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## THE USE OF EMINENT DOMAIN FOR OIL AND GAS PIPELINES IN NEW MEXICO

With the increased use of oil and natural gas by industrial and residential consumers, it is readily apparent that powers of eminent domain granted to qualified pipeline companies will be of increasing importance in New Mexico. The power of eminent domain granted to pipeline companies differs from most condemnation procedures in that condemnation for pipelines does not require a complete taking of the land;<sup>1</sup> the owner of the land gives up only an easement across his land. Pipelines are normally underground and must be below normal plow depth through farm lands.<sup>2</sup> The only inconveniences suffered by the landowner, be he private or public, are those attending the construction of the pipeline and the continued access for maintenance by the pipeline company.<sup>3</sup>

Condemnation of land for oil and gas pipelines in New Mexico may be exercised by private corporations.<sup>4</sup> Section 65-4-8,<sup>5</sup> New Mexico Statutes Annotated, provides that "any person" may exercise the right of eminent domain to acquire right of way for the construction, operation, and maintenance of pipelines which carry "petroleum, natural gas, and the products therefrom."<sup>6</sup> Similar statutes are found in thirty-four other jurisdictions.<sup>7</sup>

A pipeline company may resort to the exercise of this power only if proper compensation cannot be agreed upon between the pipeline company and the landowner, or if the landowner cannot be found.<sup>8</sup>

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1. N.M. Stat. Ann. § 65-4-8 (1953) provides for the acquisition of necessary right-of-way, nothing more.

2. See N.M. Stat. Ann. § 65-4-5 (1953).

3. See N.M. Stat. Ann. § 65-4-8 (1953).

4. See N.M. Stat. Ann. §§ 65-4-1 to -14 (1953).

5. N.M. Stat. Ann. 65-4-8 (1953).

6. *Ibid.*

7. See Summers, Oil and Gas § 757 n.54 (1962), for a complete list of states having statutes dealing with the right of private pipelines to acquire land by condemnation. Most statutes provide that pipeline companies are to be *considered* common carriers. See, e.g., N.M. Stat. Ann. § 65-4-2 (1953). And most states extend their statutes to include foreign as well as domestic corporations. See N.M. Stat. Ann. § 65-4-8 (1953), where the words "any person, firm, association, or corporation" are used.

Some states provide procedures which are patterned after the Natural Gas Act (see note 25 *infra*) in that no land may be condemned without receipt of a certificate of convenience issued by a state agency. See Ind. Stat. Ann. § 54-723 (1951) where the certificate is issued by the Indiana Public Service Commission.

8. N.M. Stat. Ann. § 22-9-1 (1953). Condemnation for pipelines is governed by

The pipeline company must also meet minimum statutory requirements.<sup>9</sup>

Since the New Mexico courts have not yet interpreted the provisions of this statute, it is the purpose of this Note to analyze and criticize the statutes on the strength of decisions in other states in order that a standard procedure might be formulated for future reference. The problems discussed will include interpretation of the term "public use," federal preemption of gas pipelines, and the problems which must be met when crossing private, state, federal, and Indian lands.

## I

### PUBLIC USE

Article 2, section 20 of the New Mexico Constitution provides that no private property shall be taken under eminent domain or damaged for *public use* without just compensation. Section 65-4-8 uses the terms "*public uses and purposes*."<sup>10</sup> Courts do not agree on the definition of the term "public use." Although most courts admit that there is no precise definition of the term,<sup>11</sup> and that any definition is ultimately a judicial question,<sup>12</sup> they endeavor to establish a single definition. They divide jurisdictions into those following the "narrow," or "public use" view, and those following the "broad" or "public benefit" view.<sup>13</sup>

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rules covering condemnation generally. See N.M. Stat. Ann. §§ 22-9-1 to -29, 65-4-8 (1953).

9. Not *all* pipeline companies may exercise eminent domain. This Note will try to answer the questions (1) which companies may exercise the right, and (2) what constitutes the minimum statutory requirements which must be met.

10. N.M. Stat. Ann. § 65-4-8 (1953). (Emphasis added.)

11. 18 Am. Jur., *Eminent Domain* § 36, p. 660 (1962). See also *Miller v. City of Tacoma*, 61 Wash. 2d 374, 378 P.2d 464, 470 (1953) where the court said:

The words 'public use' are neither abstractly nor historically capable of complete definition. The words must be applied to the facts of each case in the light of current conditions.

12. Questions as to whether the use to which the land is put is ultimately public in character are judicial questions. State *ex rel. Red River Valley Co. v. District Ct. of Fourth Judicial Dist.*, 39 N.M. 523, 51 P. 2d 239 (1935); *Cuglar v. Power Authority of State of N.Y.*, 4 Misc. 2d 879, 163 N.Y.S.2d 902 (Sup. Ct. 1957); *Superior Laundry and Towel Supply Co. v. City of Cincinnati*, 11 Ohio Ops. 2d 352, 168 N.E.2d 447 (1959).

Even if the legislature has initially decided that pipeline use is "public use," courts may nevertheless determine the question for themselves. See *Poole v. City of Kankakee*, 406 Ill. 521, 94 N.E.2d 416 (1950).

13. In addition to the terminology, "narrow" and "broad," many courts have referred to these views as the "public use" view, and the "public benefit" view. See

"Public use" in New Mexico has been defined according to the "narrow" or "orthodox" view.<sup>14</sup> This view considers a use public only if the public is entitled *as of right* to use or enjoy the property so condemned.<sup>15</sup> Conversely, the "broad view" states that the condemnation and later use of the property need only be for the public benefit or common good in order to be a public use.<sup>16</sup>

generally, Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B. U. L. Rev. 615 (1940); Note, 1 Buffalo L. Rev. 147 (1951); Note, 53 Mich. L. Rev. 882 (1955); Comment, 16 Md. L. Rev. 172 (1957). See also Annot., 54 A.L.R. 7 (1928).

A few courts have attempted to limit the definition according to the strict language employed in their constitutions. See *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280, 282 (1956), where the court said: "In . . . other states the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, as contrasted with the requirement of our constitution that it be for a public use." The court concluded that its controlling decisions define public use to *mean* public use. This rationale is spurious, however, since many states having constitutional provisions relating to "public use" have defined the term broadly.

14. Only two cases in New Mexico have interpreted the term "public use" as it appears in the New Mexico Constitution, and no New Mexico cases have interpreted "public use" in regard to pipeline cases.

In *Threlkeld v. Third Judicial Dist. Ct.*, 36 N.M. 350, 15 P.2d 671 (1932), the court denied a lumber company's plan to construct a logging railroad in order that lumber might be transported to distributors. The statutes relied upon by the court, N.M. Laws 1905, ch. 97, §§ 20-21, are comparable to N.M. Stat. Ann. §§ 22-9-1 to -38 (1953), which deal with condemnation procedures generally. The court accepted the "generally recognized" meaning of public use, *i.e.*, that public use meant public use and not public benefit. It noted, however, by way of dictum, that "if there were a reasonable showing of a public to be served, and of an ability and willingness to render service as a common carrier, . . . [the lumber company] might prevail." *Id.* at 356, 15 P.2d at 674.

The other case decided in New Mexico, *Gallup Am. Coal Co. v. Gallup Southwestern Co.*, 39 N.M. 344, 47 P.2d 414 (1935), involved the constitutionality of a statute which declared that the business of coal mining constituted a "public use." The court held the statute unconstitutional, and reaffirmed the decision of the *Threlkeld* opinion, refusing to depart from the orthodox view of public use. As the court noted, "Once we depart from the 'orthodox' view, we shall find no easy or logical stopping place. Confusion and uncertainty will surround every battle between private right and public benefit. . . ." *Id.* at 348, 47 P.2d at 416.

15. See Note, 23 Albany L. Rev. 386 (1959), for a collection of cases which follow this view. According to Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B. U. L. Rev. 615, 626 (1940), the narrow definition, which was at that time on its way out, may be restated as follows: "To take property rights from A for transfer to B or B's private enjoyment is not a public use, regardless of what ultimate public purpose the transaction is intended to further."

Another example may be taken from a situation where eminent domain was exercised to condemn a "blighted area" for urban re-development. The South Carolina court ruled in this situation that "public use" and "public benefit" are not synonymous. While acquisition of slum areas for conversion into (1) low cost housing units and (2) light industrial sites may both be for "public benefit," only the former is a "public use." *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956). See Comment, 16 Md. L. Rev. 172 (1957).

16. See Note, 23 Albany L. Rev. 386 (1959), for a collection of cases which follow

Enlightened courts do not limit "public use" to a single definition but look to the character of the case in which the term is used.<sup>17</sup> Since the scope of the statute hinges upon the definition used, the New Mexico court may either drastically restrict pipeline construction, or indiscriminately allow the construction of pipelines according to the definition which they adopt. For example, assume that a pipeline company which will be called the Atlas Company developed a business transporting the oil and gas of all producers in a series of oil fields by pipeline according to rates filed with the Interstate Commerce Commission. Any use made of land taken by eminent domain by the pipeline would be a public use, and the Atlas Company would be allowed to exercise the right of eminent domain under any definition which might be adopted. Now assume that Atlas' competitor, the Baldwin Company, has developed a pipeline system which services only the oil and gas produced from its parent company's wells. Baldwin pipes oil and gas to refineries near major cities which are extensive users of the refined products. The use put to the land by the Baldwin Company cannot be "public use" under

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this view. Contrary to reason, this view was espoused early in the nineteenth century by at least one court. In an extremely lucid opinion, the Court of Chancery in New Jersey argued for "public benefit" in 1832. The opinion, *Scudder v. Trenton Del. Falls Co.*, 1 N.J.Eq. 694 (Ch. 1832), which is set forth in part in *Texas Pipe Line Co. v. Snelbaker*, 30 N.J. Super. 171, 103 A.2d 634 (1954), states:

[The term "public use" is not] limited to private corporations whose sole object it is, to promote the public good. Such corporations are not to be found. Private interest or emolument, is the primum mobile in all. The public interest is secondary and consequential.

\* \* \* \*

If to establish this as a public benefit, it be indispensably necessary that the public should have the privilege of participating in it directly and immediately, then the proposition is not made out, and the defendants have no authority. But is not this view too narrow? Can public improvements be limited within such a compass? May we not, in considering what shall be deemed a public use and benefit, look at the objects, the purposes, and the results of the undertaking \* \* \* The varying condition of society is constantly presenting new objects of public importance and utility; and what shall be deemed a public use or benefit, may depend somewhat on the situation and wants of the community for the time being.

Following this opinion, the court in *Snelbaker* concluded that there would be a "public use" if there is a public benefit derived from service rendered which would be free of unreasonable discrimination.

Generally public benefit is used as the test and "benefit has been held to mean benefit of any considerable number of people; it is not necessary that the whole community or any large part of it should actually use or be benefited by the use." See, *e.g.* *Kansas City v. Liebi*, 298 Mo. 569, 252 S.W. 404 (1923); *State ex rel. Red River Valley Co. v. District Ct. of Fourth Judicial Dist.*, 39 N.M. 523, 51 P.2d 239 (1935).

17. See *Miller v. City of Tacoma*, 61 Wash. 2d 374, 378 P.2d 464, 470 (1963); Note, 53 Mich. L. Rev. 882 (1955).

the "narrow" definition of that term, but it may result in public benefit under the "broad" definition; any expropriation which tends to increase utilization of resources and productive power is public benefit and therefore has been held to be a public use.<sup>18</sup> Infinite variations may be added to the above hypothetical situations to demonstrate the differences in definitions.

The Missouri Court of Appeals, in construing a statute very similar to New Mexico's,<sup>19</sup> decided in 1954<sup>20</sup> that public use, when applied to eminent domain down by pipeline companies, meant public benefit. Public benefit, in turn, was defined by the court to mean "willingness to accept the trade of the general public, as distinguished from a refusal to do business with any but a selected or limited clientele."<sup>21</sup> It was recognized that present needs, as well as future demands which could reasonably be anticipated, must be considered in determining what is "public use." Other courts also stress the importance of considering the increasing wants and needs of society in determining what is "public use."<sup>22</sup>

When the definition of "public use" is litigated again in New Mexico, arguments will be made by the proponents of the "narrow view" to try to convince the New Mexico Supreme Court that "the taking of property rights from A for transfer to B for B's private enjoyment is not a public use, regardless of what ultimate public purpose the transaction is intended to further."<sup>23</sup> Such an argument has the weight of *stare decisis*. However, the arguments for a definition which would reflect the "public benefit" view are more persuasive and certainly more desirable. Future needs for oil and gas demand that a flexible definition be adopted. Limiting the use of property to a use which the public is entitled to *as of right* limits the application of the statute.

If private pipelines are given the power of eminent domain, there can be no purpose served by unduly limiting the exercise of that power. No permanent damage is done to the lands crossed, yet untold benefits accrue to the public served by the pipeline. Public benefit must logically be adopted as the test for public use.

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18. See Note, *Buffalo L. Rev.* 147 (1951), for a discussion of such cases.

19. Bureau of Public Lands, *Public Land Statistics* (1962).

20. *Phillips Pipe Line Co. v. Brandstetter*, 263 S.W.2d 880 (Mo. Ct. App. 1954).

21. *Id.* at 886.

22. See *Kansas City v. Liebi*, 298 Mo. 569, 252 S.W. 404 (1923); *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 144 Minn. 1, 174 N.W. 885 (1919).

23. Nichols, *Public Use in Eminent Domain*, 20 *Boston U. L. Rev.* 615, 626 (1940).

## II

## DISTINCTIONS BETWEEN OIL AND GAS PIPELINES

*A. Gas Pipelines*

Oil pipelines were recognized as common carriers early in the 1920's under the Hepburn Act<sup>24</sup> and placed under the protection of the Interstate Commerce Act.<sup>25</sup> Gas pipelines, however, were expressly excepted from the operation of the Act.<sup>26</sup> After much discriminatory legislation over a twenty-year period by individual states,<sup>27</sup> Congress passed the Natural Gas Act<sup>28</sup> which provided rules and regulations for interstate transportation of natural gas by pipelines. The purpose of the Act is to protect the public interest;<sup>29</sup> purchases by interstate pipeline companies from small un-integrated companies for resale for ultimate public consumption are now controlled by the Act.<sup>30</sup> In 1947, the Act was amended<sup>31</sup> to give gas pipeline companies the power of eminent domain "where 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."<sup>32</sup> The amendment provides that action may be maintained in the federal district court or in the state court wherein the land is situated; jurisdiction of federal district courts is limited to cases where landowners' claims for compensation exceed \$3,000.00.<sup>33</sup>

Courts have had little trouble in concluding that such operations

24. 34 Stat. 584, 49 U.S.C. § 1(1) (a) (1958).

25. Part I, 24 Stat. 379, 49 U.S.C. §§ 1-27 (1958).

Pipelines were put under statutory control because of two factors, large monopolistic companies which operated pipelines, and discriminatory state legislation which interfered with expansion of commerce. See Summers, *Oil and Gas* § 756 (1962).

26. 34 Stat. 584, 49 U.S.C. § 1(1) (a) (1958).

27. See Summers, *op. cit. supra* note 26, § 756, for a summary of state legislation of gas pipelines and the effect of such legislation.

28. 52 Stat. 821, 15 U.S.C. § 717-717w (1958).

29. See *Kentucky Natural Gas Corp. v. Federal Power Comm'n*, 159 F.2d 215 (6th Cir. 1947).

30. See *Saturn Oil & Gas Co., Inc. v. Federal Power Comm'n*, 250 F.2d 61 (10th Cir. 1958).

31. Act of July 25, 1947, ch. 333, 61 Stat. 459, 15 U.S.C. § 717f(h) (1958).

32. *Ibid.*

33. *Ibid.*

In the case of *Tennessee Gas Transmission Co. v. Cleveland Trust Co.*, 59 Ohio Op. 282, 120 N.E.2d 143 (Columbiana City P.Ct. 1953) the court answered defendant's contention that the pipeline company did not have a procedural right to condemn land in that the companies are not authorized to do so by Ohio statutes, by

are subject to the constitutional power of Congress to regulate interstate commerce.<sup>34</sup> Judicial notice has been taken that the only feasible method of transporting natural gas over long distances is by pipeline.<sup>35</sup> It is also well settled that Congress may delegate the power of eminent domain to private corporations engaged in public utility functions.<sup>36</sup> But may such delegation result in condemnation of state and private lands without state consent or compliance with state statutes? The amendment provides that "practice and procedure . . . in district courts of the United States . . . shall conform as nearly as may be with practice and procedure in . . . courts of the State where the property is situated."<sup>37</sup> A

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saying that the State of Ohio may refuse consent to the use of its court, but it would need to do so specifically.

See *Williams v. Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485 (W.D.S.C. 1950). In an action to enjoin a pipeline company from proceeding in condemnation actions, the plaintiffs argued that even though the pipeline company has been granted the right to condemn its pipeline by the Natural Gas Act, it cannot enforce this right in a South Carolina court because there is no specific statute providing for procedures for condemnation for pipelines. The court rejected this argument. The court held that "the right to condemn having been given by Congress in the field of interstate commerce where it is supreme, all that is needed to make the grant effective is a State court procedure which meets the requirements of due process and which can be reasonably utilized for the [pipeline company's] . . . purpose." 89 F. Supp. at 487. The court argued that the pipeline company would be powerless if it did not have the right to condemn in state court, since the prerequisite of a claim in excess of 3,000 to condemnation in a federal court would prohibit many suits if individual landowners refused the pipeline company access. The court concluded that it was "unwilling to conclude that Congress accomplished such a futility when it passed the Natural Gas Act." 89 F. Supp. at 488.

34. See the Pipeline Cases, 234 U.S. 548 (1914); *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950).

35. In *Thatcher v. Tennessee Gas Transmission Co.*, *supra* note 34, the court noticed that

vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital need of the product; and that the only way this natural gas can be feasibly transported from one State to another is by means of a pipeline. None of the means of transportation by water, land, or air, to which mankind has successively become accustomed, suffices for the movement of natural gas.

180 F.2d at 647.

36. *Luxton v. North River Bridge Co.*, 153 U.S. 525 (1893); *Cherokee Nation v. So. Kansas Ry Co.*, 135 U.S. 641 (1879); *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950). See 1 Nichols, *Eminent Domain* § 2.15 (1961).

In *Thatcher*, the landowner contended that the power granted by the federal government resulted in private taking for private use, and that the power of eminent domain was reserved exclusively to the states by the Tenth Amendment, United States Constitution. The court did not accept either argument but held that pipelines subject to the Natural Gas Act are declared to be public businesses subject to public control.

37. Act of July 25, 1947, ch. 333, 61 Stat. 459, 15 U.S.C. § 717f(h) (1958).



majority of courts which have passed upon this question have concluded that compliance with state regulations would defeat the "uniformity of regulation and control by a single agency"<sup>38</sup> which is necessary to gain benefit under the Act. The New Mexico Supreme Court has reviewed one case brought in a New Mexico state court under authority of the Natural Gas Act.<sup>39</sup> The court summarized the procedure followed but did not consider any procedural problems.<sup>40</sup> As a general rule, it may be stated that state court procedures will be followed where such procedures do not contravene the Act.

A pipeline company qualified to exercise the power of eminent domain under the Natural Gas Act need not be a common carrier,<sup>41</sup> but is only required to be engaged in the transportation of natural gas across state lines by pipeline.<sup>42</sup> The Federal Power Commission may, in its discretion, issue the company a certificate of public convenience which the pipeline company must have before exercising

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38. *Parkes v. Natural Gas Pipe Line Co. of America*, 207 Okla. 91, 249 P.2d 462, 467 (1952). In *Parkes*, the pipeline company did not comply with the laws of Oklahoma prior to action to condemn land. The Supreme Court of Oklahoma held that where the Oklahoma statute, which required that all pipelines be common carriers, was in conflict with the federal legislation and grants of power, the federal legislation must control in all matters concerning interstate commerce. The court concluded that such authority is not dependent upon the consent of states.

See *Tennessee Gas Transmission Co. v. Cleveland Trust Co.*, 59 Ohio Op. 282, 120 N.E.2d 143, 145 (Columbiana City P.Ct. 1953), where the court held that "action in the form of the Natural Gas Act certainly preempts this field."

*But see Tennessee Gas Transmission Co. v. Schmidt*, 108 N.Y.S.2d 435 (Erie County Ct. 1951), where the court held that gas companies had to conform to New York condemnation law as well as the federal Natural Gas Act. The court reasoned that the proceeding was one "in rem and \* \* \* the procedure under the New York State Condemnation Law is to be followed."

39. *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961).

40. *Transwestern Pipe Line Co. v. Yandell*, *supra* note 39, arose out of a natural gas company's attempt to acquire land for pipelines under the power of eminent domain in the Natural Gas Act. The New Mexico court said, "after filing of notice of suit and bond, the court, in accordance with our Eminent Domain Statutes, §§ 22-9-1 to 22-9-38, 1953 Comp., appointed commissioners to assess the damages sustained by the several respondents."

The court considered only the issue of damages under the above statutory proceedings.

41. 30 U.S.C. § 185 (1958) specifically excepts pipelines operating under authority of the Natural Gas Act from the requirement that "pipelines shall be constructed, operated, and maintained as common carriers." See note 7 *supra* and accompanying text.

For examples of cases involving pipelines which are not common carriers, see *Parks v. Natural Gas Pipe Line Co. of America*, 207 Okla. 91, 249 P.2d 462 (1952); *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950).

42. 15 U.S.C. § 717f(h) (1958).

its right of eminent domain under the statute.<sup>43</sup> The problem of defining "public use" is non-existent under the Act. Congress decided that the regulation of interstate commerce of natural gas "is necessary in the public interest;"<sup>44</sup> requirements were laid down by Congress for taking for "public use."<sup>45</sup> Federal decisions uniformly hold that

granted a valid public purpose to be furthered by condemnation, a determination by the condemnor of the necessity of a certain taking to carry out the public purpose is conclusive and cannot be examined by the court.<sup>46</sup>

This principle is conclusive in the absence of fraud, bad faith, or gross abuse of discretion.<sup>47</sup>

### *B. Oil Pipelines*

The right of pipeline companies, both domestic and foreign,<sup>48</sup> to exercise their right of eminent domain depends upon a showing that the owner of the land in question either cannot agree with the pipeline company on the compensation to be paid, is incapable of contracting, or cannot be found.<sup>49</sup> The court, after a petition is filed, may appoint three commissioners to assess the damages sustained.<sup>50</sup> The placement of pipelines is controlled by the language of section 65-4-8 which states "that pipelines shall be so located as to do the least damage to private or public property consistent with proper use and economical construction."<sup>51</sup> Depth of pipe-

43. *Ibid.*

44. *Ibid.*

45. *Parkes v. Natural Gas Pipe Line Co. of America*, 207 Okla. 91, 249 P.2d 462 (1952).

46. *Williams v. Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485, 489 (W.D.S.C. 1950). The court held that the quoted material is a corollary of the principle that

when the Legislature provides for the taking of private property for a public use it may either prescribe specifically the property that may be taken, or delegate that determination to the agency, either public or private, which is charged with developing the public use.

Since findings of the Federal Power Commission are by nature those of an administrative agency, they are deemed conclusive if supported by substantial evidence. See *Kentucky Natural Gas Corp. v. Federal Power Comm'n*, 159 F.2d 215 (6th Cir. 1947).

47. *Ibid.* See 18 Am. Jur., *Eminent Domain* § 108 (1938).

48. See N.M. Stat. Ann. § 65-4-8 (1953).

49. N.M. Stat. Ann. § 22-9-1 (1953).

50. *Ibid.*

51. N.M. Stat. Ann. § 65-4-8 (1953).

See note 46 *supra*. The court, in *Williams v. Transcontinental Gas Pipe Line Corp.*,

lines,<sup>52</sup> construction under highways and railroads,<sup>53</sup> and placement in municipalities<sup>54</sup> are also specifically limited by statute.

As stated earlier,<sup>55</sup> the federal government has long considered oil pipelines, as opposed to gas pipelines, to be under the power of the Interstate Commerce Commission.<sup>56</sup> The Commission has power to regulate the *operation* of the pipelines.<sup>57</sup> At present, however, there has been no declaration by the Supreme Court that Congress intends to occupy the field. Congress and the courts have allowed the states to retain control over acquisition of lands by oil pipelines, except of course where the state discriminates against interstate commerce.<sup>58</sup>

### III

#### PROCEDURAL DIFFERENCES—LANDS INVOLVED

Immediately above, the procedures for condemnation have been laid out generally with condemnation of private land in mind. In New Mexico, however, a great portion of land is held by the state, the federal government, or by Indian tribes and pueblos.<sup>59</sup> The procedures involved when acquiring land from each of these differ markedly.

##### *A. Private and State Lands*

Thus far in the discussion, the procedures discussed have been those generally followed when condemning private lands in the state. State lands are included within the eminent domain provisions of section 65-4-8; the section speaks of "damage to private or public property" and of "the right to enter upon the lands and property

89 F. Supp. 485 (W.D.S.C. 1950), refused to grant injunctive relief claimed by a landowner. They held that a landowner may not object merely because some other location might have been made or some other property condemned.

Decisions like this under the Natural Gas Act are of little import since Congress specified that state laws are to be complied with wherever possible. See note 33 *supra*.

52. N.M. Stat. Ann. § 65-4-5 (1953).

53. N.M. Stat. Ann. §§ 65-4-11 to -13 (1953).

54. N.M. Stat. Ann. § 65-4-7 (1953).

55. See notes 25-26 *supra*, and accompanying text.

56. See note 26 *supra*, and accompanying text.

57. See, *e.g.*, Phillips Pipe Line Co. v. Brandstetter, 263 S.W.2d 880 (Mo. App. 1954).

58. See Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911), where a statute which allowed the exercise of eminent domain by corporations engaged wholly in business within the state and denied it under similar conditions to corporations engaged in interstate commerce was held unconstitutional.

59. Bureau of Public Lands, Public Land Statistics (1962).

of the state and of private persons and of private and public corporations."<sup>60</sup> Although no cases involve the taking of state land by an individual for private use, the Supreme Court of New Mexico would probably allow such a taking under the language of the statute. The only thing which might give them pause would be the provision in Article 2, section 20, which states "*private* property shall not be taken . . . for public use without just compensation."<sup>61</sup> This provision, however, merely insures private landowners that they will be recompensed for all losses by exercise of eminent domain; nothing in the section would *limit* the exercise of eminent domain to private lands.

### *B. Indian Lands*

Historically, Indian lands have been protected by the government of the United States.<sup>62</sup> Even after allowing Indians to take title to lands held as reservations or pueblos, the United States retained an interest in the land in the form of a restriction against alienation for the protection of Indians.<sup>63</sup> Alienation is restricted in order to protect the Indians, "a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races,"<sup>64</sup> against the loss of their lands by improvident dispositions. The restrictions continue to apply today, and have influenced all legislation involving tribal and pueblo lands, and lands allotted in severalty to Indians.

Congress, amid a mass of legislation dealing with rights-of-way for public utilities and private companies across the public domain, national parks, and all reservations under the control of the federal government,<sup>65</sup> passed two acts dealing specifically with rights-of-way across Indian lands.<sup>66</sup>

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60. N.M. Stat. Ann. § 65-4-8 (1953).

61. N.M. Const., art. 2, § 20.

62. See note 63 *infra*.

63. See, e.g., *State ex rel. State Highway Comm'n v. United States*, 148 F. Supp. 508 (D.N.M. 1957), where the court held that there are certain characteristics concerning the title to Indian lands which are common in all Indian titles. These are: (1) certain possessory rights are always granted to Indians, sometimes jointly, sometimes severally; (2) the United States retains certain restraint on alienation of the land; the United States has a reserved "approval power"; (3) a relationship of guardian-ward or trustee-beneficiary results from grants by the United States to Indians.

64. *United States v. Candelaria*, 271 U.S. 432 (1910).

65. See *United States v. Oklahoma Gas & Electric Co.*, 127 F.2d 349 (10th Cir. 1942), for a partial collection of statutes providing for rights-of-way across public lands.

66. Act of March 3, 1901, ch. 832, § 3, 31 Stat. 1084, 25 U.S.C. § 357 (1958); Act of March 11, 1904, ch. 505, 33 Stat. 65, 25 U.S.C. § 321 (1958).

Under 25 U.S.C. § 321,<sup>67</sup> the Secretary of the Interior is authorized to grant rights-of-way for the construction, operation and maintenance of oil and gas pipelines. His authority extends to lands held by Indian tribes, lands allotted in severalty to individual Indians, and to lands reserved for Indian agencies or schools. The Secretary determines the amount of compensation to be paid for the rights-of-way;<sup>68</sup> the Secretary may, where no State or Territorial taxes apply, demand that taxes be paid for the benefit of the Indians involved.<sup>69</sup>

Under 25 U.S.C. § 357,<sup>70</sup> Congress has provided that lands allotted in severalty to Indians may be condemned for "public purposes" under the law of the state wherein the land is situated. Money awarded as damages must be paid directly to the allottee.

Private corporations exercising the right to condemn Indian lands under state law under § 357 do not need the approval or permission of the Secretary of the Interior before proceeding with the condemnation,<sup>71</sup> but have to include the Secretary as an indispensable party to the action.<sup>72</sup> The interest of the Secretary of the Interior has been said to be limited to:

the protection of the Indian ward against the alienation of any part of his land without the payment of just compensation therefor, and to safeguard his substantial rights under the applicable law.<sup>73</sup>

These sections do not contradict each other, but, according to the courts, are merely examples of two methods which may be used for

67. 33 Stat. 65, 25 U.S.C. § 321 (1958).

68. *Ibid.* The exact language of the section reads:

The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval.

69. *Ibid.* According to the language of the section, where the pipelines are not subject to State or Territorial taxation, the owner of the pipelines shall pay the Secretary of the Interior, for the benefit of the Indians involved, an amount set by the Secretary, not to exceed \$5.00 for each ten miles of line.

70. 31 Stat. 1084, 25 U.S.C. § 357 (1958).

71. *Minnesota v. United States*, 305 U.S. 382 (1939). The Supreme Court held that authorization to condemn land confers by implication permission to sue the United States.

72. *Ibid.* The Court held that the Secretary is an indispensable party because, "In its capacity as trustee for the Indians it is necessarily interested in the outcome of the suit—in the amount to be paid." 305 U.S. at 388. The Secretary is also interested in what shall be done with the proceeds, since the money may be used for re-investment purposes.

73. *United States v. Oklahoma Gas & Elec. Co.* 127 F.2d 349, 355 (10th Cir. 1942).

the acquisition of easements across *allotted* Indian lands.<sup>74</sup> Pipeline companies may request rights-of-way under § 321 and, if refused, initiate condemnation actions under § 357. When dealing with lands other than allotted Indian lands, however, § 357 must be used.

### C. Public Lands

Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior, for pipeline purposes for the transportation of oil or natural gas to any applicant possessing [necessary] qualification. . . .<sup>75</sup>

Before an application for right-of-way will be considered by the Secretary, the applicant must show (1) that he is a citizen of the United States or a corporation organized under the laws of the United States or any state or territory,<sup>76</sup> (2) that the pipeline will be constructed, operated, and maintained as a common carrier,<sup>77</sup> and (3) that the applicant will purchase and/or transport oil and gas produced from government lands in amounts deemed reasonable by the Secretary.<sup>78</sup>

These requirements impose a burden of "common carriers" on all oil and gas pipelines not covered under the Natural Gas Act.<sup>79</sup> This differs from the result which would be obtained under the "public benefit" test. By this view, a pipeline on private land would not have to be a common carrier if it served the public benefit.

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74. *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959); the court dealt with the section involving electrical power lines [25 U.S.C. §§ 323, 357 (1958)] and concluded:

So considered, each of these sections is an effective and reasonable provision in the procedure for the acquisition of a right of way, neither dependent upon the other.

75. Act of February 25, 1920, ch. 85, § 28, 41 Stat. 449, 30 U.S.C. § 185 (1958), as amended.

76. 41 Stat. 437, 30 U.S.C. § 181 (1958), as amended.

77. 41 Stat. 449, 30 U.S.C. § 185 (1958), as amended.

78. *Ibid.* The section states:

[C]ommon carriers . . . shall accept, convey, transport, or purchase without discrimination, oil and natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable.

79. *Ibid.* See notes 25-33 *infra* and accompanying text for a discussion of requirements under the Natural Gas Act.

## CONCLUSION

The differences which have been enumerated in discussing the types of land over which pipelines must pass in New Mexico may be minimized if the modern or "public benefit" view is adopted when the New Mexico courts are called upon to define "public use." Where public lands are involved, the Secretary of the Interior has discretion to grant rights-of-way for oil and gas pipelines, which discretion is not limited by any strict "public use" requirement.<sup>80</sup> In addition, where allotted Indian lands are involved, the decision of the Secretary is not exclusive.<sup>81</sup> Pipeline companies may wish to bring condemnation actions in state courts or in federal courts, where the laws of the state in which the land is situated will be applied whenever possible.<sup>82</sup>

After surmounting the "public use" hurdle, other limitations divide themselves into only two questions: (1) Is the pipeline a common carrier, or by statute considered a common carrier?; and (2) Is the pipeline if a gas pipeline, eligible to exercise its rights under the Natural Gas Act? If the answers to these questions are "yes," any pipeline may exercise the power of eminent domain, whether under state statute or under federal enactment.

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80. See note 78 *infra*, and accompanying text.

81. See note 70 *infra*, and accompanying text.

82. *Ibid.*

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