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NATURAL GAS PIPELINES AND EMINENT DOMAIN: CAN A PUBLIC USE EXIST IN A PIPELINE?

EMINENT DOMAIN—PUBLIC USE—PIPELINES: The New Mexico Supreme Court holds that condemnation by a private pipeline company of private land must evidence a public use in light of the tests and criterion outlined in previous New Mexico case law. *Kennedy v. Yates Petroleum Co.*, 23 N.M. Bar Bull. 378, 681 P.2d 53 (1984).

FACTS

The New Mexico statutes delegate the power of eminent domain to private pipeline companies conveying natural gas.[1] *Kennedy v. Yates*[2] involved the use of this statutory power. Yates, an independent private corporation which produced natural gas and petroleum, laid a pipeline to transport natural gas across property belonging to the Kennedys.[3]

Upon discovering the pipeline, the Kennedys filed a trespass action for injunctive relief and damages.[4] Yates opposed the injunction, contending that it had obtained a right-of-way from the Kennedys' predecessor in title.[5] In the alternative (and as its pivotal defense), Yates argued that it had the authority to condemn the land for the pipeline's path pursuant to the eminent domain statutes of New Mexico.[6]

The state district court found sufficient evidence to support a finding of trespass and the granting of a preliminary injunction.[7] The court stayed the issuance of the injunction provided that Yates initiated a condemnation proceeding.[8] Accordingly, Yates then filed a petition for condemnation as a separate action.[9] In the condemnation proceeding the district court held that pursuant to N.M. Stat. Ann. Section 70-3-5 (1978, Cum. Supp. 1983) and 42A-1-22 (Cum. Supp. 1981) Yates had a right to the immediate possession of a right-of-way across the Kennedy's property.[10] The Ken-

1. N.M. STAT. ANN. § 70-3-5(A) (1978, Cum. Supp. 1983).
2. *Kennedy v. Yates Petroleum Company*, 23 N.M. BAR BULL. 378, 681 P.2d 53 (1984).
3. *Id.* at 378, 681 P.2d at 54.
4. Alternatively, the Kennedys sought damages for unjust enrichment, but the trial court's decision on the trespass issue precluded the necessity of reaching this issue. *Id.*
5. *Id.* at 378, 681 P.2d at 54.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* N.M. STAT. ANN. § 70-3-5 (1978, Cum. Supp. 1984) provided that: "Any person, firm, association, or corporation may exercise the right of eminent domain . . . for the purpose of conveyance of . . . natural gas. . . ."
N.M. STAT. ANN. § 42A-1-22 (Repl. Pamp. 1981) provided that: ". . . the condemnor may apply to the court for immediate possession of the property to be taken."

nedy's trespass action was then dismissed for failure to state a claim.[11] The court concluded that the exclusive remedy remaining to the Kennedys was statutory inverse condemnation.[12] The Kennedys appealed the dismissal of their trespass action rather than the decision in the condemnation action.[13]

Although the Kennedys' appealed the dismissal of their trespass action, the New Mexico Supreme Court treated the issue as one of condemnation rather than trespass.[14] By a vote of 4 to 1, the supreme court reversed and remanded the case to the district court for determination of whether the evidence would support a finding of "public use."[15] The supreme court determined that the lower court's initial hearing failed to illicit sufficient evidence to determine whether a public use in fact existed.[16] "Public use" is the necessary element that must be present in all condemnation proceedings to make a taking of private land constitutional.[17] The court held that for Yates' condemnation to be constitutional, Yates, as a private condemnor, must show a "public use" determined by the "criterion" delineated in previous New Mexico case law.[18]

ELEMENTAL TO THE POWER OF EMINENT DOMAIN IS A "PUBLIC USE"

Both the United States Constitution[19] and the New Mexico Constitution[20] recognize the taking of private property by the state for "public use." "Eminent domain" is the power of the state to take private property for public use.[21] The sovereignty of the state is the source of the power of eminent domain.[22] The power of eminent domain is not an explicit power acknowledged by constitutions or amendments, but is implicitly recognized by the "public use" limitations of the Fifth Amendment of the

11. *Id.*

12. *Id. See,* N.M. STAT. ANN. § 47A-1-29 (Cum. Supp. 1984).

13. 23 N.M. BAR BULL. 378, 681 P.2d at 54.

14. Justice Stowers argued in dissent that the majority reached its opinion in an erroneous manner. He said that opinion resolved an action in trespass with a condemnation answer. *Id.* at 382, 681 P.2d at 58.

15. *Id.* at 380–81, 681 P.2d at 57.

16. *Id.* at 399, 681 P.2d at 55.

17. N.M. Const. art. II, § 20: "Private property shall not be taken or damaged for public use without just compensation." *See also,* 2A NICHOLS ON EMINENT DOMAIN [hereinafter NICHOLS] § 7.10 (3d ed. 1983).

18. 23 N.M. BAR BULL. 380, 681 P.2d at 56.

19. U.S. Const. amend. V: ". . . nor shall private property be taken for public use without just compensation."

20. N.M. Const. art. II, § 20: "Private property shall not be taken or damaged for public use without just compensation."

21. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES, 2 at 2 (1894).

22. *Id.* § 3 at 3. *See also* 1 NICHOLS ON EMINENT DOMAIN § 1.14[2] (3d ed. 1983).

United States Constitution[23] and Article II, Section 20 of the New Mexico Constitution.[24] That is to say that the state cannot relieve a private property owner from the ownership of his propety unless such property is put to a public use. The process of exercising the power of eminent domain is condemnation.[25] This note focuses on the nature of "public use" for purposes of condemnation proceedings in New Mexico.

The New Mexico courts have made determinations as to what uses do and do not constitute "public use." However, the courts have refrained from defining the term. No definition of "public use" is sufficiently precise or comprehensive for universal application.[26] Since no definition exists, the New Mexico courts have established some criteria and tests as a means of determining when a "public use" exists for purposes of condemnation.

Legislative or Judicial Determination

The legislature can delegate the state's power of eminent domain.[27] The delegation of eminent domain will not be held unconstitutional unless it is a clear violation of fundamental law.[28] Whenever the legislature enacts a statute providing for the taking of property by the state, then, for all intents and purposes an irrebuttable presumption of public use exists.[29] Whenever the legislature enacts a statute providing for a private party to take property and declares that a public use exists in such a taking, only prima facie public use exists.[30] The mere legislative declaration cannot make a use that is in fact a private use a public one.[31] There must in fact be a public use.

The judiciary ultimately determines whether the use is a public use.[32] As a general rule, the courts will resolve doubts in favor of the legislature,[33] particularly when the title to the condemned property vests in the

23. U.S. Const. amend. V.

24. N.M. Const. art. II, § 20.

25. BLACK'S LAW DICTIONARY 264 (5th ed. 1979).

26. NICHOLS, § 7.02.

27. *Id.* § 7.19.

28. *Id.* § 7.16. A violation of fundamental law would be to delegate eminent domain to a private individual for his sole benefit. The supreme court has stated that New Mexico's Constitution prohibits the utilization of eminent domain for any private uses. 23 N.M. BAR BULL. 379, 681 P.2d at 55.

29. Condemnation, U.S.A. § 16.

30. *Id.*

31. *Id.* Threlkeld v. Third Judicial Dist. Ct. 36 N.M. 350, 365; 15 P.2d 671, 674 (1932). This note does not focus on the issue of legislative delegation of the power, but on the use to which the condemned land is put.

32. *Id.*; 23 N.M. BAR BULL. 380, 681 P.2d at 56; Threlkeld v. Third Judicial Dist. Ct., 36 N.M. 350, 353, 15 P.2d 671, 672 (1932); Kaiser Steel Corp. v. W.S. Ranch, 81 N.M. 414, 420, 467 P.2d 986, 992 (1970); 1 Lewis, Eminent Domain, Section 251 (3d ed. 1909).

33. Condemnation, U.S.A. § 16 (1969). *See* Hawaii Housing Authority v. Midkiff, ___ U.S. ___, 104 S.Ct. 2321, 52 U.S.L.W. 4674 (May, 1984).

state itself.[34] However, where a serious doubt exists as to the validity of the public use, the courts look to the particular facts of the case to make their determination.[35]

When the court finds it difficult to agree with the legislature as to the existence of a "public use," the court must develop a perspective from which to make consistent evaluations of public use. In this case, the supreme court attempted to create such a perspective.[36] The court mandated that the lower courts determine the existence of a "public use" by evaluating the facts of the case "in light of the tests and criterion for public use outlined in *Threlkeld, Gallup,* and *Kaiser.*"[37]

A Narrow Interpretation of Public Use Applies In New Mexico

Threlkeld,[38] *Gallup,*[39] and *Kaiser*[40] show that the New Mexico judiciary recognizes that two different views exist for the interpretation of "public use." The supreme court refers to them as the "orthodox" view and the "liberal" view.[41] These two phrases do little to clarify the term "public use" and the cases do little more to shed light on their full meaning. Since no New Mexico cases expand on the definitions of "orthodox" and "liberal," it is best to turn to the authority on which the supreme court has so often relied—Nichols on Eminent Domain [hereinfter Nichols].[42]

Nichols describes two views for interpreting the meaning of public use—the narrow view[43] and the broad view.[44] The narrow interpretation of "public use" means

> 'use by the public,' that is, public service or employment, and that consequently to make a use public a duty must devolve upon the person or corporation seeking to take the property by right of eminent domain *to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken.*[45]

Under this view, the court must determine by the facts whether there will be a use available to the public in common; in other words, the court must determine that the property is not for use by a particular individual.[46]

34. *Id.*
35. 23 N.M. BAR BULL. 380, 681 P.2d at 56.
36. *Id.*
37. *Id.*
38. 36 N.M. 350, 15 P.2d 671.
39. Gallup Amer. Coal Co. v. Gallup S.W. Coal Co., 39 N.M. 344, 47 P.2d 414 (1935).
40. 81 N.M. 414, 467 P.2d 986.
41. *Kaiser,* 81 N.M. at 416, 467 P.2d at 988; *Threlkeld,* 36 N.M. at 354, 15 P.2d at 673; *Gallup,* 39 N.M. 344, 345, 47 P.2d 414 (1935).
42. *See Kennedy,* 681 P.2d at 56; *Kaiser,* 81 N.M. at 420, 467 P.2d at 922; *Threlkeld,* 36 N.M. at 354–6, 15 P.2d at 673–4.
43. 2A NICHOLS, § 7.02[1].
44. *Id.* § 7.02[2].
45. *Id.* § 7.02[1] (emphasis added).
46. *Id.*

Therefore, public use implies "use of many," or "by the public."[47] The court must resolve the question of whether the use is by the public by evaluating the facts to determine if the public has a nondiscriminatory right of access to the use.[48] It is not necessary that each member of the public participate in the use, but it is necessary that each member who wants to participate be able to do so in terms common to all.[49] In essence, this view conditions the constitutionality of the taking on a showing that actual users exist, are potentially numerous, and that the condemnor cannot discriminate and deny access to some members of the public. This view favors the protection of private property rights.

The "broad" view equates "public use" with public benefit or public advantage.[50] Nichols states that under this view, "the scope has been made as broad as the powers under the police and tax provisions of the constitution."[51] Thus, as long as the general welfare of the state and its inhabitants are advanced, anything is permissible.[52] Hence, if public uses are anything benefiting the public, then residential property could be condemned and replaced with commercial or industrial operations which arguably provide greater public benefits.[53] The distinction between the views is that under the narrow view it is necessary that the public directly participate or enjoy the use for the taking to be constitutional. Under the broad view this is not necessary: the use need only fulfill some nebulous public purpose such as community prosperity.[54]

As previously mentioned, the New Mexico judiciary recognizes that two views exist for interpreting the meaning of public use. These two views, "orthodox" and "liberal," are not found in treatises on the subject.[55] However, it is possible to infer that "liberal" equates with "broad," and "orthodox" with "narrow." The court has relied on two treatises, but neither refers to "orthodox" or "liberal."[56] However, an examination of the court's cited authorities[57] reveals that the court rejected the liberal or "broad" view in writing of "public benefit." Nichols cites to *Threlkeld*

47. *Id.*

48. *Id.* Accord Bradley v. Degnon Contracting Co., 224 N.E. 89, 93 (1918).

49. *Id.*

50. NICHOLS, § 7.02[2].

51. *Id.*

52. Condemnation, U.S.A. § 17.

53. Note, "Real Property—Eminent Domain—Expansion of the Public Use Doctrine to Include the Alleviation of Unemployment and Revitalization of the Economic Base of a Community," 28 WAYNE L. REV. 1975, 1982 (1975).

54. 2A NICHOLS § 7.02[2].

55. As referenced in NICHOLS, CONDEMNATION, U.S.A., and LEWIS, EMINENT DOMAIN.

56. The court relied on LEWIS, EMINENT DOMAIN and the second edition of NICHOLS ON EMINENT DOMAIN, 36 N.M. at 354, 15 P.2d at 673.

57. The author does not have a NICHOLS ON EMINENT DOMAIN (2d ed.) available. However, a comparison of language of NICHOLS (3d ed.) at § 7.02[2] and 1 LEWIS, EMINENT DOMAIN § 258 reveals that these two treatises use parallel language in describing the two views of public use.

as the case adopting the narrow view in New Mexico.[58] Therefore, it is inferable that when the New Mexico courts refer to "orthodox" and "liberal," they refer to Nichols' narrow and broad views respectively. For purposes of this note and clarity, the "orthodox" view will be referred to as the narrow view and the "liberal" view as the broad view.

If public use is viewed as existing along a continuum, the broad and narrow views are not separate and distinct. The narrow view stops along the continuum at a point where "use" no longer means "user."[59] At that point and beyond, where there is no longer a direct enjoyment of the right to use by the public, no public use exists. The broad view not only encompasses all uses allowed under the narrow view, but also incorporates uses where there is not direct public participation or enjoyment. The broad view extends to a point where the public benefit is only incidental to a private benefit. Finally, at the point where no public benefit exists, there can be no public use.

Application of the Narrow View to New Mexico Natural Resource Cases

New Mexico case law stops along the public use continuum at the point where use and enjoyment by the public cease—the narrow view. The leading cases in New Mexico establish that a public use must exist in the condemned property. In *Threlkeld*[60] and *Gallup American Coal Company v. Gallup Southwestern Coal Company*[61] the courts rejected the broad view in favor of the narrow by concluding that the indirect benefits to the people of the state were not public uses in the constitutional sense.[62]

In *Threlkeld,* a lumbering and timbering company brought an action to condemn Threlkeld's land for purposes of building a railroad spur to service its harvesting area.[63] The New Mexico statutes provided that:

> All corporations . . . engaged in the manufacture of logs, lumber or timber, shall have the right to construct, maintain and operate logging roads. . . . Provided, that such corporations operating under this section shall be subject to the laws in force governing common carriers.[64]
>
> Such corporations shall have the right of eminent domain and shall have the right to condemn and appropriate property. . . .[65]

58. 2A NICHOLS SECTION 7.02[1].

59. USER: is defined as "The actual exercise or enjoyment of any right. . . ." BLACK'S LAW DICTIONARY, 1383 (5th ed. 1979).

60. 36 N.M. 350, 15 P.2d 671.

61. 39 N.M. 344, 47 P.2d 414.

62. The court seemed to rely on a tautology: a public use in the constitutional sense is a use by the public. *Threlkeld,* 36 N.M. at 356, 15 P.2d at 674; *Gallup,* 39 N.M. at 348, 47 P.2d at 416.

63. 36 N.M. at 351–52, 15 P.2d at 671.

64. N.M. STAT. ANN. § 43-120 (1929).

65. *Id.* at § 43-121.

The case dealt with three lines of argument: 1) that, under the broad view, great indirect benefits from a successful business amounted to public use,[66] 2) that the development of timber enhanced the public welfare,[67] and 3) that common carriers possessed the power to condemn private land.[68]

The court, utilizing the narrow view, easily dismissed the indirect benefit argument because the indirect benefits did not amount to a constitutional public use.[69] The indirect benefits would have been those benefits that come to the state and its citizens in the form of jobs and taxes. The narrow view necessarily eliminates indirect benefits because they do not meet the standard of use and enjoyment by the public of the condemned land.

The second argument proffered by the company was that the development of natural resources was a public policy of the state.[70] It argued that the state recognized the importance of natural resources and promoted their development.[71] The court dismissed this argument reasoning that the state promoted the development of water as a matter of public policy only because such public policy was prescribed by the state's constitution.[72] Since the state's constitution did not delineate a public policy relating to lumber, then no public use existed in its development.[73]

Finally, the court in dicta apparently felt compelled to discuss common carriers. The opinion pointed out that if the company showed it served the public, and was able and willing to render service as a common carrier, then a constitutional public use might exist.[74] Hence, a public use may be found in industries or businesses operating as common carriers. However, the court cautioned that legislative fiat alone was insufficient.[75]

Three years after *Threlkeld,* the New Mexico Supreme Court addressed another natural resource/public use issue. In *Gallup,*[76] the condemnor sought to condemn a right-of-way to its coal mine across property belonging to another coal company.[77] The condemnor argued that coal mining was a public use or, in the alternative, that the statute[78] providing for

66. 36 N.M. at 354.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 355.
73. *Id.*
74. *Id.*
75. *Id.*
76. 39 N.M. 344, 47 P.2d 414.
77. *Id.*
78. N.M. STAT. ANN. § 88-401 (1929), provided:
That any mine owner . . . or owners . . . for the purposes of transporting or conveying coal . . . shall have a right of way for a road, pipe line, tramway, railway, ditch or flume across the lands of other persons by condemnation. . . .

condemnation by coal companies made it such under the broad view.[79] The court dismissed the argument that coal mining was a public use by declaring it to be in a class with the timber or lumber industry.[80] Applying the dicta of *Threlkeld,* the court would not allow the power of eminent domain to be bestowed upon the coal industry, absent a constitutional provision. Consistent with *Threlkeld,* the court held that under the narrow view the legislature could not impliedly create a public use by statute.[81] In rejecting the broad view the court declared that:

> Once we depart from the "orthdox" [or narrow] view we shall find no easy or logical stopping place. Confusion and uncertainty will surround every battle between private right and public benefit, and . . . this important constitutional right of the individual . . . would exist only at the whim of the Legislature or court.[82]

Gallup explicitly stated what was only implied in *Threlkeld:* the legislature does not create a public use in natural resource industries by simple delegation of the power of eminent domain.

Threlkeld and *Gallup* lay the foundation for implementation of the narrow view of public use in New Mexico. In both cases the court strongly adhered to the principles of the narrow view. The court stated and reiterated that the legislature does not create a public use in natural resource industries by enacting statutes providing these industries with the power of eminent domain. However, the supreme court implied that a unique status created by the state's constitution was definitive of public use for purposes of condemnation and obviated the need for judicial determination of public use.[83]

Kaiser Steel Corporation v. W.S. Ranch,[84] addressed the issue of the effect to be given a constitutional provision relating to natural resources. *Kaiser* began as a trespass action brought by W.S. Ranch against Kaiser.[85] Kaiser laid a pipeline across the W.S. Ranch to transport water to its coal mine. Kaiser did not seek permission to do so, nor did it condemn the property.[86] In defense of the action, Kaiser apparently contended that it had the right to condemn the land. If true, Kaiser was not trespassing. Any relief sought by W.S. Ranch could be provided only through an inverse condemnation action brought by W.S. Ranch.[87]

79. 39 N.M. at 345.
80. *Id.* at 348.
81. *Id.*
82. *Id.*
83. *Accord* 2A NICHOLS § 7.14; *Threlkeld,* 36 N.M. 350, 15 P.2d 671.
84. 81 N.M. 414.
85. *Id.* at 415.
86. *Id.*
87. *Id.*

As a foundation for its argument, Kaiser relied on a New Mexico statute which provided that:

> . . . any person . . . or corporation may exercise the right of eminent domain to take and acquire . . . right-of-way . . . for pipelines . . . for a conveyance of water for beneficial uses. . . .[88]

This statute is not analogous to those in *Gallup* and *Threlkeld*. It does not delegate the power of eminent domain to any particular industry involved in natural resource development. Rather, it provides the power to anyone or any entity seeking to put water to beneficial use.

However, the court's holding does not turn on this point, but on an evaluation of water's unique status in the constitution.[89] The court held that a "jus publicum" was present in water and its beneficial use was a public use.[90] The New Mexico Constitution provides that 1) the water of the state belongs to the public,[91] 2) water may be appropriated for beneficial use,[92] and 3) such beneficial use is necessary for a water right.[93] The court viewed the statute as a mechanism for fulfilling the constitutional requirements for obtaining and maintaining a water right.[94] Arguably, the court concluded that the narrow view need not be considered because of the constitutional provision for water.[95]

Although the court had disposed of the issue, the court felt impelled to address the constitutionality of the statute standing alone.[96] The court's dicta concluded that legislature impliedly declared a public use in the conveyance of water.[97] The court felt restrained to accept the legislative judgment in the absence of obvious unconstitutionality.[98] Arguably, the court's dicta indicates a move to the broad view. In order to determine if the court had moved to a broad view in reviewing statutes, we must carefully dissect the statute at issue in *Kaiser*. When compared to the statutes in *Threlkeld* and *Gallup*, the statute is unique in two respects: 1) water is constitutionally provided for and 2) the population as a whole, rather than a specific industry, has the power of eminent domain.

88. N.M. STAT. ANN. § 75-1-3 (1953). The statute also required that any such condemnations must be done pursuant to the condemnation laws of New Mexico. Kaiser did not follow the proper procedure; however, there was no issue made of this, or so it appears.

89. 81 N.M. at 417, 467 P.2d at 989.

90. *Id.*

91. N.M. Const. art. XVI, § 2: "The unappropriated water . . . declared to belong to the public and to be subject appropriation for beneficial use. . . ."

92. *Id.*

93. N.M. Const. art. XVI, § 3: "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

94. 81 N.M. at 420, 467 P.2d at 992.

95. *Id.*; 2A NICHOLS § 7.14.

96. 81 N.M. at 420, 467 P.2d at 992.

97. *Id.*

98. *Id.*

Procedure in New Mexico Courts for Determining Public Use

In applying the narrow view to natural resource cases, the New Mexico Supreme Court has outlined a procedure for determining public use. First, the court looks to the statute involved and determines whether the statute is grounded in the state's constitution, as in *Kaiser*. If grounded in the constitution, then the state has established public policy through its constitution. When the state constitution provides for the development of a natural resource there is no need to determine public use. The statute is the means for carrying out the state's public policy; hence, the statute is constitutional.

Second, when there is no constitutional provision, the court scrutinizes the statute under the narrow view. That is, the court must find a public use in the industry to which the power of eminent domain is delegated. The court has consistently held that absent a constitutional provision creating a public use in the industry delegated the power, such delegations are unconstitutional.[99]

Last, the court can find a public use if the use involves common carriers,[100] rather than natural resources. Like some natural resources, common carriers are provided for in the state's constitution.[101] The focus is no longer on the natural resource but on whether the mode of transportation qualifies the developer of the natural resource as a common carrier.[102] Because common carriers are granted a unique status, the constitutionality of a condemnation statute for common carriers is not a problem. The issue is what constitutes a common carrier. As established in *Threlkeld,* a common carrier must show a public to be served and the ability and the willingness to render service as a common carrier in order to evidence a public use under the narrow view.[103] The public use must be found in the line (e.g., pipeline, railroad, road, telegraph or telephone line).[104] If the court determines no public use exists, then the line is not a common carrier and the condemnation is unconstitutional; if the court determines that a public use exists, the condemnation is constitutional.

ANALYSIS: THE NARROW VIEW APPLIED TO *KENNEDY V. YATES*

In *Kennedy,* the Kennedys sued Yates in a trespass action.[105] Yates contended that it had a right to condemn the property pursuant to N.M. Stat. Ann. section 70-3-5 (1978, Cumm. Supp. 1984), which reads:

99. *See generally Threlkeld,* 36 N.M. 350, 15 P.2d 671; *Gallup,* 39 N.M. 344, 47 P.2d 414.

100. *Threlkeld* stated that examples of common carriers are those universally accepted to be public utilities, e.g., railroads, telephone and telegraph companies. 36 N.M. at 353, 15 P.2d at 672.

101. N.M. Const. art. XI, § 7.

102. 36 N.M. at 353.

103. *Id.* at 356.

104. *Id.*

105. 681 P.2d at 54.

> Any person, firm, association or corporation may exercise the right of eminent domain to take and acquire the necessary right-of-way for the construction, maintenance and operation of pipelines, . . . for the purpose of conveyance of petroleum, natural gas, carbon dioxide gas and the products derived therefrom. . . .[106]

The supreme court held that insufficient evidence was illicited to determine whether a "public use" existed.[107] Without elaborating on the definition or public use, the court remanded the case to the district court for a determination of whether a public use existed in the pipeline. I will analyze the facts of the instant case under the previous decisions of *Kaiser, Gallup,* and *Threlkeld* and will show that the statute, as used by Yates, does not provide for a constitutional taking of the Kennedys' property.

The statute[108] clearly provides for the power of eminent domain for the laying of pipelines. Therefore, the court must determine if the statute is constitutional for purposes of taking private land. Following the analytical steps which I previously delineated, the initial determination to be made is whether a constitutional provision exists as a predicate to the statute. Such a constitutional provision would obviate the need for judicial review as to the existence of a public use. The New Mexico constitution has no provision relating to natural gas (or petroleum, carbon dioxide or any derivative products). Therefore, the statute does not act to provide a means of fulfilling any constitutional public policy concerning the development of natural gas.

Under the second step of the analysis, the court must determine if a public use exists in the development of natural gas in order for the taking to be constitutional. The court must apply the narrow view of public use. The court has consistently held that absent a constitutional provision creating a unique status in a natural resource, the legislature cannot delegate the power of eminent domain to an industry engaged in natural resource development.[109] Since no constitutional provision exists relating to natural gas, the court should find the natural gas industry to be in the same class as the timber and coal industries. Hence, the statute should be declared unconstitutional as was the statute in *Gallup.*

In the final analysis, however, the statute may have a foundation in the constitutional provisions relating to common carriers. The New Mexico Constitution provides for common carriers,[110] thereby, creating the unique public use status necessary. The New Mexico statutory scheme at N.M. Stat. Ann. Section 70-3-1[111] provides for common carrier pipelines. The statute reads:

106. N.M. STAT. ANN. § 70-3-5 (1978, Cum. Supp. 1984).
107. 681 P.2d at 55.
108. N.M. STAT. ANN. § 70-3-5 (1978, Cum. Supp. 1984).
109. *Accord Threlkeld,* 36 N.M. 350, *Gallup,* 39 N.M. 344.
110. N.M. Const. art. XI, § 7.
111. N.M. STAT. ANN. § 70-3-1 (1978).

> The corporation commission may prescribe reasonable maximum rates for the transportation of oil or products derived therefrom, where such products are transported by a pipeline common carrier.[112]

If the statute at issue in *Kennedy* is read in conjunction with the above statute,[113] then it is arguable that condemnation is available to common carrier pipelines. If so, then the determinant question is whether Yates' pipeline was a common carrier. Yates did not argue its status as a common carrier. However, to be a common carrier pipeline, Yates would have to at least show that it was licensed by the State Corporation Commission[114] and that its rates for transportation were regulated by the same commission.[115]

CONCLUSION

It is unlikely that on remand the district court will find a public use in the Yates pipeline. There is no constitutional provision relating to natural gas. The natural gas industry falls in the same category as the timber and coal industries and no court has yet to find a public use in either industry. Nor has Yates argued that it is a common carrier. Therefore, there is no precedent or argument on which the district court could rely to find that Yates had the power to condemn the Kennedys' land.

In *Threlkeld,* the court adhered to the philosophy that it was axiomatic that eminent domain could not be used for private purposes.[116] This philosophy ought to remain embedded in the state's jurisprudence, because once the courts move away from the narrow view, there will be no clear logical stopping place. To do otherwise would mean that the courts and legislature would help one private party's interests over the interests of another. It would mean that a producer of goods could rely on the state to promote his interests over another's, even though this is supposedly a free market system. Finally, it would deny the Kennedys the opportunity to decide whether they desired to have a pipeline cross their property and, if so, at what price.

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112. The several sections of a statutory scheme must be read together so that all parts are given effect. *See* Methola v. County of Eddy, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980).

113. N.M. STAT. ANN. § 70-3-1 et seq. (1978).

114. N.M. STAT. ANN. § 70-3-2 (1978).

115. *Id.* at § 70-3-1.

116. *Kennedy,* 681 P.2d at 55, citing generally to *Threlkeld,* 36 N.M. 350, 15 P.2d 671.