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Condemnation Issues Under the Natural Gas Act

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I. INTRODUCTION

The interstate distribution of natural gas is governed by two federal statutes: The Natural Gas Act, 15 U.S.C. §§ 717 to 717Z (the "NGA") and the Natural Gas and Hazardous Materials Pipeline Safety Act, 49 U.S.C. §§ 60101 to 60125 (the NGPSA"). The NGA is a comprehensive scheme regulating the interstate transportation and sale of natural gas for ultimate distribution to the public. 15 U.S.C. § 717.[1] The NGPSA is a comprehensive federal statute regulating the safety of natural gas pipelines. 49 U.S.C. § 60102.

The NGA provides that a natural gas company must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC") in order to transport, sell, construct, extend, acquire or operate any natural gas facility. 15 U.S.C. §717f(c). To obtain a certificate, a natural gas company must submit an application to FERC to engage in these activities. 15 U.S.C. §717f(d). The process FERC uses to determine whether to issue a certificate of public conference and necessity is subject to extensive federal regulation. 18 C.F.R. Part 157. The nature of the FERC proceedings is beyond the scope of this paper. For purposes of this paper, the FERC process analyzes all aspects of the proposed action including the location, construction, and environmental impacts of the proposed action.

Once this administrative process is completed, FERC will issue a certificate if two conditions are satisfied: 1) the natural gas company is able and willing to do the acts and perform the services proposed, to conform to the provisions of the NGA, and to conform to the regulations of FERC, and 2) the service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity to the extent authorized by the certificate. 15 U.S.C. § 717f(e).

The NGA specifically provides that a natural gas company has the power of eminent domain to construct natural gas pipelines and facilities:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline or pipelines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary for the proper operation of such pipeline or pipelines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice or procedure in any action or proceeding for that purpose in the district court of the United States shall confirm as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the state where the property is situated: *Provided*, that the United States district courts shall have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717f(h) (emphasis in original). This paper examines several issues arising under the condemnation procedures authorized by the NGA.

II. THE NGA AND THE NGPSA PREEMPT STATE LAW

The NGA, 15 U.S.C. § 717(a), provides that the business of transporting and selling natural gas for the ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate commerce is necessary and in the public interest. The NGA, 15 U.S.C. § 717(b), also expressly states that its provisions and the regulations promulgated thereunder apply to the transportation of natural gas in interstate commerce and to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, industrial, and other uses.

As part of the comprehensive federal regulatory scheme, Congress has also adopted the NGPSA. This Act provides that

[T]he Secretary of Transportation shall prescribe the minimum safety standards for pipeline transportation and for pipeline facilities. The standards . . . apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities.

49 U.S.C. § 60102(a)(1)(B). The NGPSA further provides that

A state may adopt additional or more stringent safety standards for *intrastate* pipeline facilities and intrastate pipeline transportation *only* if such standards are compatible with the minimum standards prescribed under this paper. A state agency may *not* adopt or continue in force safety standards for *interstate* pipeline facilities, or interstate pipeline transportation.

49 U.S.C. § 60103(c) (emphasis added).

In 1988, the United States Supreme Court found that Congress had occupied the field of matters relating to the transportation of natural gas in interstate commerce.[2] *Schneiderwind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). In *Schneiderwind*, the State of Michigan, pursuant to a state statute, was requiring natural gas companies to obtain approval of the Michigan Public Service Corporation before the companies could issue long-term securities. The companies sought a declaratory judgment that the state lacked jurisdiction over their security issuances because the state statute was preempted by the NGA and because the state statute violated the commerce clause. The Supreme Court began its analysis by listing the three ways in which a state statute may be preempted: 1) Congress explicitly defines the extent to which its enactments preempt state law; 2) Congress implicitly preempts state law by occupying a given field to the exclusion of state law;[3] or 3) Congress has not entirely displaced state law, but the state law is preempted when it actually conflicts with state law. *Id.* at 299-300.

The Court recognized that the NGA is a "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce" and that it gives "FERC the exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Id.* at 300-01 (internal quotations omitted). The Court also recognized that FERC exercises "authority over the rates and facilities of natural gas companies" and that the NGA gives "FERC a number of tools for examining and controlling the issuance of securities of natural gas companies in the exercise of its comprehensive authority." *Id.* at 301.

After cataloging the tools given FERC, the Court also recognized that the NGA does not expressly authorize FERC to regulate the issuance of securities of natural gas companies. *Id.* at 304. The Court went on to analyze whether the Michigan statute "amounts to a regulation in the field of natural gas transportation and rates that Congress intends FERC to occupy." *Id.* The Court found that the state statute did attempt to regulate rates and facilities of natural gas companies and was preempted. *Id.* at 306. In making this determination, the Court examined the purposes of the NGA and compared them to the purposes of the state statute requiring the pre-issuance approval before the companies could sell long-term securities:

Each of these uses of [the state statute], however, is an attempt to regulate matters within FERC's exclusive jurisdiction. By keeping a natural gas company from raising its equity levels above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' This is regulation of rates. The other aim of [the state statute], seeking to ensure that a company is financed in a way that will allow proper maintenance of its facilities and continuance of its services, for the benefit of both ratepayers and investors, also falls within FERC's exclusive purview since those facilities are a critical part of the transportation of natural gas and sale for resale in interstate commerce. In short, the things [the state statute's] regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority.

Id. at 308.

Thus, when Congress enacted the NGA, it intended to create a comprehensive and effective regulatory scheme which would occupy the field to the exclusion of state regulation. *Id.; see also, Tenneco, Inc. v. Sutton*, 530 F.2d 411 (1981).

Like the NGA gives authority to FERC to regulate interstate pipeline rates and facilities, the NGPSA gives Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety authority to regulate interstate pipeline safety. Both Acts taken together deal with virtually every conceivable aspect of natural gas pipeline safety and construction.

Accordingly, the courts have repeatedly held that state and local regulations which impact the location, construction, operation, maintenance, and safety of interstate natural gas pipelines are invalid. *See e.g., ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465 (8th Cir. 1987). In *ANR Pipeline*, the Eighth Circuit ruled that the portions of a state statute that attempted to regulate an interstate natural gas pipeline company were preempted by federal law:

The [state] statute requires pipeline companies to submit detailed plans regarding the proposed construction of underground pipelines [citation omitted]; to undergo a public notice and evidentiary hearing procedure, [citation omitted]; to apply for and obtain a permit before beginning construction, [citation omitted]; to preserve topsoil, drainage structures, and underground improvements in burying pipelines, [citation omitted]; and to submit to an inspection program designed to insure compliance with the statute and its regulations, [citation omitted]. Permits issued under the statute are subject to "such terms, conditions and restrictions as to safety requirements and as to location and route as may be determined by [the Commission] to be just and proper."

Id. at 466-67. The court concluded that the Natural Gas Pipeline Safety Act provided that "[n]o State agency may adopt or continue in force any such standards applicable to interstate gas transmission facilities. . . ." *Id.* at 468.

The Eight Circuit again found that the State of Iowa's renewed attempts to regulate natural gas companies were preempted. *Northern Natural Gas Co. v. Iowa Utilities Bd.*, 377 F.3d. 817 (8th Cir. 2004). After the Eight Circuit's decision in *ANR Pipeline*, the Iowa legislature again enacted environmental legislation dealing with the preservation of topsoil, revegetation, and the like. The court found that Congress delegated to FERC the authority to regulate "a wide range of environmental issues relating to pipeline facilities, and... 'because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.'" *Id.* at 823 (quoting *National Fuel Gas Supply Corp. v. Public Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990)).

Similarly, the Minnesota District Court enjoined enforcement of a conditional land use permit issued by a Minnesota county to a pipeline company seeking to construct an interstate pipeline through the county. *Northern Border Pipeline Co. v. Jackson County, Minnesota*, 512 F. Supp. 1261 (D. Minn. 1981). The permit would have required the company to bury the pipeline at a minimum depth of six feet, while applicable federal regulations required a depth of only three feet. *Id.* at 1263. The district court found that both the text and the legislative history of the NGPSA "indicate that congress has unmistakenly [sic] ordained that the federal law preempts state law" in the regulation of interstate gas pipeline safety, and that "there is no room for any state regulation be it consistent with, or more or less stringent than the federal legislation."

The Eastern District of Louisiana Court found that Congress had preempted the field of interstate pipeline safety, and specifically had prohibited the states from "doing anything in this regard." *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F. Supp. 1138, 1141 (E.D. La. 1970), aff'd, 445 F.2d 301 (5th Cir. 1971) (per *curiam*). In rejecting the defendant's argument that its own gas pipeline construction standards were not preempted because they were identical to the federal standards, the court observed that Congress had "left nothing to the states with respect to regulation and control" of interstate pipeline safety and that "all regulatory authority and control is with the federal government." *Id.* 319 F. Supp. at 1142.

It is well established that a state cannot interfere with the federal regulation of a natural gas company operating its facilities under the jurisdiction of the FERC. *Federal Commerce Comm'n v. Eastern Oil and Gas Co.*, 338 U.S. 905 (1950). This prohibition has been extended to local governmental attempts to regulate interstate natural gas facilities through land use, zoning and development regulations. For example, in *Northern Border Pipeline Company*, the district court enjoined the Jackson County Board of County Commissioners from attempting to regulate a natural gas pipeline facility through the use of its zoning power. *Id.*, 512 F. Supp. 1261 (D.C. Minn. 1981). In that case, the court ruled, "We hold that the County lacks statutory authority to exercise its zoning power over interstate gas pipelines."

Similarly, the Third Circuit was faced with a question of the extent to which a state may legitimately interfere with interstate commerce through the exercise of its police power. *Transcontinental Gas Pipeline Corp. v. Hackensack Meadowlands Dev. Comm'n*, 464 F.2d 1358 (3rd Cir. 1972). The defendant, *Hackensack Meadowlands Development Commission ("Commission")*, was an autonomous regional agency established with the power to adopt a master plan for the physical development of all lands lying within the Hackensack Meadowlands district. The local development regulations in question provided that a building permit must be obtained prior to the commencement of any construction on lands covered by the master plan. After several meetings, the *Commission* refused to issue the necessary permit on the grounds that the storage facility contemplated was not a "permitted use" under the master plan. Ultimately, the court ruled that the state may not exercise its police power when the necessary effect would be to place a substantial burden on interstate commerce thereby upholding the district court's injunction against the *Commission's* attempt to regulate the facility. *Id.*

Additionally, the District Court of New Jersey faced a situation in which the Transcontinental Pipeline Corporation brought suit to restrain defendant from interfering with construction of a natural gas pipeline through its municipality. *Transcontinental Gas Pipeline Corp. v. Borough of Milltown, Designee, Middlesex County*, 93 F. Supp. 287 (D.C. N.J. 1950). The district court held that enforcement by a municipal corporation of its zoning ordinance to prohibit a pipeline company already holding a certificate of public convenience and necessity under the NGA from constructing its interstate transportation pipeline through the city was an undue burden upon interstate commerce. Thus, the local zoning ordinances in question were preempted:

[t]he fact remains that the mere claim by defendant that its ordinance requires plaintiff to locate its pipe line in an alternative route, suggested as available, does not fortify it with power to impede the plaintiff in the prosecution of its

legal objective in the field of interstate commerce. Such an attempt to obstruct interstate commerce under guise of an assertion of exercise of the police power must fail.

Id. at 295.

Similarly, courts have held that local regulation of a county or municipality's streets, alleyways, and other public rights of way are preempted under the NGA. *See e.g., Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971 (N.D. Ill. 2002) (the court rejected arguments by governmental entities that land held by them could not be condemned because the NGA gave the natural gas company "the overriding authority to obtain easements from the governmental authorities and any state law to the contrary was preempted); *USG Pipeline Co. v. 1.74 Acres In Marion County*, 1 F. Supp. 2d 816 (E.D. Tenn. 1998) (the court found that Tennessee law which provided that streets, alleys, squares, or highways of a municipality could not be condemned without the consent of the municipality was preempted under the NGA).

In sum, the courts have been clear that state and local regulation of pipelines is almost always precluded because the NGA and the NGPSA preempt such regulations.

III. BOTH FEDERAL AND STATE COURTS LACK JURISDICTION TO COLLATERAL ATTACK ISSUES WHICH ARE PROPERLY CONSIDERED BY FERC

As stated earlier, the NGA gives FERC the exclusive jurisdiction to regulate the rates and facilities of interstate natural gas pipelines. 15 U.S.C. § 717b(2); *Federal Commerce Comm'n*, 338 U.S. 905. Similarly, the exclusive method to attack a FERC certificate is by direct appeal as set forth in 15 U.S.C. § 717r. Accordingly, any attempt to challenge a FERC order in any federal or state court is without merit because such courts lack jurisdiction to entertain such a challenge. *See e.g., Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989).

In *Williams Natural Gas Co.*, a natural gas company holding a FERC certificate sought to condemn rights-of-way across a city's streets and to quiet title to those rights-of-way as against a local natural gas distribution company's franchise rights. Prior to the natural gas company filing its application for a FERC certificate, the local distribution company with a city franchise filed an action in state court seeking a declaratory judgment that it had the right to use the city streets to the exclusion of a non-franchised transporter. Soon thereafter, the natural gas company filed its application for a FERC certificate. During the FERC proceeding, the local distribution company argued that FERC lacked jurisdiction because the application was local in nature.

FERC disagreed and issued a certificate of public convenience and necessity. On the same day, the state court ruled that the local distribution company's franchise insulated it from competition from non-franchisees. The state court reserved its ruling on whether the NGA preempts state law on the issue.

The natural gas company then brought its action in federal court to condemn the rights-of-away. The federal court shortly thereafter authorized the natural gas company to condemn the city rights-of-way in order to install a pipeline.

In response, the local distribution company obtained a temporary restraining order from the State Court enjoining the natural gas company from constructing the pipeline. The federal court responded several days later by enjoining enforcement of the state court's temporary restraining order. The federal court declined to enjoin the state court from considering the preemption issue.

The state court soon thereafter ruled that the FERC certificate did not preempt the state franchise requirement and permanently enjoined the construction and operation of the pipeline. The federal court thereafter entered its final order granting the natural gas company the right to construct, maintain and operate the pipeline. The federal court, however, refused to grant further injunctive relief. The federal court did certify the matter for immediate review.

The Tenth Circuit held that the judicial review provisions of the NGA to review challenges to a FERC certificate "are exclusive." *Id.* at 261. The court held that "a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding." *Id.* at 262. The court further held that the prohibition on collateral attacks applies whether brought in federal or state courts. *Id.* This is true even when the issue being challenged is the agency's jurisdiction. *Id.* at 263. Finally, the court held that the "eminent domain authority granted by the district courts under . . . the NGA, 15 U.S.C. § 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function is not appellate but, rather, to provide for enforcement." *Id.* at 264.

Therefore, in a condemnation proceeding under the NGA, the issues that could have been raised in a FERC proceeding cannot be raised in the condemnation proceeding. In other words, the only issues to be determined in a condemnation proceeding are those issues necessary to enforce the FERC certificate.

IV. THE "PRACTICE AND PROCEDURE...OF THE STATE" CLAUSE OF 15 U.S.C.A. § 717f(h) HAS BEEN SUPERSEDED BY RULE 71A, FEDERAL RULES OF CIVIL PROCEDURE

The condemnation provision of the NGA provides in part as follows:

The practice and procedure in any action or proceeding for that purpose in the district court of the United States *shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated.*

15 U.S.C.A. § 717f(h) (emphasis added). This provision was enacted in 1938, with the effect that while condemnation cases were governed substantively by federal law, they were governed procedurally by the law of the state in which the land was located. At this time, federal courts did not have a uniform rule for dealing with condemnation cases in federal court.

In 1951, however, Congress enacted Rule 71A, *Federal Rules of Civil Procedure*. The rule provides that "The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule." The Advisory Committee Notes state that "Rule 71A affords a *uniform procedure for all cases* of condemnation invoking the national power of eminent domain, and...supplants all statutes prescribing a different procedure." (Emphasis added).

As a result of the 1951 amendment to the Federal Rules of Civil Procedure, the "practice and procedure . . . of the State" clause of 15 U.S.C.A. § 717f(h) has been superseded by Rule 71A. *See e.g., USG Pipeline Co. v. 1.74 Acres,* 1 F. Supp. 2d 816 (E.D. Tenn. 1998); *National Fuel*, 84 F. Supp. 2d at 415 ("[T]he court finds that Rule 71A supersedes the practice and procedure clause of section 717f(h) and that it is federal, not state, procedural law that governs the present condemnation proceeding.").

In similar circumstances, the United States Supreme Court has twice ruled that Rule 71A superseded other federal statutes that had substantially similar provisions to the NGA's clause providing that proceedings in federal courts would conform to the state's practice and procedure in which the property was located. *United States v. 93.970 Acres of Land*, 360 U.S. 328, 333 n.7 (1959) (Court held that federal statute requiring condemnation actions to be prosecuted in accordance with the condemnation laws of the state where suit was instituted was clearly superseded by Rule 71A, Federal Rules of Civil Procedure); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 4 n.2 (1984) (under federal

statute, condemnation actions were to "conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State;" however, "Rule 71A capped an effort to establish a uniform set of procedures governing all condemnation actions brought in federal court").

In federal court, state law governs neither substantively nor procedurally. *National Fuel*, 84 F. Supp.2d at 415. That is because Rule 71A governs procedurally, while the Natural Gas Act governs substantively. *Id.*

V. SPECIFIC ISSUES IN CONDEMNATION ACTIONS WHERE THE NATURAL GAS ACT AND RULE 71A HAVE BEEN HELD TO PREEMPT STATE LAW

In condemnation cases, issues of state law have been held to be preempted under the NGA and Rule 71A. An often occurring issue is whether a natural gas company must show a more necessary public use as required under state law where property is already being used for a public use. Such attempts have been rejected. In rejecting one such argument, the Northern District of Illinois held that "Congress, in the Natural Gas Act, had enacted a comprehensive scheme that preempted state law when that law was an obstacle to fulfillment of the NGA purposes." *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002) (*citing Schneidewind v. ANR Pipeline Co.*, 485 U.S. at 294). Because the NGA controls substantively and Rule 71A controls procedurally, any reliance on state law IS preempted in an action brought in federal court.

Similarly, the District court of Nevada rejected application of a Nevada law prohibiting condemnation of property already appropriated for the public use except where the new use is "more necessary":

In light of the *supremacy* of federal law, this Court declines to attempt to balance the differing public uses. *It is manifestly unlikely that Congress would have created the substantive right of eminent domain, clearly addressed in the Natural Gas Act, only to have that right held hostage to various state substantive schemes.* Under a broad interpretation of "practice and procedure," a state could conceivably eliminate all eminent domain proceedings by use of state statutes. Such an usurpation of a federal substantive right would violate the supremacy clause of the U.S. Constitution.

Kern River Gas Transmission Company v. Clark County, 757 F. Supp. 1110, 1118 (D. Nev. 1990); *see also, USG Pipeline Co. v. 1.74 Acres in Marion County*, 1 F. Supp. 2d at 825-26 (holding NGA preempts state law requiring a plaintiff to prove that before being permitted to condemn that its public use of the property is a higher public use than the existing public use).

Other state laws have likewise been preempted in condemnation actions. In the District of Massachusetts the defendant argued that Massachusetts law prohibited the natural gas company's condemnation action brought under the NGA. *Tennessee Gas Pipeline Co. v. Massachusetts Bay Transp. Auth.*, 2 F. Supp. 106 (D. Mass. 1995). The defendant argued that a state statute barred the taking of property within the location of any railroad. *Id.* at 111. The court rejected this argument because the state statute was preempted by the NGA in that the NGA "occupies the field" with respect to the regulation of natural gas 'rates and facilities'" *Id. citing Shneidewind*, 485 U.S. at 293. The Court analyzed the preemption issue as follows:

There is no question that the pipeline itself is a 'facility' used in the transportation of natural gas. The [defendant's] argument, however, is that [the state statute] is not a regulation of natural gas facilities because it concerns the *taking* of the property for the facilities. The argument is unpersuasive. A pipeline must be built and housed on property, and interference with access to that property is interference with the facility itself. The [defendant] cites no authority suggesting otherwise. In any event, the Massachusetts statutory prohibition of the taking of certain property by eminent domain is in direct conflict with the federal authorization, and that conflict is dispositive of the preemption issues. *See Schneidewind*, 485 U.S. at 300 ('[E]ven where Congress has not entirely displaced state regulations in a particular field, state law is pre-empted when it actually conflicts with federal law.') It is obvious that the federal regulatory scheme Congress established in the [NGA] could not function if state law was allowed to prohibit taking by eminent domain for gas facilities.

Id. (emphasis in original).

The NGA preempts state constitutional provisions as well. *See, e.g., Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 747 F. Supp. 401 (N.D. Ohio 1990). In *Columbia Gas*, the company had a FERC certificate to store natural gas in an underground storage easement. Prior to bringing a condemnation action, the company had begun storing natural gas underground, and the gas migrated to the property for which it later brought the condemnation proceedings. The defendants brought a counterclaim for trespass seeking compensatory and punitive damages for the time the company stored natural gas on their property prior to bringing the condemnation action under the NGA.

The Ohio constitution limits the right of the sovereign to condemn property. It provides just compensation must be paid *before* property can be taken. *Id.* at 403. Consequently, when property is taken before compensation is paid, the condemning authority is subject to civil remedies including trespass and punitive damages. *Id.* The court found that the Ohio constitutional provision was preempted under the Supremacy Clause of the United States constitution.[4] In finding preemption, the Court held as follows:

The Court reads [15 U.S.C. § 717f(h)] in *para materia* with [15 U.S.C. § 717(b)][5] of the [NGA] and concludes that the landowner's remedies with respect to a taking of his property by the United States Government or by a private corporation authorized to exercise the power of eminent domain are controlled and limited by federal substantive law. . . .

The Court concludes that the State of Ohio has no power to regulate, directly or indirectly, a natural gas storage field certified by the Federal Energy Regulatory Commission.

Id.

In sum, the NGA and Rule 71A together preempt state regulations that interfere with a natural gas company's ability to condemn property under § 717f(h).

VI. RULE 65, FEDERAL RULES OF CIVIL PROCEDURE, PROVIDES FOR PRELIMINARY INJUNCTIVE RELIEF FOR POSSESSION PENDING THE TRIAL ON JUST COMPENSATION

The NGA, does not specifically provide that a natural gas company may take possession of property pending the trial to determine just compensation. *See e.g., East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004) (The NGA, "like most statutes giving condemnation authority to government officials or private concerns, contains no provision for quick-take or immediate possession"); *USG Pipeline Co. v. 1.74 Acres*, 1 F. Supp.2d at 825 ("[N]othing in the Natural Gas Act automatically authorizes the possessor of an FERC Certificate to take immediate possession of the property sought to be condemned prior to the condemnation proceeding. Plaintiff has not directed the Court to anything in the Act it contends grants such authority."); *Northern Border Pipeline Co. v. 127.79 Acres of Land, More or Less in Williams County, N. D.* ("*Northern Border I*"), 520 F. Supp. 170, 172 (D. N.D. 1981) ("No statutory authority exists which would authorize a private party, such as the plaintiff, to take immediate possession of the real property prior to the condemnation proceeding."). Despite the NGA's silence on the issue, most courts have held that a natural gas company may be granted possession pending a trial for just compensation under a preliminary injunction procedure of

Rule 65. *Se, e.g., Sage*, 361 F.3d at 825 ("[W]e hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction."); s*ee also Northern Border I*, 520 F. Supp. at 172; *USG Pipeline Co. v. 1.74 Acres*, 1 F. Supp. 2d at 826 ("The Court finds the reasoning in *Northern Border* [*I*] compelling and will follow that reasoning here."); *Kern River Gas Transmission Co.*, 757 F. Supp. at 1120. This conclusion is derived from the general proposition that "when a substantive right exists, an equitable remedy may be fashioned to give effect to that right if the prescribed legal remedies are inadequate." *Sage*, at 823.

Some courts have refused to grant immediate possession and have suggested that to rule otherwise goes beyond Congress' intent. *Humphries v. Williams Natural Gas Co.*, 48 F. Supp.2d 1276, 1282 (D. Kan. 1999) ("In short, this court does not believe that Congress intended the condemnation authority granted by § 717f(h) to cloak holders of certificates of public convenience and necessity with impunity to commit trespasses and other civil wrongs."); *Northern Border Pipeline Co. v. 86.72 Acres of Land* ("*Northern Border II*"). In *Northern Border II*, the Court held that

[a]lthough at least one district court has entered such an injunction in a factually similar case, *see Northern Border Pipeline v. 127.79 Acres of Land*, 520 F. Supp. 170 (D.N.D.1981), Northern Border's argument misapprehends the relief available in preliminary injunction proceedings. A preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought. Because it disavows any claim that it has a substantive entitlement to the defendants' land *right now*, rather than an entitlement that will arise at the conclusion of the normal eminent domain process, Northern Border is not eligible for the relief it seeks.

144 F.3d 469, 471 (7th Cir. 1998).[6]

However, cases interpreting *Northern Border II* have limited its ruling to situations where the gas company fails to obtain an order determining that it had the right to condemn before seeking the preliminary injunction.

But [Northern Borders II] involved an entirely different set of circumstances than those presented here. Specifically, *the gas company in Northern Border [II] did not obtain an order determining that it had the right to condemn before it sought a preliminary injunction.* Its motion for an injunction was based entirely on the existence of a certificate of public convenience and necessity. Under those circumstances, the Seventh Circuit held that the gas company had no right to equitable relief because the company "did not present an argument grounded in substantive law establishing a preexisting entitlement to the property." *Id.* at 472. *Two district court decisions in the Seventh Circuit have interpreted Northern Border to mean that immediate possession is improper only when there has been no order confirming the right to condemn. N. Border Pipeline Co. v. 64.111 Acres of Land,* 125 F. Supp.2d 299, 301 (N.D.Ill.2000)("in this case, plaintiff does have a preexisting entitlement to the easements, the judgments of condemnation, which make an award of possession appropriate"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,* 210 F. Supp. 2d 976, 979 (N.D.Ill.2002) (same). *We agree with the assessment of the two district courts. The gas company in Northern Border had simply failed to seek an order determining that it had the right to condemn. Without having that right in substantive law determined, the company could not invoke equity.*

Sage, 361 F.3d at 827-28 (emphasis added).

Courts have granted immediate possession on two different grounds. In *Northern Border I*, the court granted immediate possession by virtue of the "inherent powers doctrine," which "provides a federal court with various common law equity devices to be used incidental to the authority conferred upon the court by rule or statute." 520 F. Supp. at 172. The inherent powers doctrine is not statutory in nature. *Id.* Other courts have granted immediate possession pursuant to Rule 65(a), *Federal Rules of Civil Procedure*, holding that "gas company must satisfy the strict requirements for a preliminary injunction," i.e. "demonstrate that it will suffer irreparable harm without immediate possession, and the company's harm must be weighed against any harm to the landowner." *Sage*, 361 F.3d at 825. The standard is similar whether a court proceeds under the inherent powers doctrine or Rule 65(a). *Northern Border I*, 520 F. Supp. at 173 (granting immediate possession where "[t]he plaintiff [] demonstrated to the Court that its legal remedy is inadequate under the circumstances and that it will be subjected to great delay and expense if immediate possession is not granted."). Importantly, under both avenues used to grant immediate possession, courts looked to Congress' intent and have recognized that under proper circumstances immediate possession furthers the purposes of the NGA.

In *Northern Borders I*, the Court stated that its power to grant equitable relief was "*incidenta*l to the authority conferred upon the court by rule or statute." 520 F. Supp. at 172 (emphasis added). The record before the court indicated that the gas company would incur significant "delay and expense" if it could resort to the condemnation proceeding alone. *Id.* The court did not believe that this delay and expense was in keeping with Congress' intent:

it is important to note that Congress, in enacting the Alaska Natural Gas Transportation Act (Title 15 U.S.C. s 719 *et seq.*), has declared that:

"(1) *A natural gas supply shortage exists* in the contiguous states of the United States;

(2) Large reserves of natural gas in the State of Alaska could help significantly to alleviate this supply shortage;

(3) *The expeditious construction of a viable natural gas transportation system* for delivery of Alaska natural gas to the United States Markets *is in the national interest*."

Id. (emphasis added).

The court determined that exercise of its inherent equitable powers was fitting where the gas company's legal remedy was inadequate, particularly when delay and expense ran contrary to Congress' purpose for the NGA. *Id. See also USG Pipeline Co.*, 1 F. Supp. 2d at 818. Before following the holding of *Northern Borders I*, the court noted that "Congress determined 'the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.'" *Id.* (*quoting* 15 U.S.C. § 717). Also, Congress' intent to facilitate the presence of an adequate supply of natural gas has been recognized by other courts outside of the immediate possession context. *See, e.g., Tenneco, Inc. v. Sutton*, 530 F. Supp. 411, 434 (M.D. La. 1981) ("[T]hrough the enactment of the NGA and the NGPA, Congress has expressed its intent to establish a regulatory scheme to provide adequate supplies of natural gas to the interstate market."); *Florida Power & Light Co. v. Federal Energy Regulatory Comm'n*, 598 F.2d 370, 379 (5th Cir. 1979) ("It is well established, however, that the overall purpose of the Natural Gas Act is to protect the interest of consumers in an adequate supply of gas and at reasonable rates."). It is clearly Congress' intent to incentivize production of natural gas. *Railroad Comm'n of Texas v. Lone Star Gas Co., a Div. of Enserch Corp.*, 844 S.W.2d 679, 694 (Tex. 1992) ("Although Congress desired 'fair prices,' it did not require the lowest possible price because the NGPA in fact *enacted higher statutory rates for certain categories of gas in order to stimulate natural gas production*.") (emphasis added).

In *Sage*, the court held "that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the Court may exercise equitable powers to grant the immediate possession through the issuance of a preliminary injunction"). *Id.*, 361 F.3d at 828. The Ninth Circuit has adopted two tests for determining whether a preliminary injunction will be granted. The first test is the traditional test and requires a plaintiff to show the following:

- 1. a strong likelihood of success on the merits,
- 2. the possibility of irreparable injury to the plaintiff if the preliminary relief is not granted,
- 3. a balance of hardships favoring the plaintiff, and
- 4. advancement of public interest in certain cases.

See, e.g., Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. United States Dep't of Agric., 415 F.3d 1078, 1092 (9th Cir. 2005). The alternative test requires a plaintiff to show either of the following:

- 1. a combination of probable success on the merits and the possibility of irreparable injury, or
- 2. that serious questions are raised and the balance of hardships tips sharply in the plaintiffs favor.

Id. at 1092-93. These two formulations are not separate tests but represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Id.* at 1093. The *Sage* Court used a test similar to the traditional test used by the Ninth Circuit.[7]

In determining a likelihood of success on the merits, the *Sage* Court found that the Company had shown it will succeed on the merits because it has the right to condemn the property under the NGA.

In determining the possibility of irreparable injury to the plaintiff, the *Sage* Court found the following facts established irreparable harm:

- Scheduling and conducting hearings on each property would take an extended time;
- Constructing a pipeline is a complex process that must be completed in phases;
- Certain portions of the pipeline have to be completed before other portions;
- Any single parcel has the potential to stall the entire project;
- The plaintiff was under an order for FERC to complete the pipeline by a certain time, and it would be impossible to meet this time line without a preliminary injunction being issued;
- The plaintiff had entered into contracts with electrical generation plants and utilities to supply natural gas by a certain date and that without an injunction the plaintiff could be found to be in breach of those contracts;
- The plaintiff's inability to satisfy these contracts would have negative impacts on its customers and the consumers, these customers serve;
- The plaintiff would lose in excess of $5 million if a delay in construction of the pipeline caused it to breach these contacts; and
- Delay of the pipeline would hinder economic development efforts in several counties in the State.

The next element the *Sage* Court examined was the likelihood of harm to the landowners. In finding the harm to be landowners "slight at best" the *Sage* Court relied on the following facts:

- Any loss of use of the land was a timing argument because the land would still be disturbed albeit at a later time if possession did not occur until after just compensation was determined;
- Any early loss of use argument was "blunted by the right of the land owner to draw down the money the plaintiff had deposited with the Court;"
- The amount deposited was based on an independent appraisal obtained by the company;
- Any loss of negotiating power argued by the landowners if an injunction was given was unconvincing because the Fifth Amendment guarantees just compensates no matter when possession occurs; and
- Any loss to the owners for value based on unique needs or idiosyncratic attachment to property was a burden of common citizenship.

Finally the *Sage* Court found that the expeditious completion of the pipeline was in the public interest based on the following:

- The NGA was passed to ensure consumers would have access to an adequate supply of natural gas at reasonable prices;
- FERC conducted an analysis and found the project would provide these Congressional goals and service the public interest;
- The project would bring natural gas to certain parts of the state for the first time;
- The project would help local economies attract businesses; and
- On a larger scale, the project would make gas available for electric generation plants.

The *Sage* Court also found that because the injunction was mandatory, its review was "more searching." *Id.* at 829. The Court found this elevated level of scrutiny was satisfied based upon the following:

- The right to take under the NGA was clear;
- FERC determined the project was necessary to serve the public interest;
- FERC determined the pipeline needed to be completed by a certain time; and the deadline could not be met without immediate possession; and
- Without the immediate possession, the plaintiff would face irreparable harm such as increased construction costs and losses from its breach of gas supply contracts.

In sum, the vast majority of courts have issued a preliminary injunction for possession pending a trial on just compensation.

VII. MOST COURTS HAVE NOT IMPOSED A GOOD FAITH REQUIREMENT UNDER THE NGA

A few federal courts have imposed a good faith negotiation requirement upon holders of a FERC certificate of public convenience and necessity in order to exercise the right to eminent domain granted under the Natural Gas Act, 15 U.S.C. § 717f(h). *See e.g., National Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) ("In addition to showing an inability to agree on a price with the landowner, the plaintiff utility company must also establish that it engaged in good faith negotiations with the landowner."); *USG Pipeline Co. v. 1.74 Acres*, 1 F. Supp. 2d 816, 822 (E.D. Tenn. 1998) ("Courts also have imposed a requirement that the holder of the FERC Certificate negotiate in good faith with the owners to acquire the property.").

However, a strong trend in federal case law suggests that the imposition of a good faith negotiation requirement is improper. For example, as the District of Kansas recently put it, the NGA "only requires that the party seeking to condemn be unable to acquire the property by contract or unable to agree on compensation to be paid for the property. The court declines to demand more than the statute requires by its terms." *Kansas Pipeline Co. v. 200 Foot by 250 Foot Piece of Land*, 210 F. Supp.2d 1253, 1257 (D. Kan. 2002). Similarly, the Eastern District of Louisiana characterized the imposition of the good faith requirement as "judicial gloss" without basis in the NGA and noted that every court that had imposed that requirement had not denied or even delayed condemnation when the failure to engage in good faith negotiations was alleged. *See 529.42 Acres of Land*, 210 F. Supp. 2d at 973-74. Most recently, the District of Massachusetts and the Western District of Virginia echoed this analysis. *East Tennessee Natural Gas, LLC v. 3.62 Acres*, 2006 WL 1453937, *10 (W.D. Va. 2006) ("[N]othing in the Act or Federal Rule of Civil Procedure 71A requires the condemnor to negotiate in good faith. All the Act requires is a showing that the plaintiff has been unable to acquire the property by contract or has been unable to agree with the owner of the property as to the compensation to be paid."); *East Tennessee Natural Gas, LLC v. 1.28 Acres*, 2006 WL 1133874, *10 (W.D. Va. 2006) (same); *Maritimes & Northeast Pipeline, L.L.C. v. Decoulos*, 146 Fed. Appx. 495, 498, 2005 WL 1950679, *2 (Mass. 2005) ("Once a CPCN is issued by the FERC, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking.").

In sum, the language of the NGA does not impose a good faith requirement and most courts that have directly addressed the good faith negotiation issue have ruled that no such requirement exists.

VIII. NO RIGHT TO JURY TRIAL EXISTS UNDER FEDERAL LAW

It is well-established that a landowner does not have a constitutional right to a jury trial in an eminent domain proceeding. *U.S. v. Reynolds*, 397 U.S. 14, 18 (1970) ("[I]t has long been settled that there is no constitutional right to a jury in eminent domain proceedings."); *U.S. v. Keller*, 142 F.3d 718, 720 (4th Cir. 1998). Rather, in all condemnation actions commenced under federal eminent domain power, the availability of a jury trial is governed by Rule 71A(h) of the *Federal Rules of Civil Procedure*. *Reynolds*, 397 U.S. at 19; *Keller*, 142 F.3d at 720. This Rule provides that the district court is authorized to decide all issues, whether legal or factual, except the issue of compensation. Even then, the court may, because of the "character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice," order that the issue of compensation be determined by a court-appointed, three-person commission. *Fed.R.Civ.P.* 71A(h). A landowner's right to a jury trial may also be abrogated in specific circumstances by other federal law.

A landowner also only has a limited opportunity to invoke its option to a jury trial. Rule 71A(h) provides that a demand for jury trial must be made within twenty days of service of notice of the condemnation complaint. Courts have upheld decisions to deny jury trials to landowners who did not submit timely demands. *See, e.g.*, *Keller*, 142 F.3d at 721. However, the Ninth Circuit tends to overlook the hard and fast application of the timeliness rule. *See U.S. v. 79.36 Acres of Land*, 1991 WL 275355, at *1 (9th Cir. 1991) (unpublished) ("We have in the past refused to construe the failure to demand a jury in a condemnation action as an absolute bar on the discretion of the district court to set a case for jury trial.") (citing 1971 Ninth Circuit decision allowing jury trial even though demand made 63 days after notice of Complaint served because landowner in "sufficient compliance" with jury demand requirement).

Additional information related to particular issues that may be determined by the jury or the court may be found in: *Jury Trial Under Rule 71A(h) of Federal Rules of Civil Procedure in Condemnation Proceedings by United States*, 164 A.L.R. Fed. 341 (2000).

IX. COMMISSIONS UNDER RULE 71A

As stated, condemnation actions are governed by Rule 71A of the *Federal Rules of Civil Procedure*, which sets forth the method by which pleadings in such actions must be presented and served and other related matters. Rule 71A has special provisions for adjudication of condemnation actions.

Rule 71A(h) contemplates that one of three potential tribunals - (1) a jury, (2) a commission, or (3) a trial judge - will determine the amount of just compensation due to the property owner. Adjudication of all other issues is conducted solely by the trial judge. 12 Wright & Miller, *Federal Practice & Procedure* § 3051, p. 226. The tribunal selection process is impacted by the following:

1. Congress: If an Act of Congress establishes a "specially constituted" tribunal, that tribunal will determine just compensation. The Natural Gas Act does not establish a specially constituted tribunal.

2. Parties: In the absence of a specially constituted tribunal, any party may demand a jury trial.

   a. If no party demands a jury trial, the trial judge will determine just compensation for the property at issue.

   b. If a jury demand is made by any party, a jury will determine just compensation, unless the court orders otherwise.

3. Trial Judge: If a jury demand is made, the trial judge in his or her discretion may order that just compensation be determined by a commission.

Id. at 227-28.

Although any party may demand a jury adjudication of the compensation issue through the foregoing process, the court's broad discretion to appoint a commission suggests that the parties' choice in this matter may likely be between either a commission or the trial judge. Some courts appear to disfavor jury adjudication, and favor commission adjudication, for several reasons, including the desire to avoid non-uniform results, delays inherent in the jury process, inconveniences in requiring parties and witness to travel to court or the jury to travel to the property, and the existence of crowded dockets. *Id.* at 225-26, 235-36. As one court explained, the use of a commission was well warranted in a series of condemnation actions related to the construction of a natural gas pipeline:

We believe that Southern's pipeline project, with over 500 tracts of property spread over seven counties and 122 miles, is precisely what the drafters of Rule 71A had in mind in listing exemplary reasons for denying jury trials (character, location, and quantity). Thus, the district court correctly exercised its discretion in appointing a commission to determine the issue of just compensation.

Southern Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373 (11th Cir. 1999); *see also Northern Border Pipeline Co. v. 64.111 Acres of Land in Will County*, 344 F.3d 693 (7th Cir. 2003) (upholding trial court's use of commission as to 16 tracts of land since (1) 16 trials or one mega-trial would be too costly or complex, (2) commissioners could more readily ascertain the value of the parcels, which were located more than 100 miles away from the courthouse, and (3) lay jurors would be less able than the real estate experts on a commission to differentiate between expert valuation testimony). *But see Williston Basin Interstate Pipeline Co. v. Dolyniuk Family Trust*, 355 F. Supp. 2d 1042, 1045 (D.N.D. 2005) (commission not warranted for valuation of 18 small parcels of land where landowners willingly accepted increased costs of jury trial, including travel expenses).

Typically, a commission is composed of three individuals, and up to two alternate members. Rule 71A(h). Parties are advised of the identities and qualifications of each prospective commissioner and alternate, and parties may move to disqualify prospective members only for cause. *Id.*

The court must instruct the commission of evidentiary matters. 12 Wright & Miller, *Federal Practice & Procedure* § 3052, p. 240.

Commissions must reduce their findings to writing and issue a report of their decision. Rule 71A(h); 12 Wright & Miller, *Federal Practice & Procedure* § 3052, p. 245.

A party may serve an objection to the commission's report within 10 days of its service. *Id.* at 250. The court must accept the report of the commission unless it is clearly erroneous. *Id.* If the trial court finds the report clearly erroneous, it may substitute its own valuation or may resubmit the matter to the commission. *Id.* at 253-54. Appellate courts review trial court decisions under the clearly erroneous standard. *Id.* at 254.

X. BURDEN OF PROOF IN FEDERAL COURT

It is well established that the land owner - and not the condemnor - has the burden of establishing the "value of the property sought to be condemned" in an eminent domain proceeding brought pursuant to federal law. *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266, 274, 63 S.Ct. 1047, 1052 (1943); *see also United States v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980). The Ninth Circuit has repeatedly recognized and upheld this rule of law in federal condemnation cases. *See, e.g., U.S. v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (9th Cir. 1999); *U.S. v. 174.12 Acres of*

Land, More or Less, in Pierce County, State of Wash., 671 F.2d 313, 314 (9th Cir. 1982); *U.S. v. Shewfelt Inv. Co.*, 570 F.2d 290, 291 (9th Cir. 1977).

In the few cases under the NGA that address the question of who has the burden of proof as to the issue of value must have applied this federal law. *See, e.g., Vector Pipeline LP v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 952 (N.D. Ill. 2001). In *Vector Pipeline*, a condemnation case brought pursuant to the NGA, the district court specifically held that the "burden of proving the value of the land taken is on the landowner." The Seventh Circuit Court of Appeals came to the same conclusion in a 2004 NGA decision in which a gas company brought a condemnation action for the purpose of obtaining an easement to construct a natural gas pipeline, holding "the burden was on the [landowners] to show what the fair market value was." *ANR Pipeline Co. v. 62.026 Acres of Land*, 389 F.3d 716, 719 (7th Cir. 2004); *see also Guardian Pipeline LLC v. 950.80 Acres of Land*, 2002 WL 1058833 *1 (holding same under the NGA).

XI. JUST COMPENSATION ISSUES UNDER FEDERAL LAW

The language of the Fifth Amendment to the United States Constitution requires payment of compensation to a property owner where the government or a licensee thereof, acquires property through the exercise of its eminent domain powers. *See* U.S. Const. amend. V. While the payment need not compensate the owner for every subjective loss incidental to the taking, the amount of compensation must be considered "just" in that it represents the value of the property taken. *See id.*; *see also Hellenic Cntr., Inc. v. Washington Metro. Area Transit Auth.*, 815 F.2d 982, 984 (4th Cir. 1987) (holding "[a]s a general rule, just compensation reimburses an owner only for the value of the property take; [and not] indirect costs to the owner resulting from the taking"); *U.S. v. Willow River Power Co.*, 324 U.S. 499, 502, 65 S.Ct. 761, 764 (1945). (recognizing the Fifth Amendment "does not undertake, however, to socialize all losses"). Further, where the government "takes only part of a [ ] property ... the owner [must be compensated] both for that which is physically appropriated and for the diminution in value to the [remaining] non-condemned property." *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1398 (9th Cir. 1986).

While the United States Supreme Court has repeatedly recognized - and warned - that "the determination of value cannot be reduced to inexorable rules," they have proceeded to adopt "a practical standard" for the purpose of valuing such property in federal condemnation actions. *U.S. v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402, 70 S.Ct. 217, 221 (1949); *United States v. Miller*, 317 U.S. 369, 373-74, 63 S.Ct. 276, 280 (1942).

Both the United States Supreme Court and the Ninth Circuit Court have recognized that the issue of the amount of just compensation due is a substantive issue that should usually be governed solely by federal law in a federal court.

The federal law addressing the manner and method for determining the value of property taken pursuant to the federal power of eminent domain is well developed. Generally, in determining what is just compensation under the Fifth Amendment to the United States Constitution, the Supreme Court has held that the government must attempt to put the owner of the condemned property "in as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708 (1934). In order to do so, the United States Supreme Court has employed a concept of fair market value as the standard for valuing property for the purpose of ascertaining the condemnee's loss. *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 511, 99 S.Ct. 1854, 1857 (1979).

While the Supreme Court has recognized that the unique nature of property makes it impossible to always uniformly apply one "general formula" and that the measure of compensation must take into account the particular circumstances in each case, it holds that generally the condemnee is entitled to the "fair market value" *at the time the property is taken*. *See U.S. v. Miller*, 317 U.S. 369, 373-74, 63 S.Ct. 276, 280 (1943); *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26, 29, 105 S.Ct. 451, 452-53, 454-55 (1984); *see also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Ca.*, 482 U.S. 304, 319-20, 107 S.Ct. 2378, 2388-89 (1987) (holding that "the valuation of property which has been taken *must be calculated as of the time of the taking*, and that *depreciation in value of the property by reason of preliminary activity is not chargeable to the government*.") (emphasis added) (discussing *Danforth v. United States*, 308 U.S. 271, 60 S.Ct. 231 (1939) and *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138 (1980)).

Fair market value under the federal standard is defined as "what a willing buyer would pay in cash to a willing seller" if both were in the position to bargain freely and had reasonable time to negotiate and explore alternatives. *Miller*, 317 U.S. at 374, 63 S.Ct. at 280; *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633, 81 S.Ct. 784, 790-91 (1961); *see also United States v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980). In determining market value, consideration must be given to all the facts and circumstances that would reasonably go into the making of a bargain of purchase and sale. *See 429.59 Acres of Land*, 612 F.2d at 462. This means that any evidence that could be considered to have some bearing on what willing buyers and sellers would take into account in such as sale, assuming it is both competent evidence and considered admissible under the relevant rules of the court, could be considered. *See U.S. v. 33.90 Acres of Land, More or Less, Situated in Bexar County, State of Tex.*, 709 F.2d 1012, 1014-15 (5th Cir. 1983). Conversely, however, any "special" value of the property to the owner cannot be considered. *See Miller*, 317 U.S. at 375, 63 S.Ct. at 280-81.

For appraisal purposes, the willing buyer and willing seller definition has been more specifically carved out into a market definition in terms of a cash payment and probable price standard both by various federal courts and by the Federal Government itself when compiling uniform standards of appraisal for federal land acquisitions. For example, the Federal Court of Claims has repeatedly defined the fair market value standard in inverse eminent domain cases as:

The most probable price, as of a specified date, in cash. or in terms equivalent to case [sic], or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

Osprey Pacific Corp. v. United States, 41 Fed. Cl. 150, 158 (1998) (quoting *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 156 (1990), *aff'd* 28 F.3d 1171 (Fed.Cir.1994) (citing American Institute of Real Estate Appraisers, The Appraisal Of Real Estate 19 (9th ed.1987)).

Further, the United States Government has adopted a set of uniform appraisal standards for federal land acquisitions, which were developed as the result of the Interagency Land Acquisition Conference of 2000 and are published by the Appraisal Institute. *See* Appraisal Institute, Uniform Appraisal Standards For Federal Land Acquisitions (2000). The stated purpose for adoption of the standards was:

[T]o promote uniformity in the appraisal of real property among the various agencies acquiring property on behalf of the United States. It should make no difference to the landowner, whose property is being acquired, which agency is acquiring the land, or what method of acquisition it uses.

Id. at 1.

The Uniform Appraisal Standards have adopted the following definition of market value for appraisers in federal condemnation cases based on a compendium of Supreme Court decisions dealing with these issues:

Market value is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.

Id. at 30 (citing *Kirby Forest Indust., Inc.*, 467 U.S. at 10; *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973); *United States v. Reynolds*, 397 U.S. 14, 17 (1970); *Miller*, 317 U.S. at 374; *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 359 (1918); *Kerr v. South Park Comm'rs*, 117 U.S. 379, 386-87 (1886)). This definition is remarkably similar to the one stated by the Federal Court of Claims.

A federal court should *only* deviate from the fair market value measure where market value is either too difficult to ascertain or where application of the standard would result in manifest injustice to the condemnee. *See 50 Acres of Land*, 469 U.S. at 29, 105 S.Ct. at 455; *see also Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1, 104 S.Ct. *2187 (1984); U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 99 S.Ct. 1854 (1979); *United States v. Cors*, 337 U.S. 325, 332 (1984) (noting that the court must be careful *"not* to reduce the concept of 'just compensation' to a formula" and recognizing market value "may not be the best measure of value in some cases." (emphasis added).

There exist three generally recognized and accepted methods for ascertaining the fair market value of a property, which are: (1) comparable sales or market data method; (2) income method or capitalization of income method; and (3) the reproduction cost at the time of taking, less depreciation method. *See* Appraisal Institute, The Appraisal Of Real Estate (19th ed. 1992). However, it is important to note that under the federal standard the "*preferred means* of determining [fair market] value is by referring to sales of comparable property," or the comparable sales approach. *U.S. v. 33.5 Acres of Land, More or Less, Okanogan*, 789 F.2d 1396, 1400 (9th Cir. 1986) (emphasis added); *see also 50 Acres of Land*, 469 U.S. at 29-30, 105 S.Ct. at 455-56 (rejecting use of the cost approach as providing a potential "windfall" where comparable sales are available to ascertain value). Other methods will be used to measure just compensation only when "there are no comparable sales or too few to provide a reliable basis for comparison." *33.5 Acres of Land, More or Less, Okanogan,* 789 F.2d at 1400; *see also 50 Acres of Land*, 469 U.S. at 29-30, 105 S.Ct. at 455-56.

As part of the market value standard, the court must also consider the property's highest and best use when valuing the property. *See, e.g., National R.R. Passenger Corp. v. Certain Temporary Easements Above the R.R. Rt of Way in Providence, R.I.*, 357 F.3d 36, 39 (1st Cir. 2004) (citations omitted). Accordingly, the value of land taken is not necessarily the value of the land for the purposes for which it is *actually being used by the owner at the time of the taking. See id.* It is well settled that "[t]he term 'highest and best use' corresponds to '[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the *reasonably* near future ... to the full extent that the prospect of demand for such use affects the market value while the property is privately held.'" *Id.* (quoting *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704 (1934)) (emphasis added).

The "highest and best use" criterion is not intended to allow property owners to place a value on their property that is unreasonable based on some far-fetched speculative use. *See, e.g., Olson*, 292 U.S. at 257, 54 S.Ct. at 709 (holding "[e]lements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value-a thing to be condemned in business transactions as well as in judicial ascertainment of truth"). The court must disregard any use proposed by the property owner that does not meet a "showing of reasonable probability that the land is *both* physically adaptable for such use and that there is a demand for such use in the reasonably near future." *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir.1980), *cert. denied sub nom. Bassett v. United States*, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981) (relying on *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L. Ed. 1236 (1934)). Therefore, there is a presumption that the existing use is the highest and best use for the property that the owner must overcome using the above stated criteria. *See, e.g.*, 26 Am. Jur. 2d Eminent Domain § 297 (citations omitted) (recognizing the presumption that the current use is the highest and best use, which may be over come "*only* by a showing that, at the time of the taking, the property is adaptable to, and needed, or is likely to become adaptable and needed in the reasonably near future, for the potential use.") (emphasis added). In fact, in a jury trial in the issue of just compensation, the federal court must "screen the proffered potential uses and exclude from jury consideration those which have not been demonstrated to be practicable and reasonably probable uses." *Id.* (quoting *United States v. 320.0 Acres of Land*, 605 F.2d 762, 815 (5th Cir.1979)).

In evaluating the highest and best use of the property, a court *can* consider a reasonable, non-speculative zoning change. *See id.* In the event that a party is seeking to have their property valued at a different use than what it is being used for at the time of the taking, that party bears the burden of establishing the permissibility and non-speculative nature of that proposed use. *See U.S. v. 2,175.86 Acres of Land, More or Less, Situated in Hardin and Jefferson Counties, Tex.*, 687 F. Supp. 1079, 1088-89 (E. D. Tex. 1988). Also, it should be noted that the United States Supreme Court has held "[t]he fact that the most profitable use of a parcel can be made only *in combination with other lands* does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value." *Olson*, 292 U.S. at 256, 54 S.Ct. at 709 (emphasis added).

Thus, in determining value, the value of what the condemnor *gained* is irrelevant and should not be taken into consideration. *See Miller*, 317 U.S. at 375, 63 S.Ct. at 280 (holding "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value") (citations omitted). This also means that any increase in value to the property as a result of the condemnation (or proposed condemnation) cannot be attributed to the property in assessing value. *See id.* at 376-77, 63 S.Ct. at 281; *see also Shoemaker v. United States*, 147 U.S. 282, 303-06, 13 S.Ct. 361, 392-93 (1893); Appraisal Institute, Uniform Appraisal Standards For Federal Land Acquisitions at 35 (stating the highest and best use cannot be based on a demand for the property that was *created as a result of* the project that it is being condemned for nor can the highest and best sue be the use for which the government is condemning the property (citations omitted).

In valuing the property, it should also be noted that the loss of growing crops can be considered as an element of recoverable value and just compensation where property is taken. *See U.S. v. 729.773 Acres of Land, More or Less, Situate in City and County of Honolulu,* 531 F. Supp. 967 (D. Haw. 1982*)*. However, they must be actual crops that are taken or destroyed and not crops that they would likely have in the future. This is because intangible and speculative items of value are not compensated under federal law. For example, in *U.S. v. General Motors Corporation*, 323 U.S. 373, 379, 65 S.Ct. 357, 360 (1945) the United States Supreme Court held that "[t]he sovereign ordinarily takes the fee [and, as such] [t]he rule in such a case is that compensation for that interest *does not include future loss of profits*, the expense of moving removable fixtures and personal property from the premises, *the loss of good-will* which inheres in the location of the land, *or other like consequential losses* which would ensue the sale of the property to someone other than the sovereign." Loss of business and relocation expenses have also been recognized as consequential damages that are not compensable. *See United States v. 91.90 Acres of Land*, 586 F.2d 79, 87 (8th Cir. 1978).

Generally speaking, the federal standard will compensate a property owner for what is known as "severance damages." *See U.S. v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). Severance damages occur when there is a "partial taking," or a taking of only part of a particular property. *See id.* Where there is a partial taking "'just compensation' is the difference between the fair market value of the whole parcel immediately before the taking and the remainder after the taking." *Id.* (*citing Miller*, 317 U.S. at 376, 63 S.Ct. at 281).

Under the rule for severance damages the owner is entitled to *both* "compensation for that which is physically appropriated and for the diminution in value to the non-condemned property." *See 33.5 Acres of Land*, 789 F.2d at 1398 (citations omitted). Such damages cannot be considered speculative or they are not recoverable. *Georgia-Pacific Corp. v. U. S.*, 226 Ct. Cl. 95, 640 F.2d 328, 335-36 (1980).

Also, one must be careful to distinguish between severance damages suffered by the remainder of the parcel and economic damage caused by the intended results of the condemnation of the parcel taken, the latter of which is a consequential damage and is not recoverable. *U.S. v. 79.20 Acres of Land*, 710 F.2d 1352, 1356 (8th Cir. 1983).

Severance damages do not include the "diminution in value arising solely from 'the acquisition and use of adjoining lands of others for the same undertaking.'" *United States v. 15.65 Acres of Land in Marin County*, 689 F.2d 1329, 1332 (9th Cir. 1982).

Special benefits to the remainder of the property can be used to offset and thus, lessen, the compensation paid to the owner paid for obtaining that piece of property and not simply to offset severance damages themselves. *See* Appraisal Institute, Uniform Appraisal Standards For Federal Land Acquisitions at 47-50, 52-53 (citations omitted).

In a partial taking, the phrase "cost to cure" is the cost to the owner to "cure" or rectify the damage that has occurred to remaining part of the land as a result of the taking. *United States v. 2.33 Acres of Land*, 704 F. 2d 728, 730 (4th Cir. 1983). "When the cost of curing the injury to the remainder *is less than* the outright diminution in its value uncured, the government may pay the cost of cure" as the considered a proper measure of damage in a partial taking. *Id.* (emphasis added). In such a case, where the cost to cure is less than the severance damages, the government is not obligated to also pay "the value of the taken improvement which is replaced" because this would result in "double compensation for the landowner." *Id.*

Finally, under the federal rule, any enhancement in value to the remaining portion as the result of the taking, must be off set against the amount of the owner's compensation. *See Miller*, 317 U.S. at 376-77, 63 S.Ct. at 281-81.

XII. CONCLUSION

The NGA gives natural gas companies the power to condemn property for interstate pipelines and related facilities. The issues raised by such actions are varied and diverse. This paper has attempted to identify and analyze some of those issues.

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[1] For example, the NGA sets forth provisions for the resolution of importation and exploration of natural gas, 15 U.S.C. § 717(b), the regulation of rates and charges, § 717c to § 717e, accounting and records preservation § 717g, and rates of depreciations § 717h.

[2] The Court also found that the NGA regulated the underground storage of natural gas because these facilities are a necessary and integral part of the operation of piping natural gas from the area of production to the area of consumption. *Id.* at 295.

[3] Congress intent to occupy a given field to the exclusion of state law may be inferred where 1) the "pervasiveness of the federal regulation precludes supplementation by the statutes," 2) "where the federal interest in the field is sufficiently dominant," or 3) "where the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Id.* at 300 (internal quotations omitted).

[4] Article VI, cl. 2 provides in pertinent part as follows:

This Constitution, and the laws of the United States, which shall be made in pursuance thereof ... shall be the supreme law of the land; and the Judges of the every State shall be bound hereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[5] This provision of the NGA provides as follows:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale, of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[6] At least one other court has refused to grant immediate possession based upon the gas company's failure to demonstrate that its legal remedy was inadequate. *National Fuel Gas Supply Corp. v. 138 Acres of Land in Village of Springville, County of Erie, State of N.Y.*, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000).

[7] The test used by the *Sage* Court was "(1) the likelihood of immediate harm to the plaintiff if the injunction is denied, (2) the likelihood of harm to the defendant if the injunction is granted, (3) the likelihood that the Plaintiff will succeed on the merits, and (4) the public interest. *Sage*, 361 F.3d at 828.

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