use and purpose in the construction and operation of the road.

Sadler v. Alabama G. S. R. Co., 204 Ala. 155 (Ala. 1920)(emphasis added).

This holding has been extended to subsurface to extent needed to support the railroad.

Otherwise limited to terms of grant

- “As a general rule, one holding an easement cannot change the character of that easement or ‘enlarge upon that easement for other purposes’ Specifically, as to a railroad easement, this court has held that such an easement was limited in use to railroad purposes.”

Chatham v. Blount County, 789 So.2d 235, 241 (Ala. 2001).

Methods by which railroad may have acquired their interest

- Federal grant
- Condemnation or Threat of Condemnation
- Adverse Possession
- Deed
 - Fee simple
 - Right-of-way easement

Federal Grant

- Generally in connection with interstate railroads out west.
- Pre-1871, grants construed as fee with possibility of reverter.
- Post-1871, grants generally construed as surface easements.

Condemnation

- Many railroads will have obtained parcels through condemnation or threat thereof.
- A condemnation grant or deed entered under threat of condemnation will be for an right-of-way easement, not fee simple.

Adverse Possession

- “Title” obtained by adverse possession only by court proceeding. Otherwise, merely a claim.
- If a railroad used land only as right-of-way, should have prescriptive easement rather than full fee ownership.

Deed

- May give railroad either fee simple ownership or a right-of-way easement
- General rule: intention of grantor determined by language in deed.
- Courts look for traditional words meant to convey interest, such as "Grant, Bargain, Sell" "to have and hold forever," etc.

Railroad Deed Interpretation

- Construction of railroad deeds, particularly those from 1800s, can be complex.
- A deed will often include language associated with both types of interest.
- Should consider historical context of railroad making claim, such as whether it was operating under a franchise.

“Fee simple” may not be determinative

- Example: deed states that grant to railroad “to have and to hold to [railroad]. . . Forever, in fee-simple.”
- Supreme Court holds deed only conveys right-of-way:
“Nor did the mention of rights, members, and appurtenances belonging and appertaining to the strip of land, or the use of the words ‘forever, in fee simple’ enlarge what was the limited character of the grant.”

East Alabama Ry v. Doe, 114 U.S. 340 (1885).

Lack of Point Description

- Many older railroad deeds will convey a strip of land in an identified township, range, and section, but contain no metes and bounds description.
- Either because:
 - securing deeds before they knew exactly where railroad going to be built
 - wanted to have option to move tracks

Gives an easement, not fee simple

- Under Alabama law, if the deed does not contain a definite description of the soil conveyed, the grant will generally be construed to give an easement. Greaves v. McGee, 492 So.2d 302 (Ala. 1986)
- True even if there is other language traditionally associated with a fee simple grant.

Other Issues in Determining Whether Permit Required

- Public highway
- Terms of existing agreements

Public Highway Exception

- Under Alabama Code 11-50-400, municipal gas districts have right to use public highway rights-of-way.
- Must confirm the title/right of the public highway. Some cities/counties entered into easements with railroads that restricted the uses of the right-of-way over the railroad.

Existing Agreements

- Always review your existing agreements with railroad before entering into new permit.
- May be terms in older agreements that control.

PERMITTING TERMS

Reasonable terms

- Some terms sought by railroads can be reasonable:
 - Coordination during construction process
 - Notice if entering on to railroad right-of-way when practicable

Terms To Watch

- Indemnification
 - Some railroads seek language in indemnification provisions that have a utility indemnify railroad for its own negligence.
 - This type of shifting highly disfavored under the law.

Reservation of Right to Have Facilities Removed

- Underground pipeline should be permanent.
- Railroad may try to leverage such a provision later.

Rental Fees

- Some railroads have begun to pursue rent demands aggressively:

“We also seek to grow our revenue from non-transportation uses of our land holdings such as land leases, crossing or access rights. . . . These sources of revenue and value are an important area of focus by our management as such revenue has minimal associated operating costs or capital expenditures and **represents a recurring, high margin cash flow stream.**”

Excerpt from railroad corporation’s securities filing.

Railroad Claims Regarding Fees

- Some railroads have developed standard rate charts based on “national” standards.
- Assert that there should be no difference in the amount charged between a crossing in downtown Los Angeles and a small town in Alabama.

Condemnation as Alternative to Permitting

- Three potential sets of procedures:
 1. Condemnation rules of general application set by Alabama Code 18-1A-1 *et seq.*
 2. Alternative set of procedures available to municipal utility boards and gas districts under 11-50-397 and 11-47-172.
 3. Alternative set of procedures available to interstate natural gas pipelines under Natural Gas Act, 15 U.S.C. § 71(f)(h).

Condemnation under Alabama Code 18-1A-1 *et seq.*

- Complaint should contain description of the land to be taken.
- Allege that taking is for a public use.
- Should not be arbitrary and capricious.

Speculative Concerns

- “Material interference” cannot be established through speculative concerns:

“[The landowner] complains [of] no injuries now to the bottom from the fill and sewer, but of injuries that may arise in the future. . . . Courts must deal in cases like this with the conditions that exist at the time condemnation is asked and cannot take into account conditions that may or may not arise or be created thereafter.”

Pearson v. Central Georgia Railway Co., 215 Ala. 239, 110 So.5 (Ala. 1926).

Timeframe for Condemnation under 18-1A-1 et seq.

- 18-1A-276: probate court must conduct a hearing within 45 days after filing of complaint and enter order granting or denying complaint within 10 days of hearing.
- 18-1A-279: Court must appoint commissioners within 10 days of granting complaint.
- 18-1A-282: Commissioners must issue report within 20 days of appointment, and Probate Court must enter order granting condemnation within 7 days of receiving report.

Additional Requirements for Railroads

- Railroads are considered a prior public use under Alabama law. Therefore, the condemning authority must plead and prove:
 - Actual necessity
 - Lack of material interference with use to which land already put
- Alabama Code 18-1A-72(b)

Compensation

- A pipeline easement will generally be a partial taking.
- The compensation due to the landowner is the difference between the fair market value of the entire property before the taking and the fair value of the remainder after the taking. 18-1A-170(b).
- Fair market value is the price the property would bring when offered for sale by a willing seller and bought by a willing buyer. 18-1A-172.

Permit Fee Not Considered in Valuation

- Some railroads argue that “just compensation” should consider the rental fees they will lose if property condemned.
- Under Alabama law, this is not a proper element of just compensation. Alabama Code 18-1A-173.

Municipal Boards

- Alabama Code 11-47-172 provides a second method of condemnation for municipal utilities.
- Mayor or other chief executive officer makes application to circuit court for writ quod ad damnum to sheriff to summon three property owners to assess damages.

Timeframe under 11-47-172

- Sheriff's summons must not be less than two days from date of the writ.
- Once the property holders return their verdict, condemning authority may enter onto land once damages are paid, unless there is an appeal of the verdict.

Condemnation under NGA

- Section 717f(h) of the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA") confers eminent domain authority on the holder of a certificate of FERC public convenience and necessity.
- The condemnation proceeding is brought in the federal district court where the property is located.

Procedure under NGA

- A number of courts have held that FERC's issuance of a Certificate of Public Convenience and Necessity is conclusive on the issues of the whether the condemnation is necessary and for a public use.
- The Eleventh and Fifth Circuit U.S. Court of appeals have not addressed this issue.

Timeframe under NGA

- Federal Rule of Civil Procedure 71A, unlike Alabama Code § 18-1A-233 (1985), does not establish procedures for taking early possession of a property.
- Pipeline company may apply to the federal courts for an injunction granting right of entry.