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Petitioner: WILL-O-WISP METROPOLITAN DISTRICT v. Respondents: MAGNESS LAND HOLDINGS LLC, et al.	▲ COURT USE ONLY ▲ Case Number: 06CV320
Attorney or Party Without Attorney:	Div. B Ctrm.:
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RESPONDENT MAGNESS LAND HOLDINGS' MOOTION TO DISMISS FIRST AMENDED PETITION IN CONDEMNATION	

Respondent, Magness Land Holdings LLC ("MLH"), hereby moves for the dismissal of the First Amended Petition in Condemnation ("Amended Petition"), and as grounds therefor, states as follows:

INTRODUCTION

The Petitioner does not have the authority to proceed with this action because it has not complied with C.R.S. § 38-1-101.5(1). The pertinent language of the statute provides as follows:

When a court is determining the necessity of taking private land or nonfederal public land for the installation of a pipeline, the court shall require the pipeline company:

(a) To show that the particular land lies within a route which is the most direct route practicable; [and]

(c) To consider existing utility rights-of-way before any new routes are taken if the land to be condemned is adjacent to existing utility rights-of-way.

The Petitioner does not allege that it has complied with this statute. Rather, it contends that the statute does not apply in this case. Amended Petition at ¶ 5.

The Petitioner argues that the language in the second clause of the statute – “the court shall require the pipeline company” – operates to limit the applicability of the statute to entities specifically designated as pipeline companies, and the Petitioner is not a pipeline company. It is MLH’s position, however, that the first clause of the statute – “When a court is determining the necessity of taking private land or nonfederal public land for the installation of a pipeline” – reflects the Legislature’s intent that the statute apply to any action in which property is being taken for the installation of a pipeline. The reference to a pipeline company in the next clause of the statute either reflects the fact that in this context, the condemnor is engaged in the business of installing a pipeline and is, in effect, acting as a pipeline company. Or it is language in conflict with the broad, all-encompassing scope of the first clause, and under applicable law, the language of the opening clause controls.

The Colorado Court of Appeals reads the statute the same way as MLH, namely that it applies to any condemnor attempting to take a right-of-way for a pipeline. Moreover, that interpretation is consistent with fundamental principles of statutory construction. While the Colorado Legislature specifically granted special districts, such as the Petitioner, the power of eminent domain, it specifically limited that power to that which was *necessary* to carry out the

lawful purposes of the special district. MLH's interpretation of C.R.S. § 38-1-101.5 effectuates that intent, because it preserves the ability to condemn rights-of-way for pipelines, but limits that ability only to that property which is necessary to install the pipeline.

The Petitioner's interpretation of the statute, on the other hand, violates basic tenets of statutory construction, in part because it leads to an illogical and unreasonable result. C.R.S. § 38-1-101.5(1) is designed to ensure that a party seeking to condemn a right-of-way for a pipeline determine whether a public right-of-way already exists in which to install the pipeline, and if not, that it install the pipeline in the most direct route practicable so as to minimize the amount of private property that needs to be taken. There is no logical reason why these criteria should apply only to a company whose business is limited to pipelines, and not to any other entity with the power to condemn private property for a pipeline. Nor is it reasonable that the Legislature would have meant to apply these limitations just to companies engaged only in the business of installing pipelines, and allow any other entity with the power to condemn a pipeline right-of-way to simply disregard available public rights-of-way and to utilize something less than the most direct route practicable across private property.

But most importantly, unless the Petitioner can show that it is clear and beyond any doubt that the statute only applies to entities specifically designated as pipeline companies, the Court should not adopt the Petitioner's interpretation of the statute. A legislative delegation of a condemnation power must be narrowly construed. If there is any uncertainty or doubt whatsoever about the scope of a particular condemnation power, it must be construed against the condemnor. At a minimum, given the all-encompassing language of the first clause of the

statute, there is at least some doubt about whether the Legislature really intended that entities not specifically designated as a pipeline company could disregard the criteria set forth in the statute. The Court is obligated to resolve such doubt against the Petitioner, and if it does, it must hold that C.R.S. § 38-1-101.5(1) applies to this case. Because the Petitioner has not complied with that statute, the Amended Petition should be dismissed.

ARGUMENT

A. The Colorado Court of Appeals Reads C.R.S. § 38-1-101.5(1) as Applying to Any Condemnor Seeking to Condemn a Pipeline Right-of-Way.

In West v. Hinksmon, 857 P.2d 483 (Colo. App. 1993), an owner of landlocked property was attempting to condemn a private way of necessity across an adjoining landowner's property. The right to condemn a private way of necessity can be challenged if an alternate means of access is available. The question in West was whether it was the condemnor's obligation to show that no such alternate route existed, or conversely the condemnee's obligation to show that such a route did exist. Overruling the trial court, the Court of Appeals concluded that it was the condemnee's burden to prove the availability of an alternate route.

In disposing of arguments made by the condemnee in support of the trial court's ruling, the appellate court noted that, generally speaking, a condemnor's determination of the necessity and location of a proposed taking can be challenged if fraud or bad faith was involved. However, the Court of Appeals cited C.R.S. § 38-1-101.5 as an example of a situation where the burden and type of proof required to show necessity was explicitly set forth by the Legislature:

In any event, in both cases [relied upon by the condemnee], utilities appeared as condemnors seeking at least a quasi-public

use, and in such cases, the necessity and location of the proposed taking is conclusive, unless upon proper proof condemnees establish fraud or bad faith. Arizona-Colorado Land v. District Court, *supra*. Cf. § 38-1-101.5, C.R.S. (1982 Repl. Vol. 16A) (*a condemnor seeking a way for a pipeline must show the route selected is the most direct route practicable*).

857 P.2d at 487 (emphasis supplied). In citing C.R.S. § 38-1-101.5, the Court of Appeals characterized the statute as applying to “a condemnor,” and not just pipeline companies. The Court of Appeals did not read the statute as Petitioner suggests it should be read. To the contrary, it obviously concluded that the broad language of the first clause of the statute was a reflection of the Legislature’s intent that the statute apply in any case where any condemnor is seeking to condemn a pipeline right-of-way.

B. Under Basic Tenets of Statutory Construction, C.R.S. § 38-1-101.5 Should be Interpreted as Applying to Special Districts Seeking to Condemn a Pipeline Right-of-Way.

In construing a statute, a court’s “fundamental responsibility” is to effectuate the intent of the General Assembly. People v. Alvarado, 132 P.3d 1205, 1207 (Colo. 2006). In ascertaining the legislative intent underlying a particular statute, courts may look to other statutes dealing with the same subject matter. National Union Fire Insurance Co. of Pittsburg, PA v. Price, 78 P.3d 1138, 1140 (Colo. App. 2003). Two other statutes dealing with the same subject matter at issue herein, namely the scope of a special district’s condemnation power, make it clear that the Legislature intended to limit such power to that which is *necessary* to carry out the functions of the special district. For example, C.R.S. § 32-1-1004(4) provides as follows:

A metropolitan district may have and exercise the power of eminent domain and, in the manner provided by article 1 of the title 38, C.R.S., may take any property *necessary* to the exercise of the powers granted [to the metropolitan district].

(Emphasis supplied.) Likewise, C.R.S. § 32-4-406(1)(j) provides as follows:

(1) Any district has the following powers:

(j) To have and exercise the power of eminent domain and, in the manner provided by law for the condemnation of private property for public use, to take any property *necessary* to exercise the powers granted in this part 4, either within or without the district.

(Emphasis supplied.)

In construing C.R.S. § 38-1-101.5, the Court must adopt the construction that best gives effect to the legislative intent underlying the statute. Bob Blake Builders, Inc. v. Gramling, 18 P.3d 859, 862 (Colo. App. 2001). As between the two proposed interpretations of the statute offered by MLH and the Petitioner – either that it applies to all condemnors, including special districts, or that it applies only to entities specifically designated as pipeline companies – the interpretation applying the statute to all condemnors best gives effect to the Legislature’s intent to limit condemnation powers of special districts only to the extent they are necessary. The purpose of C.R.S. § 38-1-101.5 is to prevent the unnecessary taking of property for a pipeline right-of-way. Thus, for example, if an adjacent utility right-of-way is available as a corridor for the pipeline, it is not necessary to take private property for a right-of-way, and such a condemnation is not allowable. Similarly, if more direct, practicable route for the pipeline is available, it is not necessary to take a less direct route, and it is not permissible to condemn the less direct route. Given the intent of the Legislature to limit the condemnations powers of special districts to only that which is necessary, an interpretation of C.R.S. § 38-1-101.5 that applies the necessity limitations of that statute to special districts better effectuates legislative

intent in this context than does an interpretation that allows special districts to ignore the necessity limitations of the statute.

If the Court believes the first clause of the statute may be in conflict with the second clause, the court must first strive to harmonize the potentially conflicting provisions. People v. Cross, 127 P.3d 71, 73 (Colo. 2006). The first clause applies whenever a court is determining the necessity of taking private land to install a pipeline, and the second clause references pipeline companies. Since the statute applies only to condemnation actions involving pipelines, the Legislature's use of the pipeline company language may simply reflect the fact that in this specific context, the condemnor is engaged in the business of installing a pipeline and is, in effect, acting as a pipeline company. Such an interpretation would harmonize the two clauses of the statute. When language in a statute can be defined in either a broad or a narrow sense, the definition that will best effectuate the General Assembly's intent should be adopted. Ma v. People, 121 P.3d 205, 210 (Colo. 2005). The construction of the pipeline company language in C.R.S. § 38-1-101.5 as applying to any company installing a pipeline fulfills this mandate.

If, on the other hand, the Court believes that the two clauses can't be reconciled, thereby creating an ambiguity in the statute, the Court may consider the consequences of a given interpretation, and the end to be achieved by the statute in resolving the ambiguity. People v. Yascavage, 101 P.3d 1090, 1093. As noted above, the end to be achieved by the statute is to preclude a party from condemning more private property than is necessary to install a pipeline. If the Court were to read the statute as the Court of Appeals does, and apply it to any condemnor, the consequence of that interpretation is to leave condemnors with the ability to condemn private

property that is necessary to install a pipeline, while precluding them from condemning property that is not necessary for that purpose. The consequence of the Petitioner's proffered interpretation of the statute is to apply such a reasonable limitation only to companies specifically certified as a pipeline company, and letting every other condemning authority simply disregard such limitations.

A court should presume that the Legislature intended a just and reasonable result in drafting legislation, and a court should avoid a construction of a statute that leads to an illogical result. In the Interest of H, 74 P.3d 494, 495 (Colo. App. 2003); Colorado Water Conservation Board v. Upper Gunnison River Water Conservancy District, 109 P.3d 585, 593 (Colo. 2005). It is both unreasonable and illogical that the General Assembly would have concluded that it was appropriate to apply the limitations set forth in C.R.S. § 38-1-101.5 to entities specifically designated as a pipeline company, but not to apply the same limitations to all other entities with the power to condemn pipeline rights-of-way. There is no reason why private property should be taken if a public right-of-way will suffice for the pipeline, nor is there any reason why private property should be taken for anything less than the most direct route practicable. That is true whether the condemnor is something specifically identified as a pipeline company, or a special district. The interpretation of the statute offered by the Petitioner, which would apply the limitations of the statute only to specially-designated pipeline companies, is neither reasonable nor logical.

C. Any Uncertainty About the Scope of a Legislative Grant of Condemnation Power Must Be Construed Against the Condemnor.

“The power of condemnation has been restrained by constitutional limitation for the protection of individual property rights and it lies dormant in the state until the General Assembly speaks.” Town of Parker v. Colorado Div. of Parks and Outdoor Recreation, 860 P.2d 584, 586 (Colo. App. 1993). In construing the scope of a condemnation power pursuant to legislative enactment, the courts must follow a rule of narrow construction. Id. Thus, any uncertainty about the scope of a condemnation power must be resolved against the entity asserting the right to condemn. Coquina Oil Corporation v. Harry Kourlis Ranch, 643 P.2d 519, 522 (Colo. 1982).

If it is not clear that C.R.S. § 38-1-101.5 applies to any action to condemn a pipeline right-of-way, then at a minimum there is uncertainty about the scope of the statute. The first clause clearly refers to any action in which the court is determining the necessity of taking private land for a pipeline. If the Court reads the second clause as referring just to entities specifically designated as a pipeline company, then the clauses are in conflict, and it is uncertain whether the Legislature intended to grant to non-pipeline companies the right to condemn rights-of-way unfettered by the limitations set forth in the balance of the statute. As the authorities cited above make clear, that doubt must be resolved against the Petitioner, and the Court should conclude that a special district’s power to condemn a pipeline right-of-way is subject to the limitations spelled out in C.R.S. § 38-1-101.5. Stated another way, unless the Petitioner can establish with certainty that the Legislature intended for the limitations of the statute to apply only to entities specially certified as pipeline companies, then that interpretation of the statute

should not prevail. Given the breadth of the language of the first clause of the statute, it is far from clear that the Legislature's intent was to limit the statute just to pipeline companies. That lack of clarity must be resolved against the Petitioner, and accordingly it is subject to the provisions of the statute.

D. The Amended Petition Should Be Dismissed Because the Petitioner Has Failed to Comply With C.R.S. § 38-1-101.5.

If the Court concludes that C.R.S. § 38-1-101.5 applies to this matter, then the Court should dismiss the Amended Petition because the Petitioner has not complied with the requirements of the statute. The Petitioner contends that it is not required to follow the provisions of the statute because it is not a pipeline company. Amended Petition at ¶ 5. However, because the statute should apply to any action to condemn a pipeline right-of-way, the Petitioner was required to have complied with the statute. If so, the Petitioner was required to show that the route it has selected for its pipeline represents the most direct route practicable. C.R.S. § 38-1-101.5(1)(a). The route the Petitioner has chosen is not a direct route, and it should be required to determine whether a more direct route is practicable. The proposed route begins at a point of diversion on Elk Creek, veers off to the southwest across Lot 133 and then on to Lot 134, all the way across Lot 134 to its western boundary. See Exhibits A & B to the Amended Petition. A more direct route – namely, directly to the south across Lot 133 – appears to be available, and unless the Petitioner can demonstrate that such a route is not practicable, the Petitioner should be required to follow that route. Or, stated in the terms of the statute, if the more direct route is practicable, then Petitioner cannot meet its burden of showing that the route it is seeking is necessary. For that reason, the Amended Petition should be dismissed.

Likewise, C.R.S. § 38-1-101.5(1)(c) requires the Petitioner to consider existing utility rights-of-way before any new rights-of-way are taken if the land to be taken is adjacent to existing utility rights-of-way. Part of the property the Petitioner wants to take abuts a county road, Meadow Drive. If the Petitioner were required to take the direct route to the south across Lot 133, the pipeline would also abut Meadow Drive at the southern end of the route. MLH understands that there is a ten-foot utility easement which is part of the Meadow Drive right-of-way. If so, the Petitioner must at least consider using such right-of-way, and explain why that route won't work before it should be able to take private property to install its pipeline. Again, until it has undertaken that consideration, it cannot demonstrate that it is necessary to condemn the property it is seeking, and the Amended Petition should be dismissed.

WHEREFORE, MLH requests that the Amended Petition be dismissed for failing to comply with C.R.S. § 38-1-101.5(1), and that the Court enter such additional relief, including the award of fees pursuant to C.R.S. § 38-1-122(1), as the Court deems appropriate.

Dated December 5, 2007

Respectfully submitted,

/s Todd W. Miller
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ATTORNEYS FOR MLH

CERTIFICATE OF SERVICE

I certify that on December 5, 2007, I served a copy of the foregoing document to the following by

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