

**PROTECTING CONSERVATION EASEMENTS FROM EMINENT DOMAIN
IN NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDORS**

Conservation Law Center and
Indiana University School of Law, Conservation Law Clinic
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I. OVERVIEW OF PROBLEM

The Energy Policy Act of 2005 (“EPAAct”)¹ added, among other initiatives, 16 U.S.C. §824p (henceforth referred to as “Section 824p”) to the Federal Power Act (“FPA”).² Section 824p requires the Secretary of the Department of Energy (“DOE”) to conduct a study of congestion in electric transmission every three years. If supported by the study, “any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers” may be designated by the Secretary as a National Interest Electric Transmission Corridor (“NIETC”).³

Once an NIETC has been designated, the Federal Energy Regulatory Commission (“FERC”) may issue permits to private sector utility companies for the construction or modification of electric transmission facilities within the designated corridor.⁴ This regulatory authority may be exercised only when a state in which the facilities are to be located cannot or will not issue a permit to site such facilities, and the electricity will be used in interstate commerce.⁵ According to the statute, the likelihood of permit approval will be determined at an “expeditious pre-application” meeting between the applicant and relevant agencies.⁶

Most critically for land trusts and other conservation organizations, Congress, in Subsection 824p(e), has delegated to the holder of a FERC permit the right to acquire a utility right-of-way by the exercise of eminent domain when other efforts to obtain the property have failed.⁷ This eminent domain authority, however, may not be exercised on “property owned by the United States or a State” (this exclusion is henceforth referred to as the “824p(e) exception”).⁸ The 824p(e) exception is the first line of defense against condemnation within NIETCs. Unfortunately, Congress provided no explanation of what constitutes property owned by the United States or a state in the context of the statute.

The condemnation authority delegated to utilities in Section 824p presents a particularized threat to land trusts and other conservation organizations that hold property

¹ Public Law 109-58, 119 Stat. 594.

² The Federal Power Act is codified at 16 U.S.C. §§791a *et seq.* (2008).

³ 16 U.S.C. §824p(a)(2) (2008).

⁴ 16 U.S.C. §824p(b)(2) (2008).

⁵ 16 U.S.C. §824p(b) (2008).

⁶ 16 U.S.C. §824p(h)(4)(C) (2008).

⁷ 16 U.S.C. §824p(e) (2008). In this memo we use the terms “eminent domain” and “condemnation” interchangeably.

⁸ *Id.*

interests within the NIETCs. The typically low fair market value and ease of development of conservation properties may make them particularly appealing for siting electric transmission facilities. Moreover, utility rights-of-way likely will have detrimental effects on conservation lands on which they are sited, including the physical loss of land taken to site power lines, substations, and other structures, as well as environmental damage caused by construction, maintenance, pesticides, habitat fragmentation, and, potentially, electromagnetic fields.

Finally, Section 824p gives the federal government the power to site transmission facilities when states are powerless or recalcitrant in doing so. Thus, the ultimate decision to condemn conservation interests is removed from the states and localities in which the facilities are located. Local land trusts and other organizations that rely on reputation and political connections on a state and local, but not national level, may therefore have a more difficult time getting their interests heard.

II. RELEVANT QUESTIONS AND SHORT ANSWERS

This memorandum examines the extent to which conservation easements held or co-held by land trusts may be resistant to Section 824p condemnation, by virtue of partnerships with governmental entities or other mechanisms.

A. Relevant Questions

Specifically, we address three main questions.

1. What types of conservation easements fall within the scope of the 824p(e) exception?
2. To what extent can the prior public use and related doctrines protect land already subject to a public use, such as land burdened by a conservation easement?
3. Does the environmental review process required by Section 824p for permitting and siting provide any significant protection from the exercise of eminent domain?

B. Short Answers

Based on our analysis of Section 824p and other relevant law, we conclude the following:

1. Conservation easements co-held by a federal or state agency most likely fall within the scope of the 824p(e) exception. Moreover, conservation easements newly acquired by land trusts under the federal Farm and Ranch Lands Protection Program

are likely protected under the 824p(e) exception. The 824p(e) exception also likely applies to conservation easements with attached federal or state contingent future interests, if the contingent interests are recorded and the contingencies are not speculative or remote.

2. The prior public use doctrine may be most usefully applied in situations where governmental interests are involved, and may be used to focus attention on alternative sites.
3. Requirements of federal environmental laws such as the Endangered Species Act and Clean Water Act may discourage condemnation of conservation easements containing particularly high-quality habitats, especially in situations where alternative less-damaging sites are proposed.

III. BASICS OF EMINENT DOMAIN

“Eminent domain is the power of the sovereign to take property for ‘public use’ without the owner’s consent.”⁹ Medieval legal thought found this power inherent in sovereignty, and sovereignty is still considered the basis of the power today.¹⁰ The “Takings Clause” of the Fifth Amendment of the U.S. Constitution states that “private property [shall not] be taken for public use, without just compensation[.]” The condemnee may not be able to thwart condemnation in a particular circumstance, but has the right to receive compensation for property that has been taken. These constraints also apply through the Fourteenth Amendment to the separate condemnation powers of the states.¹¹

Eminent domain raises three basic issues. The threshold issue is whether there has been a “taking” of a condemnee’s property interest. Cases and literature that focus on this issue often seek to classify various government actions as either a taking or an exercise of wholly separate governmental power.¹² The distinction between types of takings is often couched in terms of ‘physical taking,’ where the condemnor actually acquires a property interest in the condemned land, and ‘regulatory taking,’ by which government action reduces property value without physically taking possession.

⁹ 1-1 *Nichols on Eminent Domain* §1.11 (2007).

¹⁰ 1A-2 *Nichols on Eminent Domain* §2.2 (2007).

¹¹ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984).

¹² See *Yee v. City of Escondido*, 503 U.S. 519 (1992) (mobile home park owner unsuccessfully argued that a local rent control ordinance was a taking by the government).

The second basic issue is whether the property has been taken for a public use. It is a well-established precept of eminent domain analysis that the legislature's determinations of what constitutes "public interest" should be given great deference,¹³ and will be overturned only when failing a rational basis test,¹⁴ or when "[i]ts decision ... is shown to involve an impossibility."¹⁵ This rule of deference becomes more complicated when a condemnor seeks to condemn land already subject to a public use.¹⁶

The third basic issue is whether compensation for a proper taking is just.¹⁷ The proper standard of valuation of condemned land is generally held to be fair market value.¹⁸

Eminent domain power may be delegated to governmental agencies¹⁹ and private entities.²⁰ These private entities usually are corporations, particularly those with a public character that provide, for example, utility or transportation services.²¹ Although condemnation power is generally delegated to a governmental agency to "the full extent of [the agency's] statutory authority,"²² condemnation power delegated to private corporations may be inherently limited.²³

IV. THE SCOPE OF THE 824P(E) EXCEPTION

According to DOE, in order to construct a transmission facility within an NIETC, a utility company must obtain both a construction permit and a right-of-way across each piece of public or private property along the proposed route.²⁴ A permit issued by FERC under §824(b) would constitute a construction permit.²⁵

¹³ *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁴ *Kelo v. City of New London*, 545 U.S. 469, 488 (2005). In *Kelo*, the Court found a rational basis for the municipal legislature's determination that development of an upscale shopping mall was "public use." See also *Hawaii Housing Authority*, 467 U.S. 229.

¹⁵ *United States ex rel. Tennessee Valley Authority v Welch*, 327 U.S. 546, 552 (1946); but see *Cincinnati v Vester*, 281 U.S. 439, 446 (1930) ("It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.").

¹⁶ This situation is discussed in Part V below.

¹⁷ U.S. Constitution, Amendment V; *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

¹⁸ *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

¹⁹ *Welch*, 327 U.S. 546.

²⁰ *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U.S. 594 (1904).

²¹ In *Kelo* the delegee was a commercial land developer.

²² *Welch*, 327 U.S. at 551-52.

²³ *United States v. Carmack*, 329 U.S. 230, 243 (1946). See discussion of *Carmack* in Part V.

²⁴ 72 Fed. Reg. 56992, 52993 (2007).

²⁵ *Id.*

With respect to property owned wholly by a private entity, the FERC permit would entitle the permit holder to acquire a necessary right-of-way by eminent domain if the holder could not acquire the right-of-way through negotiation with the property owner. The court with jurisdiction over the condemnation proceedings would determine the just compensation owed, which would be the fair market value of the property on the date of the condemnation (including applicable severance damages).²⁶

FERC permit holders may not, however, condemn property owned by the United States or a state. The 824p(e) exception states:

In the case of a permit under subsection (b) for electric transmission facilities *to be located on property other than property owned by the United States or a State*, . . . the permit holder may acquire the right-of-way by the exercise of the right of eminent domain[.]

(Emphasis added.) Thus, because the exception precludes the use of eminent domain, if FERC were to issue a permit for a transmission facility slated to cross any federal or state property, the permit holder would need to reach agreement with the federal or state agency responsible for managing that property in order to obtain a right-of-way.²⁷

The scope of the 824p(e) exception is uncertain. Whether the exception prohibits condemnation of partial interests in land (such as conservation easements) held or co-held by federal or state government has not been indicated by Congress and not yet determined by a court. The 824p(e) exception will apply to partial interests in land to the extent that these interests are considered “property,” and can be “owned.” Conservationists and some land management agencies presumably will seek an expansive interpretation of these terms to maximize the scope of the 824p(e) exception. DOE, FERC, and utility companies, in contrast, are likely to seek a narrow interpretation of these terms to maximize siting options.

Note that even if conservation easements held or co-held by a government agency fall under the 824p(e) exception, the conservation interests still may be lost. A transmission project can be built across such property if the government agency involved is willing to grant a right-of-

²⁶ 16 U.S.C. §824p(f)(2) (2008).

²⁷ According to DOE, the issuance of a FERC permit would not control a federal or state land management agency’s decision whether to grant or deny a right-of-way. 72 Fed. Reg. at 52993. This assertion is questionable.

way or to abandon its property interest.²⁸ Thus, the 824p(e) exception is not a foolproof defense against Section 824p condemnation.

A. Possible Agency Interpretation of the 824p(e) Exception

Our analysis begins with statements by DOE relevant to the 824p(e) exception. Although we have not found formal agency interpretations of the exception, informal statements by the agency may indicate its likely position should the meaning of the exception be litigated. The following public comment and agency response are documented in the 2007 Federal Register notice and order designating the Mid-Atlantic and Southwest NIETCs:

Many commenters, including numerous individuals, argued that the Department should exclude *National Parks, State parks, and other environmentally, historically, or culturally significant lands* from any Mid-Atlantic Area National Corridor. . . .

The Department concludes that exclusion of environmentally, historically, or culturally sensitive lands from the Mid-Atlantic Area National Corridor is neither required nor necessary. First, *with regard to public lands such as parks and wildlife refuges*, nothing in the statute suggests that the Department should exclude such lands from a national interest electric transmission corridor. In fact, *FPA section 216(f)(2), as discussed in Section I.A above, expressly excludes property owned by the United States or a State from a FERC permit holder's exercise of eminent domain authority.*²⁹

* * *

The right of eminent domain under FPA section 216 does not apply to *State property*. Thus, any *current State lands* will not lose existing conservation protection unless authorized by the appropriate State authorities. In addition, State authorities will not lose any incentive to create *new parks or State conservation areas*.³⁰

Statements on DOE's website mirror its statements in the Federal Register:

[A] federal permit would empower the project developer to exercise the right of eminent domain to acquire necessary property rights to build the facilities. However, that authority could only be exercised if the developer could not acquire the property by negotiation, *and even then would not apply to property owned by the United States or a State, such as a national or State park.*

* * *

²⁸ 72 Fed. Reg. 56992.

²⁹ 72 Fed. Reg. at 57009 (emphasis added).

³⁰ 72 Fed. Reg. at 57024 (emphasis added).

Exclusion of environmentally, historically, or culturally sensitive lands from a National Corridor is neither required nor necessary. First, *with regard to public lands such as parks and wildlife refuges*, nothing in the statute suggests that the Department should exclude such lands from a National Corridor. In fact, FPA *section 216(f)(2) expressly excludes property owned by the United States or a State* from a FERC permit holder's exercise of eminent domain authority.³¹

Although the above agency statements are not a formal, or even a clear, interpretation of the 824p(e) exception, the statements suggest that DOE associates the 824p(e) exception with national parks, state parks, state conservation areas, and wildlife refuges, but not necessarily with conservation easements burdening private land.

B. What Constitutes Property Owned by the United States?

Ultimately, the scope of the 824p(e) exception should be addressed by the courts as a matter of statutory construction. In this Subpart we use relevant rules of statutory construction to interpret the phrase “property owned by the United States.”³² In section 1 we consider the terms that Congress has used in related statutory provisions. In sections 2 through 5 we analyze case law where courts have grappled with the concepts of property and federal ownership. Finally, in section 6 we highlight a rule of statutory construction for eminent domain provisions.

³¹ <http://www.oe.energy.gov/nietc.htm>; http://nietc.anl.gov/documents/docs/FAQs_re_National_Corridors_10_02_07.pdf (emphasis added).

³² The overriding objective of statutory construction is to effectuate the intent of the legislature and the purposes of the legislation. The starting point of the process is the language of the statute. If the meanings of words or phrases are uncertain and can give rise to more than one plausible interpretation, the court will attempt to ascertain the intent of the legislature from sources outside the text. Several rules or canons of statutory construction are relevant to the construction of the phrase “property owned by the United States or a State,” including the following: (1) Congress legislates with knowledge of the basic rules of statutory construction; (2) words that are not terms of art are considered in their plain and ordinary meaning; (3) if words with legal import are defined in the statute or elsewhere in the Code, that definition governs if applicable in the context used; (4) when a statute uses words that have a definite and well-known meaning at common law, it will be presumed that the words are used in the sense in which they were understood at common law; (5) the same words used in different statutes on the same subject are interpreted to have the same meaning; (6) the meaning of a broad term is known from the associated examples or more limited terms; (7) statutory language is construed in the context of the whole act – as a harmonious whole; (8) if Congress uses particular language in one part of the statute but omits the language in another part, it is generally presumed that Congress used the language intentionally; (9) where statutes interfere with private property rights, such as statutes divesting title against the owner's will, all doubts are resolved in favor of the property owner. George Costello, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, Library of Congress, Order Code 97-589 (updated March 30, 2006). See also 73 *Am. Jur. 2d Statutes*.

1. Language in the FPA indicates “property” is distinguished from “federal lands” and “public lands”

Analysis of language appearing within §824p, and more broadly in the EAct and FPA, may provide insight into whether Congress intended the word “property” in the 824p(e) exception to include partial interests in land such as conservation easements. Congress used several different terms in the EAct and FPA to designate federal or state property:

- “property owned by the United States or a State” — 16 U.S.C. §824p(e)(1), EAct §1221, FPA Subchapter II
- “lands or other property that are owned by a state or political subdivision” — 16 U.S.C. §814, FPA Subchapter I
- “federal lands” — 16 U.S.C. §824p(h)(8)(A) and (B), EAct §1221; 42 U.S.C. §15871, EAct §225; 42 U.S.C. §15907, EAct §349; 42 U.S.C. §15926, EAct §368; 16 U.S.C. §823c, FPA Subchapter I
- “public lands” — 16 U.S.C. §796, FPA Subchapter I

Rules of statutory construction suggest that Congress presumably perceived a difference between these alternative terms and intentionally used these terms to set forth distinct concepts. Based on our analysis of these alternative terms and their statutory context, we draw the following three conclusions.

First, the term “federal lands” is associated with public lands and designations such as national parks and wildlife refuges. For example, EAct §368(e) (42 U.S.C. §15926(e)) directs DOE and other agencies to designate multi-purpose energy corridors on “federal lands.” Although the statute does not define “federal lands,” the environmental impact statement associated with the corridor designations lists the “sites owned by federal agencies” which are potentially impacted by a federal corridor designation. This list includes a variety of properties managed by the federal agencies.³³

³³ These potentially impacted sites are listed in Appendix K of the EIS, and include lands “owned” by the Bureau of Land Management (National Conservation Areas, National Monuments, Wilderness Areas, Wild, Scenic, and Recreational Rivers), National Park Service (Memorial Parkways, National Battlefields, National Historic Parks, National Historical Reserves, National Historic Sites, National Monuments, National Memorials, National Parks, National Recreational Areas, Preserves), U.S. Forest Service (Research and Experimental Areas, Land Utilization Projects, National Forests, National Grasslands, Purchase Units), and U.S. Fish and Wildlife Service (Administrative Sites, Coordination Areas, National Fish Hatcheries, National Wildlife Refuges, and Waterfowl Protection Areas).

Second, Congress likely intended “public lands” to be a narrower category than “federal lands” in the context of the FPA. The FPA defines the term “public lands” as “such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws,” except for “reservations.”³⁴ The term “reservations” includes national forests and other lands typically considered “federal lands.”³⁵ Thus, “federal lands” appears to be more encompassing than “public lands,” particularly if “federal lands” also includes interests in lands.

Third, the term “property,” as used in the FPA, is likely to be construed more broadly than both “federal lands” and “public lands.” For example, §814, which delegates eminent domain authority to public utilities under FPA Subchapter I, states in relevant part:

[N]o licensee may use the right of eminent domain under this section to acquire *any lands or other property* that, prior to October 24, 1992, were owned by a State or political subdivision thereof *and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after October 24, 1992,* no licensee may use the right of eminent domain under this section to acquire *such lands or property* unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which *such lands or property* are owned.

(Emphasis added.) Congress’ use of the term “lands or other property” indicates an intent that “property” is broader in scope than “lands.” Moreover, Congress’ use of the phrase, “any lands or other property that . . . were part of or included within any public park, recreation area or wildlife refuge,” indicates that Congress may limit the term “property” when it deems necessary.

In the 824p(e) exception, Congress, presumably intentionally, used the word “property” rather than the terms “federal lands” or “public lands.” Moreover, Congress did not impose any limitations on the word “property.” The use of the word “property” in §824p(e) (and in §814) may reflect the broad use of the word in Takings Clause doctrine.

³⁴ 16 U.S.C. §796(1) (2008).

³⁵ 16 U.S.C. §796(2) (2008).

2. Partial interests generally are compensable “property” under the Takings Clause

Federal courts have articulated a broad and modern view of “property” for the purposes of the Takings Clause and eminent domain. For example, the U.S. Supreme Court, in determining the just compensation due to a lessee upon the government’s condemnation of the lessee’s right to occupancy, explained in *United States v. General Motors Corporation*:

It is conceivable that [the term property in the Fifth Amendment] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.³⁶

In *United States v. 53 1/4 Acres of Land*, the Second Circuit held that a statutory right of a mortgagor to assume a lease upon default of a tenant constituted compensable property for eminent domain purposes. The Second Circuit explained:

We see no reason to grope about in the mysterious world of “estates” and “interests not estates”. . . we think that the right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an “estate” or “interest” in the land.³⁷

As a result of this expansive view, a variety of rights or interests in real property have been treated as compensable “property” for eminent domain purposes.³⁸

Of particular relevance to conservation easements, federal courts and courts in several states have concluded that restrictive covenants and equitable servitudes imposing negative restrictions, where the benefit accrues to land, constitute compensable “property.”³⁹ *Adaman*

³⁶ *United States v. General Motors Corporation*, 323 U.S. 373, 377-78 (1945).

³⁷ *United States v. 53 1/4 Acres of Land*, 139 F.2d 244 (2d Cir. 1943).

³⁸ 2-5 *Nichols on Eminent Domain* §§5.01, 5.02, 5.07 (2007).

³⁹ 2-5 *Nichols on Eminent Domain* §5.07 (2007); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 631 (1961) (holding that flowage easement destroyed by Government’s appropriation is property, and owner of easement entitled to compensation); *United States v. 13.98 Acres in Kent County, Delaware*, 702 F. Supp. 1113 (D. Del. 1988) (concluding that because United States already owned “one stick (*i.e.*, the easement) in the bundle of rights” comprising the property appropriated, the Government “should only be required to compensate the property owner for the remaining sticks in the bundle of rights,” thus subtracting out the value of the easement); *United States v. Certain Land in the City of Augusta, Maine*, 220 F. Supp. 696, 701 (D. Me. 1963) (in condemnation of land burdened by restrictive covenants appurtenant to plaintiffs’ lots, concluding that “the claimants did have a compensable interest in the land taken in this proceeding by virtue of the restrictive covenants in their deeds”). At the state level, at least two state courts have extended the rule to negative restrictions held in gross (*i.e.*, the benefit

Mut. Water Co. v. United States is an example of the rule. Adaman provided water services to the owners of land within a reclamation project and charged the land owners an assessment to pay for the operation and maintenance of the water system. The United States condemned a portion of the land within the project, and Adaman argued that it had a compensable interest under the Fifth Amendment due to the diminution of its assessment base. The Ninth Circuit agreed with Adaman, reasoning as follows:

We think that the duty to pay assessments in the instant case is an equitable servitude or restrictive covenant Appellant [water company] has lost the benefit derived from this servitude, and the loss is compensable, for the Government has destroyed an intangible right directly connected with the physical substance of the land condemned.

* * *

Presently, a restrictive covenant is generally deemed a property right under federal law. *Chapman v. Sheridan-Wyoming Coal Co.*, 1950, 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393. We think it should be treated similarly in an eminent domain context where the purpose of the distinction between property interests and other rights is to differentiate losses directly connected with the land taken from losses comparatively more remote. . . . *Accordingly, we think that under the Fifth Amendment a restrictive covenant imposing a duty which runs with the land taken constitutes a compensable interest.*⁴⁰

We may presume, based on settled rules of statutory construction, that if Congress intended in Section 824p to change or override the interpretation of the common-law concept of “property” as expressed in *Adaman* and similar cases, then Congress would have made that intent clear. Section 824p contains no indication that Congress so intended. Thus, a cogent argument can be made that Congress intended the word “property” in §824p(e) to include partial interests in land such as conservation easements.

3. Wetland easements held by the USFWS are property of the United States

The Migratory Bird Hunting Stamp Act authorizes the U.S. Fish and Wildlife Service (“USFWS”) to acquire waterfowl management easements on private lands to protect migratory

of the restriction accrues to a person or organization rather than to land): see *Morley v. Jackson Redevelopment Authority*, 632 So.2d 1284 (Miss. 1994); *Hartford Nat. Bank & Trust Co. v. Redevelopment Agency of City of Bristol*, 321 A.2d 469 (Conn. 1973). A minority of states, however, have denied compensation to holders of restrictive covenants or equitable servitudes upon the taking of burdened land. 2-5 *Nichols on Eminent Domain* §5.07 (2007).

⁴⁰ *Adaman Mut. Water Co. v. United States*, 278 F.2d 842, 846, 849 (9th Cir. 1960) (emphasis added).

waterfowl habitat.⁴¹ A line of cases within the Eighth Circuit deciding challenges to these easements indicates that federal courts are likely to construe “property owned by the United States” to include partial interests in land held by the federal government.

In *United States v. Welte*,⁴² the USFWS had acquired a waterfowl management easement on private land and was prosecuting the landowner for violating the Wildlife Refuge Act.⁴³ The Act provides in pertinent part that “no person shall knowingly disturb, injure, . . . or possess any real or personal property of the United States . . . in any area of the [National Wildlife Refuge (“NWR”)] System . . .”⁴⁴ The defendant Welte argued that two elements of the Act were not satisfied: namely, a waterfowl management easement acquired under the Stamp Act is not an “area of the NWR System,” and such easement is not “real or personal property of the United States.” The court first ruled that under the Act the easements, as areas administered by the USFWS for the conservation of fish and wildlife, are part of the NWR System.⁴⁵ The court then ruled that the easements are U.S. property.⁴⁶

Although parts of *Welte* have been superseded in later opinions, these two rulings have not been modified by subsequent case law.⁴⁷ It would be fair to argue, based on *Welte* and similar cases, that conservation easements encumbering private land and held by a federal agency are likely to be construed as property of the United States.⁴⁸

4. The concept of federal ownership is broader than fee simple, but has bounds

Ownership has been defined as “the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.”⁴⁹ The various forms of ownership listed in Black’s Law Dictionary indicate that the modern concept of ownership of real property

⁴¹ 16 U.S.C. §718d (2008).

⁴² *United States v. Welte*, 635 F. Supp. 388, 390 (D. N.D. 1982), aff’d without opinion, 696 F.2d 999 (8th Cir. 1982).

⁴³ 16 U.S.C. §668dd (2008).

⁴⁴ *Welte*, 635 F. Supp. at 389.

⁴⁵ *Id.* Note that waterfowl management easements burdening private land may be deemed appurtenant to land owned by the government, since the easements benefit lands of the National Wildlife Refuge System.

⁴⁶ *Id.* at 390, citing *United States v. Virginia Electric Co.*, 365 U.S. 624 (1961) (flowage easement is “property” within the meaning of the Fifth Amendment) and other cases ruling that easements are property.

⁴⁷ See *North Dakota v. United States*, 460 U.S. 300 (1983); *United States v. Johansen*, 93 F.3d 459 (8th Cir. 1996); *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987).

⁴⁸ Property owned by a federal agency is, in most circumstances relevant here, property owned by the United States. See, e.g., *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 634-35 (1960) (indicating that whether property is owned by the United States turns on “practical ownership” – e.g., possession and control – rather than on who holds bare legal title, and that the concept of “practical ownership” allows the U.S. to “own” property even though record title is held by a federal instrumentality).

⁴⁹ Black’s Law Dictionary (8th ed. 2004).

is broad: for example, ownership may be conditional (contingent upon the occurrence of some event), incorporeal (ownership of rights in land rather than land itself), vested (an immediate, fixed right of present or future enjoyment), or beneficial (for the benefit of a party not holding record title).

An essential question posed by the 824p(e) exception is whether conservation easements or other nonpossessory partial interests in land can constitute property “ownership” by the U.S. The federal courts have not directly answered this question, but we may delineate the boundaries of the concept of federal “ownership.”

Property in which the U.S. holds record title in fee simple surely is “owned by the United States.” Moreover, the U.S. Supreme Court has ruled that in determining whether property is owned by the U.S., so as to be immune from state and local taxation, the appropriate test is “practical ownership of the property” rather than the holding of the formal legal title. According to the Court, indicia of “practical ownership” include a requisite degree of possession, control, and custody of the property, or circumstances indicating that the title is held for the benefit of the U.S.⁵⁰

On the other hand, some federal interests in land may be too minimal or speculative to constitute property ownership. In *Mount Olivet Cemetery Association v. Salt Lake City*, the Tenth Circuit considered whether a parcel of land in which the federal government had a contingent future interest was “property owned by the United States.”⁵¹ A Utah statute provided: “Unless otherwise provided by law, nothing contained in . . . this chapter may be construed as giving the planning commission or the legislative body jurisdiction *over properties owned by the state of Utah or the United States government.*”⁵² In 1909 the U.S. conveyed land to the Mount Olivet Cemetery Association and provided that when the land ceased to be used for a cemetery it would revert to the U.S. The court found that the U.S. retained “a future contingent interest in real property, and, at best, a future estate in land,”⁵³ and ruled as follows:

The federal government’s limited interest in the property is insufficient to trigger the government ownership exclusion provision of § 10-9-105. The Association holds the property in fee simple, subject only to the qualifying limitations set forth in the 1909 and 1992 Acts. The Association has exclusive right of possession. . . . Any interest the federal government has is minimal and speculative, and

⁵⁰ *Rohr Aircraft*, 362 U.S. at 634-35; *County of Culpeper, Virginia v. Etter*, 231 F. Supp. 999 (E.D. Vir. 1963).

⁵¹ *Mount Olivet Cemetery Association v. Salt Lake City*, 164 F.3d 480 (10th Cir. 1998).

⁵² Utah Code Ann. §10-9-105 (emphasis added).

⁵³ *Mount Olivet*, 164 F.3d at 485.

inconsistent with a characterization of the property as property “owned ... by the United States government.” . . . The limited interest of the United States – its possibility of reverter – is immaterial with respect to the current right of possession and does not establish ownership of the property. . . . The property is therefore not a property owned by the United States for purposes of § 10-9-105.⁵⁴

Mount Olivet suggests a lower bound on the types of property interests that are likely to constitute “property owned by the United States.” A narrow reading of *Mount Olivet* indicates that a future, nonpossessory interest in land must be vested, rather than contingent, to constitute ownership. A broader and more ambitious reading suggests that the court’s ruling turned on the speculative nature of the contingency – *i.e.*, if the land ceased to be used as a cemetery – and that other contingent future interests, based on more foreseeable contingencies, may constitute ownership interests.

Whether courts will in general deem nonpossessory interests in land as “ownership” interests is uncertain. Present nonpossessory interests in land, particularly where the holder is actively involved in managing the land and where the interest is recorded, may be likely candidates for “ownership” status. Federal holders of conservation easements such as the waterfowl management easements in *Welte* exhibit present control over those property interests, which is one indicator of practical ownership. In contrast, *future* nonpossessory interests contingent on some event – *e.g.*, where a federal agency is named as successor holder of an easement in the event that a land trust fails to meet its obligations – are less likely to be viewed as property “owned.” However, a contingent future interest may constitute federal ownership of property if such interest can be distinguished from the federal interest in *Mount Olivet*.

5. The Quiet Title Act indicates that federal ownership is broadly construed

The Quiet Title Act (“QTA”) is the exclusive means by which a claimant can bring a legal action to challenge ownership of real property claimed by the U.S.⁵⁵ The QTA states in relevant part:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. . . .

⁵⁴ *Id.* at 485-86.

⁵⁵ 28 U.S.C. §2409a (2008).

Courts distinguish eminent domain proceedings from QTA proceedings.⁵⁶ However, the QTA case law has made clear that (1) the “real property” to which the QTA refers includes partial interests in land, such as easements or servitudes, and (2) courts adjudicating QTA cases treat partial interests in land held by the federal government as “property owned” by the U.S.

For example, in *LaFargue v. United States*, landowner plaintiffs had donated an easement to the federal government to build an oil pipeline.⁵⁷ After using and decommissioning the pipeline, the government sold “all title, right, and interest the Government had in the Pipeline and the perpetual easements” to a natural gas transport company.⁵⁸ The court denied plaintiffs’ claim that the servitudes had terminated due to non-use,⁵⁹ and ruled that the government had “maintained *ownership* of the servitudes.”⁶⁰ Also, in *United States v. Austin Two Tracts*, the U.S. sued Austin to remove fill material it placed in a flowage easement held by the government.⁶¹ The court concluded that “[i]t is clear that the flowage easement *owned* by the United States is an interest in land which is subject to the Quiet Title Act.”⁶²

The QTA cases indicate that federal courts are at least familiar with the concept that partial interests in land such as conservation easements are “property owned” by the holder of the restriction. This view may be rooted both in statutory construction of the QTA as well as the courts’ evolving conception of “property.”

6. Eminent domain provisions are liberally construed

It is well-settled that delegations of the right to exercise the power of eminent domain are strictly construed against the grantee of that power.⁶³ The use of the eminent domain is generally scrutinized more closely when exercised by a private party, such as a public utility, than when

⁵⁶ *LaFargue v. United States*, 4 F. Supp.2d 593, 597 (E.D. La. 1998).

⁵⁷ *LaFargue*, 4 F. Supp.2d 593; see also *Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 449 (10th Cir. 1985) (holding that easements and covenants were “claims” of the U.S. under the QTA).

⁵⁸ *Id.* at 596.

⁵⁹ *Id.* at 597.

⁶⁰ *Id.* at 597, 602, 605 (emphasis added).

⁶¹ *United States v. Austin Two Tracts, L.P.*, 239 F. Supp.2d 640 (E.D. Tex. 2002).

⁶² *Id.* at 644 (emphasis added).

⁶³ 1A-3 *Nichols on Eminent Domain* §3.03(6)(b) (2007) (“Even when the power of eminent domain has been expressly granted, the grant must be construed strictly against the grantee. . . . Whatever is not plainly given is to be construed as withheld.”); see also 26 *Am. Jur. 2d Eminent Domain* §1 (2007) (“Courts take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property.”); 26 *Am. Jur. 2d Eminent Domain* §24 (2007) (“The power of eminent domain should be construed favorably to the landowner when there is doubt as to the condemnor’s right to exercise the power.”).

exercised by a governmental entity.⁶⁴ Strictly construing the delegation of eminent domain power under Section 824p against a public utility grantee includes construing the terms “property” and “owned” broadly to encompass the variety of interests in real property that may be owned by the United States or a state.⁶⁵

C. What Constitutes Property Owned by a State?

1. State law may determine the meanings of “property” and “ownership”

Federal courts often have looked to state law when considering disputes over property.⁶⁶ When interpreting a federal statute, however, federal courts will borrow state law only if there is no need for a uniform national interpretation, if state law would not frustrate federal policy or functions, and if existing relationships under state law would not be unduly disturbed.⁶⁷

It seems unlikely that federal courts will borrow state law to determine the meaning of “property owned by the United States” in §824p(e), particularly in states that interpret federal ownership narrowly.⁶⁸ On the other hand, federal courts may borrow from state law when construing the term “property owned by a State,” in keeping with the federalism concerns implicit in Section 824p. Whether a court would rule that a conservation easement held by a state agency is state property thus may depend on state law. Determining which state laws

⁶⁴ 1A-3 *Nichols on Eminent Domain* §§3.03(6)(b) and 11(a) (2007); *Columbia Gas Transmission Corp. v. Natural Gas Storage Easement*, 688 F. Supp. 1245, 1249 (N.D. Ohio 1988).

⁶⁵ Nancy A. McLaughlin, Professor of Law, University of Utah S.J. Quinney College of Law, unpublished and personal communication.

⁶⁶ See *Reconstruction Finance Corp. v. Beaver County, PA*, 328 U.S. 204, 209 (1946) (meaning of real property in federal statute authorizing local taxation of property determined by the application of state rules); *Cortese v. United States*, 782 F.2d 845, 849 (9th Cir. 1986) (“[F]ederal courts, as a general rule, follow state law rather than federal law in resolving real property disputes.”); *United States v. Certain Land in the City of Augusta, Maine*, 220 F. Supp. 696, 699 (D. Me. 1963) (“Though the meaning of ‘property’ as used in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law.”).

⁶⁷ *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 762-63 (10th Cir. 2005) (in deciding whether federal or state law applies to interpretation of federal statute, stating that “[e]ven where an issue is ultimately governed by federal law, however, it is not uncommon for courts to ‘borrow’ state law to aid in interpretation of the federal statute”), citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 672 (1979); *United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974) (state law barring conveyance of real property not applicable where it would hinder a national program of acquiring land for waterfowl production areas).

⁶⁸ Even if federal courts determine that the term “property owned by the United States” cannot be defined according to state law, the courts may draw on principles of state law to construe the statutory language. See, e.g., *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47-48 (1989) (deciding not to rely on state law for the definition of domicile in federal Indian Child Welfare Act, but adding: “That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine ‘the ordinary meaning of the words used.’ Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define.”).

would produce rulings unfavorable to Section 824p condemnation is beyond the scope of this memo.

2. “Property owned by a State” may not include political subdivisions

Statutory provisions in the FPA indicate that the word “State,” as used by Congress in the 824p(e) exception, may not include political subdivisions of a state, such as county or municipal governments. First of all, Subchapter I of the FPA provides separate definitions for the terms “State” and “municipality”:

The words defined in this section shall have the following meanings for purposes of this chapter [Chapter 12, the FPA], to wit: . . . (6) “State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States; (7) “municipality” means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power; . . .⁶⁹

Furthermore, throughout the FPA Congress has distinguished the word “state” from the political subdivisions of a state: for example, “[N]o licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to October 24, 1992, were owned by a *State or political subdivision thereof* . . .”⁷⁰ We conclude that conservation easements held by county or municipal governments may not be protected by the 824p(e) exception unless some other aspect of the easement brings it within the scope of state (or federal) ownership.

D. Co-Holding Conservation Easements

If a conservation easement held by a federal or state agency is protected from Section 824p condemnation, then, in our opinion, a conservation easement duly recorded in the names of multiple parties also would likely be protected if one of the parties is a federal or state agency. Our conclusion is based on the concept of “tenancy in common.” The law is settled that a “tenancy in common” is created where an owner of property grants, conveys, or bequeaths a property interest to two or more parties, unless a “joint tenancy” is intended and specifically expressed in the granting document.⁷¹ That is, tenancy in common is the presumptive form of

⁶⁹ 16 U.S.C. §796 (2008).

⁷⁰ 16 U.S.C. §814 (2008) (emphasis added).

⁷¹ 20 *Am. Jur. 2d Cotenancy and Joint Ownership* §§36-37 (2008).

concurrent ownership of property.⁷² In a tenancy in common, each cotenant owns a separate fractional share of undivided property, without a right of survivorship.⁷³ Moreover, a tenancy in common may exist “in every species of property – real, personal, or mixed, and corporeal or incorporeal . . . [and] adjoining landowners may be tenants in common of easements, of fences on a common boundary, . . . and of irrigation ditches and the right to appropriate the water.”⁷⁴ In sum, a conservation easement would likely be protected under the 824p(e) exception if the recorded easement identifies a federal or state agency as a co-grantee.

E. Easements Held under the Farm and Ranch Lands Protection Program

Since 1996, the Natural Resources Conservation Service (“NRCS”), in the Department of Agriculture, has provided matching funds to state, tribal, and local governments to purchase perpetual conservation easements pursuant to the Farm and Ranch Lands Protection Program (“FRPP”).⁷⁵ The FRPP is a voluntary program in which enrolled farmers and ranchers agree not to convert their land to non-agricultural uses but retain rights to use the land for agriculture. The FRPP was reauthorized and expanded in the 2002 Farm Bill, which among other things added NGOs such as land trusts to the list of entities with which the NRCS will partner in acquiring FRPP easements. If a partnering entity’s proposal to the NRCS meets the criteria for funding, the NRCS enters into a cooperative agreement with, and obligates money to, the partnering entity. The entity then acquires the conservation easement through an easement deed, and holds, manages, and enforces the easement according to the easement contract. The NRCS requires that the cooperative agreement with the partnering entity, as well as the deed conveying the easement, specify that the federal government will hold a contingent property interest in the conservation easement to protect the federal investment.

It is likely that an FRPP easement would constitute “property owned by a State” if the partnering entity is a state agency. Thus, the state’s involvement would protect the easement from Section 824p condemnation. In addition, due to recent modifications to the FRPP regulations, recent and new FRPP easements may be protected as “property owned by the United States” even where the partnering entity is a county, municipality, or private organization.

⁷² *Id.*

⁷³ 20 *Am. Jur. 2d Cotenancy and Joint Ownership* §32 (2008); 7-50 *Powell on Real Property* §50.01 (2005).

⁷⁴ 20 *Am. Jur. 2d Cotenancy and Joint Ownership* §34 (2008).

⁷⁵ 7 C.F.R. Part 1491 (2008).

The NRCS, in response to questions arising as to the nature of the property rights the U.S. purchases by funding FRPP easements, revised the FRPP regulations in 2006 to require that the U.S. be identified as a grantee in FRPP-funded deeds and that the U.S.'s "contingent right" in the easement be recharacterized as a presently-vested and insurable property right.⁷⁶ The U.S., therefore, is now a co-owner of each new FRPP easement along with the partnering entity, and the FRPP easement, at least in the view of the NRCS, is federal property. The NRCS explained:

Historically, the United States has acquired a "contingent right" in FRPP-funded easements which allows the Secretary, at his or her discretion, to enforce or take title to the conservation easement should the Secretary determine that the partner is not enforcing the easement or is attempting to divest itself of the easement without prior approval of and payment of consideration to the Secretary. Under FRPP, the Secretary of Agriculture is authorized "to purchase conservation easements or other interests in eligible land that is subject to a pending offer from an eligible entity," which means that the Secretary is to purchase a presently vested real property right. To avoid any confusion, NRCS is clarifying the nature of the rights acquired under FRPP so there can be no question that these rights are presently vested, insurable real property rights. The Agency is doing this by re-characterizing its "contingent right," as well as requiring that the United States is identified as a grantee in FRPP funded deeds. . . .

. . . The property rights provision required in FRPP easements will read substantially as follows:

Under this Conservation Easement, the same rights have been granted to the United States that have been granted to the grantee/partner. . . . In the event that the grantee/partner attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests in this Conservation Easement without the prior consent of the Secretary and, if applicable, payment of consideration to the United States, then, at the option of the Secretary, all right, title, and interest in this Conservation Easement shall become vested solely in the United States of America.

* * *

An additional reason for adding the United States as a grantee is to ensure that the United States appears in the chain of title. Grantee status facilitates enforcement of these Federal rights vis a vis subsequent landowners, *and also has the beneficial effect of preventing condemnation of the easements by local authorities because State and local governments cannot condemn Federal property.*⁷⁷

⁷⁶ 71 Fed. Reg. 42567 (2006), revising 7 C.F.R. Part 1491.

⁷⁷ 71 Fed. Reg. at 42568 (emphasis added).

In sum, conservation easements recently acquired under the FRPP are likely to be protected from Section 824p condemnation as “property owned by the United States.”⁷⁸ Although there is no indication that pre-2006 FRPP easements will receive the same level of protection, the NRCS may argue for similar treatment of all FRPP easements.

F. Summary of the Likely Scope of the 824p(e) Exception

The following points summarize our conclusions about the scope of the 824p(e) exception:

1. Conservation easements held by a federal or state agency recorded as a grantee: probably protected by 824p(e) exception.
2. Conservation easements co-held by federal or state agency recorded as a grantee: probably protected by 824p(e) exception.
3. Conservation easements held or co-held by political subdivision of a state: may not be protected, unless co-held by federal or state agency.
4. Conservation easements held by private land trust, with federal or state contingent future interest in easement: may be protected if interest is recorded and contingency not speculative or remote.

Land trusts can protect conservation easements vulnerable to Section 824p condemnation by co-holding the easement with a federal or state agency. Co-holding easements with government agencies may entail some risk, however. Land trusts adverse to this co-holding option may explore arrangements where a federal or state agency holds a contingent future interest in the easement. For example, the easement may specify that the agency will co-own the easement upon the occurrence of an event related to condemnation. The result of this option is uncertain, however, since whether the future interest constitutes property ownership may depend on the likelihood that the contingency will come to pass in the foreseeable future.

In addition, we recommend that land trusts exercise caution when considering taking ownership of conservation easements from federal or state government unless the government’s

⁷⁸ Two particular aspects of the FRPP underpin the conclusion that FRPP easements are protected from §824p condemnation. First, FRPP is a real property acquisition program, not a financial assistance or grants program. Second, under the FRPP the Secretary of Agriculture is authorized to purchase a presently vested real property right. See 71 Fed. Reg. 42567.

status as a co-owner is maintained in the recorded deed. For example, under the Grassland Reserve Program, the Department of Agriculture “may transfer title of ownership to an easement . . . to a private conservation or land trust organization . . . to hold and enforce an easement.”⁷⁹ A land trust taking part in such a transfer should consider requiring that the easement be held jointly with the U.S. or a state agency.

V. THE PRIOR PUBLIC USE AND CARMACK DOCTRINES

As discussed above, the 824p(e) exception likely protects conservation easements co-held with a federal or state agency. Conservation easements held or co-held by political subdivisions of a state, however, may not be protected by the exception. Also, easements held solely by private entities likely are not protected by the exception. In this Part, we examine doctrines that potentially protect these latter two categories of easements from Section 824p condemnation.

Under state law and U.S. Treasury code, conservation easements held or co-held by private land trusts generally are held for a public purpose. Can private sector utilities use eminent domain authority delegated under §824p to condemn conservation properties previously set aside for public purposes? The short answer is that such properties may receive some degree of protection from common-law doctrines, but only in particular circumstances.

A. The Doctrines Generally

Two different yet logically related bodies of case law may provide conservation easements with some protection from condemnation. The first is the disparate group of cases describing the common-law doctrine of prior public use (“PPU”). The second is a line of cases following from the 1946 U.S. Supreme Court case *U.S. v. Carmack*, which contains dictum suggesting that eminent domain authority delegated to private entities (such as utility companies) is limited and therefore subject to a more stringent standard of review than similar delegations to governmental actors.⁸⁰

Whether these two bodies of case law can be used to impede Section 824p condemnation will depend on two factors, generally: (1) which standard of review a court imposes on the condemnor as a matter of law, and (2) whether any of the several exceptions noted by these

⁷⁹ 16 U.S.C. §3838q (2008).

⁸⁰ *United States v. Carmack*, 329 U.S. 230 (1946).

doctrines allow the condemnation of land devoted to prior public use to nevertheless proceed. It is fairly clear that the degree of the government's co-interest in conservation land prior to attempted condemnation correlates positively with the likely success of *Carmack*/PPU arguments.

B. The Doctrine of Prior Public Use

The PPU doctrine provides that “[a] general grant of power to condemn property does not extend to property already acquired for or devoted to a public use.”⁸¹ The doctrine is by no means uniformly applied across jurisdictions, and is not even recognized by all. Where the doctrine is applied, its variability in application is most notable in the nature and interpretation of the various exceptions to the rule. We now consider five of these exceptions to the PPU defense.

First, some courts have ruled that the PPU defense is applicable only where the competing entities (*i.e.*, the would-be condemnor and the current holder of property) possess equivalent condemnation powers.⁸² In situations where competing entities are non-governmental, the requirement provides that both parties have equally delegated powers of eminent domain.⁸³ It is not necessary that the current property holder acquired the property for the prior public use through condemnation.⁸⁴

Second, the PPU defense may not prevent the destruction or impairment of the prior interest where there is an express legislative authorization to undermine the interest.⁸⁵ What exactly constitutes an express authorization is unclear. It may be assumed that statutory language to the effect of “all land currently subject to the prior public use of conservation is subject to condemnation under this section” would create such an explicit mandate.⁸⁶

Third, the PPU defense is not likely to be recognized where the authority to impair or destroy the prior interest exists by “necessary implication.”⁸⁷ The definition of “necessary implication” varies across jurisdictions. Some jurisdictions take a broad view of what is required to show necessary implication, looking to the general purposes for which the statute was enacted

⁸¹ *Buffalo Sewer Authority v. Cheektowaga*, 228 N.E.2d 386, 389-90 (N.Y. 1967).

⁸² *United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land*, 753 F. Supp. 50 (D. P.R. 1990); *Georgia Dept. of Transp. v. Jasper County*, 586 S.E.2d 853 (Ga. 2003).

⁸³ *Board of Education v. Pace College*, 27 A.D.2d 87, 89 (N.Y. App. Div. 1966).

⁸⁴ *Westchester Creek Corp. v. N.Y. City Sch. Constr. Auth.*, 286 A.D.2d 154 (N.Y. App. Div. 2001).

⁸⁵ *Buffalo Sewer Authority*, 228 N.E.2d at 390.

⁸⁶ More ambiguous arguments under this “legislative authorization” exception are likely better addressed within the broader “necessary implication” exception.

⁸⁷ *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir. 1987).

and not focusing on particular facts.⁸⁸ Other courts have found that the “general Congressional grant of the power of eminent domain includes the power to take property devoted to public use if the improvement or construction authorized by Congress cannot be undertaken without acquiring and using such property.”⁸⁹ This latter view calls for a more fact specific analysis less deferential to the condemnor.

Fourth, the PPU defense is not likely to be recognized where the new and prior public uses are compatible. This is the so-called “compatible use exception” to the doctrine.⁹⁰ Generally, property devoted to a public use is subject to eminent domain provided the second public use does not interfere with or is not inconsistent with the first public use.

Finally, the PPU defense is not likely to be recognized where the new use is “superior” to the prior use.⁹¹ This exception is sometimes referred to as the “paramount public use exception.”⁹² The judicial application of this exception is problematic, because balancing of public uses in the absence of guidance from the legislature necessarily involves judicial policy making. The applicability of this exception has been diluted by *Kelo*’s holding of broad judicial deference to legislative determination of public uses.⁹³

C. *U.S. v. Carmack*

The U.S. Supreme Court has never explicitly addressed the PPU doctrine, at least not by that name. However, *United States v. Carmack* addresses the same underlying issue – namely, how to resolve conflicts between prior and proposed public uses in condemnation proceedings.⁹⁴ In *Carmack*, the heir of a donor who conveyed land in trust to a city to be used for a park, library, and bandstand, challenged the ability of a federal agency to take the land in order to site a post office. The Court ruled that the agency’s decision to take the land was reviewable only under an “arbitrary and capricious” standard, and rejected the heir’s claim.

⁸⁸ *Id.*

⁸⁹ *Davenport v. Three-Fifths of An Acre of Land*, 147 F. Supp. 794 (S.D. Ill. 1957); see also *Missouri ex rel. Camden County v. Union Electric Light & Power Co.*, 42 F.2d 692 (C.D. Mo. 1930).

⁹⁰ *City of Las Cruces v. El Paso Elec. Co.*, 904 F. Supp. 1238, 1252 (D. N.M. 1995).

⁹¹ See Joris Naiman, *Judicial Balancing of Uses for Public Property: the Paramount Public Use Doctrine*, 17 B.C. Envtl. Aff. L. Rev. 893 (Summer 1990), for an in-depth discussion of the paramount public use exception.

⁹² *Id.*

⁹³ See *Kelo*, 545 U.S. at 488.

⁹⁴ *Carmack*, 329 U.S. 230.

Courts generally have interpreted *Carmack* to stand for two principles: first, that eminent domain power may be exercised against state and municipal property, reinforcing the earlier holding of *Kohl v. United States*,⁹⁵ and second, that the rational condemnation decision of a governmental actor to whom the power of condemnation has been delegated may be reversed upon judicial review only if found to be “arbitrary and capricious.”⁹⁶

A third principle, however, stems from dictum in footnote 13 of *Carmack*’s majority opinion. The footnote explicitly draws a distinction between delegation of eminent domain power to federal actors such as agencies, to which the arbitrary and capricious standard applies, and private actors, such as utility companies.⁹⁷ Footnote 13 states as follows:

A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.⁹⁸

The distinction suggested in this footnote has not been followed in every federal circuit. The Ninth Circuit, in *Chapman v. Public Utility Dist. No. 1*, applied the less stringent arbitrary and capricious standard of review to the condemnation decisions of a private licensee under §814 of the FPA.⁹⁹ It is not clear, however, whether the condemnees in *Chapman* raised footnote 13 of *Carmack* as a defense, as no discussion of that language appears in the case.¹⁰⁰

Other courts have used the dictum in footnote 13 to distinguish the actions of private and governmental delegees of eminent domain power.¹⁰¹ However, even where the limitations in footnote 13 have been recognized, courts have held in favor of private delegees based on the “necessary implication” created by the statute delegating condemnation authority.¹⁰² In *Missouri ex rel. Camden County v. Union Electric Light & Power Co.*, a private delegee of eminent domain authority was found to have sufficient authority by necessary implication to take land

⁹⁵ *Kohl v. United States*, 91 U.S. 367 (1875).

⁹⁶ *Carmack*, 329 U.S. 230.

⁹⁷ *Id.* at 243.

⁹⁸ *Id.*

⁹⁹ *Chapman v. Public Utility Dist. No. 1*, 367 F.2d 163 (9th Cir. 1966).

¹⁰⁰ *Id.*

¹⁰¹ See *National R.R. Passenger Corp.*, 822 F.2d at 1264-65.

¹⁰² *Id.*

owned by a municipality for a proposed hydroelectric project.¹⁰³ Although this case has been cited for the principle that delegations of condemnation authority under the FPA are “a plenary eminent domain power,”¹⁰⁴ the facts of the case may be distinguished from siting under Section 824p. *Camden County* involved takings caused by flooding related to a hydroelectric project.¹⁰⁵ Siting of transmission lines and facilities allows more flexibility in what land is taken than does flooding of large areas by damming – that is, more reasonable alternatives are available to the Section 824p condemners.

D. A Carmack/PPU Defense

A defense derived from the *Carmack*/PPU doctrine is likely to be most successfully applied in situations where a government owns an interest in the property proposed for condemnation, primarily because some of the exceptions to the doctrine are likely weaker in these situations. For example, because the 824p(e) exception is phrased in terms of governmental ownership, courts may be less willing to find “express legislative authorization” and “necessary implication” where condemnation is proposed for lands with a government ownership interest attached.¹⁰⁶ Also, the detrimental environmental effects of a utility right-of-way of the scope contemplated by Section 824p preclude most arguments that siting transmission facilities is a public use compatible with the existing (prior) conservation purposes.¹⁰⁷

A *Carmack*/PPU defense is not likely to be very effective against condemnation of conservation easements held solely by a private land trust. In some jurisdictions, however, condemnation of property essential to the activities of a private charitable organization has been ruled unjustified where a reasonable alternative existed – that is, where property suitable to the

¹⁰³ *Missouri ex rel. Camden County*, 42 F.2d 692.

¹⁰⁴ *Tenneco Atlantic Pipeline Co., et al.*, 1 F.E.R.C. P63,025 (F.E.R.C. 1977). This agency adjudication did not undergo judicial review, however, nor has it been further cited for the principle of “plenary eminent domain power.”

¹⁰⁵ *Missouri ex rel. Camden County*, 42 F.2d 692.

¹⁰⁶ Express legislative authorization for condemnation of governmental interests, even if not found in Section 824p, may be found in state law. For example, the Attorney General of Kansas was asked by a state senator whether the state watershed district could exercise eminent domain over lands encumbered by a conservation easement held by another state agency. Kansas Attorney General Opinion No. 93-76 (June 1, 1993), accessed at <http://ksag.washburnlaw.edu/opinions/1993/1993-076.htm>, 3-27-08. The Attorney General considered the PPU doctrine, and found that the second public use would destroy the property’s use as conservation land, but the AG interpreted the Kansas version of the Uniform Conservation Easement Act (“UCEA”) as giving express precedence to the rights of a watershed district over conservation easement rights. The statutory language the AG relied upon was an addition of the Kansas legislature, and does not appear in the American Bar Association’s formulation of the UCEA. Thus, the efficacy of a *Carmack*/PPU defense may depend upon the language in applicable state legislation.

¹⁰⁷ Because the Section 824p permitting process provides a grant of condemnation authority to private utility companies, the heightened standard of review suggested in *Carmack* is triggered.

condemnor's needs could reasonably be obtained elsewhere.¹⁰⁸ The set of conservation easements held by a land trust is most likely "essential" to the activities and mission of the land trust, and furthermore, because each parcel of land is unique, land trusts can make a fair argument that each parcel is essential. Given that a conservation easement threatened by condemnation is essential to the activities of the land trust, the success of the *Carmack*/PPU defense would turn on whether a reasonable, less-damaging alternative can be found. A land trust may employ the *Carmack*/PPU defense at least to try to focus the attention of the court and the electric utility on such reasonable alternatives. In the best case, a court may find that the utility's decision to condemn conservation land is arbitrary and capricious if the utility did not adequately account for available alternatives.¹⁰⁹

VI. ENVIRONMENTAL REQUIREMENTS AND 824P CONDEMNATION

Before an electric transmission facility can be sited within an NIETC, FERC, the permitting agency, and the permittee utility must comply with the requirements of a number of environmental laws.¹¹⁰ The Secretary of Energy is required to prepare a single "environmental review document to serve as the basis for all decisions on the proposed project under Federal law."¹¹¹ The agency's goal is to have federal permits issued and environmental reviews completed within one year or as soon as possible.¹¹²

The applicability of each environmental law depends, of course, on the type of land to be condemned and the nature of the proposed facility. Notwithstanding DOE's intention to have environmental reviews completed within one year, the more complicated the environmental issues, the longer it will take for a permit applicant to receive all necessary federal authorizations and meet all requirements of relevant environmental laws. Litigation over the environmental review document may further extend the process. In situations where high-quality conservation

¹⁰⁸ Phillip E. Hassman, *Eminent domain: right to condemn property owned or used by private educational, charitable, or religious organization*, 80 A.L.R.3d 833 (1977, 2008); see also *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, 225 A.2d 130 (N.J. 1966) (wildlife corporation entitled to trial of claim that satisfactory alternate route was available which would not result in such irreparable damage to preserve).

¹⁰⁹ Holding an easement pursuant to a governmental program may strengthen the *Carmack*/PPU defense by supporting the argument that the land is in public use.

¹¹⁰ See 16 U.S.C. §824p(j)(1) (2008); 18 C.F.R. §50.7(f) (2008).

¹¹¹ 16 U.S.C. §824p(h)(5)(A) (2008).

¹¹² 16 U.S.C. §824p(h)(4)(B) (2008).

lands are targeted for facility siting, permit applicants may find it more economical to select a location with fewer environmental encumbrances.

Property interests held by land trusts and that do not fall under the 824p(e) exception may benefit from the environmental review process required for permitting. Thus, land trusts should understand the environmental requirements involved in siting a transmission facility under Section 824p, bring these requirements to the attention of the utility company as soon as possible, and monitor the utility's and agency's adherence to these requirements.

A. The Environmental Report

To obtain a construction permit from FERC pursuant to §824p, applicants must conduct any study that FERC determines is necessary to determine the impact the action will have on the human environment and natural resources; consult with federal, regional, state, and local agencies to ensure all environmental issues have been identified; submit all applications necessary for federal and state approvals; and notify FERC of all other federal actions required for completion of the proposed permit.¹¹³

In addition, the applicant must provide an “environmental report.”¹¹⁴ The environmental report must contain an analysis of alternatives as well as a series of resource reports addressing water use and quality; fish, wildlife, and vegetation; cultural resources; socioeconomics; geological resources; soils; and land use, recreation, and aesthetics.¹¹⁵ Notwithstanding the above contents, the environmental report must contain at least an environmental assessment (“EA”) for proposals to site new electric transmission facilities.¹¹⁶ For “major electric transmission facilities . . . using [a] right-of-way in which there is no existing facility,” a more rigorous environmental impact statement (“EIS”) is “normally” prepared first,¹¹⁷ unless FERC determines that the proposed siting “may not be a major Federal action significantly affecting the quality of the human environment.”¹¹⁸ Thus, if the proposed facility will not be using a new right-of-way, or if the siting may not be a “major” action, then an EA, rather than an EIS, will be

¹¹³ 18 C.F.R. §380.3(b) (2008).

¹¹⁴ 18 C.F.R. §50.7(f) (2008).

¹¹⁵ 18 C.F.R. §380.16 (2008). Part 380 regulations implement the National Environmental Policy Act (“NEPA”). An alternatives analysis may support a *Carmack*/PPU defense discussed above.

¹¹⁶ 18 C.F.R. §380.5(b)(14) (2008).

¹¹⁷ 18 C.F.R. §380.6(a)(5) (2008).

¹¹⁸ 18 C.F.R. §380.6(b) (2008).

prepared first. Depending on the outcome of the EA, an EIS may or may not be prepared afterward.¹¹⁹

B. Requirements of Environmental Laws

The consolidation of environmental reviews into a single report does not absolve FERC or the permit applicant of their responsibilities under the various federal environmental laws. Subsection 824p(j) states: “Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969.”¹²⁰ The environmental report must account for the requirements of relevant environmental laws.¹²¹

1. The National Environmental Policy Act

The National Environmental Policy Act (“NEPA”) requires federal agencies to prepare an EIS for “*major* Federal actions *significantly* affecting the quality of the human environment.”¹²² Federal permitting is traditionally considered to be a federal action under NEPA.¹²³ The CEQ regulations categorize “major federal actions” as, among other things, the “[a]pproval of specific projects, such as construction or management activities located in a defined geographic area.”¹²⁴ The term “major” reinforces but does not have a meaning independent of “significantly.”¹²⁵ “Significantly” as used in NEPA requires considerations of both context and intensity.¹²⁶ Whether a particular Section 824p siting decision is a “major” action cannot be established categorically.

¹¹⁹ *Id.*

¹²⁰ 16 U.S.C. §824p(j)(1) (2008). There is no indication that Congress intended the terms “law,” “environmental,” or “requirement” to be used in a specialized sense. In the absence of congressional instruction, the laws invoked by §824p(j) include at least those federal statutes, regulations, treaties, and executive orders that impose any obligation on either the permitting agency (*i.e.*, FERC) or the permit applicant.

¹²¹ 16 U.S.C. §824p(h)(3) (2008).

¹²² 42 U.S.C. §4332(2)(C) (2008) (emphasis added).

¹²³ *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985); *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Com.*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973).

¹²⁴ 40 C.F.R. §1508.18(b)(4) (2008).

¹²⁵ 40 C.F.R. §1508.18 (2008).

¹²⁶ 40 C.F.R. §1508.27 (2008). Context means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Intensity refers to the severity of impact.

2. The Endangered Species Act

FERC is required to comply with the Endangered Species Act (“ESA”) before issuing a permit under Section 824p.¹²⁷ The holder of a FERC permit also is subject to ESA requirements. The ESA protects listed species in two ways: first, the ESA prohibits all federal actions that jeopardize listed species or adversely modify designated critical habitat,¹²⁸ and second, the ESA makes it unlawful for anyone to “take” a listed species.¹²⁹

a. Federal actions under ESA §7

FERC’s approval of a Section 824p permit most likely will constitute an agency action triggering ESA Section 7 requirements. Under Section 7, federal agency actions that “jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of [critical] habitat” are prohibited.¹³⁰ Moreover, FERC is required by Section 7 to consult with the Secretary of Interior to avoid such impacts.¹³¹ Consultations may be formal or informal.¹³² If a listed species is potentially present and the siting requires major construction activities, FERC (or the permit applicant) will likely conduct a biological assessment to determine whether the species will be affected by the siting decision.¹³³ The assessment, which is used to determine whether formal consultation is required,¹³⁴ should be completed within 180 days but may be extended by following procedural notice requirements.¹³⁵ If formal consultation ensues, the Secretary of Interior will produce a biological opinion on how the permit issuance will affect any listed species or critical habitat.¹³⁶

b. Taking of species under ESA §9

The ESA makes it unlawful for any person to take a listed species.¹³⁷ Adverse habitat modification can be considered a taking.¹³⁸ Holders of FERC permits, as “persons,” will be held

¹²⁷ 16 U.S.C. §824p(j)(1) (2008); 18 C.F.R. §380.13 (2008).

¹²⁸ 16 U.S.C. §1536 (2008).

¹²⁹ 16 U.S.C. §1538(2008).

¹³⁰ 16 U.S.C. §1536(a) (2008).

¹³¹ *Id.*

¹³² 50 C.F.R. Part 402 (2008); 18 C.F.R. §380.13 (2008).

¹³³ 50 C.F.R. §402.12 (2008).

¹³⁴ *Id.*

¹³⁵ 16 U.S.C. §1536(c)(1) (2008).

¹³⁶ 16 U.S.C. §1536(b) (2008); 50 C.F.R. §402.14(g) (2008).

¹³⁷ 16 U.S.C. §1538(a)(1) (2008).

responsible for takings of a listed species.¹³⁹ Additionally, permit applicants will need to provide information to assure FERC and the Department of Interior that the applicants will not violate the take provision of the ESA.

3. The Clean Water Act

The holder of a FERC permit who proposes to construct transmission facilities in wetland areas may be subject to Clean Water Act (“CWA”) requirements. Specifically, Section 404 of the CWA requires that a person who discharges dredged or fill material into navigable waters must obtain a general or individual permit, or fall within an exemption.¹⁴⁰ When deciding whether or not to issue a dredge-and-fill permit, the Army Corps of Engineers publishes the permit application for a public comment period lasting 15 to 30 days.¹⁴¹ Any person may request a public hearing on a permit.¹⁴² According to the Corps, a permit applicant for a non-controversial project may expect to wait 60 to 120 days before receiving a 404 permit.¹⁴³

VII. CONCLUSION

In this memorandum we examined the extent to which conservation easements held or co-held by land trusts may be resistant to Section 824p condemnation, by virtue of partnerships with governmental entities or other mechanisms. Based on our analysis we conclude that conservation easements co-held by a federal or state agency most likely will fall within the scope of the 824p(e) exception. The 824p(e) exception also likely covers conservation easements with attached federal or state contingent future interests, if the contingent interests are recorded and the contingencies are not speculative or remote. Moreover, conservation easements acquired by land trusts after 2006 under the federal Farm and Ranch Lands Protection Program are likely protected under the 824p(e) exception.

The prior public use doctrine may be most usefully applied in situations where governmental interests are involved, and may be used in any case to focus attention on alternative sites. Also, requirements of federal environmental laws such as the Endangered

¹³⁸ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

¹³⁹ 16 U.S.C. §1532(13) (2008); 16 U.S.C. §1538(g) (2008).

¹⁴⁰ 33 U.S.C. §1344 (2008).

¹⁴¹ 33 C.F.R. §325.2(d)(2) (2008).

¹⁴² 33 C.F.R. §327.4(a) (2008).

¹⁴³ <http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=740#ques4>.

Species Act and the Clean Water Act may discourage condemnation of conservation easements containing particularly high-quality habitats, especially in situations where alternative less-damaging sites can be proposed.