# Condemnation Of Depleted Underground Reservoirs For Gas Storage Areas

One of the most pressing problems facing the gas utilities today is the inability to deliver sufficient quantities of gas to meet consumer demands on winter days of peak operation. The supply in the Southwest is plentiful, but because of the tremendous increase in the amount of gas delivered annually to northern markets, transmission and distribution headaches in the market area have arisen.[1]

Getting the gas to the point of consumption at the precise time it is required by the public is the specific problem. When the demand increases, the supply at the market is drawn upon to a greater extent than it can be replenished. Pressure troubles develop, and industrial plants and domestic users are asked to curtail. The completion of the Gulf Interstate supply line in November, 1954, will help somewhat, but is by no means a solution to the supply shortage.

Many utilities have found that the use of depleted underground gas sands as storage reservoirs greatly increases the supply available in cold weather as the gas accumulated and stored during the summer months can be easily injected into the supply lines near the points of increased consumption.[2] Wells which formerly produced are natural containers for underground storage. When left vacant, they can be refilled with gas simply by reversing the producing procedure and pumping gas back into the earth.

Being migratory in nature, gas has no fixed situs but it does constitute part of the land in which it tarries for the moment. The owner of the land alone has the right to extract it, and he may capture all or any part of the contents of a pool without violating the rights of his neighbors, although his action diminishes the common supply.[3] It is evident that 100 per cent of the storage rights on a contemplated tract, including the surrounding fringe area, is necessary before any project may be undertaken. Gas distributors have been generally successful in leasing storage rights. Most landowners welcome the standard $200 per well annual payment, but a few hamper the success of an entire storage pool by

[1] In Ohio alone the annual delivery since 1946 has doubled, while seven times more homes use gas for heat than in pre-war years. Information Dept., The Ohio Fuel Gas Co., Columbus, Ohio.

[2] On Dec. 18, 1953, 55 per cent—593 million cubic feet—delivered by Ohio Fuel, came from underground storage. Information Dept., The Ohio Fuel Gas Co., Columbus, Ohio.

[3] Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); Kelley v. Ohio Oil Co., 57 Ohio St. 317, 49 N.E. 399 (1897).

refusing to lease at any price. Thus, the interest of one or several individual landowners seriously hampers adequate service to the public.

The gas distributors, therefore, as public utilities, desire to acquire the right to store gas underground in depleted reservoirs by condemnation proceedings under the right of eminent domain. The solution demands a look at condemnation proceedings in general, existing statutes, and judicial interpretations.

The use of and justification for the power of eminent domain are sufficiently well understood to allow the omission of any general discussion of the subject at this point.[4] However, the requirement that the power be used for the welfare of the public must be borne in mind throughout.[5] In general, it must be remembered that the power lies dormant in the state until exercised, but that the state of Ohio may delegate the power to subordinate agencies, including private corporations.[6] When so delegated the statute making the grant must be strictly followed and the public use clearly evident.[7] Note, however, that the power need not be expressly conferred if it appears in the statute by clear implication.[8] That the power is of practical value in serving the public is obvious

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[4] Scott v. Toledo, 36 Fed. 385 (6th Cir. 1888); Kohl v. United States, 91 U.S. 397 (1875); Pontiac Improvement Co. v. Cleveland Metropolitan Park District, 104 Ohio St. 447, 135 N.E. 635 (1922).

[5] Western Union Telegraph Co. v. Louisville and Nashville Railway Co., 270 Ill. 399, 110 N.E. 583 (1915).

[6] By the Ordinance of 1787, the territorial government was limited in the general right of eminent domain by the requirement that compensation should be paid when public exigencies make the taking necessary, ORDINANCE OF 1787, ART. II. This was superseded by a similar provision in the Ohio Constitution of 1802, OHIO CONST., ART. VIII, §4 (1802), and the Constitution of 1851, OHIO CONST., ART. I, §19; OHIO CONST. ART. XIII, §5, which added limitations with respect to when compensation should be paid or secured and how it should be assessed. Missouri v. Union Electric Light and Power Co., 42 F. 2d 692 (N.D. Mo. 1930); Richland School v. Overmeyer, 164 Ind. 382, 73 N.E. 811 (1905).

[7] Hatch v. Cincinnati and Indiana Railroad Co., 18 Ohio St. 92 (1868); Zanesville v. Zanesville Telegraph and Telephone Co., 64 Ohio St. 67 (1901); Cincinnati v. Vester, 281 U.S. 439 (1930); Cincinnati v. Louisville and Nashville Railroad Co., 88 Ohio St. 283, 102 N.E. 951 (1913); NICHOLS, EMINENT DOMAIN §3.213 (1950) "Even when the power has been expressly granted, the grant, itself, and the extent thereof will be construed strictly against the grantee. The latter will not be allowed to take the lands of another unless such right comes clearly and unmistakenly within the limits of the authority granted. Whatever is not plainly given is to be construed as withheld." *But see*, Covington and Cincinnati Bridge Co. v. Magruder, 66 Ohio St. 455, 475, 59 N.E. 216 (1900). "While the legislative grant should be strictly construed, it should not be technically construed so as to defeat the purpose of the grant."

[8] Oakland Club v. South Carolina Public Service Authority, 110 F. 2d 84 (4th Cir. 1940).

from its delegation to such varied agencies as bridge, cemetery, canal, electric light and power, irrigation, loggery, railroad, telephone and telegraph, water and pipeline companies.[9]

Unfortunately, as with so many legal phrases the term "public use" has been given many definitions but no precise meaning. The discussion of the Sixth Circuit Court of Appeals in *Irrigation Co. v. Klein* is fairly typical.[10] There it was said that the legislature determines "when" the power of eminent domain may be exercised by private persons and corporations for public uses, and the character, quality, method, and extent of such exercise; but the courts determine "what is" a public use. It is understandable why the decisions of the various states are irreconcilable. By the weight of authority public use under the law of eminent domain is not the equivalent of public benefit, public convenience, or public welfare, but in order to make use a public one, there must be a right on the part of the public, or some portion of it, or some public or quasi public agency on behalf of the public, to use the property after it has been condemned.[11] But the recent pronouncement by the Supreme Court of Ohio in *State v. Ruh*,[12] indicates that the phrase "for public use" found in Article I, Section 19 of the Ohio Constitution is to mean the same as if it had read "for the public welfare."

It is not the number of people who use the property taken that determines whether the use is or is not a public one. A use does not fail merely because immediate enjoyment of it is limited to a small group or even to a single person.[13] An appropriation should not fail simply because it also promotes a private incidental interest.[14] The Supreme Court of California said that "in determining whether the taking of property is necessary for public use, not

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[9] See 29 C.J.S., Eminent Domain, §24. Equally important is the factor of the property owner's right to a constitutional statute, Nichols v. Cleveland, 247 Fed. 731 (6th Cir. 1917), and a taking within the power granted, Pontiac Improvement Co. v. Cleveland Metropolitan Park District, 104 Ohio St. 447, 135 N.E. 635 (1922). While the requisite finding that the taking is necessary is a legislative matter, Sears v. Akron, 246 U.S. 242 (1918), it may be delegated to a private corporation, State v. Ferguson, 155 Ohio St. 26, 97 N.E. 2d 660 (1951); Geisy v. Cincinnati, W. & Z. R.R. Co., 4 Ohio St. 308 (1854).

[10] Lake Koen Navigation, Reservoir and Irrigation Co. v. Klein, 63 Kan. 484, 65 Pac. 684 (1901).

[11] Shasta Power Co. v. Walker, 149 Fed. 568 (N.D. Cal. 1916); See note, 54 A.L.R. 7 (1928).

[12] State *ex rel.* v. Rich, 159 Ohio St. 13, 25, 26, 110 N.E. 2d 778 (1953) which limits paragraph three of the syllabus in Pontiac Improvement Co. v. Cleveland Metropolitan Park District, 104 Ohio St. 447, 135 N.E. 635 (1922).

[13] U.S. v. Boyle, 52 F. Supp. 906 (N.D. Ohio 1943), *affirmed* in Cleveland v. U.S., 323 U.S. 329 (1945).

[14] State v. Rich, 159 Ohio St. 13, 25, 26 110 N.E. 2d 778 (1953).

only the present demands of the public, but those which may be fairly anticipated in the future, may be considered."[15] "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment."[16] The Minnesota court has stated: "No question is made of the right . . . to condemn property for boulevards, pleasure drives, etc. . . . and numerous other purposes which contribute to the general good and well-being of the community."[17] If the courts were to supply such views in condemning for the right to store gas underground, it seems as though the gas utilities would have no trouble in showing that the use of storage would be a public one. No one would deny that supplying cities and homes with gas is not a service to the public, which the public has a right to demand. In times like the present, when the supply of gas is so inadequate that many consumers desiring gas for heat are not permitted its use, it seems that any facility which is reasonably required to make possible adequate service would be a public use by being for the public welfare. It is apparent from the conditions of the Ohio gas utilities on days of peak operation, that the need of an adequate storage supply near the point of consumption, is indeed pressing. Evidence of this is abundant.[18]

### Ohio Statutory Provisions

The courts have not been hesitant to subject private business to public regulation when the business is devoted to public use to such an extent as to create a peculiarly close relationship between the business and the public.[19] An obligation is said to be raised on the business' part to be reasonable in dealing with the public.[20] The obligation of these "public utilities" is that of service to, or readiness to serve, an indefinite public (or portion of the public) which has a legal right to demand and receive the services and commodities.[21]

Ohio, by statute, has recognized artificial and natural gas

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[15] Central Pacific Railway Co. v. Feldman, 152 Cal. 303, 309, 92 Pac. 849 (1907).

[16] Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923); See, *infra,* note 73.

[17] State *ex rel.* Twin City Building and Investment Co. v. Houghton, 144 Minn. 1, 174 N.W. 885, 887.

[18] See, *supra,* note 17.

[19] Munn v. Illinois, 94 U.S. 113 (1876); Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U.S. 522 (1922).

[20] Munn v. Illinois, *supra,* note 19.

[21] Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246, 143 N.E. 700 (1924).

suppliers, and pipeline companies as public utilities.[22] Natural gas suppliers, being public utilities, are subject to the utility acts.[23] Note that under OHIO REV. CODE § 4905.03 the term "gas company" refers to suppliers of artificial gas; "natural gas company" to suppliers of natural gas; and "pipeline company" to transporters of natural gas. The right to condemn for underground storage is desired by the suppliers falling within the "natural gas company" category. No such power is needed by the dealers of bottled gas or the transporters, whose function is one of carriage only.

That pipeline companies have the power of eminent domain in acquisition of rights of way cannot be doubted.[24] Many gas distributing companies (suppliers) have also been vested with this power.[25] As seen in *Columbus v. Federal Gas and Fuel Co.*,[26] pipeline companies and distributors have exercised eminent domain in acquisition of rights of way and facilities necessary for operations of transporting and distributing gas. This power stems from OHIO REV. CODE § 1723.01 establishing the power to enter upon and appropriate land.[27]

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[22] OHIO REV. CODE §4905.02, "As used in sections 4905.01 to 4905.64 inclusive, of the Revised Code, public utility includes every corporation, company, co-partnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code . . ." OHIO REV. CODE §4903.03. "Any person, firm, co-partnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is: (5) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artificial gas as is manufactured by such producer as a by-product of some other process in which such producer is primarily engaged within this state is not thereby a gas company . . . .

(6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, but where a producer supplies to one or more gas or natural gas companies only such gas as is produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, such producer is not thereby a natural gas company . . .

(7) A pipeline company, when engaged in the business of transporting natural gas, oil or coal or its derivatives through pipes or tubing, either wholly or partly within this state . . ."

[23] OHIO REV. CODE §4905.63.

[24] Carnegie Natural Gas Co. v. Swiger, 72 W.Va. 557, 79 S.E. 3 (1913).

[25] Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N.E. 853 (1891).

[26] Columbus v. Federal Gas and Fuel Co., 13 Ohio N.P. (N.S.) 394 (1910).

[27] OHIO REV. CODE §1723.01. "If a company is organized for the purpose of . . . transporting natural or artificial gas . . . through . . . pipes . . . ; for

The statute establishes that the appropriation referred to in Section 1723.01 shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations.[28] The companies within this section also may transport, store, insure, and ship natural gas, and for such purposes may lay down, construct, and maintain the necessary pipes.[29] Such companies with respect to transporting natural gas, are common carriers and subject to the duties and liabilities of a common carrier.[30] It must be remembered that before a corporation may appropriate private property, it must be unable to agree with the owner as to compensation to be paid, or the easement or interest sought to be appropriated.[31]

So in Ohio the legislature has provided that natural gas companies can appropriate property when engaged in storing, transporting, or transmitting activities.[32] The substance of the present statute is more fully appreciated when the historical development is traced.

The first act relating to condemnation by fuel transportation companies was passed in 1868, and provided for the incorporation of oil transportation companies, with the "power to take and hold such real and personal estate... as may be necessary to transport oils through tubes and pipes." The company was a "body corporate" with the accompanying privileges and immunities, and was "authorized to enter upon any land for the purpose of examining and surveying a line for its tubing and pipes for the transporting of oil and may appropriate so much thereof as may be deemed necessary for the laying down of such tubing and piping ... but no appropriation of private property shall be had... until full compensation shall be made."[33] Much of this language has been carried over to Section 1732.01.[34] The 1872 amendment required that the appropriation be made in accordance with the acts

storing, transporting, or transmitting . . . , natural or artificial gas, . . . ; then such company may enter upon any private land to examine or survey lines for its . . . pipes, . . . or to examine and survey for a reservoir, . . . and may appropriate so much of such, or any right or interest therein, as is deemed necessary for the laying down or building of such . . . pipes, . . . reservoirs, . . . storage yards, . . . receiving and delivery structures or facilities, pumping stations, and any other buildings, structures, appliances, or facilities necessary to the purposes of such companies . . . ."

28 OHIO REV. CODE §1723.02.

29 OHIO REV. CODE §1723.05.

30 OHIO REV. CODE §1723.08.

31 OHIO REV. CODE §2709.03.

32 Note 27, *supra*.

33 65 OHIO LAWS 109 (1868).

34 Note 27, *supra*.

then in force concerning compensation to owners of private property.[35]

The right to transport and store water and maintain pipes as necessary for petroleum transportation and the rights and privileges by which Ohio railroad companies are governed on rights of entry and rights of way, was provided by the act of 1875.[36] The significant provision of § 1723.01 applying to the gas companies found its beginning in 1888 when the right of eminent domain was extended to a company organized for the purpose of transporting natural gas. This grant included the surveying and laying of a line, and the erection of buildings.[37] In the amendment in 1900 the right was extended to include companies organized for the purpose of storing natural gas, petroleum, and water.[38] Four years later such things as building dams and canals, and erecting poles to transmit electricity were in the scope of the provision.[39]

Artificial gas companies were provided for in 1927 and thus had the right of storing, transporting, and transmitting.[40] The 1951 amendment brought coal or its derivatives within the coverage of appropriation, which proceeding now will be used to acquire "so much of such land or any right or interest therein."[41] The revision of the code in 1953 incorporated this existing statute, OHIO GEN. CODE §10128 into OHIO REV. CODE § 1723.01, with only minor changes in wording.

As is true in Ohio and all the other states except Kansas, the scope of such similar statutes has never been judicially determined in regard to underground storage in depleted reservoirs. The extension of the eminent domain power to include condemnation of a lateral underground pool is a relatively new idea.

### JUDICIAL INTERPRETATION AND LEGISLATIVE ENACTMENTS IN OTHER JURISDICTIONS ON UNDERGROUND STORAGE

Consideration of the lone decision on underground gas storage, *Strain v. Cities Service Gas Co.*,[42] would prove helpful in distinguishing it from any case that may arise under the Ohio statutes.

This was an action by landowners against the gas company to restrain the taking or appropriation of their land under condemnation proceedings. Judgment for the plaintiff was affirmed

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[35] 69 OHIO LAWS 194 (1872).
[36] 72 OHIO LAWS 151 (1874).
[37] 85 OHIO LAWS 115 (1888).
[38] 94 OHIO LAWS 382 (1900).
[39] 97 OHIO LAWS 300 (1904).
[40] 112 OHIO LAWS 143 (1927).
[41] 124 OHIO LAWS 166 (1951).
[42] Strain v. Cities Service Gas Co., 148 Kan. 393, 83 P. 2d 124 (1938).

by the Supreme Court of Kansas and the condemnation proceeding was enjoined, with Justice Allen writing both the majority and dissenting opinions. Defendant was a gas pipeline and service company, furnishing gas to numerous public utilities and federal and state institutions. Defendant's petition for condemnation alleged that because of sudden and drastic temperature changes it was necessary in order to maintain continuous, dependable and uniform service to its customers, to have storage reservoirs to hold gas in readiness for delivery; that the storage reservoirs would obviate the danger to the gas consumers that would result from an interruption of the gas supply. Defendant further alleged that to accomplish this end it had three such reservoirs already in operation, that it obtained all leases necessary for the use of the depleted sands except the lease belonging to the landowners in the action, and that they refused to lease except at exorbitant prices.

Limitations on the power of appropriation are provided in the Kansas Constitution.[43] The statute outlining the procedure for condemnation by a corporation having the right of eminent domain contains no grant authorizing the defendant to take subterranean sands of landowners for a gas storage reservoir.[44] But the statute did provide that "lands may be appropriated for the use of... oil companies, pipeline companies, and for the piping of gas in the same manner as is provided in this article for railway corporations as far as applicable," and, any oil company, pipeline company or gas company desiring the right to conduct oil in pipes or to conduct gas in pipes, may obtain such right of way for all necessary pipes "in manner as aforesaid."[45]

The statutory authorization for railway corporations to condemn, provides for the taking of a strip of land one hundred feet wide for its right of way "and also such land as may be deemed necessary for sidetracks, depots, workshops, and water stations, materials for construction, except timber,..."[46]

The majority in holding that the above statutes did not authorize a pipeline company to condemn the underground strata, stated that:

> "The use of the earth as a storage place for gas is an idea so novel, we cannot believe the legislature had such matter in contemplation when the power of eminent domain was given to pipeline companies.... To stretch the statute to cover the case here presented would be little short of judicial legislation."[47]

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[43] KAN. CONST., ART. XII, §4.

[44] KAN. GEN. STAT. §26-101, 26-102 (1935).

[45] KAN. GEN. STAT. §17-618 (1935).

[46] KAN. GEN. STAT. §66-901 (1935).

[47] Strain v. Cities Service Gas Co., *supra*, note 42 at p. 395.

It was also felt by the majority that if the statutes were interpreted as giving the right to condemn any property necessary, or which the gas companies deem necessary in the conduct of their business, it would authorize them to condemn any land in which its officials thought gas might be found if more than the amount of gas available was thought necessary to supply its demands, and that this would disrupt the whole theory of gas ownership, production, and distribution. But the dissent doubted this and pointed out that the majority's reasoning overlooked the protection given the public by the settled law of eminent domain that the purpose might be "public," and that there can be no taking for private use.

The dissent reasoned, it is submitted, and correctly so, that the railway statute was to be applied to pipeline companies "as far as applicable" meaning that they might take land for purposes similar to the purposes allowed railway corporations. The dissent stated:

> "It would then seem that sites for compressor stations, pipe yards and warehouses, storage reservoirs and expansion chambers, etc., are as necessary to a gas utility as sites for depots, workshops, and switch yards are to a railroad company. The storage reservoir is not different in kind but only in degree from the pipe that holds the gas."[48]

Justice Wedell, concurring specially, believed that storage of gas was designed to conserve it for future use, and that the legislature in providing means of transporting it, was concerned with consumption, a present use. He added that the duty to recognize the need for underground storage rested with the lawmakers, that it was the legislature's prerogative to provide the companies with power to condemn for storage, and not the judiciary's.

As an article in the OKLAHOMA BAR ASSOCIATION JOURNAL pointed out, the conservative result reached in the *Strain* case, which contrasts sharply with the realities facing today's gas industry, should not be controlling, for that decision was based solely upon the construction of the Kansas statutes.[49] In 1951 Kansas granted the right of eminent domain for the underground storage.[50] The utility desiring the power must get a certificate from the state corporation commission which decides after a public hearing that the strata sought is a suitable one and that its use for such purposes is in the public interest. The certificate must also state the amount of recoverable oil and native gas remaining in the reservoir. The utility may appropriate what the commission authorizes. Section 2 provides that the public interest and welfare of the state

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[48] Strain v. Cities Service Gas Co., *supra*, note 42 at p. 399.

[49] OKLA. BAR ASSN. J. 1186, 1193 (1949).

[50] KAN. GEN. STAT., Chap. 55-1201.

is promoted if the storage "promotes conservation" of natural gas, "permits the building of reserves for orderly withdrawal in periods of peak demand, and makes more readily available... natural gas resources to the domestic, commerical and industrial consumers of the state."

The Oklahoma statute of 1951 is very similar to the Kansas one regarding the certificate, commission and appropriation, but it adds limitations that protect the interests of both landowner and utility by defining their rights and obligations.[51]

The Illinois provision (1951) likewise establishes application procedures, notice and hearing, appeals and administration by the Illinois Commerce Commission,[52] which may issue no order approving the storage process if it involves condemnation of a stratum or formation containing oil, gas or coal in commercial paying quantities. The corporation must carry public liability insurance in an amount determined by the Commission, to secure payment of any damages resulting from the storage operation.

The Commissioner of the Department of Conservation and Economic Development issues a permit under the New Jersey enactment[53] (1951) and prescribes rules and regulations to effectuate the storage operation. Michigan, the first state having a specific storage condemnation statute (1947), set us a plan with the appropriation power limited to "dry" natural gas leaseholds and the right to be exercised when the company has obtained "by any means other than by condemnation, at least 90 per cent... of the property rights and interests in the underground field..."[54] Kentucky in 1948 recognized condemnation for underground storage fields[55] and the following year West Virginia enacted a statute[56] setting up public uses for which property may be taken, but limited to areas that ceased to produce or proved to be non-productive of oil and gas in "substantial" quantities. The statutes of Texas, a

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[51] OKLA. STAT., Title 52, 36-1—36-7, "no sand or stratum capable of oil production in paying quantities, through any known recovery method, shall be subject to appropriation, nor shall any gas bearing sand or stratum, unless the volume of native gas shall be shown to be substantially depleted." Section 6 states that, "all natural gas which has previously been reduced to possession, and which is subsequently injected into underground . . . reservoirs . . . , shall . . . be deemed the property of the injector . . . , and in no event shall such gas be subject to the right of the owner of the surface of said lands or of any mineral interest therein, . . . provided that the injector . . . shall have no right to gas in any stratum . . . which has not been condemned . . . or otherwise purchased."

[52] ILL. STAT., c. 104, §104-112.

[53] N.J. STAT., 58:10, 35.1-35.4.

[54] MICH. STAT., §11872, Sec. 2.

[55] KY. REV. STAT., §278.501.

[56] W. VA. CODE §5362.

major gas producer are broad in coverage[57] and similar to the Ohio statutes. As seen, the states vary in the procedures for obtaining permits, the limitations imposed, and the administration of the enactments.

The gas industry in Ohio attempted to obtain the power by statute as it sponsored a measure for consideration at the regular session of the 100th General Assembly, which convened January 5, 1953. The act, Senate Bill No. 116, would have amended OHIO REV. CODE § 1723.01 to provide for the appropriation of interests in land for the purpose of storing natural or artificial gas in underground storage reservoirs. After further amendments in both Senate and House, the proposal,[58] which eventually failed, provided that OHIO REV. CODE §1723.01 would remain in its present form, with certain additions needed to extend the appropriation to cover underground storage and with six additional clauses of limitation for the companies benefiting from such condemnation powers.[59]

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[57] TEX. REV. CIV. STAT., Art. 1496, "Such corporation shall have power . . . to lay down, construct, maintain, and operate pipelines, tubes, tanks, pump stations, connections, fixtures, storage houses and such machinery, apparatus, devices and arrangements as may be necessary to operate such pipes and pipelines." And "to own, hold, use and occupy such lands, right of way, easements, franchises, buildings, structures as may be necessary to the purposes of such corporation." The right to condemn is provided by Art. 1497.

[58] Amended ,Senate Bill No. 116, Messrs. Ferguson-Kinley, 100th General Assembly, State of Ohio.

[59] Clauses of limitations, Amended Senate Bill No. 116: (1) "The right to so appropriate shall be limited to a stratum which is or previously has been, commercially productive of natural gas, and to a stratum in which the original native gas reserve is at least fifty percent depleted . . ."
(2) A corporation . . . shall at such time hold title in fee or have the right by grant, lease, or other agreement, to store gas in at least seventy-five per cent of the total acreage within the perimeter of the gas storage reservoir;
(3) A corporation . . . shall designate . . . the particular stratum in which it will store gas. The area, location, extent, and depth of the reservoir, . . . the location of any well or wells to be drilled, . . . together with the location and extent of any pipeline or lines . . . , shall be accurately set out in its petitions;
(4) The right to appropriate . . . shall not authorize the drilling of wells . . . within (three thousand linear feet of any mine) . . . other than on a stripping or open pit operation, . . . nor the appropriation of any coal seam other than the right to drill . . . through such seam to a lower strata, nor the appropriation of any other or greater occupation or use of the surface . . . than is specifically set forth in the petition, nor any other interference with . . . farming or for the recovery of any mineral or natural resource, or for any other purpose;
(5) The right appropriated shall not be construed to preclude the owner of a non-storage strata from drilling wells . . . from any stratum over or under the stratum appropriated . . . , but said owner shall be liable for loss of stored gas or damage to the storage reservoir as a result of such drilling;
(6)Nothing in this section shall be construed to relieve persons drilling wells

The right to enter and survey would have extended to ascertain the number of areas "necessary for the operation of an underground reservoir for the storage of natural or artificial gas," and the companies could have appropriated so much of such land, or any right or interest therein, as was deemed necessary "for the storage of natural or artificial gas in underground storage reservoirs including the right to drill wells and construct and operate facilities for such storage and the removal of such gas from such reservoirs, . . . subject to the following limitations," which have been set out above.

This bill passed in the Senate with comparative ease by a 25 to 7 vote, but by the time the House Committee on Mines held hearings in early July, the coal industry was organized in solid opposition. As a result the bill was amended so that its benefit to the gas utilities became practically a nullity. The committee sent the bill to the House floor, but with an amendment that prohibited using the land for the condemned purpose.[60]

In the end, the gas suppliers were not too sure that they even favored the proposed bill or would be able to operate under it any better than without the right. The matter never came to a final floor showdown as the majority party allowed it to die in the confusion of the session's end realizing that the issue was too highly controversial.

The practical effect of any attempt to secure favorable legislation has at least brought the problem before the public, so that if a future effort in the General Assembly be made, the idea will not appear to be such a revolutionary one. Perhaps the coal and gas industries should iron out their difficulties beforehand and present a measure satisfactory to both.

### Present Situation of Ohio Gas Suppliers

The Ohio gas suppliers may not be operating in the precarious situation that appears at first blush, for the existing Ohio statutes appear broader than those under which the decision of the *Strain* case was rendered.[61] If this is true, an interpretation by the Supreme Court would give the desired use of depleted reservoirs for storage, but without imposition of the limitations on operations that were included in Senate Bill No. 116. The gas utilities might well be benefited more by this judicial construing of existing statutes than by the legislative enactment of new ones.

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. . . or removing such stored gas from any of the requirements of any other section of the Revised Code.

[60] Amendment by the House Committee on Mines "that no pipelines, roads, wells, buildings, or any other installations shall be placed by a gas company upon an owner's lands under whose land a special stratum has been acquired by right of eminent domain, against the owner's express wishes."

[61] Ohio Rev. Code §§4905.01 to 4905.63, 1723.01, 1723.02, 1723.05, 1723.08, 2709.01 to 2709.46.

It is conceded that the legislature did not have the specific thought of using depleted underground reservoirs for storage areas when it enacted OHIO GEN. CODE §10128, the forerunner of OHIO REV. CODE §1723.01.[62] However, the Ohio court has indicated a quite possible argument.[63] Thus, the absence of a specific statement on underground storage should be no basis for defeating such use if in fact the statute is sufficiently broad enough to include it, as the Ohio statute appears to be.

A look at the 1951 decision of the Supreme Court of Ohio in *The Ohio Power Co. v. Deist,*[64] further strengthens the position that gas suppliers as public utilities have the right to appropriate private land for use as an underground storage reservoir. Here, the Ohio Power Co., as plaintiff sought to appropriate a right of way over defendant landowner's premises for the erection, operation, and maintenance of a belt conveyor to transport coal from the company's privately owned coal field to its proposed electric generating station, a distance of approximately four miles. The appropriation statute for electric companies is very similar to the one for gas companies.[65]

In determining the scope and meaning of the phrase "and other necessary structures and appliances" the court adopted the thought expressed in an earlier decision[66] that while statutes delegating the authority to exercise the right of eminent domain must be strictly construed, such construction should not be so strict and strained, as to disregard the admitted policy of the law. The court stated:

> "In construing the statute we cannot ignore changes and improvements in mechanical devices which are incident to and part of the general progress of science. We must rec-

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[62] See note 45, *supra,* for text of statute.

[63] "But it is well understood that the scope of the operation or applicability of a statute is not limited or prescribed by the object or purpose prompting its enactment. A statute may include by inference a case not originally contemplated, when it deals with a genus, and a thing which afterward comes into existence is a species thereof, and the language of the statute will generally be extended to the new species, although it was not known and could not have been contemplated by the Legislature when the act was passed." Columbus v. Federal Gas and Fuel Co., *supra,* at p. 397.

[64] The Ohio Power Co. v. Deist, 154 Ohio St. 473, 96 N.E. 2d 771 (1951).

[65] OHIO GEN. CODE §9192-1, now OHIO REV. CODE §4933.15, "Any company organized for the purpose of manufacturing, generating, selling, supplying or transmitting electricity, for public and private use, may enter upon any land, . . . and may appropriate so much thereof, or any right or interest therein, . . . as is deemed necessary for the erection, operation or maintenance of an electric plant, including its generating stations, substations, switching stations, transmission and distribution lines, poles, towers, piers, conduits, cables, wires *and other necessary structures and appliances.*" (Italics supplied.)

[66] Toledo and Wabash Railway Co. v. Daniels, 16 Ohio St. 390 (1865).

> ognize the fact that a modern electric generating plant may and probably will embody many mechanical devices which were non-existent in earlier years, and that many such devices may form necessary integral parts of a modern electrical generating plant although not specifically enumerated in the statute under discussion.
>
> A belt conveyor for transporting coal is a recently developed mechanical device. We believe that it can qualify as a 'structure' or 'appliance' constituting part of an electric plant, provided its necessity is established."[67]

The court determined this necessity from the fact that the plant was required to be on a river where the water supply was abundant; that an economical source of coal was imperative, since cost of coal is 65 per cent of the cost of production, that the cost of coal would directly affect the rates charged the public for current; and that it was impractical to obtain coal by trucking or by railroad.

In recognizing the propriety of placing a reasonable construction upon statutes authorizing condemnation, the court said:

> "This is particularly true when public utilities face practical problems which are the result of mechanical and scientific progress."[68]

And further,

> "this court is entitled to and should construe the evidence in the light of certain important well known facts such as the chaotic condition of the coal industry...[69]
>
> "Even though Section 9192-1, General Code, does not specifically mention belt conveyor, the evidence... justifies the conclusion that this belt conveyor is a 'structure' or 'appliance' which is here necessary in the generating of electricity and is so closely associated with other necessary elements as to become in effect a part of this 'electric plant'."[70]

Since OHIO REV. CODE §1723.01 is practically identical in structure as OHIO GEN. CODE §9192-1 (now OHIO REV. CODE §4933.15) the same arguments should apply to condemnation for underground storage as applied to condemnation for a belt conveyor. In the light of the decision in *The Ohio Power Co. v. Deist* it can be argued quite forcefully that an underground storage reservoir, which furthers the essential purpose for which gas suppliers exist — that of adequately serving the public — is within the "facilities necessary to the purposes of such companies, . . . organized for the . . . storing, transporting, or transmitting... natural or artificial gas."[71] That the necessity need not be that the very existence of the cor-

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[67] The Ohio Power Co. v. Deist, *supra*, note 64 at p. 478.

[68] The Ohio Power Co. v. Deist, *supra*, note 64, at p. 481.

[69] See Oury v. Goodwin, 26 Pac. 376 (Ariz. 1891).

[70] The Ohio Power Co. v. Deist, *supra*, note 64, at p. 482.

[71] OHIO REV. CODE §1723.01.

poration depends on the appropriation is conceded.[72] Nor would the fact that underground storage is novel make it less a public use.[73]

The phrase to "appropriate so much of such land, or any right or interest therein, as is deemed necessary for the... building of such... reservoirs..."[74] may be interpreted to include an underground storage reservoir even though the surrounding words of the statute indicate that the legislature was dealing with water companies. The condemnation power for gas storage is contained in the existing statutes. Such an interpretation by the courts would not be within that haunting term, judicial legislation.

It should be kept in mind, however, that in 90 per cent of the dealings, arrangements for storage rights are completed in an amicable manner. But because 100 per cent acquiescence of the landowners is absolutely essential, the companies need the condemnation power when forced to use it by an unapproachable landowner. Without sufficient underground storage facilities, the gas consumer and not the utility will suffer.

*Wilbur L. Collins*

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[72] Giesy v. Cincinnati, Wilmington and Zanesville Railroad Co., 4 Ohio St. 308 (1854).

[73] Knoxville Housing Authority v. Knoxville, 174 Tenn. 76, 123 S.W. 2d 1085 (1939).

[74] OHIO REV. CODE §1723.01.