08-035-42

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PUBLIC SERVICE COMMISSION

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December 10, 2008

Attorney General
State of Utah
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, Utah 84114

Utah Public Service Commission
Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84114

Re: Ninth Circuit Decision Taking Away All Power Line "Siting" Authority from States

Dear sirs/madams:

"That's it; I'm beat," I said after reviewing the enclosed Ninth Circuit decision. "Federalism takes another blow to the gut."

My only option left: to petition for certiorari from the U.S. Supreme Court. But how could I possibly do that, on my shoestring litigation budget--if you could even call it that? How could I possibly do that, with another appellate brief due in late November and an over-abundance of other deadlines and pressures?

Never mind that a three-judge panel of unlikely judicial activists had just brazenly created new law out of thin air, ruling that the Western Area Power Administration can preempt state authority to site power lines whenever it feels like it.

Never mind that the panel had to ignore most of my Petition for Review (copy enclosed), including a document containing a recent admission from the FERC chairman that federal government officials did not have power over utility line siting decisions.

Well, they do now, at least in the Ninth Circuit or the 15 states in which WAPA roams just as free and indolent as the bygone buffalos of yesteryear.

And no one knows about this landmark buffalo chip, because the panel opinion just keeps gliding "under the radar," or under the utility towers, as it were. There is no constituency, no media coverage, no public interest groups rallying to your side, when you are a solo practitioner Davy taking on the Goliath of a Rothschild-financed private energy company partnering with the federal government. I should be used to it--after all, I'm that one out of a 100 who voted for Ralph Nader a month ago, as Rome churned.

But wait! Rather than completely throw in the towel, might there not still be a few state attorneys general, or a few public utility commissioners, in some of the states where WAPA operates, who still care whether utility line siting decisions in their states are entrusted to state authorities rather than "federal" public-private power-brokers?

A few who know that Congress really didn't give WAPA the powers that this Ninth Circuit decision says it has?

After all, there are a full ninety (90) days after the date of the enclosed amended decision, October 27, 2008, in which the losing party--that would be my clients, of course--can seek certiorari.

That gives us--that gives you--until early January to put some humps on this bleak landscape. I won't be able to do it without you. I absolutely can't and won't.

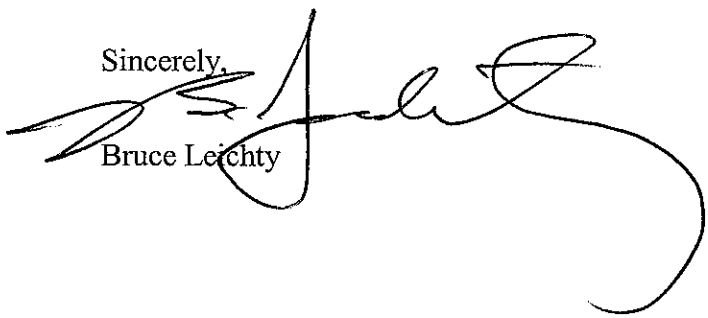
My clients can't be the only people in the world who care about what the Ninth Circuit has just done, can they?

If not, I can be reached at leichty@sbcglobal.net in addition to the phone number appearing above.

Heck, even if you guardians of state's rights don't want to help fund a petition for cert, or convince someone else to do so, or become an amicus, maybe one of you would at least like to suggest that the case be depublished. I don't know how to do that, but maybe some of you do.

I guess I will find out. I'm not holding my breath, but I thought that those of you whose interests will most directly be affected might want to at least know what prerogatives the federal courts have taken away from you, before they are completely gone, just like the ghostly creatures of a less monopolistic era.

Sincerely,



Bruce Leichty

enclosures

AMENDED OPINION
CONSTITUTIONAL LAW

'Public use' requirement is met in takings case where easements were sought to construct high-voltage transmission line.

Cite as 2008 DJDAR 16189

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
14.02 ACRES OF LAND MORE OR LESS IN FRESNO COUNTY;
EDNA E. STONE; PAUL KRAJIAN;
SHRINERS HOSPITAL FOR CRIPPLED CHILDREN;
DAVID C. WHITLOCK;
EDWARD H. MARSELLA;
HENRY SCHAFER, Jr.;
SHARON CECILE PECKINPAH;
SHARON CECILE MARCUS
aka Sharon Cecile Peckinpah;
FERN L. PETER;
LOLA A. SWANSON;
FLORENCE F. CLASS;
CLARENCE E. BERNHAUER, JR.,;
JANE WHITLOCK STILES;
NORMA B. GIBBS;
JUNE E. LUCAS;
IRENE MARLEY;
HENRY SCHAFER, SR.;
DENVER C. PECKINPAH;
SUSAN JANE PECKINPAH;
AGNES H. VIGNOLA;
DONG SHE MAR;
BESSIE E. BERNHAUER;
LEONARD P. LEBLANC;
IVONE M. CARLSON;
ELVIRA MOSHER;
LORRAINE S. EICHENBERGER;
ELEANOR C. HICKS;
TRUSTEE PETER FRECHOU;
KATHRYN MCAFEE;
TRUSTEE JOHN C. RICKSEN
KATHRYN BROWN;
ESTATE OF JOHNNY BELLO;
ESTATE OF LOUIS BELLO;
FRANCIS BELLO;
EDWARD C. BEAUMONT;
PAULINE EICHENBERGER;
LORRAINE C. FORTNOY;
FLOREEN L. WALSH;
TRUSTEE MARY FRECHOU
ALLEN MOORE;
BEVERLY M. FIELDER;
HAL E. VERBLE;
MAY EVYLEN BERNHARD;
GORDON WINANT HEWES;
PAULINE D. HANSON;
ELOISE MITCHELL;
LAWRENCE E. AUSTIN;
EVELYN SANTOS;
SAMUEL B. BRECK
DAVID BISWELL;
STEPHEN BISWELL;
MELISSA BROOK PECKINPAH;
JOAN LEONARD;
MAUDE DAWSON;
GERTRUDE PORTERFIELD;
WILLIAM J. MATHOS;
JOHN ROBERT SHORB;
CANDACE HAAS;
KRISTEN LOUISE PECHINPAH;
MATTHEW DAVID PECHINPAH;
J. DANIEL HARE, III;
BRADLEY B. LEONARD;
SECURITY TITLE INSURANCE;
VICKI TREASURER,
FRESNO COUNTY;
RUSS FREEMAN;
THOMAS C. HARE,
Defendants,
and
MAXINE H. SAWYER;
MARK W. SAWYER;
HARRIET H. LEONARD;
CHARLES A. SAWYER;
ANDREW KLEMM;
RAMON ECHEVESTE,
Defendants-Appellants.

No. 05-17347
D.C. No.CV-03-06019-REC/LJO
United States Court of Appeals
Ninth Circuit
Filed June 24, 2008
Amended October 24, 2008

Appeal from the United States District Court
for the Eastern District of California

Robert E. Coyle,
District Judge, Presiding

Argued and Submitted
February 14, 2008–San Francisco, California

Before: William C. Canby, Jr.
and
Milan D. Smith, Jr.,
Circuit Judges,
and
Stephen G. Larson,*
District Judge.

Opinion by Judge Canby

COUNSEL

Bruce Leichty, Clovis, California, for the defendants-appellants.

Douglas R. Wright, United States Attorney, Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the plaintiff-appellee.

ORDER

The opinion filed June 24, 2008, slip op. 7271, and appearing at 530 F.3d 883 (9th Cir. 2008), is amended as follows:

At slip op. at 7271, delete the full paragraph (beginning "In any event . . .") and its accompanying footnote 3, and substitute therefor the following two paragraphs:

> In any event, the Supremacy Clause, Article VI, clause 2, of the United States Constitution forecloses Sawyer's noncompliance argument. Because WAPA is an agency of the federal government, its activities "in connection with the construction and operation of the transmission line in question, are wholly immune from local control, unless it can be established that Congress has directed that [WAPA] subjects itself thereto." *Maun v. United States*, 347 F.2d 970, 974 (9th Cir. 1965). We have accordingly required federal agencies seeking to condemn easements to construct power transmission lines to comply with state and local siting requirements where the Congress' authorization expressly required such compliance. *See id.* at 975 (requiring Atomic Energy Commission to comply with local ordinances in constructing overhead transmission line where the authorizing statute mandated that "[n]othing in [the relevant] chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission"); *cf. Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 603 (9th Cir. 1981) (requiring the Bonneville Power Administration to comply with the substantive standards of Washington State's siting act–but not its procedural hurdles –where an applicable statute expressly required "compliance with State standards").
>
> In this case, however, Sawyer has not pointed to a comparable unequivocal pronouncement by Congress to overcome the presumption of preemption– and we could find none. None of the authorizing statutes discussed earlier in this opinion mandate compliance with state law. Indeed, the only statutory provision cited by Sawyer in support of its noncompliance argument is the Reclamation Act of 1902. 43 U.S.C. § 383. Although the Reclamation Act of 1902 does disclaim preemption of state law, it is irrelevant to this case, for it applies only to the "control, appropriation, use, or distribution of *water* used in *irrigation*, or any vested right acquired thereunder." *Id.* (emphases added). We therefore conclude that California law is preempted and WAPA is not required to comply therewith in constructing the congressionallyauthorized Path 15 Upgrade.

With these amendments, the panel has voted to deny the appellants' petition for panel rehearing. Judge Smith has voted to deny appellants' petition for en banc rehearing, and Judges Canby and Larson have so recommended.

The full court has been advised of the above amendments and of appellants' petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for panel rehearing and petition for rehearing en banc are denied. There are no other pending petitions for panel or en banc rehearing. No further petitions for panel or en banc rehearing will be entertained.

OPINION

CANBY, Circuit Judge:

Pursuant to a 2001 order of the Secretary of Energy, the Western Area Power Administration ("WAPA") selected certain land estates in the western portion of the San Joaquin Valley in California, where it planned to construct a highvoltage transmission line. The United States began condemnation proceedings in the district court on behalf of WAPA, seeking transmission easements on the lands selected by WAPA. Sawyer and a few other individual owners of condemned property (collectively "Sawyer") challenged the government's exercise of its power of eminent domain, claiming that the taking lacked proper congressional authorization, was not for a "public use" as required by the Takings Clause, and violated California law. The district court dismissed Sawyer's objections and, when the parties reached an agreement on the compensation amount, entered summary judgment *sua sponte*. Sawyer filed this appeal. We affirm.

BACKGROUND

In 2001, in an effort to mitigate California's electric power transmission constraints, the Secretary of Energy directed WAPA to prepare plans to construct the Los BanosGates Transmission Project, or Path 15 Upgrade. The project consists of an additional 84-mile, 500-kilovolt transmission line along Path 15, which is located in the western portion of the San Joaquin Valley and connects its northern terminus near Los Banos, California with its southern terminus at the Gates Substation near Coalinga, California. *See* Department of Energy, Los BanosGates Transmission Project: Record of Decision (hereinafter, "DOE Record of Decision"), 66 Fed. Reg. 65,699 (Dec. 20, 2001). The Secretary also instructed WAPA to explore partnership opportunities with private industry, *see id.*, and delegated authority to WAPA to acquire and condemn property interests in land to complete the proj ect. Department of Energy, Delegation Order No. 00-036.00 (Dec. 6, 2001), *available at* http://www.directives.doe.gov/ pdfs/sdoa/00-036_00.pdf (last visited May 28, 2008). WAPA updated plans that it had originally developed in the mid 1980s and accepted proposals from TransElect and Pacific Gas and Electric Company to "finance, construct, and coown the system additions." DOE Record of Decision, 66 Fed. Reg. at 65,699-700. The Federal Energy Regulatory Commission ("FERC") approved the proposed upgrade, which provided, among other things, that "WAPA w[ould] own the new 500 kV transmission line and associated land that is the most significant part of the transmission upgrades." Western Area Power Administration, FERC Order Accepting Letter Agreement, 99 FERC ¶ 61,306, at 62,278, 2002 WL 1308653 (2002), *aff'd, Pub. Util. Comm'n. of Cal. v. FERC*, 367 F.3d 925 (D.C. Cir. 2004).

In 2003, the United States began condemnation proceedings in the district court on behalf of WAPA to acquire easements on approximately 14.02 acres of land in western Fresno County, California. Sawyer filed an answer to the government's complaint and challenged the condemnation by asserting eight affirmative defenses. The government moved to strike the affirmative defenses or, in the alternative, for judgment on the pleadings as to its authorization to take. The district court granted the government's motion, concluding that "WAPA was fully authorized by federal law to construct the Path 15 Project and to condemn the power line transmission easement[s] for it." The district court also rejected Sawyer's argument that the upgrade did not serve a "public purpose."

One year later, the parties filed a Joint Pretrial Statement, in which they agreed that the "value of the property taken is $7,374.32." At a later evidentiary hearing, the government asserted that no viable issue remained for trial because the district court had previously granted judgment as to the lawfulness of the taking. Sawyer disagreed. The district court then requested supplemental briefing.

With the benefit of the parties' briefing, the district court concluded that no issue remained for trial and granted summary judgment *sua sponte* in favor of the government. The district court then entered final judgment and apportioned the stipulated value of the easements, $7,374.32, among the "approximately 73 ownership entities." Each entity was assigned compensation according to its percent ownership interest. (*Id.*) Ownership interests were computed on the basis of the title information supplied by the government. As of final judgment, neither Sawyer nor any other condemnation defendant had disputed such information.[1] (*Id.*) Sawyer filed this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. Authorization and Lawfulness of the Taking

Where, as here, the parties do not dispute the amount of compensation, "[t]he only [substantive] question for judicial review in a condemnation proceeding is whether the purpose for which the property was taken is for a Congressionally authorized public use." *United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993) (internal quotation marks and citation omitted). "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman v. Parker*, 348 U.S. 26, 36-37 (1954). In addressing Sawyer's challenges, we must assess both prongs of the "public purpose" inquiry set forth in our precedent. First, we must satisfy ourselves that the Secretary of Energy and the Administrator of WAPA enjoy statutory authorization to condemn property interests to construct the Path 15 Upgrade. Second, we must decide whether the Path 15 Upgrade qualifies as a "public use" under the Takings Clause of the Fifth Amendment.

A. Statutory Authority

There is no dispute that, if any federal agency is authorized to acquire land by eminent domain for the purpose of constructing the Path 15 Upgrade, that agency is WAPA. *See* 42 U.S.C. § 7152(a)(1)(D) ("There are transferred to, and vested in, the Secretary [of Energy] all functions [previously] of the Secretary of the Interior . . . with respect to . . . the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities."); Department of Energy, Delegation Order No. 00-036.00 (Dec. 6, 2001), *available at* http://www.directives.doe.gov/pdfs/sdoa/00-036_00.pdf (last visited May 28, 2008). The operative question before us, then, is whether Congress ever authorized the construction of the Path 15 Upgrade at all.

Numerous congressional enactments convince us that it did. In 1984, Congress enacted the Energy and Water Development Appropriations Act. The Act generally authorized

> the Secretary of Energy . . . to construct or participate in the construction of such additional facilities as he deems necessary to allow mutually beneficial power sales between the Pacific Northwest and California and to accept funds contributed by non Federal entities for that purpose.

Pub. L. No. 98-360, tit. III, 98 Stat. 403, 416 (1984) (codified at 16 U.S.C. § 837g-1). This enactment clearly conferred discretion on the Secretary of Energy to construct power lines in the area where the Path 15 Upgrade is located. By citing this statutory provision in the Declaration of Taking, then, the Administrator of WAPA, as delegate of the Secretary, evi dently made the discretionary finding that the Path 15 Upgrade would facilitate the consolidation of the Pacific NorthwestCalifornia market.

Since passage of this 1984 Act, Congress has repeatedly confirmed its authorization and appropriated funds to develop the Path 15 Upgrade. In the Supplemental Appropriations Act of 1985, Congress again authorized construction of transmission lines along the Pacific NorthwestCalifornia Intertie:

> Public Law 98-360 . . . authorized the Secretary of Energy to construct or participate in the construction of such project for the benefit of electric

> consumers of the Pacific Northwest and California. . . .

Pub. L. No. 99-88, tit. I, ch. IV, 99 Stat. 293, 321 (1985). In the same provision, Congress further indicated that "sufficient capacity shall be reserved, as recognized in [the] Memorandum, to serve the needs of the Department of Energy laboratories and wildlife refuges in California." *Id.* In turn, the Memorandum referenced by Congress committed WAPA to provide "a reasonable and proportionate share of the capital required for increasing the transfer capability between Los Banos and Gates," i.e., the Path 15 Upgrade. Department of Energy, Memorandum of Understanding for the California Oregon Transmission Project, 50 Fed. Reg. 421 (Dec. 24, 1984). Thus, we have little doubt that, as early as the mid 1980s, Congress had authorized the Path 15 Upgrade.

Although construction of the Path 15 Upgrade did not progress beyond the planning stages in the 1980s and 1990s, in 2001, the House Appropriations Committee again proposed special funding to "complete the planning and environmental studies to support the proposed 84-mile, 500-kilovolt transmission line between Los Banos and Gates (also known as 'Path 15') in California." H.R. Rep. No. 107-102, at 24 (2001). The Conference Committee "provide[d] . . . [n]onreimbursable funding of $1,328,000 . . . to complete planning and environmental studies for the Path 15 transmission line," H.R. Rep. No. 107-148, at 61 (2001) (Conf. Rep.), *reprinted in* 2001 U.S.C.C.A.N. 259, 278, and Congress appropriated those funds through the Supplemental Appropriations Act of 2001, Pub. L. No. 107-20, 115 Stat. 155, 174 (2001).

Finally, although no appropriation has specifically mentioned the Path 15 Upgrade since 2001, Congress has implicitly reaffirmed its authorization by funding WAPA through general appropriations "[f]or carrying out the functions authorized by title III, section 302(a)(1)(E) of the Act of August 4, 1977 (42 U.S.C. 7152)." Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 152 (2003). These functions, in turn, encompass "the construction . . . of transmission lines and attendant facilities," which is the essence of the Path 15 Upgrade.[2] 42 U.S.C. § 7152(a)(1)(D). We therefore conclude that WAPA is authorized to carry out the Path 15 Upgrade by acquiring lands by eminent domain.

In reaching this conclusion, we reject Sawyer's argument that, even if the Path 15 Upgrade has been authorized, WAPA is not at liberty to condemn property interests to realize the project. To the extent that Congress did not spell out the Secretary's and WAPA's eminent domain prerogatives in the enactments specifically authorizing the Path 15 Upgrade, we deem such omissions irrelevant. When Congress mandates the construction of a new highvoltage transmission line and appropriates funds to carry it out, it implies, by necessity if not common sense, the authority on the part of the executing agency to acquire land on which the transmission line may be constructed. *See, e.g., City of Davenport v. ThreeFifths of an Acre of Land*, 252 F.2d 354, 356 (7th Cir. 1958) (rule of implied necessity authorizes eminent domain for the construction of duly authorized bridge, where condemnation is required to realize the project).

Finally, Sawyer generally contends that any authorization contained in these statutes is conditional on a preliminary finding that the Path 15 Upgrade is "necessary." Whereas a threshold finding of necessity is in fact required under the 1984 authorization, Congress has unequivocally committed that determination to the discretion of the Secretary (which has been delegated to WAPA). *See* 16 U.S.C. § 837g-1 (authorizing the Secretary of Energy "to construct or participate in the construction of such additional facilities *as he deems necessary* to allow mutually beneficial power sales between the Pacific Northwest and California and to accept funds contributed by nonFederal entities for that purpose.") (emphasis added). We are therefore not at liberty to review the agency's determination with respect to the necessity condition. *See United States v. 80.5 Acres of Land*, 448 F.2d 980, 983 (9th Cir. 1971) ("[T]he necessity of taking or appropriating private property for public use is legislative in nature and one over which the courts lack jurisdiction.").

B. The "Public Use" Requirement Under the Takings Clause

We must next decide whether the Path 15 Upgrade satisfies the "public use" requirement of the Takings Clause even though it is a partnership of public and private entities and the beneficiaries of the project arguably are the customers of privatelyowned utilities, as opposed to the public at large. For over a century, the Supreme Court's "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo v. City of New London*, 545 U.S. 469, 483 (2005). It remains true, of course, that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Id.* at 477. At the same time, the Court has long abandoned any "use by the public" test for privatetoprivate transfers by eminent domain. *See id.* at 479-81 & nn.7, 9, 10 (collecting cases). " 'It is only the taking's purpose, and not its mechanics' . . . that matters in determining public use," *id.* at 482 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)), and we do "not substitute [our] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " *Midkiff*, 467 U.S. at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

Applying these principles, we conclude that the Path 15 Upgrade satisfies the "public use" requirement. To begin with, the project hardly entails a privatetoprivate transfer at all. It is true that WAPA will initially receive only ten percent of the transmission system rights arising from the 500 kV capacity increase. Western Area Power Administration, FERC Order Accepting Letter Agreement, 99 FERC ¶ 61,306, at 62,278, 2002 WL 1308653 (June 12, 2002). However, "WAPA will own the new 500 kV transmission line and associated land that is the most significant part of the transmission upgrades." *Id.* Further, in its 1985 appropriations and mandate to the Secretary of Energy to expand the Pacific Northwest California Intertie, Congress specified that "sufficient capacity shall be reserved . . . to serve the needs of the Department of Energy laboratories and wildlife refuges in California." Pub. L. No. 99-88, tit. I, ch. IV, 99 Stat. 293, 321 (1985). In short, it is clear that Congress' purpose in authorizing the condemnation envisioned a continued proprietary and operational presence of the federal government.

Moreover, to the limited extent that the project does involve a transfer of property interests among private entities, such transfer poses no constitutional difficulty. In the pursuit of what it perceives as a "public use," "the Congress and its authorized agencies have made determinations that take into account a wide variety of values." *Berman*, 348 U.S. at 33. Therefore, "It is not for [the courts] to reappraise them." *Id.* In its 1984 authorization, Congress unambiguously expressed its intent to "allow mutually beneficial power sales between the Pacific Northwest and California." 16 U.S.C. § 837g-1. In so doing, it spoke to the value it intended to pursue–i.e., facilitating the consolidation of the western electricity market. It would therefore be impermissible for us to engage, as Sawyer asks us to do, in "empirical debates over the wisdom" of increased access to electricity or the effectiveness of the Path 15 Upgrade. *See Midkiff*, 467 U.S. at 242-43.

C. Federal Preemption of the California Public Utility Commission Review

In a final substantive challenge, Sawyer contends that the condemnation is unlawful because WAPA did not obtain the approval of the California Public Utility Commission for the Path 15 Upgrade as required by California law. *See* Cal. Pub. Util. Code §§ 1001-06. We agree with the district court that Sawyer waived this argument by not advancing it in the Answer. Under Rule 71.1, "[a] defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed." Fed. R. Civ. P. 71.1(e)(3). Because Sawyer did not raise the federal government's failure to comply with California law in the Answer, we affirm the district court's waiver ruling.

In any event, the Supremacy Clause, Article VI, clause 2, of the United States Constitution forecloses Sawyer's noncompliance argument. Because WAPA is an agency of the federal government, its activities "in connection with the construction and operation of the transmission line in question, are wholly immune from local control, unless it can be established that Congress has directed that [WAPA] subjects itself thereto." *Maun v. United States*, 347 F.2d 970, 974 (9th Cir. 1965). We have accordingly required federal agencies seeking to condemn easements to construct power transmission lines to comply with state and local siting requirements where the Congress' authorization expressly required such compliance. *See id.* at 975 (requiring Atomic Energy Commission to comply with local ordinances in constructing overhead transmission line where the authorizing statute mandated that "[n]othing in [the relevant] chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission"); *cf. Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 603 (9th Cir. 1981) (requiring the Bonneville Power Administration to comply with the substantive standards of Washington State's siting act–but not its procedural hurdles–where an applicable statute expressly required "compliance with State standards").

In this case, however, Sawyer has not pointed to a comparable unequivocal pronouncement by Congress to overcome the presumption of preemption–and we could find none. None of the authorizing statutes discussed earlier in this opinion mandate compliance with state law. Indeed, the only statutory provision cited by Sawyer in support of its noncompliance argument is the Reclamation Act of 1902. 43 U.S.C. § 383. Although the Reclamation Act of 1902 does disclaim preemption of state law, it is irrelevant to this case, for it applies only to the "control, appropriation, use, or distribution of *water* used in *irrigation*, or any vested right acquired thereunder." *Id.* (emphases added). We therefore conclude that California law is preempted and WAPA is not required to comply therewith in constructing the congressionallyauthorized Path 15 Upgrade.

II. Procedural Challenges

Sawyer also advances a number of procedural challenges that, he contends, require us to reverse the judgment of the district court and remand this case for further proceedings. We review each challenge in turn.

A. Joinder of Owners of Fractional Property Interests

The district court did not err in allowing the action to proceed without requiring the government to join all owners of fractional interests in the condemned property. Rule 71.1(c) provides:

> When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and *whose names are then known*. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names *have become known or can be found by a reasonably diligent search of the records*, considering both the property's character and value and the interests to be acquired. All others may be made defendants under

05-17347

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. 14.02 ACRES OF LAND MORE OR LESS IN THE COUNTY OF FRESNO, EDNA E. STONE, et al. Defendants, and MAXINE H. SAWYER; ANDREW KLEMM; HARRIET H. LEONARD; MARK W. SAWYER; CHARLES A. SAWYER; RAMON ECHEVESTE; Defendants-Appellants.	Appeal from the United States District Court for the Eastern District of California - Fresno Division, Judge Robert E. Coyle DC No. CIV-F-03-6019-REC/LJO

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

BRUCE LEICHTY
Law Offices of Bruce Leichty
625-A Third St.
Clovis, California 93612-1145
(559) 298-5900

Attorney for Maxine Sawyer, Mark Sawyer, Harriet Leonard, Charles Sawyer, Andrew Klemm, and Ramon Echeveste, Appellants

MAXINE H. SAWYER, MARK W. SAWYER; HARRIET H. LEONARD; CHARLES A. SAWYER, ANDREW KLEMM and RAMON ECHEVESTE ("Petitioners")[1] hereby (1) petition for panel rehearing based on multiple errors of law in the court's 6/24/08 Opinion as noted below (Opinion appended hereto), and (2) suggest rehearing en banc because the case involves several questions of exceptional importance as identified below.

I. THERE ARE MULTIPLE GROUNDS FOR EN BANC REHEARING

The following questions of exceptional public importance are raised even if the Opinion of the panel otherwise accurately construes law pertaining to the right of the federal government to preempt utility line siting decisions within the jurisdiction of the State of California based on the alleged "exclusivity" of authority of the Secretary of Energy, which is disputed:

1. Whether the exceptional circumstances justifying a sua sponte grant of summary judgment under In re Rothery, 13 F.3d 546 (9th Cir. 1998) are met in a case where declarations submitted in threshold opposition to a motion to dismiss or for judgment on the pleadings are accompanied by a disclaimer of any intent to cover the field for purposes of conversion to summary judgment, and where

[1] Because the Panel Opinion does not name Cecelia Echeveste as an appellant, she is not included as a petitioner so as to not cloud the issues.

judgment is not entered then but after a cutoff date for bringing dispositive motions has expired and without any further notice to the party that facts may be or must be submitted to preclude summary judgment.

2. Whether the judicial branch must abdicate its power in favor of the executive branch to determine the "necessity" of a taking of land when the very statute conferring authority on the executive branch sets forth a factual predicate condition for the exercise of that authority implicating "necessity."

3. Additionally, with respect to Part II below, whether there was a violation of Appellants' rights of due process by the panel, which relied in its Opinion on authority which the United States never asserted during the appeal and which was raised for the first time by one of the panel judges at oral argument. Appellants were not given adequate opportunity to address this authority [being limited only to a Rule 28(j) letter]; and even at that, the panel must necessarily have ignored the Rule 28(j) letter because the panel did not distinguish let alone acknowledge the authority presented by Appellants in that letter, and the panel could not have ruled that utility line siting decisions in this case fell within the "exclusive authority" of the Energy Secretary--or at least could not have upheld sua sponte summary judgment--had it understood the authority presented by Appellants in the Rule 28(j) letter.

II. PART I(C) OF THE OPINION IS BASED ON FALLACIES FATAL TO THE INTEGRITY OF THE OPINION

This case involves private investors who, having failed to get state approval for siting a electric utility transmission line, persuaded the federal government through financial inducement to condemn the land necessary for the siting without state approval, and the subsequent unwillingness of the federal judiciary to check this "private-public" partnership, notwithstanding fatal defects in the authority for the taking effectively pled by a principled group of landowners. Without addressing all of the errors in the Opinion, Appellants contend that the panel must reverse itself, or alternatively the case must be reheard by the court sitting en banc, because Part I(C) of the Opinion is based on two independent fallacies, one of which Appellants were not given adequate opportunity to address.

In Part I(C) of the Opinion, the Court concluded that federal law preempted California law requiring Public Utilities Commission approval of the Path 15 Upgrade project implicated in the taking of Appellants' property, and that Appellants had waived this argument. Neither conclusion is logically sustainable.

With regard to the supposed waiver, the Court observed merely that "Sawyer waived this argument by not advancing it in the Answer." The panel then cited a portion of Rule 71.1 pertaining to "objections and defenses." However, this is a classic straw man fallacy.

Appellants had already pointed out to the panel (Reply Brief, pp. 20ff) that the lack of federal authority for the taking was raised in their Answer simply by their denials of the government's allegations of authority, and that an allegation denied does not need to be separately raised as either an objection or a defense. It was fallacious, therefore, for the panel to look at the "defenses" so-named that were included in Appellants' Answer, to see whether lack of federal authority based on noncompliance with California law was specifically set forth as a "defense." Nowhere does Rule 71 require that a general denial to a complaint in eminent domain, as distinct from defenses and objections, has to be pled with specificity greater than called for by Rule 8(b). Appellants likewise know of no authority for the proposition that lack of authority for a taking based on noncompliance with state law has to be raised as a "defense" rather than in the course of a general denial.[2]

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[2] The fact that Appellants did state as "defenses" in their Answer certain contentions that could have been or were subsumed within their general denial does not mean that they were required to plead the matter as "defenses" so-named, nor should it mean that they waived a right available under the general denial by not making a duplicative pleading under the rubric of a "defense." The fact that Appellants may have pled certain matter as "defenses" that really belonged in their general denial should also not be a ground sufficient for prejudicing them for failing to be duplicative on all such matters. The panel would effectively penalize Appellants for erring on the side of caution and asserting as "defenses" some contentions that were already put in issue by the general denial.

The court did not even mention let alone confront Appellants' argument that their general denial was sufficient to put the issue of noncompliance with California law into play in the litigation. The panel did not explain why it rejected Appellants' argument that pleading noncompliance by way of a "defense" was not necessary. Appellants are justified in their belief that the panel either overlooked the arguments or had no principled basis for refuting Appellants' logic.

Once that fallacy is identified, then the panel's only remaining ground for recognizing authority in the federal government to violate or circumvent California law is its remarkable conclusion in Part 1(C) [headnote 6] that exclusive authority to "regulate the transmission and sale...of electric energy" gave WAPA[3] exclusive authority to make decisions about where utility lines should be sited or situated as well--a conclusion which has no basis in law or fact whatsoever, and in fact is contrary to the admission of the federal government, which should have been regarded as part of the applicable law to be applied to the appeal.

There is no discussion at all in the panel's Opinion of Appellants' contention that siting decisions, as distinct from "transmission and sale" decisions, are

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[3] The panel stated inaccurately (at p. 7265) that no one disputed that if anyone was authorized to take Appellants' property, it was WAPA. There are various other misstatements and erroneous conclusions in the Opinion which Appellants cannot address in detail; however, the necessary selectivity in this petition should not be construed as acquiescence to other parts of the Opinion.

uniquely within the province of the state and were uniquely within the province of the California Public Utilities Commission in this case. One will look in vain for even any mention of the term "siting" in the opinion, which shows--at best--the court's lack of familiarity with the highly specialized area of public utility law.

This is despite the fact that Appellants briefed the point in their Opening Brief at pp. 34, 38 and 43, and in their Reply Brief at pp. 15 and 17 (the word "siting" is used on each page), and again pointed out how critical it was to understand the distinction between "siting" and other issues within the exclusive authority of the Secretary when Appellants submitted their Rule 28(j) letter.

Indeed, the cursory treatment given to this issue (in two paragraphs at the end of the initial section of the opinion) is itself curious. Appellants had made no secret of the fact that they believed that issues of noncompliance with California law alone warranted denial by the District Court of the government's motion to dismiss or for judgment on the pleadings as to the affirmative defenses--and that they had the considered opinion of a former California Public Utilities Commissioner to back them up--nor had they made any secret during their briefing to this court of their contention that PUC circumvention was one of the main issues on appeal.

Appellants can have no confidence that their Rule 28(j) letter (appended

hereto as Exhibit A) was even considered by the panel, since it is not mentioned. In that Rule 28(j) letter, Appellants included a statement from the Chairman of the Federal Energy Regulatory Commission, RM06-12-000, Item C-2, acknowledging that "When Congress provided for federal siting of interstate natural gas pipelines, it completely displaced the states, and provided for exclusive and preemptive federal siting. By contrast, federal transmission siting is not exclusive" (emphasis added). Appellants correctly observed in their Rule 28(j) letter that, given that admission, Transmission Agency of Northern California v. Sierra Pacific Power Company et al, 295 F.3d 918 (9th Cir. 2002) and Jones v. Rath Packing Co., 430 U.S. 519 (1977), were not on point. Yet the panel cited both cases (Opinion p. 7271) without even acknowledging Appellants' argument.[4] The panel also stated that natural gas pipeline decisions and Federal Power Act decisions are "interchangeable," which is at best misleading given the above admission.

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[4] If the panel rejected the Rule 28(j) letter for some procedural defect, there is no indication of that in its Opinion. Appellants believe that the attachment to the Rule 28(j) letter should have been viewed and should be viewed as a reproduction of source material comprising part of the governing law relevant to the determination of the Secretary's "exclusive authority." If the panel viewed the statement of the FERC Chairman as an improper factual submission, however, that only underscores Appellants' point about how outrageous it was for the district court to grant sua sponte summary judgment in this case, because they had indeed raised the issue of whether siting authority came within the exclusive authority of the federal government, by the Declaration of Loretta Lynch (see Opening Brief, p. 13).

Had the court believed that utility line siting decisions were somehow embraced within the exclusive authority conferred on the Secretary notwithstanding the authority presented by Appellants showing the contrary, it would have been appropriate for the panel to have at least included a statement, "Appellants' attempt to distinguish siting decisions from decisions relating to transmission and sale are rejected," and to state why--just as it would have been appropriate for the court to say something analogous as to why it had rejected Appellants' arguments that the issue of noncompliance with state law was preserved by their general denial. Litigants whose critical arguments remain completely unaddressed cannot be blamed for suspecting intellectual dishonesty rather than judicial parsimony on the part of the reviewing panel, and the Ninth Circuit should be loathe to let stand a decision even where the decision only creates the impression of intellectual dishonesty.

III. THE EXTRAORDINARY LICENSE GIVEN TO THE TRIAL JUDGE IN THIS CASE TO ISSUE SUA SPONTE SUMMARY JUDGMENT SHOULD BE CAREFULLY REEXAMINED AND REPUDIATED

The panel waited until almost the end of its decision (p. 7275) to treat one of the central defects in the District Court proceedings dismissively as a "procedural challenge" (p. 7271), concluding that a court is justified in granting

summary judgment sua sponte where the losing party has had fair notice and a fair opportunity to contest the issues summarily decided. Such a conclusion on the facts of this case should shock the conscience of any fair-minded judge and cannot be allowed to stand.

The panel cited only three decisions in support of its remarkable conclusion. The first of the three, Greene v. Solano County Jail, 513 F.3d 982, 990 (9th Cir. 2008), had not even been decided at the time of the briefing in this case, and was not mentioned at oral argument, and Appellants have had no opportunity to address it until now. In that decision the court actually overturned a district court's award of a sua sponte summary judgment against a self-represented prisoner, noting that he was not given a "full and fair opportunity to ventilate the issues" and that he did not have proper "notice and opportunity to oppose summary judgment." The court expressly noted that the litigant could not be expected to anticipate and prospectively oppose arguments that the opposing defendant did not even make. The case supports Appellants' request for rehearing. The holding in Buckingham v. United States, 998 F.2d 735, 742 (9th Cir. 1993), cited in Greene, is similar. That court stated that reasonable notice implies adequate time to develop the facts on which the litigant will depend in order to oppose summary judgment, and the court rejected an attempt to foreclose against further proceedings merely because

a new theory of opposition had not been utilized previously when the party was not in possession of as many facts. Id.

That leaves In re Rothery, 143 F.3d 546, 549 (9th Cir. 1998) as the only authority where sua sponte summary judgment was actually upheld; yet there are critical elements that were present in Rothery that were not present in Appellants' case, and the panel completely neglected to discuss any of these elements, and instead focused only on two declarations that had been submitted by Appellants with an express disclaimer that Appellants had not attempted to address by way of those declarations all of the facts that would be required to prevent summary judgment since they were not responding to a motion for summary judgment (see Opening Brief, p. 5, second full paragraph).

The panel paid no heed to Appellants' accurate contentions that "nowhere before the summary judgment order was made...were Sawyers given notice that the DC was contemplating sua sponte entry of summary judgment. [A]t no time prior to the summary judgment order were Sawyers given notice that an evidentiary showing was solicited or required." (Opening Brief, p. 10). This alone distinguishes Appellants' case from the Rothery case, where the court ostensibly upheld a sua sponte grant of summary judgment but where the court had specifically referred to the prevailing party's motion as a "motion for summary

judgment," and where the court had "defined the [factual] deficiency and invited Rothery to support her bare allegations...." (Reply Brief, p. 3). No invitation to produce facts was ever extended to Appellants (and for that matter, neither the District Court nor the panel referred to any of the facts that Appellants did show, which should have also been sufficient to preclude a grant of summary judgment under the authority noted in Part I above).

The panel completely failed to note that the District Court in this case gave Appellants only three days and four pages in which to come up with "legal" authority as to why they should have a trial. This is as compared to the 90 days between the filings of the applicable motion to dismiss and summary judgment order in Rothery, supra, during which time the losing party was notified to produce facts showing something more than her bare allegations that she had more than 12 creditors.

Similarly, the panel paid no heed to Appellants' contentions that Appellants had submitted the declarations of Loretta Lynch and Bruce Leichty "solely in order to show that there were subsidiary facts not pled as part of the affirmative defenses (they didn't have to be) that confirmed the viability of the defenses." (Reply Brief, p. 7). Appellants also stated: "[I]t is logically inconsistent for the U.S. to argue that Sawyers, having escaped summary judgment at the time that it could

have putatively been rendered (according to the apparent argument of the U.S. based on the filing of the two declarations) could have been placed on proper notice after the time for dispositive motions had passed more than a year later that their defensive filing of declarations might mean that the Court could now grant summary judgment sua sponte." (Reply Brief, p. 9). Nothing that the panel said in its Opinion has cured that logical inconsistency.

Under the panel's logic, Appellants should be punished for submitting two declarations in the context of a (rushed) opposition to a motion for judgment on the pleadings as to their affirmative defenses only, where the declarations treated threshold issues and where Appellants specifically noted that their tendering of the declarations should not be construed as consent to conversion of the motion into a motion for summary judgment--and where summary judgment was not in fact granted at the time of a ruling on those pleadings.[5] If a district court can be given license in a published opinion on these facts to grant summary judgment sua sponte, then this Court might as well abandon all pretense of adherence to the applicable Federal Rules of Civil Procedure as well as concern for procedural due process.

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[5] The panel inaccurately implied at p. 7263 that the court granted judgment on the pleadings as to the whole Answer; in fact the initial judgment on the pleadings was only as to Appellants' affirmative defenses.

IV. APPELLANTS' ASSERTIONS REGARDING THE PREROGATIVES AND DUTIES OF COURTS TO DETERMINE FACTUAL PREDICATES WITHIN STATUTORY AUTHORIZATIONS BEFORE LABELING DECISIONS AS DISCRETIONARY EXECUTIVE DECISIONS RAISES AN IMPORTANT SEPARATION-OF-POWERS ISSUE AND SHOULD NOT HAVE BEEN CASUALLY DISCOUNTED BY THE PANEL AS A "PROCEDURAL CHALLENGE"

Finally, the panel failed to apprehend the importance of the distinction briefed by Appellants between the "necessity" determination of the executive branch normally implicated in any taking of a private property for public use, and a finding of necessity when necessity is expressly made an element of a statute conferring authority on the government to take private property for public use.

The former type of necessity determination is implicated in such cases as United States v. 80.5 Acres of Land, 448 F.2d 980, 983 (9th Cir. 1971), and the latter type of necessity determination has never been the subject of any Supreme Court decision, as briefed by Appellants in their Opening Brief at pages 18, 39 and 40. For example, Appellants explicitly pointed out that there was no question in Kelo v. City of New London, Conn., 125 S.Ct. 2655 (2005) that the City had the necessary legislative authority to condemn the property in question.

As Appellants explained in their reply brief, "the U.S. has confused the issue of nonjusticiability of an executive determination of necessity with the (required) justiciability of necessity when the word 'necessary' or 'need' appears

as part of the legislative language itself." (Reply Brief, p. 10). The panel then simply indulged in the same error as the United States.

The panel's treatment of this important issue was relegated to a couple sentences (Opinion, pp. 7273 and 7274). Instead of treating the issue as a serious question of law (i.e., can necessity ever be justiciable when it is specified by Congress as a predicate condition for executive authority?), the panel treated it only as a question of pleading, one of several which were lumped together as "procedural challenges." The panel disparagingly referred to Appellants' argument as an argument concerning "conditions and predicates," even though that is not a phrase ever used by Appellants.

Strangely, the panel stated that Appellants' "positions" were not to be accorded any "deference" (the "district court did not err in refusing to defer to Sawyers' contentions pertaining to 'conditions and predicates' that confine WAPA's authority to take property") (Opinion, pp. 7273-74) even though that does not even remotely resemble what Appellants were arguing. The issue is not one of "deference." Rather, the issues are (1) the legal issue of whether a court has the ability to make a finding of fact on necessity when there is a predicate condition of necessity included in an authorizing statute on which the taking is dependent, and (2) if so (and if summary judgment was even properly considered),

whether Appellants in this case showed that there was a question of fact on whether the "necessity" components of several authorizing statutes had been satisfied. Appellants also took pains to point out to the panel that even though some statutes confer authority on the Energy Secretary when he has "deemed" an act necessary, other statutes on which the government relied for taking authority in this case did not contain any such "deemed" language, which shows that Congress did not intend to make those particular determinations of necessity matters of executive discretion (Reply Brief, pp. 10 and 11).

The above-identified errors will have precedential impact if the published opinion of the panel remain unchanged; and the Court of Appeals should be duly concerned about that effect and should not permit the current Opinion of this panel to become final.

WHEREFORE, for all or any of the foregoing reasons, Petitioners request that an order be entered providing for at least panel rehearing, but optimally for rehearing in banc.

Date: 8/7/08 Bruce Leichty

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rules 35-4 and 40-1, the foregoing petition for panel rehearing and suggestion for rehearing en banc is in compliance with Fed.R.App. 32(c) and does not exceed 15 pages.

Date: 8/7/08

Bruce Leichty

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February 28, 2008

BY CALIFORNIA OVERNIGHT

Clerk
United States Court of Appeals
95 Seventh Street
San Francisco, California 94103-1526

Re: United States of America v. 14.02 Acres of Land More or Less in Fresno County/Maxine Sawyer, No. 05-17347, United States Court of Appeals For the Ninth Circuit

Dear Clerk:

This letter, in original plus seven (7) copies, is being sent to the Court pursuant to F.R.A.P. 28(j) and the explicit instruction of Hon. Milan Smith, presiding judge, at oral argument February 14, 2008; Appellants respectfully protest the limitation imposed by Judge Smith and F.R.A.P. 28(j), leading to a denial of due process and opportunity to sufficiently brief and argue the matter; and in fewer than 350 words in the following body of this letter Appellants state as follows:

Judge Smith posited that the United States and WAPA were not required to comply with California law prior to siting transmission lines and condemning Appellants' property, based on the preemption provisions of Part II of the Federal Power Act, pursuant to Transmission Agency of Northern California v. Sierra Pacific Power Company et al., 295 F.3d 918 (9th Cir. 2002), which in turn cited Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). None of these authorities had previously been cited by the government. None of them support Judge Smith's position.

FERC is not a party to this action; however, not even FERC, much less WAPA, had as of the time of the condemnation action brought against Appellants (July 2003) been given exclusive authority over "siting" of power transmission lines. No siting authority had been conferred until at least the enactment of the Energy Policy Act of 2005, and arguably not even then. See accompanying statement of FERC Chairman Joseph T. Kelliher in the context of FERC's 2006 adoption of a final rule--itself with limitations and acknowledging that "federal transmission siting" is not exclusive--issued 11/16/2006.

EXHIBIT A

Nothing in Transmission Agency of Northern California, which is not a siting case, provides otherwise. As Mr. Kelliher's statement makes clear, there must necessarily be a distinction (acknowledged by the U.S. itself) between FERC having "exclusive jurisdiction over all facilities" as stated in the Federal Power Act, and the United States having authority to "site" a line wherever it wishes, and thus WAPA being able to unilaterally impose location of new lines on the State of California and Appellants here notwithstanding state law.

Even federal laws containing preemption clauses do not automatically escape the presumption against preemption, and any ambiguity is construed against preemption. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005).

No doubt these are the good reasons why the government never cited the Federal Power Act or Transmission Agency of Northern California in either its Declaration of Taking or in its briefs; and it is imperative that this court understand the nuances of and limits on federal government authority, especially siting authority, before ruling in this case.

Sincerely,

Bruce Leichty

/bdl

enclosure

cc: Douglas R. Wright, Esq. (w/ encl.) (by mail)
All clients (w/ encl.) (by mail)

Federal Energy Regulatory Commission
November 16, 2006
Open Commission Meeting
Statement of
Chairman Joseph T. Kelliher

Item C-2: Regulations for Filing Applications for Permits to Sit Transmission Facilities (RM06-12-000)

"Today, the Commission issues a final rule to implement its federal transmission siting responsibilities under the Energy Policy Act of 2005. This is only the latest step in our implementation of this important federal law.

Last year, Congress concluded that the status quo was failing to develop the strong transmission grid that our country needs. It took a number of steps to change the status quo in order to improve reliability, reduce congestion, and strengthen competitive markets. One change was directing FERC to issue a transmission incentives rule to attract greater investment. We issued that final rule in July, by unanimous vote, and have approved incentives in a number of orders. Another change was providing federal transmission siting authority.

We believe the final transmission siting rule is faithful to Congressional intent. We recognize that the siting authority entrusted to FERC is limited in scope. Congress took a very different approach with respect to federal transmission siting than it took with federal pipeline siting. When Congress provided for federal siting of interstate natural gas pipelines, it completely displaced the states, and provided for exclusive and preemptive federal siting. By contrast, federal transmission siting is not exclusive. Federal transmission siting supplements state siting, it does not supplant state siting.

We recognize that as a practical reality states will continue to site most transmission facilities. Federal jurisdiction to site transmission projects under the Energy Policy Act of 2005 is limited. First, FERC can only issue a construction permit for transmission projects that are located in "national interest electric transmission corridors", as designated by the Department of Energy.

Second, even in the national interest corridor regions, FERC can only issue a construction permit where states do not have authority to site these facilities or consider the interstate benefits of a project, where an applicant does not quality for siting under state law, or where the state siting body has withheld approval for more than a year or conditioned approval in a particular manner.

In my view, the most significant change between the proposed rule issued in June and the final rule is with respect to initiation of the prefiling process. The Commission uses prefiling in both hydropower licensing proceedings and natural gas project proceedings. In our experience, prefiling is an important and necessary part of a construction permit proceeding. Important because it encourages early identification and resolution of issues, engages all stakeholders in determining study needs, and enhances the possibility of all permitting agencies acting in unison. Necessary because, based on our experience, a mandatory prefiling process is needed for the Commission to meet the one year statutory deadline for authorization. For that reason, prefiling is mandatory under the final rule.

Under the proposed rule, FERC barred formal filings during the first year of a state proceeding. However, we would have allowed prefiling to be initiated during the first year. States have expressed serious concerns about prefiling occurring

contemporaneously with state proceedings. They are concerned that ex parte rules would impede or bar their participation in the FERC prefiling process, that a contemporaneous FERC prefiling proceeding will be a burden on state resources as they conduct their own proceeding, and that contemporaneous proceedings, even if the FERC proceeding is informal, would allow for gaming by project developers. We take these concerns seriously and believe they have merit.

Prefiling has not been controversial in either the hydropower or natural gas project contexts. In fact, prefiling enjoys broad support from private landowners, environmental and recreation groups, state and federal lands agencies, and state siting bodies. However, federal siting authority in these contexts is both exclusive and preemptive. By contrast, federal transmission siting authority is not exclusive. Allowing prefiling to occur contemporaneously with state siting proceedings creates potential for conflicts that do not exist in either the hydropower or natural gas pipeline contexts.

For that reason, we go further than the proposed rule, and not only bar a formal application for a construction permit in the first year of a state proceeding, but also bar the initiation of prefiling during this period. Doing so gives state siting agencies one clear year to site electric transmission facilities in designated transmission corridors, free from any burden or competition of a contemporaneous FERC proceeding. That will help state siting bodies make timely siting decisions during this period.

I should point out that we could have gone much further in the final rule. Under a strict reading of the relevant statutory provisions, FERC could have allowed contemporaneous filings with state and federal regulators, so that FERC could take final action and issue a construction permit a year and a day after such contemporaneous filings. That is not what we do today. We do something quite different, bar prefiling during the first year of a state proceeding, mandate prefiling, and only allow a formal filing at the end of prefiling. We give states one clear year to site proposed transmission facilities in designated corridors.

The final rule also clarifies the meaning of the term "withheld approval" in the statute. As indicated earlier, one of the circumstances where FERC is authorized to issue a construction permit for a transmission project in a designated corridor is where a state siting body has "withheld approval" for a year. The question has arisen as to whether than term only means state failure to act, or means both state failure to act and denial. We interpret this term using the usual rules of statutory construction, and conclude the most reasonable interpretation is that the term encompasses both state failure to act and denial. There seems to be no merit in deferring this decision until a later day when we can interpret the term now and provide greater regulatory certainty.

A few months ago, we decided to issue final rules along a schedule so that when the Department of Energy was in a position to designate national interest electric transmission corridors, our rules would be in place. We meet that schedule today."

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

14.02 ACRES OF LAND MORE OR LESS IN FRESNO COUNTY; EDNA E. STONE; PAUL KRAJIAN; SHRINERS HOSPITAL FOR CRIPPLED CHILDREN; DAVID C. WHITLOCK; EDWARD H. MARSELLA; HENRY SCHAFER, JR.; SHARON CECILE PECKINPAH; SHARON CECILE MARCUS aka Sharon Cecile Peckinpah; FERN L. PETER, LOLA A. SWANSON; FLORENCE F. CLASS; CLARENCE E. BERNHAUER, JR.; JANE WHITLOCK STILES; NORMA B. GIBBS; JUNE E. LUCAS; IRENE MARLEY; HENRY SCHAFER, SR.; DENVER C. PECKINPAH; SUSAN JANE PECKINPAH; AGNES H. VIGNOLA; DONG SHE MAR; BESSIE E. BERNHAUER; LEONARD P. LEBLANC; IVONE M. CARLSON; ELVIRA MOSHER; LORRAINE S. EICHENBERGER; ELEANOR C. HICKS; TRUSTEE PETER FRECHOU; KATHRYN MCAFEE; TRUSTEE JOHN C. RICKSEN KATHRYN BROWN;

No. 05-17347

D.C. No. CV-03-06019-REC/LJO

OPINION

EXHIBIT B

ESTATE OF JOHNNY BELLO; ESTATE OF LOUIS BELLO; FRANCIS BELLO; EDWARD C. BEAUMONT; PAULINE EICHENBERGER; LORRAINE C. FORTNOY; FLOREEN L. WALSH; TRUSTEE MARY FRECHOU ALLEN MOORE; BEVERLY M. FIELDER; HAL E. VERBLE; MAY EVYLEN BERNHARD; GORDON WINANT HEWES; PAULINE D. HANSON; ELOISE MITCHELL; LAWRENCE E. AUSTIN; EVELYN SANTOS; SAMUEL B. BRECK DAVID BISWELL; STEPHEN BISWELL; MELISSA BROOK PECKINPAH; JOAN LEONARD; MAUDE DAWSON; GERTRUDE PORTERFIELD; WILLIAM J. MATHOS; JOHN ROBERT SHURB; CANDACE HAAS; KRISTEN LOUISE PECHINPAH; MATTHEW DAVID PECHINPAH; J. DANIEL HARE, III; BRADLEY B. LEONARD; SECURITY TITLE INSURANCE; VICKI TREASURER, FRESNO COUNTY; RUSS FREEMAN; THOMAS C. HARE,

Defendants,

and

MAXINE H. SAWYER; MARK W. SAWYER; HARRIET H. LEONARD; CHARLES A. SAWYER; ANDREW KLEMM; RAMON ECHEVESTE,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
February 14, 2008—San Francisco, California

Filed June 24, 2008

Before: William C. Canby, Jr. and Milan D. Smith, Jr., Circuit Judges, and Stephen G. Larson,* District Judge.

Opinion by Judge Canby

SUMMARY

Government Law/Eminent Domain

The court of appeals affirmed a judgment of the district court. The court held that the Western Area Power Administration (WAPA) is authorized to carry out the upgrade of a high voltage transmission line in the San Joaquin Valley by acquiring lands by eminent domain.

Appellee the United States began condemnation proceedings in district court in California on behalf of WAPA to acquire easements on about 14 acres of land on which it planned to construct a high-voltage transmission line along Path 15, a location in the San Joaquin Valley. Appellant landowners including Maxine Sawyer challenged the condemnation by asserting eight affirmative defenses. The district court granted the government's motion to strike the defenses, concluding that WAPA was fully authorized by federal law to

*The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.

proceed. The court also rejected Sawyer's argument that the upgrade did not serve a public purpose. The parties later agreed that the value of the property taken was about $7,400. The court concluded that no issue remained for trial and granted summary judgment *sua sponte* in favor of the government. The court entered final judgment and apportioned the stipulated value of the easements among the ownership entities.

Sawyer appealed.

[1] The 1984 Energy and Water Development Appropriations Act generally authorized the Secretary of Energy to construct additional facilities to allow mutually beneficial power sales between the Pacific Northwest and California. This enactment clearly conferred discretion on the Secretary of Energy to construct power lines in the area where the Path 15 upgrade is located. [2] Congress confirmed its authorization and appropriated funds to develop the Path 15 upgrade in the Supplemental Appropriations Act of 1985, again authorizing construction of transmission lines along the Pacific Northwest-California Intertie. There was little doubt that, as early as the mid-1980s, Congress had authorized the Path 15 upgrade. [3] Congress has implicitly reaffirmed its authorization by funding WAPA through general appropriations. It had to be concluded that WAPA is authorized to carry out the Path 15 upgrade by acquiring lands by eminent domain.

[4] The next question was whether the Path 15 upgrade satisfied the "public use" requirement of the Takings Clause even though it was a partnership of public and private entities and the beneficiaries of the project arguably were the customers of privately owned utilities, as opposed to the public at large. It is only the taking's purpose, and not its mechanics, that matters in determining public use. Courts do not substitute their judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation. [5] Applying these principles, it had to

be concluded that the Path 15 upgrade satisfied the "public use" requirement. The Path 15 upgrade project hardly entailed a private-to-private transfer at all. WAPA would own the new transmission line and associated land that was the most significant part of the transmission upgrades.

[6] With respect to the regulation of electric power transmission networks, Part II of the Federal Power Act delegates to the Federal Energy Commission exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce. Because the statute expressly commands exclusive federal regulation and Sawyer did not point to an unequivocal pronouncement by Congress to overcome the resulting presumption of preemption, California law was preempted and WAPA was not required to comply therewith in constructing the Path 15 upgrade.

[7] The court of appeals also ruled that the district court properly allowed the action to proceed without requiring the government to join all owners of fractional property interests; [8] the government was not required to serve non-objecting defendants who did not file a notice of appearance with its motion for judgment on the pleadings; and [9] the district court properly refused to defer to Sawyer's contentions pertaining to the "conditions and predicates" that confine WAPA's authority to take property, [10] took judicial notice of the Department of Energy National Transmission Grid Study, [11] *sua sponte* granted summary judgment, and [12] apportioned the total compensation by accepting at face value the ownership information provided by the government. The judgment of the district court had to be affirmed.

COUNSEL

Bruce Leichty, Clovis, California, for the defendants-appellants.

Douglas R. Wright, United States Attorney, Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the plaintiff-appellee.

OPINION

CANBY, Circuit Judge:

Pursuant to a 2001 order of the Secretary of Energy, the Western Area Power Administration ("WAPA") selected certain land estates in the western portion of the San Joaquin Valley in California, where it planned to construct a high-voltage transmission line. The United States began condemnation proceedings in the district court on behalf of WAPA, seeking transmission easements on the lands selected by WAPA. Sawyer and a few other individual owners of condemned property (collectively "Sawyer") challenged the government's exercise of its power of eminent domain, claiming that the taking lacked proper congressional authorization, was not for a "public use" as required by the Takings Clause, and violated California law. The district court dismissed Sawyer's objections and, when the parties reached an agreement on the compensation amount, entered summary judgment *sua sponte*. Sawyer filed this appeal. We affirm.

BACKGROUND

In 2001, in an effort to mitigate California's electric power transmission constraints, the Secretary of Energy directed WAPA to prepare plans to construct the Los Banos-Gates Transmission Project, or Path 15 Upgrade. The project consists of an additional 84-mile, 500-kilovolt transmission line along Path 15, which is located in the western portion of the San Joaquin Valley and connects its northern terminus near Los Banos, California with its southern terminus at the Gates Substation near Coalinga, California. *See* Department of

Energy, Los Banos-Gates Transmission Project: Record of Decision (hereinafter, "DOE Record of Decision"), 66 Fed. Reg. 65,699 (Dec. 20, 2001). The Secretary also instructed WAPA to explore partnership opportunities with private industry, *see id.*, and delegated authority to WAPA to acquire and condemn property interests in land to complete the project. Department of Energy, Delegation Order No. 00-036.00 (Dec. 6, 2001), *available at* http://www.directives.doe.gov/pdfs/sdoa/00-036_00.pdf (last visited May 28, 2008). WAPA updated plans that it had originally developed in the mid-1980s and accepted proposals from Trans-Elect and Pacific Gas and Electric Company to "finance, construct, and co-own the system additions." DOE Record of Decision, 66 Fed. Reg. at 65,699-700. The Federal Energy Regulatory Commission ("FERC") approved the proposed upgrade, which provided, among other things, that "WAPA w[ould] own the new 500 kV transmission line and associated land that is the most significant part of the transmission upgrades." Western Area Power Administration, FERC Order Accepting Letter Agreement, 99 FERC ¶ 61,306, at 62,278, 2002 WL 1308653 (2002), *aff'd. Pub. Util. Comm'n. of Cal. v. FERC*, 367 F.3d 925 (D.C. Cir. 2004).

In 2003, the United States began condemnation proceedings in the district court on behalf of WAPA to acquire easements on approximately 14.02 acres of land in western Fresno County, California. Sawyer filed an answer to the government's complaint and challenged the condemnation by asserting eight affirmative defenses. The government moved to strike the affirmative defenses or, in the alternative, for judgment on the pleadings as to its authorization to take. The district court granted the government's motion, concluding that "WAPA was fully authorized by federal law to construct the Path 15 Project and to condemn the power line transmission easement[s] for it." The district court also rejected Sawyer's argument that the upgrade did not serve a "public purpose."

One year later, the parties filed a Joint Pretrial Statement, in which they agreed that the "value of the property taken is

$7,374.32." At a later evidentiary hearing, the government asserted that no viable issue remained for trial because the district court had previously granted judgment as to the lawfulness of the taking. Sawyer disagreed. The district court then requested supplemental briefing.

With the benefit of the parties' briefing, the district court concluded that no issue remained for trial and granted summary judgment *sua sponte* in favor of the government. The district court then entered final judgment and apportioned the stipulated value of the easements, $7,374.32, among the "approximately 73 ownership entities." Each entity was assigned compensation according to its percent ownership interest. (*Id.*) Ownership interests were computed on the basis of the title information supplied by the government. As of final judgment, neither Sawyer nor any other condemnation defendant had disputed such information.[1] (*Id.*) Sawyer filed this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. Authorization and Lawfulness of the Taking

Where, as here, the parties do not dispute the amount of compensation, "[t]he only [substantive] question for judicial review in a condemnation proceeding is whether the purpose for which the property was taken is for a Congressionally authorized public use." *United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993) (internal quotation marks and citation omitted). "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legisla-

[1]To the extent that other unnamed interest owners or their successors are not specifically mentioned in the district court's order, they remain entitled to claim their share of the award by presenting appropriate documentation to the district court. 28 U.S.C. § 2042.

tive branch." *Berman v. Parker*, 348 U.S. 26, 36-37 (1954). In addressing Sawyer's challenges, we must assess both prongs of the "public purpose" inquiry set forth in our precedent. First, we must satisfy ourselves that the Secretary of Energy and the Administrator of WAPA enjoy statutory authorization to condemn property interests to construct the Path 15 Upgrade. Second, we must decide whether the Path 15 Upgrade qualifies as a "public use" under the Takings Clause of the Fifth Amendment.

A. Statutory Authority

There is no dispute that, if any federal agency is authorized to acquire land by eminent domain for the purpose of constructing the Path 15 Upgrade, that agency is WAPA. *See* 42 U.S.C. § 7152(a)(1)(D) ("There are transferred to, and vested in, the Secretary [of Energy] all functions [previously] of the Secretary of the Interior . . . with respect to . . . the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities."); Department of Energy, Delegation Order No. 00-036.00 (Dec. 6, 2001), *available at* http://www.directives.doe.gov/pdfs/sdoa/00-036_00.pdf (last visited May 28, 2008). The operative question before us, then, is whether Congress ever authorized the construction of the Path 15 Upgrade at all.

[1] Numerous congressional enactments convince us that it did. In 1984, Congress enacted the Energy and Water Development Appropriations Act. The Act generally authorized

> the Secretary of Energy . . . to construct or participate in the construction of such additional facilities as he deems necessary to allow mutually beneficial power sales between the Pacific Northwest and California and to accept funds contributed by non-Federal entities for that purpose.

Pub. L. No. 98-360, tit. III, 98 Stat. 403, 416 (1984) (codified at 16 U.S.C. § 837g-1). This enactment clearly conferred discretion on the Secretary of Energy to construct power lines in the area where the Path 15 Upgrade is located. By citing this statutory provision in the Declaration of Taking, then, the Administrator of WAPA, as delegate of the Secretary, evidently made the discretionary finding that the Path 15 Upgrade would facilitate the consolidation of the Pacific Northwest-California market.

[2] Since passage of this 1984 Act, Congress has repeatedly confirmed its authorization and appropriated funds to develop the Path 15 Upgrade. In the Supplemental Appropriations Act of 1985, Congress again authorized construction of transmission lines along the Pacific Northwest-California Intertie:

> Public Law 98-360 . . . authorized the Secretary of Energy to construct or participate in the construction of such project for the benefit of electric consumers of the Pacific Northwest and California. . . .

Pub. L. No. 99-88, tit. I, ch. IV, 99 Stat. 293, 321 (1985). In the same provision, Congress further indicated that "sufficient capacity shall be reserved, as recognized in [the] Memorandum, to serve the needs of the Department of Energy laboratories and wildlife refuges in California." *Id.* In turn, the Memorandum referenced by Congress committed WAPA to provide "a reasonable and proportionate share of the capital required for increasing the transfer capability between Los Banos and Gates," i.e., the Path 15 Upgrade. Department of Energy, Memorandum of Understanding for the California-Oregon Transmission Project, 50 Fed. Reg. 421 (Dec. 24, 1984). Thus, we have little doubt that, as early as the mid-1980s, Congress had authorized the Path 15 Upgrade.

Although construction of the Path 15 Upgrade did not progress beyond the planning stages in the 1980s and 1990s, in 2001, the House Appropriations Committee again proposed

special funding to "complete the planning and environmental studies to support the proposed 84-mile, 500-kilovolt transmission line between Los Banos and Gates (also known as 'Path 15') in California." H.R. Rep. No. 107-102, at 24 (2001). The Conference Committee "provide[d] . . . [n]onreimbursable funding of $1,328,000 . . . to complete planning and environmental studies for the Path 15 transmission line," H.R. Rep. No. 107-148, at 61 (2001) (Conf. Rep.), *reprinted in* 2001 U.S.C.C.A.N. 259, 278, and Congress appropriated those funds through the Supplemental Appropriations Act of 2001, Pub. L. No. 107-20, 115 Stat. 155, 174 (2001).

[3] Finally, although no appropriation has specifically mentioned the Path 15 Upgrade since 2001, Congress has implicitly reaffirmed its authorization by funding WAPA through general appropriations "[f]or carrying out the functions authorized by title III, section 302(a)(1)(E) of the Act of August 4, 1977 (42 U.S.C. 7152)." Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 152 (2003). These functions, in turn, encompass "the construction . . . of transmission lines and attendant facilities," which is the essence of the Path 15 Upgrade.[2] 42 U.S.C. § 7152(a)(1)(D). We there-

[2]Sawyer's discussion of the Flood Control Act of 1944 and its restriction on the construction of new transmission lines is unavailing. The Act applies only to "[e]lectric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects." Pub. L. No. 78-534, § 5, 58 Stat. 887, 890 (1944) (codified at 16 U.S.C. § 825s). Nothing suggests that the Path 15 Upgrade was ever under the control of the Department of the Army.

Similarly, it is true that the Reclamation Project Act of 1939 confers on the Secretary only limited authority to condemn land in connection with the construction of new transmission lines: "The Secretary is authorized, in connection with the construction or operation and maintenance of any project . . . to purchase or condemn suitable lands or interests in lands for relocation of . . . electric transmission lines . . . . the relocation of which in the judgment of the Secretary is necessitated by said construction or operation and maintenance." 43 U.S.C. § 389. But the "relocation" condition—to the extent it is judicially reviewable at all—does not curtail the Secretary's authorization to condemn land stemming from the other enactments to which we already have referred.

fore conclude that WAPA is authorized to carry out the Path 15 Upgrade by acquiring lands by eminent domain.

In reaching this conclusion, we reject Sawyer's argument that, even if the Path 15 Upgrade has been authorized, WAPA is not at liberty to condemn property interests to realize the project. To the extent that Congress did not spell out the Secretary's and WAPA's eminent domain prerogatives in the enactments specifically authorizing the Path 15 Upgrade, we deem such omissions irrelevant. When Congress mandates the construction of a new high-voltage transmission line and appropriates funds to carry it out, it implies, by necessity if not common sense, the authority on the part of the executing agency to acquire land on which the transmission line may be constructed. *See, e.g., City of Davenport v. Three-Fifths of an Acre of Land*, 252 F.2d 354, 356 (7th Cir. 1958) (rule of implied necessity authorizes eminent domain for the construction of duly authorized bridge, where condemnation is required to realize the project).

Finally, Sawyer generally contends that any authorization contained in these statutes is conditional on a preliminary finding that the Path 15 Upgrade is "necessary." Whereas a threshold finding of necessity is in fact required under the 1984 authorization, Congress has unequivocally committed that determination to the discretion of the Secretary (which has been delegated to WAPA). *See* 16 U.S.C. § 837g-1 (authorizing the Secretary of Energy "to construct or participate in the construction of such additional facilities *as he deems necessary* to allow mutually beneficial power sales between the Pacific Northwest and California and to accept funds contributed by non-Federal entities for that purpose.") (emphasis added). We are therefore not at liberty to review the agency's determination with respect to the necessity condition. *See United States v. 80.5 Acres of Land*, 448 F.2d 980, 983 (9th Cir. 1971) ("[T]he necessity of taking or appropriating private property for public use is legislative in nature and one over which the courts lack jurisdiction.").

B. The "Public Use" Requirement Under the Takings Clause

[4] We must next decide whether the Path 15 Upgrade satisfies the "public use" requirement of the Takings Clause even though it is a partnership of public and private entities and the beneficiaries of the project arguably are the customers of privately-owned utilities, as opposed to the public at large. For over a century, the Supreme Court's "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo v. City of New London*, 545 U.S. 469, 483 (2005). It remains true, of course, that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Id.* at 477. At the same time, the Court has long abandoned any "use by the public" test for private-to-private transfers by eminent domain. *See id.* at 479-81 & nn.7, 9, 10 (collecting cases). " 'It is only the taking's purpose, and not its mechanics' . . . that matters in determining public use," *id.* at 482 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)), and we do "not substitute [our] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " *Midkiff*, 467 U.S. at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

[5] Applying these principles, we conclude that the Path 15 Upgrade satisfies the "public use" requirement. To begin with, the project hardly entails a private-to-private transfer at all. It is true that WAPA will initially receive only ten percent of the transmission system rights arising from the 500 kV capacity increase. Western Area Power Administration, FERC Order Accepting Letter Agreement, 99 FERC ¶ 61,306, at 62,278, 2002 WL 1308653 (June 12, 2002). However, "WAPA will own the new 500 kV transmission line and associated land that is the most significant part of the transmission

upgrades." *Id.* Further, in its 1985 appropriations and mandate to the Secretary of Energy to expand the Pacific Northwest-California Intertie, Congress specified that "sufficient capacity shall be reserved . . . to serve the needs of the Department of Energy laboratories and wildlife refuges in California." Pub. L. No. 99-88, tit. I, ch. IV, 99 Stat. 293, 321 (1985). In short, it is clear that Congress' purpose in authorizing the condemnation envisioned a continued proprietary and operational presence of the federal government.

Moreover, to the limited extent that the project does involve a transfer of property interests among private entities, such transfer poses no constitutional difficulty. In the pursuit of what it perceives as a "public use," "the Congress and its authorized agencies have made determinations that take into account a wide variety of values." *Berman*, 348 U.S. at 33. Therefore, "It is not for [the courts] to reappraise them." *Id.* In its 1984 authorization, Congress unambiguously expressed its intent to "allow mutually beneficial power sales between the Pacific Northwest and California." 16 U.S.C. § 837g-1. In so doing, it spoke to the value it intended to pursue—i.e., facilitating the consolidation of the western electricity market. It would therefore be impermissible for us to engage, as Sawyer asks us to do, in "empirical debates over the wisdom" of increased access to electricity or the effectiveness of the Path 15 Upgrade. *See Midkiff*, 467 U.S. at 242-43.

C. Federal Preemption of the California Public Utility Commission Review

In a final substantive challenge, Sawyer contends that the condemnation is unlawful because WAPA did not obtain the approval of the California Public Utility Commission for the Path 15 Upgrade as required by California law. *See* Cal. Pub. Util. Code §§ 1001-06. We agree with the district court that Sawyer waived this argument by not advancing it in the Answer. Under Rule 71.1, "[a] defendant waives all objections and defenses not stated in its answer. No other pleading

or motion asserting an additional objection or defense is allowed." Fed. R. Civ. P. 71.1(e)(3). Because Sawyer did not raise the federal government's failure to comply with California law in the Answer, we affirm the district court's waiver ruling.

[6] In any event, the Supremacy Clause, Article VI, clause 2, of the United States Constitution forecloses Sawyer's non-compliance argument. Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). With respect to the regulation of electric power transmission networks, "Part II of the Federal Power Act, codified at 16 U.S.C. §§ 824-824m, delegates to the Federal Energy Commission '*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.' " *Transmission Ag. of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) (quoting *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982)). Because the statute expressly commands exclusive federal regulation and Sawyer has not pointed to an unequivocal pronouncement by Congress to overcome the resulting presumption of preemption, California law is preempted and WAPA is not required to comply therewith in constructing the Path 15 Upgrade.[3]

II. Procedural Challenges

Sawyer also advances a number of procedural challenges that, he contends, require us to reverse the judgment of the

[3]In a gas pipeline case, the Seventh Circuit has similarly held that a state commission may not interfere with an interconnection of interstate pipelines once that interconnection has been approved by FERC. *Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539-40 (7th Cir. 2001). This conclusion is particularly instructive because decisions under the Natural Gas Act and Federal Power Act are interchangeable. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

district court and remand this case for further proceedings. We review each challenge in turn.

A. Joinder of Owners of Fractional Property Interests

[7] The district court did not err in allowing the action to proceed without requiring the government to join all owners of fractional interests in the condemned property. Rule 71.1(c) provides:

> When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and *whose names are then known*. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names *have become known or can be found by a reasonably diligent search of the records*, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

Fed. R. Civ. P. 71.1(c)(3) (emphases added). Here, WAPA and the Assistant U.S. Attorney investigated the title history and current interests in the condemned land, enrolled the services of an outside title investigator and, in the end, even attempted to cooperate with the defendants in an effort to identify all interest owners. We conclude that the government has easily met the burden imposed by Rule 71.1(c).[4]

[4]To the extent that Sawyer relies on our 1952 decision in *United States v. Adamant Co.*, 197 F.2d 1, 4 (9th Cir. 1952) to establish a due process requirement to join "all persons having any interest in the property," his reliance is misplaced. *Adamant* was a post-condemnation case dealing with the apportionment of a compensation award among former interest holders, not a challenge to a condemnation. *Id.* at 3-5. Accordingly, the "universal joinder" principle it endorses is limited to "proceedings . . . to apportion the award[, in which] the condemnor has no interest." *Id.* at 5.

B. Service On Non-Objecting Defendants

[8] Sawyer contends that Rule 5 of the Federal Rules of Civil Procedure, required the government to serve its motion for judgment on the pleadings on those defendants who had neither objected to the condemnation nor filed a notice of appearance. But Rule 71.1 governs condemnation proceedings "except as this rule provides otherwise." Fed. R. Civ. P. 71.1(a). With regard to notice, Rule 71.1 provides that

> [a] defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

Fed. R. Civ. P. 71.1(e)(1). The only way to give effect to Rule 71.1(e)(1) is to interpret it as overriding the default requirement laid out in Rule 5, which mandates that "a pleading filed after the original complaint" be served on "every party." Fed. R. Civ. P. 5(a)(1)(B). Otherwise, the Rule 71.1(e)(1) option for non-objecting defendants to remain abreast of the case by filing a "notice of appearance" would be surplusage, for these defendants would be entitled to receive full service under Rule 5(a)(1)(B). Applying Rule 71.1(e)(1), therefore, the government was not required to serve non-objecting defendants who did not file a notice of appearance with its motion for judgment on the pleadings.

C. Deference to Sawyer's Factual Allegations

[9] The district court did not err in refusing to defer to Sawyer's contentions pertaining to the "conditions and predicates" that confine WAPA's authority to take property. It is true that, in deciding a Rule 12 motion, the district court must "take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party." *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

But the "conditions and predicates" to which Sawyer alludes are not "allegations of fact." *Id.* They are either nonreviewable discretionary determinations—as in the case of the "necessity" determination, *see supra* Section I.A—or pure questions of law—as in the case of the "public use" inquiry, *see supra* Section I.B. The district court properly declined to accord Sawyer's positions any deference.

D. Consideration of Documents Outside the Pleading

[10] The district court also did not abuse its discretion in taking judicial notice of the *Department of Energy National Transmission Grid Study* (May 2002) ("DOE Study"), which was not included in the pleadings, and referring to it as background material in its order granting the government's motion for judgment on the pleadings. *See Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995) ("An appellate court reviews the district court's decision to take judicial notice under Rule 201 for an abuse of discretion."). Although, as a general rule, a district court may not consider materials not originally included in the pleadings in deciding a Rule 12 motion, Fed. R. Civ. P. 12(d), it "may take judicial notice of matters of public record" and consider them without converting a Rule 12 motion into one for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotation marks and citation omitted). Judicial notice is appropriate for records and "reports of administrative bodies." *Interstate Natural Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1954). The district court considered the DOE Study, which is clearly a "report[ ] of [an] administrative bod[y]." *Id.* Further, it referred to the report only as background material, without relying on it to resolve any factual dispute. We therefore conclude that the district court did not abuse its discretion in taking judicial notice of the DOE Study for the limited purpose for which the court considered it.

E. The District Court's *Sua Sponte* Summary Judgment

[11] The district court did not err in granting summary judgment *sua sponte*. "*Sua sponte* grants of summary judgment are only appropriate if the losing party has 'reasonable notice that the sufficiency of his or her claim will be in issue.' " *Greene v. Solano County Jail*, 513 F.3d 982, 990 (9th Cir. 2008) (quoting *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993)). "Notice need not be explicit. . . . A party is 'fairly appraised' that the court will in fact be deciding a summary judgement [sic] motion if that party submits matters outside the pleadings to the judge and invites consideration of them." *In re Rothery*, 143 F.3d 546, 549 (9th Cir. 1998) (internal citations omitted). Sawyer met this condition by submitting two declarations outside the pleadings in support of his opposition to the government's motion, and he had a fair opportunity to contest the issues decided in the motion. *See id.* More fundamentally, with the exception of just compensation, Sawyer never raised any issue that required resolution of any question of fact. *See supra*. As a consequence, when Sawyer eventually entered into a stipulation with the government with respect to compensation, he effectively removed the only factual issue before the court. The district court did not err in granting summary judgment *sua sponte*.[5]

[5]We also reject Sawyer's contention that the court's ability to enter judgment on the pleadings was necessarily confined to Sawyer's *affirmative defenses* and could not reach his *denial* of the allegations contained in the complaint. The government moved for—and the district court granted—"judgment on the pleadings *on the issue of the government's right to take* in this action." (emphasis added). Thus, the government's motion encompassed both affirmative defenses and the allegations in the Answer.

F. Apportionment of Just Compensation

[12] Finally, the district court did not abuse its discretion in apportioning the total compensation by accepting at face value the ownership information provided by the government. *See United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1269 (9th Cir. 2003) ("[T]he apportionment is left to either the discretion of the court, or the allocation agreed upon by the parties in a contract."). "The 'undivided fee rule' essentially operates by permitting the governmental authority to condemn property by providing just compensation, then allowing the respective interest holders to apportion the award among themselves, either by contract or judicial intervention." *Id.* In the absence of a contractual agreement among the property owners, it was proper for the district court to apportion the total amount of compensation by "judicial intervention." *Id.* Nor do we find an abuse of discretion in the district court's deference to the ownership information provided by the government where, as here: (1) no defendant objected to the court's apportionment or presented conflicting ownership data, and (2) the court has provided an opportunity for unknown fractional owners to obtain their share of the award at a later time.

CONCLUSION

The district court did not err in granting summary judgment in favor of the United States or apportioning the compensation among the defendants. The judgment of the district court is

AFFIRMED.

PROOF OF SERVICE BY MAIL

I am employed in the County of Fresno; I am over the age of eighteen years and not a party to the within above-entitled cause; my business address is 625-A Third St., Clovis, CA 93612-1145; I am readily familiar with the business practice for processing of documents and correspondence for mailing with the United States Postal Service; the documents referred to below would have been deposited with the United States Postal Service on the date of execution hereof in the ordinary course of business. On the date of execution there was regular delivery of United States mail between the place of deposit and place of address.

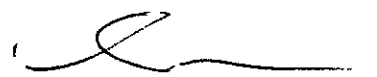
On the dates indicated below, I served the following documents:

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

on the parties to be noticed in said cause, by placing two true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, for collection and mailing following ordinary business practices and addressed as follows for deposit in the United States Postal Service:

Douglas R. Wright, Esq.
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026-3795

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Proof of Service was executed on August 7, 2008 at Clovis, California.



Samantha Lopez