THE *SAGE* APPROACH TO IMMEDIATE ENTRY BY PRIVATE ENTITIES EXERCISING FEDERAL EMINENT DOMAIN AUTHORITY UNDER THE NATURAL GAS ACT AND THE FEDERAL POWER ACT

Jim Behnke & Harold Dondis***

"[N]ecessity is the mother of our invention."
Plato, The Republic, Book II
Trans. Benjamin Jowett

I. INTRODUCTION

From time to time practical necessity gives expression to a new legal development that is implicit in established forms of rights or remedies.

On November 8, 2004, the United States Supreme Court denied a petition for certiorari with respect to *East Tennessee Gas Pipeline Co. v. Sage*.[1] By denying the petition, the United States Supreme Court refused to review the application of an immediate entry remedy in federal takings by private entities in the United States district courts (USDC). This remedy, which authorizes a private condemnor to enter and possess or use condemned property prior to the time that compensation for the property is finally decided and paid, has evolved unevenly during the last fifty years, and the first documented request for immediate entry by a private party holding delegated federal eminent domain authority was denied.

That denial occurred in 1957 after a USDC was asked to consider a novel application of its general equity jurisdiction in aid of delegated federal eminent domain authority. Entry was sought by a natural gas company[2] holding a certificate of public convenience and necessity (Certificate) issued by the Federal Power Commission (FPC)[3] under section 7(c) of the Natural Gas Act (NGA).[4]

---

* Jim Behnke is a shareholder at Rich May, a Professional Corporation, Boston, Massachusetts. There he has practiced in the area of right of way acquisition for federally regulated energy projects since 1981. He received an A.B. from Dartmouth College and a J.D. from Harvard University Law School.

** Harold Dondis is of counsel at Rich May, a Professional Corporation and was formerly a managing partner of that firm's predecessor. There he has practiced in the area of right of way acquisition for federally regulated energy projects since 1948. He received a B.S. from Bowdoin College and an L.L.B. from Harvard University Law School. The views expressed in this article are those of the authors and do not necessarily reflect the views of Rich May, a Professional Corporation.

1. East Tenn. Gas Pipeline Co. v. Sage, 361 F.3d 808 (4th Cir. 2004), *reh'g en banc denied*, 369 F.3d 357 (2004), *and cert. denied*, 543 U.S. 978 (2004).

2. The definition of "natural gas company" is provided for in 15 U.S.C. § 717a(6) (2000).

3. This authority is now held by the Federal Energy Regulatory Commission (FERC). The functions of the FPC were transferred to the Secretary of Energy with regard to natural gas matters subject to the Natural Gas Act, 15 U.S.C. §§ 717-717z (2000), electric transmission and hydro-electric matters under the Federal Power Act, 16 U.S.C. §§ 791a–838c (2000) (FPA), and to the FERC within the Department of Energy by the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977).

4. 15 U.S.C. § 717f(c) (2000).

The plaintiff in the case,[5] relied on *United States v. Fisk Building*,[6] arguing that a USDC exercising its inherent equity jurisdiction could, prior to determining compensation for the easement to be taken, grant the holder of an FPC Certificate immediate entry of an affected property.[7] The court found decisions to be equivocal, reading *United States v. a Parcel of Land* [8] to reach the opposite result from *Fisk Building*. Nevertheless, the court stated that it could exercise "its inherent equity power under suitable circumstances to order an immediate taking"[9] because " there [was] an equity in favor of the public which call[ed] for the exercise of that power . . . determined by whether or not the public would be prejudiced or injured if the exercise of that power were withheld."[10] The USDC, however, found little prejudice to the natural gas company and, to avoid harm to the landowner, decided that the immediate entry petition should be denied.[11]

The remedy was not sought again and obtained in the USDC until 1981.[12] Subsequently it evolved rapidly[13] and by 2004, the United States Circuit Court of Appeals for the Fourth Circuit found it necessary to affirm an immediate entry remedy framed in terms of a mandatory preliminary injunction.[14] In doing so the Fourth Circuit attempted to distinguish its decision from a Seventh Circuit decision which defendant landowners argued was inconsistent with immediate entry.[15]

The purposes of this article are to examine the evolution of the federal immediate entry remedy for private entities, identify its sources, constituent elements and purposes, assess the equity theory affirmed by *Sage*, assess

---

5. Algonquin Gas Transmission v. Herman Yules, Civ. No. 6842 (D. Conn. Sept. 10, 1957) (Memorandum of Decision on Petition for Immediate Entry, D.J. Anderson). A copy of this unpublished decision is available in the files of the authors. The page references to the *Yules* decision included in this article are to the original pagination of the transcript which is cited as a slip opinion.

6. United States v. Fisk Bldg., 99 F. Supp. 592 (S.D.N.Y. 1951).

7. In *Yules*, the right to immediate entry is referred to as the right to immediate possession or taking.

8. United States. v. Parcel of Land, 100 F. Supp. 498 (D.D.C. 1951).

9. *Yules*, slip op. at 8.

10. *Id.*

11. *Yules*, slip op. at 9.

12. *Compare* Northern Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170 (D.N.D. 1981), *with* Atlantic Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455 (4th Cir. 1963).

13. Published opinions discussing this remedy include: Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 Acres of Land, No. A1-03-66, 2003 WL 21524816 (D.N.D. June 3, 2003); Northwest Pipeline Corp. v. The 20' x 1,430' Pipeline Right of Way Easement, 197 F. Supp. 2d 1241 (E.D. Wash. 2002); Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 210 F. Supp. 2d 976 (N.D. Ill. 2002) (citing Commercial Station Post Office v. United States, 48 F.2d 183, 184 (8th Cir. 1931)); Vector Pipeline, L.P. v. 68.55 Acres of Land, 157 F. Supp. 2d 949, 951 (N.D. Ill. 2001); N. Border Pipeline Co. v. 64.11 Acres of Land, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000); Tennessee Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F. Supp. 2d 102, 104 (D. Mass. 1998); USG Pipeline Co. v. 1.74 Acres of Land in Marion County, Tenn., 1 F. Supp. 2d 816, 826 (E.D. Tenn. 1998); Kern River Gas Transmission Co. v. Clark County, 757 F. Supp. 1110, 1117 (D. Nev. 1990); *Compare* 127.79 Acres, 520 F. Supp. 170, *with* National Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000); Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999). *See also* Brief For Respondent at 12, n.6, Joyce v. E. Tenn. Natural Gas Co., 543 U.S. 978 (2004) (No. 04-174) for a list of the cases cited here. A number of unpublished opinions are also listed in note 193.

14. East Tenn. Gas Pipeline Co. v. Sage, 361 F.3d 808 (4th Cir. 2004), *reh'g en banc denied*, 369 F.3d 357 (2004), *and cert. denied*, 543 U.S. 978 (2004).

15. Northern Border Pipeline Co. v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998).

applicability of the remedy to changes in the NGA and FPA[16] rendered by the enactment of the Energy Policy Act of 2005 (EPAct 2005),[17] and suggest some points of practice in the area of takings and entry. The authors believe that the USDCs' exercise of authority granted under the NGA, the FPA, and Rule 71A of the Federal Rules of Civil Procedure (FRCP) has evolved into several approaches to the remedy of immediate entry for federally regulated but privately owned projects of which *Sage* is the best articulated. We hope that this article will help to inform future application of the remedy, by continuing to assure protection of property owners' rights in the face of public interest findings by Congress and the FERC that are implemented in part via the exercise of federal eminent domain authority.

In this article, we have chosen to use the terms "immediate entry" broadly to mean any court order or decision, issued in connection with a taking,[18] to enter and use property for purposes specifically authorized by FERC under the NGA or FPA in advance of a final, non-appealable decision on and payment of compensation to an effected property owner. We have tried to avoid the terms "immediate possession" generally used by the courts[19] because in many situations the property interest to be taken constitutes an easement (a legal right to use property without material interference by others for a specified purpose) rather than a fee ownership or leasehold (essentially a legal right to possess property and exclude others from it). In such circumstances, the rights sought to be taken and the authorization to immediately enter do not always include a right of possession as customarily understood.

II. DISCUSSION

Our discussion commences with a review of the sources of authority for eminent domain and the remedy of immediate entry on behalf of private entities and related issues that may affect the remedy. Immediate entry will then be examined in detail. We will suggest an approach that may slightly streamline the *Sage* doctrine by eliminating redundancy and emphasize the necessity of demonstrating tangible public benefits and reasonably adequate security for payment of compensation before immediate entry is ordered. We will also list some points of practice pertaining to takings and entry.

A. Sources of Authority

At least three sources of statutory authority underlie immediate entry in aid of holders of the FERC hydro-power licenses, the FERC construction permits for transmission facilities in national interest interstate electric transmission corridors (when and if approved), and the FERC certificates of public

16. *See generally* Natural Gas Act, 15 U.S.C. §§ 717-717z (2000); Federal Power Act, 16 U.S.C. §§ 791a-828c (2000); Department of Energy Organizational Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified as amended at 42 U.S.C. §§ 7101–352 (2000)); *see also supra* text accompanying note 3.

17. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

18. The rights taken may be easements for pipelines under the NGA, flowage rights, and other incidentals under the Federal Power Act § 21, electric transmission easements under Federal Power Act § 216(e)(3), as enacted by Energy Policy Act of 2005 § 1221, or fee ownership rights under any of these statutes as deemed appropriate by FERC and the project developer.

19. For a list of published opinions, *see supra* note 13.

convenience and necessity exercising the federal power of eminent domain.[20] First, an express Congressional delegation of federal eminent domain authority has been granted to those entities.[21] Second, a delegation of authority to a federal agency specifies the form of regulatory approval for the project and identifies the public use and interest that makes a taking and immediate entry by such entities necessary or advisable.[22] Third, a specific Congressional grant of jurisdiction is made to a federal court to decide taking cases and specifies the procedures that are to be used by the court in determining whether and how immediate entry and other matters pertaining to an exercise of eminent domain are to be administered.[23] Importantly for the immediate entry remedy, Congress has placed no express limitation on the equity jurisdiction of the USDC in administering takings under the NGA or FPA.[24]

Under *Sage*,[25] these general sources of authority give rise to two general conditions, and an implied constitutional condition that must be satisfied before immediate entry may be granted: (1) The condemnor must demonstrate it has the right to take under an appropriate FERC authorization;[26] (2) conditions for preliminary injunctive relief against the property owner must be satisfied[27] and mandatory;[28] and (3) the landowners' compensation claims must be adequately secured.[29]

1. A Private Entity's Authority to Take

Eminent domain is a non-waivable attribute of sovereignty[30] and, prior to the merger of law and equity practice in USDC, was ordinarily exercised by

20. Although the Energy Policy Act of 2005 § 311(c) greatly clarified the preemptive effect of federal licensing of facilities onshore or in state waters used in the importation of liquefied natural gas, the exclusive authority of the FERC to approve such facilities under NGA § 3 did not include any delegation of federal eminent domain authority. *See also* S. Rep. No. 109-78, at 381 (2005) ("§ [311] clarifies FERC's exclusive jurisdiction under the [NGA] for siting, construction, expansion and operation of import/export facilities located onshore or in State waters. This § does not provide [the] FERC eminent domain authority over siting LNG facilities.") Presumably after EPAct 2005 eminent domain delegations under the NGA remain restricted to facilities approved by the FERC under the Natural Gas Act § 7(c). *See generally* 15 U.S.C. § 717f(h).

21. *See also* 15 U.S.C. § 717f(h); 16 U.S.C. § 814; Energy Policy Act of 2005 § 1221(a) (adding Federal Power Act § 216(e)(1), to be codified at 16 U.S.C. § 824 p(e)(1), as well as all other sub-sections of FPA § 216). Hereinafter the Energy Policy Act 2005 § 1221(a) addition will be referred to as Federal Power Act § 216.

22. *See also* 15 U.S.C. § 717f(c); 16 U.S.C. § 797(e); Federal Power Act § 216(b) (to be codified at 16 U.S.C. § 824p(b)).

23. *Supra* note 21.

24. Generally, the United States Supreme Court requires a clear and valid Congressional command before it will consider a federal court to have been limited in its equity jurisdiction. *See also* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); Porter v. Warner Holding Co., 328 U.S. 395, 403 (1946).

25. East Tenn. Gas Pipeline Co. v. Sage, 361 F.3d 808 (4th Cir. 2004), *reh'g en banc denied*, 369 F.3d 357, *cert. denied*, 125 S. Ct. 479 (2004).

26. *Id.* at 831.

27. *Sage*, 361 F.3d at 831.

28. *Id.* at 830. As the court points out, a mandatory injunction directs an affirmative action that changes the status quo rather than an action that preserves it.

29. *Sage*, 361 F.3d at 826.

30. Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924).

filing an action at law.[31] Congress may delegate authority to take to a federal agency[32] or to a private entity.[33] It has expressly delegated that authority to private entities holding the FERC Certificates issued under the NGA,[34] FERC Licenses,[35] and Construction Permits[36] issued under the FPA. The language of the NGA section 7(h) delegation is similar to and was based on the language of section 21 of the FPA.[37] Similarly, the language of FPA section 216(e)(1) and

31. United States v. Kohl, 91 U.S. 367 (1875).

32. United States v. Carmack, 329 U.S. 230 (1946).

33. Thatcher v. Tenn. Gas Transmission Co., 180 F.2d 644 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950). *See also* Kelo v. City of New London, 545 U.S. 469 (2005) (indicating that Congress and the States have very great latitude in defining the types of public purposes that will be considered "public use" for purposes of the Fifth Amendment and exercise of eminent domain by public or private entities).

34. The language of the delegation is in Natural Gas Act § 7(h): "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 pipe line or pipe lines 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 to the proper operation of such pipe line or pipe lines, 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 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: *Provided*, That the USDCs shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000." Natural Gas Act § 7, 15 U.S.C. § 717f (h) (2000).

35. The relevant language of this delegation is in Federal Power Act § 21: "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, 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 land or other property may be located, or in the State courts. 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: *Provided*, That USDCs shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000 . . . . " Federal Power Act § 21, 16 U.S.C. § 814 (2000).

36. The language of the delegation is in Federal Power Act § 216(e) (to be codified at 16 U.S.C. § 824p(e)): "(1) In the case of a permit under subsection (b) of this section for electric transmission facilities to be located on property other than property owned by the United States or a State, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located. (2) Any right-of-way acquired under paragraph (1) shall be used exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition. (3) The practice and procedure in any action or proceeding under this subsection in the district court of the United States shall conform as nearly as practicable to the practice and procedure in a similar action or proceeding in the courts of the State in which the property is located. (4) Nothing in this subsection shall be construed to authorize the use of eminent domain to acquire a right-of-way for any purpose other than the construction, modification, operation, or maintenance of electric transmission facilities and related facilities. The right-of-way cannot be used for any other purpose, and the right-of-way shall terminate upon the termination of the use for which the right-of-way was acquired."

37. *See also* H.R. REP. NO. 80-695 (1947), *reprinted in* 1947 U.S. Code Cong. Serv., 1477. Moreover, the United States Supreme Court has stated that decisions under similar provisions of either of these two statutes may be used in construing comparable provisions of the other. *See also* Arkansas La. Gas Co. v. Hall,

(3) appears to be based on that of FPA section 21 and NGA section 7(h).[38] Although all three laws authorize takings in "State courts" in addition to USDC, to the knowledge of the authors, takings in State courts rendered solely under the NGA and FPA have been extremely rare or non-existent.

NGA section 7(h) and FPA sections 21 and 216(e) also specify that the procedures to be used in administering the exercise of federal eminent domain authority shall conform to the practice and procedure used in applicable state courts. Lastly, these statutes grant jurisdiction to USDC to hear such cases, and in the case of NGA section 7(h) and FPA section 21 an amount in controversy requirement must be satisfied. None of the statutes expressly creates an immediate entry remedy.

The requirement to use state procedures under the eminent domain delegations in NGA section 7(h) and FPA section 21 is no longer applicable to cases that are filed in the USDC. The requirement to use state procedures under FPA section 216(e), on the other hand, seems problematic in that the principles applicable to NGA section 7(h) and FPA section 21 which require the use of the FRCP may have been overlooked in the drafting of FPA section 216(e).

Although there is no express limitation to the legal or equitable jurisdiction of the USDC in a taking case under the FPA or NGA, there is a jurisdictional restriction on the issues that may be raised by an affected landowner in an eminent domain case or immediate entry hearing due to judicial review requirements pertaining to the FERC orders under the NGA[39] and FPA.[40] Additionally, the question whether the statutes delegating federal eminent domain authority impose an implied obligation to negotiate with a property owner in good faith prior to taking has often been raised as a limitation to taking and immediate entry authority. As to this matter, there appears to be a split of opinion on whether this requirement applies to takings and immediate entry proceedings.

a. Limitations on Eminent Domain Authority Arising Due to FERC Certificate, License, or Construction Permit Conditions

Entities exercising federal eminent authority and requesting immediate entry relief under the NGA or FPA must hold a FERC Certificate, License, or Construction Permit relating to the property that is to be entered and taken. The requirement that a natural gas company hold a FERC Certificate arises under NGA section 7(c).[41] Generally speaking, an interstate pipeline project proponent is required to file an individual application for such a Certificate.[42] An exception exists where the proponent has previously been granted a so-called

453 U.S. 571, 577 n.7 (1981); Federal. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956), *motion denied*, 351 U.S. 956 (1956).

38. *Compare* language of Energy Policy Act of 2005 § 216(e), *with* that of 15 U.S.C. § 717(h), *and* 16 U.S.C. § 814.

39. *See also* Natural Gas Act § 19, 15 U.S.C. § 717r (2000).

40. *See also* Federal Power Act §313, 16 U.S.C. § 825l (2000).

41. Natural Gas Act § 7, 15 U.S.C. § 717f (2000).

42. 18 C.F.R. § 157 (2004).

Blanket Certificate.[43] The latter, once granted, automatically authorizes a project if the cost of the project does not exceed annually designated project cost limitations. With respect to a second set of higher threshold costs, the project must be noticed publicly and authorization under the Blanket Certification will not automatically take effect if a protest is filed and that protest is not subsequently withdrawn by the parties filing it. In the event that the protest is filed and not withdrawn, the project is treated by the FERC as requiring an individual project application. The FERC is obligated under such circumstances to fully review the project for purposes of determining whether the project is or will be required by the public convenience and necessity.[44] In conformity with the NGA and the FERC rules and regulations, the FERC may place reasonable conditions on any Certificate that it issues and thereby impact property owners.[45] Additionally, under section 401(d) of the Clean Water Act (CWA) state water quality requirements may be incorporated directly into a FERC Certificate, License, or Construction Permit.[46] The FERC License authority over an individual hydro-electric project is comparable to the FERC Certificate authority over an individual pipeline project except that the FERC has no Blanket License analogue to the Blanket Certificate.[47] In issuing an FPA License, the FERC is required to determine whether a proposed hydro-electric project serves the public interest.[48] A Construction Permit under FPA section 216(b), on the other hand, requires the FERC not only to find that a proposed project is consistent with the public interest[49] but the FERC must, in addition, make statutory findings on a number of other items.[50] The FERC has recently

---

43. 18 C.F.R. § 157.203 (2004). FERC has recently proposed new rules for Blanket Certificates including landowner notification requirements. *See also* Notice of Proposed Rule Making, *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, 71 Fed. Reg. 36,276 (June 26, 2006).

44. In this regard generally, the United States Supreme Court has indicated that FERC is to review all matters relevant to the public interest in considering whether to issue a Certificate. Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378 (1959).

45. 15 U.S.C. § 717f(e) (2000).

46. 33 U.S.C. § 1341(d) (2000).

47. 16 U.S.C. § 797(e) (2000); 18 C.F.R. § 4 (2004).

48. 16 U.S.C. § 797(e) (2000).

49. Federal Power Act § 216 (b)(3) (to be codified as16 U.S.C. § 824p(b)(3) (2000)).

50. The required findings are in Federal Power Act § 216 (b)(3) (to be codified as 16 U.S.C. § 824p(b)): "(1)(A)a State in which the transmission facilities are to be constructed or modified does not have authority to—

(i) approve the siting of the facilities; or

(ii)consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this Act . . . but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has—

(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;

proposed regulations for Construction Permits.[51] As a condition to consideration of any application for a Construction Permit, the Secretary of Energy must, within a year of the enactment of EPAct 2005, and every three years thereafter, conduct consultations with affected states concerning electricity transmission congestion and designate national interest electric transmission corridors[52] with respect to which delegated eminent domain powers held by a Construction Permit holder may be exercised against private persons or municipalities.[53]

Pursuant to the National Environmental Policy Act (NEPA),[54] the FERC has promulgated extensive environmental review regulations to be used by project proponents and the FERC in evaluating the land use, environmental, and citing impacts of a proposed project which may specifically affect the location of the project and necessarily affect property owners.[55] Nothing in EPAct 2005 has restricted the requirement of the FERC to conduct NEPA review in connection with the issuance of Certificates, Licenses, or Construction Permits, although the Secretary of Energy or FERC, as the case may be, is now designated as the lead agency for purposes of NEPA review involving energy facility siting of applicants for a Construction Permit or Certificate.[56] With the exception of any state law requirements validly imposed under CWA section 401(d)[57] these regulations and those pertaining to Licenses generally retain their preemptive character in relation to comparable state law requirements.[58] In EPAct 2005, Congress generally assured that collateral approvals required for an interstate pipeline or liquefied natural gas import or export facility under federal law,

---

(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and

(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures."

51. Notice of Proposed Rule Making, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, [2006 Proposed Regs.] F.E.R.C. STAT & REGS. ¶ 32,605, 71 Fed. Reg. 36,258 (2006). FERC's authority to promulgate such regulations is granted in the Federal Power Act §216(c)(2) (to be codified at 16 U.S.C. § 824p(c)(2) (2005)).

52. Federal Power Act § 216(a) (to be codified at 16 U.S.C. § 824p(a)).

53. Federal Power Act § 216(e)(1) (to be codified at 16 U.S.C. § 824p(e)(1)).

54. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–70f (2000).

55. *See also* Final Rulemaking, *Regulations Implementing the National Environmental Policy Act*, 18 C.F.R. pt. 380.

56. *See also* Federal Power Act § 216(h)(3) (to be codified at 16 U.S.C. § 824p(h)(3)); Energy Policy Act of 2005, Pub, L. No. 109-58, § 313(a), 119 Stat. 594 (amending Natural Gas Act by adding § 15(b), to be codified at 15 U.S.C. § 717n(b)).

57. American Rivers, Inc., v. Green Mountain Power, 129 F.3d 49 (2d Cir. 1997); *see also* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S.Ct. 1843 (2006) (For recent United States Supreme Court comment on the CWA).

58. *See also* National Fuel Gas Supply Corp. v. N.Y. Pub. Serv. Comm'n, 894 F.2d 571 (2d Cir. 1989), *cert. denied*, 497 U.S. 1004 (1990); Northern Natural Gas Co. v. Munn, 254 F. Supp. 2d 1103 (S.D. Iowa 2003), *aff'd mem.*, 377 F.3d 817 (8th Cir. 2004) (also noting that FERC may adjust the scope of state jurisdiction under Natural Gas Act § 7(e)).

whether initially rendered by State or other federal agencies, receive review in a federal forum.[59]

Given the plain language of NGA section 7(h) and FPA sections 21 and 216(e), it is questionable whether the FERC can generally prohibit the exercise of eminent domain or the immediate entry remedy by a Certificate, License, or Construction Permit holder.[60] The FERC can, however, condition a FERC License, Certificate, or Construction Permit and thereby specify the type of property interest that may be taken pursuant to that License, Certificate, or Construction Permit.[61] The FERC may also limit construction timing, impose operational or environmental restraints, and specify the location in which property rights may be taken either generally or specifically.[62] Such supervision and regulation by the FERC with respect to land use, environmental, construction and operational matters as expressed in Certificate, License, or Construction Permit conditions can serve as important factors for a USDC to consider in deciding whether to order immediate entry of affected property.[63]

b. Limitations on USDC Authority to Consider Defenses of Landowners

A related jurisdictional limitation restricts the issues that may be considered by the USDC in a taking action and immediate entry hearing under the NGA or FPA. The limitation is imposed by the judicial review provisions of the NGA and FPA with respect to the FERC orders.[64] Congress has mandated that review of those orders "shall be exclusive" in applicable United States circuit courts of appeal after issues for review are raised with the FERC on rehearing.[65] As a result, the United States Supreme Court has decided that the failure of an

---

59. Energy Policy Act of 2005 § 313(a) (amending the Natural Gas Act by adding § 15(a) through (d), to be codified at 15 U.S.C. § 717n(a) through (d)); Energy Policy Act of 2005 § 313(b) (amending Natural Gas Act by adding § 19(d), to be codified at 15 U.S.C. § 717r(d)); Federal Power Act § 216(h)(6) (to be codified at 16 U.S.C. § 824p(h)(6)). These laws appear to have been enacted by Congress to overrule, at least with respect to the FERC approved interstate and foreign import/export energy facilities, Roosevelt Campobello Int'l Park Comm'n v. E.P.A., 684 F.2d 1041, 1056 (1st Cir. 1982) (holding judicial review of state water quality certificates issued under Clean Water Act § 401(a) must be in state court)..

60. *See also supra* notes 34, 35 and 36.

61. Columbia Gas Transmission Corp. v. Gas Storage Easement, 776 F.2d 125 (6th Cir. 1985).

62. *See also* Kern River Gas Transmission Co. v. Clark County, 757 F. Supp. 1110, 1116 (D. Nev. 1990). In the case of a electric transmission facility construction permit, the FERC's ability to dictate location is more constrained than with Certificates or Licenses due to the fact that permitted facilities must be situated in previously reviewed and approved national interest electric transmission corridors. Federal Power Act § 216(a) (to be codified at 16 U.S.C. § 824 p(a)). A Notice of Inquiry, *Considerations for Transmission Congestion Study and Designation of National Interest Electric Transmission Corridors*, 71 Fed. Reg. 5660 (2006).

63. Federal Power Act § 216(e)(4) (to be codified at 16 U.S.C. § 824p(e)(4)), however, may create an interpretation problem for FERC and the courts in that it seems ambiguous. If a Construction Permit holder takes property rights of a landowner in an interstate electric transmission corridor, it is clear that it may not use those property rights for any purpose other than electric transmission. What is not clear, however, is the breadth of this prohibition and whether it also extends to and is enforceable against a Certificate holder who subsequently, in an unrelated and separate project, attempts to cross or longitudinally occupy the property that was taken by the Construction Permit holder for electric transmission purposes.

64. *Compare* 15 U.S.C. § 717r(b) (2000), *and* 16 U.S.C.§ 8251(b) (2000).

65. *Compare* 15 U.S.C. § 717r(b) (2000), *and* 16 U.S.C.§ 8251(b) (2000).

aggrieved party to raise an issue which is properly within the scope of the FERC jurisdiction on rehearing with the FERC and on direct appeal in an appropriate United States circuit court of appeal, constitutes an insurmountable bar to raising it in a subsequent state judicial proceeding.[66] This prohibition against collateral attack of a FERC order has been also extended to Certificate proceedings under the NGA.[67] EPAct 2005 leaves the statutory requirement for judicial review of Certificates, Licenses, and Construction Permits in the United States courts of appeals untouched even though it has extended federal judicial review to other collateral authorizations in the case of FERC Certificates and to the President in the case of Construction Permits.[68]

As to takings and immediate entry, the principle against collateral attack of FERC orders requires that issues that are appropriate for review by the FERC[69] cannot be raised by a landowner in defense of a taking or a related request for immediate entry.[70] To date, federal courts have uniformly applied this prohibition against collateral attack in FPA and NGA takings and immediate entry hearings, to prevent property owners from raising such FERC jurisdictional issues as whether notice of the FERC proceedings to property owners has been adequate,[71] whether the project has been improvidently located,[72] and whether state law prohibitions against takings of property apply to the project.[73] Moreover, at least one federal court has characterized such takings as "enforcement of the FERC" certificate (or license).[74] Thus, a USDC or State court may not review the findings and conditions of a FERC order. USDC review authority is generally limited in the case of a taking under a hydro-power license or interstate pipeline certificate to: (1) determining whether the amount in controversy in the taking is in excess of $3,000, (2) determining whether the Certificate or License holder have failed to contract or agree with the property owner, and (3) assuring that the FERC order is effective. With respect to a taking under an electric transmission Construction Permit USDC review authority would appear to be limited to items (2) and (3) above as no jurisdictional amount is specified by EPAct 2005. FPA section 216, however, adds a requirement that the electric transmission right of way taken be used exclusively for that purpose.[75]

---

66. Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

67. Williams Natural Gas Co. v. City Oklahoma City, 890 F.2d 255 (10th Cir. 1989).

68. Energy Policy Act of 2005, *supra* note 59.

69. Conditions incorporated into the FERC certificate by virtue of the Clean Water Act § 401(d) may now be appealed and reviewed by the United States Circuit Courts of Appeals in the case of FERC construction permits appeal is to the President. *See generally supra* note 59. *Compare* Roosevelt Campobello Int'l Comm'n v. U.S. 684 F.2d at 1056.

70. *See, e.g*., *Williams Natural Gas Co.*, 890 F.2d. at 263; Tennessee Gas Pipeline Co. v. 104 Acres, 749 F. Supp. 427, 430-33 (D.R.I. 1990).

71. *Tennessee Gas Pipeline*, 749 F. Supp. at 430.

72. Kern River Gas Transmission Co. v. Clark County, 757 F. Supp. 1110, 1116 (D. Nev. 1990).

73. Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth., 2 F. Supp. 2d 106, 110 (D. Mass. 1998). *See also Kern River Gas Transmission Co.*, 757 F. Supp. at 1118.

74. *Williams Natural Gas Co.*, 890 F.2d at 265.

75. Federal Power Act § 216(e)(2)-(4) (to be codified at 16 U.S.C. § 824 p(e)(2)-(4)). The reverter expressly required by Congress may be a clarification of its intention. On the issue of a condemnor using property for purposes other than those for which they are taken, *see* Jim Behnke & Harold Dondis, *Assuring*

In terms of USDC's jurisdiction over the taking and its incidents, the FERC Certificate, License, or Construction Permit does three things: (1) it helps define the scope of the rights that may be taken by the Certificate or Construction Permit or License holder; (2) it jurisdictionally limits the issues that a landowner may successfully raise in defense of a taking or request for immediate entry; and (3) it provides much of the factual and regulatory basis that can support the grant for a request of immediate entry in a particular case.

c. Implied Condition of Good Faith Negotiations by a Certificate License, or Permit Holder

An exercise of eminent domain authority by a Certificate, Construction Permit, or License holder is conditioned on the holder being unable to acquire necessary property interests by contract. Alternatively, in the case of the Certificate or Construction Permit holder, there may be an inability to reach agreement with a property owner on the issue of compensation.[76] Although there can be no doubt that a Certificate, Construction Permit, or License holder is required to attempt to reach an agreement with an affected property owner as a jurisdictional matter, it is not precisely clear what the extent and quality of its negotiations with the landowner must be. The language of NGA section 7(h) and FPA sections 21 and 216(e)(1) impose no express requirement that a Certificate, License, or Construction Permit holder engage in good faith negotiations with landowners prior to taking and entry[77] but a split of opinion has developed as to whether or not there is an implied obligation to do so. Some USDCs that have considered the issue have stated that there is such an obligation on the part of a Licensee or Certificate holder. Others have indicated that there is no such obligation.[78]

In those jurisdictions that imply a requirement of good faith negotiation adherence to the extensive negotiation guidelines recommended for federal agencies in connection with real property acquisition is not required of private condemnors.[79] Generally, USDCs requiring good faith negotiations find the condition to be satisfied by reasonable and common-sense efforts on the part of a Licensee or Certificate holder. In *Transcontinental Gas Pipeline Co. v. 118 Acres*, for instance, the USDC found that two meetings with a property owner and an offer based on an appraisal of the affected properties using standard methodologies and in an amount no less than the appraised value of the rights to be taken were sufficient to satisfy any "good faith negotiation" requirement.[80] Additional efforts to negotiate with a property owner can be helpful in settling a case and, if the negotiations are unsuccessful, in emphasizing to a court why application of an immediate entry remedy is necessary or advisable. In those situations where negotiations with a property owner cannot occur under NGA

Telecommunications Access in the Commonwealth, 89 MASS. L. REV. 63, 69-70 (2004). *See also supra* note 63.

76. *See generally*, *supra* note 34, 35, 36 and accompanying text.

77. *See generally*, *supra* note 34, 35, 36 and accompanying text.

78. *See* Lauren Mohr, *The Tangled Web: Regulation, Interstate Pipeline Companies, and Due Process Rights of Property Owners*, 26 ENERGY L.J. 191, 206-07 (2005).

79. *Compare* 42 U.S.C. §§ 4651–5 (2000), *with Tennessee Gas Pipeline Co.*, 6 F. Supp. 2d at 105.

80. Transcontinental Gas Pipeline Corp. v. 118 Acres, 745 F. Supp. 366, 369 (E.D. La. 1990).

section 7(h) and FPA section 21 because the affected property owner cannot be readily identified from public property records, the FRCP provide the applicable standard for investigating those records.[81] On the other hand, in the case of FPA section 216(e)(3) what state procedural standards may apply will be discussed below.

3. Authority under the Federal Rules of Civil Procedure

Application of FRCP 71A to a taking or immediate entry hearing under the NGA or FPA appears to contradict language of NGA section 7(h) and FPA sections 21 and 216(e)(3). That language states:

> The practice and procedure in any action or proceeding . . . 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 . . . .[82]

a. NGA section 7(h) and FPA section 21 Enacted Prior to FRCP 71A

The contradiction of Rule 71A with NGA section 7(h) and FPA section 21, however, is only apparent for the language of the procedural conformity clause in these two statutes and has been rendered inoperative by the United States Supreme Court's exercise of its procedural rule-making authority. The Court's authority to promulgate Rule 71A, as well as other FRCP, derives generally from the Rules Enabling Act[83] and in relevant part that law states: "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." [84]

Shortly after their original promulgation, the United States Supreme Court held that the FRCP superseded[85] the Conformity Act.[86] That act, like the conformity clauses of NGA section 7(h) and FPA section 21, required USDCs to apply to civil actions generally the practice and procedure of the state in which the court was situated. In 1951, subsequent to the enactment of FPA section 21[87] and NGA section 7(h),[88] the United States Supreme Court amended the FRCP by adopting Rule 71A.[89] The purpose of the Rule was to provide a uniform procedure in USDC for all federal takings under prior federal laws. Its promulgation, therefore, superseded clauses requiring conformity to state

81. FED. R. CIV. P. 71A(c)(2). *See also* FED. R. CIV. P. 71A(c)(2) advisory committee notes (1951 Addition) (Original Report Note to Subdivision (c)), *reprinted in* 12A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE 608-10 (6th ed. 2000) [hereinafter WRIGHT I]

82. *Compare* 15 U.S.C. § 717f (2000), *with* 16 U.S.C. § 814 (2000), *and* Federal Power Act § 216 (to be codified as 16 U.S.C. § 824p (2000)).

83. 28 U.S.C. § 2072 (2000).

84. *Id.*

85. Sibbach v. Wilson, 312 U.S. 1 (1941).

86. Conformity Act, ch. 255, 17 Stat. 197 (1872).

87. Federal Power Act, ch. 285, § 21, 41 Stat. 1074 (1920) (codified as amended at 16 U.S.C. § 814 (2000)).

88. Natural Gas Act, ch. 333, § 7, 61 Stat. 459 (1947) (codified as amended at 15 U.S.C. § 717f (2000)).

89. *Amendments to Federal Rules of Civil Procedure Governing Condemnation Cases in the District Courts of the U.S.*, 11 F.R.D. 213 (U.S. 1951).

practice and procedure wherever found in federal taking laws on the effective date of its promulgation.[90] Not surprisingly, federal courts that have considered the issue have uniformly ruled that Rule 71A supersedes the conformity clauses of the FPA section 21[91] and the NGA section 7(h).[92] Consequently, the authority of the court to decide procedural issues pertaining to takings under the FPA section 21 and NGA section 7(h) currently derives from Rule 71A and the Rules Enabling Act. Furthermore, Rule 71A does not restrict the equity jurisdiction of a USDC, for it incorporates by reference most other FRCP, including Rule 65, governing the granting of preliminary equitable relief.[93] Attention to these points is important to the question of immediate entry for at least one USDC appears to have mistakenly invoked the conformity clause of NGA section 7(h) to authorize immediate entry under a combination of state and federal law. [94]

b. FPA section 216(e)(3) Enacted After Rule 71A Was Promulgated

The enactment of EPAct 2005 subsequent to the enactment of the Rules Enabling Act makes the use of Rules 71A and 65 problematic in a taking or entry proceeding under FPA section 216(e)(3). Although the language from the Rules Enabling Act quoted above would have Rule 71A supersede procedural conformity to state rules prior to or contemporaneous with the promulgation of Rule 71A, it is arguable that the Congress that enacted the Rules Enabling Act could not bind a subsequent Congress and that in this case the 109th Congress decided to ignore or partially overrule the Rules Enabling Act in enacting FPA section 216(e)(3).[95] Presumably, Congress was aware of Rule 71A at the time FPA section 216(e)(3) was enacted and decided to add a procedural conformity clause despite the existence of Rule 71A. Alternatively, inclusion of the clause may have been an uninformed or non-reflective addition of the conformity language of FPA section 21 and NGA section 7(h) without a clear awareness of the consequences of such inclusion. Thus, if properly raised in a USDC proceeding the question whether Rule 71A supersedes FPA section 216(e)(3) would appear to create an issue for the federal courts to clarify if Congress does not do so sooner by amending FPA section 216(e)(3).

From a procedural standpoint this difference between NGA section 7(h) and FPA section 21, on the one hand, and FPA section 216 on the other, could be important. For instance, jury trials in eminent domain cases are considered procedural matters and are not required under either the Seventh Amendment of

90. Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, 4 n.2 (1984) (Rule 71A supersedes the conformity clause of 40 U.S.C. § 257).

91. Georgia Power Co. v. 54.20 Acres, 563 F.2d. 1178, 1182 (5th Cir. 1977), *rev'd on other grounds*, Georgia Power Co. v. Saunders, 617 F.2d 1112 (5th Cir. 1980).

92. East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 822 (4th Cir. 2004); Northern Border Pipeline Co. v. 64.111 Acres, 344 F.3d 693 (7th Cir. 2003); Southern Natural Gas Co. v. Land, 197 F.3d 1368, 1374 (11th Cir. 1999); Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land, 210 F. Supp. 2d 1253, 1258 (D. Kan. 2003); USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 826-27 (E.D. Tenn. 1998); Algonquin Gas Transmission Co. v. Yules, Civ. No. 6842, slip op. at 10 (D. Conn. Sept. 16, 1957).

93. FED. R. CIV. P. 71A(a), 65.

94. *See infra* note 200.

95. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 946.

the United States Constitution[96] or in a trial subject to Rule 71A.[97] State constitutions, laws or procedures, on the other hand, may require jury trials in eminent domain cases.[98] Furthermore, under FPA section 216 it may be possible to use state immediate entry or so called "quick take" procedures in a taking filed in USDC.[99]

B. Immediate Entry: Granted by Courts on a Case by Case Basis

Having identified the sources and discussed the limitations of the authority by which a USDC supervises and implements an exercise of federal eminent domain by a private entity under the NGA and FPA, it is now appropriate to consider how such delegations and limitations can affect a USDC decision whether to order immediate entry as we have defined such entry in the introduction to this article. The source of the remedy with some exceptions has generally been considered to be the equity jurisdiction of the USDC. Thus, whether a License, Certificate, or Construction Permit holder is to be granted immediate entry of a property is generally decided by the USDC on a project by project and a case by case basis with the court retaining a high degree of discretion to grant or withhold relief. As indicated above a taking (and hence immediate entry remedy if ordered) has been characterized as enforcing the terms and conditions[100] of a FERC Certificate, License, or Construction Permit against a particular property and property owner.[101] The USDC retains authority to modify or revoke an entry order issued under equitable principles until at least such time as compensation is agreed upon or reduced to final judgment and paid to the landowner. Retention of such authority is necessary because the common law of federal eminent domain requires that title with respect to the affected property passes to a condemnor only after the property owner's just compensation claim is finally determined and paid to the property owner.[102] This doctrine allows the affected property owner to avail him or herself of state trespass or nuisance remedies against the taking authority if the condemnor subsequently abandons the project or dismisses the taking action.[103] In such situations, the property owner also retains a claim for a temporary taking.[104]

---

96. *See generally* United States v. Reynolds, 397 U.S. 14 (1970); Alabama Power Co. v. 1354.02 Acres, 709 F. 2d 666, 668 (11th Cir. 1983); Paxton Blair, *Federal Condemnation Proceedings and the 7th Amendment*, 41 HARV. L. REV. 29 (1927-28).

97. FED. R. CIV. P. 71A(h); *see also* Roland F. Chase, *Appointment, Proceedings and Review of Federal Eminent Domain Commission Under Rule 71a(h) of the Federal Rules of Civil Procedure*, 8 A.L.R. FED. 180 (1971) [hereinafter Chase].

98. *See e.g.*, Waltham Tele-Communications v. O'Brien, 403 N.E.2d 747, 749 (Mass. 1989).

99. *See infra* note 200.

100. With the exception of conditions incorporated by 33 U.S.C. § 1341(d), review of those terms and conditions is exclusively on direct appeal. *See generally* City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); Williams Natural Gas Co. v. City of Okla. City, 890 F.2d 255 (10th Cir. 1989).

101. *See also Williams Natural Gas Co*., 890 F.2d at 263.

102. *See also* Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1890).

103. *Id.* at 660.

104. East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 826 (4th Cir. 2004).

Reasonable attorneys' fees and other costs expended by the affected property owner may also be recovered if the taking is abandoned.[105]

The most comprehensive judicial discussion of immediate entry rendered in equity is in *Sage*.[106] The USDC rendering the decisions that were reviewed in *Sage*, severed determination of the issue of right to take and enter from the issue of compensation and then considered whether the Certificate holder had satisfied the requirements of NGA section 7(h) with respect to each of the affected landowners and properties. This accomplished, an order stating that the Certificate holder had the right to take was entered with respect to each condemnee. According to *Sage*, entry of such orders by the USDC was critical for such orders created for the Certificate holder "an interest in the landowner's property that could be protected in equity if the conditions for granting . . . (. . . injunctive) relief were satisfied."[107] Furthermore, because the Certificate holder had established "that it would have been entitled to possession upon the entry of final judgment"[108] and because a preliminary injunction was "appropriate to grant intermediate relief of the same character as . . . may be granted finally"[109] *Sage* held that the court was authorized to grant "immediate possession" [110] upon determining that the Certificate holder had also satisfied the requirements for a mandatory[111] preliminary injunction.[112]

In the Fourth Circuit a preliminary injunction requires a showing of: the degree of irreparable harm to plaintiff, the degree of harm to the defendant, the plaintiff's probability of success on the merits, and whether the relief requested is in the public interest.[113] Where the preliminary injunction is also mandatory, the Fourth Circuit further requires that review of the showing be "more searching."[114] In contrast to the USDC in *Sage*, however, there are other decisions in the First and Second Circuits that appear to have granted a condemnor entry of property prior to the final determination of compensation without considering the requirements for granting of preliminary injunctive relief. Instead, in those decisions a Certificate holder's or Licensee's right to take appears to have been decided on a motion for summary judgment and thereafter the plaintiff was free to enter the condemnee's land.[115] Although

105. *See* 42 U.S.C. § 4654(a)(2) (2000); *see also* Tennessee Gas Pipeline Co. v. 104 Acres, 828 F. Supp. 123, 130 (D.R.I. 1993), *aff'd, vacated on other grounds*, 32 F.3d 632 (1st Cir 1994).

106. *Sage*, 361 F.3d 808.

107. *Id.* at 823.

108. *Sage*, 361 F.3d at 824.

109. *Id.* at 823-24 (quoting De Beers Consol. Mines, Ltd. v. U.S., 325 U.S. 212, 220 (1945)) (internal citation omitted).

110. *Sage*, 361 F.3d at 820.

111. *See* note 28 as to how a mandatory preliminary injunction differs from a preliminary injunction generally.

112. *Sage*, 361 F.3d at 824-25.

113. *Id.* at 828. Similar standards can apply outside the 4th Circuit. *See also* Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996) Permanent injunctions have a somewhat different standard. *See generally* Ebay, Inc. v. MercExchange, LLC, 126 S.C. 1837, 1839 (May 15, 2006).

114. *Sage*, 361 F.3d at 830 (quoting *In re* Microsoft Corp. Antitrust Litig. v. Microsoft Corp., 333 F.3d 520, 525 (4th Cir. 2003).

115. *See also* Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth., 2 F. Supp. 2d 106 (D. Mass. 1998) (natural gas pipeline had obtained a certificate from the FERC to construct and operate an extension of pipeline

those specific decisions seem to create a separate means of achieving entry prior to payment of compensation, and perhaps a conflict with the common law of takings and passage of title, USDCs generally appear to treat immediate entry as a remedy that is to be applied using a preliminary injunction standard.[116]

A noteworthy right accrues to an affected property owner with respect to an entry remedy that is based on preliminary injunctive relief. Where the analysis is based on that standard, an affected property owner has the opportunity to seek review of an immediate entry order by an interlocutory appeal.[117] From the property owner's perspective, this contrasts favorably with partial summary judgment on the issue of taking after which entry is allowed. A decision on such a motion is not reviewable until the property owner's compensation is determined and a final judgment is rendered in the case.[118]

1. Necessity of Present Substantive Interest in Property.

Sage also examined a case that on a cursory reading appears to hold that FERC Certificate holders cannot be granted immediate entry *based solely* on the equity jurisdiction of a USDC.[119] In *Northern Border v. 86.72 Acres* a Certificate holder asserted that it had no right under the NGA to seek immediate entry and requested that the USDC grant it immediate entry *based solely* on the inherent equity jurisdiction of the court.[120] In affirming the court's denial of the immediate entry, the Seventh Circuit pointed out injunctive relief can only be granted to protect, preserve, or help achieve a substantive legal entitlement existing at the time that injunctive relief is requested.[121]

To illustrate this point the Seventh Circuit gave the example of how a preliminary injunction might be used to transfer a software license to one of two parties to a software joint venture who dispute between themselves the ownership of software and have a state self-help repossession remedy that neither disputant is able to use under the facts of the court's example. To obtain a preliminary injunction transferring use of the software, a disputant claiming ownership must make a convincing showing that he or she is likely to succeed on the merits of his or her ownership claim. As the Court put it, "the party receiving immediate possession of the software claimed an ownership interest in the property that [was] fully vested even before initiation of the lawsuit."[122]

---

and brought an action pursuant to the NGA); Rivers Elec. Co., Inc. v. 4.6 Acres of Land, 731 F. Supp. 83, 86 (N.D.N.Y. 1990) (Federal Power Act § 21, 16 U.S.C. § 814 (2000)); Rivers Elec. Co. Inc., v. .9 Acres, No. 89 Civ. 2383 (PNL), 1990 U.S. Dist. LEXIS 4421 (S.D.N.Y. April 17, 1990) (Federal Power Act § 21, 16 U.S.C. § 814 (2000)).

116. *See supra* note 13 and *infra* note 193. See *also* East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004); Algonquin Gas Transmission Co. v. Herman Yules, Civ. No. 6842, slip op. at p. 7–9 (D. Conn. Sept. 10, 1957).

117. *See also* 28 U.S.C. § 1292 (2000).

118. *See* 28 U.S.C. § 1291 (2000); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976).

119. Northern Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998).

120. *See also id.* at 471. The Certificate holder had relied on Northern Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170 (D.N.D. 1981).

121. *86.72 Acres of Land*, 144 F.3d at 469.

122. *Id.* at 472. One of the problems with the example used by the Seventh Circuit is that the analogy with an eminent domain case may not be sufficiently close. In the Seventh Circuit's example it is likely that the purported owner of the software also disputes the payment of any compensation whatsoever. This is not

According to the Seventh Circuit, the problem with the FERC Certificate holder's immediate entry request before the court was that "it did not present an argument grounded in substantive law establishing a preexisting entitlement to the property. Since [the Certificate holder] disavowed any such substantive argument, the district court had no authority to enter a preliminary injunction awarding immediate possession."[123]

The question of what the Seventh Circuit intended to be a preexisting entitlement to property is puzzling. From the Seventh Circuit's software ownership example it might initially appear that the Certificate, Construction Permit, or License holder must show that the filing of the eminent domain complaint creates a present legal interest in the property that is sufficient to justify lawful entry in the absence of the taking suit, something that is in fact legally impossible, because procedurally the filing of the taking action must occur prior to entry and any transfer of legal title. The Seventh Circuit then must have meant something else. The language of *Northern Border v. 86.72 Acres* requiring that a plaintiff "present an argument grounded in substantive law establishing a preexisting entitlement to the property"[124] is therefore unclear. It might also be interpreted to require a Certificate, License, or Construction Permit holder to demonstrate merely that it has a preexisting entitlement to a transfer of title to the property upon payment of just compensation to the property owner (i.e., upon satisfaction of the conditions of the FPA sections 21, or 216(e), or NGA section 7(h) eminent domain delegation). The unarticulated premise of this interpretation of preexisting entitlement to the property is that the actual transfer of the property owner's legal right, title, and interest to the property interest sought will occur in the future upon satisfying the condition precedent that the present property owner be paid just compensation; for as a matter of common law it is the final, non-appealable determination and tendering of just compensation that triggers the legal transfer of title.[125]

If, contrary to fact, landowner compensation could be finally determined by the court and tendered to the property owner at the time the taking action is commenced, thus satisfying the condition precedent to legal transfer of title, that transfer of title (and entry, a lesser included right) would take place upon the filing of the taking action. But this is quite impractical from the standpoint of timing and marshalling scarce judicial resources. Even so, this contra-factual example is what the Fourth Circuit's approach to immediate entry in *Sage* approximates. The USDC decisions reviewed in *Sage* required the Certificate holder to deposit a reasonable estimate of just compensation with the USDC to be made available to the property owner's account at the time of the suit or shortly thereafter.[126] That payment was released to the property owner by the USDC prior to entry subject to final accounting by the USDC as to any excess or

true of a condemnor whose disagreement with the condemnee is generally with respect to the amount of liability, and not whether the condemnor is liable.

123. *86.72 Acres of Land*, 144 F.3d at 472.

124. *Id.* at 469.

125. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 642 (1889).

126. FED. R. CIV. P. 65(c), 71(A)(j).

deficiency after a commission determined the actual amount of just compensation, and that judgment became final.[127]

As *Sage* points out, USDCs within the Seventh Circuit that have considered immediate entry requests subsequent to *Northern Border v. 86.72 Acres* have not required Certificate holders to claim present legal title to the property interest they seek at the time the taking action is filed.[128] Rather, like the court in *Sage*, they required a FERC Certificate holder to seek a court order that the holder had the present right to take the property in question under applicable law and to deposit reasonable estimated amounts of just compensation into the court prior to ordering immediate entry.[129] The USDC order seems to create or to serve as a talisman for a preexisting substantive right to property to which the standard for preliminary injunctive relief is applied in deciding whether immediate entry is to be authorized by the USDC prior to passage of title.

The question remains whether *Sage* has convincingly distinguished what appears at first blush to be a facial conflict with the Seventh Circuit's principal point—that in order for relief in the nature of a preliminary injunction to issue, a plaintiff must have a vested right in the property at the time of the suit.[130] The authors believe that the Fourth Circuit has in fact resolved any apparent conflict, but that the clarity of its resolution can be improved. In granting such relief, the Fourth Circuit relied on the principle, that "when a party has an interest in property 'distinct from legal ownership,' that interest 'constitute[s] an equity which a court of equity will protect and enforce.'"[131] This principle was applied to the USDC finding and order that the Certificate holder had the right to take in order to establish a present "interest in the landowners' property that could be protected in equity if the conditions for granting equitable (in this case, injunctive) relief were satisfied."[132]

But the assertion that a USDC order and finding creates a necessary present equitable interest, where the underlying cause of action only authorizes transfer of a legal property interest at some future date upon satisfaction of a condition precedent, appears to differ significantly from the software ownership example that was used in the Seventh Circuit's analysis. That example appeared to require proof of a valid claim to a *present legal interest* in property at the time equitable relief was sought. By contrast, the Fourth Circuit found that a *present equitable interest* in the property was created by filing a valid taking action. The unanswered question is whether a difference between a claimed present legal interest, as opposed to a claimed present equitable interest in property, is material to the decision to grant immediate entry in a situation where compensation is concededly due to the landowner. We think not.

Real property option and purchase and sale agreements are examples of consensual instruments in which present equitable interests in property are

127. FED. R. CIV. P. 71(A)(h), 71(A)(j).

128. East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 827-28 (4th Cir. 2004).

129. Northern Border Pipeline Co. v. 64.111 Acres of Land, 125 F. Supp. 2d 299 (N.D. Ill. 2000); Guardian Pipeline v. 950.80 Acres, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002).

130. Northern Border v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998).

131. East Tenn. Natural Gas Co. v. Sage, 362 F.3d 808, 823 (4th Cir. 2004) (citing Seymour v. Freer, 75 U.S. 202, 213-14 (1868)).

132. *Id.* at 823.

created.[133] They may be enforced by specific performance (a type of injunction) to transfer legal title to property at a future date.[134] Similarly, the granting of a mortgage is in many states viewed as the transfer of a defeasible legal interest in property to the mortgage holder and the retention of a present equitable interest in the property (namely the value in excess of the loan and the right of redemption) in the mortgagor with possession of the property transferred or retained as agreed between the parties.[135] Likewise, real property held as a life estate separates the ownership of the property into a legal interest and possession that is held by the life tenant and an equitable (future) interest that is held by a remainderman or reversioner.

The analogy of a vendor/purchaser to a condemnor/condemnee is not entirely complete; however, due to the non-consensual nature of a taking and because a purchaser's present equitable interest in the property cannot ordinarily be enforced until a vendor breaches its obligation to transfer legal title to the property in question. Similarly, the mortgage holder ordinarily may not take full legal and equitable title to and possession of the property until the mortgagor breaches a mortgage covenant and the mortgagor's equity of redemption is subsequently foreclosed by a court order. Furthermore, a purchaser's entry of property prior to transfer of title is not ordinarily permitted unless the vendor has agreed to such entry; however, under contemporary mortgage practices the mortgagor ordinarily retains the possession and use of the property under its equitable title. A remainderman or reversioner, on the other hand, having a potential future interest, that may be presently protected by resorting to equitable relief, generally does not have possession of the property that is being used by the life tenant or tenant in possession.[136]

These common place examples show that present equitable interests have been and continue to be routinely recognized by courts to exist separately from and prior to the time that a legal interest in property vests in either its purchaser, remainderman or reversioner, or revests in its mortgagor. Moreover, if a vendor or mortgagee attempts to transfer the property without consent to a third party having actual or constructive knowledge of the purchaser's or mortgagee's interest or permits waste of the property prior to the stipulated date of the property's legal transfer, an injunction may be sought to preempt that transfer or waste, even on occasions where damages may constitute an adequate remedy.[137] Similarly, when a remainderman or reversioner brings an action of waste against a life tenant and seeks injunctive relief, that action constitutes an example of a future legal (but present equitable) interest being enforced by injunction against

133. *See generally* 14 POWELL ON REAL PROPERTY §§ 81.01(1), 81.03(1)-(3) (Michael Alan Wolf ed., 2004) [hereinafter 14 POWELL]; 3 AMERICAN LAW OF PROPERTY §§ 11.22-11.23 (A. James Casner ed., Little, Brown & Co. 1979) [hereinafter 3 AMERICAN LAW OF PROPERTY].

134. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981); 14 POWELL § 81.04(1)(a); 3 AMERICAN LAW OF PROPERTY §11.68.

135. *See generally* Crowley v. Adams, 116 N.E. 241, 242 (Mass. 1917); Atlantic Savings Bank v. Metro. Bank & Trust Co., 400 N.E.2d 1290, 1291 (Mass. App. Ct. 1980). *See also* DAN B. DOBBS, LAW OF REMEDIES § 2.3(3) (2nd ed., West Publishing Co. 1993).

136. *See also* 8 THOMPSON ON REAL PROPERTY §§ 70.09(g), 70.10 (David A. Thomas ed., The Michie Co. 1994) [hereinafter 8 THOMPSON].

137. *Id.* §§ 70.09(a), 70.09(c). *See also* 8 THOMPSON, *supra* note 136, at §§ 70.09(e), 70.09(g).

the holder of the life tenancy.[138] Furthermore, still other holders of present equitable, but sometimes only contingent future interests in real property may seek and obtain injunctive relief against the present possessors and holders of the legal interest in real property to abate its waste.[139]

Thus, commentators and courts have recognized and the courts have enforced, by means of injunctive relief, present equitable interests in property where parties have contracted for the transfer of future legal interests upon the satisfaction of stipulated conditions or otherwise have potential legal interests in property that may mature into a conveyance of the legal interest at a later date. It seems quite logical and appropriate then that courts might extend the practical and equitable principles governing these situations slightly to recognize a present equitable interest of a condemnor in property of a condemnee that might be enforced against the condemnee via injunctive relief in appropriate circumstances. Such an extension seems particularly appropriate, where Congress has created a private cause of action in eminent domain to aid in achieving officially recognized public purposes via the non-consensual transfer of legal interests in property upon payment of just compensation.

Delegation of federal eminent domain authority to the FERC Certificate License, and Construction Permit holders and the granting of general subject matter jurisdiction over such actions to USDC would appear to create a set of relationships among a condemnee, condemnor, and the court in which the court has the implied authority to recognize the bifurcation (whether fictional or otherwise) of a unitary property interest of the condemnee into a legal and an equitable interest. That legal interest is to be retained by the condemnee until the payment of just compensation and the present equitable interest arguably can be transferred to the condemnor, upon the condemnor's filing a taking action and presenting a satisfactory proof that condemnor has the necessary authorization from the FERC to take.[140]

Customarily, the United States Supreme Court has been reluctant to expand equitable remedies of federal courts in cases involving property disputes strictly between private parties beyond those historically available from a court of equity upon the enactment of the Judiciary Act of 1789.[141] On the other hand, if there is a clear statutory expression of a national public interest in favor of one of the parties to a dispute, the Court has been far more flexible, emphasizing that a federal court's equitable discretion "must be exercised in light of the large objectives of the [applicable] Act. For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases."[142] Viewed in this light, both the NGA and FPA contain

138. 8 THOMPSON, *supra* note 136, at §§ 70.07(g), 70.09(a).

139. *Id.* §§ 70.09, 70.10.

140. *Compare* East Tenn. Gas Pipeline Co. v. Sage, 361 F.3d 808 (4th Cir. 2004), *with supra* note 115.

141. *See generally* Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (finding transfer of insolvent foreign party's assets out of the United States not enjoined to secure note-holder's claim). *But see* dissenting opinion in that case which would apply recent developments in English equity practice to federal practice. *Id*. at 335, 339 (Ginsburg, J., dissenting).

142. *See generally* Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944). *See also* Virginian Ry. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much [further] both to give

general and unequivocal statements that federal regulation of the subject matter of these statutes serves the public interest.[143] Furthermore, the Certificate, License, or Construction Permit is a specific expression of a public interest finding by the FERC, and, in our view, these facts support the use of federal equity jurisdiction in the limited manner that was approved in *Sage*.[144]

As a result, it seems to the authors that the Fourth and Seventh Circuit decisions on immediate entry are distinguishable and, indeed subsequent decisions by USDC in the Seventh Circuit, cited above, appear to concede this. There is, moreover, federal precedent prior to 1981 that supports the Fourth Circuit's requirement of a present vested equitable interest in the context of the immediate entry remedy. That precedent, however, does not expressly discuss the remedy in terms of a legal-equitable dichotomy.

2. Pre-1981 Federal Court Rulings Exercising a Judicial Remedy of Immediate Entry

Two decisions rendered before 1981 were cited by *Sage* to establish present vested property interests of a condemnor in property to be taken under federal law and to justify the grant of a judicial immediate entry remedy. Those decisions are: *Atlantic Seaboard Corp. v. Van Sterkenburg*[145] and *Commercial Station Post Office, Inc. v. United States*[146]

Van Sterkenburg involved a taking by a Certificate holder under NGA section 7(h).[147] The property owner objected to the taking of an easement interest in its property and filed a number of dilatory pleadings and motions which the USDC denied.[148] Trial, on just compensation, was conducted by the court without a jury. The property owner refused to accept the amount of just compensation as determined by the court. The court then ordered the Certificate holder to pay the compensation into the court "the effect of which was to authorize the plaintiff to take immediate possession of the easement and to proceed with the construction of the pipe line."[149] The property owner appealed the questions of the denied motions, lack of jury trial and the USDC's grant of immediate entry.[150] Thus the USDC's judgment as to compensation was final but appealable. The Certificate holder had no fully vested legal interest in the property.

Under a *Sage* analysis, the court's grant of immediate entry might be characterized as having been based on a present equitable interest held by the

---

and withhold relief in further[ing] of the public interest than they are accustomed to go when only private interests are involved.").

143. *See generally* Natural Gas Act § 1, 15 U.S.C. § 717(a) (2000); Federal Power Act § 201, 16 U.S.C. § 824(a) (2000).

144. *See generally* Natural Gas Act §7, 15 U.S.C. § 717f(c) (2000); Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 379 (1959). *See also* Federal Power Act § 4, 16 U.S.C. § 797(e) (2000); Federal Power Act § 216(a)(4), (b)(3), (5) (to be codified as 16 U.S.C. § 824p(a)(4), (b)(3), (b)(5)).

145. Atlantic Seaboard Corp. v. Van Sterkenburg, 318 F.2d 456 (4th Cir. 1963).

146. Commercial Station Post Office, Inc. v. U.S., 48 F.2d 183 (8th Cir. 1931).

147. Natural Gas Act § 7, 15 U.S.C. § 717f(h) (2000).

148. *Van Sterkenburg*, 318 F.2d at 458.

149. *Id*. at 460.

150. *Van Sterkenburg*, 318 F.2d at 459.

Certificate holder in the landowner's property that had been specifically recognized by the court by the time of the appeal. That equitable interest was perfected by the Certificate holder and made enforceable when the court's determination of just compensation was deposited into court. The Fourth Circuit opinion did not, however, specifically analyze the entry decision in terms of this legal-equitable framework. In the words of the Fourth Circuit: "the [USDC] had the authority, after judgment, to permit the [Certificate holder] to pay into the Court the amount of the award and, thereupon, immediately to enter upon the land and to construct and lay its pipe line."[151] Therefore, although the decision does not discuss whether the entry remedy that is granted is legal or equitable, it helps to bridge any gap that there may be between the judicially recognized right of immediate entry in takings by the United States to be discussed below, and that of private delegatees of federal eminent domain authority generally. As recognized in *Sage*, although "the *[Van Sterkenburg]* case was much further along than today's case[s] . . .[n]evertheless, *[Van Sterkenburg]* demonstrates that a court may use its equitable power to authorize early possession."[152]

The second decision that provides an important precursor for *Sage* is *Commercial Station*. It is important for at least three reasons. First, it is the initial decision in a line of decisions that expressly recognized judicially ordered immediate entry prior to the final determination and payment of just compensation. Second, *Commercial Station* emphasized the critical importance of securing a property owner's just compensation claim as a condition to immediate entry. Third, the decision and its progeny serve as a very helpful contrast to the immediate possession remedy that is available under the Declaration of Taking Act (DTA)[153] and other similar declaration of taking statutes.[154]

In *Commercial Station*, the United States commenced a taking action to acquire premises that it had leased for some years previously as a commercial post office.[155] The acquisition was undertaken pursuant to an act of Congress specifying the maximum amount to be paid for the premises. When negotiations with the property owner failed, the United States initiated a taking in USDC pursuant to a state law that did not include a provision for immediate entry.[156] Upon filing its petition with the court, the United States requested immediate entry of the premises. The court denied that request without prejudice. A commission, as required under state law, then assessed damages. Its assessment was appealed by the landowner to the court, and the judgment of the court when rendered was also appealed. The United States requested and was granted immediate entry of the premises by the court, upon completion of the commission's assessment of damages. The court's authority to order immediate

151. *Id.* at 460.

152. East Tenn. Gas Pipeline Co. v. Sage, 361 F.3d 808, 826 (4th Cir. 2004).

153. 40 U.S.C. § 3114 (2000).

154. *See, e.g.*, Amtrak, 49 U.S.C. § 24311(b) (2000).

155. Commercial Station Post Office, Inc. v. U.S., 48 F.2d 183, 184 (8th Cir. 1931).

156. This procedure was sometimes used prior to the promulgation of FED. R. CIV. P. 71A and is now recognized in subdivision (k) of that Rule. *See also* Advisory Committee Notes to subdivision (k) in the Original Report and in 1951 Addition, Supplementary Report *reprinted in* WRIGHT I, *supra* note 81, at 614.

entry prior to completion of the appeal and payment of compensation as well as the propriety of that order was contested by the property owner on appeal.[157]

The landowner argued, among other things, "that there must be express statutory authority to take possession pending condemnation proceedings . . . ."[158] The Eighth Circuit disagreed. It explained that the United States had been properly authorized to take the entire fee and that possession being less than the entire fee was included in that authorization.[159] As to when and under what circumstances immediate entry might properly occur, the Eighth Circuit stated the timing of entry and possession depends on:

> whether adequate provision has been made to pay for such possession. It is settled that the government may take possession in advance of passing of title or of abandonment of the condemnation proceeding, and that, while payment must be made for the use of the property during such advance possession, yet it need not make such payment at the time of taking possession, but that the owner is sufficiently protected if adequate provision for payment for possession be made at the time of taking possession.[160]

The Eighth Circuit found that adequate provision for payment had been made because if the taking were fully consummated the property owner would be compensated for the advance period of entry by the interest that is required to be paid on the ultimate award to cover the period of advance entry.[161] Even if the taking was abandoned, the Eighth Circuit found that the United States would be obligated to pay for its use of the property under a theory of implied agreement.[162] Lastly, the Court found that the propriety of the taking order was well within the discretion of the USDC because the state taking statutes in question required payment of interest commencing upon issuing of the commissioners' damage assessment, and the payment for entry had been secured by a Congressional appropriation.[163]

The Eighth Circuit did not consider whether the order of immediate possession was grounded in either a legal or equitable interest of the condemnor in the property of the affected landowner, nor does it appear necessary to do so. It satisfied the Seventh Circuit's *Northern Border v. 86.72 Acres* requirement of "substantive law establishing a preexisting entitlement to the property".[164] It is also consistent with the present equitable interest analysis of the Fourth Circuit in *Sage*.

Commercial Station was decided in 1931 the same year that the DTA was enacted.[165] Notwithstanding enactment of the DTA, *Commercial Station* continued to be cited by the USDC as authority for the granting of orders of immediate entry. With one reported exception, those courts continued to grant

---

157. *Commercial Station*, 48 F.2d at 184.

158. *Id.*

159. *Commercial Station*, 48 F.2d at 184.

160. *Id.* at 184-85 (internal citation omitted).

161. *See also* Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299 (1923).

162. *Commercial Station*, 48 F.2d at 185.

163. *Id.*

164. *See also* Northern Border v. 86.72 Acres, 144 F.3d 469, 472 (7th Cir. 1998).

165. The DTA is a supplementary eminent domain statute authorizing immediate possession that was originally codified at 40 U.S.C. §§ 258a-258c (2000).

immediate entry to the United States in cases where the DTA was inapplicable for one reason or another.[166] In *Chatham County*, for instance, the United States was granted an *ex parte* order of immediate possession after being unable to satisfy the requirements of the DTA. To the argument that compensation had not been paid, the court replied that "the general rule is that pre-payment of the price is not necessary before the taking or occupation, if due provision for payment and for the means by which the landowner may make his claim and receive compensation or damages is made."[167] The court also stated "no express legislation [for immediate entry] is needed, for if the power to acquire the entire fee title is admitted--as it is here--the possession, a lesser right, is implied without limitation as to when possession may be taken."[168]

Similarly, in *Fisk Building*,[169] the United States relying on *Commercial Station*, again obtained an *ex parte* order of immediate possession. The landowner argued that the DTA established the sole and exclusive procedure to be used by the United States when immediate entry is sought in advance of a judgment of taking. The court considered the landowner's argument but found that:

> [Prior to the enactment of the DTA] the Court's inherent power to grant an order of immediate possession, provided that adequate provision was made to assure the owner of compensation, was unquestioned. . . . [t]he Government urges that the [DTA] was adopted by Congress not for the purpose of changing the decisional law but to supplement it. While the issue is not altogether free from doubt, neither the [DTA] nor its legislative history shows that Congress intended that the [DTA] supersede the judicially declared power to grant immediate possession. In the absence of clear indication as to such legislative intent, the Court is constrained to find that the pre-existing power has not been supplanted by the Act.[170]

The one reported case that contradicts *Commercial Station* decided instead that by enacting the District of Columbia declaration of taking statute Congress had impliedly overruled any judicial grant of immediate entry.[171] In that case, the USDC concluded that because Congress had enacted a number of statutes wherein immediate possession was authorized in advance of the payment of just compensation, *Commercial Station* was no longer valid and that statutory authorization of immediate possession was necessary. The USDC also cited Nichols on Eminent Domain for a general principle that eminent domain "power lies dormant until legislative action is had pointing out the occasions, modes, agencies and conditions for its exercise."[172] The court's reasoning and

166. United States v. Certain Tract of Land in Chatham County, 44 F. Supp. 712 (S.D. Ga. 1942) (granting immediate possession of shipyard); *see also* United States v. Fisk Bldg., 99 F. Supp. 592 (S.D.N.Y. 1951) (granting immediate possession of a leasehold to Voice of America); United States v. Certain Tracts of Land, 225 F. Supp. 549, 552 (D. Kan. 1964) (granting immediate possession upon payment of adequate security into court registry for security and stating "[P]laintiff has not proceeded under the [DTA] . . . nor is it required to do so.") (internal citation omitted).

167. *Chatham County*, 44 F. Supp. at 715.

168. *Id.* at 716 (internal citation omitted).

169. *Fisk Building*, 99 F. Supp. at 592.

170. *Id.* at 594-95.

171. United States v. Parcel of Land, 100 F. Supp. 498 (D.D.C 1951).

172. *Id.* at 504.

categorical rejection of the judicial immediate entry remedy, however, based as it is on what seems to be a theory of negative implication, is questionable.

Consider the fact that statutory authorization of immediate possession by a condemnor under a statutory procedure such as the DTA expressly transfers title to the condemnee's property immediately. In effect, the condemnor has full and superior title to the former landowner's property and not merely a modifiable judicial license to enter and use that property. Such a procedure limits the discretion of a USDC in supervising the condemnor and helps to contain litigation by landowners on entry issues.[173] These factors, which will be examined in detail in the next section, seem to be more reasonable explanations for enactment of a declaration of taking statute than a negatively implied Congressional intention to repeal a judicially created remedy. Moreover, having sufficient Congressional authorization, the United States has nearly always been able to take by physically entering property and ousting its owner of possession[174] with the owner's remedy being an inverse condemnation action in the Court of Claims.[175]

Thus, with a single exception, as late as 1964 *Commercial Station*, its progeny and *Van Sterkenburg* recognized a discretionary, judicially administered remedy of immediate entry whose authority arose independently of the DTA or any similar declaration of taking law.[176]

3. Distinguishing Judicial Right of Entry from the DTA and Similar Laws

There are sound theoretical and legal reasons for distinguishing the DTA and similar statutes from the immediate entry remedy validated by the *Commercial Station* line of cases and *Sage*.

Without the DTA or a similar federal law, title to the property taken does not transfer to the condemnor until the amount of compensation due the person from whom property rights are taken is finally determined and paid.[177] That common law doctrine assures the affected property owner that trespass and nuisance remedies at law and equity will be preserved in the event that the taking authority abandons the project before the owner's compensation is finally determined and paid.[178] Although insolvency is not a serious concern in the case

173. *Compare* Catlin v. U.S., 324 U.S. 229 (1945) (deciding that an interlocutory appeal of the government's authority to take immediate possession (and title) under the DTA is not possible but must await final judgment in the case), *with* East Tenn. Gas Pipeline Co. v. Sage, 361 F.3d 808 (4th Cir. 2004) (involving interlocutory appeals of immediate entry orders issued in the form of mandatory preliminary injunctions).

174. In general there were, at the time, four ways the United States might take property rights: (1) It could take under 40 U.S.C. § 257, in which case title did not pass until compensation was tendered; (2) It could file a Declaration of Taking under DTA and pay the estimated value of the right taken into USDC; (3) Congress could act by legislative taking in which it took title directly and established a special just compensation procedure; (4) It could take by physically entering the property and ousting the owner, who could commence a suit for damages in an inverse condemnation. Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, 4-5 (1984). *Compare* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (The President may not order taking of private property without Congressional authorization of that taking either specifically or generally).

175. 28 U.S.C. § 1491(2000).

176. *See also* Amtrak, 49 U.S.C. 24311(b) (2000).

177. Hanson Lumber Co. v. U.S., 261 U.S. 581 (1923); Cherokee Nation v. S. Kan. Ry., 135 U.S. 641, 659 (1890).

178. East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 826 (4th Cir. 2004).

of a taking by the United States or a state (both of which have taxing and appropriation authority),[179] the issue remains quite relevant in the case of private delegatees of federal or state eminent domain powers.

The DTA was enacted to facilitate takings by the United States in construction of public works projects during the Great Depression.[180] Congress "sought merely to provide a means whereby the Government may take title immediately, and leave the amount of compensation to be determined by the court according to the usual procedure."[181]

The innovative feature of the DTA and similar federal declaration of taking laws is how they changed the common law rule on passage of title. The DTA, for instance, states:

> On filing the declaration of taking and depositing in the court, to the use of the persons entitled to the compensation, the amount of the estimated compensation stated in the declaration—(1) title to the estate or interest specified in the declaration vests in the Government; (2) the land is condemned and taken for the use of the Government; and (3) the right to just compensation for the land vests in the persons entitled to the compensation.[182]

Thus, the recording of such a declaration makes the condemnor the indisputable owner of the property with a title to the property that is superior to all others. Common law remedies against the condemnor for trespass or nuisance are necessarily rendered nugatory, and a right to just compensation is substituted for such remedies even if the project that has prompted the taking is abandoned prior to the final determination of the former owner's compensation. Although the condemnor, as the new property owner, automatically succeeds to such common law remedies as the new property owner, the DTA requires the USDC to supervise surrender of possession of the property by the former owner to the condemnor—who is now the holder of superior title—presumably to prevent possible abuse by the condemnor or condemnee.[183] The second major improvement in the condemnor's position relative to judicial immediate entry is that questions pertaining to the validity or application of a declaration of taking are not subject to interlocutory appeal, a factor mentioned above.[184] Thus, with respect to a declaration of taking, the former property owner must ordinarily delay appeal of taking and entry issues until the landowner's compensation is determined and a final judgment is rendered.[185] This is in contrast to a court ordered immediate entry that is based, as in *Sage*, on a theory of preliminary injunctive relief. Such relief is subject to interlocutory appeal in those situations where the standard for such appeal is satisfied.[186]

Given these two substantial improvements to a condemnor's legal position and the fact that the use of a statutory declaration of taking procedure is elective, there seems little reason to speculate, as did the United States District Court for

179. *See also* Commercial Station Post Office v. U.S., 48 F.2d 183 (8th Cir. 1931).

180. *See also* H.R. 2086, 71st Cong. (1930).

181. *See also id.*

182. *See also* 40 U.S.C. § 3114(b) (2000); *compare* 49 U.S.C. § 24311(b)(2) (2000).

183. *See, e.g.*, 40 U.S.C. § 3114(c).

184. *See also* Catlin v. U.S., 324 U.S. 229, 243 (1945).

185. *Id.*

186. *See also* 28 U.S.C. § 1292 (2000).

the District of Columbia in 1951, that Congress impliedly intended by such laws to limit, much less supersede, the discretionary judicial remedy of immediate entry for holders of federal eminent domain authority. As a matter of practical convenience such improvements in the condemnor's legal position makes it sensible for a federal condemnor to use a declaration of taking procedure in situations where it is available, in preference to the judicially created immediate entry remedy. These advantages undoubtedly explain why the United States has infrequently sought the judicial remedy of immediate entry subsequent to 1931.

4. Immediate Entry, Equity Jurisdiction, and Alaska Natural Gas Transportation

In 1981, fifty years after *Commercial Station* was decided and the DTA was enacted, a case purporting to base judicially granted immediate entry *solely on* the equity jurisdiction of a USDC was decided. In *Northern Border v. 127.79 Acres* the United States District Court for the District of North Dakota granted a FERC Certificate holder the right to immediate entry of a property owner's land with respect to the construction of an interstate pipeline project pursuant to the Alaska Natural Gas Transportation Act.[187] That decision and the subsequent decisions that it inspired made no reference at all to *Commercial Station* or *Van Sterkenburg*, and when considered in isolation from those cases and *Sage*, the *Northern Border v. 127.79 Acres* line of cases appears to be technically inconsistent with the Seventh Circuit's analysis of immediate entry in *Northern Border v. 86.72 Acres* and that decision's requirement of a present substantive interest in property. Hence, a closer examination of the *Northern Border v. 127.79 Acres* decision is required.

In *Northern Border v. 127.79 Acres*, the USDC determined that the Certificate holder did not have an immediate entry remedy either expressly or impliedly under NGA section 7(h) and use of the DTA was not available to a Certificate holder.[188] The court then determined that "either the primary right which serves as the basis for the cause of action must be equitable rather than legal or the remedy . . . must be equitable. If the legal remedy is inadequate, the court may exercise its equitable jurisdiction" and the party seeking relief must be subject to imminent, irreparable harm.[189] The court further stated: "[t]he doctrine is not derived from a statutory base and is rooted in the notion that a federal court, when requested to extend equitable relief, possesses all the common law equity tools in order to process litigation to a just and equitable conclusion."[190]

The court considered the pipeline construction schedule, costs and potential delays of the project and the Congressional declarations of the Alaska Natural Gas Transportation Act. Those declarations indicated that there was a natural gas shortage in the United States and access to Alaskan natural gas reserves could help to alleviate that shortage significantly by expeditious completion of a

187. *See also* 15 U.S.C. § 719 (2000); Northern Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170 (D.N.D. 1981).

188. *127.79 Acres*, 520 F. Supp. at 170.

189. *Id.* (citation omitted).

190. *127.79 Acres*, 520 F. Supp. at 172 (citation omitted).

transportation system delivering Alaskan natural gas to markets in the United States. The court stressed the importance of the declarations and concluded that the pipeline project was in the national interest.[191] On those grounds the USDC issued an order granting immediate entry to the landowner's property on the condition that the Certificate holder deposit with the court its estimate of the just compensation to be paid to the landowner, and an additional deposit or bond in twice the amount of that estimate.[192]

Not long after *Northern Border v. 127.79 Acres* and its remedy of immediate entry pursuant to the inherent equity powers was published, Algonquin Gas Transmission Company and its affiliates sought to revive what now, in retrospect, appeared to be its ill-fated but no longer quixotic attempt in *Yules* to achieve immediate entry via a taking in USDC. Thereafter, in a series of takings under NGA section 7(h) with respect to lands situated in Rhode Island, Massachusetts and Maine, that natural gas company and its affiliates generally achieved immediate entry by arguing the inherent equity power remedy of *Northern Border v. 127.79 Acres*.[193] That opinion was also used to justify immediate entry decisions in favor of other Certificate holders in a series of published decisions.[194] Taken together, the decisions rendered in *Commercial Station*, its progeny, *Van Sterkenburg* and the "inherent equity power" line of cases of *Northern Border v. 127.79 Acres*, would appear to address the concern of the Seventh Circuit in *Northern Border v. 86.72 Acres*[195] that there be a presently vested substantive right with respect to which the equitable authority and powers of the USDC may be applied. Certainly, federal courts have impliedly recognized such vested substantive rights since at least 1931. Thus, in our view *Sage* is best understood as a decision that makes the first clear synthesis of the *Northern Border v. 127.79 Acres* and *Commercial Station/Van Sterkenburg* immediate entry approaches in order to address the question of a lack of necessary substantive right that was stated to be critical in *Northern Border v. 86.79 Acres*.

Even the previously mentioned line of summary judgment decisions that appear to have resulted in entry prior to the payment of compensation to the property owner in takings by License holders under FPA section 21,[196] seem to have been considered to some degree in *Sage*. *Sage* for instance, endorsed the USDC's requirement that an order be issued deciding that the Certificate holder had the right to take an interest in property before immediate entry of that property was authorized. By comparison, in the FPA line of decisions the court first bifurcated the issue of liability from that of damages. The USDC then decided, on a motion for partial summary judgment, that the FERC License

191. *Id.*

192. *127.79 Acres*, 520 F. Supp. at 173.

193. *See, e.g.*, Transcripts of Hearings and Orders, Algonquin Gas Transmission Co. v. .24 Acres of Land, No. 86-0402P (D.R.I. Sept. 2, 1986); Transcript of Hearing, Algonquin Gas v. City of Medford, No. 92-11952WD (D. Mass. Aug. 20, 1992); Transcript of Hearing, Portland Natural Gas Transmission System v. 1.28 Acres, No. 98-50-P-H, 98-67-P-H-D (D. Me. Apr. 10, 1998); Transcript of Orders, *In re* Maritimes and Northeast. Pipeline Litig., Consol. No. 02-10941-WGY (D. Mass. July 25, 2002).

194. *See generally supra* note 13.

195. Northern Border Pipeline Co. v. 86.72 Acres, 144 F.3d 469 (7th 1998).

196. *See generally supra* note 115.

holder was to be issued a judgment of condemnation authorizing the License holder to enter the condemned properties to commence construction of the hydro-electric project upon depositing with the USDC the estimated amount of landowner compensation prior to a trial or commission proceedings to determine the final amount.[197] The same procedure seems to have been used by at least one Certificate holder[198] to achieve entry prior to the payment of final compensation although it is not entirely clear whether the Certificate holder's approach might not also have involved consideration of the USDC's equitable jurisdiction.[199]

In summary, the elements of judicially granted immediate entry as articulated in *Sage* have had significant support in what the authors view as different but converging lines of legal decision making. Those decisions provide the source of legal and practical arguments for distinguishing between *Sage* and *Northern Border v. 86.72 Acres.* Certainly *Commercial Station* and *Van Sterkenburg* provide grounds for maintaining that a License, Certificate, or Construction Permit holder has a substantive interest in a condemnee's property once a taking action is filed under that License, Certificate, or Permit and a USDC has determined that the holder has the right to take. Whether that interest is characterized as legal or equitable, those cases are sufficient to support the grant of an order of immediate entry provided that the other elements of the remedy are satisfied.[200]

5. Landowner Protections

With respect to the exercise of the federal power of eminent domain by the FERC Certificate, License, and Construction Permit holders, it is also important to consider the principal legal protections that are or may be afforded a property owner in considering the question of taking and immediate entry of a landowner's property.

---

197. *Id.*

198. Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Authority, 2 F. Supp. 2nd 106, 110 (D. Mass 1998).

199. *Id.*; Tennessee v. New England Power, 6 F. Supp. 2d 102, 104 (D. Mass. 1998).

200. There is yet another immediate entry approach that was not mentioned in *Sage* that has been advanced by a Certificate holder to obtain entry of a condemned property. The approach was asserted in Portland Natural Gas Transmission System v. 4.83 Acres of Land, 26 F. Supp. 2d 332 (D.N.H. 1998). In that case, the USDC applied N.H. REV. STAT. ANN. § 371:15, V (2006) to grant a Certificate holder who had commenced a taking under the Natural Gas Act § 7(h) immediate entry of a landowner's property for purposes of constructing and operating a pipeline. N.H. REV. STAT. ANN. § 371:15, V expressly allowed a pipeline company after initiating a taking, to enter and take possession of property upon providing adequate security to pay for any damages incurred due to the entry. Unfortunately, the USDC justified the application of this state law in a taking under the Natural Gas Act § 7(h) on the grounds that the procedural conformity clause of the Natural Gas Act § 7(h) authorized it to do so. As discussed previously in this article, however, promulgation of Rule 71A in 1951 superseded the conformity clause of the Natural Gas Act § 7(h). Hence, the United States district court's reasoning seems significantly flawed as to the Natural Gas Act § 7(h) or Federal Power Act § 21. As to the Federal Power Act § 216 on the other hand, this approach may work under a state entry statute for it is not at all clear that Rule 71A has superseded Federal Power Act § 216(e)(3) rather than vice versa. Although *Sage* may have now mooted this specific approach and its justification in the Natural Gas Act § 7(h) and Federal Power Act § 21 takings, there was a possible alternative justification for use of state entry laws in these two situations, for there is general authority that state law may be considered by federal courts in non-diversity cases arising under the laws of the United States if there is no federal rule of decision that applies to the specific issue or dispute at hand. *See generally,* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4520 (2d ed. 1996) [hereinafter WRIGHT II].

Generally, property owners have three procedural protections with respect to the exercise of eminent domain or immediate entry under the NGA or FPA. These protections deal with notice and opportunity to be heard on: (1) the necessity for the taking or entry, (2) the amount of compensation to be paid for the taking, and (3) the amount of security for immediate entry by the condemnor pending final determination and payment of just compensation. The first protection derives from the rule-making authority of the FERC under the NGA and FPA. The second and third protections derive from the just compensation clause of the Constitution[201] and are administered by the USDC under the FRCP (or applicable state procedural rules in the case of FPA section 216).

a. Notice and Hearing on Necessity of the Taking

The due process clause of the Fifth Amendment does not appear to guarantee the affected property owner a right to notice and opportunity for hearing on the issue of the necessity of taking.[202] That right arises only if it has been conferred by statute or rule. In cases where the right is conferred, the taking authority must use reasonable efforts to issue the type of notice that has been specified by the law or regulation although over time what constitutes reasonable efforts in this context may be increasing in terms of stringency.[203] Under authority of the FPA and NGA, the FERC has authority to promulgate requirements specifying the type of notice that is to be given to landowners who may be affected by a project[204] and how those property owners may intervene[205] and participate[206] in the FERC decision regarding whether or not to approve a project. To date the federal courts have decided that any claim, including a due process claim concerning notice and opportunity to be heard on necessity of the taking, must be raised with the FERC on direct appeal of the Certificate or License and may not be raised in a taking or entry proceeding in USDC.[207] Presumably, federal courts will hold to the same effect in connection with a Construction Permit.

b. Notice and Hearing on Amount of Compensation

The landowner also has a constitutional right to reasonable notice and opportunity to be heard on the amount of just compensation to be paid for the rights that are to be taken.[208] This includes compensation in the form of interest

201. U.S. CONST. amend. V.

202. Tennessee Gas Pipeline v. 104 Acres, 749 F. Supp. 427, 430-34 (D.R.I. 1990).

203. *Compare* Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 314-15 (1950), *with* Jones v. Flowers, No. 04-1477, slip op. at p. 7-12 (U.S. Apr. 26, 2006).

204. *See generally* 18 C.F.R. § 157.6(d) (2004); 18 C.F.R. § 157.203 (2004); Federal Power Act § 10, 16 U.S.C. § 803(b) (2000); 18 C.F.R. § 5.18(a)(3) (2004); Federal Power Act § 216(d) (to be codified at 16 U.S.C. § 824p(d)). The proposed FERC regulations have been promulgated for comment on Construction Permit requirements including notice to landowners in Construction Permit cases. *See generally supra* note 51.

205. 18 C.F.R. § 385.214 (2004).

206. 18 C.F.R. § 380.10 (2004).

207. *104 Acres*, 749 F. Supp. at 430. *See also* Lauren Mohr, *The Tangled Web: Regulation, Interstate Pipeline Companies, and Due Process Rights of the Property Owners*, 26 ENERGY L.J. 191 (2005).

208. Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

for use of the property during the period of immediate entry prior to transfer of title.[209] Furthermore, in NGA section 7(h) and FPA section 21 takings FRCP Rule 71A provides guidance on the degree of diligence that must be exercised in title work by a project proponent to identify property interest holders having interests that may be taken[210] and the type of notice that must be given to such persons.[211] Presumably, state rules of procedure will apply in takings under FPA section 216.

c. Property Owner's Right to Reasonably Adequate Security during Entry

In a proceeding for immediate entry, the property owner's right to reasonably certain and adequate security for payment of just compensation is one of his or her most significant legal protections. The protection is constitutional.[212]

In takings by the United States, under the DTA, the legally implied promise of the United States to pay for what is taken or used and the taxing and appropriating authority of the Congress moots the issue of whether or not there is adequate landowner security.[213] The issue of adequate security, however, is crucial to a landowner whenever a taking is commenced and immediate entry is sought by a Certificate, Construction Permit, or License holder. Unlike a taking by the United States implemented under the DTA,[214] the property owner has valid theoretical and practical concerns arising from the possibility that a Certificate, Construction Permit, or License holder might abandon a project prior to its completion or become insolvent. In such instances, an affected property owner could find itself retaining title to property that has been greatly diminished in value and encumbered by an incomplete or inoperable project. Additionally, to the extent the project proponent is insolvent, trespass, ejectment, private nuisance, or other tort remedies are likely to be delayed, impractical, or legally impossible to implement on a timely basis.[215] In such circumstances, a deposit or condemnation bond in a reasonably adequate amount to secure payment of just compensation to the landowner that is administered and controlled by the USDC would appear to be a fair and appropriate landowner protection.

---

209. Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299 (1923).

210. FED. R. CIV. P. 71A(c)(2). *See also* FED. R. CIV. P. 71A(c)(2) advisory committee's notes, (Original Report, Note to Subdivision (c)) *stating in part* "[w]here a short term interest in property of little value is involved, as a two or three year easement over . . . vacant land for purposes of ingress and egress to other property, a search of the record[] covering a long period of time is not required. Where, on the other hand fee simple title in valuable property is being condemned the search must necessarily cover much longer period of time and be commensurate with the interest involved. But even here the search is related to the type made by competent title searchers in the vicinity." *reprinted in* WRIGHT I, *supra* note 81, at 609.

211. FED. R. CIV. P. 71A(d)(3)(B).

212. U.S. CONST. amend. V.

213. Commercial Station Post Office v. U.S., 48 F.2d 183, 184 (8th Cir. 1931).

214. 40 U.S.C. § 3114(b) (2000).

215. 11 U.S.C. § 362 (2000) (as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23) (imposing automatic stay of judicial proceedings upon filing of petition in bankruptcy). *See also* 15 U.S.C. § 717f(b) (2000) (requiring an abandonment order by the FERC).

Cherokee Nation v. Southern Kansas Railroad Company[216] addressed the constitutional standard applicable to this protection. There, the United States Supreme Court decided that a private railroad corporation exercising delegated federal eminent domain authority could enter property to commence construction and operation of the railroad prior to final determination and payment of just compensation to a property owner without violating the just compensation clause of the United States Constitution.[217] The Court stated:

> [t]he constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or [require] that compensation shall be actually paid in advance of the occupancy of the land to be taken; but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.[218]

The federal legislation at issue in *Cherokee* required that if the railroad and property owner could not agree on the compensation to be paid for the rights taken, referees would decide their value subject to a trial *de novo* before a court. Pending completion of the judicial proceedings and final determination and payment of the landowner's just compensation, the railroad company was statutorily authorized to pay double the amount of the referees' determination into court and upon such payment to enter the land to be taken to commence construction and operation of its facility.[219] The Court found that the federal legislation under review satisfied the Fifth Amendment's just compensation standard.

Subsequent cases have uniformly followed *Cherokee*, allowing the United States and other condemning authorities to enter property prior to final determination and payment of just compensation to and transfer of the title from the affected landowner, if reasonable, certain, and adequate provision has been made for payment of such compensation to the landowner.[220] In cases such as those arising under the NGA and FPA, where title is transferred under the common law rule, interest must also be awarded on the final judgment amount from the date of entry to the date of final judgment.[221]

The FRCP provides procedures for administering this constitutional requirement.[222] Rule 65, for instance, stipulates that an applicant for preliminary injunctive relief provide security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."[223]

This supplements Rule 71A which states in relevant part:

---

216. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1889).

217. *Id.* at 659.

218. *Cherokee*, 135 U.S. at 659.

219. *Id.*

220. *See, e.g.*, Commercial Station Post Office, Inc. v. U.S., 48 F.2d 183, 185 (8th Cir. 1931) (cited cases).

221. *See generally* Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299 (1923).

222. In situations involving § 216(e)(3) of the Federal Power Act (to be codified at 16 U.S.C. § 824p(e)(3)), applicable state procedures may have to be examined, until such time as any controversy over the enforceability of its procedural conformity clause is resolved.

223. FED. R. CIV. P. 65(c).

> [t]he plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain . . . . In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation.[224]

Since at least the decision in *Northern Border v. 127.79 Acres*,[225] USDCs have used Rules 65 and 71A to administer the constitutional requirement of reasonable, certain, and adequate security for payment and damages where immediate entry has been granted in NGA and FPA section 21 takings. In *Northern Border v. 127.79 Acres*, for example, the court required an aggregate deposit or bond that equaled three times the Certificate holder's original estimate of the property owner's just compensation.[226] Other courts have not necessarily followed *Northern Border* v. *127.79 Acres* in requiring an increased multiple over the condemnor's estimate of just compensation.[227] Thus, a critical issue for the property owner in a hearing on immediate entry is assuring the adequacy of the deposit when compared with the value of the property rights taken and damages, if any, that may occur, particularly if the deposit that is proffered by the License, Certificate, or Construction Permit holder is not based on a preliminary or tentative appraisal, or if there are sound reasons for believing the project may not be timely completed. Once the property owner has the opportunity to contest whether the amount of the deposit is reasonable and adequate, however, the principal constitutional condition to immediate entry is satisfied. [228]

III. *SAGE* CONSIDERATIONS

Sage, and its discussion of immediate entry as a form of mandatory preliminary injunctive relief, creates a workable frame work for reconciling the variety of immediate entry decisions. *Sage* suggests that the FERC Certificate holder or Licensee must satisfy only three general conditions to obtain immediate entry. It must: (a) demonstrate by court order an effective delegation of eminent domain authority,[229] (b) satisfy the requirements for a mandatory preliminary injunction,[230] and in doing so (c) provide security for reasonably adequate and certain payment of compensation.[231] When these general conditions are reviewed, it becomes clear that some of the individual elements of the conditions are redundant.

A. Delegation of Authority

Sage examined the USDC's order determining the validity of the pipeline company's eminent domain delegation to establish a present equitable interest of the condemnor in the property to be taken. As discussed, federal court decisions

224. FED. R. CIV. P. 71A (j).

225. *See generally* Northern Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170 (D.N.D. 1981).

226. *Id.* at 173.

227. *See also* East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 820-24 (4th Cir. 2004).

228. *Id.* at 829.

229. *Sage*, 361 F.3d at 828.

230. *Id.*

231. *Sage*, 361 F.3d at 829.

rendered during the 1930-70 period support the existence of a substantive right to the property sought by the condemnor if a valid delegation is proved. That substantive right in turn satisfies one of the conditions for obtaining the equitable remedy of immediate entry in federal eminent domain cases.

In *Sage*, a valid eminent domain delegation was also important from a practical standpoint. It identified the FERC Certificate, License, or Construction Permit, that the USDC was to enforce, and the specific factual and regulatory limitations that may constrain a condemnor and a USDC in deciding whether to grant an immediate entry order. In the case of a License, Certificate, or Construction Permit authorizing a specific project, the FERC will have issued a finding that the project is in the public interest or public convenience and necessity. The FERC may also direct and specify pipeline alignment, construction, land use, and environmental constraints for the project that translate into specific temporal and spatial limitations.[232] Compliance with at least four other federal laws conditions the Certificate or License and any Construction Permit[233] and at least one of those may require certain conditions of state law to be incorporated directly into the Certificate or License thereby limiting the condemnor's activities and freedom of choice.[234] This contrasts with a project that is to be constructed under the authority of a so-called Blanket Certificate, where the FERC has rendered a generic determination that all such projects may be undertaken provided certain cost and procedural conditions are satisfied.[235] Even so, a Blanket Certificate holder is required by the FERC to comply with federal environmental and land-use laws that are generally applicable to federally approved projects[236] and these laws may also specify temporal or spatial limitations on the Blanket Certificate project.[237] Thus, determinations of the FERC under a Certificate, License, or Construction Permit and the spatial and temporal limitations that may be imposed on a project by that the FERC order or the FERC regulation and the other federal and state laws that it incorporates can play an important role in a USDC's consideration whether a Certificate, License, or Permit holder satisfies *Sage* requirements for immediate entry, and if satisfied, what conditions may be placed on such entry.

B. Mandatory Preliminary Injunction

To some degree, elements of the second general condition of *Sage*, namely the requirements necessary to issue a preliminary injunction seem to repeat at

---

232. *See also* 15 U.S.C. § 717f(e) (2000); 16 U.S.C. § 797(e) (2000); Federal Power Act § 216(b)(3) (to be codified at 16 U.S.C. § 824p(b)(3)).

233. *See also* Clean Water Act § 401, 33 U.S.C. § 1341 (2000); Coastal Zone Management Act § 306(c)(3)(A), 16 U.S.C. § 1456 (c)(3)(A) (2000); Natural Environmental Policy Act, 42 U.S.C. §§ 4321-70f (2000); National Historic Preservation Act, 16 U.S.C. §§ 470a-70w-7 (2000).

234. *See also* 33 U.S.C. § 1341(d) (2000).

235. 18 C.F.R. §§ 157.201-157.218 (2004). *See also* note 204.

236. *See also* 18 C.F.R. § 157.206 (2004) (including App. I and II).

237. There are no reported cases involving a taking by the holder of a Blanket Certificate. Given the language of NGA § 7(h) however, there is no reason to believe that Congress intended to withhold the eminent domain delegation from Blanket Certificate holders. FERC certainly appears to believe that holders of Blanket Certificates can exercise eminent domain authority. *See, e.g.*, *Emergency Reconstruction of Interstate Natural Gas Facilities Under the Natural Gas Act*, 18 C.F.R. pt. 157 (2003). *See also* note 43.

least one of the elements of its other two general conditions. *Sage* identified the elements a preliminary injunction as "(1) the likelihood of irreparable 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."[238] Additionally, immediate entry was further characterized in *Sage* as a mandatory preliminary injunction which necessarily changes the status quo between the plaintiff and defendant and is to be granted only when the exigencies of the situation demand it.[239] The equitable nature of this condition reflects the fact that a USDC retains broad discretion to grant, condition or withhold relief and as a matter of fact, applications to a USDC for judicial immediate entry under the NGA or FPA are not always granted.[240]

Certainly, if a USDC has issued an order that the Certificate, License, or Construction Permit holder has the right to condemn an affected landowner's property, "likelihood of success on the merits" would automatically appear to be satisfied.[241] Thus, the "success on the merits" element of a *Sage* preliminary injunction seems redundant or identical to its first condition, that is to say, determining whether the condemnor has satisfied the requirements of the federal eminent domain delegation under NGA section 7(h) or FPA section 21 or 216.

Although a License, Certificate, or Construction Permit may only be issued if the FERC has determined that the project is in or consistent with the public interest,[242] the granting of a Certificate, License, or Construction Permit alone, however, may not establish a level of national interest in a project under the NGA or FPA sufficient to both satisfy heightened public interest and harm to plaintiff requirements of *Sage* that are necessary to justify mandatory relief and a change in the status quo.[243] An individual Certificate, License, or Construction Permit, however, if requiring strict compliance with construction and/or environmental time frames or impacting numerous property owners who disagree with the project proponent on compensation or property interest issues, can help to establish the likelihood of irreparable harm to the condemnor and to the broader public generally should entry be denied or the project delayed.

Discussion of irreparable harm to the plaintiff in *Sage* for example, included substantial factual development demonstrating how delays in the condemnor's construction schedule would adversely affect its customers and the consuming public in addition to injury to the plaintiff.[244] As a general proposition, federal courts have been more willing to use equitable remedies which change the status quo in disputes between private parties if an officially

238. East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 828 (citing Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977)).

239. *Id.* at 828 (citing *Blackwelder*, 550 F.2d at 194).

240. *See, e.g.*, Algonquin Gas Transmission Co. v. Yules, Civ. No. 6842 (D. Conn. Sept 10, 1957); National Fuel Gas Supply Corp. v. 138 Acres, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000); Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276 (D. Kan. 1999).

241. *Sage*, 361 F.3d at 829-30.

242. *See also* 16 U.S.C. § 797(e); 15 U.S.C. § 717f(c); Federal Power Act§ 216(b)(3) (to be codified as 16 U.S.C. § 824p(b)(3)).

243. *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944).

244. *Id.* at 828-29.

sanctioned public interest is clearly served by application of the remedy in favor of one of the disputants.[245] On the other hand, although a Certificate or Construction Permit holder or Licensee is likely as a general matter to suffer some degree of economic loss from construction and operational delays arising due to postponed entry,[246] such loss is not always a foregone conclusion.[247] In *Sage*, the discussion of the potential harm to plaintiff emphasized that general harm would result from delayed or lost energy opportunities and listed negative impacts on natural gas customers and consumers, and the hindering of economic development in several Virginia counties.[248] In other words, harm to the Certificate holder was linked to the issue of wider public harm and loss of energy opportunities generally even though *Sage* did not offer any clear explanation why these two issues should be linked analytically.[249] The court's perception that the plaintiff's delay in complying with its FERC order might be generalized to public harm seems to have motivated the court to affirm the USDC's immediate entry order. Under different facts, a court may not be as obliging.

C. Harm to and Protection of the Landowner

The Fourth Circuit also determined there was no likelihood of harm to affected property owners in *Sage* because the Certificate holder had adequately secured a landowner's just compensation claim with a deposit that assured reasonably adequate and certain payment pending final judgment. Furthermore, because affected property owners were authorized to draw down their respective deposits, their argument that they as property owners had been deprived of the use of their land without compensation during the period of immediate entry was determined by the court to be wholly without merit.[250] Similarly, the argument that landowners had special psychological attachments to their particular properties was judged, as a matter of law, to be idiosyncratic. According to the Court, loss of such attachment cannot qualify as a cognizable legal harm because the possible exercise of eminent domain with respect to property is one of the common burdens of any property owner's citizenship or residency.[251] Thus, in the end, harm to the landowner under the *Sage* analysis seemed to collapse into what amounted to consideration of the owner's constitutional just compensation claim to security in a reasonably adequate and certain amount[252] and adequate

245. *See also Hecht Co.*, 321 U.S. at 331.

246. *Id.*

247. *See, e.g.*, the considerations of the USDC in Algonquin Gas Transmission Co. v. Yules, Civ. No. 6842, slip op. at 8-9 (D. Conn. Sept 10, 1957).

248. It is interesting to contrast judicial attitudes on this issue given the passage of time. On essentially the same issue in 1957 the USDC in *Yules* found that the lost opportunities for gas service did not constitute harm to plaintiff, gas consumers or the public. Perhaps the relatively small size, perceived abundance of energy resources and scope of the project in *Yules* explains this difference in attitude. *See also Yules*, No. 6824, slip op. at 9.

249. *See also* East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 829 (4th Cir. 2004).

250. *Id.*; *compare* Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299 (1923).

251. *Sage*, 361 F.3d. at 829.

252. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1889); *Sage*, 361 F.3d at 829.

provision for payment of post-judgment compensation.[253] However, under different facts and with more expertise displayed by a property owner in identifying specific harms to him or herself or by a convincing demonstration that the "security" tendered by the Certificate, License, or Construction Permit holder is inadequate to make him or her whole in the event the project were to fail, it remains open for a property owner to defeat immediate entry on this ground.

D. Possible Simplification

Judicial immediate entry under the NGA and the FPA (and perhaps certain state taking laws) is likely to continue to evolve beyond *Sage*. Under the circumstances it is not surprising that the correspondence of doctrine and factual discussion within the *Sage* decision was not always analytically distinct or precise. Determination that a Certificate, Construction Permit holder, or License holder has the right to take under the NGA or FPA, for example, could be merged into the equitable finding of "likelihood of success on the merits."[254] Additionally, it seems appropriate to emphasize how the public might be harmed if the condemnor's project is delayed and what energy benefits and opportunities, if any, are likely to be delayed or lost if the project is not timely completed and much of this information may be available in the FERC proceeding. Currently, the courts seem to view such demonstrations as persuasive, particularly where numerous property owners may be able to delay the project by failing to agree on compensation or to grant necessary rights. Although in *Sage* this discussion occurred as part of the proof of harm to the plaintiff, it seems more appropriate to a discussion of the public interest.

Similarly, from the condemnor's perspective discussion of harm suffered by an affected property owner might be further clarified and simplified. As discussed above, subject to the ability of property owners to establish further types of harm, one of the principal concerns is whether the property owner's claim for just compensation under the Fifth Amendment has been secured in a reasonably adequate and certain amount under the FRCP or comparable state procedure under the FPA section 216(e)(3). If this assurance is given to the affected property owner by deposit or court supervised payment of an adequate amount, *Sage* seems to indicate that there is little for a court to discuss in connection with landowner protection during the period of pre-judgment entry unless the property owner identifies a unique harm that cannot be addressed in terms of a monetary damage equivalent or mitigated by conditions on the immediate entry order issued by the USDC.

Lastly, the immediate entry remedy could be discussed by courts and the companies seeking such entry with more precision and clarity. Certainly, fee

253. *Sage*, 361 F.3d at 824.

254. Whether the "merits" in this context constitutes the ultimate transfer of title or the right to a license to enter seems largely irrelevant. As the *Commercial Station* and *Van Sterkenburg* decisions indicate, as a practical matter, court ordered immediate entry preceded any discussion of whether the remedy was based on preexisting legal or equitable doctrines. Undoubtedly as this remedy has come to be more widely used, the discussion of its theoretical source in preexisting legal and equitable forms has become more and more important because identifying that source helps to establish a proposed extent and therefore approximate limit of the remedy, and not merely its utility and fairness.

holders and leaseholders have collections of enforceable property rights that include the right of possession. Such collections allow their holders generally to exclude third parties having inferior title from the property that the holder possesses or to regain possession of the property from a party having possession of it but holding inferior title. Easements and licenses, on the other hand, do not technically include a right of possession. License and easement holders generally have an affirmative right to enter and perform a specified activity from time to time on land that is owned or in possession of the original grantor without unreasonable interference by that grantor or treatment by that grantor as a trespasser. Additionally, in the case of an easement holder, the successors, assignees, licensees, and invitees of the original grantor are, generally speaking, similarly bound. The fee or leaseholder retains all other uses of the land within the right of way or licensed area that does not unreasonably interfere with the easement or licensed activity.

Among the foregoing categories of rights and privileges, a court order for immediate entry seems to most closely resemble a license which is ordinarily considered to be revocable and modifiable.[255] Moreover, the entry order is often phrased as an affirmative statement of the Certificate holder's or Licensee's authorization or permission to enter and use an affected landowner's property for a specific purpose rather than as a prohibition of interference by the landowner with the specified activities of the entrant or the categorical exclusion of the owner from the affected land within the bounds of the proposed right of way. Thus, in terms of traditional property concepts and analogies it may be helpful to think of and discuss the immediate entry remedy as a discretionary court ordered license whose issuance requires a level of proof ordinarily necessary to obtain as in *Sage*, a mandatory preliminary injunction directing a change in the pre-existing status quo between the condemnor and the condemnee.

IV. PRACTICE CONSIDERATIONS

As discussed above federal courts have evolved and adapted immediate entry as an important remedy for private entities exercising federal eminent domain authority under the NGA and the FPA. Accordingly, in what follows, our comments will be generally supportive and not critical of that remedy.

There are, in our experience, best practices for condemnors to employ in exercising eminent domain authority or seeking immediate entry. Generally, takings and entry are sought in the context of a complex energy facility construction and land acquisition programs involving numerous individual landowners and parcels of land. Typically the request for entry has pre-condemnation and post-condemnation considerations, although such considerations do overlap.

255. Baseball Publ'g Co. v. Bruton, 18 N.E.2d 362 (Mass. 1938) (distinguishing easements, leases, and licenses). *See also* Western Mass. Elec. Co. v. Sambo's of Mass. Inc., 398 N.E.2d 729 (1979) (analyzing representative easement rights); Nelson v. Am. Tel. & Tel. Co., 171 N.E. 416 (Mass. 1930) (analyzing representative license rights).

A.Pre-Condemnation

Pre-condemnation considerations typically involve the FERC authorization for the project and project proponent relations with landowners.

1. Considerations Involving the FERC Authorization

As *Sage* indicates, the FERC Orders can be quite influential in determining whether immediate entry relief will be granted. In the context of an extensive FERC approved project and property acquisition program, the filing of a condemnation complaint and entry motion is generally timed to occur after project proponent's acceptance of the FERC authorization.[256] Optimally, filing will occur at least one to two months prior to the anticipated start of project construction. Because immediate entry relief is not always granted[257] careful preparation of the land acquisition strategy is important to the recipient of a FERC Order. The FERC authorization is critical in establishing the need for the project. In *Sage*, the FERC Certificate was also influential in the court's evaluation,[258] as it identified the prospect of lost or delayed energy delivery opportunities if the project proponent was unable to reach timely agreements with landowners.[259] Other areas in which the FERC authorization can be helpful to the project proponent lie with respect to questions of construction timing[260] and location of the project.[261] Although a property owner may want to dispute all these issues, it seems clear that his or her remedy as to these matters is to request a rehearing and then direct appeal of the FERC order. An attempt to raise these matters in the USDC during a condemnation or entry hearing will undoubtedly be barred.[262]

As to the FERC and individual property owner considerations, the issue of notice to property owners of the applicable FERC authorization proceeding is important.[263] We believe that it is a good practice for project proponents to take special care and document its compliance with the letter of the FERC's property owner notification requirements and to make reasonable measures to assure that affected landowners have received notice of the FERC proceeding. Although *Tenneco v. 104 Acres* cites considerable authority that property owners have no

256. *See, e.g.*, Regulations Under Natural Gas Act, 18 C.F.R. § 157.20(a) (2006).

257. *See, e.g.*, Algonquin Gas Transmission Co. v. Yules, Civ. No. 6842 (D. Conn. Sept 10, 1957); National Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000); Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276 (D. Kan. 1999).

258. East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004).

259. *Id.*, at 829

260. *Sage*, 361 F.3d at 828-9.

261. *See, e.g.*, Kern River Gas Transmission Co. v. Clark County Nev., 757 F. Supp. 1110, 1116 (D. Nev. 1990); Consideration for Transmission Congestion Study and Designation of National Interest Electric Transmission Corridors, 71 Fed. Reg. 5600 (Feb. 2, 2006); *see also supra* text accompanying note 62.

262. *See, e.g.*, Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); *see also* Williams Natural Gas Co. v. City of Okla. City, 890 F.2d 255, 263 (10th Cir. 1989); Tennessee Gas Pipeline Co. v. 104 Acres, 749 F. Supp. 427 (D.R.I. 1990).

263. *See, e.g.*, 18 C.F.R. § 157.6(d) (2006); 18 C.F.R. § 157.203 (2006); Revisions to the Blanket Certification Regulations and Clarification Regarding Rates, 71 Fed. Reg. 36,276 (June 26, 2006); 16 U.S.C. § 803(b) (2000); 18 C.F.R. § 5.18(a)(3) (2006); Federal Power Act § 216(d) (to be codified at 16 U.S.C. § 824p(d)); Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors, 71 Fed. Reg. 36,258 (June 26, 2006); *see also supra* text accompanying notes 43, 51.

general constitutional right to notice and opportunity to be heard on the necessity of the project,[264] statutory and the FERC regulatory requirements do grant certain categories of potentially affected property owners limited rights of notice, participation, and comment in the applicable FERC proceeding, and recent decisions indicate the United States Supreme Court is ever more sensitive to property owner notice issues in those cases where a deprivation of property may occur.[265] Consequently, where compliance with the FERC property owner notification requirements has been in bad faith, ignored or slipshod, and an individual landowner has, as a result, never received notice in accordance with FERC requirements, our belief is that in a proceeding for equitable relief of immediate entry, a project proponent would be tempting fate, for if these problems are egregious enough, a USDC may feel compelled to deny or stay such relief at least until the FERC has addressed the notice non-compliance issue. Conversely, although the property owner faces the serious obstacle imposed by *Tenneco v. 104 Acres*, there may be exceptional circumstances where this obstacle can be overcome.

Another area in which a project proponent may experience difficulty is in obtaining pre-Certificate, pre-License, or pre-Construction Permit authorization by potentially affected landowners to enter their property for civil and environmental survey purposes. In light of the FERC's encouragement of pre-filing collaborative procedures in the case of energy facilities subject to NGA Certificate requirements and the assembly of information pertaining to location, land-use, and environmental concerns, the issue of survey entry of potentially affected properties may become increasingly important.[266] Neither the FPA nor the NGA grant a survey entry remedy to a project proponent for purposes of preparing an application to the FERC where property owners refuse survey permission but at least one state authorizes such entry if a Certificate application *has been filed with the FERC* in connection with a proposed interstate pipeline project.[267] Thus, it is advisable for a project proponent to check state laws pertaining to survey permission in the states where the project will be located to determine whether state laws provide a serviceable remedy. Although it is theoretically possible to seek a temporary entry and easement for survey purposes by exercising domain eminent powers after a FERC Certificate, License, or Construction Permit has been issued to a project proponent, such an approach to survey entry may be virtually pointless in that the purpose to be served by the survey would seem to be mooted by the issuance of a Certificate, License, or Permit that situates the project on the land that is to be surveyed. Moreover, any relocation of a project from a property owner's land in circumstances where a taking has been initiated and a survey shows the location to be undesirable, may result in property owner claims for reasonable attorneys fees in connection with abandonment of the taking.[268] These are issues that the

264. Tennessee Gas Pipeline Co. v. 104 Acres, 749 F. Supp. 427, 430-34 (D.R.I. 1990).

265. *Compare* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), *with* Jones v. Flowers, No. 04-1477, slip op. at 7-12 (U.S. Apr. 26, 2006).

266. *See generally* 18 C.F.R. § 157.22 (2005).

267. MASS. GEN . LAWS. ANN. ch. 164, §§ 75D, 75H (West 2003).

268. 42 U.S.C. § 4654 (2000); Tennessee Gas Pipeline Co. v. 104 Acres of Land, 828 F. Supp. 123, 126 (D.R.I. 1993).

FERC and Congress may wish to consider in the future. Property owners may wish to consider appropriate indemnities against damage to their property if they agree to grant survey permission.

2. Considerations Involving Individual Property Owners Negotiations

In addition to adequate notice of the FERC proceedings, individual property owners may raise the issue of the project proponent's failure to negotiate in good faith as a defense to immediate entry, or the taking in general. This can involve issues of the adequacy of compensation, the terms and conditions of the easement/fee, conveyance, or both. Although there is a split of opinion on whether NGA section 7(h), FPA section 21, and FPA section 216(e)(3) impose an implied obligation on the part of a project proponent to negotiate in good faith,[269] the authors believe that the best practice for project proponents is to document all contacts with individual property owners affected by the project. At a minimum, during land acquisition negotiations with a property owner, the property owner should be contacted three times in person by a land agent of the project proponent.[270] The first meeting should explain the project, including its location, and address any landowner questions. This can be followed by a meeting to present an initial offer of compensation for rights to be purchased, the form of instrument containing the rights sought, (for example, a grant of easement) and to answer any questions. There should also be a follow-up meeting or meetings to address any special landowner requests or requirements. In practice, it has been the authors' experience that most property owner negotiations will result in more than three meetings for any number of reasons including requests for changes in easement language, discovery of additional persons having interests in the property and need to contact such persons (if, e.g., tenants, either joint or in common, or estates are involved), requests for additional compensation, and/or changes in project location. These facts may become important in an immediate entry hearing. From the property owner's perspective, these meetings are important for they provide an opportunity to establish what is likely to be a long term relationship with the project proponent and to bring to that proponent's attention any special problems or requirements of the property owner.

During negotiations, it has also been the authors' experience that the best practice is to avoid any changes to standard forms that are to be recorded by the condemnor except to the extent the changes in the rights set forth in the standard form are either ministerial or cannot be taken by the project proponent under the project Certificate, License, or Construction Permit order. The latter exception is necessary because the right of private entities taking to specify rights under the FERC orders to be taken is limited to what the FERC order has authorized.[271] Any special agreements that are requested by a landowner in connection with a sale of property rights should be in a separate, unrecorded instrument, such as a damage release, in order to vitiate subsequent arguments that a breach of such agreements has triggered a reversion of land rights to the landowner.

269. Mohr, *supra* note 78, at 206-07.

270. Transcontinental Gas Pipeline Corp. v. 118 Acres of Land, 745 F. Supp. 366, 369 (E.D. La. 1990).

271. Columbia Gas Transmission v. Exclusive Gas Storage Easement, 776 F.2d 125, 128 (6th Cir. 1985).

Maintaining the integrity of standard forms also provides some assurance that all property owners are being treated substantially the same by a project proponent.

As to compensation negotiations, there would generally seem to be an inverse relationship between the number of special rights permanently retained by the property owner and the compensation to be paid. The best practice, in the authors' opinion, is to base any offer for compensation on a standard form of rights to be requested from all property owners affected by the project and a solid market study or an individualized preliminary appraisal for each parcel of land with respect to which such rights will be sought. Initial landowner offers should be based on the standard instrument and the market study or appraisal. After the landowner's response to the offer is known and taken into account (for landowners generally know their property intimately and often raise valid issues), adjustments to the offer of compensation can be made. Practically speaking, if the project proponent has a solid appraisal, the decision whether to settle or to condemn and seek immediate entry is often based on whether the property owner has agreed to rights under an undiluted standard instrument at a price that is no more than the appraised value plus a premium (based, for example, on the estimated average costs per parcel of filing complaints, entry motions and then going to trial on the issue of compensation, including expert fees and the costs of a commission, if a commission is to be sought). Documenting relevant portions of this approach in any USDC proceeding for immediate entry may defuse a property owner's attempt to raise the issue of a lack of good faith negotiation as a defense.[272] Conversely, in negotiations the property owner should try to obtain a realistic sense of the fair market value of his or her property and identify to the project proponent any special problems that the project may create which may be subject to reasonable mitigation.

A solid market study or set of individual preliminary appraisals can also form a convincing basis for justifying the value of the bond or deposit that may be required by the court at the conclusion of any hearing on immediate entry.[273] Prior to filing a condemnation complaint against a property owner's land, it is a good practice to a send a "final offer" letter clearly articulating the rights sought, the amount of the appraisal, the compensation offered, the date on which the taking complaint may be filed if the final offer is not accepted, and a statement that the appraised value, and not the stated offer, will form the basis of the project proponent's position on value in court. The property owner who does not accept the offers of a project proponent should be prepared to face condemnation and a likely hearing on immediate entry. One of the property owner's important concerns during a hearing or entry should be reasonably adequate security prior to the determination of his or her just compensation.

Often, property owners do not wish to incur the costs of opposing entry to their property but have reservations about the amount of compensation that has been offered by a project proponent. In such situations it may be possible after filing the eminent domain complaint for the project proponent and an individual property owner to enter into a stipulation of taking to be approved by the USDC and then recorded in the registry of deeds or other appropriate office for the

272. *118 Acres*,, 745 F. Supp. at 369.

273. Northern Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170, 173 (D.N.D. 1981).

filing of public land records. In such instruments, the landowner agrees to the taking and entry, but expressly reserves his or her right to contest the compensation that has been offered. The offered compensation can be released to the property owner with the understanding that Rule 71A(j),[274] or an appropriate state rule under FPA section 216(e)(3) will apply and that the property owner may be required to pay some of the deposit back if he or she fails in his or her claim for increased compensation. This approach can be of value to the property owner as well as the project proponent. Although a taking is generally characterized as an *in rem* proceeding that is binding against third persons[275], the condemnor may want to consider filing a *lis pendens* or a similar instrument in appropriate public offices of land records at the time of filing a taking complaint. Such a filing will be of benefit to potential third party purchasers of the property in question.

B. Taking and Post-Condemnation

There are a number of considerations to weigh when filing a taking complaint and entry motion under the FPA or NGA. Procedural matters under FPA section 21 and NGA section 7(h) are governed by the FRCP.[276] FPA section 216(e)(3), however, remains problematic in that the arguments that apply to the United States Supreme Court's overruling of conformity to state procedure in FPA section 21 and NGA section 7(h) do not appear applicable to FPA section 216(e)(3), hence state procedures are likely to apply in USDC in takings under that law.[277]

Thus, in drafting a complaint and making service Rule 71A applies under NGA section 7(h) and FPA section 21, but state rules of procedure likely govern these issues in the case of FPA section 216(e)(3).[278] The same will be true of the right to a jury trial on the issue of compensation. Neither the Seventh Amendment of the United States Constitution nor Rule 71A guarantee a property

---

274. The rule states: "Deposit and its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment." FED. R. CIV. P. 71A(j).

275. *See e.g.*, Weeks v. Grace, 194 Mass. 296, 299-300, 80 N.E. 220 (1907).

276. Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178, 1182 (5th Cir. 1977), *rev'd on other grounds*, Georgia Power Co. v. 138.30 Acres of Land, 617 F.2d 1112 (5th Cir. 1980); *see, e.g.*, East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 822 (4th Cir. 2004); Northern Border Pipeline Co. v. 64.111 Acres of Land, 344 F.3d 693 (7th Cir. 2003); Southern Natural Gas Co. v. Land, 197 F.3d 1374 (11th Cir. 1999); Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land, 210 F. Supp. 2d 1253, 1258 (D. Kan. 2002); USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 826-27 (E.D. Tenn. 1998); Algonquin Gas Transmission Co. v. Yules, Civ. No. 6842 (D. Conn. Sept. 16, 1957).

277. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 948; adding Federal Power Act § 216 (e) (3) (to be codified as16 U.S.C. § 824p(e)(3) (2000)).

278. In this case the condemnor may be able avail itself of immediate entry under the theory asserted under Portland Natural Gas Transmission Sys. v. 4.83 Acres of Land, 26 F. Supp. 2d 332, 335-6 (D.N.H. 1998). *See also supra* text accompanying note 200.

owner a jury trial on the issue of compensation. It is possible therefore for property owner compensation to be determined in the first instance by the USDC (either with or without advisory jury)[279] or by a commission.[280] With respect to FPA section 216(e)(3), on the other hand, as matters presently stand under the laws of a particular state, jury trial on the issue of property owner compensation may be guaranteed by law.[281] Although Rule 71A does not require that all persons having an interest in the property be named as of the time the complaint is filed, by the time of trial on compensation, diligent efforts to locate all interest holders must be expended. Such diligent efforts should also be expended prior to any hearing on immediate entry. Property having unknown owners is also addressed by the Rule which should be complied with at the time of any hearing on immediate entry.[282] From an individual property owner's perspective, a jury trial on compensation may be viewed as more advantageous than a bench trial or commission. If so, the property owner should make certain that he or she timely submits the appropriate request under federal or state law, as the case may be.

In terms of filing one complaint incorporating all property interest holders or individual complaints against each of the property owners affected by a project, using separate complaints for the individual fee owners of affected properties rather than listing landowners in a single complaint is practical and efficient. Owners of less than fee rights in the same property should also be joined with the owner as they are discovered. As individual landowner claims are settled, their respective complaints may be dismissed without involving further amendments to a single initial complaint and the problem of joining necessary parties is confined to individual properties and is thereby simplified. The approach also facilitates court endorsed interim agreements between the condemnor and individual property owners such as stipulations of taking to allow entry. We believe this approach benefits property owners and project proponents equally.

Lastly, consideration should be given, at the time of filing a complaint under NGA section 7(h) and FPA section 21 (and FPA section 216(e) if the applicable state procedure allows), to filing in the alternative, a motion for summary judgment on the issue of taking and entry and a motion for immediate entry and other equitable relief. This approach provides the condemnor with maximum flexibility. If project construction requirements dictate, the USDC can be petitioned for a hearing in advance of the date that the property owners' answers are due. If the answer date occurs prior to the hearing date on entry, relief may be sought on the motion for summary judgment. In the latter situation, the USDC may bifurcate taking issues from that of compensation and then decide a summary judgment motion as to the taking and allow entry as has occurred in several decisions. Alternatively, the court may reserve a decision on the summary judgment motion in order to preserve the property owner's ability to take an interlocutory appeal of an equitable entry motion in the nature of

279. *In re Maritimes*, *supra* note 193 (the USDC impaneled in advisory jury, whose verdicts the Court then reviewed and adjusted where the Court deemed necessary).

280. FED. R. CIV. P. 71A(h). *See also* Chase, *supra* note 97.

281. *See e.g.*, Walthan Tele-Comm. v. O'Brien, 532 N.E.2d 656, 658 (Mass. 1989).

282. FED. R. CIV. P. 71A(c)(2).

Sage.[283] From the property owner's perspective, an immediate entry order pursuant to *Sage* principles would appear preferable to a decision on a motion for summary judgment based on the opportunity it presents for interlocutory appeal.

V. CONCLUSION

Having considered the theoretical and practical dimensions of the issue of immediate entry, it is appropriate to reflect on how far the judicial remedy unsuccessfully urged by a natural gas company in 1957 has evolved.[284] Although the USDC in *Algonquin Gas Transmission v. Herman Yules* found no pre-existing legal entitlement of a Certificate holder to immediate entry, that court was willing to state that under certain circumstances, such an equitable remedy might be granted. Unfortunately, for Certificate and License holders, the company's timing and circumstances in *Yules* were not propitious and seemingly the remedy fell dead born from the bench.[285] Its approach was not to be resuscitated until almost a quarter of a century later in connection with the transportation of Alaskan natural gas to the lower contiguous forty-eight states. Now, almost fifty years after that initial petition for immediate entry was denied, and after a series of expansions of the interstate natural gas transmission grid that seem to have made the use of the judicial remedy of immediate entry a practical possibility, *Sage* has articulated a workable doctrinal framework in which the application and extent of the remedy may be evaluated and implemented. Moreover, that framework has managed to survive intact after landowners asserting purported inconsistencies between *Sage* and *Northern Border v. 86.77 Acres*, petitioned the United States Supreme Court for certiorari only to have their petition denied.

In closing, there remain the two other approaches to entry which need to be addressed. The first, based on a summary judgment motion to decide the Certificate holder or Licensee's right to take, appears to have been incorporated at least in part by the *Sage* requirement that a court order declaring that the plaintiff has the right to take be issued. Even so, the summary judgment approach may require more study and thought than the courts have given it to date. Certainly, *Commercial Station*, its progeny, and *Van Sternkenburg* suggest that implicit in delegated federal authority to take is a substantive entitlement to property rights that help justify immediate entry under equitable principles and that may justify a decision granting such entry on a summary judgment motion. At least one USDC that has used the latter approach, however, seems to hint that it would have collapsed its hearing on a summary judgment motion into a hearing on a preliminary injunction had the affected property owner not ultimately agreed to entry.[286]

---

283. 28 U.S.C. § 1292 (2000).

284. Algonquin Gas Transmission Co. v. Yules, Civ. No. 6842 (D. Conn. Sept 16, 1957).

285. This metaphor in a slightly different form is attributable to the Scottish philosopher and historian David Hume in characterizing the tepid public reaction to his first major philosophical work. David Hume, *My Own Life in* 1 THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688 (Jack Lynch ed., 1748).

286. Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth., F. Supp. 106, 112 (D. Mass. 1998). There the USDC denied a Certificate holder's request for a prohibitory injunction to enforce its summary judgment

Another approach has had a USDC apply state granted rights of immediate entry under delegated state eminent domain laws in a NGA section 7(h) proceeding.[287] Unfortunately, this theory, as explained by the court that employed it, was premised on application of the conformity clause of NGA section 7(h) and as discussed above, federal courts that have examined clauses requiring conformity with state procedure have uniformly agreed that such clauses have been superseded by the United States Supreme Court's promulgation of Rule 71A. That theory, however, may now have new vitality in the situation of takings for interstate electric transaction corridors due to the enactment of FPA section 216(e)(3).

Thus, it appears that the *Sage* approach to immediate entry currently represents the most developed stage of judicial thought and action concerning immediate entry and federal eminent domain law. To date the approach has been one of practical necessity, recognizing utility in the invention of this discretionary judicial remedy, granted only after balancing the national public interest as determined by the FERC against the right of affected landowners to have their claims to just compensation secured in a reasonable, certain, and adequate manner pending ultimate transfer of title to affected property rights from condemnee to condemnor. Undoubtedly, the federal courts will view *Sage* as a valuable decision in future efforts to adapt the immediate entry remedy to new situations. Certainly, the metamorphosis of the federal judicial immediate entry remedy as applied to Certificate, License, and Construction Permit holders exercising federal eminent domain authority, from its first abortive appearance in 1957 to *Sage*, presents an instructive example of how the decisional law of the federal courts unfolds; as an episodic, sometimes halting or incomplete adaptation of traditional judicial practices and remedies to the rights of project proponents and affected landowners in the face of important and publicly recognized energy needs of the nation as a whole.

decision, but only on the representation of the MBTA that it would not interfere with the Certificate holder's entry. *See also* Tennessee Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F. Supp. 2d 102, 104 (D. Mass. 1998).

287. *See supra* text accompanying note 200.