No. _____

In The
# Supreme Court of the United States

4.360 ACRES OF LAND, MORE OR LESS, IN THE S/2 OF SECTION 29, TWN 163 N, RANGE 85 W, RENVILLE COUNTY, ND; 4.675 ACRES OF LAND, MORE OR LESS, IN THE SE/4 OF SECTION 30, TWN 163 N, RANGE 85 W, RENVILLE COUNTY, ND; LEONARD SMITH, IONE SMITH; and ALL OTHER UNKNOWN OWNERS,

*Petitioners,*

vs.

ALLIANCE PIPELINE L.P.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case pertains to the taking of real property owned by the Smiths. Alliance Pipeline L.P. sought to acquire some of the Smiths' land for a pipeline easement, to transport hydrocarbons from the Bakken Region of North Dakota.

Two questions are before this Court on this Petition for Certiorari:

I. Can the Eighth Circuit Court of Appeals deny a landowner the right to a jury trial (timely and fully invoked) on a taking by a pipeline company – when the United States Constitution, Seventh Amendment provides for that as a right? This Circuit Court's decision is contrary to other Circuit Courts' decisions and is at odds with FRCP Rule 71.1 and 15 U.S.C. § 717f(h).

II. May a landowner challenge the lack of notice, to the taking of their property by a Pipeline Company – of Federal Energy Regulatory Commission (FERC) proceedings, when Due Process requires a right to be heard and timely notice?

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## OPINIONS BELOW

The Eighth Circuit Court of Appeals opinion was entered on March 24, 2014. The Judgment sought to be reviewed is dated March 24, 2014. This case is reported at 746 F.3d 362. (App. pg. 1) A timely Petition for Rehearing was submitted to the Eighth Circuit Court of Appeals. It was denied on April 25, 2014. (App. pg. 73) The prior opinion of the United States District Court for the District of North Dakota-North West Division was issued and is reported at 2012 WL 6963313 It is reprinted with this Petition. (App. pg. 14)

## JURISDICTION

The Judgment of the Eighth Circuit Court of Appeals was entered on March 24, 2014. A Petition for rehearing was filed with the Court of Appeals for the Eighth Circuit on April 4, 2014. The Petition for Rehearing was denied on April 25, 2014. (App. pg. 73) The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VII – In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise

re-examined in any court of the United States than according to the rules of the common law.

**FRCP Rule 71.1(h) Trial of the Issues**

> (1) Issues Other Than Compensation; Compensation. In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:
>
> (A) *by any tribunal specially constituted by a federal statute* to determine compensation; or
>
> (B) *if there is no such tribunal, by a jury when a party demands one within the time to answer* or within any additional time the court sets, unless the court appoints a commission . . . (emphasis supplied).

**15 U.S.C. § 717f(h) Right of eminent domain for construction of pipelines, etc.**

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of

the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. *The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated*: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000 (emphasis supplied).

**15 U.S.C. § 717r(a) Application for rehearing; time**

> Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission *is a party* may apply for a rehearing within thirty days after the issuance of such order. . . .
>
> **(b) Review of Commission order**
>
> *Any party to a proceeding* under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located . . . , within sixty days after the order of the Commission upon the application for rehearing, . . . (emphasis supplied).

**18 C.F.R. § 157.6(d)(1)**

For all applications filed under this subpart which include construction of facilities or abandonment of facilities (except for abandonment by sale or transfer where the easement will continue to be used for transportation of natural gas), the applicant shall make a good faith effort to notify all affected landowners and towns, communities, and local, state and federal governments and agencies involved in the project:

(i) By certified or first class mail, sent within 3 business days following the date the Commission issues a notice of the application; or

(ii) By hand, within the same time period; *and*

(iii) By publishing notice twice of the filing of the application, no later than 14 days after the date that a docket number is assigned to the application, in a daily or weekly newspaper of general circulation in each county in which the project is located.

(2) All affected landowners includes owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property:

(i) Is directly affected (i.e., crossed or used) by the proposed activity, . . . .

(3) The notice shall include:

(i) The docket number of the filing;

(ii) The most recent edition of the Commission's pamphlet that explains the Commission's certificate process and addresses the basic concerns of landowners. . . . ;

(iii) A description of the applicant and the proposed project, its location (including a general location map), its purpose, and the timing of the project;

(iv) A general description of what the applicant will need from the landowner if the project is approved, and how the landowner may contact the applicant, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;

(v) A brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state. Except: pipelines are not required to include this information in the published newspaper notice. Instead, the newspaper notice should provide the Commission's Internet address and the telephone number for the Commission's Office of External Affairs; and

(vi) Information on how the landowner can get a copy of the application from the company or the location(s) where a copy of the application may be found as specified in § 157.10. . . .

> Specifically stating the date by which timely motions to intervene are due, together with the Commission's information sheet on how to intervene in Commission proceedings. . . .

## STATEMENT OF THE FACTS

Leonard and Ione Smith appealed from the District Court Order of the Hon. Daniel Hovland to the United States Court of Appeals for the Eighth Circuit. (App. pg. 2) They own land in Renville County North Dakota. Alliance sought to condemn a portion of their land for the construction of a natural gas pipeline. Alliance had secured contracts to transport hydrocarbons. It had obtained from the Federal Energy Regulatory Commission (FERC) an Order authorizing the construction and condemnation of various tracts including parcels that went across the Smiths' land. (App. pg. 38) FERC's regulation (18 C.F.R. § 157.6(d)), mandates that affected landowners be afforded notice of those FERC proceedings. In this regard Alliance never provided the Smiths with timely notice of their proceedings before FERC. After FERC issued its Order of authorization and directive to condemn, a copy of that FERC Order was served by Alliance upon an adult child of the Smiths. That adult child of the Smiths did not reside with them. That occurred one business day before the Smiths' statutory right to petition for a rehearing (15 U.S.C. § 717r) before the agency expired. After the time expired for a rehearing application before FERC, the Smiths were personally

served. As the time to seek a rehearing before FERC, was jurisdictional – the Smiths had no choice but to defend and challenge the taking of their land in Federal Court.

An action was commenced by Alliance against the Smiths and their land. Alliance utilized the procedures set forth under FRCP Rule 71.1. That Rule in part references resolution of damage claims by a host of alternatives. In this regard the Smiths by their Answer to the Complaint – and Notice of Condemnation (of Alliance) in Federal Court, invoked timely and fully a demand for a jury trial. (App. pg. 91) That demand was affixed to their Answer and was filed with the Federal Court. It was also immediately served upon Alliance.

Alliance moved for Summary Judgment of possession and use of the Smith land for its pipeline. Its application was served upon the Smiths at the same time that the Complaint and Notice of Condemnation were served upon the Smiths.

Alliance alleged that its network of pipelines is extensive. Further that this was a transportation line rather than a gathering and collection line. It announced it needed to start with construction immediately on account of its contract commitments. Further North Dakota's Bakken rich oil and gas formations were being harvested and flaring was occurring. It felt that there were no other alternatives for the transportation of these hydrocarbons. As such the line was needed to immediately market a valuable

national resource. The Trial Court agreed and denied the Smiths relief. At the time Smiths advanced their claim that they were denied due process of law and a right to be heard before the Agency. The Smiths urged below that they had no notice of and as to FERC proceedings – that their lands were being taken without notice or due process – a lack of the right to be heard, and that they should be allowed a jury trial among other things.

The Circuit Court ruled that the Smiths had no right to a jury trial on account of the holding of *United States v. Reynolds*, 397 U.S. 14, 18 (1970). (App. pg. 10) The Court of Appeals also noted that while North Dakota authorizes jury trials in eminent domain matters, (by reason of NDCC 32-15-22), Rule 71.1 overrides that entitlement and effectively nullifies the legislative will set forth by Congress in 15 U.S.C. § 717f(h). That act states that the procedures of state law govern. It should be recognized that there is no congressionally authorized tribunal (under the Natural Gas Act ("NGA")) to hear landowner damage claims on taking proceedings such as in the case at bar.

Further the lower court felt that 15 U.S.C. § 717r limited its ability to hear claims of no notice of the taking. In doing so it ignored that 717r rehearing proceedings are applicable only to parties and the Smiths were never parties to the FERC proceedings (brought by Alliance). In addition the Circuit Court acknowledged that the Smiths might not have seen the Federal Register notice and should not be charged with that notice of publication. However the Appeals

Court felt that the Smiths' lawyer's separate inferred knowledge was adequate to meet due process requirements of adequate notice. That implied knowledge the Appeals Court felt was sufficient to meet the requirements of *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950). *Mullane* noted the requirement of a notice to the litigant reasonably calculated to apprise.

The Smith's petition for rehearing before the Eighth Circuit Court of Appeals was denied. That leads to this Petition for Certiorari.



## REASONS FOR GRANTING THE PETITION

### I. The denial of a right to a jury trial (timely and fully invoked) in a suit between private litigants, violates the plain meaning and language of the U.S. Constitution, Seventh Amendment. Further it is at odds with other Circuit Court cases construing Rule 71.1 FRCP (or its predecessor) and denies the Smiths the rights granted to Citizens of this country by Congress.

The Smiths fully and timely invoked their demand for a jury trial. (App. pg. 91) It is urged by the Appeals Court that *United States v. Reynolds*, 397 U.S. 14, 18 (1970) strikes the landowners' right to a jury. *Reynolds* is inapplicable. It pertains to proceedings involving the sovereign and the landowner on a

taking case. Further it is limited to questions of need and necessity and not damages.

It has been noted recently in *Granfinanciera v. Nordberg*, 492 U.S. 33, 51 (1989) that – *Congress may only deny trials by jury in actions at law where public rights are litigated. Wholly private tort, contract and property cases* as well as a vast range of other cases *are not implicated*. Justice Scalia in a concurring opinion, noted that he would return to the longstanding principle that the public rights doctrine requires at a minimum that the United States be a party. (Id. at 70)

It has been noted that public rights are those where the government is involved. Here the issue of damages between two private litigants, does not invoke public rights, but rather personal rights – as the parties in this case are private citizens and a business entity.

In *Atlas Roofing v. Occupational Safety*, 430 U.S. 442 (1977), this Court explained that when the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights, administrative fact finding may be appropriate. However where private tort contract and property cases exist a jury can be invoked. This recognizes that a private right is defined as the liability of one individual to another as defined – *in contrast* – to cases that arise between the government and persons subject to its authority in connection with the performance of the constitutional functions

of the executive. (*Crowell v. Benson*, 285 U.S. 22, 51 (1932).

In the case at bar what damages are owed does not implicate Federal – Public Rights considerations or policy, as the case is solely between private litigants. Nor does it implicate a public right when the question comes to what damages are due a landowner. As has been noted the aid of juries is not only deemed appropriate, but is required by the Constitution. Congress (assuming this is a question of a public right) could have assigned a tribunal to hear this matter. In fact it did not. (717f(h)). It directed that the parties rely upon State policy and law. This would mean that the Smiths could use a jury as it was legislatively codified in North Dakota for eminent domain matters. (NDCC 32-15-22) *City of Minot v. Minot Highway Center Inc.*, 120 N.W.2d 597, 599 (N.D. 1963). As such reliance upon FRCP 71.1 for the principle that a jury be stricken and denied the landowners, ignores the plain language of the rule. That Rule states otherwise.

The fact that it may be more convenient to set aside the demand for jury, does not pass constitutional muster. The Seventh Amendment is enshrined as a protected entitled right of the people for matters at law involving more than ten dollars. As 717f(h) permits invocation of state law on these types of cases – there is an insufficient underpinning to strike the Smiths' jury demand involving Alliance and only Alliance. Just this past term this Court in *Executive Benefits v. Arkison*, No. 12-1200, ___ U.S.

___ (June 9, 2014) reaffirmed that a jury is afforded a litigant on fraudulent conveyance claims as they are not matters of public right (id. at note 3). It has been recognized that jury trials have been allowed in a host of cases involving real property – i.e., *Hipp for Use of Cuesta v. Babin*, 60 U.S. 271 (1856) ejectment; *Ross v. Bernhard*, 396 U.S. 531 (1970) – actions to recover title. As noted earlier juries have been permitted in Bankruptcy proceedings when properly invoked.

This recognizes that reliance upon 28 U.S.C. § 2072(b) to displace state law on account of Rule 71.1 is misplaced. 28 U.S.C. § 2072(b) – notes that such rule shall not abridge, enlarge, or modify any substantive right. In this regard the right to a jury is constitutionally established. It is not a mere procedural right but one of substance and constitutional dimension. As was said in *Shady Grove Orthopedic v. Allstate*, 559 U.S. 393 (2010) where the rule alters the rules of decision by which the rights are adjudicated, it is not valid or applicable. Here eliminating the jury alters the rules of decision that are of a constitutional dimension set forth by our founding fathers.

This case should be heard as there is now a conflict between the Circuits on this point. *Georgia Power Co. v. 138.30 Acres of Land,* 596 F.2d 644 (5th Cir. 1979) noted the ruling of *Reynold*s. However it went on to state in part that:

> For example, in 21.54 Acres of Land, supra, 491 F.2d at 304, the court noted that a landowner is not entitled to a jury trial if the trial judge determines that valuation should be by a commission or if Congress establishes a tribunal to determine the amount of compensation due. See 40 U.S.C. § 258a; Fed.R.Civ.P. 71A(h). *If there were a constitutional right to a jury trial on just compensation, the judiciary and Congress would have no power to deny landowners a jury trial* . . . (emphasis supplied).

In *United States v. Hardage*, 58 F.3d 569 (10th Cir. 1995) the Court said:

> Nothing contained in the rule (FRCP 71.1) states, as suggested by HSC's counsel, the procedure provided in state law shall govern with respect to the right to a jury. Nor does the rule state federal condemnation is always a "commission proceeding" as noted by counsel for the government. *Indeed, the rule explicitly provides for a jury upon demand unless federal law governing the case creates another "tribunal" for that purpose*. Atlantic Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455, 459 (4th Cir.1963). *Any party to a condemnation proceeding is ordinarily entitled to a jury trial to fix the value of the property taken where demand is made as provided in Rule 71A(h)*. United States v. Waymire, 202 F.2d 550, 552 (10th Cir.1953); United States v. Buhler, 254 F.2d 876, 878 (5th Cir.1958). *Such a jury trial is a matter of right*, United

> States v. Theimer, 199 F.2d 501, 503-04 (10th Cir.1952) (emphasis supplied).

See also *United States v. Waymire*, 202 F.2d 550 (10th Cir. 1953) which allowed a jury trial.

This recognizes that the instant case involves litigation between private litigants and does not involve the sovereign. It has been recognized that when Federal Court proceedings pertain to eminent domain matters and state law authorizes a trial by jury on an issue of fact, that substantive right shall be followed. See 15 U.S.C. § 717f(h). This would be consistent with FRCP Rule 71.1. In this matter there is *no federal law* that *creates a tribunal for cases arising* under the NGA that involves this pipeline.

Likewise the Rule is limited by its plain language. When read with 717f(h) applying state law on these types of cases – how does the law justify a wholesale redrafting of the rights of a party that elected a jury, timely and properly. (App. pg. 91)

Since the ruling of the Circuit Court for the Eighth Circuit conflicts with rulings from Courts in other Circuits, and vitiates a constitutional right that the Smiths enjoy and have been granted, this case needs to be heard to resolve this issue.

## II. Smiths may challenge the lack of notice afforded to them by Alliance of FERC proceedings, in Federal Court in this matter at this time. Due Process so requires and the Smiths are not barred by Federal Law to do so. The Eighth Circuit's ruling is at odds with the rulings of other Circuits.

The Court of Appeals noted the Smith's reliance upon 18 C.F.R. § 157.6(d). It overlooked that Alliance did not adhere to agency (FERC) rules of mandated notice to the Smiths on Alliance's application for a certificate of authority from FERC.

18 C.F.R. § 157.6 – Applications; general requirements, provides in part at (d) Landowner Notification:

> (1) *For all applications* filed under this subpart which include construction of facilities or abandonment of facilities (except for abandonment by sale or transfer where the easement will continue to be used for transportation of natural gas), the *applicant shall* make a good faith effort to *notify all affected landowners* and towns, communities, and local, state and federal governments and agencies involved in the project:
>
> (i) *By certified or first class mail*, sent within 3 business days following the date the Commission issues a notice of the application; or
>
> (ii) By hand, within the same time period; *and*

(iii) By *publishing notice twice of the filing of the application, no later than 14 days after the date that a docket number is assigned to the application, in a daily or weekly newspaper of general circulation in each county* in which the project is located.

(2) *All affected landowners includes owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property:*

(i) *Is directly affected* (*i.e., crossed or used*) by the proposed activity, . . . .

(3) *The notice shall include*:

(i) The *docket number of the filing*;

(ii) The *most recent edition of the Commission's pamphlet* that explains the Commission's certificate process and addresses the basic concerns of landowners. . . . ;

(iii) A description of the applicant and the proposed project, its location (including a general location map), its purpose, and the timing of the project;

(iv) A general description of what the applicant will need from the landowner if the project is approved, and how the landowner may contact the applicant, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;

(v) *A brief summary of what rights the landowner has at the Commission and in*

> *proceedings under the eminent domain rules of the relevant state.* Except: pipelines are not required to include this information in the published newspaper notice. Instead, the newspaper notice should provide the Commission's Internet address and the telephone number for the Commission's Office of External Affairs; and
>
> (vi) *Information on how the landowner can get a copy of the application from the company* or the location(s) where a copy of the application may be found as specified in § 157.10. . . .
>
> *Specifically stating the date by which timely motions to intervene are due,* together with the Commission's information sheet on how to intervene in Commission proceedings. . . . (emphasis supplied)

At no time did Alliance meet the requirement – of timely notice by mail to the Smiths as required. (18 C.F.R. § 157.6(d)) In the case at bar, the Appeals Court crafted purported knowledge of third parties as meeting the constitutional standard of adequate due process notice. While it noted that *mere publication* was not adequate for an old farmer (inferring application of *Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988)), it found that counsel for the Smiths had enough knowledge of Alliance purported intentions that satisfied due process standards. This crafted and inferred knowledge with a third party does not meet FERC's requirement – nor constitutionally mandated direct notice to the landowner of the (a) application

filing and (b) proceedings before FERC. It is that direct notice that is adequate and sufficient to apprize the landowner. (Supra)

Nothing was shown where the Smith's attorney was then the agent of the Smiths for purposes of service of process or otherwise. Mere possible knowledge of Agency action from another proceeding does not meet constitutional correctness or adequacy.

*Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) mandates there be notice reasonably calculated to apprize (the Smiths) of Alliance's FERC Application. *Mullane* goes on to state that the notice needs to be reasonably calculated to afford a person of the *pendency of the matter* and an *opportunity to present objections*. In the case at bar when Alliance got around to giving the Smiths notice, they did so as follows: (a) First delivering papers to the Smiths' son – with only 1 business day before expiration of the time to seek an agency rehearing. (App. pgs. 74, 76 and compare with App. pg. 38); (b) When Alliance got around to actually serving the Smiths, they did so on November 21, 2012. That was past the time for the Smiths to Petition for Reconsideration before FERC. (App. pgs. 78, 80 and compare with App. pg. 38). The statute relied upon by the Court of Appeals to bar the Smiths' challenge of FERC proceedings without notices – is 15 U.S.C. § 717r(a) That law, notes only a 30 day time period for reconsideration of an Agency decision before FERC *as to parties*. Again the Smiths were directly served more than 60 days after the FERC Order was

issued. As FERC's time for reconsideration was jurisdictional and not extendable the Smiths were left without an Agency remedy.

*Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988) informs us that when a *person's identity is known then due process requires that they be given actual notice*. The Smiths' identity was known to Alliance for months before it got around to starting the instant case. *Schroeder v. New York*, 371 U.S. 208 (1962) notes on an eminent domain case, that *even if the landowner had knowledge of the intent to take – that is far short of the notice that is required to be given*. See also *Walker v. Hutchison*, 352 U.S. 112, 115 (1956) – notice must be calculated to *inform parties*. *Mennonite Bd. v. Adams*, 462 U.S. 791, 799 (1983) – personal service or mailed notice is required. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) – the Court said our precedents establish the general rule that "*individuals must receive notice and an opportunity to be heard. . . .*"

In the case at bar the Court of Appeals for the Eighth Circuit changed the tenor of the regulatory rule and constitutional standard decades old. It applied a standard of notice, not envisioned by the Due Process clause or FERC's rule. No authorities are shown where knowledge can be imputed to the landowner of proceedings before FERC by the incomplete and general knowledge of others. Note nothing final was sent to counsel for the Smiths initially of Alliance's intent 'to take' or Agency action. There was only a vague, earlier state-based survey case that

failed to advise what Alliance would subsequently do. See *Alliance Pipeline L.P. v. Smith*, 2013 ND 117, 833 N.W.2d 464.

*Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005) stated that *Mullane* requires as much notice as is practical to inform the condemnee of legal proceedings against his property. In this regard *Mullane* 339 U.S. at 315 said notice that is a mere gesture is not due process. In the case at bar no notice was afforded to the Smiths allowing them any meaningful time, to seek any reasonable hearing or rehearing with FERC. Again it is information to the landowner that is required. Here there is a difference between the Circuits as well as long-standing precedent. See *United States v. Chatham*, 323 F.2d 95 (4th Cir. 1963) absent actual notice of an attempt to condemn is inadequate; *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1989) – landowner was entitled to individual notice. Relying upon *Bragg v. Weaver*, 251 U.S. 57, 58 (1919) is inadequate as that has been effectively repealed by *Mullane* and its progeny. This recognizes that due process does not require a property owner to have actual notice before the property may be taken. What it does require is notice given be sufficient to apprize (*Jones v. Flower*, 547 U.S. 220 (2006) & *Dusenbery v. United States*, 534 U.S. 161 (2002)). In the case at bar that notice was not afforded the Smiths.

It has been noted that FRCP Rule 4 requires more than actual knowledge of the existence of lawsuit in order to confer personal jurisdiction over a

defendant. Unless defendant voluntarily makes an appearance or waives defective service, federal courts have been held to be without jurisdiction to render a personal judgment – if service of process was not made in accordance with applicable federal or state statutory requirements, notwithstanding any actual notice defendant may have of lawsuit. *Sieg v. Karnes*, 693 F.2d 803 (8th Cir. 1982). Why such standard is to be abandoned has not been addressed by this Circuit Court in its mandate. Here there is no reasonable notice given to the Smiths by Alliance as was required by the Rule of the Agency.

The Court of Appeals states that the Order of FERC cannot be attacked by the Smiths. (App. pg. 5 et seq.) It states that Section 19 of the Act requires any challenge to a FERC Order first be brought before FERC within 30 days of the Order's issuance. It notes that the special judicial review provisions are exclusive. In coming to this conclusion the Court of Appeals for the Eighth Circuit, casts to the side language in the 717r. The exclusive review provisions as the act as framed is limited to parties to the proceedings. In this regard the act provides in part that:

> *Any person, State, municipality, or State commission aggrieved by an order* issued by the Commission in a proceeding under this chapter to *which such person*, State, municipality, or State commission *is a party may apply for a rehearing within thirty days* after the issuance of such order. . . .

(b) Review of Commission order

> *Any party to a proceeding under this chapter aggrieved by an order issued by the Commission* in such proceeding *may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located* . . . , within sixty days after the order of the Commission upon the application for rehearing, . . . (emphasis supplied).

Again a careful reading of the act notes *it applies to parties and does not apply to strangers* to those proceedings or those that were not given notice. An examination of the FERC Order reveals that the Smiths are not referenced therein. (App. pg. 38 et seq.)

In this case as has been shown the Smiths were completely ignored by Alliance. They were not before FERC. They couldn't be when they weren't timely brought in as parties and were time barred to join in the proceedings later. As such 717r is not applicable to them. In *Mathews v. Eldridge*, 424 U.S. 319, 333 et seq. (1976) it notes that some form of a hearing is required before an individual is deprived of his property interest. It has been noted that – it be a meaningful opportunity with meaningful time. As *United States v. James Daniel Good Real Property*, 510 U.S. 43, 54-55, notes – the deprivation of a person's interest in private property unquestionably weighs heavily in the due process balance. Here this Court of

Appeals did not 'patrol the border' and allowed carte blanche – unregulated power to the Agency and Alliance without any notice of the taking being afforded to the landowner.

Effectively the Court of Appeals for the Eighth Circuit ruling states that the pipelines can ignore the landowner totally or until the last minute so the owner cannot be heard. How that meshes with the agency rule (18 C.F.R. § 157.6) that requires timely mail notice to landowners is unexplained. Notwithstanding that result hardly meshes with fair or due process.

While no cases directly address a collateral attack by third parties on NGA – FERC agencies decisions – other authorities have noted the principle the Smiths advanced before the Court of Appeals. That being a collateral attack can be made by a person that was not a litigant in the matter. For example *United States v. Utah Construction and Mining*, 384 U.S. 394, 422 (1966) held in part that:

> *When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.* (Emphasis supplied).

Similarly stated, the Supreme Court on considering a case from the Eighth Circuit in *Allen v. McCurry*, 449 U.S. 90, 95 (1980) said that:

> *jurisdiction might be appropriate* when a petitioner's failure to properly seek legal relief resulted *from errors of procedure and form or the government's own misconduct*, it cannot be used to enable a petitioner to rescind his own choice as to which avenue of relief to pursue.

Again the exception to application of the collateral attack rule is whether the *party against whom the earlier decision is asserted . . . had a "full and fair opportunity" to litigate* that issue in the earlier case. *Montana v. United States*, 440 U.S. 147-153 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971). Yet the Court of Appeals for the Eighth Circuit, overlooked the fact that the Smiths were never directly served with timely notice of FERC proceedings and what notice came to them was after the fact. That resulted in a loss of valuable rights. The right to defend and be heard on their property interest before it was subjected to a damage and taking is a cardinal right of a free people.

This is not a hypothetical or theoretical issue. It is one that involves competing uses for land. The Smiths by being ignored – never had a say as to the effect the new use had on its existing property uses. FERCs own regulations at 18 C.F.R. § 380.15 provides in part on siting that the company *must* consider: (a) Avoidance or minimization of effects. The siting, construction, and maintenance of facilities shall be undertaken in a way that avoids or minimizes effects

on scenic, historic, wildlife, and recreational values; (b) Landowner consideration. *The desires of landowners should be taken into account in the planning, locating, clearing, and maintenance of rights-of-way and the construction of facilities on their property*, so long as the result is consistent with applicable requirements of law, including laws relating to land-use and any requirements imposed by the Commission. (Emphasis supplied). North Dakota's regulatory scheme (NDAC 69-06-08-01) on siting also was never considered as no North Dakota regulatory proceedings were had. The Court of Appeals concluded it lacked jurisdiction to consider these issues – as it felt it was precluded from hearing the challenge on account of *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) – (holding that parties are subject to procedures of review outlined by Congress). In doing so it overlooked *Taylor v. Sturgell*, 553 U.S. 880 (2008) – There this Court held that one who is not a party to a suit – generally has not had a full and fair opportunity to litigate his or her claim. That was a case pertaining to an administrative agency ruling. None of the exceptions to the Rule of Bar – has been found or set forth in the instant case. Here the Smiths were never made a party to the administrative proceedings of Alliance. This recognizes that preemption does not eliminate the involvement of private considerations or those of the affected states on where pipelines will be placed. *Dan City Used Car Inc. v. Pelkey*, No. 12-52, ___ U.S. ___ (2013) – preemption has limits and may not be read so broadly that it consumes the whole field. In this regard *ANR*

*Pipeline v. Iowa State Commerce Commission*, 828 F.2d 465 (8th Cir. 1987) permits a consideration of state based laws on routing considerations. So also does FERC's own regulations – 18 C.F.R. § 157.6, 18 C.F.R. § 380.15, and FERC's Order Issuing Certificate Par. 47.

The expediency to market oil and capture gas should not be the touchstone of the day. Rather it should be what the law directed occur – that there be notice to the landowners. With multiple pipelines proposed and on the drawing board this issue has the potential of being repeated. Why the Smiths should bear the burden of Alliance's neglect in failing to be served actually and timely is not explained. Here this Court's mandate changes the obligations of the parties and places a duty on Smith that was not envisioned by the framers of the Constitution.

What is advanced by the Smiths meshes with current standards on due process. See *Dusenbery v. United States*, 534 U.S. 161 (2002) individuals whose property interests are at stake in rem proceedings are entitled to actual notice and an opportunity to be heard.

## CONCLUSION

**It is requested that the Petition be Granted** as the Smiths

(1) are entitled to a jury trial as they invoked a demand for a jury trial timely and properly and

(2) were denied due process of law consistent with *Mullane*, by not being given any notice of Agency proceedings.

Respectively submitted this 21 day of July 2014.

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*Attorneys for Leonard and Ione Smith & 4.36 and 4.675 Acres of Land*

United States Court of Appeals
for the Eighth Circuit

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No. 13-13003

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Alliance Pipeline L.P.

*Plaintiff-Appellee*

v.

4.360 Acres of Land, More or Less, in the S/2 of Section 29, Township 163 North, Range 85 West, Renville County, North Dakota; 4.675 Acres of Land, More or Less, in the SE/4 of Section 30, Township 163 North, Range 85 West, Renville County, North Dakota; Leonard Smith; Ione Smith

*Defendants-Appellants*

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Appeal from United States District Court
for the District of North Dakota – Bismarck

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Submitted: December 17, 2013
Filed: March 24, 2014

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Before WOLLMAN, LOKEN, and KELLY, Circuit Judges.

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WOLLMAN, Circuit Judge.

Leonard and Ione Smith (the Smiths) appeal from a district court[1] order condemning portions of their property for the construction of a natural gas pipeline owned and operated by Alliance Pipeline, L.P. (Alliance), and granting Alliance immediate use and possession of the condemned land. Alliance brought the condemnation action against the Smiths' property after obtaining a certificate from the Federal Energy Regulatory Commission (FERC) authorizing Alliance to condemn land along the route of its proposed pipeline. The Smiths assert that Alliance's certificate is ineffective against them because Alliance failed to provide the Smiths with notice of its application for the certificate and because FERC failed to consider relevant state law in granting the certificate. The Smiths also assert that Alliance's condemnation action runs afoul of state and federal procedural law. We affirm.

## I.

Alliance operates an approximately 2300-mile network of oil and natural gas pipelines in the United States and Canada. In 2011, Alliance began plans to construct a 79-mile-long underground pipeline from a natural gas processing plant near Tioga, North Dakota, to an interconnection with Alliance's main

[1] The Honorable Daniel L. Hovland, United States District Judge for the District of North Dakota.

pipeline near Sherwood, North Dakota. There was at that time (and there continues to be) an oil boom in North Dakota, and occasionally oil prospectors would find reservoirs containing both petroleum and natural gas. The oil companies, having no pipeline capacity to ship the gas to major markets, would burn the gas at the source – a practice called "flaring." Alliance sought to take advantage of this market inefficiency by shipping the otherwise wasted gas east to Chicago.

Anyone who wishes to construct a natural gas pipeline in the United States must first obtain a certificate of public convenience and necessity from FERC, the federal agency responsible for supervising and coordinating the production of energy in the United States. *See* 15 U.S.C. § 717f(c)-(e). Such a certificate also gives the recipient the authority to condemn land along the route of its pipeline under the power of eminent domain. *See* 15 U.S.C. § 717f(h). Alliance applied to FERC for a certificate of public convenience and necessity on January 25, 2012. FERC published notice of Alliance's application in the Federal Register on February 7, 2012.

The Smiths are an elderly couple who own a farm near Sherwood, North Dakota. The route of Alliance's proposed pipeline crossed the Smiths' property. Sometime in February 2012, Alliance representatives visited the Smiths' farm to ask the Smiths if Alliance could purchase an easement across their land. Because the Smiths were in poor health, Alliance representatives met with Guy Solemsaas, the son of Ione and stepson of Leonard, who lives next to the Smiths

and helps tend the Smiths' farm. Solemsaas told Alliance that neither he nor the Smiths were interested in negotiating the sale of an easement across the Smiths' land.

On April 13, 2012, Alliance representatives visited the Smiths again, this time to serve them with a state-court summons and petition to enter and survey their property. Alliance asserted that it needed access to the Smiths' property to complete various field surveys required as part of its FERC application. The state court granted Alliance's petition on May 15, 2012.

On September 20, 2012, FERC granted Alliance a certificate of public convenience and necessity, and on October 16, 2012, Alliance brought a condemnation action against two parcels of land owned by the Smiths. Alliance moved for summary judgment and for immediate use and possession of the Smiths' land. The district court granted both motions. *See* D. Ct. Order of Nov. 26, 2012.

## II.

We review the district court's grant of summary judgment *de novo,* viewing the evidence in the light most favorable to the nonmoving party. *Hill v. Walker,* 737 F.3d 1209, 1216 (8th Cir. 2013). Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In challenging the district court's grant of

summary judgment to Alliance, the Smiths attack both Alliance's FERC certificate and the procedural propriety of Alliance's subsequent condemnation action. We address each challenge in turn.

A.

We begin with the Smiths' challenge to the FERC certificate, which is twofold. First, the Smiths assert that Alliance failed to provide them notice of its FERC application as required by both the Due Process Clause of the Fifth Amendment and FERC's own landowner notice requirements, set forth in 18 C.F.R. § 157.6(d). Second, the Smiths assert that FERC failed to consider state criteria for the siting of pipelines in approving Alliance's application. These criteria are set forth in North Dakota Administrative Code (NDAC) § 69-06-08-01.

We conclude that we lack jurisdiction to consider the Smiths' statutory challenges (in other words, the challenges based on 18 C.F.R. § 157.6(d) and NDAC § 69-06-08-01).

When Congress prescribes specific procedures for the review of an administrative order, courts outside the statutory review framework are precluded from hearing challenges to that order. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 336 (1958). Section 19 of the Natural Gas Act, 15 U.S.C. § 717r(a)-(b), sets forth specific procedures for challenging a FERC order:

> (a) Any person, state, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. . . . No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. . . .
>
> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.

Section 19 thus requires that any challenge to a FERC order first be brought before FERC itself in a petition for rehearing within thirty days of the order's issuance. If, after rehearing, a party aggrieved by the order remains unsatisfied, that party may seek further review by appealing directly to a United States court of appeals within sixty days of FERC's decision on rehearing.

"As the statutory language plainly states, the special judicial review provisions of § 19 are exclusive." *Williams Natural Gas Co. v. City of Oklahoma City,* 890 F.2d 255, 261 (10th Cir. 1989). By collaterally attacking the FERC order in this condemnation proceeding, the Smiths seek to circumvent this exclusive review scheme.

We need not determine whether § 19 would permit us to exercise jurisdiction over the Smiths' claim that Alliance denied them due process of law by failing to provide them with advance notice of its FERC application. Assuming that such notice is constitutionally required, we conclude that the Smiths received notice "reasonably calculated . . . to apprise" them of Alliance's FERC application. *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). In February 2012, Alliance visited the Smiths' farm to negotiate the purchase of an easement across the Smiths' land for the construction of its pipeline. On April 13, 2012, Alliance filed a state court action to enter and survey the Smiths' property for purposes of its FERC application. And on October 16, 2012, Alliance brought this condemnation action against the Smiths' property. All three of these events occurred before the expiration of the thirty-day rehearing period provided by § 19, and all three occurred after or around the time FERC published notice of Alliance's application in the Federal Register. Perhaps the Smiths, as an elderly couple in rural North Dakota, should not be charged with notice of the Federal Register. But their counsel in the state-court

proceeding to enter and survey their land (who also represents the Smiths in this proceeding) can claim no such lack of notice. Taken together, these events gave the Smiths reasonable notice that Alliance was applying to FERC for the right to condemn the Smiths' land.

B.

The Smiths' challenges to Alliance's FERC certificate now aside, we turn next to the Smiths' allegation that Alliance violated several state procedural rules in bringing this condemnation action. The Smiths refer us specifically to North Dakota Century Code (NDCC) § 32-15-06(1), which imposes a duty upon the condemnor to negotiate with a condemnee prior to bringing a condemnation action; NDCC § 31-15-06(2)-(4), which govern appraisals and compensation in a condemnation proceeding; and NDCC § 32-15-22, which provides that a jury shall determine the value of condemned property based on a set of enumerated criteria. As we explain below, Federal Rule of Civil Procedure 71.1 preempts all of these state procedures.

In support of their premise that state law is relevant in this federal condemnation proceeding, the Smiths cite 15 U.S.C. § 717f(h), which provides that "[t]he practice and procedure [in a condemnation proceeding under this section] shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where

the property is situated[.]" According to the Smiths, § 717f(h) requires a party who brings a condemnation action pursuant to a FERC certificate to comply with relevant state procedural law in bringing that action.

As several other courts have observed, however, § 717f(h)'s state-law directive has been superseded. *See N. Border Pipeline Co. v. 64.111 Acres of Land in Will Cnty., Ill.,* 344 F.3d 693, 694 (7th Cir. 2003); *S. Natural Gas Co. v. Land, Cullman Cnty.,* 197 F.3d 1368, 1372-73 (11th Cir. 1999). Congress amended § 717f to include subsection (h) in 1947. *See* Pub. L. No. 80-245, 61 Stat. 459 (1947). At that time, the Federal Rules of Civil Procedure did not provide a specific framework for initiating a condemnation action. In 1951, the Supreme Court adopted Rule 71A (later renumbered 71.1), which "govern[s] proceedings to condemn real and personal property by eminent domain[.]" The advisory committee notes to Rule 71.1 state that the rule "affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain" and "supplants all statutes prescribing a different procedure." And Congress has provided directly that "[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). Thus, Rule 71.1 displaces state procedural law in this condemnation proceeding.

The Smiths assert that the jury requirement set forth in NDCC § 32-15-22 cannot be preempted by federal statute or rule because it vindicates their Seventh Amendment right to a jury trial. But "there

is no constitutional right to a jury in eminent domain proceedings." *United States v. Reynolds,* 397 U.S. 14, 18 (1970). The Smiths also argue that Alliance's invocation of state law in its state-court petition to enter and survey the Smiths' property estops Alliance from arguing in this condemnation action that state law does not apply. But as the Smiths acknowledge, there is no federal law that deals specifically with entries to survey property, so there is nothing to preempt state law in such a proceeding. Accordingly, Alliance's invocation of state law in its state court action for entry to survey does not necessitate the application of state law in this case.

C.

Finally, the Smiths assert that Alliance violated the Natural Gas Act, 15 U.S.C. § 717f(h), by failing to negotiate with them in good faith before bringing this condemnation action. The Natural Gas Act itself does not mention good-faith negotiation. *See id.* Rather, the Act simply states:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way . . . 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.

*Id.* Courts are split as to whether § 717f(h) contains an implied requirement of good-faith negotiation. *Compare USG Pipeline Co. v. 1.74 Acres in Marion Cnty., Tenn.,* 1 F. Supp. 2d 816, 822 (E.D. Tenn. 1998), and *Kern River Ga. Transmission Co. v. Clark County, Nev.,* 757 F. Supp. 1110, 1113 (D. Nev. 1990), with *Maritimes & Ne. Pipeline, L.L.C. v. Decoulos,* 146 F. App'x 495, 498 (1st Cir. 2005) (per curiam). Even if § 717f(h) does contain an implied covenant of good faith, however, Alliance has abided by this covenant. Alliance made the Smiths an offer for an easement across their land and showed the Smiths how it had calculated its offer, and it does not appear that the Smiths ever made Alliance a counteroffer or attempted to negotiate with Alliance, even after Alliance's attempts to follow up with the Smiths. Moreover, the fact that Alliance was able to purchase easements from 90% of the affected landowners suggests that most landowners found Alliance's damages calculations to be reasonable. We conclude, therefore, that Alliance has satisfied any duty to negotiate with the Smiths in good faith.

## III.

Lastly, we address the Smiths' argument that the district court erred in granting Alliance immediate use and possession of their land. We review this

exercise of the district court's inherent equitable powers for abuse of discretion. *See eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391 (2006).

The considerations that attend a motion for immediate use and possession are similar to those that attend a motion for a preliminary injunction. *See N. Border Pipeline Co. v. 86.72 Acres of Land,* 144 F.3d 469, 471-72 (7th Cir. 1998); *see also Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) ("Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.").

The court below determined that Alliance's pipeline would "fill a critical need" for the transportation of natural gas and that a delay in access to the Smiths' land could cost Alliance as much as $540,000 per day. *See* D. Ct. Order of Nov. 26, 2012, at 17. The court also found that Alliance had convincingly demonstrated its right to condemn the Smiths' property and that any prejudice to the Smiths could be offset by the $3,000 per acre that Alliance had agreed to deposit with the clerk of court. The district court thus considered all four of the *Dataphase* factors in issuing its injunction.

The Smiths' attack on the district court's findings focuses primarily on Alliance's right to condemn the

Smiths' property – the "success on the merits" prong of the *Dataphase* analysis. In support of this challenge, the Smiths renew many of their previous arguments. The Smiths allege, for instance, that Alliance did not provide them notice of the FERC proceeding, did not negotiate in good faith before bringing this condemnation action, and failed to comply with state law in initiating the condemnation action. Our conclusions above foreclose these arguments. If there was any doubt that Alliance had the right to condemn the Smiths' property, that doubt has now been resolved.

The remainder of the Smiths' challenges to the district court's finding consist of unsupported allegations that Alliance will not suffer irreparable harm if not granted immediate use and possession of their land. The Smiths assert, for example, that the affidavit of one of Alliance's employees was based on hearsay and that some of the harm to Alliance could have been avoided had Alliance waited until securing regulatory approval to negotiate shipping contracts. None of these allegations are sufficient to support a finding that the district court abused its discretion in holding that Alliance was entitled to immediate use and possession.

IV.

The judgment is affirmed.

**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF NORTH DAKOTA**
**NORTHWESTERN DIVISION**

| | |
|---|---|
| Alliance Pipeline L.P.,<br>Plaintiff,<br>vs.<br>4.360 Acres of Land, more or less, in the S/2 of Section 29 Township 163 North, Range 85 West, Renville County, North Dakota et al.,<br>Defendants. | **ORDER GRANTING PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND IMMEDIATE USE AND POSSESSION**<br>Civil No. 4:12-cv-140<br>(Filed Nov. 26, 2012) |

Before the Court are Alliance Pipeline L.P.'s motions for (1) summary judgment, and (2) immediate use and possession filed on October 16, 2012. *See* Docket No. 3. Alliance Pipeline seeks partial summary judgment as to its right to condemn parcels of property named in this action to construct, operate, and maintain a natural gas pipeline pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq*. Alliance Pipeline also seeks immediate use and possession of the property sought to be condemned in order to construct the natural gas pipeline. The Defendants filed a responsive brief in opposition to the motions on November 7, 2012. *See* Docket No. 8. Alliance Pipeline filed a reply brief on November 20, 2012. *See* Docket No. 17. For the reasons set forth below, the Court (1) grants the motion for partial summary judgment; and (2) grants the motion for immediate use and possession.

## I. BACKGROUND

This is a condemnation action brought by the plaintiff, Alliance Pipeline L.P. Alliance Pipeline is a limited partnership organized and in good standing under the laws of the State of Delaware, and authorized to do business in the State of North Dakota as a foreign limited partnership. *See* Docket No. 5, p. 1. On September 20, 2012, the Federal Energy Regulatory Commission ("FERC") issued an Order granting Alliance Pipeline a certificate of public convenience and necessity, specifically authorizing the construction, operation, and maintenance of an approximately 79-mile-long, 12-inch diameter, underground natural gas pipeline and related facilities and appurtenances known as the Tioga Lateral Project ("Project"). *See* Docket No. 1-2. The Project will provide infrastructure to transport 106 million cubic feet (mmcf) of natural gas and natural gas liquids per day from an existing processing plant operated by Hess Corporation near Tioga, North Dakota, to a location near Sherwood, North Dakota, where it will connect to Alliance Pipeline's existing mainline pipeline. *See* Docket No. 5, pp. 2-3. Alliance Pipeline's mainline pipeline is a 36-inch diameter pipeline that transports natural gas and natural gas liquids from production sources in Canada and North Dakota to delivery points in the Midwestern United States, including Alliance Pipeline's primary delivery point near Joliet, Illinois, located 50 miles southwest of Chicago. *See* Docket No. 5, p. 3.

Alliance Pipeline has engaged in negotiations with the affected landowners along the route of the Tioga Lateral Project to acquire easements to construct and operate the pipeline. *See* Docket No. 5, p. 3. The company has reached agreements with most of the affected property owners to acquire the necessary easements. However, Alliance Pipeline has been unable to secure all of the easements needed through negotiations. The company initiated this action to condemn the remaining easements along the route of the Project. A description of the easements sought in this action was filed with the complaint. *See* Docket Nos. 1-1; 1-3; and 5. The easements sought are all within the route approved by the FERC for the Tioga Lateral Project in the certificate of public convenience and necessity. *See* Docket No. 5, p. 3. Alliance Pipeline contends the Project will require a 50-foot-wide permanent easement for construction, operation, and maintenance, with an additional 25-foot-wide temporary easement for workspace adjacent to either or both sides of the permanent easement to construct the pipeline, and additional temporary easements for workspace for special construction conditions, where necessary, along with the rights of ingress and egress. *See* Docket No. 5, p. 3. Special construction conditions that will require additional temporary workspace include areas where the pipeline will be bored under roadways, cross waterways and wetlands, and lands with particularly steep grades. *See* Docket No. 5, p. 3.

In the order issuing the certificate of public convenience and necessity, the FERC determined that

the Tioga Lateral Project will fill a critical need by facilitating the transportation of liquids-rich gas produced from the Bakken shale formation in western North Dakota and eastern Montana, to major markets in the Chicago area. *See* Docket No. 1-2, p. 5. The Project will provide downstream consumers with increased access to clean burning energy and reduce "flaring" – the burning of natural gas produced as a by-product of oil production at the well sites. *See* Docket No. 5, pp. 4-5. In addition, the Project will provide the unique ability to transport the Bakken formation's liquids-rich natural gas to market, without the need for significant additional above-ground infrastructure in North Dakota, including processing plants. Generally, natural gas liquids – products like propane, butane, and ethane – are separated from the natural gas, which is primarily methane, at processing plants near the source of production and shipped separately. The shortage of processing plants, and the high cost of constructing additional plants, has limited the ability of producers to ship gas out of North Dakota, and contributed to the prevalence of flaring. According to the North Dakota Industrial Commission, nearly one-third of the natural gas produced in North Dakota is flared. The Tioga Lateral Project and Alliance Pipeline's mainline pipeline have the ability to transport the liquids entraining in the gas stream to an existing processing plant near Chicago, where the gas and liquids can be effectively separated and delivered to market. *See* Docket No. 5, pp. 3-5.

Producers and shippers of natural gas and natural gas liquids in the Williston Basin have expressed support for the Tioga Lateral Project. *See* Docket No. 5, p. 4. Of the total shipping capacity of 106 mmcf per day, Alliance Pipeline has obtained a "firm commitment" from Hess Corporation to ship approximately 61.5 mmcf per day for ten years. *See* Docket Nos. 5, p. 4; 5-2. EOG Resources, Inc., and its subsidiary, Pecan Pipeline (North Dakota), Inc., have also publicly declared support for the Project. *See* Docket No. 5-2, p. 5. The Project will enable these producers and shippers to increase their shipping capacity, potentially reducing the need for flaring, and providing a method for shipping the Williston Basin's liquids-rich gas to market without constructing additional processing plants. *See* Docket No. 5, pp. 4-5.

Based upon an expected July 1, 2013, in-service date, Alliance Pipeline and its contractors have made significant investments in preparation for construction of the Tioga Lateral Project, including commitments for the purchase of pipe for the Project and other items requiring long lead-times. Similarly, Hess Corporation and other potential shippers have developed their drilling and marketing plans in reliance on the Project. *See* Docket No. 5, p. 6. Delays in completion of the Project would negatively affect those plans and place the significant investments made by Alliance Pipeline and its contractors and shippers at risk.

Delays in the completion of the Project could also negatively impact post-construction restoration of the affected properties, and increase the cost of the Tioga

Lateral Project and the time required to complete construction. *See* Docket No. 5, pp. 7-8. Construction of the Project will be completed in several phases. The first phase will involve stripping and stockpiling the topsoil from the trench area and, depending on the nature of the property, additional areas within the easements. Alliance has committed to completing topsoil removal before the ground freezes, but any delay in acquiring easements could make that impossible. *See* Docket No. 5, p. 7. If Alliance Pipeline is unable to strip and stockpile all the topsoil before it freezes, it will add significant cost to the construction process and make it more difficult to restore the soil to its preconstruction condition in a timely fashion.

Pipeline construction is a continuous, mass production procedure, similar to a moving assembly line. *See* Docket No. 5, p. 7. Within each construction crew are smaller specialized crews, such as the staking crew, grading crew, ditching crew, welding crew, and so forth. To maximize the efficiency of the construction process, these specialized crews need to be able to follow each other down the length of the easements, performing each construction operation in a sequential manner. For this reason, access to the entire route of the Project is required for the construction process to proceed as efficiently and expeditiously as possible. If Alliance Pipeline does not have access to the entire route of the Project, it must either have crews "stand-by" (i.e., stop work and wait) until the necessary easement can be acquired, or "move-around" the parcel where Alliance Pipeline has not

yet acquired the necessary easement. *See* Docket No. 5, pp. 7-8. Either approach would significantly increase the costs of construction and would significantly delay completion of the Project.

Alliance Pipeline's contractor for the Tioga Lateral Project costs approximately $500,000 per day. *See* Docket No. 5, p. 6. Alliance Pipeline has also contracted with a vendor near Tioga to provide housing for the construction crews for an additional $280,000 per week, or $40,000 per day. Accordingly, each day that the construction crews must stand-by or move equipment around a particular tract of land, as much as $540,000 will be added to the total cost of the Project.

In order to complete construction in a timely and efficient manner, Alliance Pipeline contends it needs to have access to the entire route of the Tioga Lateral Project as soon as possible and before the ground freezes. *See* Docket No. 5, p. 8. The company contends that delays in construction and completion of the Project caused by the lack of access will not only significantly and irreparably harm Alliance Pipeline, but will also harm natural gas producers, project suppliers, consumers of the natural gas transported, and other landowners along the Project route. According to declarations that accompany Alliance Pipeline's motions, the impact to the lands in question will be no greater if immediate access is granted for purposes of constructing the Project, and the impacts of construction may be less, particularly considering that

immediate access should avoid the need for stripping topsoil after freeze up. *See* Docket No. 5.

On October 16, 2012, Alliance Pipeline filed motions for (1) partial summary judgment as to its right to condemn easements along the route of the Tioga Lateral Project pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.*; and (2) immediate use and possession of the condemned property to construct and operate the natural gas pipeline. *See* Docket Nos. 3. The Defendants filed a responsive brief in opposition to the motions on November 7, 2012. *See* Docket No. 8. Alliance Pipeline filed a reply brief on November 20, 2012. *See* Docket No. 17.

## II. LEGAL DISCUSSION

### A. PARTIAL SUMMARY JUDGMENT

Alliance Pipeline seeks partial summary judgment as to its right to condemn certain parcels of property and acquire easements to construct, operate, and maintain the Tioga Lateral Pipeline pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et. seq.,* and the certificate of public convenience and Necessity.

In 1977, the United States Congress created FERC, and delegated to FERC regulatory authority over the interstate transportation and sale of natural gas, as well as natural gas companies. 42 U.S.C. § 7171. Congress has determined "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public

interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a). Pursuant to the Natural Gas Act, a natural gas company may condemn private land in order to construct and operate a natural gas pipeline. 15 U.S.C. § 717f(h) provides as follows:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount

> claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C.A. § 717f(h) (emphasis in original). 15 U.S.C. § 717f(h) permits a natural gas company to condemn property if: (1) the company is a "holder of a certificate of public convenience and necessity"; and (2) the company is unable to agree with property owners as to "the compensation to be paid for" necessary easements to "construct, operate, and maintain a pipe line." Alliance Pipeline contends it has authority to condemn the properties named in this action based upon 15 U.S.C. § 717f(h), as a holder of a certificate of public convenience and necessity.

Alliance Pipeline filed the certificate of public convenience and necessity issued by FERC along with the complaint. *See* Docket No. 1-2. The certificate authorizes the construction, operation, and maintenance of the Tioga Lateral Project. *See* Docket No. 1-2, pp. 13-14. Many of the necessary easements to construct and operate the pipeline have been acquired through settlement agreements with affected property owners, but Alliance Pipeline was unable to reach agreements with property owners to acquire all of the necessary easements. *See* Docket No. 5, p. 3. The Court finds that Alliance Pipeline clearly has authority to condemn property to acquire easements along the Tioga Lateral Project route pursuant to 15 U.S.C. § 717f(h), as FERC issued the certificate of public convenience and necessity for the Project and, despite efforts to negotiate agreements with affected property owners,

Alliance Pipeline has been unable to acquire the easements by contract.

The Defendants contend that Alliance Pipeline does not have authority to condemn their property essentially because: (1) Alliance Pipeline has not complied with the rules of federal procedure; (2) Alliance Pipeline failed to comply with state law; (3) Alliance Pipeline presented an inadequate offer of damages to purchase the necessary easements; and (4) the FERC Certificate of Public Convenience and Necessity was improvidently issued. The Court will address each objection.

### 1) COMPLIANCE WITH THE FEDERAL RULES OF CIVIL PROCEDURE

The Defendants argue that Alliance Pipeline failed to comply with the Federal Rules of Civil Procedure by not adequately describing the easement it seeks to condemn. A plaintiff in a condemnation action must prepare a notice of condemnation and deliver it to the clerk of court. Fed.R.Civ.P. 71.1(d)(1). The notice of condemnation must include a description of "the interest to be taken," among other requirements. Fed.R.Civ.P. 71.1(d)(2). After filing with the clerk, the notice of condemnation must be personally served on each defendant whose address is known and who resides in the United States. Fed.R.Civ.P. 71.1(d)(3). The record reveals that Alliance Pipeline delivered a notice of condemnation to the Clerk and personally served the Defendants with the notice of

condemnation, the complaint, the exhibits attached to the complaint, and the FERC order issuing the certificate of public convenience and necessity. *See* Docket Nos. 2, 21, and 22. The notice of condemnation provides in relevant part as follows:

> 1. You are hereby notified that a complaint in condemnation has been filed in the United States District Court for the District of North Dakota, Northwestern Division, to take permanent easements, temporary easements and access rights required in order to construct, operate and maintain an approximately 79-mile-long, 12-inch diameter underground natural gas pipeline known as the Tioga Lateral Project.
>
> 2. The subject tracts and the easements to be taken are set forth in Exhibit A to the Condemnation Complaint, attached hereto and incorporated herein. You have a claim or interest in one or more of the subject tracts.

*See* Docket No. 2. Exhibit A, which was filed along with the complaint and served on the Defendants, provides a detailed description of the land sought to be condemned and also the nature of the easements sought. *See* Docket No. 1-2. Exhibit A plainly sets forth the permanent and temporary easements sought by Alliance Pipeline to construct, operate, and maintain the Tioga Lateral Project. *See* Docket No. 1-2, pp. 2-4. The record before the Court clearly refutes the Defendants' claim that they did not receive notice of the nature of the easements sought by Alliance Pipeline. The Court finds that Alliance Pipeline

adequately described "the interest to be taken" as required by Rule 71.1(d)(2) of the Federal Rules of Civil Procedure.

**2) COMPLIANCE WITH STATE LAW**

The Defendants contend that Alliance Pipeline must comply with an assortment of state laws. The Defendants' argument is based on language in 15 U.S.C. § 717f(h), which provides in relevant part that "[t]he practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated[.]" 15 U.S.C. 717f(h). Although this provision appears to require Alliance Pipeline to conform with state practice and procedure, courts have uniformly held that Rule 71.1 of the Federal Rules of Civil Procedure establishes the controlling procedure for condemnation actions in federal district court, superceding contrary federal law.

Rule 71.1(a) provides as follows:

> **(a) Applicability of Other Rules.** These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

Fed.R.Civ.P. 71.1(a). The Advisory Committee Notes provide that Rule 71.1 "affords a uniform procedure for all cases of condemnation invoking the national

power of eminent domain . . . and supplants all statutes prescribing a different procedure." Courts have consistently interpreted Rule 71.1 to supercede contrary procedure in federal statutes, including 15 U.S.C. § 717f(h).

The United States Supreme Court has noted in dicta that Rule 71.1 supercedes contrary federal law. The Supreme Court explained "[t]he adoption in 1951 of Rule 71A [the predecessor of Rule 71.1] capped an effort to establish a uniform set of procedures governing all federal condemnation actions." *Kirby Forest Indus. v. United States,* 467 U.S. 1, 4 n.2 (1984). Interpreting a federal statute similar to the Natural Gas Act, which authorized condemnation only in conformity with state practice and procedure, the Supreme Court stated the conformity requirement was "clearly repealed" by Rule 71.1. *United States v. 93.970 Acres of Land,* 360 U.S. 328, 333 n.7 (1959).

United States Courts of Appeals have similarly held that Rule 71.1 supercedes the provision in 15 U.S.C. § 717f(h) which requires conformity with state practice and procedure. *N. Border Pipeline Co. v. 64.111 Acres of Land in Will Cnty., Ill.,* 344 F.3d 693, 694 (7th Cir. 2003); *S. Natural Gas Co. v. Land, Cullman Cnty.,* 197 F.3d 1368, 1372-75 (11th Cir. 1999). The Seventh Circuit Court of Appeals explained:

> The Rules of Civil Procedure, which are established by the Supreme Court under the Rules Enabling Act, cannot "repeal" any

> statute; the Constitution does not give the Judicial Branch any power to repeal laws enacted by the Legislative Branch. But Congress may itself decide that procedural rules in statutes should be treated as fallbacks, to apply only when rules are silent. And it has done just this, providing in what has come to be called the supersession clause of the Rules Enabling Act that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). Any doubts about the force and validity of the supersession clause were laid to rest in *Henderson v. United States,* 517 U.S. 654, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996). Thus Rule 71A(h) [which is now Rule 71.1] prevails: its nationally uniform approach conflicts with the conformity-to-state-practice approach of [15 U.S.C.] § 717f(h), and under § 2072(b) the statutory rule "shall be of no further force or effect."

*N. Border Pipeline Co.,* 344 F.3d at 694; *see also S. Natural Gas Co.,* 197 F.3d at 1372-75 (finding Rule 71.1 supersedes the Natural Gas Act's requirement to follow state practice and procedure) *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cnty.,* 550 F.3d 770, 776 n.7 (9th Cir. 2008) ("While Rule 71.1 cannot provide additional substantive rights under the [Natural Gas Act], it seems clear that it does supercede that part of the § 717f(h) which requires the district court to 'conform as nearly as may be with the practice and procedure in similar action or proceedings in the courts of the State where

the property is situated.' "). The Court finds that Rule 71.1 of the Federal Rules of Civil Procedure sets forth the applicable procedure for this condemnation action, and supercedes the contrary provisions in 15 U.S.C. § 717f(h) requiring conformity, with state practice and procedure. Therefore, the Defendants' arguments regarding Alliance Pipeline's non-compliance with North Dakota law are rejected.

### 3) INADEQUATE OFFER OF DAMAGES

The Defendants next contend that Alliance Pipeline presented an inadequate offer of damages while negotiating to purchase easements to construct the pipeline. The issue of damages is not a material issue of fact that would prevent the Court from determining Alliance Pipeline's partial motion for summary judgment, which concerns the company's right to condemn the Defendants' property under the Natural Gas Act, 15 U.S.C. § 717f(h). The Natural Gas Act permits a natural gas company to condemn property, in part, if it is unable to agree with property owners as to "the compensation to be paid for" necessary easements to "construct, operate, and maintain a pipe line." 15 U.S.C. § 717f(h). In other words, Alliance Pipeline would not have the right to seek condemnation of the Defendants' property under 15 U.S.C. § 717f(h) *unless* the parties disagreed about the proper amount of damages. The Court finds that the issue of damages is not a material issue of fact that would prevent the Court from determining, as a matter of law, whether Alliance Pipeline has a right to condemn the

Defendants' property. Regardless of the disposition of Alliance Pipeline's motion for partial summary judgment, damages will remain an issue for trial.

**4) COLLATERAL ATTACKS ON FERC'S ORDER**

The Defendants also contend that FERC improvidently issued the certificate of public convenience and necessity authorizing the Tioga Lateral Project. A review of a certificate of public convenience and necessity is limited in a condemnation action under 15 U.S.C. § 717f(h). *Williams Natural Gas Co. v. City of Okla. City,* 890 F.2d 255, 260-64 (10th Cir. 1989), cert. denied, 497 U.S. 1003 (1990). "[A] challenger may not collaterally attack the validity of a prior FERC order" in federal district court. *Id*. at 262 (original citation omitted). Rather, challenges attacking the propriety of a certificate of public convenience and necessity must first be brought to FERC upon an application for rehearing. 15 U.S.C. § 717r(a). Thereafter, appeals may be brought to a United States Court of Appeals. 15 U.S.C. § 717r(b). In a condemnation action, a district court lacks jurisdiction to hear collateral attacks on certificates issued by FERC. *See Williams Natural-Gas Co.,* 890 F.2d at 262 ("Judicial review . . . is exclusive in the courts of appeals once the FERC certificate issues."); *Transcon. Gas Pipe Line Corp. v. 118 Acres of Land,* 745 F.Supp. 366, 372 (E.D. La. 1990) (stating "review of FERC orders are to be made only to United States Circuit Courts of Appeal"). A district court's review in a condemnation

action is limited to determining whether (1) the certificate of public convenience and necessity is "facially valid"; and (2) the property sought to be condemned is within the scope of the certificate. *USG Pipeline Co. v. 1.74 Acres in Marion Cnty., Tenn.,* 1 F. Supp. 2d 816, 821 (E.D. Tenn. 1998) (citing *Williams Natural Gas Co.,* 890 F.2d at 262; *Tenn. Gas Pipeline Co. v. 104 Acres in Providence Cnty.,* 749 F.Supp. 427, 430 (D.R.I. 1990)).

The Defendants do not contend the certificate of public convenience and necessity held by Alliance Pipeline is invalid on its face, or that their property falls outside the scope of FERC's order approving the Tioga Lateral Project. The Defendants concede "that some form of a FERC certificate is held by Alliance," but contend the FERC's order was improvidently issued for various reasons. *See* Docket No. 8, p. 4. The Court finds that Congress conferred to the United States Courts of Appeals the exclusive jurisdiction to review FERC's orders under the Natural Gas Act. Thus, the Court finds that it lacks jurisdiction to address the Defendants' collateral attacks on the certificate of public convenience and necessity issued by FERC.

The Court has carefully reviewed the entire record, the parties' briefs, and the relevant case law. The Court finds that Alliance Pipeline has demonstrated that it has authority to exercise the right of eminent domain pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h), and that the certificate of public convenience and necessity authorizing the Tioga

Lateral Project. The Court grants Alliance Pipeline's partial motion for summary judgment, and issues an order of condemnation for the properties named in this action.

## B. IMMEDIATE USE AND POSSESSION

Alliance Pipeline also moves for immediate use and possession of the condemned property along the route of the Tioga Lateral Project. The motion is made on the grounds that Alliance Pipeline will suffer irreparable harm if it does not acquire immediate access to the entire route of the pipeline. Alliance Pipeline contends the Court has inherent equitable power to grant the motion.

This Court has granted immediate use and possession of property in similar cases based on its inherent equitable powers. *N. Border Pipeline Co. v. 127.79 Acres of Land,* 520 F. Supp. 170 (D.N.D. 1981); *Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across.152 Acres of Land,* No. A1-03-66, 2003 WL 21524816 (D.N.D. June 3, 2003). It is well-established that district courts in a number of jurisdictions have similarly granted immediate possession to natural gas companies that have demonstrated the right to condemn property under the Natural Gas Act, as Alliance Pipeline has done in this case. *See Nw. Pipeline Corp. v. The 20' by 1,430' Pipeline Right of Way,* 197 F. Supp. 2d 1241, 1245 (E.D. Wash. 2002) ("where there is no dispute about the validity of [the gas company's] actual right to the easement," denying

authority to grant immediate possession "would produce an absurd result"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,* 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002) (immediate possession proper when condemnation order has been entered and preliminary injunction standards have been satisfied); *N. Border Pipeline Co. v. 64.111 Acres of Land,* 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000) (same); *Tenn. Gas Pipeline Co. v. New England Power, Inc.,* 6 F. Supp. 2d 102, 104 (D.Mass.1998) (holding district court has inherent equitable power to grant immediate entry and possession where such relief is essential to the pipeline construction schedule); *USG Pipeline Co.,* 1 F. Supp. 2d at 825-26 (granting immediate possession where pipeline company would suffer substantial financial detriment if construction were delayed); *Kern River Gas Transmission Co. v. Clark Cnty,* 757 F.Supp. 1110, 1117 (D.Nev. 1990) (granting motion for immediate occupancy); *Humphries v. Williams Natural Gas Co.,* 48 F. Supp. 2d 1276, 1280 (D.Kan. 1999) ("[I]t is apparently well settled that the district court does have the equitable power to grant immediate entry and possession [under the NGA]."); *Rivers Electric Co., Inc. v. 4.6 Acres of Land,* 731 F.Supp. 83, 87 (N.D. N.Y. 1990) (granting immediate possession under a statute similar to the NGA).

In the order issuing the certificate of public convenience and necessity, FERC determined that the Tioga Lateral Project will fill a critical need by facilitating the transportation of liquids-rich gas produced from the Bakken shale formation in western North

Dakota and eastern Montana, to major markets in the Chicago area. *See* Docket No. 1-2, p. 5. As outlined above, the Project will provide downstream consumers with increased access to clean burning energy. *See* Docket No. 5, pp. 4-5. The Project will provide significant benefits to producers and shippers of natural gas from the Bakken by increasing shipping capacity, potentially reducing the need for flaring, and providing a method for shipping the Williston Basin's liquids-rich gas to a market without constructing additional processing plants. *See* Docket No. 5, pp. 4-5. Delays in the completion of the Project could negatively impact post-construction restoration of the affected properties, and increase the cost and the time required to complete construction. *See* Docket No. 5, pp. 7-8. Alliance has committed to completing topsoil removal before the ground freezes. *See* Docket No. 5, p. 7. However, if Alliance Pipeline is unable to strip and stockpile all the topsoil before it freezes, it will add cost to the construction process and make it more difficult to restore the soil to its preconstruction condition in a timely fashion.

The record before the Court reveals that access to the entire route of the Project is required for the construction process to proceed in an efficient and expeditious manner. If Alliance Pipeline does not have access to the entire route of the Project, it must either have crews "stand-by" until the necessary easement can be acquired, or "move-around" the parcel where Alliance Pipeline has not yet acquired an easement. *See* Docket No. 5, pp. 7-8. Either approach would

significantly increase costs and delay completion of the Project. Each day that the construction crews must stand-by or move equipment around a particular tract of land will add as much as $540,000 to the total cost of the Project.

The Court has carefully considered the evidence submitted by the parties. As determined above, Alliance Pipeline has established that it has a right to condemn the property in question pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h). The record before the Court reveals that Alliance Pipeline has met the equitable considerations needed to warrant immediate use and possession of the land at issue. The Court expressly finds that there is urgency and a need on behalf of Alliance Pipeline for the immediate possession. Alliance Pipeline has demonstrated that it would suffer immediate and irreparable harm if construction crews do not have immediate access to the entire route of the Tioga Lateral Project. The Court further finds that it would be in the best interests of the public to grant immediate possession of the properties to Alliance Pipeline and that the public interest will be prejudiced by any delay in granting such possession. In addition, Alliance Pipeline has committed to deposit the sum of $3,000 per acre of land to be condemned with the Clerk as a condition of immediate use and possession.

The Court concludes that Alliance Pipeline has clearly demonstrated that the necessary equitable considerations weigh in favor of granting immediate

use and possession of the land in question. As such, the Court issues the following **ORDER**:

> (1) That the plaintiff, Alliance Pipeline L.P., shall have immediate possession of the specific tracts of land identified in the condemnation complaint for the purpose of constructing a natural gas pipeline transportation system, i.e., the Tioga Lateral Project;
>
> (2) That Alliance Pipeline L.P. shall take immediate possession of the land at issue as identified in the condemnation complaint upon depositing with the Clerk of the District Court the sum of $3,000 per acre of land, in cash or surety bond as a condition of immediate use and possession;
>
> (3) That Alliance Pipeline L.P. shall have such authority under this Court's award of immediate possession as it would have if the landowners had granted an easement and right-of-way.

The Court is very cognizant of the interests of the landowners and their need for assurances that the land will be reasonably restored to its original contour and condition, just as it was before the commencement of the pipeline construction project. Alliance Pipeline has made repeated assurances that the land will be reasonably restored. Based upon such assurances, the Court further finds that an order granting Alliance Pipeline immediate possession is warranted and appropriate under the circumstances.

## III. CONCLUSION

For the reasons set forth above, the Court **GRANTS** Alliance Pipeline's motion for partial summary judgment (Docket No. 3); and **GRANTS** Alliance Pipeline's motion for immediate use and possession (Docket No. 3).

**IT IS SO ORDERED,**

Dated this 26th day of November, 2012.

*/s/ Daniel L. Hovland*
Daniel L. Hovland, District Judge
United States District Court

**Exhibit B**
**Alliance Pipeline L.P. v. 4.360 Acres of Land, More or Less, et al.**

140 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, Cheryl A. LaFleur, and Tony T. Clark.

Alliance Pipeline L.P. Docket No. CP12-50-000

ORDER ISSUING CERTIFICATE

(Issued September 20, 2012)

1. On January 25, 2012, Alliance Pipeline L.P. (Alliance) filed an application under section 7(c) of the Natural Gas Act (NGA) for a certificate of public convenience and necessity authorizing it to construct and operate pipeline and appurtenant facilities in North Dakota (Tioga Lateral Project). Alliance states that the proposed pipeline is designed to connect natural gas production from the Bakken shale formation in Eastern Montana and Western North Dakota to Alliance's mainline. Alliance also requests a waiver of the hydrocarbon dewpoint specifications in its tariff and approval of a non-conforming firm transportation agreement to provide transportation service through the proposed facilities. The Commission will grant the requested authorization and waiver, subject to conditions, as discussed below.

## I. Background and Proposal

2. Alliance is a natural gas company that transports gas in interstate commerce subject to the Commission's jurisdiction. Alliance's pipeline system is approximately 886 miles long, extending from the United States-Canada border in Renville County, North Dakota southeast through North Dakota, Minnesota, Iowa, and Illinois. The pipeline terminates at the Aux Sable processing plant in Grundy County, Illinois, near Chicago.[1]

3. Alliance proposes to construct and operate approximately 79.3 miles of 12-inch diameter pipeline and appurtenant facilities, extending from a gas processing facility near Tioga, North Dakota east through Williams, Montrail, Burke, and Renville Counties, North Dakota to an interconnection with Alliance's mainline near Sherwood, North Dakota. Alliance also proposes to construct and operate: (1) a 6,000 horsepower compressor station, containing three electric-driven compressors, and a meter station near Tioga; and (2) a pressure regulating station at the pipeline's initiation point. The proposed facilities are designed to have a capacity of 106,500 Mcf per day. Alliance estimates that the proposed facilities will cost approximately $141 million.

4. Alliance proposes an incremental firm monthly reservation recourse rate of $20.1533 per dekatherm

[1] Aux Sable Liquid Products LP, an affiliate of Alliance, processes gas at the Aux Sable processing plant.

(Dth), with a usage charge of $0.0594 per Dth and an availability of service charge of $0.6626 per Dth, and an interruptible rate of $0.7220 per Dth. Alliance does not seek approval to roll the costs of the project into its existing rates, but reserves the right to do so in the future as part of a general rate case.

5. On June 22, 2011, Alliance entered into a precedent agreement with Hess Corporation (Hess) to transport up to 61,500 Mcf per day for 10 years at negotiated rates. Subsequent to the Hess agreement, Alliance states that it held an open season from September 28 to October 27, 2011 but did not receive any bids for capacity. Alliance states that it continues to pursue additional commitments for firm capacity on the Tioga Lateral.

6. Alliance requests a waiver of the hydrocarbon dewpoint specifications in section 2.1 of the General Terms and Conditions (GT&C) of its tariff in order to transport natural gas from the Bakken shale region. In its application, Alliance filed a nonconforming firm transportation service agreement granting a hydrocarbon dewpoint waiver to Hess.[2] Alliance states that

[2] Revised section 2.3(b) of Alliance's tariff provides that Alliance will waive the hydrocarbon dewpoint specification in section 2.1(b) on a non-discriminatory, first-come first-served basis. Pursuant to section 2.3(b), Alliance will grant waivers if operating conditions permit the blending of gas subject to any waivers with other receipts in a manner which allows Alliance to maintain prudent and reliable operations. If Alliance grants more than one waiver under section 2.3(b), it will determine the priority on a first-come, first-served basis.

it offered waivers to similarly-situated potential shippers in the open season and will grant any additional waives on a first-come, first-served basis if operational conditions permit. Alliance states that, since gas quality specification waivers are available to all shippers on a first-come, first-served basis under the tariff, its proposal does not present a risk of undue discrimination.

7. Alliance states that the proposed Tioga Lateral Project responds to the demand for natural gas transportation capacity from the Bakken shale formation in Eastern Montana and Western North Dakota to the Chicago, Illinois market area. Although the Bakken formation is primarily a crude oil play, Alliance states that natural gas is produced in association with oil. Alliance asserts that some of the natural gas is currently being flared because the Bakken shale region lacks adequate natural gas processing infrastructure because natural gas from the Bakken formation generally requires additional processing before it can be delivered for customer end-use. Alliance states that, under current operating conditions, it can receive Bakken shale gas in North Dakota because it can blend that gas with gas received from upstream supply sources without adverse operational impact to its system. Alliance contends that the proposals herein would enable it to transport Bakken natural gas to the Aux Sable processing plant, thus allowing producers access to the Chicago market.

## II. Interventions, Comments, and Answers

8. Notice of Alliance's application was published in the Federal Register on February 7, 2012.[3] Hess and Constellation Energy Commodities Group, Inc. filed timely, unopposed motions to intervene.[4] In addition, EOG Resources, Inc. and Pecan Pipeline (North Dakota), Inc. (EOG/Pecan) and BP America Production Company and BP Energy Company filed timely joint, unopposed motions to intervenes.[5] We also received numerous comments from individuals about the Tioga Lateral Project. The issues raised in these comments will be discussed below.

9. ConocoPhillips Company (ConocoPhillips), the Dakota Resource Council, and a group of landowners whose property would be crossed by the proposed pipeline[6] filed late motions to intervene. These movants have demonstrated an interest in this proceeding. The untimely motions to intervene will not delay, disrupt, or unfairly prejudice any parties to this

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[3] 77 Fed. Reg. 7,572.

[4] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(d) (2012).

[5] Id.

[6] These landowners are: Boyd and Connie Anderson, Bruce Ankenbauer, Brian Ankenbauer, Dennis Bauer, Douglas Beard, Jacquelynn Blikre, Frederick Cart, Elroy Hanson, Anita Jacobson, Allan Jacobson, Tilmer Jacobson, Marlin and Pauline Jacobson, Joan Jensen, Dennis Johnson, Tim Knutson, Mary Ann Matson, Jon Sagness, Ron Sagness, Marian Morris, and Natalie Wade.

proceeding. Thus, we will grant the late motions to intervene pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure.[7]

## III. Discussion

10. Since the proposed facilities will be used to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

### A. Application of the Certificate Policy Statement

11. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[8] The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explained that in deciding whether to authorize the construction of major new pipeline facilities, we balance the public benefits against the potential adverse consequences. Our goal is to give

[7] *See* 18 C.F.R. § 385.214(d) (2012).

[8] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

12. Under this policy, the threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, we will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will we proceed to complete the environmental analysis where other interests are considered.

13. As stated, the threshold requirement is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. Since Alliance proposes to charge incremental recourse rates for the proposed service,

the proposal will not result in subsidization by Alliance's existing customers. If Alliance seeks to roll the costs associated with the project into its rates in the future, it must demonstrate that rolling the costs into its rates will not result in any subsidization by existing customers.

14. The proposed project will have no adverse impact on Alliance's existing customers. In addition, existing pipelines in the region do not have the capacity to transport Bakken shale gas unless they construct new aboveground facilities, including gas processing facilities to remove liquids from the gas prior to transportation. Further, no pipeline company in the market area has protested the application. Thus, we find that there will be no adverse impact on other pipelines or their captive customers.

15. The proposed facilities have been designed to minimize the impact on landowners and the environment. We find that Alliance has taken appropriate steps to minimize impacts on landowners and surrounding communities.

16. The Tioga Lateral Project will allow Alliance to transport liquids rich gas produced from the Bakken shale formation to the Chicago market area. Without the proposed facilities, the gas could be flared or vented due to a lack of infrastructure in the Bakken region. Based on the benefits the project will provide and the minimal adverse impacts on Alliance's existing customers, other pipelines and their captive customers, and landowners and surrounding

communities, we find that, consistent with the Certificate Policy Statement and section 7(c) of the Natural Gas Act, the public convenience and necessity requires approval of Alliance's proposal, subject to the conditions set forth herein.

### B. Initial Recourse Rates

17. Alliance proposes to provide service on the proposed facilities under Rate Schedules FT-1 and IT-1 and to charge incremental firm and interruptible recourse rates for service on the lateral. Alliance proposes that Rate Schedule FT-1 shippers designating the Tioga receipt point will be assessed a maximum incremental reservation charge of $20.1533 per Dth and a usage charge of $0.0594 per Dth. Aliance also proposes a maximum Tioga Lateral Incremental Usage Charge for Interruptible Transportation of $0.7220 per Dth. The incremental firm recourse rate is based on the first-year cost of service of $28,202,697 associated with the construction of the project facilities. The rate is based on a straight fixed-variable rate design and reflects billing determinants based on the full 106,500 Mcf per day capacity of the expansion. A projected level of costs associated with the electric driven compressors is included in the cost of service and will be recovered from project shippers in the usage charge.

18. We have reviewed Alliance's proposed cost of service, allocation, and rate design used to develop the incremental rates and find that, with the exception of

the rate of return on equity (ROE), they reasonably reflect current Commission policy. Alliance proposes to use a 14 percent ROE in calculating its cost of service, stating that is the rate of return the Commission has traditionally approved for new greenfield pipeline projects and that is the rate of return it used in establishing Alliance's own initial recourse rates when the Alliance system went into service in December 2000.[9] Alliance states that it has not filed an NGA section 4 rate case since its in-service date.

19. The Commission has generally approved higher rates of return on equity for greenfield projects to reflect the higher risks associated with such a project.[10] With respect to developing incremental rates for expansions of existing pipeline systems, our general policy is to use the rate of return components approved in the pipeline's last NGA section 4 general rate proceeding.[11]

20. Although Alliance has not filed a section 4 rate case since it went into service, we do not believe it is appropriate to use the 14 percent ROE used in Alliance's initial certificate application in determining the cost of service for the Tioga Lateral expansion, because it would not reflect the lower risks associated with expanding an existing pipeline system. Since the

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[9] *See* Alliance's July 11, 2012 data response.

[10] *See, e.g., Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224 (2009).

[11] *See, e.g., Texas Eastern Transmission, LP,* 129 FERC ¶ 61,151 (2009).

lateral pipeline Alliance is proposing has more in common with the incremental expansions constructed by existing pipelines than with greenfield pipeline projects the Commission believes it is more appropriate to use the most recent ROE approved in a litigated section 4 rate case as the ROE for designing the incremental rates for this project. This is the approach the Commission adopted in determining the ROE to be used in developing initial rates for existing facilities being acquired by a new interstate pipeline and the Commission believes it is appropriate to use in these circumstances.[12] The last litigated ROE applicable for this situation is 12.99 percent.[13] Thus, we will require Alliance to revise its proposed initial incremental recourse rates to reflect this revised rate of return on equity.

21. Alliance included the income tax gross-up on the equity component of Allowance for Funds Used During Construction (AFUDC) of $2,650,369 as part of the AFUDC amount and included it as a part of gas plant in service for rate purposes. In response to a data request, Alliance states that it intends to reflect the income tax gross-up for the equity component of AFUDC for accounting purposes in the proper deferred income tax account and as a regulatory asset

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[12] *Southern Natural Gas Company, L.L.C.; High Point Gas Transmission, LLC*, 139 FERC ¶ 61,237 (2012).

[13] *Portland Natural Gas Transmission System*, 134 FERC ¶ 61,129 (2011).

in accordance with Commission accounting requirements.

22. This classification is not consistent with our accounting instructions, which require that the deferred tax liability for the equity component of AFUDC be recorded in Account 282, Accumulated Deferred Income Taxes – Other Property, and any corresponding regulatory asset in Account 182.3, Other Regulatory Assets. Since Alliance improperly reflected the income tax gross-up on the equity component of AFUDC of $2,650,369 as a part of gas plant in service for cost of service purposes in determining its rates, we will require Alliance to reflect the proper accounting treatment of equity AFUDC income tax gross-up in its rate calculation. Thus, Alliance is instructed to recalculate its incremental recourse rates in accordance with this clarification.

### C. Reporting Incremental Rates

23. To assure that costs are properly allocated between Alliance's existing shippers and the incremental services authorized in this proceeding, we will require Alliance to keep separate books and accounting of costs attributable to the proposed incremental services. The books should be maintained with applicable cross-references, as required by section 154.309 of the Commission regulations. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case and the information

must be provided consistent with Order No. 710. Such measures protect existing customers from cost overruns and from subsidization that might result from under-collection of the project's incremental cost of service, as well as help the Commission and parties to the rate proceedings determine the costs of the project.[14]

### D. Negotiated Rates

24. Alliance states that it will provide service to Hess under a negotiated rate agreement. Alliance must file all negotiated rate agreements or a tariff record describing the negotiated rate agreements associated with this project in accordance with the Alternative Rate Policy Statement and the Commission's negotiated rate policies.[15]

### E. Waiver of the Hydrocarbon Dewpoint Tariff Provisions

25. Alliance states that a waiver of the hydrocarbon dewpoint specifications in section 2.1(b) of the GT&C

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[14] 18 C.F.R. § 154.309 (2012).

[15] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines* (Alternative Rate Policy Statement), 74 FERC ¶ 61,076, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996), *aff'd sub nom., Burlington Resources Oil & Gas Co. v. FERC*, 172 F. 3d (D.C. Cir. 1998); and *Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006).

of its tariff is needed in order to recieve the rich natural gas from the Bakken shale formation in its system.[16] Section 2.3(b) of Alliance's GT&C provides that Alliance will waive the hydrocarbon dewpoint specification in section 2.1(b) on a nondiscriminatory, first-come first-served basis if operating conditions permit the blending of gas, subject to any waivers with other receipts, in a manner which allows the maintenance of prudent and reliable operations on Alliance. Alliance states that, under current operating conditions and in conjunction with the appropriate provisions of a proposed gas quality specification waiver, it can receive additional quantities of rich natural gas from the proposed Tioga, North Dakota receipt point and blend them with gas received from upstream sources without jeopardizing the pipeline integrity of its system. Therefore, Alliance proposes to waive the hydrocarbon dew point specification in its Section 2.3(b) of its GT&C in order to allow the transportation of rich natural gas from the Bakken Shale under its agreement with Hess. *Pro forma* Sheet No. 209 identifies the proposed waiver and specifies the maximum volumes eligible for the waiver, the hydrocarbon specification at the new receipt point, and specific restrictions which apply to gas tendered at that receipt point.

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[16] The Commission has approved a revised section 2.3(b) of Alliance's GT&C establishing a mechanism by which Alliance may grant waiver of the hydrocarbon dewpoint specifications in its tariff. See *Alliance Pipeline L.P.*, 125 FERC ¶ 61,109 (2008).

26. We recognize that in order for Alliance to bring liquids-rich natural gas from the Bakken shale formation to its system, it needs to waive the hydrocarbon dewpoint specifications in its tariff. Alliance states that it will continue to assess its ability to grant additional hydrocarbon dewpoint waivers and will consider all requests for such waivers on a nondiscriminatory basis. We find that the proposed hydrocarbon dewpoint waiver is just and reasonable and not unduly discriminatory. Accordingly, we will approve Alliance's proposed tariff provision providing for a waiver of its hydrocarbon dewpoint specifications for the Tioga receipt point.

### F. Proposed Nonconforming Firm Transportation Agreement

27. Alliance states that Exhibit I of its application included a nonconforming firm transportation agreement with Hess for transportation on the proposed Tioga Lateral and requests the Commission approve the nonconforming agreement as nondiscriminatory. Alliance's application includes only a redacted version of its precedent agreement with Hess. While Commission regulations require certain information to be submitted as Exhibit I to an application for a certificate of public convenience and necessity,[17] the precedent agreement included in Exhibit I may not be the final service agreement between Alliance and Hess

[17] 18 C.F.R. § 157.14(a)(11) (2012).

under which service is ultimately provided. Hence, if Alliance wants the Commission to review any nonconforming provisions in its service agreement at an earlier date than required by Commission regulations, it may submit the complete service agreement for review, clearly highlighting any nonconforming provisions. However, Alliance must file an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff record identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations no earlier than 60 days, and no later than 30 days, before the in-service date of the proposed facilities.

### G. Environmental Analysis

28. On August 25, 2011, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment* (NOI). The NOI was mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

29. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), our staff prepared an environmental assessment (EA) for Alliance's proposal. The EA was prepared with the cooperation of the U.S. Fish and Wildlife Service (FWS) and the U.S. Army Corps of Engineers. The analysis in the EA addresses geology, soils, water

resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. In response to the NOI, we received 48 written comment letters. All substantive comments received in response to the NOI were addressed in the EA.

30. The primary issues raised by commenters include impacts on native prairie habitat, migratory birds, and the depth of pipeline burial on agricultural lands.

31. Construction of the project would affect approximately 90.4 acres of native prairie and grassland habitat. As discussed in section 3.a. of the EA, Alliance proposes to implement a Native Prairie Restoration and Mitigation Plan (NPRM Plan), which will minimize and mitigate the impacts resulting from the construction and increase the likelihood of successful native prairie revegetation. In addition, the NPRM Plan states that Alliance will provide funds to the FWS for the purchase of 90.4 acres of conservation easements as compensatory mitigation. The EA finds that the measures presented in the NPRM Plan, as modified by environmental recommendation 13, would result in no significant impact on native prairie habitat.

32. Section 3.c. of the EA addresses impacts on migratory birds and the project-specific migratory bird conservation measures Alliance incorporated within its NPRM Plan. These measures were developed in

consultation with the FWS. Based on Alliance's proposed construction schedule, the characteristics and habitat requirements of the migratory birds, the amount of similar habitat adjacent to and in the vicinity of the project, and Alliance's implementation of its NPRM Plan and other mitigation, the EA concludes that constructing and operating the proposed project would not result in population-level impacts on migratory birds. We agree.

**EA Comments**

33. The EA was issued for a 30-day comment period and placed into the public record on July 13, 2012. In response to the EA, we received comments from Alliance, Mountrail County, and the Dakota Resource Council. We also received six comment letters from landowners. These comments are discussed below.

34. In comments on the application, several landowners expressed concern over the depth of pipeline burial on agricultural lands and impacts to farming practices. Section B.5.a of the EA states that Alliance's burial depth of more than 42 inches is sufficient. However, several landowners identified specific farming practices or equipment that may require modifications to the burial depth. Thus, the EA recommended (environmental recommendation 12) that Alliance work with those landowners to find a mutually acceptable depth of burial. This recommendation is included as a condition in this order.

35. Comments were also received regarding restoration and revegetation of disturbed land. As addressed in section B.3.a. of the EA, the implementation of Alliance's Restoration and Revegation Plan would minimize impacts on vegetation and ensure proper restoration.

36. Alliance filed supplemental information on August 7, 2012, indicating several corrections to the EA based on information previously filed with the Commission. We acknowledge these corrections and accept them. None of the corrections affect the conclusions presented in the EA.

37. Alliance also filed supplemental information on August 13, 2012, indicating that subsurface conditions would make it difficult to complete a horizontal directional drill (HDD) under the White Earth Creek. Therefore, Alliance now proposes to cross White Earth Creek and an associated tributary to the White Earth River using the dam-and-pump method. This construction method would cause a slight pipeline alignment shift and change in workspace configurations between mileposts 12.5 and 13.3. In addition to the two waterbodies that would be affected by the revised construction method, 0.4 acre of wetland would also be affected. No new landowners would be affected.

38. We have determined that Alliance's implementation of its Wetland and Waterbody Construction and Mitigation Procedures and its Plan for Construction and Stabilization in Winter Conditions will

adequately minimize impacts on the wetland within the construction right-of-way. As stated in the EA, the primary effect of construction and operation activities on wetlands would be the temporary removal of vegetation during construction. Alliance's construction impacts on emergent wetland vegetation would be relatively short-term and minor, because it would revegetate within two to three growing seasons.

39. While a successfully completed HDD would be environmentally preferable, the Commission recognizes the probability of failure of crossing White Earth Creek using this method. We further find the newly proposed method to construct across White Earth Creek, and the associated tributary to White Earth River, to be environmentally acceptable.

40. Alliance also filed a series of minor route adjustments between mileposts 69.1 and 69.9. All of the changes will be on land managed by the FWS and the FWS approved the changes. The newly proposed route adjustments would result in about 0.16 acre of additional impact on cropland, 0.06 acre of additional impact on upland forest, and no net change in the acreage of wetland that would be affected by the project. However, the newly-proposed changes would avoid crossing 0.14 acre of FWS-protected wetland within a wetland conservation easement in Renville County, North Dakota. Thus, we find these route adjustments environmentally acceptable.

41. Alliance also commented on staff's environmental recommendation number 13, which addresses

changes to its NPRM Plan. Based on Alliance's comments and the staff's subsequent consultation with the FWS regarding these comments, we believe that Alliance has adequately addressed staff's concerns with the NPRM Plan. Thus, we believe that the revisions to this plan identified in the EA are no longer necessary. Accordingly, environmental recommendation 13 of the EA has been omitted from the environmental conditions included in the appendix to this order.

42. Several comments were received from Brenda Jorgenson, Richard Jorgenson, on behalf on the Bicker Township Board, and Mountrail County regarding designated recreational and agricultural areas located within the White Earth Valley. As stated in section B.5.e. of the EA, the project would not cross any "designated natural, recreation, or scenic areas". Comments received from the landowners on this issue state that the White Earth Valley is zoned for recreational and agricultural use by Mountrail County, and should be considered "designated" areas as well. We disagree. In the context of our NEPA review, the term "designated" refers to officially designated special-use areas such as wildlife refuges, waterfowl production areas, state or national parks, or state or national preserves, which are managed by resource agencies. Zoning districts, on the other hand, are tools used by planners to manage development within an area, such as a city or county.

43. Comments were received from the Dakota Resource Council requesting that the Commission

evaluate the proposed route to follow two existing pipeline routes. Section C.6. of the EA evaluated the existing Williston Basin Interstate Pipeline Company and Prairie Rose Pipeline routes and found neither route provides an environmental advantage over Alliance's proposed route.

44. The Commission received several comments about the health risk of releasing radon when natural gas is burned in the home. Section 9.c of the EA found that naturally-occurring radon and solid particles of radioactive material would be removed from the natural gas stream prior to transfer to the transmission pipeline or that the radiation would decay to negligible levels before reaching end-users. Thus, the EA concluded that radon poses no risk to end users of the gas stream.

45. Comments were received from landowners regarding the potential noise impacts on wildlife resulting from operation of pipeline and the Tioga Compressor Station. The EA states that the compressor station will be located adjacent to an existing gas processing plant and in an area with a mix of agricultural, industrial and residential properties. Therefore, wildlife in the area are already habituated to similar noise and activity levels. The EA also states the project is not likely to adversely affect any federally listed threatened or endangered species and that the predominant wildlife habitats in the project area are occupied by commonly found species. The EA states that the predicted noise levels from the compressor station would be below our limit of 55 decibels

at nearby residences and environmental condition 14 will ensure that this standard is met. The operation of the pipeline will not generate noise.

46. Based on the analysis in the EA, we conclude that if constructed and operated in accordance with Alliance's application and supplements, and in compliance with the environmental conditions in the Appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

47. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. We encourage cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[18]

48. At a hearing held on September 20, 2012, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, as supplemented, and

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[18] *See, e.g., Schneidewind v. ANR Pipeline Co*., 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P., et al*., 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued authorizing Alliance to construct and operate the Tioga Lateral Project facilities, as described and conditioned herein, and as more fully described in the application.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on Alliance's:

(1) completion of construction of the proposed facilities and making them available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;

(2) compliance with all applicable Commission regulations including, but limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;

(3) compliance with the environmental conditions listed in the Appendix to this order.

(C) Prior to the commencement of construction, Alliance shall execute firm transportation agreements equal to the levels and terms of service reflected in the precedent agreement submitted in support of its proposal.

(D) Alliance's request for authority to charge incremental rates for the Tioga Lateral is approved, subject to Alliance's refiling the rates with a revised rate of return on equity and recalculating the incremental recourse rates to reflect the proper accounting treatment of equity AFUDC income tax gross-up in its rate calculation.

(E) Alliance shall file actual tariff records with the revised incremental rates and changes to its tariff no earlier than 60 days, and no later than 30 days, prior to the date the Tioga Lateral goes into service.

(F) Alliance shall file its negotiated rate agreements or a tariff record describing the negotiated rate agreements no earlier than 60 days, and no later than 30 days, prior to the date the Tioga Lateral goes into service.

(G) Alliance shall submit an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff record identifying these agreements as non-conforming agreements no earlier than 60 days, and no later than 30 days, prior to the date the Tioga Lateral goes into service.

(H) Alliance shall notify the Commission's environmental staff by telephone, e-mail, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Alliance. Alliance shall file written confirmation of such notification with the Secretary of the Commission (Secretary) within 24 hours.

(I) The untimely motions to intervene are granted.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

## APPENDIX

As recommended in the Environmental Assessment (EA), this authorization includes the following conditions:

1. Alliance shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the Environmental Assessment (EA), unless modified by the Order. Alliance must:

    a. request any modification to these procedures, measures, or conditions in a filing with the Secretary;

    b. justify each modification relative to site-specific conditions;

    c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and

    d. receive approval in writing from the Director of the Office of Energy Projects (OEP) before using that modification.

2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction, operation, and activities associated with abandonment of the Project. This authority shall allow:

    a. the modification of conditions of the Order; and

    b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from Project construction, operation, and activities associated with abandonment.

3. **Prior to any construction**, Alliance shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, Environmental Inspectors (EI), and contractor personnel will be informed of the EIs' authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets, and as identified in Alliance's revised route alignments filed on August 13, 2012. **As soon as they are available, and before the start of construction**, Alliance shall

file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets. Alliance's exercise of eminent domain authority granted under Natural Gas Act Section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Alliance's right of eminent domain granted under Natural Gas Act Section 7(h) does not authorize it to increase the size of its natural gas pipelines or aboveground facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Alliance shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/

aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area**.

This requirement does not apply to extra workspace allowed by the *Upland Erosion Control, Revegetation, and Maintenance Plan*, and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

a. implementation of cultural resources mitigation measures;

b. implementation of endangered, threatened, or special concern species mitigation measures;

c. recommendations by state regulatory authorities; and

d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of the certificate and before construction** begins, Alliance shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Alliance must file revisions to the plan as schedules change. The plan shall identify:

a. how Alliance will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;

b. how Alliance will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;

c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;

d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;

e. the location and dates of the environmental compliance training and instructions Alliance will give to all personnel involved with construction and restoration (initial and refresher training as the Project progresses and personnel change);

f. the company personnel and specific portion of Alliance's organization having responsibility for compliance;

g. the procedures (including use of contract penalties) Alliance will follow if noncompliance occurs; and

h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:

(i) the completion of all required surveys and reports;

(ii) the environmental compliance training of onsite personnel;

(iii) the start of construction; and

(iv) the start and completion of restoration.

7. Beginning with the filing of its Implementation Plan, Alliance shall file updated status reports with the Secretary on a biweekly basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

a. an update on Alliance's efforts to obtain the necessary federal authorizations;

b. the construction status of the Project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;

c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);

d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;

e. the effectiveness of all corrective actions implemented;

f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and

g. copies of any correspondence received by Alliance from other federal, state, or local permitting agencies concerning instances of noncompliance, and Alliance's response.

8. **Prior to receiving written authorization from the Director of OEP to commence construction of any Project facilities**, Alliance shall file with the Secretary documentation that it has received all authorizations required under federal law (or evidence of waiver thereof).

9. Alliance must receive written authorization from the Director of OEP **before placing the Project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.

10. **Within 30 days of placing the authorized facilities in service**, Alliance shall file an affirmative statement with the Secretary, certified by a senior company official:

a. that the facilities have been constructed and installed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or

b. identifying which of the certificate conditions Alliance has complied with or will comply with. This statement shall also identify any areas affected by the Project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

11. Alliance shall revise its Restoration and Revegetation Plan to be consistent with the definition of successful revegetation in the Staffs Upland Erosion Control and Revegetation Plan (January 2003 version) at section VII.A.2.

12. **Prior to construction**, Alliance shall file for review and approval by the Director of OEP, environmental surveys for the remaining unsurveyed segments of the construction right-of-way, including Additional Temporary Work Space and access roads.

13. Alliance shall not begin implementation of any treatment plans/measures (including archaeological data recovery); construction of facilities and/or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:

c. Alliance files with the Secretary cultural resources survey and evaluation reports, any

necessary treatment plans, and the State Historic Preservation Office's comments on the reports and plans;

d. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected; and

e. the Commission's staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Alliance in writing that treatment plans/ mitigations may be implemented and/or construction may proceed.

All materials filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in **bold** lettering: "**CONTAINS PRIVILEGED INFORMATION – DO NOT RELEASE.**"

14. Alliance shall make all reasonable efforts to ensure its predicted noise levels from the compressor station are not exceeded at nearby Noise Sensitive Areas (NSA) and file noise surveys showing this with the Secretary **no later than 60 days** after placing the compressor station in service. However, if the noise attributable to the operation of the compressor station at full load exceeds an average day-night ambient sound level (Ldn) of 55 decibels on the A-weighted scaled (dBA) at any nearby NSAs, Alliance shall file a report on what changes are needed and shall install additional noise controls to meet the level

**within one year** of the in-service date. Alliance shall confirm compliance with this requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

15. **Prior to construction** across actively cultivated properties owned by Wayne Jacobson, Leo and Joanne Christiansen. Ronald Sagness and Jon Sagness, Alliance shall determine, in consultation with these landowners, a pipeline burial depth that is consistent with farming practices used in each field and file the results of the consultation with the Secretary.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No: 13-1003

Alliance Pipeline L.P.

Appellee

v.

4.360 Acres of Land, More or Less, in the S/2 of Section 29, Township 163 North, Range 85 West, Renville County, North Dakota, et al.

Appellants

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Appeal from U.S. District Court for
the District of North Dakota – Bismarck
(4: 12-cv-00140-DLH)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 25, 2014

Order Entered at the Direction
of the Court: Clerk, U.S. Court
of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**AFFIDAVIT OF SERVICE**

**State of United States o County of Court**

Case Number: _____

Plaintiff:
**Alliance Pipeline LP.,**

vs.

Defendant:
**4.360 Acres of Land et.al**

For:
Fredrikson & Byron, P.A.
200 North 3rd St.
Suite 150
Bismarck, ND 58501

Received by Chris Rhoades Investigations on the 17th day of October, 2012 at 4:58 pm to be served on **Leonard Smith, 4665 103rd St. Nw, Sherwood, ND 58782.**

I, Chris Rhoades, being duly sworn, depose and say that on the **18th day of October, 2012** at **10:50 am, I**:

**INDIVIDUAL/PERSONAL:** served by delivering a true copy of the **ECF 1 Complaint; ECF 1-1 Ex A.; ECF 1-2 Ex B; ECF 1-3 Ex C; ECF 1-4 EX D; ECF 2 Notice of Condemnation; ECF 3 Memorandum of Law; ECF 5 Affidavit; ECF 5-1 Ex E; ECF 5-2 Ex F** to: **Guy Solemsass** at the address of: **4665 103rd St. Nw, Sherwood, ND 58782** with the date and hour of service endorsed thereon by me, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the judicial circuit in which the process was served.

Subscribed and Sworn
to before me on the
24th day of October,
2012 by the affiant
who is personally
known to me.

/s/ Rollie A. Port
NOTARY PUBLIC

/s/ Chris Rhoades
**Chris Rhoades**
Process Server

**Chris Rhoades**
**Investigations**
**304 14th Avenue S.W.**
**Minot, ND 58701**
**(701) 838-7668**

Our Job Serial Number:
RPI-2012000284

**ROLLIE A. PORT**
Notary Public
State of North Dakota
My Comm. Expires
Jan. 24, 2017

**AFFIDAVIT OF SERVICE**

**State of United States o County of Court**

Case Number: _____

Plaintiff:
**Alliance Pipeline L.P.,**

vs.

Defendant:
**4.360 Acres of Land et.al**

For:
Fredrikson & Byron, P.A.
200 North 3rd St.
Suite 150
Bismarck, ND 58501

Received by Chris Rhoades Investigations on the 17th day of October, 2012 at 4:58 pm to be served on **Ione Smith, 4665 103rd St. Nw, Sherwood, ND 58782.**

I, Chris Rhoades, being duly sworn, depose and say that on the **18th day of October, 2012** at **10:50 am, I**:

**INDIVIDUAL/PERSONAL:** served by delivering a true copy of the **ECF 1 Complaint; ECF 1-1 Ex A.; ECF 1-2 Ex B; ECF 1-3 Ex C; ECF 1-4 EX D; ECF 2 Notice of Condemnation; ECF 3 Memorandum of Law; ECF 5 Affidavit; ECF 5-1 Ex E; ECF 5-2 Ex F** to: **Guy Solemsass** at the address of: **4665 103rd St. Nw, Sherwood, ND 58782** with the date and hour of service endorsed thereon by me, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the judicial circuit in which the process was served.

Subscribed and Sworn
to before me on the
24th day of October,
2012 by the affiant
who is personally
known to me.

/s/ Rollie A. Port
NOTARY PUBLIC

/s/ Chris Rhoades
**Chris Rhoades**
Process Server

**Chris Rhoades**
**Investigations**
**304 14th Avenue S.W.**
**Minot, ND 58701**
**(701) 838-7668**

Our Job Serial Number:
RPI-2012000285

**ROLLIE A. PORT**
Notary Public
State of North Dakota
My Comm. Expires
Jan. 24, 2017

**AFFIDAVIT OF SERVICE**

**State of United States o County of Court**

Case Number: _____

Plaintiff:
**Alliance Pipeline L.P.,**

vs.

Defendant:
**4.360 Acres of Land et.al**

For:
Fredrikson & Byron, P.A.
200 North 3rd St.
Suite 150
Bismarck, ND 58501

Received by Chris Rhoades Investigations on the 14th day of November, 2012 at 12:09 pm to be served on **Leonard Smith, 4665 103rd St. Nw, Sherwood, ND 58782.**

I, Chris Rhoades, being duly sworn, depose and say that on the **21st day of November, 2012** at **12:29 pm, I**:

**INDIVIDUAL/PERSONAL:** served by delivering a true copy of the **ECF 1 Complaint; ECF 1-1 Ex A.; ECF 1-2 Ex B; ECF 1-3 Ex C; ECF 1-4 EX D; ECF 2 Notice of Condemnation; ECF 3 Memorandum of Law; ECF 5 Affidavit; ECF 5-1 Ex E; ECF 5-2 Ex F** to: **Ione Smith** at the address of: **4665 103rd St. Nw, Sherwood, ND 58782** with the date and hour of service endorsed thereon by me, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the judicial circuit in which the process was served.

Subscribed and Sworn
to before me on the
26th day of November,
2012 by the affiant
who is personally
known to me.

/s/ Rollie A. Port
NOTARY PUBLIC

/s/ Chris Rhoades
**Chris Rhoades**
Process Server

**Chris Rhoades**
**Investigations**
**304 14th Avenue S.W.**
**Minot, ND 58701**
**(701) 838-7668**

Our Job Serial Number:
RPI-2012000336

**ROLLIE A. PORT**
Notary Public
State of North Dakota
My Comm. Expires
Jan. 24, 2017

**AFFIDAVIT OF SERVICE**

**State of United States o County of Court**

Case Number: _____

Plaintiff:
**Alliance Pipeline L.P.,**

vs.

Defendant:
**4.360 Acres of Land et.al**

For:
Fredrikson & Byron, P.A.
200 North 3rd St.
Suite 150
Bismarck, ND 58501

Received by Chris Rhoades Investigations on the 14th day of November, 2012 at 12:09 pm to be served on **Ione Smith, 4665 103rd St. Nw, Sherwood, ND 58782.**

I, Chris Rhoades, being duly sworn, depose and say that on the **21st day of November, 2012** at **12:29 pm, I**:

**INDIVIDUAL/PERSONAL:** served by delivering a true copy of the **ECF 1 Complaint; ECF 1-1 Ex A.; ECF 1-2 Ex B; ECF 1-3 Ex C; ECF 1-4 EX D; ECF 2 Notice of Condemnation; ECF 3 Memorandum of Law; ECF 5 Affidavit; ECF 5-1 Ex E; ECF 5-2 Ex F** to: **Ione Smith** at the address of: **4665 103rd St. Nw, Sherwood, ND 58782** with the date and hour of service endorsed thereon by me, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the judicial circuit in which the process was served.

Subscribed and Sworn
to before me on the
26th day of November,
2012 by the affiant
who is personally
known to me.

/s/ Rollie A. Port
NOTARY PUBLIC

/s/ Chris Rhoades
**Chris Rhoades**
Process Server

**Chris Rhoades**
**Investigations**
**304 14th Avenue S.W.**
**Minot, ND 58701**
**(701) 838-7668**

Our Job Serial Number:
RPI-2012000335

**ROLLIE A. PORT**
Notary Public
State of North Dakota
My Comm. Expires
Jan. 24, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

| | |
|---|---|
| Alliance Pipeline, L.P.<br>Plaintiff,<br>vs.<br>4.360 Acres of Land, More or Less, in the S/2 Of Section 29, Twn 163 N Range 85 W, Renville County ND;<br>4.675 Acres of Land, More or Less in the SE/4 of Section 30, Twn 163 N. Range 85 W, Renville County, ND<br>Leonard Smith, Ione Smith; and All Other Unknown Owners<br>Defendants, | ANSWER |

Comes now Leonard Smith and Ione Smith – owners of the foregoing described land and for their Answer to the Complaint, Shows, Answers, Responds and Defends as follows

I.

Denies each and every cause, complaint allegation and averment except as is hereinafter admitted qualified and or explained.

II.

The Defendants Leonard Smith and Ione Smith are the owners of the property described as follows;

> 4.360 Acres of Land, More or Less, in the S/2 of Section 29, Twn 163 N Range 85 W, Renville County ND; 4.675 Acres of Land, More or Less in the SE/4 off Section 30, Twn 163 N. Range 85 W, Renville County, ND

as well as adjoining tracts and parcels that are connected or related thereto. They are fee title holders in fee simple absolute. That to the best of their information knowledge and belief no one else owns an interest in this property except as is noted of record. That the property is used for for agricultural purposes and is in the stream of commerce and is in family farm operation

III.

Neither admits nor denies Paragraph 1 of the Complaint and puts Plaintiff to its proof.

IV.

Puts Plaintiff to its proof as to Paragraph 2 of the Complaint – that it is engaged in the Interstate Transportation of natural gas and that it holds any Certificate of Convenience and Necessity from the Federal Energy Regulatory Commission. Denies that the Order of FERC Ordered a 12 inch diameter line

as is shown by Exhibit B to the complaint. Admits Plaintiff has 2 years to construct the pipeline.

V.

Admit as to Paragraph 3 of the Complaint that Defendants own land described within the complaint and states that the Order of FERC (Exhibit B) fails to identify the land to be used on the purported project. States that nothing in the Order (Exhibit B) relates that this is an interstate project and Defendants aver that this is an intrastate project exempt from FERC regulation and is for the benefit of a limited entity and not the general public.

VI.

Neither admits nor denies Paragraph 4, 5, 6, 7, 8, 9, 10, 11, 14 of the Complaint and puts Plaintiff to its proof

V.

Denies Paragraph # 12 of the Complaint as to acquiring other property for the project as Defendant has no knowledge of the same. States that Defendants have not sold to Alliance an interest in the property

VI.

Denies paragraph #13 of the Complaint

VII.

Admits Paragraph # 15 of the Complaint.

VIII.

Admits as to Paragraph 16 of the Complaint that Plaintiffs agents have been on the subject tract wrongfully and in violation of state law and which actions of Plaintiff were and are being challenged by proceedings in state court and on a host of grounds including the grounds that the survey order was over broad, that the survey was not authorized by NDCC 32-15 but by other statutory provisions of state law including NDCC 49-19-12 & NDCC 49-09-11 and that the Summons that hailed Defendants into state court was void ab initio and deprived the State Court of all jurisdiction to grant any relief to Alliance and its agents. Denies the balance of Paragraph 16 of the Complaint and further states that the proposed route is not consistent with the least private harm but promotes a greater taking than is necessary and advances the interest of Federal easement holders over the general public including defendants and when no necessity is needed for the greater taking

IX.

As to Paragraph 17 of the Complaint, neither admits nor denies and puts Plaintiff to its proof. Further any increase in cost and expense is due solely to the conduct and actions and or failure of Alliance and its agents to proceed in accordance with the law and

its desire to ignore the rights of Defendant and or negotiate reasonable or diligently. That Plaintiffs by Rule 71.1 FRCP are denied the right to deposit funds for quick take and when the State Law fails to afford this plaintiff with quick take.

X.

That Defendants have never been afforded any, need and necessity hearing and it is invoked under NDCC 32-15.

XI.

That Defendants interests in land not 'taken' are 'damaged' and Defendants and their land will suffer consequential and severance damages for property damaged but not taken. Those claims are reserved for State Court litigation and are not within the purview of 15 USC 717 et seq as only jurisdiction is retained by the Federal Courts for damages incurred in taking to the extent that they exceed $3000

XII.

That the actions of the Plaintiff and its taking have failed to minimize the harm and damages of the Defendants.

XIII,

That Art 1 Sect 16 prohibits this taking as it is for economic development, and or general economic health and Plaintiff urges that is not for the public use but for the private benefit of a select few. Further Alliance is not within the meaning of Art 1 Sect 16 – a common carrier and or utility business as it is not within the meaning of NDCC 08-07 and or NDCC 49-19 as it is not subject to North Dakota Public Service and or State oversight on this project and has no State Certificate of Necessity and or Convenience and or has failed to have its corridor adopted and approved by the State of North Dakota and the regulations thereto. That notwithstanding 15 USC 717 et seq – State regulatory schemes are applicable and binding – to wit *ANR v Iowa State Commission* 828 F2d 465,473 – (states may be able to enact legislation to protect its valuable topsoil and other aspects of the environment and to provide private damage remedies to the extent they are not preempted).

XIV.

That Plaintiffs have waived their claim and cause, by splitting causes of action and or res judicata – collateral estoppel.

XV.

That this action is barred by multiplicity of action and causes of action by Plaintiff not reserving the cause and claim in earlier proceedings.

XVI.

That this action is void by failure of service of a summons and complaint and nothing in Rule 71.1 FRCP waives the same.

XVII.

That this action is premature and or barred by failure of Alliance to Negotiate fully and in accordance with NDCC 32-15-06.1 and or to make disclosures consistent with NDCC 32-1506.2 which have been invoked. That no adequate or competent written appraisal or statement of value has been made and or set forth showing just compensation for the land sought to be taken.

XVIII.

That Defendants have been denied due process and equal protection of the laws by the whole failure of Alliance and its minion and agents to advise Defendants of regulatory action before FERC and which results in a taking of property without notice, right to be heard or due process.

XVIX.

That there is no basis for asserting that the damages for the taking amount to $3000 or any other sum such that jurisdiction has not be established at this time.

XX.

That the survey upon which Alliance predicates its, taking and claim is void and which renders the instant action without jurisdiction and or basis.

XXI.

That the Notice of Condemnation and Complaint are defective as they fails to identify the exact form and scope of easement and their terms. That nothing in the Order of FERC and or Notice identify the regulatory approval of State of North Dakota and or the uses of the property sought to be taken.

XXII.

That Alliance is acting in bad faith in seeking condemnation of Defendants property or a portion of it by easement(s) in that the real purpose in taking the tract and or portion sought, is so as to eliminate the need to secure other approval from the United States of America as to crossing fish and wild life, easements and which do not prohibit the crossing that alliance seeks to need. That the sole reason to ignore a lesser taking is that it will delay the resolution of this matter

XXIII.

That the actions of Alliance are arbitrary and capricious as to Plaintiff land or a portion of it as Plaintiff has not sought to take similarly situated

lands that are more appropriate and necessary and which prevent a material damaging of Smith's land

XXIV.

That the costs of the project necessitate the filing and depositing of cash resources with the Court for the necessary removal of the line and the properties remediation upon the term of the easement having expired.

XXVV.

That there is a failure of service of process and or inadequate service of process.

Wherefore, Defendants pray

1) A Judgment be rendered denying Plaintiff right to take by eminent domain Defendants land described in the Complaint.

2) Defendant be allowed Attorney Fees and Costs consistent with NDCC 32-15-32

3) An Order permitting State Court actions for severance and consequential damages on account of the damaging of Defendants land.

4) Such other and further relief as is just and equitable including Orders denying injunctive relief

Dated this 6 day of November, 2012.

/s/ Robert S. Rau
Robert S. Rau (#3133)
Attorney at Law
P.O. Box 939
Minot, North Dakota 58702-0939
Telephone No. (701) 852-3578

DEMAND FOR JURY TRIAL

The Defendant's and each of them Demand a Jury Trial of 12 persons and or such lesser number as is allowed or permitted by law.

/s/ Robert S. Rau
Robert S. Rau