Protecting pipelines, storage fields, wells and other facilities from encroachments is critical to all participants in today’s natural gas industry. Unless this basic infrastructure is protected, the industry cannot fulfill its fundamental mission of delivering natural gas safely and reliably.

In the past, most major pipelines, wells, and surface facilities were located in remote locations and there was little chance of encroachments on those facilities. Today, however, the proliferation of development in and around major population centers has combined with the higher demand for natural gas service in those areas to increase the potential for conflict. At the same time, stricter regulation of pipeline has required natural gas pipeline companies to be ever more vigilant in protecting their facilities.

This paper will explore what natural gas companies can do to protect their facilities and how the courts have reacted to those efforts.

I. Pipelines

Pipelines are the superhighway upon which the interstate transportation of natural gas depends. Like any highway, this complex system of pipelines must be maintained in order to assure safe and reliable service. Pipelines must be protected from developers seeking to build roads, homes or businesses over pipelines, from homeowners seeking to plant trees or build sheds or additions within rights-of-way, and from coal companies whose modern mining techniques can damage pipelines by subsiding the land.

a. Scope of Ownership. Most all pipelines are located and operated on land owned by others -- that simple fact explains why most disputes over encroachments occur with regard to pipelines. The pipeline company’s right to operate is generally granted by an easement or right-of-way agreement across private property. Encroachment disputes generally arise when a landowner’s use of his property conflicts with the safe operation and maintenance of a pipeline.

The first step in resolving any dispute is to look at the agreement itself. Easements and right-of-way agreements are contracts which must be interpreted according to well-established contract principles. The most fundamental of these principles is that the parties will be bound by the plain and unambiguous meaning of the words of the contract. If the language is ambiguous (meaning that it can reasonably be given more than one meaning), the courts will construe the easement to conform to the intentions of the parties. The controlling principle is that the easement must be construed in such a way as to not frustrate the basic purpose of the easement – to allow the pipeline company to safely operate and maintain its pipeline.

In addition to the right to operate and maintain pipelines, courts have held that pipeline easements also include the “implied right” to maintain the pipelines in a manner which complies with current federal regulations. In Avery v. Colonial Pipeline Co., 444 S.E. 2d 363 (Ga. Ct. App. 1994), the court held that the pipeline company could remove trees from the right-of-way even though it had not done so in the previous forty years of the easement’s existence. The pipeline company was notified by the Office of Pipeline Safety that the company likely was in violation of its inspection requirements because encroachments of vegetation made aerial inspections unlikely to be effective. On appeal,
the trial court’s ruling that the pipeline company was permitted to remove encroaching vegetation in order to comply with federal regulations based on the “implied right” in the easement to take action to comply with federal law was affirmed. See Avery, 444 S.E.2d at 364-65.2

As more and more federal regulations address pipeline safety and the burden on operators to comply with these requirements grows, the number of disputes over encroachments will likely also increase.

b. Type of Encroachment. Depending on the nature of the encroachment and its location, the delay between the occurrence of the encroachment and its discovery can vary from the same day the encroachment begins to several months after the initial encroachment has occurred.

Most encroachments are discovered by field personnel performing maintenance or other operations required by the company’s policies or government regulations.3 It is important for any encroachments to be reported to the company’s supervisors and legal department as soon as possible. If it becomes necessary to file a lawsuit to obtain a court order to remove the encroachment, one of the factors a court will consider is how quickly the company acted after discovering the encroachment. As is discussed below, in order to obtain a court order, the company must prove that it will suffer “irreparable harm” if the encroachment is not removed. Courts are less likely to find such harm irreparable if the company does not take immediate action after discovering the encroachment.

2 See also Panhandle E. Pipe Line v. Tishner, 699 N.E.2d 731, 738 (Ind. App. 1998) (holding that “[a]n easement which grants the right to operate a natural gas pipeline must, if the easement is not to be wholly illusory, imply the right to operate the pipeline in accordance with applicable federal law”); Swango Homes Inc. v. Columbia Gas Transmission Corp., 806 F. Supp. 180, 185 (S.D. Ohio 1992) (same); Natural Gas Pipeline Co. of Am. v. Cox, 490 F. Supp. 452, 454 (E.D. Ark. 1980) (noting that pipeline operator has “the implied right to operate its line in accordance with applicable Federal regulations”).

3 The applicable regulations and government agencies will vary according to whether the pipeline company is an interstate pipeline company within the jurisdiction of the federal government or an intrastate pipeline company or local distribution company. The federal government’s regulations are contained in the Natural Gas Act, 15 U.S.C. §§ 717-717z and Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101 et. seq. and in the Code of Federal Regulations at 49 CFR § 190 et. seq. Those regulations are the minimum standards for the operation, maintenance and inspection of all pipelines. State agencies are free to impose more stringent standards on intrastate pipelines. 49 U.S.C. § 60105.

The nature of the encroachment will dictate the speed and severity of the response. An encroachment on a right-of-way is any condition or activity within the right-of-way which impairs the use of the right-of-way. The greater the impairment, the swifter and more aggressive the response must be.

Encroachments come in many forms, including but not limited to:

1. The building of a structure within the right-of-way;
2. Operation of heavy equipment within the right-of-way without padding or consent;
3. Digging in a right-of-way;
4. Dumping excess fill on the right-of-way;
5. Grading the property so that there is too little fill on the right-of-way;
6. Planting trees or shrubbery within the right-of-way;
7. Blocking access to the right-of-way with a fence or by threats of physical violence.

After the encroachment is discovered and reported to management and the in-house legal department, the pipeline company must determine how best to respond to and remove the encroachment.

In the majority of cases, the landowner will voluntarily remove the encroachment after the company explains that the condition or activity impairs the safe and efficient operation and maintenance of the pipeline. Thus, in cases where the encroachment does not pose an immediate danger to life or property, the first response is to educate the landowner. Typically, the company will send a letter or meet with the landowner to explain the nature of the right-of-way and why the landowner’s activities impair the operation and maintenance of the pipeline. The landowner should be advised what must be done to safely remove the encroachment. In many cases, the landowner will comply and the matter will be resolved without a lawsuit.

However, in cases involving immediate danger to life or property, the response must be more immediate and severe. For example, if a contractor is digging or operating heavy equipment within a right-of-way without advance notice and consent, the pipeline company must immediately confront the contractor to stop the work. Once the danger to the contractor is explained, most rational contractors will stop work. If not, the pipeline company must seek immediate relief from the court or other authorities. Likewise, if a pipeline needs
immediate repairs and the landowner has blocked access to the right-of-way, immediate action must be taken. Finally, any threats to company personnel or facilities must be taken seriously. In such cases, the decision must be made whether to seek relief from the court or to report the threats to the police.

In cases where the landowner refuses to remove the encroachment, the company must decide whether to file a lawsuit in order to have the encroachment removed. In the typical case, the company will send a letter to the landowner giving them a last chance to remove the encroachment before outside counsel is hired. After outside counsel is hired, another letter will typically be sent.

Before the landowner’s deadline passes, the company’s legal department and outside counsel must do the necessary investigation to prepare and file the complaint and seek injunctive relief to require the removal of the encroachment. Because the company will usually ask the court to expedite the hearing of the request for an injunction, it is important that the case be fully prepared at the time the complaint is filed. The information which must be gathered includes:

1. Information as to the pipeline affected (pipeline number, age, type of steel, pressure, maintenance history).
2. Information as to the landowner (name, address, acquisition of property, use of property).
3. Any location reports, leakage patrol reports or other reports for the affected tract which may show the landowner’s awareness of the pipeline.
4. Information as to the encroachment (nature of encroachment, when it occurred, when it was discovered).
5. Information as to the impact of the encroachment (how the encroachment affects the safe and efficient operation and maintenance of the pipeline, the markets that are served by the pipeline, the affect on customers of any disruption in service, how any nearby persons or property will be endangered by encroachment).
6. Information as to potential defenses (has the company allowed similar encroachments on neighboring properties, has it agreed to landowner's use in past, etc?).

At the same time the basic information is being gathered, the company’s lawyers or land department will seek documentation of the property interests at issue. First, a certified copy of the right-of-way will need to be obtained. A copy certified by the appropriate government entity is admissible at the injunction hearing without the need for testimony. Second, the company needs to obtain documentation as to the landowner’s property interest to show that the landowner had notice of the right-of-way. Also, photographs or videotapes of the encroachment should be taken. It is important that the photographs be marked on the back with the date and the name of the photographer. As to videotapes, it is usually better to avoid background noise and limit narration to the minimum required to describe the scene.

This information gathering and any photographs or videotapes should be done at the direction of the company’s lawyers and should be given only to the lawyers. Once the lawsuit is filed, the landowner’s counsel will seek discovery of copies of all written materials in the company’s files. Although the company may resist producing those materials if they are privileged, it is safer to control the content of the materials in case they are deemed discoverable.

In addition to the information gathering process, the photographs, and the documentation of right-of-way, the lawyers will need to interview the company’s personnel and prepare them to testify at an injunction hearing. Generally, the company will need to present evidence in the form of exhibits and testimony as to the following:

1. Ownership of the right-of-way;
2. The extent of the landowner’s property interest and notice of the right-of-way;
3. If applicable, the FERC certificate of convenience and necessity, and duty to provide service under the Natural Gas Act or applicable state law;
4. Use of the right-of-way (the size of the pipeline and the markets served by the pipeline);
5. Procedures for safely operating and maintaining the pipeline in accordance to governmental regulations;
6. The encroachment and the landowner’s refusal to remove the encroachment;
7. The irreparable harm that has or will be caused if the encroachment is not removed; and
8. The relief sought by the pipeline company.

c. Obtaining Relief in Court. If the landowner does not remove the encroachment by the deadline in the demand letter, the pipeline company will file suit. Generally, it is preferable to file suit immediately after the deadline passes and to seek a hearing as soon as possible. As discussed above,
on the day the complaint is filed, the company should have already prepared the evidence necessary for the hearing.

The lawsuit is commenced by filing a complaint. The complaint may be filed in either state or federal court. Unlike state court jurisdiction, the jurisdiction of federal courts is limited. Thus, the company must prove the elements necessary to establish federal jurisdiction. These elements are discussed below. In cases involving intrastate pipelines, the complaint must usually be filed in state court.

The complaint identifies the parties, the property interests owned, the encroachment and the harm to the pipeline company. The complaint also specifically requests the relief sought. The requested relief usually consists of an injunction ordering the landowner to remove the encroachment and damages, if appropriate. Any claim for damages is usually deferred until after the encroachment is resolved.

Shortly after the complaint is filed, the company files a motion for injunctive relief and a memorandum of law in support. The motion for injunctive relief asks the court to order the landowner to remove the encroachment or stop the activity that impairs the use of the right-of-way. The motion and memorandum of law address the following issues:

1. **Subject Matter Jurisdiction.** In cases where the complaint is filed in federal court, the company may argue that the Court has subject matter jurisdiction over the action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337 because federal laws, including laws regulating interstate commerce and federal common law, involve substantial questions arising under federal laws.

   The company may argue that federal jurisdiction is warranted because its operations, including its operation of the pipeline threatened by the defendant’s interference, are subject to pervasive federal regulation under the Natural Gas Act, 15 U.S.C. §§ 717-717z (1976 & Supp. 1993) and the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101 et. seq. (1997 & Supp. 1998).4

   If applicable, the company may also argue that the Court has subject matter jurisdiction over the action pursuant to 28 U.S.C. § 1332 which provides for federal jurisdiction in cases where there is diversity -- the parties are from different states or countries. In order to establish federal diversity jurisdiction, the company must also establish that the amount in controversy exceeds the sum of $75,000. “In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.” Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 347 (1977); accord Glenwood Light Co. v. Mutual Light Co., 239 U.S. 121 (1915); Tarbuck, 845 F.Supp. at 308, 62 F.3d at 541. The object of encroachment litigation is (1) to protect present and future access to the right-of-way; (2) to protect the pipeline and other facilities; and (3) to protect the public from harm resulting from the defendant’s actions. The value of these interests usually exceeds $75,000. See Tarbuck, 62 F.3d at 542-543.

In cases filed in state courts, there is usually no jurisdictional issue because state courts are courts of general jurisdiction. State law, however, may require allegations as to the dollar amount in controversy. Also, there may be arguments as to the jurisdiction or interest of state public utility commissions.

2. **Standard for Injunctive Relief.** The standards governing the issuance of a preliminary injunction are well established. Before ordering injunctive relief, the Court must find that: (1) the plaintiff possesses a substantial likelihood of success on the merits; (2) the plaintiff will sustain irreparable injury absent the issuance of injunctive relief; (3) the defendant will not suffer substantial hardship if the injunction is granted; and (4) the public interest favors issuance of a preliminary injunction. See Tarbuck, 845 F.Supp. at 308; McMullan v. Wohlgemuth, 281 A.2d 836 (Pa. 1971); Crowe v. DeGioia, 447 A.2d 173 (N.J. 1982); Faberge International, Inc. v. DiPino, 109 N.Y.S.2d 345 (N.Y. App. Div. 1985); Corbett v. Ohio Building Authority, 619 N.E.2d 1145 (Ohio Ct. App. 1993); Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100 (6th Cir. 1982); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985); Richmond Medical Center for Women v. Gilmore, 11 F.Supp.2d 795 (E.D. Va. 1998); State v. Imperial Marketing, 472 S.E.2d 792 (W. Va. 1996). Courts employ distinguished other cases where Columbia presented evidence that the encroachment directly implicated federal regulations. Also, the concurring opinion noted that it believed that federal question jurisdiction would be present in cases of properly pled declaratory and injunctive relief. After the Fourth Circuit dismissed Columbia's action, Columbia filed a new complaint seeking declaratory relief. This time, the Fourth Circuit held that there was federal question jurisdiction. Columbia Gas Transmission Corp. v. Drain, 237 F.3d 366 (4th Cir. 2001).

4 In Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552 (4th Cir. 1999), the United States Court of Appeals for the Fourth Circuit held that the district court did not have federal question jurisdiction over a case where the landowner agreed to Columbia's request to move her home from the alleged right-of-way but contested Columbia's contention as to the width of the right-of-way. Although the Fourth Circuit found that there was no federal question jurisdiction under the particular fact situation present in Drain, the Court

3. Substantial Likelihood of Success on Merits. The pipeline company must establish a substantial likelihood of success on the merits. Under Pennsylvanian law, an owner of land which is subject to an easement may not “interfere substantially” with that easement. When the landowner (or their predecessor) grants a pipeline easement, the landowner retains the right to use the land in any manner which does not substantially interfere with the easement. Minard Run Oil Co. v. Pennzoil Co., 419 Pa. 334 (1965). Thus, the critical issue in encroachment cases is whether the landowner's use of its land substantially interferes with the pipeline company’s use of its easement to maintain and operate its pipeline. Tarbuck, 845 F. Supp. at 309; accord Rodier v. Township of Ridley, 595 A.2d 220 (1991). In Tarbuck, a property owner interfered with the right-of-way and pipeline by regrading the right-of-way so that the pipeline was buried beneath an excessive amount backfill. 845 F. Supp. at 307. The company moved for injunctive relief to prevent Tarbuck from continuing to interfere with the right-of-way and pipeline. The district court concluded that the company had established a sufficient probability of success on the merits because of Tarbuck’s impermissible interference with the right-of-way. Id. at 309. The Third Circuit Court of Appeals affirmed the district court’s decision. Tarbuck, 62 F.3d 538.

Other examples of "substantial interference" are the building of structures within the right-of-way, the planting of trees within the right-of-way, erecting fences to block access, or construction within the right-of-way.

Another issue that is frequently litigated is the width of the right-of-way. Where no width is specified in the right-of-way or easement, the grant is construed so as to provide the grantee the “reasonable and necessary” use of the right of way within the purpose of the easement and the intentions of the original parties to the grant. Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 926 (Pa. 1995). See also Simeon v. Varlolo, 152 A. 173 (N.J. 1930) (easement "shall be of reasonable width to accomplish the purpose contemplated"); Grafton v. Moir, 29 N.E. 974 (N.Y. 1892) (easement's width shall be "such as is reasonably necessary and convenient for the purpose for which it was created"); Columbia Gas Transmission Corp. v. Adams, 646 N.E. 2d 923, 926 (Ohio Ct. Com. Pl. 1994) (determining easement's width "by what is reasonably necessary and convenient to serve the purpose for which the easement was granted"); Hamlin v. Pandapas, 90 S.E.2d 829 (Va. 1956) (inerring a width "reasonably sufficient" to effectuate the purpose of the easement); Columbia Gas Transmission Corp. v. Burke, 768 F. Supp. at 1173 (noting that an inferred width should be "such as is reasonably convenient and necessary" to protect the purpose of the easement). Most courts which have addressed the issue have held that the “reasonable and necessary” width of a gas pipeline is 50 feet (25 feet on either side of the pipeline). Tarbuck, 845 F. Supp. at 310, aff’d, 62 F.2d at 544 (applying Pennsylvania law); Columbia Gas Transmission Corp. v. Savage, 863 F. Supp. 198, 201-02 (M.D. Pa. 1994) (same); Columbia Gas Transmission Corp. v. Adams, 646 N.E. 2d at 926 (applying Ohio law); Columbia Gas Transmission Corp. v. Large, 63 Ohio Misc. 2d 63, 619 N.E. 2d 1215 (1992) (applying Ohio law); Columbia Gas Transmission Corp. v. Burke, 768 F. Supp. at 1173 (applying West Virginia law).

At the injunction hearing, the pipeline company must be prepared to present evidence as to why it needs 50 feet in order to safely maintain its pipeline. Typically, that evidence will include an explanation of the type of equipment which must be brought on the right-of-way to uncover the pipeline and make repairs. Also, evidence can be presented as to the slope needed for the trench. The company also must be prepared to explain what federal or state regulations apply and why the encroachment affects its ability to comply with those regulations.

4. Irreparable Harm. In order to obtain injunctive relief, the pipeline company must demonstrate that it will suffer irreparable harm if the injunction is not granted. “Irreparable harm” is a harm which cannot be remedied by the payment of damages. See Board of Ed., Borough of Union Beach v. New Jersey Ed. Ass’n, 233 A.2d 84, 96 (N.J. Super. Ct. Ch. Div. 1967) ("[I]rreparable injury that must be shown means no more than an injury that is material for which pecuniary damages would not afford adequate compensation."); Republic Aviation Corp. v. Republic Lodge No. 1987, Intern. Ass’n of Machinists, 169 N.Y.S.2d 651, 667 (N.Y. Sup. Ct. 1957) ("An injury is irreparable when it cannot
be adequately compensated in damages, or there is no certain pecuniary standard for the measurement of damages."); AgriGeneral Co. v. Lightner, 711 N.E.2d 1037, 1042 (Ohio Ct. App. 1998) ("Irreparable harm consists of the substantial threat of material injury that cannot be compensated with monetary damages."); West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295 (Pa. Super. Ct. 1999) ("An injury is regarded as 'irreparable' if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard."); Sanderlin v. Baxter, 76 Va. 299 (1882) (describing irreparable harm for purposes of an injunction as a "grievous one, or at least a material one, and not adequately reparable in damages"); Mullens Realty & Ins. Co. v. Klein, 102 S.E. 677, 680 (W.Va. 1920) ("As judicially defined, [irreparable harm] means only a grievous or substantial injury, one not adequately compensable in damages.").

Interference with the ability to properly maintain a natural gas pipeline poses the threat of irreparable injury. Tarbuck, 845 F. Supp. at 309. “Without proper inspections and maintenance, [the] pipe line poses a very serious threat of danger to both the public and the environment.” Texas Eastern Transmission Corp. v. Giannaris, 818 F. Supp. 755, 760 (M.D. Pa. 1993). The company may also contend that the defendant’s actions would irreparably injure it by preventing it from complying with “Federal regulations, which could subject [the company] to civil and criminal penalties.” Tarbuck, 845 F. Supp. at 309.

5. No Harm to Landowner. The company must also show that its requested injunctive relief would not deprive the landowner of any rights or property to which it is entitled. The requested injunctive relief seeks only to protect the company’s ability to exercise its right to operate and maintain its pipeline within the right-of-way. See Texas Eastern, 818 F. Supp. at 758. In Texas Eastern, the court concluded that any inconvenience to the defendants which accompanied the recognition and protection of a valid right-of-way would not prevent the issuance of a preliminary injunction because the defendants “were well aware of Plaintiff’s right-of-way traversing the land and so they were cognizant of the inconveniences this would entail.” Id. at 760. In most cases, the company is seeking to preserve the "status quo." In such cases, the landowner will not be harmed by the grant of injunctive relief.

6. Granting Injunction is in Public Interest. Finally, the company must show that granting the injunction is in the public’s best interest. Columbia argues that that the landowner’s actions and the resulting interference with its right-of-way pose a “serious risk of harm to the public, including the loss of life, property damage and interruption of gas service.” Tarbuck, 845 F. Supp. at 309. In Texas Eastern, the district court concluded that granting the request for injunctive relief was in the public interest because:

[e]njoining Defendants from impeding Plaintiff’s access to the pipelines will further the federally protected goal that gas lines be adequately tested and maintained. Moreover, an injunction will protect human life and the environment from the potential catastrophe that could result if the subject pipelines are not adequately maintained and inspected.


II. Storage Fields

As demand increases and is projected to continue increasing in the densely populated cities in the northeastern United States, storage fields play a more vital role than ever in meeting the nation’s energy needs. Without these huge storage fields, it would be impossible to meet the demand for natural gas, especially in days of peak demand. Because storage fields can only be developed in a limited number of areas where the geological conditions permit storage and because it costs hundreds of millions of dollars to develop a field, it is imperative that the existing fields be protected to the maximum extent.

a. Federal vs. State Regulation. Storage fields can fall under the regulation of the Federal Energy Regulatory Commission or under state regulatory agencies.

FERC only has jurisdiction over “natural gas companies” as defined in the Natural Gas Act ("NGA"). A natural gas company is defined under the NGA as “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” 15 U.S.C.A. § 717a(6) (West 2004). The provisions of the NGA apply to the “transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale.” 15 U.S.C.A. § 717(b) (West 2004). A natural gas company is required to obtain a certificate of public convenience and necessity before it may “engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof.” 15 U.S.C.A. §717(f)(1)(A) (West 2004) (this certificate is often referred to as a “section 7(c)” certificate).

The NGA specifically exempts from its jurisdiction the intrastate transportation of gas, the local distribution of gas, and the facilities used for such distribution or the production or gathering of natural gas. 15 U.S.C.A. § 717(b). An intrastate pipeline is defined by the Natural Gas Policy Act ("NGPA") as “any person engaged in natural gas transportation (not including gathering) which is not subject to the jurisdiction of the Commission under the NGA (other than
any such pipeline which is not subject to the jurisdiction of the Commission solely by reason of section 1(c) of the NGA [15 U.S.C.A. 717(c)].” 15 U.S.C.A. § 3301(2)(16) (West 2004).

There are numerous intrastate gas storage facilities that operate throughout the United States outside of the jurisdiction of FERC. Typically, these purely intrastate facilities are associated with production and gathering operations. Indeed, if the primary function of a pipeline is gathering and not transportation, then the pipeline system, including the storage facilities connected thereto, are not subject to the jurisdiction of FERC. See FERC Office of General Counsel Opinion, 1987 FERCGC LEXIS 9 (June 8, 1987) (“The Commission has ruled that the ‘ultimate test’ in determining whether a particular facility is jurisdictional is whether the primary function of the facility is transportation or gathering”) (citing Farmland Industries, Inc., 23 FERC ¶ 61,063 (1983)). It is clear that in order to be considered an intrastate storage facility, at the least, the facility must be located within one state, connected only to intrastate pipelines, and must be subject to the regulation of the appropriate state agency.

b. Protecting the Components of the Storage Field. The basic components of a gas storage field are the storage reservoirs, surface facilities such as compressor stations, storage wells to inject gas into and withdraw gas from the reservoirs, observation wells to monitor the integrity of the field, and pipelines to gather the gas and transport it to markets.

The protection of the reservoirs mainly involves protection of the integrity of the naturally occurring container in which the gas is stored. That container can be threatened by the drilling of other wells of the same reservoir (an attempt to “produce” stored gas rather than native gas) or to deeper horizons. The container can also be threatened by longwall coal mining above the reservoir. If there are abandoned, uncharted or improperly plugged wells which connect the storage reservoirs to the coal seam, longwall mining will cut through these uncharted or improperly plugged wells and destroy the integrity of the field.

The storage wells and observation wells are also endangered by longwall mining because, if the wells are located in the longwall panels, the sections of the wells located in the coal seam will be cut out by the mining. Compressor stations will be severely damaged by longwall mining under them because the compressor engines and other machinery cannot tolerate subsidence. Pipelines within the field can be damaged or ruptured by subsidence caused by longwall mining.

The law concerning conflicts between storage fields and longwall mining is unsettled. Coal companies take the position that if their coal severance deeds were recorded before the property rights for the storage field were obtained, they have the right to mine without regard for the impact on the storage fields. Storage field operators, on the other hand, take the position that, irrespective of when property rights were obtained, the coal company must accommodate the ownership rights of others with rights in the same parcels. Moreover, federal mining law and state law prohibit mining within a specified distance from oil and gas wells. Thus, the mining company must leave barriers around all storage and observation wells. See, e.g., Richardson v. Citizens Gas & Coke Utility, 422 N.E.2d 704 (Ind. Ct. App. 1981).

Storage field operators also argue that federal, rather than state law, should apply to conflicts between mining and storage fields because federal law preempts state law in this area. Federal preemption of state law is derived from the Supremacy clause of the United States Constitution which provides that constitutionally enacted federal laws take precedence over state and local laws on the same subject. See United States Constitution, Article VI. Federal law can preempt, and thereby displace, state law under three separate principles: (1) “express” preemption where a federal statute specifically provides for preemption of state law; (2) “field” or “implied” preemption where federal law so thoroughly occupies a legislative field as to leave no room for state regulation; and (3) “conflict” preemption where it is impossible to comply with both the state and federal law or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress. See generally Schneiderwind v. ANR Pipeline Co., 485 U.S. 293 (1988) (discussing preemption principles); Green v. Fund Asset Management, 245 F.3d 214 (3d Cir. 2001) (same); Algonquin LNG v. Loka, 79 F. Supp. 2d 49 (D.R.I. 2000) (same).

The overriding purpose of the Natural Gas Act is to protect the interests of consumers in the adequate supply of gas at reasonable prices. See Clark v. Gulf Oil Corp., 570 F.2d 1138 (3d Cir. 1977). In passing the Natural Gas Act, Congress determined that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.” 15 U.S.C. § 717 (a).

Pursuant to the Natural Gas Act, interstate gas storage pipeline companies may not construct or operate any facilities covered by the Natural Gas Act unless there is in force a certificate of public convenience and necessity issued by FERC authorizing such acts. 15 U.S.C. § 717 (a). Application for such certificate of public convenience and necessity may only be granted after public notice and hearing. 15 U.S.C. § 717(f)(c)(1)(B). Once a certificate of public convenience and necessity is granted to operate certain facilities, those facilities may not be abandoned “without the permission and approval of the Commission first had and obtained, after due hearing, and finding by the Commission
that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.” 15 U.S.C. § 717(b).

In light of the comprehensive regulation effected by the Natural Gas Act, the United States Supreme Court has held that the Natural Gas Act confers upon FERC exclusive jurisdiction over the transportation, storage and sale for re-sale of natural gas in interstate commerce and preempts all state law in that field. See Schneidewind v. ANR Pipeline Co., 485 U.S. at 300. The Court explained that, through extensive regulation, the Natural Gas Act had preempted the field of matters relating to the wholesale sales and transportation of natural gas in interstate commerce, including “the regulation of rates and facilities” of interstate natural gas companies. Id. at 305-307 (emphasis added). The Court concluded that the Michigan statute at issue in that case had been preempted by the Natural Gas Act because it attempted indirectly to regulate rates and to ensure “proper maintenance of [the FERC regulated company’s] facilities and continuance of its services….” “both of which are matters within FERC’s exclusive jurisdiction.” Id. at 308. Based on this holding, federal, not state law, should be applied where longwall mining has the potential to interfere with transportation, storage and sale for re-sale of natural gas in interstate commerce.

The uncertainty of the law has led to settlements in two actions over storage fields. In a dispute over the Majorsville-Heard Storage Field, the coal company paid the storage operator $20 million to depressurize the field and to take steps to mitigate subsidence damage to pipelines. See In Re Columbia Gas Transmission Corp., 71 FERC ¶ 61,077 (April 21, 1995). In a later dispute involving the Victory Storage Field, the coal company and storage operator reached an agreement which allowed them both to operate in the field. The coal company guaranteed to replace the storage wells that were mined through and to do so in such a manner as to maintain the total deliverability of the field. The parties agreed that the compressor station would not be mined under and agreed to share the costs of mitigating the effect of subsidence on the pipelines. See In Re Columbia Gas Transmission Corp., 104 FERC ¶ 61, 293 (September 15, 2003) (Order approving settlement).

III. Production Wells and Surface Facilities

The protection of production wells and surface facilities such as compressor stations, measurement and regulation stations and meters has caused fewer legal issues than pipeline protection issues but the protection of production wells and surface facilities is obviously no less important.

Like encroachments on pipelines, encroachments on rights-of-way for wells and other facilities have the potential to impair the company’s efficient operation and maintenance of the well or facility and create a danger to the public. In these cases, like pipeline encroachments cases, courts have found that the company’s rights include the right to use its facilities free of encroachments.

Two cases in particular have addressed the issue of encroachments on gas wells. In Columbia Gas Transmission Corp. v. Bishop, 809 F. Supp. 220, 222 (W.D.N.Y. 1992), the gas company requested the removal of trailers and septic systems located within its gas well right of way. The landowners argued that the gas company had only maintained a fifty foot radius around the wellhead in prior years, and that this precluded it from requesting the removal of encroachments now. Id. The court ruled in favor of Columbia, finding that prior practice regarding the use of “convenient access’ easements did not preclude changed usage of the right-of-way and the owner of an “easement of convenient access may find that ‘convenience’ changes with time and with changing circumstances.” Id. The court further noted that the terms of an easement “are to be construed against the grantor in determining the extent of the easement.” Id.

In Columbia Gas Transmission Corp. v. Zeigler, 83 Fed. Appx. 26, 28 (6th Cir. 2003), an electric fence had been installed by the landowner within 30 feet of the gas wellhead despite the landowner’s knowledge that nothing was to be constructed within 300 feet of the well. The court found that evidence regarding the need for set backs, combined with the broad language in the easement agreement granting the gas company setbacks that were “reasonably necessary and convenient for the purpose of storing gas in the well,” were sufficient to grant the gas company a right of way of 200 feet. Id.

IV. The Availability of the Power of Eminent Domain

Another way to protect natural gas facilities is through the power of eminent domain. When an easement for a new pipeline or land for a new compressor station cannot be acquired by negotiation, federal and state laws grant certain natural gas companies the power to condemn the necessary property interest.

The power of eminent domain can be used for new facilities or to upgrade existing facilities (for example, the power may be used to upsize a pipeline where the existing easement is limited to the current size). It may also be used where the existing rights have been interpreted to provide less rights than previously believed (for instance, if a court held that a right-of-way was less than 50 feet wide, the power could be used to condemn the extra width). The major downside of using the power of eminent domain to protect facilities is that the gas company must pay for the interests condemned.
a. Acquisition Of Easements Through Condemnation. The acquisition of necessary easements through condemnation is done through the filing of a declaration of taking or Complaint. The Complaint states the Court's jurisdiction to hear the case, the power to condemn, a description of the property interest to be taken and an identification of the owners who may be entitled to just compensation. Each of these elements, along with a discussion of issues that commonly arise, is discussed below.

(1) Jurisdiction. The Complaint should state the Court's jurisdiction and venue. As discussed in Section (2) below, the power of eminent domain for interstate gas pipeline companies emanates from the Natural Gas Act. Therefore, the United States District Court has federal question jurisdiction over eminent domain actions brought under the Natural Gas Act. 28 U.S.C. §§ 1331, 1337 (2000). In appropriate cases, federal jurisdiction may also be based on diversity of citizenship. 28 U.S.C. § 1332 (2000). However, diversity jurisdiction requires an amount in controversy in excess of $75,000. See 28 U.S.C. § 1332 (2000). Federal question jurisdiction under the Natural Gas Act, on the other hand, only requires an amount in controversy of $3,000. See 15 U.S.C. § 717f(h) (2000). The Complaint must state that the required amount in controversy is met. Stating that the amount in controversy exceeds $3,000 is not an admission that the amount in controversy exceeds $3,000. Rather, it is simply a statement that the landowner is demanding in excess of $3,000. In order to avoid any dispute over jurisdiction, it is good practice to document the offers made by the pipeline company and the landowner's demands.

If the jurisdictional amount of $3,000 cannot be satisfied, the action must be brought in state court. Likewise, condemnation cases brought by intrastate pipeline companies or local distribution companies must be filed in state court.

(2) Source of Power of Eminent Domain. The Complaint must next state the source of the power of eminent domain. The Fifth Amendment to the United States Constitution provides that private property may not be taken for public use "without just compensation." The government may, by statute, delegate its power to take private property for public use provided that just compensation is paid for each taking. Interstate pipeline companies are granted the power of eminent domain by Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), which provides as follows:

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 United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.


The Natural Gas Act's grant of the power to condemn expressly gives the interstate pipeline companies the power to condemn right-of-ways to construct, operate and maintain pipelines, as well as land or other property interests necessary for compressor stations or other equipment needed to operate pipelines. See id.; see also USG Pipeline Co. v. 1.74 Acres, 1 F.Supp. 2d 816 (E.D. Tenn. 1998). The Natural Gas Act does not explicitly grant pipeline companies the right to condemn easements necessary for storage operations. However, several federal courts have held that the Natural Gas Act authorizes the holder of a certificate of public convenience and necessity to condemn property rights necessary for gas storage operations. See Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, ["Arnhold"] 747 F.Supp. 401 (N.D. Ohio 1990); Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement 578 F.Supp. 930, 933-34 (N.D. Ohio 1983) ["Parrott"], aff'd, 776 F.2d 125, 128-29 (6th Cir. 1985) ["Parrott Appeal"]; and Natural Gas Pipeline Co. of America v. Iowa State Commerce Comm'n, 369 F.Supp. 156, 158-59 (S.D. Iowa 1974).

(3) Elements of Condemnation Claim. In order to condemn a property interest under Section 7(h) of the Natural Gas Act, the plaintiff must show that:

(a) it is a holder of a certificate of public convenience and necessity;
(b) it needs to acquire an easement, right-of-way, land or other property necessary to the operation of its pipeline system; and
(c) it has been unable to acquire the necessary property interest from the owner.

The first element is proved by submitting evidence of the FERC certificate of public convenience and necessity. Before filing suit it is important to obtain all FERC orders that apply to the pipeline or storage field and review those orders.

In storage condemnation cases, the federal courts in Ohio have adopted a "map rule" which limits the power to condemn to the boundaries of the storage field as certificated by FERC. See Parrott, 578 F.Supp. at 934-35; Parrott Appeal, 776 F.2d at 127-29. In order to comply with the map rule, it may be necessary to submit a detailed map to FERC before the condemnation action can be brought.

The second element is that the easement to be condemned is necessary to fulfill its obligation under the certificate. This element will generally be proved by testimony as to the need for the pipeline or storage easement. Again, so long as the proposed easement is tied to the pipeline company’s obligations under its FERC certificate, the court should not go behind the language of the FERC certificate.

The third element is that the pipeline company was unable to acquire the easement through negotiation. That will generally be established through testimony and documentation of the efforts to acquire the easement.

(4) **Description of the Easement to be Taken.** The Complaint must explicitly state the property on which the easement will be taken and the scope of the easement itself. The property should be described by metes and bounds or by reference to prior recorded documents. This is necessary in order to allow the recordation of the taking in state courts.

Special care must be taken in describing the easement to be taken. The condemnor has the sole power to define the exact property interest that it is taking and for which just compensation must be paid. Neither the landowner nor the court can add to or subtract from the easement described in the Complaint. See United States v. 38.60 Acres of Land, 625 F.2d 196, 199 (8th Cir. 1980).

In the case of a pipeline right-of-way, the Complaint should describe the location of the pipeline. Although there is no requirement to file an engineer's survey or map, it is good practice to at least submit a construction drawing which shows the location of the pipeline. The Complaint may also specify the width of the right-of-way, thereby precluding future disputes over the width. However, if at a later date the pipeline company desires additional width, it will need to acquire or condemn the additional width even if circumstances have changed. See Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 924 (Pa. 1995). If no width is specified, the pipeline company could argue that it is entitled to whatever width is reasonable and necessary to effectuate the intent of the easement. See Tarbuck, 62 F.3d at 544; Zettlemoyer, 657 A.2d at 924. However, that may make it more difficult to value the property interest taken. In any event, the Complaint's description of the easement taken should specify whether a temporary construction easement is necessary and should also specify any restrictions on the landowner's use of the property. Again, the Complaint can specify the exact limitations (no structures within 25 feet, no trees in the right-of-way, etc.) or can generally state that the landowner may use the right-of-way for any purposes that will not interfere with the use of the easement.

In the case of a storage easement, the Complaint should state the taking of an exclusive easement to inject, store and remove natural gas from the specified geological formations while reserving to the landowner all other uses that would not interfere with the storage operations. Again, the restrictions can be stated generally or specifically. A common practical issue is whether the landowner retains the right to mine for coal or explore for oil and gas in other formations. If the Complaint forbids such uses, the pipeline company may have to pay increased just compensation. If such uses are allowed, the company must retain some right of approval over the proposed mining or drilling in order to protect the integrity of the storage field.

(5) **Identification of Owners Entitled to Just Compensation.** The pipeline company is obligated to pay just compensation to the owners of the property interest taken. Before filing the Complaint, the company will generally obtain an abstract of title to identify all persons who may claim an ownership interest. All potential claimants should be joined in the condemnation action to avoid future claims. Federal law even permits the joinder of "Unknown Owners" in the Complaint in order to allow for the possibility that other interest owners will be identified in the course of the litigation. See Fed. R. Civ. P. 71A.

b. **Procedures For Condemnation.** The procedures for a condemnation action in federal court are governed by Rule 71A of the Federal Rules of Civil Procedure. Some landowners have claimed that state law procedures for condemnation must be followed because the Natural Gas Act provides that procedures for condemnation under the Act "shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated..." 15 U.S.C. § 717f(h) (2000). However, the United States Supreme Court held a similar provision in another federal condemnation statute to be inapplicable, finding that such language was repealed by Rule 71A. See United States v. 93.970 Acres of Land, 360 U.S. 328, 333 n.7 (1959). At least two courts have likewise held that Rule 71A repealed the Natural Gas Act's requirement of conformity with state law procedures. See USG, 1 F.Supp. 2d at 827; Columbia Gas Transmission Corp. v. An Exclusive Easement (Chapon), C.A. No. 94-1336 (W.D. Pa. 1994).

If required by statute, the condemnor shall deposit with the court any money required by law as a condition to its exercise of the power of eminent domain. Even if not
required, a condemnor may choose to make such a deposit. The Natural Gas Act does not require any advance deposit of money for just compensation. However, in some cases, the pipeline company may move for immediate possession of the property interest because immediate possession is required for construction. See Tennessee Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F.Supp. 2d 102 (D. Mass. 1998); USG, 1 F.Supp. 2d 816; Northern Border Pipeline Co. v. 127.79 Acres of Land, 520 F.Supp. 170 (D. N.D. 1981). In such an instance, the condemnor may be forced to put up a bond as security. If a bond is required, the money should be deposited with the court in an escrow account that bears interest.

c. **Litigation Of Condemnation Action.** The litigation of the condemnation action can be split into two distinct parts. First, the court must dispose of any objections to the validity of the taking by dealing with any objections or defenses raised in the landowner's answer. Second, the issue of just compensation is tried to a jury or a commission.

(1) **Objections to Validity of Taking.** Any number of objections or defenses may be raised to the validity of the taking under the Natural Gas Act. A representative sampling is discussed below:

(a) **Challenges to Public Purpose.** The very essence of a condemnation is to allow the taking of private property for a public purpose. Some landowners may object to a taking on the grounds that the taking only serves the needs of the utility. Such challenges will generally fail. The landowner cannot challenge the validity of the FERC certificate of public convenience and necessity in the condemnation action. See USG, 1 F.Supp. 2d at 819 ("Barring glaring errors within the four corners of the Certificate, the Court may not look beyond the Certificate itself to determine validity."). Thus, the landowner cannot challenge the public purpose of the pipeline or the storage field because FERC has already decided that the pipeline or storage field is in the public interest and the court should not review FERC's decision. In the USG case, the pipeline to be constructed was to serve only one customer, a plant owned by the pipeline's parent company. Nevertheless, the court rejected the landowner's claim that the taking served purely private purposes.

(b) **Failure to Negotiate.** Landowners have challenged whether the pipeline has negotiated in good faith to attempt to acquire the property interest before bringing a condemnation action. See USG, 1 F.Supp. 2d at 822-25. The court will resolve such issues by reviewing the efforts made by the pipeline company to acquire the necessary interests. In USG, the court held that the pipeline company complied with the requirement of the Natural Gas Act by negotiating with all landowners involved and making "monetary offers it considered reasonable in good faith efforts to acquire easements on the properties." Id. at 824. The court specifically held that the pipeline company "had no statutory obligation to negotiate over the route of the proposed pipeline." Id. at 825.

In order to defeat any challenge to the good faith effort to acquire the property before commencing a condemnation action, the pipeline company should maintain records of all contacts with landowners and document all offers and demands.

(2) **Trial as to Just Compensation.** The primary issue in any just compensation trial is the amount of just compensation due for the interest taken.

Federal law governs the determination of just compensation.6

The burden of proving just compensation is on the landowner claiming such compensation. See United States v. Evans, 380 F.2d 761, 762 (10th Cir. 1967); United States v. 15.3 Acres of Land, 154 F.Supp. 770, 783 (M.D. Pa. 1957).

Just compensation is judged by the fair market value of the property interest lost by the owner, not by the value of the interest to the condemnor. See Id. at 784. As the United States Supreme Court explained in United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946):

The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such

6 Although holding that federal law governs all aspects of a condemnation action under the Natural Gas Act, the Sixth Circuit has held that federal law would look to state law standards as to the determination of just compensation. See Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Easement, 962 F.2d 1192, 1196-99 (6th Cir. 1992), cert. denied, 506 U.S. 1022 (1992). However, that holding seems to ignore the extensive body of federal eminent domain law. The Third Circuit has held, under a different federal condemnation statute, that federal law applies to the determination of just compensation. See United States v. Certain Parcels of Land, 144 F.2d 626 (3d Cir. 1944).
consequential losses are refused in federal condemnation proceedings. See also United States v. Miller, 317 U.S. 369, 375 (1943); Kinter v. United States, 156 F.2d 5, 7 (3d Cir. 1946); United States v. An Easement and Right of Way 100 Feet Wide, 447 F.2d 1317, 1319 (6th Cir. 1971).

Where the property interest taken is only a partial taking of the property, such as an easement, the proper measure of just compensation is the diminution in market value as measured by the difference between the fair market value of the land without the easement and the fair market value of the land with the easement. See United States v. 9.2 Acres, 638 F.2d 1123, 1126-27 (8th Cir. 1981) (“In partial taking cases, the proper measure of compensation is the difference between the fair and reasonable market value of the entire ownership immediately before the taking and the fair and reasonable market value of what is left immediately after the taking.”); Lyons v. United States, 99 F.Supp. 429, 431 (W.D. Pa. 1951) (The amount of compensation to be awarded for the condemnation of a strip of plaintiffs' farm for use as a railway spur "is the difference between the market value of the farm prior to the taking and the market value of the farm after the taking.").

Fair market value is the price that would be agreed upon by a willing and informed buyer and seller, taking into consideration the present use of the property and its highest and best use. See United States v. 15.3 Acres of Land, 154 F.Supp. at 783-84. The United States Supreme Court has defined "highest and best use" as "[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future...." Olson v. United States, 292 U.S. 246, 255 (1934); see also United States v. 3,544 Acres of Land, 147 F.2d 596, 598 (3d Cir. 1945). Compensation may not be awarded for remote or speculative losses. See 3,544 Acres of Land, 147 F.2d at 598; Wilson v. United States, 350 F.2d 901, 909 (10th Cir. 1965).

Conclusion

Without the pipelines, storage fields, wells and other facilities which make up the complex infrastructure of the natural gas industry, companies within the industry cannot fulfill their fundamental mission of delivering natural gas safely and reliably. In order to accomplish this mission, this infrastructure must be protected from encroachments. In most cases, disputes over encroachments can be resolved through education and discussion with landowners. In cases where removal of encroachments cannot be achieved by agreement and where the encroachment interferes with the company’s reasonable and necessary maintenance and operation of their facility, the courts can provide a forum through which a company’s facility can be protected.

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7 Under federal law, the date of the "taking" is "either the date of the filing of the declaration of taking, or the date when physical possession is taken, whichever occurs first." United States v. 57.09 Acres of Land, 706 F.2d 280, 282 (9th Cir. 1983); see also United States v. Dow, 357 U.S. 17, 25 (1958). States use different tests for determining the date of the taking. See 26 Am. Jur. 2d, Eminent Domain § 138.