

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

JOHN P. BOERSCHIG,
Plaintiff,

v.

TRANS-PECOS PIPELINE, LLC,
Defendant,

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No. PE:16-CV-00056-RAJ

ORDER DENYING PLAINTIFF’S APPLICATION FOR PRELIMINARY INJUNCTION

BEFORE THE COURT is Plaintiff John P. Boerschig’s (“Plaintiff”) Application for Preliminary Injunction. (Docs. 2, 5). Plaintiff requests a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure preventing Defendant Trans-Pecos Pipeline, LLC (“Trans-Pecos”) from taking possession of his Presidio County ranch property until the Court has disposed of Plaintiff’s federal constitutional challenges to Trans-Pecos’s right as a private entity to take his property. (Doc. 2). An evidentiary hearing was held on July 12, 2016. After hearing arguments of counsel, the Court DENIES Plaintiff’s Application for Preliminary Injunction. (Docs. 2, 5).

I. BACKGROUND

This dispute relates to Trans-Pecos’s pursuit of an easement across Plaintiff’s 11,000-acre ranch in Presidio County, Texas, referred to as the “South Shurley ranch.” (Doc. 1 at 2). Trans-Pecos is in the process of constructing the Trans-Pecos Pipeline (“TPP”) for the transportation of natural gas in the State of Texas, as part of an agreement with Mexico’s federal electricity commission. (Doc. 8-1 at 13). On July 1, 2016, Plaintiff filed his Complaint alleging Trans-Pecos’s exercise of eminent domain authority under Texas law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution “because it is an invalid standardless delegation of government authority to a private entity.” (Doc. 1 at 9). Additionally, Plaintiff claims Trans-Pecos’s exercise of the right to possess Plaintiff’s ranch without a prior determination that the

TPP constitutes a “public use” violates due process. (*Id.*). Accordingly, Plaintiff seeks “preliminary and permanent injunctive relief and declaratory relief[.]” (*Id.* at 1).

A. Administrative Proceedings

Generally, natural gas pipelines engaged in the “exploration of natural gas in foreign commerce,” are subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC”). 15 U.S.C. § 717(b). Here, it is undisputed that Trans-Pecos’s Presidio Border Crossing Project is subject to FERC jurisdiction. Trans-Pecos’s Presidio Border Crossing Project consists of “approximately 1,093 feet of 42-inch-diameter pipeline extending from a point approximately 12.5 miles northwest of the City of Presidio in Presidio County, Texas, to the middle of the Rio Grande River at the international boundary with the State of Chihuahua, Mexico.” *Trans-Pecos Pipeline, LLC*, No. CP15-500-000, 155 FERC P 61140, 2016 WL 2607442, at *1 (2016).

On May 5, 2016, after appropriate administrative proceedings, the FERC issued an order granting a Presidential permit and authorization under Section 3 of the federal Natural Gas Act (“NGA”) to Trans-Pecos’s Presidio Border Crossing Project to import and export natural gas at the international boundary between the United States and Mexico. *Id.* As explained by the FERC in its Order Issuing Presidential Permit and Granting Authorization under Section 3 of the NGA:

Trans-Pecos contemplates owning, constructing, and operating an intrastate pipeline in Texas, the [TPP], that would be subject to the jurisdiction of the Railroad Commission of Texas. The [TPP] intrastate pipeline would transport gas southwest from a hub in Pecos County, Texas, to the proposed border-crossing facility. The intrastate pipeline will consist of approximately 148 miles of 42-inch-diameter pipeline with a total capacity of 1.3 Bcf per day. Trans-Pecos anticipates that the intrastate pipeline will interconnect with other Texas intrastate pipelines, as well as processing plants, and that it may later interconnect with interstate pipelines. Trans-Pecos also states that while it will initially provide only intrastate service on its contemplated upstream pipeline, it may at a later time provide transportation services under section 311 of the Natural Gas Policy Act (NGPA).

Id. Furthermore, the FERC declined to exercise jurisdiction over the intrastate TPP:

[W]hile the applicant’s overall project will include approximately 148 miles of pipeline, the only portion subject to the [FERC’s] jurisdiction is the 1,093 feet that would constitute the import/export border-crossing facilities for which authorization

under section 3 of the NGA and a Presidential Permit are necessary. The remaining 148 miles of upstream pipeline facilities sited in Texas are under the jurisdiction of the Railroad Commission of Texas.

Id. at *6.

B. Eminent Domain Proceedings

Since Trans-Pecos has not sought a certificate of convenience and necessity from the FERC with regard to the intrastate TPP, which would have provided the power of federal eminent domain under 15 U.S.C. § 717f(h), Trans-Pecos has two options for acquiring a right-of-way in connection with Plaintiff's privately-owned property: (1) negotiate purchase by contract; or (2) invoke the power of eminent domain under Texas law to forcibly take the private property and provide just compensation. Plaintiff alleges Trans-Pecos has invoked "sovereign powers of eminent domain delegated to it by Texas Statutes. . . to condemn about 13 acres" of Plaintiff's South Shurley ranch in Presidio County. (Doc. 2 at 1).

Trans-Pecos claims that it "is a gas utility under the Texas Utilities Code, and, as such, has the right and power to enter on, condemn, and appropriate land, rights-of-way, easements, or other property as may be necessary for the natural gas pipeline system, in accordance with applicable Texas laws and regulations." (Doc. 8-1 at 16). On March 4, 2016, after Trans-Pecos was unable to reach an agreement with Plaintiff for the acquisition of a pipeline easement across his property, Trans-Pecos filed a Petition for Condemnation in the 394th Judicial District, Presidio County, Texas, No. 7668. (*Id.* at 17). This petition alleges it is necessary for Trans-Pecos to acquire a permanent right-of-way and easement that is fifty feet wide on Plaintiff's property to construct the TPP. (*Id.* at 17-18).

A hearing before three special commissioners designated to make the initial valuation determination under Texas Property Code § 21.015 is scheduled for Thursday, July 14, 2016, at 9:00 a.m. (Doc. 2 at 1). Plaintiff contends the special commissioners have no authority to make determinations or recommendations about Trans-Pecos's right to condemn Plaintiff's private

property. (*Id.* at 1–2). Rather, the pending administrative proceeding concerns only the question of compensation for the forcible taking. (*Id.* at 2).

Plaintiff claims once the special commissioners have made a valuation determination at the July 14, 2016, hearing, the condemnation process moves from the administrative to the judicial phase. (*Id.*). According to Plaintiff, “Texas law would allow Trans-Pecos to take possession of [Plaintiff’s] property merely by depositing the amount of the valuation determined by the special commissioners into the registry of the state district court.” (*Id.*). Because the State of Texas would allow this forcible possession of private property without affording Plaintiff any advance opportunity to judicially challenge Trans-Pecos’s right to take, Plaintiff argues that Trans-Pecos’s use of the eminent domain authority delegated to it by Texas statutes violates substantive and procedural due process. (*Id.*).

C. Preliminary Injunction

Plaintiff’s Application for Preliminary Injunction, filed on July 1, 2016, seeks to prevent Trans-Pecos from obtaining a right-of-way and constructing a natural gas pipeline across the South Shurley ranch. (Doc. 2). In support of the Application for Preliminary Injunction, Plaintiff submits his own declaration, which states: “I do not want Trans-Pecos, a private entity, to be able to take possession and begin construction-related activities for its pipeline on my South Shirley [sic] Ranch until it has been judicially determined that Trans-Pecos has a legal right to condemn and forcibly take my property.” (Doc. 2-1). Further, Plaintiff declares that Trans-Pecos made a written offer of \$16,500.00 for the right-of-way across his South Shurley ranch, which Plaintiff rejected. (*Id.*).

On July 11, 2016, Trans-Pecos filed its Response to Plaintiff’s Application for Preliminary Injunction (Doc. 8) and Motion to Dismiss (Doc. 10) alleging essentially the same grounds in opposition to Plaintiff’s request for injunctive relief. First, Trans-Pecos argues that Plaintiff’s Application for Preliminary Injunction violates the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that a “court of the United States may not grant an injunction to stay proceedings in a State

court except as expressly provided by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” (Doc. 8 at 1). Alternatively, Trans-Pecos contends Plaintiff’s Application for Preliminary Injunction should be denied under the abstention doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. (*Id.*). Finally, Trans-Pecos urges the Court to deny the instant motion because Plaintiff cannot “satisfy any of the elements required for the issuance of a preliminary injunction.” (*Id.* at 2).

II. LEGAL STANDARD

A party seeking a preliminary injunction must satisfy each of four criteria: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not granted, (3) the substantial injury outweighs the threatened harm to the party against whom the injunction is sought, and (4) granting the injunction will not disserve the public interest. *Planned Parenthood Ass’n of Hidalgo Cnty., Tex., Inc. v. Suehs*, 692 F.3d 343, 348 (5th Cir. 2012). “[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements.” *Id.* (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012)). Nonetheless, “given the haste that is often necessary” in addressing a motion for a preliminary injunction, “the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

III. DISCUSSION

In his Application for Preliminary Injunction, Plaintiff argues that Trans-Pecos’s exercise of eminent domain under Texas law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the following reasons: (1) the State of Texas has given Trans-Pecos, a private party, the open-ended right to forcibly take Plaintiff’s private property without having to meet any due process standards; and (2) Plaintiff has not received a predeprivation hearing

and judicial determination of Trans-Pecos's right to take. (Doc. 5). In response, Trans-Pecos contends Plaintiff's requested relief would violate the Anti-Injunction Act, and alternatively, should be denied under the *Younger* abstention doctrine. (Doc. 8-1 at 19). The Court finds that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court from enjoining a state court condemnation proceeding that has already commenced. Therefore, the Court denies Plaintiff's request to enjoin Trans-Pecos from proceeding with the state eminent domain action.

The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The exceptions listed in the Act are exclusive, and if none of the exceptions applies, then the Act establishes "an absolute prohibition." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993). The Anti-Injunction Act's "basic purpose is to prevent needless friction between state and federal courts." *Mitchum v. Foster*, 407 U.S. 225, 233 (1972) (internal quotation marks and citations omitted). "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970).

Plaintiff has specifically requested that the state-court condemnation proceeding be enjoined. (Doc. 2). Thus, the Anti-Injunction Act comes into play, even though the request for an injunction is directed at Trans-Pecos and not directly at the state court. *Atl. Coast Line R.R. Co.*, 398 U.S. at 297 ("[T]he prohibition of § 2283 cannot be evaded by addressing the order to the parties[.]"). Rather than asserting an exception to the Anti-Injunction Act, Plaintiff argues that Trans-Pecos's state effort to condemn Plaintiff's property has not reached the stage of a state judicial proceeding because it is in the pre-judicial administrative phase. (Doc. 9 at 1). Plaintiff cites *Central Elec. & Gas Co. v. City of Stromsburg*, 192 F. Supp. 280 (D. Neb. 1960), *aff'd* 289 F.2d 217 (8th Cir. 1961), for the

proposition that the Anti-Injunction Act is inapplicable to condemnation cases that are administrative in nature. However, the Court finds that the Texas condemnation statutes are dissimilar to those involved in *Central Elec. & Gas Co.* That case concerned a statutory procedure for the condemnation of a utility by a municipality that was wholly administrative whereas a Texas condemnation proceeding “even at its administrative stage, is a civil action brought in a State court.” *City of Sachse, Tex. v. Kan. City S.*, 564 F. Supp. 2d 649, 655 (E.D. Tex. 2008) (internal quotation marks and citations omitted).

While an administrative hearing before special commissioners is a precursor to a state court eminent domain action in Texas, here Trans-Pecos has already initiated a state court condemnation proceeding by filing its Petition for Condemnation in the 394th Judicial District of Presidio County, Texas, on March 4, 2016. (Doc. 8-1 at 17). At the time Plaintiff filed his Complaint in federal court on July 1, 2016, Plaintiff was on notice that state administrative and judicial proceedings had been initiated by Trans-Pecos. The state eminent domain case was thus developing for almost four months prior to Plaintiff seeking a preliminary injunction from this Court on July 1, 2016.

Contrary to Plaintiff’s argument, this federal case has not advanced in proceedings of substance on the merits of Plaintiff’s claims. Accordingly, the Court concludes that there is the existence of an ongoing state judicial proceeding. As Plaintiff’s Application for Preliminary Injunction is tantamount to staying the state court condemnation proceeding, it is prohibited by the Anti-Injunction Act. *See Fort Worth v. W. R.R. Co. v. City of Fort Worth, TX*, No. 4:03-CV-319-Y, 2004 WL 743901, at *3 (N.D. Tex. March 8, 2004). Because the Court cannot provide the relief requested by Plaintiff, his Application for Preliminary Injunction must be denied.

IV. CONCLUSION

The Court finds that Plaintiff’s Application for Preliminary Injunction violates the Anti-Injunction Act. As such, the Court need not consider Trans-Pecos’s alternative argument for abstention under *Younger* or the preliminary injunction factors before denying the motion for

injunctive relief. Accordingly, Plaintiff's Application for Preliminary Injunction shall be **DENIED**.
(Docs. 2, 5).

It is therefore **ORDERED** that Plaintiff's Application for Preliminary Injunction is hereby
DENIED. (Docs. 2, 5).

It is so **ORDERED**.

SIGNED this 13th day of July 2016.


ROBERT A. JUNELL
Senior United States District Judge