Picking Up a 7–10 Split: Studying the Seventh Circuit's *Northern Border* Opinion for a Tenth Circuit Solution

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I. INTRODUCTION

From 2015 to 2035, "[b]etween 18,000 and 29,000 miles [. . .] of new natural gas" pipelines are projected to be built across the United States.[1] Nearly a century after the passage of the Natural Gas Act (NGA),[2] companies continue to expand the massive network of natural gas pipelines throughout the country.[3] The continued expansion benefits companies but is problematic for property owners with land in the path of a new pipeline who must make way for the new lines. These owners must contend not only with construction,[4] nearly permanent loss of property,[5] and the dangers of natural gas close to their home,[6] but they also must deal with uncertainty in compensation.[7]

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1. ICF Int'l, *North American Midstream Infrastructure Through 2035: Leaning into the Headwinds*, INGAA FOUNDATION, INC. 10 (Apr. 12, 2016) https://www.ingaa.org/File.aspx?id=27961&v=db4fb0ca [https://perma.cc/85NE-AQCH].

2. 15 U.S.C.S. § 717f(h).

3. ICF Int'l, *supra* note 1, at 7.

4. FED. ENERGY REG. COMM'N, *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?* 11–13 (2015), https://www.ingaa.org/File.aspx?id=4074 [https://perma.cc/B5FH-3Z56].

5. *See, e.g.*, S. STAR CENT. GAS PIPELINE, *Land Use Development and Right-of-Way Handbook* 15–16 (Dec. 2019) (stating that not even "deep-rooted shrubs" may be maintained on the land used for the pipeline), https://www.southernstar.com/wp-content/uploads/dlm_uploads/2019/03/75-Land-Use-Handbook.pdf [https://perma.cc/VL63-KA43]; FED. ENERGY REG. COMM'N, *supra* note 4, at 10 (stating the right-of-way may last twenty years, fifty years, or longer).

6. *See, e.g.*, S. STAR CENT. GAS PIPELINE, *Important Safety Message for your Community* 2–3 (2018), https://www.southernstar.com/wp-content/uploads/dlm_uploads/2019/03/2018-Affected-Public-Brochure-English.pdf [https://perma.cc/YSE8-V2EJ].

7. *See* RJ Vogt, *Land Grab: Property Owners Fight Back Against Pipeline IOUs*, LAW360 (April 28, 2019), https://www.law360.com/articles/1153244/land-grab-property-owners-fight-back-against-pipeline-ious [https://perma.cc/R8UW-DU66].

Under the NGA, Congress delegates eminent domain authority to private pipeline companies for construction of new lines once they meet certain criteria.[8] Oftentimes, the companies that make it as far as filing eminent domain proceedings will seek to accelerate the process by filing for preliminary injunctions that grant the company immediate access to the land that is to be condemned.[9] This occurs prior to termination of the condemnation proceeding and prior to payment of the just compensation required of all eminent domain actions.

Whether a company may enter the land before it pays depends on the rights the company has in the target land. The Seventh Circuit required a company to display a substantial substantive right to possess the land.[10] Other circuits have allowed pipelines to "take-first" and "pay-later,"[11] after a relatively easier showing of a substantive right to possess the land.[12] This split in authority over substantive rights to the target land has created the issue at hand. Four circuits have yet to decide the issue, including the Fifth Circuit[13] and Tenth Circuit[14], which rank first and second in total mileage of transmission pipeline.

The Tenth Circuit should decide the issue of whether a natural gas company must pay a landowner before or after the company enters and takes the property. While many courts have argued that no split exists, this Comment argues the Tenth Circuit must recognize the varying standards set forth in the Seventh Circuit's *Northern Border Pipeline Co. v. 86.72 Acres of Land*[15] and the Fourth Circuit's *East Tennessee Natural Gas Co. v. Sage*[16] before it ultimately sides with the majority *Sage* method. Applying this new rule to a recent District of Kansas case would lead the Tenth Circuit to resolve the circuit split for itself

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8. 15 U.S.C.S. § 717f(h) (describing the "take first, pay later" model of land acquisition by private companies and how most landowners approached by these companies do not get attorneys to represent them, leaving them vulnerable to exploitation).

9. *See, e.g.*, Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 210 (4th Cir.) *cert. denied*, 140 S. Ct. 300 (2019); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1141–44 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 1634 (2019); N. Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469, 470 (7th Cir. 1998); E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 820 (4th Cir. 2004).

10. *N. Border Pipeline Co.*, 144 F.3d at 471.

11. *Mountain Valley Pipeline, LLC*, 915 F.3d at 213–14.

12. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 734–35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019); *Mountain Valley Pipeline, LLC*, 915 F.3d at 214; Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 491 (6th Cir. 2018); All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d 362, 365 (8th Cir. 2014); Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 776–77 (9th Cir. 2008); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d at 1147–48.

13. The Fifth Circuit has roughly 87,282 miles of natural gas transmission pipeline. *See* U.S. ENERGY INFO. ADMIN., *Estimated Natural Gas Pipeline Mileage in the Lower 48 States, Close of 2008* (2008), https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/mileage.html [https://perma.cc/BLM4-8THM].

14. The Tenth Circuit has roughly 59,561 miles of natural gas transmission pipeline. *See id.*

15. 144 F.3d 469 (7th Cir. 1998).

16. 361 F.3d 808 (4th Cir. 2004).

in favor of allowing entry prior to just compensation if the case were brought before it.

Section II of this Comment will lay out critical background information that make this situation possible. Section III analyzes the various approaches, arguing the Tenth Circuit should adopt and apply the approach taken by the *Sage* court. Finally, Section IV concludes the Comment with final thoughts and long-term solutions. The Tenth Circuit must recognize the split of authority, but ultimately it should follow the *Sage* approach for finding substantive rights requisite for granting immediate entry before payment of just compensation.

II. BACKGROUND

A company opting to use eminent domain to acquire a right-of-way for a new natural gas pipeline will have a difficult, though well-traveled road ahead of it. Eminent domain under the NGA first requires approval from the Federal Energy Regulatory Commission (FERC).[17] Once it has a FERC order, the company must attempt to buy the required property before it can begin eminent domain action under Federal Rule of Civil Procedure (FRCP) 71.1.[18] A company may sue for a finding that they have a substantive right to the land at that moment, rather than at the end of normal eminent domain actions.[19] Deciding what is required to have a substantive right is the center of the argument in this Comment. If a company is found to have a substantive right, the court will look to caselaw and to Federal Rule of Civil Procedure 65 to determine if the company merits a preliminary injunction for the property.[20] If the company does merit such an injunction, it may immediately begin construction, enabling the company to draw a profit after the long and arduous battle needed to get to that point.

A. Statutory Basis

Eminent domain power comes from the Takings Clause of the Fifth Amendment. To qualify for eminent domain power, the Takings Clause requires land takings be for the public benefit and the former landowners be justly compensated.[21] The Natural Gas Act of 1938 (NGA)[22] extended this power to

17. 15 U.S.C.S. § 717f(c).

18. *Id.* § 717f(h).

19. *Id.*

20. *See, e.g.*, *E. Tenn. Nat. Gas Co.*, 361 F.3d at 828 (considering four factors: irreparable harm to plaintiff if the injunction is denied, irreparable harm to defendant if granted, likelihood plaintiff will succeed on the merits, and public policy).

21. U.S. CONST. amend. V.

22. 15 U.S.C.S. § 717f(h). *See also* Valerie L. Chartier-Hogancamp, *Fairness and Justice: Discrepancies in Eminent Domain for Oil and Natural Gas Pipelines*, 49 TEX. ENVTL. L.J. 67, 71–75 (2019) (providing a history of the Natural Gas Act and the reason for its passage).

private companies who were building natural gas pipelines but the NGA left some details such as timing of compensation unclear.[23] A few years earlier, the Declaration of Taking Act (DTA) was passed to facilitate New Deal government projects.[24] The DTA explicitly grants the government the quick-take authority, or the ability to immediately take possession and title to property it needs, while leaving compensation to be settled later.[25]

By comparison—for the NGA to be utilized—the private companies must hold a FERC certificate and must have made an offer over $3,000 for each parcel of land, suggesting that eminent domain be a last resort after negotiations have failed.[26] This sets an outer limit on timing but leaves a large window of time open and available.[27] The NGA lays this process out saying:

> 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, . . . 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.[28]

These "proceeding[s] . . . shall conform as nearly as may be with [Federal Rule of Civil Procedure 71.1] . . . ."[29] In relevant part, Rule 71.1 requires the condemnor to make any required deposits with the court and following this "deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation."[30] Rule 71.1 also provides guidance on the issue of timing and land possession, as it permits dismissal of an action by the movant only "[i]f no compensation hearing[s] . . . ha[ve] begun [and the movant] has not acquired title or a lesser interest or taken possession. . . ."[31]

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23. *See* 15 U.S.C.S. § 717f(h).

24. Jim Behnke & Harold Dondis, *The* Sage *Approach to Immediate Entry by Private Entities Exercising Federal Eminent Domain Authority Under the Natural Gas Act and the Federal Power Act*, 27 ENERGY L.J. 499, 523–24 (2006) (discussing 40 U.S.C. § 3114(b) (2000)).

25. *Id.*

26. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 731 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019).

27. 15 U.S.C.S. § 717f(h).

28. *Id.*

29. Notwithstanding this section of the NGA, courts are now to follow Federal Rule of Civil Procedure 71.1, instead of the "practice and procedure" of the state where the action is taking place. *Id. See also* All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d 362, 366–67 (8th Cir. 2014).

30. *See* FED. R. CIV. P. 71.1(j).

31. FED. R. CIV. P. 71.1.

Rule 71.1 provides limited guidance on the issue of timing and land possession.[32] By requiring a deposit by the company payable to the landowner and by considering the start of compensation hearings and acquisition of an interest in the property as separate factors, an outline for timing is provided.[33] But these requirements still only provide procedure for the takings. Due to Rule 71.1's limited nature, "the regular rules of civil procedure apply when Rule [71.1] is silent."[34] Critically, FRCP 65 grants authority for preliminary injunctions. Rule 65 is designed to allow court action "when necessary to prevent irreparable harm pending a final determination of the parties' claims."[35] Use of Rule 65(c), like 71.1, requires a deposit to the court, but this one is provided to assuage injury for improperly granted injunctions, rather than as compensation for the possession itself.[36]

B. FERC

FERC heads the "[r]egulation of pipeline, storage, and liquefied natural gas facility construction" and "[r]egulation of facility abandonment."[37] Every company using the NGA must first obtain a FERC Certificate of Public Convenience and Necessity (certificate).[38] Attaining a certificate is an extensive process, in some cases taking over a year.[39] FERC sends out various letters and notices to "interested parties" regarding the environmental impact, pipeline routes, and other potential issues.[40] FERC also "invite[s] comment" at points throughout the process in an attempt to identify all impacts and impacted parties

32. *See id.*

33. *Id.*

34. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 823 (4th Cir. 2004).

35. N. Nat. Gas Co. v. 9117 Acres, No. CIV.A. 10-1232-DWB, 2013 WL 3328773, at *14 (D. Kan. July 2, 2013); FED. R. CIV. P. 65(c).

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

37. *Natural Gas*, FED. ENERGY REG. COMM'N (Oct. 10, 2019), https://www.ferc.gov/industries-data/natural-gas [https://perma.cc/M5K3-MGXJ].

38. 15 U.S.C.S. § 717f(h). *See also* Rebecca Ewing, *Pipeline Companies Target Small Farmers and Use Eminent Domain for Private Gain*, 38 N.C. CENT. L. REV. 125, 138–39 (2016) (providing an alternative description of the FERC process).

39. *See, e.g.*, Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 729 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1143 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 1634 (2019); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 491 (6th Cir. 2018).

40. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 729 (sending to "all levels of government, interest groups, Native American tribes, affected property owners, local media and libraries, and other interested parties.").

before it issues a certificate.[41] FERC will also notify landowners of their ability to "intervene in [the] proceedings" after the company has filed.[42]

After FERC collects all the data it needs and reviews it, FERC will choose to issue or withhold the certificate. In the case of Transcontinental Gas Pipe Line Company in the Third Circuit, FERC found the project suitable "based on the benefits of the pipeline, the minimal adverse effects on landowners or surrounding communities, and the absence of adverse effects on existing customers and other pipelines and their captive customers."[43] Transcontinental's certificate, like others, was conditioned on certain things such as a mandatory in-service date.[44]

Appealing a granted FERC certificate is also a significant process. An application for rehearing must be submitted directly to FERC "within thirty days after the issuance of" a certificate.[45] Appeals from this rehearing must be made to the appeals court in which the property sits within sixty days.[46] Many landowners attempt to delay construction by attacking the FERC order directly in district court, which is always a losing argument when the attack occurs outside of the statutory appeals process.[47]

C. Substantive Right

A substantive right is "any interest that a person has in doing or refraining from any conduct; in having a given status or achieving it; or in having, receiving, or granting a thing, which is protected by law. . . ."[48] "Substantive rights are to be distinguished from procedural or remedial rights that prescribe methods of obtaining redress or enforcement of substantive rights."[49] Resolving the timing issue of payment involves resolving what substantive right a natural gas company has at a given time. All courts agree that a substantive right to the

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41. *Id.* at 729–30. During this process FERC can receive a high response volume. For example, "[a]t four public meetings in June 2016, FERC heard from 203 speakers and received over 560 written comments and 900 identical letters on the draft [Environmental Impact Statement]." *Id.* at 730.

42. Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d at 1143.

43. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 730 (internal citation omitted).

44. *Id.* Some courts have questioned the importance of this date, especially when the in-service date is used as an argument for a preliminary injunction. *Compare* Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 772 n.1 (9th Cir. 2008) (suggesting the deadline is less important), *with* Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 211, 222 (4th Cir. 2019) *cert. denied*, 140 S. Ct. 300 (2019) (suggesting an elevated power for these deadline dates).

45. 15 U.S.C.S. § 717r(a).

46. *Id.* § 717r(b).

47. *Id.* § 717r(a); *see* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 740.

48. *Substantive Right*, BOUVIER L. DICTIONARY (accessed through Lexis Nexis).

49. Hale v. Basin Motor Co., 795 P.2d 1006, 1011 (N.M. 1990).

land is required prior to immediate possession of property and to any eminent domain seizure at all.[50] What courts do not agree on, is what that substantive right looks like.

Many courts declare that a substantive right to begin eminent domain actions requires only conformity with the NGA: "(1) it held a valid [FERC certificate]; (2) the property to be condemned was necessary for the . . . [p]roject; and (3) it could not acquire the necessary easements by contract."[51] The Eleventh Circuit found that these requirements were enough for a partial summary judgment, and thus a substantive right as required for preliminary injunction.[52] The Third Circuit changed things slightly for the second two requirements.[53] The Third Circuit requires "that the gas company negotiate with the landowner for the necessary right of way and that [the] value of the right of way exceeds $3000."[54] The Sixth and Eighth Circuits also considered partial summary judgment as establishing the substantive right needed for preliminary injunction, though they did so with little debate.[55]

The Ninth Circuit is the outlier, though its differences were slight. Initially denying that the company had substantive right to condemn,[56] the court said that it could gain this right by obtaining an "order of condemnation" from the district court.[57] This had the same three requirements as in the Third and Eleventh Circuit decisions, but the Ninth was more overt about a good faith requirement in the negotiations.[58] The Ninth Circuit also followed the Fourth Circuit's *E. Tenn. Natural Gas Co. v. Sage* opinion in requiring a condemnation order "before the substantive right of taking accrues," because such an order "strikes the correct balance" between satisfaction of all statutory elements and "full determination of just compensation."[59]

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50. *See, e.g.*, Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 778 (9th Cir. 2008); Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 736 (3d Cir. 2018) (describing the right as "crucial"); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 492 n.2 (6th Cir. 2018).

51. Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1148 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 1634 (2019). *See also* Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 211 (4th Cir.) *cert. denied*, 140 S. Ct. 300 (2019).

52. Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d at 1153–54 (citing 15 U.S.C.S. § 717f(h)).

53. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 731.

54. *Id.*

55. *See infra* Section II.E.2.

56. Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 772 (9th Cir. 2008).

57. *Id.* at 776.

58. *Id.* (quoting Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) (internal citations omitted)).

59. *Id.* at 777.

D. Preliminary Injunctions

Once a court has decided that a substantive right exists, the court has the ability to consider equitable relief. Equitable relief is the solution courts look to when available remedies at law do not meet the needs of the parties in the given circumstances.[60] In NGA eminent domain actions, equitable relief is usually metered out in the form of preliminary injunctions.[61] These injunctions are a grant of authority to the company to take immediate possession of the properties that they need "while [just compensation] proceedings were ongoing."[62] One court, however, argued that specifically this is a "*mandatory* injunction, which is 'particularly disfavored' in the law" because this motion does not seek to "preserve the status quo" which is the reason why preliminary injunctions "are primarily issued."[63] "Mandatory preliminary injunctions" have more difficult requirements for movants to meet before issuance than typical preliminary injunctions.[64]

Each circuit uses a variation of roughly the same four-prong test for granting preliminary injunctions.[65] The Fourth Circuit's test from the *Winter v.*

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60. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 823 (4th Cir. 2004) ("However, when a substantive right exists, an equitable remedy may be fashioned to give effect to that right if the prescribed legal remedies are inadequate.") (citing Berdie v. Kurtz, 88 F.2d 158, 159 (9th Cir. 1937)).

61. *Id.* ("The district court followed these principles when it granted ETNG equitable relief in the form of a preliminary injunction that allowed the company to take early possession of the condemned property.").

62. *See* Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 211 (4th Cir.) *cert. denied*, 140 S. Ct. 300 (2019).

63. Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 776 (9th Cir. 2008) (emphasis added) (quoting Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994)). If more courts followed this approach, it would make preliminary injunctions and thus eminent domain much harder on the natural gas companies, potentially altering the analysis and balancing that follows in the Comment.

64. *Id.* (stating mandatory preliminary injunctions are only to be granted if "the fact and law clearly favor the moving party.") (quoting Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994)).

65. *See e.g.*, *Mountain Valley Pipeline, LLC*, 915 F.3d at 211 (requiring the moving party to establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.") (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)); Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 732 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019) (requiring that there first be a "reasonable probability of success on the merits, 2) that there will be irreparable harm to the movant in the absence of relief, 3) that granting the injunction will not result in greater harm to the nonmoving party, and 4) that the public interest favors granting the injunction") (citing Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017)); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1163 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 1634 (2019) (demanding proof that the party seeking the preliminary injunction first demonstrate "substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest") (quoting Am.'s Health Ins. Plans v. Hudgens, 742 F.3d 1319, 1329 (11th Cir. 2014).

Natural Resources Defense Council, Inc. Supreme Court case[66] first asks if the movant "is likely to succeed on the merits."[67] When the company has already been "granted partial summary judgement . . . on its claim that it is entitled to exercise the power of eminent domain," this determination is easy.[68] The second prong considers whether the movant is "likely to suffer irreparable harm in the absence of preliminary relief."[69] There must be a "clear showing" of harm that is not "remote [or] speculative, but actual and imminent."[70] The harm must be "irreparable [and thus] 'cannot be fully rectified by the final judgement after trial.'"[71] This may include "substantial [unrecoverable] economic losses" to the company in various forms.[72] Third is whether losses to the movant company "would exceed any harms [the] injunction might cause the Landowners."[73] Finally, the test asks if "an injunction is in the public interest."[74] The courts give extra weight to the first two factors during their consideration[75] but use the factors to "simply guide the discretion of the court."[76]

E. The Split

The Seventh Circuit's *Northern Border* case[77] and the Fourth Circuit's *Sage* case[78] provided two subtly different approaches for granting (or denying) immediate entry in NGA eminent domain actions. The Seventh Circuit, in a short but crucial opinion, set a high bar for what is required of a would-be-condemnor of property to take immediate possession.[79] By contrast, the Fourth Circuit deviated from the Seventh Circuit when it took a more relaxed approach that found substantive rights to possess with much less evidence of right to

66. *Mountain Valley Pipeline, LLC*, 915 F.3d at 211 (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

67. *Id*. at 211 (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

68. *Id*. at 216.

69. *Id*. at 211 (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

70. *Id*. at 216 (quoting Direx Isr., Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991)).

71. *Id*. (quoting Stuller, Inc. v. Steak N Shake Enters., 695 F.3d 676, 680 (7th Cir. 2012)).

72. *Id*. at 212 (citing Mountain Valley Pipeline, LLC v. Simmons, 307 F. Supp. 3d 506 (N.D.W. Va. 2018)).

73. *Id*.

74. *Id*. at 211 (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

75. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 732 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019).

76. Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 492 (6th Cir. 2018) (quoting McPherson v. Mich. High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 459 (6th Cir. 1997) (en banc)).

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

78. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004).

79. *See N. Border Pipeline Co.*, 144 F.3d at 472.

possession.[80] Following these cases, six Courts of Appeals have addressed this issue and have sided with the Fourth Circuit, each delineating the lower bar for substantive right slightly.[81]

1. The Seventh Circuit's Higher Bar for Substantive Right to Condemn

The Seventh Circuit in *Northern Border* required an "argument grounded in substantive law establishing a preexisting entitlement to the property" before immediate possession could be granted.[82] The *Northern Border* case had semi-unique facts that would have forced a denial of substantive rights under any standard.[83] Nonetheless, the standard the Seventh Circuit established when it rejected the request of Northern Border Pipeline Company (NBPC) was a strict one. NBPC wanted land to extend its natural gas pipeline.[84] NBPC sought to take that land through eminent domain and to take it quickly.[85]

The company sought a preliminary injunction for immediate possession right after it initiated condemnation proceedings.[86] However, the circuit and district courts agreed that NBPC had "no legal right to immediate possession under either federal substantive law or Illinois substantive law" as was required to take the land right then.[87] NBPC argued that, notwithstanding the "lack of substantive entitlement," the court could "have exercised its equitable power to" grant the preliminary injunction.[88] The district court held the preliminary injunction was not possible, even if the court's equitable powers would allow such a motion without the legal substantive right.[89]

The *Northern Border* court used the example of two software developers who have a falling-out—with one developer attempting to take their product from the other—in order to demonstrate the kind of substantive right needed before a

80. *See E. Tenn. Nat. Gas Co.*, 361 F.3d at 818.

81. *See, e.g.*, Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 739 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019); Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 214–15 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019); *Nexus Gas Transmission*, 757 F. App'x at 492 n.2; Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 777 (9th Cir. 2008); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1152 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019).

82. *N. Border Pipeline Co.*, 144 F.3d at 472.

83. *Compare id.* at 470 (where the company immediately sought right to possess), *and Transwestern Pipeline Co.*, 550 F.3d at 773 (same), *with Mountain Valley Pipeline*, 915 F.3d at 214 (where the company waited until later in the proceeding to attempt to claim possession).

84. *N. Border Pipeline Co.*, 144 F.3d at 470.

85. *Id.*

86. *Id.*

87. *Id.* at 471.

88. *Id.*

89. *Id.*

preliminary injunction can be granted.[90] In the example, there is a statute that allows for taking of property, but does not explicitly provide for immediate possession (similar to the NGA).[91] The court held that preliminary injunction to seize the property was available to the software developer but not NBPC.[92]

The court outlined the crucial differences between the software maker seeking immediate possession of the co-developed software and the NGA taker.[93] The court agreed the difference between them was "the party receiving immediate possession of the software claimed an ownership interest in the property that, if it existed at all, was fully vested even before initiation of the lawsuit."[94] By contrast, NBPC had no "preexisting entitlement to the defendants' land" so the court held the company could not use a preliminary injunction.[95] The company would be eligible for a preliminary injunction if it "present[ed] an argument grounded in substantive law establishing a preexisting entitlement to the property."[96]

The *Northern Border* opinion does not require a preexisting entitlement that predates the start of the lawsuit.[97] While no right must exist quite as early as it did for the software maker, the *Northern Border* court does require a substantial entitlement prior to the granting of equitable relief.[98] The substantive entitlement described here is akin to the right or entitlement that arises "at the conclusion of the normal eminent domain process."[99] The court in *Northern Border* saw itself as granting not only a substantive right, but also a substantial one.[100] It opted to not give that up very easily. Among early Americans there was a "fear[] that 'one adjudication would form a precedent to the next, and this to a following one.'"[101] These fears may have not been without reason. Beginning with the *East Tennessee Natural Gas Co. v. Sage* opinion in 2004, circuit courts across the country set a new and lower bar for substantive rights, establishing the circuit split that this Comment seeks to resolve.[102]

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90. *Id.* at 471–72.
91. *Compare id.* at 471, *with* 15 U.S.C.S. § 717f(h).
92. *N. Border Pipeline Co.*, 144 F.3d at 471 .
93. *Id.* at 471–72.
94. *Id.* at 472.
95. *Id.*
96. *Id.*
97. *Id.* at 471–72.
98. *See id.*
99. *Id.* at 471.
100. *See id.* at 471–72.
101. Jeremy P. Hopkins & Elisabeth M. Hopkins, *Separation of Powers: A Forgotten Protection in the Context of Eminent Domain and the Natural Gas Act*, 16 REGENT U. L. REV. 371, 392 (2004) (quoting THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 308 (Ralph Ketcham ed., 1986)).
102. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 823 (4th Cir. 2004).

2. Lowering the Bar on Requirements for Substantive Rights to Condemn

The *Sage* court approved of the district court's issuing an order determining the right to use eminent domain as successfully giving the company "an interest in the landowners' property that could be protected in equity if the conditions for granting equitable (in this case, injunctive) relief were satisfied."[103] The *Sage* court found support for this idea in Supreme Court precedent from the nineteenth century where "interests in property distinct from the legal ownership [. . . .] constitute[d] an equity [interest] which a court of equity will protect and enforce."[104] On these grounds, the *Sage* court decided that it could grant immediate entry, and that a property interest that could be protected in equity—but an interest less than legal ownership—was all that was required before considering preliminary injunction.[105] The *Sage* court and the opinions that followed established this lower bar for a substantive right and thus created the circuit split with the Seventh Circuit.

The *Sage* court acknowledged that relief in equity "may not be used to create new substantive rights."[106] Thus, any equitable relief it grants must be founded upon a preexisting substantive right.[107] By granting a preliminary injunction the *Sage* court was stating the company had done enough to establish a substantive right.[108] This level of requirement is predicated on an analysis not made or considered by the *Northern Border* court. The *Sage* court believed Congress had not intended the court, nor had it given the court authority, to require more than the minimum requirements as laid out in Federal Rule of Civil Procedure 65.[109] This perception left the *Sage* court with seemingly little choice in what to require.

In the last fifteen years, six circuit courts accepted the approach provided by the Fourth Circuit in the *Sage* opinion.[110] The courts mostly allowed natural gas companies to immediately enter land and begin construction even though

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103. *Id.*
104. *Id.* (quoting Seymour v. Freer, 75 U.S. 202, 213–14 (1868)).
105. *See id.*
106. *Id.* (citing Norwest Bank of Worthington v. Ahlers, 485 U.S. 197, 206–07 (1988)).
107. *Id.* at 828.
108. *See id.*
109. *Id.* at 824.
110. *See, e.g.*, Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 739 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019); Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 214–15 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 492 n.2 (6th Cir. 2018); Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 777 (9th Cir. 2008); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1152 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019).

payment was not yet finalized.[111] These cases all start the same way: the natural gas company is given a FERC certificate, the company attempts to negotiate with landowners, and then the company files suit against those it could not come to terms with in the end.[112] In most of the courts, the company immediately filed motions for partial summary judgment and for preliminary injunction to take possession.[113] These opinions followed and often expanded upon the *Sage* court's reasoning, further explaining the lower bar for finding a substantive right to take.

Years after it decided *Sage*, the Fourth Circuit heard *Mountain Valley Pipeline, LLC v. 6.56 Acres*.[114] Like the *Sage* court, the court in *Mountain Valley* granted a preliminary injunction after a finding of a "substantive right to condemn;" it did so through partial summary judgment, which was not challenged on appeal.[115] When it granted the motions on the right to take, "the courts explained, the holder of a duly issued [FERC] certificate has the right to condemn property if it is necessary for pipeline construction and operation and cannot be acquired by private agreement."[116] The *Mountain Valley* court understood the importance of just compensation and—prior to considering and granting the preliminary injunction—required the company to deposit money into a fund that "each Landowner would be entitled to draw on" while the proceeding continued, in addition to a surety bond "in an amount double each easement's estimated value" before it granted immediate entry.[117] While just compensation payments are required before the transfer of title, these deposits made the court more comfortable with early entry because the payments assured the owners that money would be available to pay their just compensation upon the conclusion of the proceedings.

As in the *Mountain Valley* case, in the Third Circuit's *Transcontinental Gas Pipeline Company, LLC v. Permanent Easements for 2.14 Acres*, the district court first denied motions for "immediate entitlement based [only] on the

111. *Compare* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 737, *and Mountain Valley Pipeline*, 915 F.3d at 214, *and Nexus Gas Transmission*, 757 F. App'x at 493, *and* All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d 362, 369 (8th Cir. 2014), *and* Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d at 1172 (allowing the pipeline company to possess the land, shortly after which construction began), *with Transwestern Pipeline Co.*, 550 F.3d at 772 (denying right to immediate possession until after a condemnation order was issued. This delay postponed construction indefinitely until the condemnation order was issued in a subsequent proceeding).

112. *See* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 729–31; *Mountain Valley Pipeline*, 915 F.3d at 209–10; *Nexus Gas Transmission*, 757 F. App'x at 491.

113. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 734–35; *Mountain Valley Pipeline*, 915 F.3d at 210; *Nexus Gas Transmission*, 757 F. App'x at 491; *All. Pipeline L.P.*, 746 F.3d at 365; *Transwestern Pipeline Co.*, 550 F.3d at 773; Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d at 1144.

114. 915 F.3d 197 (4th Cir. 2019).

115. *Id.* at 214.

116. *Id.* at 211.

117. *Id.* at 212.

existence of the FERC order"[118] but "noted that if Transcontinental later established its right to condemn, the court would be able to use its equitable power to award preliminary injunctive relief."[119] Transcontinental then moved for partial summary judgment on their right to condemn which the district court granted because there was "no dispute that Transcontinental met the three requirements for seeking eminent domain under the NGA."[120] Having granted partial summary judgment, the court found a supported substantive right to the property sufficient to permit a preliminary injunction.[121]

Like the Fourth and Third Circuits above, the Eleventh Circuit similarly used partial summary judgments to find a substantive right to take the land needed for the pipeline.[122] In considering its equitable powers, this court added that their equitable powers "should be broadly construed to afford complete relief under a statute."[123] The court held that Congress had not indicated a desire to prevent such practices in eminent domain through the NGA statute itself, and therefore it was permissible.[124] The court went on to affirm the trial court's holding that a company had a sufficient right to seek immediate entry if: (1) the company "held a valid [FERC certificate]; (2) the property to be condemned was necessary for the [project]; and (3) it could not acquire the necessary easements by contract."[125] Finally, the court held that the company receiving summary judgment in their favor on the right to eminent domain was equivalent to receipt of the substantive right to seek a preliminary injunction for immediate entry.[126]

In the Ninth Circuit, Transwestern Pipeline Co., LLC was denied its motion for preliminary injunction[127] because a preliminary injunction could not "provide the basis for new substantive rights" and such injunctions "are primarily issued to preserve the status quo of the parties."[128] As such, the court required "the issuance of an order of condemnation by the district court" for there to be a "substantive right to condemn the affected parcels."[129] This order only came after Transwestern could show it held a relevant FERC certificate, the land desired was required for the project, no agreement could be reached between company and landowner, and, finally, the Ninth Circuit required Transwestern to establish it

118. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d at 731.
119. *Id.*
120. *Id.* at 731–32.
121. *Id.* at 741.
122. Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1144, 1153 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019).
123. *Id.* at 1152 (quoting Lewis v. Fed. Prison Indus., Inc., 953 F.2d 1277, 1285 (11th Cir. 1992)).
124. *Id.* at 1153.
125. *See id.* at 1163 (citing 15 U.S.C.S. § 717f(h)).
126. *See id.*
127. Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 772 (9th Cir. 2008).
128. *Id.* at 776 (emphasis omitted).
129. *Id.*

acted in good faith in negotiations.[130] The *Transwestern* court held that after the satisfaction of these requirements and subsequent order of condemnation, the company could meet the preliminary injunction standard.[131]

3. The Argument that There is No Circuit Split

Jim Behnke and Harold Dondis wrote an article detailing the *Sage* court's decision where they reject the idea of a circuit split with the Seventh Circuit.[132] While it used a thorough combination of examples, case analysis, and discussion of inherent court powers to accurately describe the *Sage* court's approach, they fall short of completely rebuffing the argument that the *Sage* court created a circuit split with the *Northern Border* court.[133] These examples do not prove as much as the authors seem to suggest. In fact, these sources help to identify the differences in the two standards and the legally significant distinction between them.[134] *The Sage Approach* considers a number of examples in discerning the requirements of the Seventh Circuit as compared to that of the Fourth Circuit.[135]

F. Landowner Arguments

The Landowners who are adamant enough about their desire to keep their land to fight the eminent domain action in court will have a lot pushing against them.[136] These Landowners frequently contend that because the NGA does not specifically provide for immediate possession, it is impermissible.[137] In *Nexus Gas Transmission, LLC v. City of Green*, despite a third party's amicus brief argument that federal courts did not have the right to grant immediate possession

130. *Id.* (quoting Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000)).

131. *See id.* at 777–78.

132. Behnke & Dondis, *supra* note 24.

133. *See id.* at 516.

134. For example, the authors first consider "real property option and purchase and sale agreements," and second, they consider mortgages, specifically in title theory states. *Id.* at 516–17. As the authors themselves admit to a limited extent, the first and second examples deal with consensual exchanges. *Id.* at 517. Third and finally, they look at life estates which, while maybe not necessarily an "exchange," deals with predetermined legal interests. *Id.* While each of these does present the type of divided interest that they contend is at the heart of the "non-split," each example fails to fully match the type of split interest present in these cases where the condemnor-to-be holds a partial interest in the property, but does not have the right to take the property at that time. *Id.* at 516–17.

135. *Id.*

136. Vogt, *supra* note 7.

137. 15 U.S.C.A. § 717f(h). The Fourth Circuit in *Mountain Valley* relied on *Sage* for the notion that, notwithstanding a lack of express provision in the NGA, a court may still grant the immediate possession. Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 213–14 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019).

to private parties,[138] the Sixth Circuit dismissed the argument and granted Nexus' partial summary judgment.[139] Alternatively, these landowners have argued that the company and the court were essentially creating a quick-take provision.[140] Quick-take provisions are drastic measures that have been reserved for the federal government up to this point.[141] One court distinguished quick-take and straight condemnations saying that because the company "does not yet have title but will receive it once final compensation is determined and paid" and because the Landowners could file briefs before the injunction was granted, this was not a quick-take.[142]

G. District of Kansas

The Tenth Circuit Court of Appeals has not yet directly considered the issue addressed in this Comment, but over the last few years the District of Kansas has looked at the NGA and its eminent domain provisions in the context of natural gas wells in *Northern Natural Gas Co. v. Approximately 9117.3 Acres*. This case has been appealed and remanded several times up and down through the Kansas court system. In this case, the NGA was to be used by the company to "implement its containment plan for the Cunningham Storage Field"[143] as part of a plan to resolve gas migration issues and fortify their "substantially at risk" storage field.[144] FERC expressed concern at any potential delay, rejecting the company's "initial proposal for a 'wait and see' approach."[145]

This case provides a basis for analyzing and suggesting how the Tenth Circuit should handle this issue if this case or cases like it ever came before the Tenth Circuit.[146] The District of Kansas opinion is not binding on the Tenth Circuit at large, but it is informative.[147] This case considered and ultimately

138. *See* 757 F. App'x 489, 492 n.2 (6th Cir. 2018).

139. *Id.* at 497. By the time of the Sixth Circuit case, it had become well established that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* (quoting Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1392 (2015)).

140. *See id.*

141. *See supra* Section II.A (discussing the DTA).

142. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 735 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019).

143. *See* N. Nat. Gas Co. v. Approximately 9117.53 Acres, No. 10-1232-MLB, 2012 U.S. Dist. LEXIS 34388, at *27 (D. Kan. Mar. 13, 2012).

144. *Id.* at *40.

145. *Id.*

146. *See generally id.* at *59.

147. *See* Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 213 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019); Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 741 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 497 (6th Cir. 2018); All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d

adopted the *Sage* court's approach after finding it presented a better standard,[148] but, in application, did not require good faith negotiations.[149] The court then considered the four elements of a preliminary injunction at elevated scrutiny,[150] opting to follow a preliminary injunction approach identical to the Fourth Circuit.[151]

III. ANALYSIS

This Comment demonstrates in Section III.A that the Fourth Circuit's *Sage* opinion established an appropriate and useful bar for substantive rights that has been carried on by its descendants. Section III.B considers the appeal and benefits of the countervailing arguments for finding substantive rights. Section III.C looks to landowner arguments and traditional societal interests and answers the question as to what a centered and fair approach to substantive rights looks like. Finally, Section III.D applies these conclusions to a District of Kansas case demonstrating that when the lower bar for a substantive right to eminent domain is met, the court has the right to, and must, grant access to property through preliminary injunctions prior to payment of just compensation.

The Seventh Circuit, in its *Northern Border* opinion, required not only a FERC certificate, but critically also established and required a high bar for a "legal right to immediate possession under either federal substantive law or Illinois substantive law" for immediate possession and found them unsatisfied.[152] The circuits that have now considered the issue have come to the same general conclusion as the Seventh Circuit, agreeing that a company exercising eminent domain authority under 717f(h) of the NGA may take possession of the to-be-condemned land prior to the conclusion of the eminent domain action.[153] Those

362, 368–69 (8th Cir. 2014); Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 778 (9th Cir. 2008); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1174 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019).

148. N. Nat. Gas Co., 2012 U.S. Dist. LEXIS 34388 at *39–40.

149. *Id.* at *35 n.7. There is a national split of authority in NGA cases on whether or not to require a showing of good faith in negotiations between landowners and natural gas companies prior to eminent domain actions. *Compare id.* (not requiring good faith as an explicit element), *with Transwestern Pipeline Co.*, 550 F.3d at 776 (quoting Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) (requiring good faith).

150. *See N. Nat. Gas Co.*, 2012 U.S. Dist. LEXIS 34388 at *40–46.

151. *See id.* at *39–47. *See also* the discussion of the Winters factors, *supra* Section II.D.

152. N. Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469, 471–72 (7th Cir. 1998).

153. Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 737 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019); *see* Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 220 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 497 (6th Cir. 2018); All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d 362, 368–69 (8th Cir. 2014); Transwestern Pipeline Co., 550 F.3d at 777–78; *see* Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1141, 1174 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019).

circuit courts agreed—though they did so under different circumstances—while requiring much less for a substantive right.[154] Within those later cases in the split lies the answer to the question at the heart of this Comment: the lower bar laid out first in the *Sage* case is the right choice for a bar to substantive rights. With this bar set, the timing of just compensation payments can be consistently answered with uniformity and ease.

A. Fourth Circuit Start

Any court that faces eminent domain actions under the NGA must determine what sort of bar it wants to put on the substantive right to condemn; the Tenth Circuit is one such court.[155] If the issue comes before them, the Tenth Circuit should adopt the approach suggested by the Fourth Circuit in *Sage*. The court is better served with the lower bar that was used by *Sage* and its progeny, with extra emphasis placed on the Ninth Circuit.[156] The higher bar to substantive rights in *Northern Border* is certainly preferred by landowners wanting payment prior to the loss of their land to natural gas companies.[157] That being said, the lower bar to substantive rights still conforms to statutory requirements, that bar is solid and well defined, and it meets the goals of the NGA.

1. The Requirements are Clear and Stable

The higher bar for substantive rights for immediate possession that is discussed by this Comment is born out of an interpretation of the Seventh Circuit's *Northern Border* case.[158] While that case does create a higher standard as compared to the lower bar that was later established by the Fourth Circuit in its *Sage* opinion, exact details of the Seventh Circuit's requirements are hard to discern.[159] This higher bar for a preexisting substantive right contemplates something greater than mere statutory compliance, an interest that comes closer to a preexisting ownership interest and right to the property.[160] However, what the Seventh Circuit demands is something less than an actual ownership interest

154. *See supra* Section II.C.

155. *See N. Nat. Gas Co.*, 2012 U.S. Dist. LEXIS 34388, at *28–29.

156. *See* E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 831 (4th Cir. 2004); *Transwestern Pipeline Co.*, 550 F.3d at 777–78. The Ninth Circuit, like *Sage*, required an order of condemnation. *Transwestern Pipeline Co.*, 550 F.3d at 778. Other courts used summary judgment which might also work, but the condemnation order is the preferred method in this Comment. *See Nexus Gas Transmission, LLC*, 757 F. App'x at 491, 493.

157. *N. Nat. Gas Co.*, 2012 U.S. Dist. LEXIS 34388, at *19, *21–22.

158. *See supra* Section II.E.1.

159. *See supra* Section II.E.

160. N. Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469, 472 (7th Cir. 1998); *see supra* Section II.E.1.

established before the condemnation suit even begins.[161] This standard is separate from that of the lower bar of *Sage*, but this higher standard is—at the same time—less concrete and less stable.[162]

In seeking to settle this issue for the Tenth Circuit, it makes sense to choose a standard that is both clear and stable. The approach adopted by *Sage* is both legally desirable and sufficient, with a relatively clear standard for what is required. This approach is relatively clear, especially when compared to the more uncertain requirements of the *Northern Border* standard.[163] Though the circuit courts have offered numerous iterations with only small variations, only the original variation from *Northern Border*—the Fourth Circuit's *Sage* opinion—has been truly significant in the guidance it provided.[164] Since the *Sage* opinion was decided, courts across the country have followed the opinion with only slight changes or additions to the approach to fit their circumstances.[165] As such, the *Sage* standard is not only clear but shows early signs of stability through its popularity.[166] The repeated use has allowed a fairly uniform outline to form, making subsequent application by other courts, such as the Tenth Circuit, much easier.

There has been concern over oppressive stare decisis, especially earlier in the history of the United States, a concern regarding a sort of snowballing effect.[167] There is now a precedent in much of the country for using the lower bar to substantive rights. It is possible that many years from now the *Sage* line of thought will be abandoned in favor of the higher bar or in favor of some alternative argument. However, the process of arriving at this consensus via a number of lower court cases as opposed to one single United States Supreme Court case means many great legal minds throughout the country have independently argued and considered this approach over time. Thus, the adoption of the lower bar by a number of courts that were not bound to follow the opinions of the other courts suggests that, in this case, fear of oppressive stare decisis is not well founded. For now, the lower bar approach to substantive rights is relatively stable and that approach will likely only become more stable over time. Finally, the fear of

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161. *N. Border Pipeline Co.*, 144 F.3d 469; *supra* Section II.E.1.

162. *See supra* Sections II.E.1; III.A.1.

163. *See N. Border Pipeline Co.*, 144 F.3d at 472.

164. *Compare id.*, *with* E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 827, 831 (4th Cir. 2004). While Sage and its progeny have vacillated on exactly how to identify a substantive right, they have all approached the question in the same way. Meanwhile, this Comment suggests that the answer given by *Northern Border* is drastically different, suggesting not merely a different answer, but also a different approach for getting there.

165. *See, e.g.*, Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 216 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019).

166. It continues to influence cases. *See, e.g.*, *id.*; Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1166, 1174 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019).

167. *See supra* Section III.

oppressive precedent is not—by itself—sufficient deterrence for an otherwise useful schema.[168]

2. Conforms to Statutory Minimum Requirements

The Constitution requires that "just compensation" be paid at some point to those whose land is taken for public benefit.[169] It is enough that there is a fairly certain and secure provision for the payment, even when there is no payment before the condemnation occurs.[170] These ideas are not new at this point in this Comment, but they demonstrate the meager statutory demands placed on the timing of just compensation.[171] "The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."[172] The *Loudermill* court was concerned about the deprivation of rights without proper safeguards built into the procedure.[173] The lower bar provided by the *Sage* court utilizes Due Process safeguards such as those considered by the *Loudermill* court[174] as well as satisfies each of the requirements and procedures laid out for NGA condemnors.[175]

The NGA and the Federal Rules of Civil Procedure discussed above provide only little help by providing the basis for these eminent domain actions and the edges of the timing requirements.[176] While these statutes do not prohibit a high bar—as some courts have contended[177]—the statutes do not exactly require a high bar either. No company is statutorily required to prove it has the pre-existing substantive right that is associated with the higher bar.[178] Statutory interpretation does require substantial proof of the right to eminent domain,[179] but

168. *See, e.g.*, *Mountain Valley Pipeline, LLC*, 915 F.3d at 216; Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d at 1152.

169. U.S. CONST. amend. V.

170. 3 Nichols, The Law of Eminent Domain § 8.10 (2020) (citing Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d at 1171 ("Fifth Amendment does not require that compensation be paid before taking occurs. Instead, all that is required is that reasonable, certain and adequate provision for obtaining compensation exists at time of taking.") (internal citations omitted).

171. 15 U.S.C.S. § 717f(h).

172. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (differentiating between substantive and procedural rights in the context of due process).

173. *Id.*

174. *See id.* at 542.

175. 15 U.S.C.S. § 717f(h).

176. *See supra* Section II.A.

177. *See supra* Section III.B.

178. *Compare supra* Section II.A, *with* Section II.E.1 (comparing the NGA to the holding in *Northern Border*).

179. *See supra* Section II.A (requiring a FERC certificate and offer of over $3,000 after negotiations failed).

no statutes require the application of a high bar as defined in *Northern Border*.[180] The approach taken in *Sage* is legally sufficient.

3. This Method Accomplishes the Goal of the NGA.

The final benefit to the *Sage* court's approach is its success at accomplishing the goal and purpose of the NGA. The purpose of the NGA was to facilitate the commercial use and sale of natural gas while protecting citizens.[181] The *Sage* court and the Ninth Circuit used orders of condemnation to determine merit for granting a substantive right.[182] The Ninth Circuit also ensured money was given to the landowners in the waiting period between possession of their land and the full end of the condemnation proceedings.[183] This method shoots the gap between the minimum statutory requirements and the high bar of *Northern Border*, [184] making it a legally efficient compromise and a legally sufficient standard for use in the Tenth Circuit. As discussed further below, this debate pulls on conflicting threads of law and society. Despite contentions otherwise, the use of an order of condemnation and the providing of immediately available funds represent the best choice, while at the same time offering a stable and sufficient option for the Tenth Circuit.

B. Seventh Circuit as Counter

When Landowners are unable to convince courts to abandon immediate possession altogether, the "fall back" is to accept and advocate the higher bar as advocated in the Seventh Circuit. Many landowners have looked to the Seventh Circuit's decision to say that in their circumstances, the Seventh Circuit's conclusions apply.[185] It would be possible to claim this argument is merely a stalling tactic used by the landowners seeking to delay and frustrate natural gas companies, as at least one court has considered.[186] Better though, is the argument that these landowners are following a legally distinct path, forged by the Seventh Circuit in its *Northern Border* case.

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180. *See supra* Section II.A.

181. Chartier-Hogancamp, *supra* note 22, at 74.

182. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 831 (4th Cir. 2004); Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 778 (9th Cir. 2008).

183. *Transwestern Pipeline Co.*, 550 F.3d at 777.

184. *See id.* at 776–77.

185. *See*, *e.g.*, Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 215 n.6 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019).

186. *See* Behnke & Dondis, *supra* note 24, at 519 (citing Atl. Seaboard Corp. v. Van Sterkenburg, 318 F.2d 456 (4th Cir. 1963)). "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." *Id.*

The *Sage* court directly considered the Seventh Circuit's *Northern Border* opinion and concluded that no split existed because *Northern Border* had varied facts.[187] In support of this, the *Sage* court discussed the two district court cases in the Seventh Circuit that "interpreted *Northern Border* to mean that immediate possession is improper only when there has been no order confirming the right to condemn."[188] However, the court in *Northern Border* could easily have concluded such an order "merely confirms a condemnor's general right to exercise the normal power of eminent domain in accordance with the powers granted to it"[189] and that it cannot grant "additional quick-take power upon a condemnor."[190]

1. Pushback from the Seventh Circuit; Is the Minimum Sufficient?

The Seventh Circuit opinion pushes back on the assessment that the minimum is sufficient. The Seventh Circuit demands more from the statute.[191] A whole catalog of sources[192] have discussed the incredibly harsh nature of eminent domain actions—the forced loss of property is not a thing to be taken lightly—with one judge going so far as to liken it to the military draft.[193] The lack of quick-take authority as well as the differences between the NGA and the DTA demonstrate a restrained set of powers in the NGA.[194] Though Congress drafted the all-powerful DTA only a few years prior,[195] it chose not to grant those same powers to the private companies who were the focus of the NGA.

The statutes also lend credence to a more searching barrier to a substantive right, requiring a close look before an extension of equitable relief in NGA cases. "[B]ecause the power of eminent domain is one of the most harsh proceedings known to the law," these eminent domain statutes "are subject to strict construction against the one exercising the power and in favor of the landowner."[196] Courts are to restrict powers that grant eminent domain, which

187. *E. Tenn. Nat. Gas Co.*, 361 F.3d at 827–28.

188. *Id. See* N. Border Pipeline Co. v. 64.111 Acres of Land, 125 F. Supp. 2d 299 (N.D. Ill. 2000); Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 210 F. Supp. 2d 976 (N.D. Ill. 2002).

189. Hopkins & Hopkins, *supra* note 101, at 403 n.176.

190. *Id.*

191. *See supra* Section II.E.1.

192. As evidence of this point, "[a]ll but two states have adopted constitutional protections associated with takings." *See* Chartier-Hogancamp, *supra* note 22, at 76 (discussing a number of the sources that themselves note the harshness of eminent domain action).

193. *Id.* at 75.

194. *See supra* Section II.A (outlining the basic differences between the two provisions).

195. *Compare* 40 U.S.C.S. § 3114(b), *with* 15 U.S.C.S. § 717f(h).

196. Hopkins & Hopkins, *supra* note 101, at 381 (quoting 26 AM. JUR. 2D *Eminent Domain* § 20 (2002)).

would suggest that they would also be cautious in granting eminent domain quickly.[197]

The government is worthy of wielding more power than private companies. In cases applying the traditional eminent domain power rather than the stronger quick-take powers, "the condemnor cannot seize possession of property until it obtains title. It does not obtain title until it pays the owner the amount determined at trial to be just compensation."[198] This case occurred outside the purview of the DTA, which meant the federal government was forced to wait to seize.[199] If the absence of quick-take authority requires the government to wait, then perhaps this rule should extend to the private companies under the NGA who have significantly less eminent domain authority than the federal government. If the natural gas companies have less authority and power, there is little sense in giving them more invasive capabilities.

2. What Makes a Party Worthy of Such a Large Power?

This limit is not only reflected in the acts themselves but follows from the need for just compensation and from the *harshness* of eminent domain. For these two reasons, it is logical to give the federal government greater power for eminent domain. The federal government has greater resources to make payments for its takings and has a much smaller chance of going bankrupt during construction of the pipeline as sometimes happens with private companies—leaving landowners with all or part of a pipeline on their property and uncertainty as to what will happen for them next.

Some will be tempted to argue the federal government needs more constraints because it is more powerful[200] and so it has more authority that could be abused.[201] Notwithstanding this argument, abuse of discretion is something that should be guarded against, whether the entity threatening the abuse has a large or somewhat smaller chance of utilizing such an abuse. That said, the federal government is more beholden to the population than are private companies, making abuse of eminent domain authority by the federal government much less

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197. *Id.* at 382 (citing City of Richmond v. Carneal, 106 S.E. 403, 406–07 (Va. 1921)). "If the legislature is silent with regard to a certain power, the court should construe the power as being withheld because every doubt in construction is to be resolved against the granting of powers of eminent domain." *Id.*

198. *Id.* at 385 n.66 (citing United States v. Certain Lands, 46 F. Supp. 386, 387 (S.D.N.Y. 1942)).

199. *Id.* at 384–85.

200. In the famous words of Lord Acton, "[p]ower tends to corrupt, and absolute power corrupts absolutely." Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), *in* Louise Creighton, LIFE AND LETTERS OF MANDELL CREIGHTON, SOMETIME BISHOP OF LONDON, BY HIS WIFE 396 (1913) https://hdl.handle.net/2027/uc1.b3224212 [https://perma.cc/QJ9H-RQ6A].

201. Hopkins & Hopkins, *supra* note 101, at 388.

likely to occur and much easier to address in the event that abuses do occur.[202] In addition to fear of abuse generally, the eminent domain power was granted in the Constitution to the federal government[203] and—much like the military draft it was once compared to[204]—that mighty power is best wielded by the body for whom it was designed. Eminent domain uses government authority to strip citizens of their property rights, rights which are the foundation of American society. These rights should not be taken away lightly.

The nature of the condemnor themselves is important in determining their scope of authority and power. By contrast to the federal government as discussed above, a private company should not be granted the full power of eminent domain. Comparatively, private companies have very limited strength and reach, and they lack the durability, financial backing[205], and motive[206] of the federal government. If an entity is not backed by the national treasury and is granted "only those powers that Congress specifically delegates to it"[207] then necessarily it must not have the same powers as an entity like the federal government that does have such authority. Though this argument is largely covered in the discussion of the general differences between the DTA and the NGA, drawing this argument out once more aids in demonstrating the congressionally recognized limitation on authority for eminent domain. The use of a higher standard for substantive right to take immediate possession of property is one such limit.

The harshness of eminent domain, the varied powers enacted by Congress, and the very nature of the two classes of condemnor discussed in this Comment present a fair suggestion that perhaps the standard for a substantive right prior to immediate possession should be the higher standard from the Seventh Circuit's *Northern Border* opinion.

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202. While private companies are kept under watch by FERC and other governmental oversight agencies generally, they are not subjected to the same amount of direct public access that the government is. This dynamic suggests that the government's actions are not only more visible to the wider public, but those actions are also more easily kept in check.

203. U.S. CONST. amend. V.

204. Chartier-Hogancamp, *supra* note 22, at 75.

205. 3 Nichols, *supra* note 170, at § 8.10 (footnote omitted) ("[w]hen compensation is not paid in advance of the taking, there can be no absolute certainty that the owner will get his or her money at all.") (citing Vazza v. Campbell, 520 F.2d 848 (1st Cir. 1975)). This fear extends to the availability of funds. A landowner who is not paid right away or guaranteed payment by the federal government runs a risk that there will be no money available to them in the future. *Id.*

206. *See* Hopkins & Hopkins, *supra* note 101, at 379 n.42. Companies may have a harder time proving their actions are really motivated by the public good and not "corporate profit and pecuniary gain." *Id.*

207. *Id.* at 380.

C. Landowner Arguments Help the Center

This Comment has discussed two main options for identifying the substantive rights necessary to take immediate possession: a high bar set by the *Northern Border* case and a lower bar set by *Sage* and its progeny.[208] Additionally the landowners frequently make arguments advocating some version of all-out prohibition of condemnation before the end of the condemnation proceedings when their time in court initially begins. While the argument made by the landowners is not considered a part of the "split," their arguments and the court's disposition of these arguments demonstrates the favorability of the Fourth Circuit's approach is functionable.

1. Analyzing and Dissecting the Landowner Arguments

The Landowners argue that eminent domain authority must be strictly construed,[209] that quick-takes are impermissible,[210] and inadvertently demonstrate that a higher bar is not necessary. A balancing act must occur between, first, a strict and literal construction of the statute which might deny immediate access because it is not specifically provided for in the NGA and, second, a more relaxed interpretation that permits the NGA to function as intended.[211]

The landowner arguments focus on statutory interpretation and judicial authority. The *Sage* court, and the others after it, rejected the argument that because eminent domain statutes "must be strictly construed, equity [powers] cannot be invoked" for the purpose of issuing preliminary injunctions for immediate possession.[212] The court correctly pointed out that the general eminent domain actions themselves were properly within "the strict purpose authorized by the NGA" and it also rejected the landowners' argument because their "circuit has never interpreted the strict construction principle" to prohibit equitable relief.[213] This argument also lies on the line between express statutory direction and judicial interpretation to promote and facilitate the handling of unclear legal doctrines.

The same issue arises in the landowner's second argument that this sort of immediate possession action constitutes a quick-take. This issue highlights the

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208. *See supra* Sections II.C, II.E.

209. Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 214 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019).

210. N. Nat. Gas Co. v. Approximately 9117.53 Acres, No. 10-1232-MLB, 2012 U.S. Dist. LEXIS 34388, at *21 (D. Kan. March 13, 2012).

211. 1A Nichols, Law of Eminent Domain § 3.03 ("Although a statute authorizing the exercise of eminent domain power should be construed strictly, it should be enforced in such a way as to effectuate the purpose for which it was enacted.").

212. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 825–26 (4th Cir. 2004).

213. *Id*. at 826.

difference between the court expediting the process of the NGA and the limited language of the statute. The courts have opted to grant quick-take-like authority, but with limits.[214] Some have held that the immediate access grant prior to the normal conclusion of an eminent domain proceeding does not constitute a quick-take.[215] As discussed before, while the quick-take and straight condemnation are very similar, the quick-take is a more expansive and invasive eminent domain power.[216]

In this way, the congressional restriction placed on the NGA through the lack of a provision for quick-take authority delineates courts' capacities for administering the NGA. Nonetheless, the power to take land prior to the natural end of eminent domain proceedings without quick-take authority has routinely been granted with seemingly little concern.[217] While undoubtedly inconvenient for the landowners, the argument does not carry sufficient legal weight. For these circuit courts, granting the right before the trial's end is a critical step in the immediate entry process that is best justified as a concession that helps move the eminent domain actions along in the process.

2. Answering One Split with Another

The landowners' argument is not traditionally considered a part of the "split" in the circuits. The arguments typically made by the landowners draw as much from public policy and NIMBY[218] arguments as they draw from legal analysis. The landowners' argument pulls in some amount of public policy consideration—asking what the best interpretation of the statute is where there is a lack of direct guidance from Congress and the Constitution. However, this small public policy consideration can develop an answer to the Seventh Circuit's arguments and thus answer the legal question presented in this Comment.

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214. *See supra* notes 139–41 and accompanying text (discussing the accusation by landowners that the eminent domain actions amount to nothing more than quick-take actions and the court's response that quick-take provisions permit much less landowner involvement). Modern NGA eminent domain actions end up being similar to actions under quick-take authority because few landowners have the knowledge, opportunity, or financing to be as involved in the process to the level that is intended. While the true power of the quick-take provisions has been limited to take the form of the eminent domain powers as we know them under the NGA, the facts of life blur the lines of those distinctions. *E. Tenn. Nat. Gas Co.*, 361 F.3d at 826; Vogt, *supra* note 7.

215. *N. Nat. Gas Co.*, 2012 U.S. Dist. LEXIS 34388, at *29–33.

216. *E. Tenn. Nat. Gas Co.*, 361 F.3d at 822. *See also supra* Section II.F.

217. *See, e.g.*, *N. Nat. Gas Co.*, 2012 U.S. Dist. LEXIS 34388, at *48–49 (explaining facts showed that defendants would receive just compensation).

218. NIMBY is the abbreviation for the term "not in my backyard." The term represents the idea that, while beneficial to have generally, few people want large public works sites in their backyard or right around where they live. People want the benefit of services but do not want to have their area encumbered. Peter D. Kinder, *Not in My Backyard Phenomenon*, ENCYC. BRITANNICA (June 14, 2016), https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon [https://perma.cc/HX99-2EJ4].

The argument of the Landowners who have fought NGA eminent domain takings tugs at two important philosophies represented throughout the American legal system. While natural gas has been important to the development of the nation, so too are the property rights of landowners. For one thing, consistent and predictable property rights are vital to stability in American society. Citizens may be disincentivized from working hard if there is no guarantee that what is earned will be theirs to freely alienate as they so desire.

Beyond that, property rights were of central importance at the time of the founding of the country. The landowners' argument is supported by the principles of separation of powers.[219] The use of equity powers to grant a quick-take like authority, the courts can be said to become *de facto* legislatures in violation of separation of powers.[220] By taking from property owners their "right to exclude others," a right the Supreme Court has deemed "one of the most essential sticks in the bundle of rights that are commonly characterized as property," the courts' actions have eviscerated the notion of separation of powers.[221] This stripping of property and damage to separation of power are issues that a higher standard for substantive rights under the Seventh Circuit would avoid.

It is worth considering whether the public good may be well served also by the fair and predictable payment of landowners for use of their land. The balancing of the two sides nearly always favors the corporations,[222] but that balancing calculation remains unsettled in the Tenth Circuit. Countervailing that analysis is the benefit to public good provided by the pipelines. The idea of a public good is very important in the typical eminent domain conversation and this Comment is no exception.[223] In this context, that often leads to a conclusion of placing the natural gas companies' interests ahead of the landowners. This idea dates back to the birth of the NGA. Implicit in the statute is a recognition of the importance of collecting natural gas as a benefit for the public that merited regulation to ensure its efficient distribution.[224] It has often been suggested in the opinions discussed in this Comment that what is in the best interests of the natural gas companies is also in the best interests of the public.[225] While the role of

219. *See* Hopkins & Hopkins, *supra* note 101, at 373.

220. *Id.*

221. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

222. *See generally* Vogt, *supra* note 7 (discussing the uphill battle that parties face when fighting pipeline companies).

223. *See* Chartier-Hogancamp, *supra* note 22, at 82.

224. 15 U.S.C.S. § 717f(a).

225. *See* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 733 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019); Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 212 (4th Cir.), *cert. denied*, 140 S. Ct. 300 (2019); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 496 (6th Cir. 2018); All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d 362, 368–69 (8th Cir. 2014); Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 773 (9th

natural gas in the United States has long been an important one, there is a way to recognize that public benefit while conceding the importance of property rights that are infringed with each taking executed under the NGA.

Ultimately, this tugging between competing ideals can support the final conclusion that the *Sage* court's substantive right bar is an appropriate one. The lower bar for substantive rights to condemn under the NGA can strike the appropriate balance between landowner and corporate desires as well as between property rights and public good. By providing safeguards for landowners such as delayed title exchange[226] and prepayment or provision of temporary funds until final just compensation is provided[227] later on, both the statutory requirements[228] and the purpose of the NGA will be fulfilled.[229] When such important policies are placed in competition, a method that compromises between them is likely the best bet.

D. Applying the Law to the Tenth Circuit

There are very particular facts under which the Tenth Circuit should allow companies to take first and pay later. The Tenth Circuit would first need to adopt the analysis of the *Sage* and District of Kansas cases, as described and supported in this Comment.[230] If brought before them, the Tenth Circuit must review the lower court's decision on an abuse of discretion basis,[231] which will make upholding the grant of immediate entry fairly certain.

The Tenth Circuit would find that Northern Natural Gas Company has met the requirements for the substantive right to use eminent domain.[232] The Company had a proper FERC certificate, it properly attempted to contract with the owners of the wells prior to the use of eminent domain, and these wells were necessary for the Company's project.[233] The lower court considered these facts

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Cir. 2008); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1167 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019).

226. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 825 (4th Cir. 2004).

227. *See generally Transwestern Pipeline Co.*, 550 F.3d at 777 (explaining the benefits of a cash deposit as a sort of temporary just compensation). *See also* 3 Nichols, *supra* note 170, at § 8.10.

228. *See supra* Sections II.A, II.C, II.D (discussing the NGA and Takings Clause statutory requirements).

229. *See* Chartier-Hogancamp, *supra* note 22, at 74 (stating that the NGA was created in response to growing commercial use of natural gas for energy with the intent to keep consumers safe from price exploitation).

230. *See supra* Sections II.E.2, II.G.

231. Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 213 (4th Cir.) *cert. denied*, 140 S. Ct. 300 (2019).

232. *See* N. Nat. Gas Co. v. Approximately 9117.53 Acres, 2012 U.S. Dist. LEXIS 34388, at *48 (D. Kan. March 13, 2012).

233. *Id*. at *58–59.

and found them satisfactory.[234] There is a split of opinions as to whether the NGA requires "good faith" negotiations.[235] Much like the present issue, the statute provides little help.[236] While FERC has specifically mentioned and required "good faith" in FERC orders before,[237] the District of Kansas case theoretically on appeal to the Tenth Circuit in this Comment did not have such a requirement.[238] For the sake of analyzing only one circuit split in this Comment it will be assumed that "good faith" has been satisfied or is not required.[239]

With substantive right to the property settled, it would be vital to require a deposit[240] by Northern Natural Gas Company for "the full estimated amount of the taking."[241] This amount will be made available to the landowners while the exact amount of just compensation is being settled. This step is vital in striking the balance, discussed above, between landowner and property interests on one side and corporate and "public benefits" on the other.[242]

Finally, the court would need to similarly review the preliminary injunction factors to ensure the project warranted immediate possession. In the process of weighing and reviewing those factors, there would be an important emphasis placed on the first two factors. If the Tenth Circuit follows the lead of the Ninth Circuit, the Tenth Circuit must find that the factor test heavily favors an injunction, as some courts consider preliminary injunctions for immediate possession to be mandatory injunctions, a particularly harsh form of injunction.[243]

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234. *Id.*

235. *See* N. Nat. Gas Co. v. Approximately 9117.53 Acres, 781 F. Supp. 2d 1155, 1160–61 (D. Kan. 2011) (discussing and gathering cases regarding the split).

236. *Id.* at 1161.

237. *Id.*

238. *N. Nat. Gas Co. v. Approximately 9117.53 Acres*, 2012 U.S. Dist. LEXIS 34388, at *35–38 n.7. There is a split of authority in NGA cases on whether or not to require a showing of good faith in negotiations between landowners and natural gas companies prior to eminent domain actions. *Compare id.* (not requiring good faith as an explicit element), *with* Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 776 (9th Cir. 2008) (quoting Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) (citations omitted)) (requiring good faith).

239. *See* N. Nat. Gas Co. v. Approximately 9117.53 Acres, 781 F. Supp. 2d at 1161 (suggested that there was no need for good faith because of the statutory language). "The plain language of the NGA does not impose an obligation on a holder of a FERC certificate to negotiate in good faith before acquiring land by exercise of eminent domain." *Id.* (quoting Kansas Pipeline Co. v. 200 Foot by 250 Foot Piece of Land, 210 F. Supp. 2d 1253, 1257 (D. Kan. 2002)).

240. It is worth noting here that parties and courts often disagree as to whether deposits or bonds are better protections for landowners. *See, e.g.*, N. Nat. Gas Co. v. Approximately 9117.53 Acres, 2012 U.S. Dist. LEXIS 34388, at *20–22 (D. Kan. March 13, 2012).

241. Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d at 777.

242. *See supra* Section III.C.

243. Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d at 776 (citing Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994)). *See also* the discussion of preliminary injunctions *supra* Section II.D.

If the court opted to use factors like those in the District of Kansas case[244] or those from the Supreme Court's *Winter* case as followed by the Fourth Circuit,[245] the Tenth Circuit would first find that the Company was likely to succeed on the merits of its case. A condemnation order may fall short of the summary judgment that had already been awarded in the Fourth Circuit's *Mountain Valley Pipeline* case,[246] but it nonetheless demonstrates a substantial likelihood of success and has been sufficient in other courts.[247]

Second, if the injunction is not granted, there would be irreparable harm to the Company. The company here is attempting eminent domain over a number of wells that, with respect to at least one of the wells, will not only hurt the company's future growth, but will also cause current problems of gas migration if the company cannot take it over and implement its fortification plan.[248] The Company here has a stronger argument for irreparable harm than many of the companies considered previously in this Comment, whose sole issue was future lost profits.[249] Not only must the Company deal with lost future profits, but also faces concern over long-term viability of its operation and concern over its reputation should it fail to maintain service to its customers.

Third, the losses to the Company outstrip the losses the well owners would face. As the lower court found that the "potential harms to [non-movants], which appear compensable, are substantially outweighed by the danger of irreparable harm to Northern from being unable to restore the integrity of the storage field."[250] Finally, this injunction would be in the interest of the public. FERC has previously decided this issue and while this is not dispositive with regard to a public interest finding for a preliminary injunction, FERC's finding does suggest a benefit.[251] Furthermore, this eminent domain action helps the company to not only expand its capacity, but also to maintain its current ability. This is an important consideration especially for the many landowners who could

244. N. Nat. Gas Co. v. Approximately 9117.53 Acres, 2012 U.S. Dist. LEXIS 34388, at *39–47.

245. Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 211 (4th Cir.) *cert. denied*, 140 S. Ct. 300 (2019).

246. *Id.* at 210–11.

247. *See, e.g.*, Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d at 777; E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 827 (4th Cir. 2004).

248. N. Nat. Gas Co. v. Approximately 9117.53 Acres, 2012 U.S. Dist. LEXIS 34388, at *40–41.

249. *See* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 729, 733 (3d Cir. 2018) *cert. denied*, 139 S. Ct. 2639 (2019); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489, 491 (6th Cir. 2018); All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d 362, 364 (8th Cir. 2014); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1141–42 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 1634 (2019); Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 772 (9th Cir. 2008).

250. N. Nat. Gas Co. v. Approximately 9117.53 Acres, 2012 U.S. Dist. LEXIS 34388, at *46.

251. *See id.* at *47.

lose partial service should the Company need to wait to solve the problem. Continued service without interruption is plainly within the best interest of the consuming public.

Applying the *Sage* Court's approach and the *Winter* factors, the Tenth Circuit should find that the District of Kansas case properly sorted the issues and awarded entry to property before payment of just compensation is made.

IV. CONCLUSION

The Seventh Circuit's *Northern Border* decision required much more of condemnors. Under equal circumstances, the six circuits that have considered the issue since that decision would have been tighter fisted on declaring sufficient substantive rights. The two approaches discussed in this Comment were not mere fact differences, but legally significant separations. The Tenth Circuit—the circuit with the second most miles of natural gas pipeline in the nation[252]—should resolve the issue for itself by following the 'lower bar' approach as articulated in *E. Tenn. Nat. Gas Co. v. Sage*.[253] While landowners will likely not favor this approach compared to a total bar on eminent domain, it provides a balanced, consistent, and legally sufficient standard for all courts in the Tenth Circuit to use and apply. Finally, in the future—and depending in part on the strength of landowner support—two long-term solutions could come to pass. First, while the Supreme Court has not heard cases on this issue yet, it has had the chance to do so and to provide a nationwide answer to this split.[254] Alternatively, Congress could amend the NGA to specify what is required. For the time being, disputes will still arise, and people will argue their case, but this approach is the best bet under the circumstances at a time of continued growth.

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252. *See* U.S. ENERGY INFO. ADMIN., *supra* note 13 (finding that Texas alone has more than double the pipeline as the next highest state, and that Oklahoma and Kansas rank in the top four).

253. E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 831 (4th Cir. 2004). *See supra* Section II.E.2.

254. As the Supreme Court denied three chances to hear this issue this term, this solution may not come about anytime soon. *See* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 741 (3d Cir. 2018), *cert. denied* 139 S. Ct. 2639 (2019); Mountain Valley Pipeline, LLC v. 6.56 Acres, 915 F.3d 197, 223 (4th Cir.) *cert. denied*, 140 S. Ct. 300 (2019); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130, 1174 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 1634 (2019).