Note

Siting Natural Gas Pipelines Post-*PennEast*: The New Power of State-Held Conservation Easements

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INTRODUCTION

New Jersey, like many states, has set aside numerous areas within its borders to preserve farmland and open space. The Ted Stiles Preserve at Baldpate Mountain covers approximately 1,800 acres of hiking trails and wilderness in Mercer County and is named after Edmund "Ted" Stiles, one of New Jersey's most successful conservation activists.[1] The Thomas F. Breden Preserve at Milford Bluffs overlooks the Delaware River from the top of a high cliff and is named after the former Administrator of the Office of Natural Lands Management and Executive Director of the New Jersey Natural Lands Trust.[2] The Wickecheoke Creek Preserve is home to New Jersey's only covered bridge, as well as a stone house that predates the United States.[3] Where the name "Wickecheoke" comes from, though, is unknown.[4] These three special places share a common factor beyond unique monikers: they all stand in the route of a proposed natural gas pipeline

* J.D. Candidate 2021, University of Minnesota Law School. I'd like to thank Professor Alexandra Klass for her feedback, insight, and guidance, without which this Note would not exist. I'd also like to thank Research Librarian Scott Dewey for his assistance and patience. This piece is for Mary, as always. This Note was originally published in *Arizona Journal of Environmental Law & Policy*. *See* Zachary J.H. Wright, *Siting Natural Gas Pipelines Post*-PennEast*: The New Power of State-Held Conservation Easements*, 10 ARIZ. J. ENV'T L. & POL'Y 296 (2020).

1. *Ted Stiles Preserve at Baldplate Mountain*, N.J. TRAILS ASS'N, https://njtrails.org/trail/ted-stiles-preserve-at-baldpate-mountain [https://perma.cc/3QQB-CTGT].

2. *Thomas F. Breden Preserve at Milford Bluffs*, N.J. NAT. LANDS TR., https://www.nj.gov/dep/njnlt/tfbreden.htm [https://perma.cc/5PWX-XZ2V].

3. *Wickecheoke Creek Preserve*, N.J. CONSERVATION FOUND., https://www.njconservation.org/preserve/wickecheoke-creek-preserve [https://perma.cc/CR95-RU2W]; *see also History of the Prallsville Mills*, PRALLSVILLE MILLS, https://www.prallsvillemills.org/history [https://perma.cc/PG99-FLNJ].

4. WILLIAM BRIGHT, NATIVE AMERICAN PLACENAMES OF THE UNITED STATES 566 (2004).

known as the PennEast pipeline.[5] In 2018, the pipeline obtained federal approval and moved forward with condemnation actions for rights-of-way across the preservation lands.[6] New Jersey, like any other state, was unable to stop the federal administrative approval of the pipeline and would be saddled with its upkeep upon its completion.[7] State opposition to natural gas pipelines exists in pockets and various forms around the country,[8] but natural gas production and infrastructure continues to grow.[9]

Ultimately, however, New Jersey succeeded where previous states had failed and halted the PennEast pipeline. The Third Circuit's decision in *In re PennEast Pipeline Co.* has swung the balance of power over control of natural gas pipeline construction back in the direction of the states.[10] In *PennEast*, the Third Circuit held that the Natural Gas Act (NGA), which delegates federal eminent domain power to private actors constructing natural gas pipelines, did *not* delegate the federal exemption to a state's sovereign immunity to private natural gas companies.[11] As a result, the pipeline company's attempt to build a natural gas pipeline over land that New Jersey had a property interest in was defeated by the state's assertion of its sovereign immunity.[12] This

5. Michele Byers, *Block of PennEast Pipeline a Victory for New Jersey Conservation Efforts*, PHILA. INQUIRER (Sept. 19, 2019), https://www.inquirer.com/opinion/commentary/penneast-pipeline-new-jersey-court-ruling-20190919.html [https://perma.cc/P9KB-SXR8] ("Forty-two of the 131 properties targeted for condemnation—nearly a third—are state-preserved farmland and open space. They include special places like the Ted Stiles Preserve at Baldpate Mountain, the Milford Bluffs, the Wickecheoke Creek Greenway, and some of the state's first preserved farms in the Rosemont Valley.").

6. *In re* Penneast Pipeline Co., No. CV 18-1585, 2018 WL 6584893, at *7–8 (D.N.J. Dec. 14, 2018), *vacated and remanded sub nom*. *In re* PennEast Pipeline Co., 938 F.3d 96 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

7. Jacquelyn Pless, *Making State Gas Pipelines Safe and Reliable: An Assessment of State Policy*, NAT'L CONF. ST. LEGISLATURES (Mar. 2011), https://www.ncsl.org/research/energy/state-gas-pipelines-federal-and-state-responsibili.aspx [https://perma.cc/U8HQ-YHZM] ("Although the federal government is responsible for developing, issuing and enforcing pipeline safety regulations, most inspections are conducted by state regulatory agencies, which are responsible for regulation, inspection and enforcement of pipelines within state boundaries.").

8. *See, e.g.*, Michael Gold, *Cuomo Threatens National Grid: Provide Gas or Lose Your License*, N.Y. TIMES (Nov. 12, 2019), https://www.nytimes.com/2019/11/12/nyregion/cuomo-national-grid.html [https://perma.cc/NR8W-KXMQ].

9. *Today in Energy: U.S. Natural Gas Production Hit a New Record High in 2018*, U.S. ENERGY INFO. ADMIN. (Dec. 26, 2019), https://www.eia.gov/todayinenergy/detail.php?id=42337 [https://perma.cc/XHT5-TUUQ].

10. *In re PennEast Pipeline Co.*, 938 F.3d 96.

11. *Id.* at 112–13.

12. *Id.*

holding has opened the door for a state to potentially block any natural gas pipeline that crosses into its borders by obtaining an interest in a portion of the land over which the proposed pipeline is to be built.[13] It has also given new strength to an old tool in the conservationist's toolbox: the conservation easement.[14] A state that wishes to stop a natural gas pipeline can use *PennEast* to stop it by obtaining a conservation easement over property in the pipeline route and then asserting sovereign immunity to prevent the condemnation of the underlying land restricted by the conservation easement.[15]

Part I of this Note begins by providing brief background information on the various legal doctrines and principles implicated in and by the *PennEast* decision. It then proceeds to an in-depth look at the Third Circuit's analysis. Part II describes the long history of federal and state interests competing for control of—and decision-making power over—the land within state borders and situates conservation easements in that tale. Assuming arguendo that *PennEast* was correctly decided and will not be overturned, Part III starts by explaining how the decision has injected significant legal heft to conservation easements and handed new leverage to any state interested in opposing a natural gas pipeline. It then uses the Uniform Conservation Easement Act to forecast what is required of a conservation easement for a state to successfully prevent the construction of a natural gas pipeline and explains why existing state laws do not present an obstacle to doing so. It culminates by suggesting changes states interested in stopping a natural gas pipeline could make to their conservation easement laws to take advantage of *PennEast*.

I. THE LEGAL CONTEXT OF *PENNEAST*

It is important to acknowledge the context in which *PennEast* exists to recognize the significance of the decision for states. The dispute in *PennEast* involved principles at the heart of the United States'

13. *Id.* at 113 ("PennEast warns that our holding today will give states unconstrained veto power over interstate pipelines, causing the industry and interstate gas pipelines to grind to a halt.").

14. *See* Appellee PennEast Pipeline Co., LLC's Petition for Panel Rehearing or Rehearing En Banc at 16, *In re PennEast Pipeline Co.*, 938 F.3d 96 (No. 19-1191) [hereinafter Petition for Panel Rehearing] (contemplating "if sovereign immunity can be invoked to block NGA condemnation actions, not only will states exercise a veto, but so will individual landowners through the simple expedient of granting minor property interests to a state" such as conservation easements).

15. *Id.*

federalist structure.[16] In particular, the Third Circuit's decision focused on the interplay between eminent domain, the control of natural resources, and state sovereign immunity.[17] This Part elaborates on those subjects and explains how the court arrived at its decision in *PennEast*.

A. EMINENT DOMAIN, NATURAL GAS REGULATION, AND STATE SOVEREIGN IMMUNITY ARE DISTINCT LEGAL CONCEPTS THAT INTERSECT IN *PENNEAST*

Several legal concepts collided in the *PennEast* decision: eminent domain, natural gas regulation, and state sovereign immunity. Each of these concepts is distinct from the others, and the interplay between them is at the heart of the Third Circuit's holding. This Section provides information on each discrete topic below. The next Section then discusses their intersection in the *PennEast* decision.

1. Eminent Domain

Eminent domain is the power a sovereign possesses to condemn and take property regardless of objection by the property owner.[18] Both the federal government and the states have eminent domain power.[19] The federal government's eminent domain power is limited by the Takings Clause of the Fifth Amendment of the Constitution.[20] The Takings Clause instructs "nor shall private property be taken for public use, without just compensation."[21] At the federal level, in *Kelo v. City of New London*, the Supreme Court defined "public use" to include economic development efforts.[22] That decision has spawned

16. *In re PennEast Pipeline Co.*, 938 F.3d at 101 (explaining New Jersey's interest in stopping the pipeline so as to preserve local wilderness and PennEast's interest in creating the pipeline so as to promote national transportation of natural gas).

17. *Id.*

18. *See, e.g.*, Rex Realty Co. v. City of Cedar Rapids, 322 F.3d 526, 528 (8th Cir. 2003) (rejecting a challenge to the procedure used by the City of Cedar Rapids, Iowa, to take property from a landowner through eminent domain).

19. *Compare* United States v. Carmack, 329 U.S. 230, 240 (1946) (discussing the breadth of the federal government's eminent domain power), *with* Kelo v. City of Ne w London, 545 U.S. 469, 483–90 (2005) (upholding a city's exercise of eminent domain power through invocation of a state statute delegating the state's eminent domain power).

20. *See Carmack*, 329 U.S. at 241–42 (discussing how the Fifth Amendment limits the federal government's eminent domain power); *Kelo*, 545 U.S. at 479–80 (recounting the history of the application of the Fifth Amendment to the states).

21. U.S. CONST. amend. V.

22. *Kelo*, 545 U.S. at 489–90.

significant academic discussion,[23] but it is settled law that a "taking" for economic development meets the public-use requirement of the Takings Clause.[24] Thus, a taking for economic development is within the federal government's eminent domain power.[25] To reiterate: the eminent domain power of the federal government remains subject only to the limitations imposed by the Takings Clause and the Supreme Court's interpretation thereof.

The eminent domain power of the states is subject to the requirements of the Takings Clause and the applicable state constitution.[26] Following *Kelo*, many states amended their constitutions to limit that state's eminent domain power[27] to exclude situations of purely economic development from being considered a public use.[28] The eminent domain power of a state is limited by the Takings Clause to the same extent that federal eminent domain power is, and a state's eminent domain power is further curtailed by the limitations imposed by that state's constitution and the highest state court's interpretation thereof.[29]

Both the federal government and the states can delegate their eminent domain power to private actors.[30] The federal government and the states do so by enacting legislation that contains language

23. *See, e.g.*, William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013); Bernard W. Bell, *Legislatively Revising* Kelo v. City of New London*: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165 (2006); Alberto B. Lopez, Kelo-*Style Failings*, 72 OHIO ST. L.J. 777, 779–80 (2011).

24. *E.g.*, Lauren Trimble, *Eminent Domain a Decade After* Kelo*: Are Takings to Build Professional and College Sports Stadiums in Texas a Valid Public Use?*, 5 TEX. A&M J. PROP. L. 1101, 1108–10 (2019).

25. Bell, *supra* note 23, at 166.

26. Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829 (Iowa 2019) ("Several state supreme courts have held that public use must mean something more than indirect economic benefits."); *see, e.g.*, Sw. Ill. Dev. Auth. v. Nat'l City Env't, L.L.C., 768 N.E.2d 1, 10–11 (Ill. 2002); Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004); City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006); Bd. of Cnty. Comm'rs v. Lowery, 136 P.3d 639, 647 (Okla. 2006).

27. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) (discussing the political reaction of the states to the Supreme Court's decision in *Kelo*).

28. *Id.* at 2114.

29. *See supra* note 26.

30. *E.g.*, United States v. 243.22 Acres of Land in Farmingdale, 43 F. Supp. 561, 565 (E.D.N.Y. 1942) ("The Congress may properly delegate to individuals or to corporations power to condemn . . . to carry out its legislative intent."), *aff'd*, 129 F.2d 678 (2d Cir. 1942).

delegating the use of eminent domain power to a private actor.[31] Like there are two types of eminent domain power—federal and state—there are also two types of takings: public and private.[32] A public taking is a condemnation action initiated by the government or sovereign itself.[33] A private taking is a condemnation action initiated by a private actor through eminent domain power delegated to that private actor by the sovereign.[34] Delegated eminent domain authority is limited by the same principles that would otherwise limit the delegating sovereign in its exercise of that power.[35] A private actor exercising delegated federal eminent domain power is limited in that exercise by the Takings Clause.[36] A private actor exercising delegated state eminent domain power is limited by the Takings Clause and the delegating state's constitution.[37]

Eminent domain has been delegated to private actors for centuries, and the development of natural resources has traditionally been the purpose of such delegations.[38] State legislatures have delegated state eminent domain power to private actors since the early nineteenth century,[39] such as transportation and manufacturing companies.[40] Congress has delegated federal eminent domain power to private actors since at least 1894.[41] Many of these delegations were intended to "promote the generation [and] movement of energy or

31. *See generally* 1A NICHOLS ON EMINENT DOMAIN § 3.03[d] (Julius L. Sackman et al. eds., 3d ed. 2020) (noting the legislative powers necessary to authorize eminent domain procedures).

32. Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 653 (2008).

33. Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 517 (2009) (defining public takings as takings carried out by governmental actors).

34. *Id.* (defining private takings to be "takings carried out by nongovernmental actors").

35. Klass, *supra* note 32, at 662–69 (discussing the development of state and federal court eminent domain jurisprudence).

36. *See* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (holding economic development is within limits of Takings Clause).

37. Klass, *supra* note 32, at 662–69 (discussing the development of state and federal court eminent domain jurisprudence).

38. *Id.* at 656–60 (recounting delegations for natural resource development, such as mining).

39. Charles Fels, N.T. Adams, Richard Camody, Margaret Elizabeth Clark, Randolph H. Lanier, James Carlos Smith & Robert M. White, *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681, 690–92 (1974).

40. *See* ROBERT MELTZ, CONG. RSCH. SERV., RS22884, DELEGATION OF THE FEDERAL POWER OF EMINENT DOMAIN TO NONFEDERAL ENTITIES 3–4 (2008).

41. *Cf.* Luxton v. N. River Bridge Co., 153 U.S. 525, 534 (1894).

energy-related materials"[42] by conveying federal eminent domain power to energy companies[43] and utilities.[44] The NGA amendments of 1947 contain such a delegation of federal eminent domain,[45] and that delegation was the focal point of the Third Circuit's analysis in *PennEast*.[46]

2. Natural Gas Regulation

Natural gas regulation has a long and conflict-filled history in the United States.[47] Modern day interstate natural gas activity is regulated at the federal level while regulation of intrastate natural gas activity is the responsibility of the state in question.[48] This dichotomy resulted, in part, from the difficulties involved with transporting natural gas without pipelines.[49] Unlike crude oil (which is a liquid), natural gas (which is a gas . . . naturally) cannot be easily transported via trains, trucks, or ships.[50]

42. MELTZ, *supra* note 40, at 4.

43. *See, e.g.*, 16 U.S.C. § 814 (delegating federal eminent domain power for the construction of "any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto"); Philip Marcus, *The Taking and Destruction of Property Under a Defense and War Program*, 27 CORNELL L.Q. 317, 329–46 (1942).

44. *See* 33 U.S.C. § 532 (delegating federal eminent domain "to any individual, corporation, state or political subdivision, or municipality, authorized [by this Act] to build a bridge between two or more states, over navigable waters of the United States," and explaining the "condemnation power extends to building, operating, and maintaining such bridge and its approaches"); *see also* Pub. L. No. 89-774, 80 Stat. 1324 (1966) (creating the Washington Metropolitan Area Transit Authority and providing it the power to condemn property necessary or useful for the authorized mass transit system).

45. 15 U.S.C. § 717f(h) (delegating federal eminent domain "to companies engaged in the interstate transportation of natural gas that have received from the Federal Energy Regulatory Commission a certificate of public convenience and necessity under the Natural Gas Act").

46. *See In re* PennEast Pipeline Co., 938 F.3d 96, 101 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

47. *See generally* CHRISTOPHER J. CASTANEDA, THE INVISIBLE FUEL: MANUFACTURED AND NATURAL GAS IN AMERICA, 1800-2000 (1999) (chronicling the history of natural gas production and regulation in the United States); Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 990–99 (2015) [hereinafter *Transporting Oil & Gas*] (contrasting the histories of oil and natural gas production and regulation in the United States).

48. *Transporting Oil & Gas*, *supra* note 47, at 999 (explaining state responsibilities include overseeing local distribution companies).

49. *Id.* at 996–1004 (recounting the historical development of natural gas infrastructure and its modern capabilities).

50. *E.g.*, James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 676–77 (2019) ("New oil production can be moved to distant

Today's natural gas regulation resulted from the growth of natural gas use as the country developed. Natural gas increased in popularity in the late nineteenth century and displaced manufactured gas[51] as the primary means through which consumers obtained light and heat for their homes.[52] More homes using natural gas created higher demand for natural gas, which in turn spurred natural gas companies to build interstate pipelines from newly discovered gas fields in the west to major metropolitan areas in the east.[53] During the same period, the Supreme Court struck down several state laws aimed at oil pipelines that imposed inconsistent regulations designed to benefit in-state citizens at the expense of citizens of other states as violations of the Dormant Commerce Clause.[54] A handful of utility holding companies came to dominate the natural gas industry in the years that followed.[55] As a result, an amalgamation of groups pressured Congress to step in and regulate the natural gas industry.[56] Congress responded by enacting the Public Utility Holding Company Act of 1935, which "forced the dissolution of interstate . . . gas and electric giants."[57]

markets by rail, pipeline, ship, or truck. By contrast, if gas producers want to reach new markets they must either build multi-billion-dollar air-tight pipelines, or multi-billion-dollar liquefaction facilities that can cool the gas until it becomes a liquid that can be sent overseas on refrigerated ships.").

51. Manufactured gas is gas obtained from the burning of such things as coal or kerosene and is a general term for any gas that is not "naturally occurring." *History*, NATURALGAS.ORG (Sept. 20, 2013), http://naturalgas.org/overview/history [https://perma.cc/MPH8-YJ7H].

52. Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1906–07 (2015) ("After World War II, major northeast cities shifted quickly from manufactured gas to natural gas when southwestern natural gas arrived via long-distance pipelines.").

53. *Transporting Oil & Gas*, *supra* note 47, at 993–94; *see* CASTANEDA, *supra* note 47, at 52–65.

54. *See* Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927) (rejecting the argument that Congress' regulation of gas rates in interstate commerce was not exclusive), *abrogated by* Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983); Missouri *ex rel.* Barrett v. Kan. Nat. Gas Co., 265 U.S. 298, 307 (1924) (confirming interstate commerce involving natural gas is subject solely to national regulation by Congress, not the states); Pennsylvania v. West Virginia, 262 U.S. 553, 595 (1923) (striking down preferential treatment of intrastate natural gas in the marketplace at the expense of interstate competitors).

55. CASTANEDA, *supra* note 47, at 103–15.

56. *Transporting Oil & Gas*, *supra* note 47, at 994 (noting that natural gas consumers, producers, and distributors, the coal industry, railroads, approximately 100 midwestern cities, and other supporters all pressured Congress for greater regulation of the natural gas industry).

57. *Id.* at 995 (quoting ARLON R. TUSSING & CONNIE C. BARLOW, THE NATURAL GAS INDUSTRY: EVOLUTION, STRUCTURE, AND ECONOMICS 32 (1984)).

Congress attempted to go even further and "grant a federal agency authority over gas pipelines as common carriers,"[58] but the natural gas industry pushed back on this effort and instead promoted the idea of regulation without federal competition.[59] Congress accepted the natural gas industry's proposed compromise in 1938 by enacting the first version of the NGA.[60] The 1938 version of the NGA created federal regulatory authority over natural gas "sales for resale in interstate commerce, transportation in interstate commerce, and facilities used for such sales and transportation,"[61] which included interstate pipelines.[62]

The integral piece of the modern federal regulation of natural gas originated with the 1947 amendments to the NGA.[63] The 1938 version of the NGA did not delegate federal eminent domain power to private actors constructing interstate natural gas pipelines.[64] The 1947 amendment changed that with the addition of Section 717f(h).[65] That section, in part, provides:

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

58. *Id.*

59. Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 25 ENERGY L.J. 57, 61–62 (2004) ("With interstate gas pipelines required to provide equal access to their facilities to all third parties, thousands of producers would be free to sell to hundreds of gas distributors and millions of consumers in a perfectly competitive gas sales market. The pipelines objected to this approach, however."); *see* William A. Mogel & John P. Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, 25 ENERGY L.J. 21, 40 (2004) (summarizing the legislative history of the NGA and noting that "Congress initially considered the idea of treating natural gas pipelines as common carriers, [but] strong advocacy by the pipeline industry dissuaded legislative action").

60. Pierce, *supra* note 59, at 62 (citing 15 U.S.C. §§ 717–717z (1982)).

61. *Transporting Oil & Gas*, *supra* note 47, at 995.

62. Phillips Petrol. Co. v. Wisconsin, 347 U.S. 672, 677 (1954) (confirming as much and interpreting the NGA to provide FPC jurisdiction over all wellhead sales of natural gas in interstate commerce).

63. Natural Gas Act Amendment of 1947, Pub. L. No. 80-245, 61 Stat. 459; *see Transporting Oil & Gas*, *supra* note 47, at 998.

64. Natural Gas Act, ch. 556, 52 Stat. 821 (1938) (codified at 15 U.S.C. §§ 717–717w).

65. 15 U.S.C. § 717f(h).

> district court of the United States for the district in which such property may be located, or in the State courts.[66]

Section 717f(h) allows a private actor, as a last resort, to utilize federal eminent domain power to obtain land necessary for building, or "siting," an interstate natural gas pipeline.[67]

A private actor wishing to site a natural gas pipeline must exhaust certain alternatives before utilizing eminent domain under Section 717f(h). Section 717f(h) enables a private landowner to condemn land through delegated federal eminent domain only if that private actor (1) was not able to obtain the land contractually through negotiations with the landowner, and (2) obtains a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC).[68] Obtaining a certificate of public convenience and necessity is a straightforward process: if the proposed pipeline meets certain statutory requirements and passes review of its economic and environmental impacts, FERC will issue a certificate.[69] FERC involvement in natural gas pipelines is not limited to issuing certificates; FERC is the federal agency body that administers the NGA and has regulatory authority over all interstate natural gas activities.[70] Following the enactment of the Energy Policy Act of 2005, FERC also holds authority over terminals where liquified natural gas is imported and exported.[71]

The natural gas industry has avoided inconsistent regulation at the hands of states as a result of the existing framework of natural gas regulation.[72] This, in turn, has given the natural gas industry the flexibility to respond to changing market pressures.[73] For example,

66. *Id.*

67. *Id.*; *see also LNG Facility Siting*, U.S. DEP'T TRANSP.: PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., https://www.phmsa.dot.gov/pipeline/liquified-natural-gas/lng-facility-siting [https://perma.cc/KE32-A8U7] (using "site" and "siting" to refer to the process of properly proposing, obtaining approval for, and constructing a pipeline).

68. 15 U.S.C. § 717f(h) ("When any holder of a certificate of public convenience and necessity . . . .").

69. *Id.* (reserving for FERC the ultimate decision-making power over certificates of public convenience and necessity). FERC regulations further clarifying the statutory requirements for a certificate can be found at 18 C.F.R. § 157 (2019), 18 C.F.R. § 153.2 (2019), and 18 C.F.R. § 380.5 (2019). *See also* Minisink Residents for Env't Pres. & Safety v. FERC, 762 F.3d 97, 101–02 (D.C. Cir. 2014) (reviewing the regulatory framework for approving interstate natural gas pipelines under the NGA).

70. *Minisink*, 762 F.3d at 101 ("The [NGA] vests FERC with broad authority to regulate the transportation and sale of natural gas in interstate commerce.").

71. Alexandra B. Klass, *Future-Proofing Energy Transport Law*, 94 WASH. U. L. REV. 827, 857 (2017).

72. *Supra* note 50 and accompanying text.

73. Klass, *supra* note 71, at 855.

industry was able to respond to the natural gas shortages of the early 2000s by constructing the infrastructure needed to transport natural gas to the affected areas.[74] Industry has also been able to quickly create infrastructure in response to the natural gas boom of the late 2000s that resulted from advances in hydraulic fracturing (also known as "fracking") technologies.[75] The federal-level regulatory scheme for natural gas has enabled consistent industry growth since its implementation.[76] The Third Circuit's decision in *PennEast* cuts against the grain of this history and provides more power to the states than they have traditionally possessed.[77]

3. Sovereign Immunity of the States

The legal doctrine of sovereign immunity seemingly exists outside of the federal-state battle over land control and resource development. Sovereign immunity is the general proposition that a sovereign has the power to be free from suits against it absent its consent.[78] There are federal and state flavors of sovereign immunity like there are federal and state flavors of eminent domain.[79] *PennEast*, however, concerned only state sovereign immunity under the Eleventh Amendment.[80]

State sovereign immunity, like a state's ability to use eminent domain, flows from the state's status as a sovereign.[81] The sovereign immunity of the states is constitutionalized in the Eleventh Amendment.[82] The Eleventh Amendment reads: "The Judicial power of the

74. *Id.* at 864–65 (referencing *Natural Gas: Symposium Before the S. Comm. on Energy & Nat. Res.*, 109th Cong. 2 (2005) (statement of Sen. Domenici), which discussed decreasing natural gas supplies, the corresponding increasing demand for natural gas, and the resulting increased costs to consumers).

75. *Id.* at 864; *see* John M. Golden & Hannah J. Wiseman, *The Fracking Revolution: Shale Gas as a Case Study in Innovation Policy*, 64 EMORY L.J. 955, 968–69 (2015) ("Fundamentally, hydraulic fracturing—commonly known as 'fracking'—is a process of pumping large amounts of liquid into a wellbore and selected areas of surrounding rock, with the liquid being pumped at a high enough pressure that the rock fractures.").

76. *E.g.*, Klass, *supra* note 71, at 866 ("[I]t is clear that the federal process for siting and approving interstate natural gas pipelines and LNG terminals is a major reason . . . why [natural gas infrastructure] build-out has occurred so quickly.").

77. *See infra* Parts I.B, III.

78. 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524 (3d ed. 2008).

79. *Supra* Part I.A.1.

80. *See In re* PennEast Pipeline Co., 938 F.3d 96, 101 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

81. Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996).

82. *Id.*

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[83] This language does not stand for exactly "what it says, but for the presupposition . . . which it confirms."[84] There are two parts to this "presupposition."[85] First, "each State is a sovereign entity in [the] federal system."[86] Second, because each state is a sovereign entity, each state is inherently immune to suits from individuals brought against the state without the state's consent.[87] State sovereign immunity is, at its heart, the immunity states possess against suits brought against them without their consent in both federal[88] and state courts.[89]

There are several exceptions to this rule that allow a suit against a state. For instance, a plaintiff may avoid the state sovereign immunity doctrine by successfully arguing that the state consented to the suit[90] or invoking the doctrine of *Ex parte Young*.[91] This Note (and the *PennEast* decision) focuses instead on the "[f]ederal [g]overnment's exemption from state sovereign immunity"[92] created through the states' role in ratifying the Constitution. The federal government's exemption to state sovereign immunity refers to the principle that each state consented to suits in federal court brought by the federal

83. U.S. CONST. amend. XI.

84. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

85. *See Seminole Tribe*, 517 U.S. at 54.

86. *Id.* (relying on Hans v. Louisiana, 134 U.S. 1, 10 (1890)).

87. *Id.* (citing THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

88. *Blatchford*, 501 U.S. at 782.

89. *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019) (holding states may not be sued by citizens of other states in state courts); Alden v. Maine, 527 U.S. 706, 713 (1999) (holding Congress may not authorize suits against states in state courts without the defendant state's consent).

90. Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1184–86 (2003) (discussing the ways in which "a state consents to suit or in some other way waives its sovereign immunity," such as a state consenting to suit by intervening in ongoing litigation).

91. *Ex parte* Young, 209 U.S. 123 (1908); *see* Green v. Mansour, 474 U.S. 64, 68 (1985) ("The landmark case of *Ex Parte Young* created an exception to [the] general principle [of Eleventh Amendment immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State." (citations omitted)).

92. *Blatchford*, 501 U.S. at 785.

government or by other states when the state ratified the Constitution and joined the Union.[93]

The federal exemption to state sovereign immunity also allows Congress to abrogate state sovereign immunity in certain situations.[94] Congress can both "indirectly" and "directly" abrogate state sovereign immunity. Congress can indirectly abrogate sovereign immunity when Congress unambiguously conditions its approval of a compact between states or its grant of federal funds to a state on the consent of the involved states to waive their Eleventh Amendment immunity.[95] Direct abrogation of state sovereign immunity requires Congress to enact legislation providing as much. Congress can directly abrogate state sovereign immunity in legislation that satisfies four requirements. First, the legislation must be enacted pursuant to Section 5 of the Fourteenth Amendment.[96] Second, the legislation must expressly state Congress's intent to abrogate state sovereign immunity.[97] Third, the legislation must be remedial, not substantive.[98] Fourth, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to the end" within it.[99]

93. *Alden*, 527 U.S. at 755; *see also* Principality of Monaco v. Mississippi, 292 U.S. 313, 328–29 (1934) (listing cases confirming the principle that "the States by the adoption of the Constitution . . . waived their exemption from judicial power").

94. *See generally* WRIGHT & MILLER, *supra* note 78, § 3524.5 (discussing how Congress can abrogate state sovereign immunity).

95. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999) (reserving the ability of Congress to utilize "constructive waivers" under the Compact Clause and the Spending Clause to condition an approval of a compact between states or a grant of federal funds to the states "upon . . . certain actions that Congress could not require [the states] to take" including consenting to waive their Eleventh Amendment immunity); Sossamon v. Texas, 563 U.S. 277, 285–93 (2011) (holding "that States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits" because the statute did not "expressly and unequivocally" include such a waiver).

96. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976).

97. *See, e.g.*, Coleman v. Ct. of Appeals, 566 U.S. 30, 34–35 (2012).

98. City of Boerne v. Flores, 521 U.S. 507, 508 (1997) ("Although Congress certainly can enact legislation enforcing the constitutional right . . . its § 5 power 'to enforce' is only preventive or 'remedial.' The [Fourteenth] Amendment's design and § 5's text are inconsistent with any suggestion that Congress has the power to decree the substance of the Amendment's restrictions on the States . . . . Congress does not enforce a constitutional right by changing what the right is." (citation omitted)).

99. *Id.* at 508, 520.

The legal nature of a sovereign immunity defense is not settled.[100] On one hand, a sovereign immunity defense is like a defense for lack of subject matter jurisdiction, which "operates like a jurisdictional bar, depriving federal courts of the power to adjudicate" a suit and cannot be waived.[101] A defendant generally may raise a sovereign immunity defense for the first time at any stage in litigation, including on appeal.[102] Courts may also raise the Eleventh Amendment *sua sponte*, or on their own accord.[103] A defense based on the lack of subject matter jurisdiction shares those characteristics.

On the other hand, a sovereign immunity defense is like an affirmative defense, which is the "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true"[104] and can be waived if not asserted. State defendants can consent to suit by waiving Eleventh Amendment immunity in several different ways.[105] For example, a state can waive its Eleventh Amendment immunity by "specify[ing its] intention to subject itself to suit in *federal court*" through a state statute or constitutional provision.[106] Also, the courts may indeed raise a sovereign immunity defense *sua sponte*, but they are not required to do so.[107] Both of these characteristics are inconsistent with a subject matter jurisdiction defense; a lack of subject matter jurisdiction cannot be waived and a court is required to assert such a

100. Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 391 (1998) ("Even making the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction—a question we have not decided . . . .").

101. Union Pac. R.R. v. La. Pub. Serv. Comm'n, 662 F.3d 336, 340 (5th Cir. 2011).

102. *See* Calderon v. Ashmus, 523 U.S. 740, 745 n.2 (1998) ("[T]he Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings . . . ."); *Union Pac. R.R.*, 662 F.3d at 342 (allowing the state to assert sovereign immunity as a defense for the first time on appeal).

103. Mixon v. Ohio, 193 F.3d 389, 397 (6th Cir. 1999) ("Despite the fact that the Ohio Attorney General has not pressed the immunity question on appeal, we may sua sponte raise the issue of lack of jurisdiction because of the applicability of the eleventh amendment." (citation and internal quotation marks omitted)).

104. *Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

105. *See* WRIGHT & MILLER, *supra* note 78, § 3524.4 (explaining a state can waive sovereign immunity by express consent, state legislation, a state constitutional provision, a failure to make a timely objection, making a general appearance, and litigation conduct, such as removal to federal court).

106. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306 (1990).

107. Patsy v. Bd. of Regents, 457 U.S. 496, 516 n.19 (1982) ("[W]e have never held that [Eleventh Amendment immunity] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion.").

defense *sua sponte*. Instead, these characteristics indicate sovereign immunity shares some similarities with a general affirmative defense.

B. THE THIRD CIRCUIT'S *PENNEAST* DECISION

As discussed above, there are many moving pieces across eminent domain, natural gas regulation, and state sovereign immunity. They collided in *PennEast*. The Third Circuit issued the *PennEast* decision in September of 2019 and marked another chapter in the winding story of the pipeline at issue.[108]

On January 19, 2018, following an extensive administrative process, FERC issued an order authorizing PennEast Pipeline Company, LLC to construct and operate the PennEast pipeline system by granting PennEast a certificate of public convenience and necessity.[109] The PennEast pipeline system consisted of a new 116-mile natural gas pipeline running from Luzerne County, Pennsylvania, to Mercer County, New Jersey, plus appurtenant facilities.[110] The FERC order granting the certificate order drew immediate requests for rehearing, and FERC denied those requests.[111] PennEast then began the process of obtaining interests in the land needed to complete the pipeline and used the federal eminent domain power delegated to it by the NGA to condemn land as needed.[112]

PennEast filed numerous applications for orders of condemnation and orders granting preliminary injunctive relief with the United States District Court for the District of New Jersey.[113] Defendants in these condemnation actions included the State of New Jersey, the New Jersey Department of Environmental Protection, the Delaware and Raritan Canal Commission, and the State Agriculture Development

108. *In re* PennEast Pipeline Co., 938 F.3d 96 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

109. PennEast Pipeline Co., 162 FERC ¶ 61,053 (2018) (Certificate Order).

110. *Current Proposed Route (Detailed View)*, PENNEAST PIPELINE CO., https://penneastpipeline.com/docs/proposed-route-19.pdf [https://perma.cc/2QLZ-AQ4X] (follow the "Proposed Route" tab on the ribbon and then follow the "Download the Current Proposed Route (Detailed View) as a PDF" hyperlink).

111. Order on Rehearing, 164 FERC ¶ 61,098, at 2 (2018).

112. *See* Michael Heffler, *The End of a Dream*, HALT-PENNEAST (Mar. 19, 2017), https://haltpenneast.org/2017/03/19/the-end-of-a-dream [https://perma.cc/Q4U5-XUAS] ("Maryanne says that PennEast has increased its' [sic] pressure on her. None of her neighbors has succumbed to PennEast's offers to buy land or survey their land.").

113. *In re* Penneast Pipeline Co., No. CV 18-1585, 2018 WL 6584893, at *1 (D.N.J. Dec. 14, 2018), *vacated and remanded sub nom*. *In re* PennEast Pipeline Co., 938 F.3d 96 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019); *see also supra* notes 66–69 and accompanying text.

Committee (collectively, the "State Defendants"), among others.[114] The State Defendants filed briefs in opposition to, and seeking dismissal of, PennEast's condemnation actions against the land that the State Defendants had interests in.[115] The State Defendants argued they were entitled to Eleventh Amendment immunity from such actions.[116] The district court held that the Eleventh Amendment was inapplicable because PennEast possessed a valid certificate from FERC allowing PennEast to exercise delegated federal eminent domain under the NGA.[117] Thus, the State Defendants were not entitled to immunity, and PennEast's condemnation actions for state land could proceed.[118]

The State Defendants appealed the district court's ruling and the Third Circuit reversed.[119] The court's holding rested on the conclusion that the NGA did not abrogate New Jersey's sovereign immunity.[120] First, the court noted that where the Eleventh Amendment demands clarity and unambiguity in a congressional abrogation of state sovereign immunity, the NGA was silent.[121] The court then rejected PennEast's contention that Congress intended the NGA to make all property subject to the NGA's delegated eminent domain power by not differentiating between privately held and state-owned property in the NGA.[122] The court held the NGA's silence on that matter was not an appropriate base to infer such an intent and, thus, the district court incorrectly ruled in favor of PennEast.[123]

That did not, however, stop the court from engaging with another issue raised on appeal: whether the NGA delegated the federal exemption from state sovereign immunity to the holder of a FERC

114. *In re Penneast Pipeline Co.*, 2018 WL 6584893, at *8.

115. *Id.*

116. *Id.*; *see also supra* notes 79–81 and accompanying text.

117. *In re Penneast Pipeline Co.*, 2018 WL 6584893, at *12, *17–19.

118. *See id.* at *26 ("[T]he State Defendants' request for dismissal is DENIED; PennEast's application for orders of condemnation and for preliminary injunctive relief allowing immediate possession of the Rights of Way in advance of any award of just compensation is GRANTED.").

119. *In re* PennEast Pipeline Co., 938 F.3d 96, 113 (3d Cir. 2019.), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

120. *Id.* at 99–100.

121. *Id.* at 111 ("[T]he NGA does not even mention the Eleventh Amendment or state sovereign immunity. Nor does it reference 'delegating' the federal government's ability to sue the States. It does not refer to the States at all. If Congress had intended to delegate the federal government's exemption from sovereign immunity, it would certainly have spoken much more clearly.").

122. *Id.* at 112.

123. *Id.* ("That is to say, we will not assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design.").

certificate.[124] The court reasoned there were two, distinct powers at play in the instant case: "the federal government's eminent domain power and [the federal government's] exemption from Eleventh Amendment immunity."[125] The court viewed PennEast's contention that it was entitled to exercise "the federal government's ability to condemn State land" as inherently the contention that PennEast was entitled to exercise *both* the federal government's eminent domain power and the federal government's exemption to state sovereign immunity.[126] The court acknowledged that PennEast could validly exercise delegated federal eminent domain power through the certificate of public convenience and necessity issued by FERC[127] but expressed considerable doubt as to whether PennEast could do the same for the federal government's exemption to state sovereign immunity.[128] First, the court found "no support in the caselaw for PennEast's 'delegation' theory of sovereign immunity."[129] Second, the court noted that "fundamental differences between suits brought by accountable federal agents and those brought by private parties" balance in support of its reading of the caselaw.[130] Third, and finally, the court concluded that "endorsing the delegation theory would undermine the careful limits established by the Supreme Court on the abrogation of State sovereign immunity."[131] The Third Circuit ultimately declined to resolve

124. *See id.* at 104–11.

125. *Id.* at 104.

126. *Id.*

127. *See supra* notes 41–46.

128. *In re PennEast Pipeline Co.*, 938 F.3d at 105; *see also supra* notes 90–91.

129. *In re PennEast Pipeline Co.*, 938 F.3d at 105–07 ("[T]he caselaw strongly suggests that . . . the federal government cannot delegate to private parties its exemption from state sovereign immunity.").

130. *Id.* at 105, 107 ("Non-delegability makes sense, since there are meaningful differences between suits brought by the United States, an accountable sovereign, and suits by private citizens.").

131. *Id.* at 105, 107–08 ("What we take from those rules is that state sovereign immunity goes to the core of our national government's constitutional design and therefore must be carefully guarded."). The Third Circuit also responded to several more specific arguments advanced by PennEast and rejected all of them. *Id.* at 108–12. First, the court rejected PennEast's argument that "[t]here simply is no interference with state sovereignty when the United States itself has found that an interstate infrastructure project is both necessary and in the public's interest and that New Jersey faces no real harm . . . given FERC's plenary oversight over pipeline projects and their respective routes" because it misses the point, which is "whether the federal government can delegate its ability to hale fellow sovereigns into federal court and force the States to respond." *Id.* (citation and internal quotation marks omitted). Second, it rejected PennEast's argument that *qui tam* suits prove "the federal government can delegate its authority to sue the States, provided the parties act on the government's behalf and

whether Congress could delegate the federal exemption to state sovereign immunity in *PennEast*—despite clearly making its thoughts on the matter known—because "nothing in the NGA indicates that Congress intended to do so."[132]

Eminent domain, natural gas regulation, and state sovereign immunity came together in *PennEast* to produce a result that the court itself acknowledged would be disruptive for the natural gas industry.[133] *PennEast* also has significant federalism implications. As discussed above, the NGA prioritizes federal control of natural gas regulation, particularly for the siting of natural gas pipelines.[134] States interested in halting a natural gas pipeline had little power to do so prior to *PennEast*.

II. STATES LACKED A TOOL TO RETAIN CONTROL OF THE LAND WITHIN THEIR BORDERS IN THE FACE OF A NATURAL GAS PIPELINE CONDEMNATION ACTION

This Note focuses on the motivations states might have for opposing and stopping the construction of natural gas pipelines without questioning the soundness of those motivations. This Part discusses such motivations. It then describes the utilization of conservation easements to control land for conservation purposes and the inability for conservation easements to live up to their name in the face of fossil fuel development. This Note does not intend nor attempt to wade into the debate regarding whether natural gas production is environmentally advantageous, or even whether halting natural gas pipelines is a good idea, regardless.[135]

under its control" because none of the government's interests implicated in a *qui tam* suit (the government receives a portion of any amount recovered, it can intervene in the suit, and the suit cannot settle or be voluntarily dismissed without the government's consent) are present in the instant case: "PennEast filed suit in its own name; PennEast will gain title to the land; there is no special statutory mechanism for the federal government to intervene in NGA condemnation actions; and PennEast maintains sole control over the suits." *Id.* at 109 (citation and internal quotation marks omitted). Third, it rejected PennEast's argument that state sovereign immunity does not apply to *in rem* proceedings because the caselaw holding as much is "confined . . . to the specialized areas of bankruptcy and admiralty law." *Id.* at 110.

132. *Id.* at 111.

133. *Id.*

134. *See supra* Part I.A.2.

135. *See, e.g.*, Beth Gardiner, *Is Natural Gas Good, or Just Less Bad?*, N.Y. TIMES (Feb. 22, 2011), https://www.nytimes.com/2011/02/21/business/energy-environment/21iht-renogas21.html [https://perma.cc/V6UY-S8U8].

A. STATE MOTIVATIONS FOR OPPOSING OR ATTEMPTING TO STOP A NATURAL GAS PIPELINE

On the one hand, states might wish to oppose a natural gas pipeline for climate reasons. There is a consensus amongst the scientific community that our planet is facing a climate crisis.[136] Experts predict that these impacts are likely to get exponentially worse if humankind continues on its current energy-consumption trajectory.[137] Natural gas production and consumption has a far from negligible impact on the environment.[138] Transitioning from fossil fuels—like natural gas—to renewable sources of energy is thought to be imperative to reduce carbon emissions and mitigate climate damage.[139] Moving away from carbon-dependent sources of energy is possible but requires the construction of renewable energy infrastructure rather than more infrastructure for natural gas or other fossil fuels.[140] States sympathetic to that plight—or, more likely, state governments whose constituents are concerned about climate action—lack a surefire way to stop the siting of a natural gas pipeline and instead must attempt to do so at the administrative level.[141]

136. *See, e.g.*, ALISTER DOYLE, THE HEAT IS ON: TAKING STOCK OF GLOBAL CLIMATE AMBITION 4 (2019); *see also* Michael Svoboda, *12 Major Climate Change Reports from 2019*, YALE CLIMATE CONNECTIONS (Oct. 10, 2019), https://www.yaleclimateconnections.org/2019/10/12-major-climate-change-reports-from-2019 [https://perma.cc/2AK2-AXQL].

137. DOYLE, *supra* note 136, at 6 ("While climate action has accelerated since Paris, it still falls far short of an unprecedented transformation needed to limit impacts of climate change.").

138. *Environmental Impacts of Natural Gas*, UNION CONCERNED SCIENTISTS (June 19, 2014), https://www.ucsusa.org/resources/environmental-impacts-natural-gas [https://perma.cc/2NFP-L6ST].

139. Dan Tong, Qiang Zhang, Yixuan Zheng, Ken Caldeira, Christine Shearer, Chaopeng Hong, Yue Qin & Steven J. Davis, *Committed Emissions from Existing Energy Infrastructure Jeopardize 1.5°C Climate Target*, 572 NATURE 373, 373–77 (2019).

140. Alexandra B. Klass, *Expanding the U.S. Electric Transmission and Distribution Grid to Meet Deep Decarbonization Goals*, 47 ENV'T L. REP. 10,749, 10,754 (2017); JAMES H. WILLIAMS, BENJAMIN HALEY, FREDRICH KAHRL, JACK MOORE, ANDREW D. JONES, MARGARET S. TORN & HAEWON MCJEON, US 2050 VOL. 1 TECHNICAL REPORT: PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES 35–37 (2015).

141. For example, a state could submit comments explaining why it opposed the potential granting of a certificate of need to a pipeline by FERC. *Cf.* Brief of TC Energy Corp. as Amicus Curiae in Support of Appellee PennEast Pipeline Co., LLC's Petition for Panel Rehearing or Rehearing En Banc at 7, *In re* PennEast Pipeline Co., 938 F.3d 96, 113 (3d Cir. 2019.), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019) (No. 19-1191) ("The route ultimately approved by FERC in a certificate proceeding takes into account the interests of all landowners, including state landowners.").

On the other hand, states might wish to oppose the siting of a natural gas pipeline for land control reasons. The federal government and the states have competed and clashed over the use of natural resources and control of land since the creation of the nation and the adoption of the federalist system.[142] As of 2017, the federal government owned and controlled roughly twenty-eight percent of the surface area land of the United States.[143] Federal ownership of land is especially concentrated in the western United States where the federal government reserved large swaths of land for itself in the statehood-enabling legislation passed to incorporate those states into the Union.[144] Conflicts between the federal government and state citizens frustrated with the extent of federal control over land within their state have sometimes turned destructive or violent.[145] State governments themselves also have a history of opposing federal control and ownership of lands within state borders. For example, some states have passed legislation demanding that the federal government transfer the land held by the federal government within the state's borders back to the state.[146] These efforts have thus far been unsuccessful or unenforced.[147]

Even more intrusive than federal ownership of land within state borders is the federal government's power to approve natural gas pipelines. This power strips states and their citizens of the ability to control their land. As mentioned above, the NGA allows a private actor

142. CHRISTINE A. KLEIN, FEDERICO CHEEVER, BRET C. BIRDSON, ALEXANDRA B. KLASS & ERIC BIBER, NATURAL RESOURCES LAW 39 (4th ed. 2018).

143. CAROL HARDY VINCENT, LAURA A. HANSON & LUCAS F. BERMEJO, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2020), https://fas.org/sgp/crs/misc/R42346.pdf [https://perma.cc/C343-AUBN].

144. KLEIN ET AL., *supra* note 142, at 40–41.

145. *See* Associated Press, *Nevada's 'Sagebrush Rebel' Happy with Results of His Defiant Bulldozing*, DESERET NEWS (Nov. 13, 1996), https://www.deseret.com/1996/11/13/19276552/nevada-s-sagebrush-rebel-happy-with-results-of-his-defiant-bulldozing [https://perma.cc/JE9A-5RXB]; *Oregon Standoff Timeline: 41 Days of the Malheur Refuge Occupation and the Aftermath*, OREGONLIVE (Jan. 9, 2019), https://www.oregonlive.com/portland/2017/02/oregon_standoff_timeline_41_da.html [https://perma.cc/HD57-KVRJ].

146. *See, e.g.*, Transfer of Public Lands Act, H.B. 148, Gen. Sess. (Utah 2012); NEV. REV. STAT. ANN. 321.5973 (2020); *see also* Robert B. Keiter & John C. Ruple, *The Transfer of Public Lands Movement: Taking the 'Public' Out of Public Lands*, *in* STEGNER CENTER WHITE PAPER (2015).

147. *See* United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997), *cert. denied*, 522 U.S. 907 (1997); Brian Maffly, *Utah Attorney General Sean Reyes Hints at Suing Feds over Control of Public Lands*, SALT LAKE TRIB. (Feb. 21, 2018), https://www.sltrib.com/news/environment/2018/02/21/utah-attorney-general-sean-reyes-hints-at-suing-feds-over-control-of-public-lands.

to utilize federal eminent domain to condemn privately owned land within a state.[148] Private actors have also traditionally used NGA-delegated federal eminent domain power to condemn land within a state that is owned by the state itself.[149] Interstate natural gas pipelines have proceeded for the last eighty years through exclusive federal approval, which leaves states and their citizens by the wayside.[150] A state opposing a pipeline to protect local interests or to reject federal decision-making for the use of land within the state's borders has no recourse other than to let its thoughts be known during the administrative notice-and-comment process.[151]

B. THE LEGAL FRAMEWORK AND UTILIZATION OF CONSERVATION EASEMENTS

One tool that a state can utilize to control land uses is a conservation easement. A conservation easement is a legal agreement between a landowner and a qualified holder that preserves the land's conservation values but keeps the property in private ownership and use.[152] The laws governing conservation easements are a complicated "mosaic" of state and federal statutes.[153] All fifty states, the District of Columbia, and the U.S. Virgin Islands have enacted legislation enabling the conveyance of conservation easements in some form.[154] Indeed, several of New Jersey's property interests at issue in *PennEast* are conservation easements held by various state bodies.[155]

148. *See supra* Part I.B (discussing the NGA).

149. *See In re* PennEast Pipeline Co., 938 F.3d 96, 113 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019) ("We are not insensitive to those concerns and recognize that our holding may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.").

150. *Id.*

151. *See* Brief of TC Energy Corp. as Amicus Curiae in Support of Appellee PennEast Pipeline Co. LLC's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 141.

152. Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RES. & ENV'T 244, 245 (2001).

153. *See* Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 111 (2015).

154. ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD 20 (2012).

155. *See In re PennEast Pipeline Co.*, 938 F.3d at 101 ("[T]he State holds possessory interests in two of the properties and nonpossessory interests–most often, easements requiring that the land be preserved for recreational, conservation, or agricultural use–in the rest."); *id.* at 100 n.1 (holding that was enough for sovereign immunity to block the exercise of federal eminent domain despite the fact that FERC, in the pre-

Most state legislation enabling conservation easements is based on the Uniform Conservation Easement Act (UCEA), which is a model statutory framework promulgated by the National Conference of Commissioners on Uniform State Laws in 1981.[156] Section 170 of the Internal Revenue Code provides the federal-level requirements a conservation easement must meet to take advantage of federal tax benefits.[157] Generally, there are four parts to the creation of a conservation easement: (1) a landowner transfers a nonpossessory real property interest (2) to a qualified conservation easement holder (3) for a specified purpose (4) for a certain period.[158]

The conveyance of a nonpossessory real property interest is what makes an easement an easement.[159] The holder of the easement holds a nonpossessory interest in the land encumbered by the easement, which means the owner of the land encumbered by the easement retains the title to the land, or "possession."[160] A conservation easement functions in the same way: the holder of the conservation easement gains a nonpossessory interest in the land while the landowner retains title and possession.[161] However, not just anyone can qualify to hold a conservation easement.

The requirements a qualified holder of a conservation easement must meet are similar across state and federal law. State conservation easement laws, such as the Uniform Conservation Easement Act (UCEA), typically allow only a governmental entity or a land trust[162]

permit environmental review process, had concluded that "nearly all New Jersey parcels [of land] subject to types of conservation or open space protective easements will generally retain their conservation and open space characteristics" (citation and internal quotation marks omitted)).

156. KLEIN ET AL., *supra* note 142, at 761.

157. *Id.* at 776.

158. Cheever & McLaughlin, *supra* note 153; s*ee also* KLEIN ET AL., *supra* note 142, at 760 (listing typical conservation easement pieces).

159. *See, e.g.*, Goss v. C.A.N. Wildlife Tr., 852 A.2d 996 (Md. Ct. Spec. App. 2004) ("[A]n easement is an interest in land that grants the right to use that land for a specific purpose." (citation and internal quotation marks omitted)).

160. FREYFOGLE & KARKKAINEN, *supra* note 154, at 523 (describing an easement as an "*incorporeal* interest meaning that it has no physical body; it does not give the holder an exclusive right to possess any part of the land" but "[i]nstead . . . [gives the holder] a use right").

161. Hocker, *supra* note 152.

162. "Land trusts" are private nonprofit corporations, associations, or trusts committed to preservation, and play an important role in conserving open space for the public benefit. *See* KLEIN ET AL., *supra* note 142, at 750–51. Land trusts must meet state and federal law requirements to qualify as a holder of a conservation easement, most importantly Section 501(c)(3) of the Internal Revenue Code. Hocker, *supra* note 152.

to hold a conservation easement.[163] At the federal level, the Internal Revenue Code defines a "qualified organization" to hold a conservation easement as "tax-exempt charitable organizations that receive substantial public support" (or land trusts) and "almost any governmental entity."[164] Both federal and state governmental bodies can hold conservation easements.[165] The qualified holder of the easement is responsible for monitoring the land to ensure the terms of the easement are upheld and can take legal enforcement action if necessary to enforce the purpose of the easement.[166] The National Conservation Easement Database estimates governmental bodies hold over 20 million acres of land encumbered by conservation easements and nonprofit entities hold almost 15 million.[167]

The exact nature of an acceptable conservation easement purpose varies across state law but is generally recognized as needing to be for the public benefit.[168] The UCEA allows the purpose of a conservation easement to include "retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."[169] Section 170(h)(4) of the Internal Revenue Code defines

163. KLEIN ET AL., *supra* note 142, at 751.

164. *Id.*

165. An example of a federal conservation easement program is the Agricultural Conservation Easement Program administered by the U.S. Department of Agriculture. *See Agricultural Conservation Easement Program*, NAT. RES. CONSERVATION SERV., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep [https://perma.cc/N4PB-ZT7Y].

166. *Id.* The UCEA also expressly authorizes third-party enforcement of conservation easements. This "means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder." UNIF. CONSERVATION EASEMENT ACT § 1(3), at 5 (1981) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., amended 2007), https://www.landcan.org/pdfs/UCEA.pdf [https://perma.cc/34P2-L5BK].

167. These numbers were determined using the interactive map available on the National Conservation Easement Database website. A table containing state-by-state data is on file with the author. *See Completeness*, NAT'L CONSERVATION EASEMENT DATABASE, https://www.conservationeasement.us/completeness [https://perma.cc/RZP5-T3RP].

168. KLEIN ET AL., *supra* note 142, at 761 ("To help ensure that conservation easements provide public benefits, the easement enabling statutes generally require that such easements be conveyed to representative of the public (land trusts or governmental entities) for certain conservation purposes intended to provide significant benefits to the public.").

169. UNIF. CONSERVATION EASEMENT ACT § 1.

"conservation purpose" along similar lines.[170] A landowner conveying a conservation easement has quite a bit of flexibility in how the easement language fits within these broad requirements.[171]

Conservation easements are typically conveyed in perpetuity. The UCEA instructs that "a conservation easement is unlimited in duration unless the instrument creating it otherwise provides" and also allows "a court to modify or terminate a conservation easement in accordance with the principles of law and equity."[172] The Internal Revenue Code is more stringent; a conservation easement does not meet the requirements of Section 170(h)(5) unless "the conservation purpose [of the easement] is protected in perpetuity."[173] Perpetual conveyances of conservation easements are the norm, but some academic scholars have questioned the usefulness of such perpetual conveyances moving forward.[174]

Conservation easements enable the protection of public values on non-federal land by both private parties and governmental entities.[175] The exact acreage of land encumbered by conservation easements in the United States is not known, but it is estimated to be around 35 to 40 million acres.[176]

170. I.R.C. § 170(h)(4)(A) (defining "conservation purpose" as "the preservation of land areas for outdoor recreation by, or the education of, the general public"; "the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem"; "the preservation of open space (including farmland and forest land)"; and "the preservation of an historically important land area or a certified historic structure").

171. *See* ELIZABETH BYERS & KAREN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 318 (2d ed. 2005) (discussing sample purpose statements).

172. UNIF. CONSERVATION EASEMENT ACT §§ 2–3.

173. I.R.C. § 170(h)(5).

174. *See* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV'T L. REV. 421, 425, 427 (2005) (describing the "considerable confusion and uncertainty" over how a perpetual conservation easement may be modified or terminated and how that "has caused . . . alarm over the potentially harmful consequences to society when, as is inevitable, some perpetual easements . . . cease to provide the public benefit for which they were acquired, or actually become detrimental to the public good").

175. KLEIN ET AL., *supra* note 142, at 751.

176. The 35-million figure was determined using the interactive map available on the National Conservation Easement Database website. *See Completeness*, *supra* note 167. Some scholars estimate the total amount of land encumbered by conservation easements to be higher—over 40 million acres. Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 33 UTAH ENV'T L. REV. 1, 1 (2013).

C. CONSERVATION EASEMENTS HAVE TRADITIONALLY BEEN AN INADEQUATE METHOD OF STOPPING PIPELINES AND FOSSIL FUEL DEVELOPMENT

Conservation easements have successfully protected conservation interests for over a century.[177] However, conservation easements have not lived up to this potential in the context of protecting land from energy infrastructure siting and eminent domain. A conservation easement, alone, does not stop the exercise of eminent domain.[178] The text of the UCEA is silent on whether a conservation easement can be condemned through eminent domain, but the preface to the 2007 version provides that "the Act neither limits nor enlarges the power of eminent domain[,]" instead leaving "the scope of that power" to "the adopting state's eminent domain code and related statutes."[179] Many states, even those states that have adopted the UCEA, include provisions expressly subjecting conservation easements to eminent domain condemnations.[180] These "eminent domain exception" provisions are often included in the legislation originally enabling and describing conservation easement conveyances.[181]

Conservation easements have, thus, traditionally been ineffective at stopping the development of fossil fuel infrastructure. This was true of conservation easements conveyed to both governmental bodies and land trusts or other non-profits. A landowner's conveyance of a conservation easement encumbering their land was not enough to stop the land being condemned and the pipeline from being built.[182] Rather, the conveyance of the conservation easement would have only

177. Jean Hocker, *Forward* to PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, at xvii (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE] (noting the first conservation easements protected parkways in the Boston area in the 1880s, the National Park Service's extensive use of conservation easements in the 1930s, and Wisconsin's institution of a successful conservation easement program in the 1950s).

178. Gideon Kanner, *Restrictive Covenants in Condemnation: Bringing Equity into Just Compensation*, *in* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 237, 245–46 (Virginia S. Cameron ed., 1976) ("The notion that restrictive covenants somehow impair the exercise of the power of eminent domain is simply untenable."); Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1916 (2008) ("Negative restrictions on development and use do not preclude the taking of the burdened land. Rather, the government is free to take the burdened land and is merely required to pay appropriate compensation to the various owners of interests in that land.").

179. *See* UNIF. CONSERVATION EASEMENT ACT commissioners' prefatory note at 4 (1981) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., amended 2007).

180. *See infra* Appendix.

181. *See infra* Part III.C.

182. *See generally* McLaughlin, *supra* note 178, at 1933–60 (examining how "just compensation" for a condemnation of a conservation easement should be determined).

impacted the amount of compensation the landowner would have received for the taking of the land.[183]

Both conservation easements and state motivations for stopping the siting of a natural gas pipeline existed prior to *PennEast*, and both failed to provide any meaningful legal mechanism for a state (or another interested party) to stop the siting of a natural gas pipeline. Instead, voicing opposition to such a pipeline in the administrative process was the best way forward. At least, that was the case until *PennEast*.

III. *PENNEAST* HAS TURNED CONSERVATION EASEMENTS INTO THE PREMIER NATURAL-GAS-PIPELINE-STOPPING TOOL AND PROVIDED STATES WITH A MEANS TO PARTICIPATE IN THE SITING PROCESS

The Third Circuit recognized that its decision in *PennEast* would disrupt the existing natural gas regulatory scheme.[184] The decision has effectively given states "veto" power over any and every natural gas pipeline siting project within their borders.[185] The following discussion assumes that *PennEast* was correctly decided and will not be overturned.[186] This Part explains how *PennEast* has provided states the ability to halt the siting of a natural gas pipeline by using a state-held conservation easement and argues every state in the nation could do so if the state so wishes. It then suggests several ways state law could be modified to further support a state's efforts to halt the siting of a natural gas pipeline per *PennEast*.

183. *Id.*

184. *In re* PennEast Pipeline Co., 938 F.3d 96, 113 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019) ("We are not insensitive to [PennEast's] concerns and recognize that our holding may disrupt how the natural gas industry . . . operates.").

185. Petition for Panel Rehearing, *supra* note 14, at 1.

186. FERC issued an order four months after *PennEast* and reiterated its conclusion that the NGA directly abrogated state sovereign immunity. *See* Order on Petition for Declaratory Order, 170 FERC ¶ 61,064 (Jan. 30, 2020). PennEast has petitioned the Supreme Court to review the Third Circuit's decision. *See* Petition for Writ of Certiorari, PennEast Pipeline Co., Petitioner v. New Jersey, 2020 WL 3492843 (2020) (No. 19-1039). On June 29, 2020, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. PennEast Pipeline Co., Petitioner v. New Jersey, 2020 WL 3492843 (2020) (No. 19-1039). The Court has yet to grant or deny certiorari, but in late June, invited the Solicitor General to file a brief in the case expressing the views of the United States. Opinion at 1, PennEast Pipeline Company, LLC, Petitioner vs. New Jersey, et al., Docket No. 19-1039 (U.S. Feb. 20, 2020), 2020 WL 3492643.

A. *PENNEAST* PROVIDES STATES WITH "VETO" POWER OVER INTERSTATE NATURAL GAS PIPELINES

The *PennEast* decision has opened the door for a state to stop any interstate natural gas pipeline proposed to be sited across state land because of the court's reasoning that a state's sovereign immunity defense defeats a private actor's exercise of delegated federal eminent domain power. Neither FERC nor any other federal agent or body currently has the authority to condemn land under the NGA.[187] This means only private actors can exercise eminent domain to construct a pipeline, and a pipeline is thus vulnerable to a state stopping the pipeline pursuant to the reasoning in *PennEast*. For example, take a pipeline proposed to be sited across a road or river within a state. A state could stop the pipeline because states have property interests in the land underlying the roads and rivers within their borders, thus allowing the state to invoke sovereign immunity to defend against a condemnation action.[188]

But the implications of *PennEast* do not stop there. State land interests are not static. *PennEast* has also empowered states to successfully stop the siting of a natural gas pipeline by gaining an interest in land through a conservation easement.[189] This is exactly what happened in *PennEast*.[190]

187. And it is doubted whether FERC would ever be able to do so, regardless. Petition for Panel Rehearing, *supra* note 14, at 16–17 ("Neither FERC nor any other federal agency has the resources to prosecute condemnation actions timely whenever states assert sovereign immunity.").

188. *See* Plaintiff's Reply in Support of Its Motion for an Order of Condemnation and for Preliminary Injunction at 6, Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, No. 1:19-cv-01444-GLR, 2019 BL 258106 (D. Md. July 12, 2019), 2019 U.S. Dist. Lexis 116524 (D. Md. 2019) (stating that "*every single one*" of natural gas company's FERC-regulated interstate pipeline projects in North America, which together transport gas through nearly 10,000 miles of pipeline in ten states, crosses and/or collocates with state-owned property or property interests).

189. Petition for Panel Rehearing, *supra* note 14 (contemplating "if sovereign immunity can be invoked to block NGA condemnation actions, not only will states exercise a veto, but so will individual landowners through the simple expedient of granting minor property interests to a state" such as conservation easements).

190. *See In re* PennEast Pipeline Co., 938 F.3d 96, 101, 100 n.1 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019) (noting "the State holds possessory interests in two of the properties and nonpossessory interests–most often, easements requiring that the land be preserved for recreational, conservation, or agricultural use–in the rest" and holding that was enough for sovereign immunity to block the exercise of federal eminent domain despite the fact that FERC, in the pre-permit environmental review process, had concluded that "nearly all New Jersey parcels [of land] subject to types of conservation or open space protective easements will

B. THE NEW AND IMPROVED ABILITY OF CONSERVATION EASEMENTS TO STOP NATURAL GAS PIPELINES

The power of a conservation easement to stop a pipeline per *PennEast* is somewhat narrow. Conservation easements can be conveyed to both state and federal governmental bodies. The reasoning in *PennEast* functions to stop a pipeline only where a private actor brings a condemnation action under delegated federal eminent domain power against a *state* property interest, and Congress has not abrogated state sovereign immunity.[191] A conservation easement conveyed between a landowner and a land trust or a federal governmental body will not function to stop a pipeline per *PennEast*—only the conveyance of a conservation easement to the state will do so. Importantly, a conveyance between a landowner and the state must satisfy the requirements of the applicable state law to be an enforceable conservation easement.[192]

As mentioned above, state laws enabling conservation easements vary in form and structure.[193] State conservation easement requirements generally track the four conservation easement formation requirements found in the UCEA: (1) a landowner must transfer a nonpossessory real property interest (2) to a governmental body that is a qualified conservation easement holder (3) for a specified purpose (4) for a certain period.[194] Thus, all four of the requirements must be satisfied for the conservation easement to be valid and enforceable.[195] These requirements are examined below to elucidate how a state could use a conservation easement to stop a pipeline per *PennEast*.

generally retain their conservation and open space characteristics" (citation and internal quotation marks omitted)).

191. Whether Congress even could abrogate state sovereign immunity to enable the siting of natural gas pipelines would require a court to find that constructing natural gas pipelines (or something of that ilk) is a substantive due process right guaranteed by Section 5 of the Fourteenth Amendment. *See supra* note 96. The reverse of this tactic—arguing that fossil fuel consumption condoned and promoted by the federal government violates the Due Process Clause of the Fifth Amendment—is currently being litigated. *See* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

192. Cheever & McLaughlin, *supra* note 153, at 120–21 (noting concern regarding potential failure to enforce conservation easements without codifying their requirements).

193. *See supra* Part II.B.

194. Cheever & McLaughlin, *supra* note 153; *see also* KLEIN ET AL., *supra* note 142, at 760 (listing typical conservation easement pieces).

195. Cheever & McLaughlin, *supra* note 153, at 124 ("[Conservation easement] requirements are intended to ensure that the donee or its successor has the information, as well as the notice, access, and enforcement rights necessary to enforce the easement on behalf of the public over its perpetual life.").

1. A Landowner Must Transfer a Nonpossessory Real Property Interest . . .

The UCEA requires a landowner to transfer a nonpossessory real property interest to create a conservation easement. As mentioned above, the transfer of a nonpossessory real property interest is what makes an easement an easement.[196] The transfer of a possessory real property easement is not an easement; it is a transfer of title to land, which is something more than an easement.[197] States can assert sovereign immunity to defend against the condemnation of both a nonpossessory and a possessory real property interest, but the transfer of a possessory interest to the state is beyond the scope of a conservation easement. Thus, the conveyance of a nonpossessory interest in land to the state through a conservation easement satisfies the first requirement of a valid conservation easement under the UCEA and allows the state to invoke sovereign immunity to defend that nonpossessory interest from condemnation.[198] In other words, the conveyance of a nonpossessory property interest to the state that stands in the way of a proposed pipeline is enough for the state to invoke sovereign immunity to defend against condemnation brought by the pipeline.

2. . . . to a Governmental Body That Is a Qualified Conservation Easement Holder . . .

The most important part of the *PennEast* conservation easement equation is the requirement that the conservation easement be conveyed to the state as a qualified holder. A state cannot invoke sovereign immunity to defend against a pipeline's condemnation action if the state is not a party to a condemnation action.[199] A state will not be a party to a condemnation action if the state does not have a property interest subject to the pipeline's attempted condemnation.[200] Thus, a conservation easement capable of stopping a natural gas pipeline must be in the way of the pipeline's proposed route and conveyed to

196. *See supra* Part II.B (providing background information on conservation easements).

197. *See* FREYFOGLE & KARKKAINEN, *supra* note 154, at 525.

198. PennEast argued that sovereign immunity does not apply to *in rem* proceedings. The Third Circuit rejected this argument, holding that "the Supreme Court has made clear that the general rule is a federal court cannot summon a State before it in a private action seeking to divest the State of a property interest." *In re* PennEast Pipeline Co., 938 F.3d 96, 110 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019) (citation and internal quotation marks omitted).

199. *Id.* at 107 (stating that "identity of a party is not insignificant").

200. *Id.* at 110.

the state.[201] This requirement begs the question: what exactly qualifies as the 'state' for purposes of sovereign immunity?

To start with, and self-evidently, the state itself qualifies as a state for purposes of sovereign immunity.[202] A conservation easement conveyed to "the State of New Jersey" undoubtedly meets the required sovereign status to invoke sovereign immunity because a condemnation action against the underlying land would be against an interest held by the state itself.[203] However, conservation easement law is not that straightforward. Most state statutes enabling the conveyance of conservation easements follow the lead of the UCEA and do not expressly list the capital-S "State" as a qualified holder.[204] Instead, most states include language allowing a "governmental body" to be a qualified holder.[205]

Whether a governmental body qualifies for sovereign immunity is not a simple question. The answer is dependent entirely on the connection between the state as a sovereign and the governmental body in question.[206] A governmental body qualifies for sovereign immunity if it passes what is colloquially known as "the arm-of-the-state test."[207] What the test entails is not settled, but it has developed around the idea that Eleventh Amendment immunity is intended to protect a state from liability which could result in the payment of public funds to satisfy a judgment.[208] In 2002, the Rehnquist Court seemingly expanded the arm-of-the-state test by holding that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[209] Thus, the arm-of-

201. A conservation easement conveyed to a charitable organization or land trust is unable to stop a pipeline per *PennEast* because only the state can assert Eleventh Amendment immunity. *See id.* at 104.

202. *E.g.*, Alden v. Maine, 527 U.S. 706, 712–13 (1999).

203. *See In re PennEast Pipeline Co.*, 938 F.3d at 101.

204. *See* UNIF. CONSERVATION EASEMENT ACT § 2 (1981) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., amended 2007).

205. Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, *supra* note 177, at 26, 35; *see also* UNIF. CONSERVATION EASEMENT ACT § 1(2)(i); *infra* Appendix.

206. *Compare* Grajales v. P.R. Ports Auth., 831 F.3d 11, 13 (1st Cir. 2016) (holding Puerto Rico is entitled to sovereign immunity), *with* CSX Transp., Inc. v. Williams, 406 F.3d 667, 674 n.7 (D.C. Cir. 2005) (holding the District of Columbia is not a state for purposes of sovereign immunity).

207. WRIGHT & MILLER, *supra* note 78, § 3524.2.

208. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994) (holding that "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations").

209. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).

the-state test is generally satisfied when a suit against a governmental body offends a state's dignity or threatens funds from its treasury.[210] However, courts also consider the powers the governmental body possesses "vis-à-vis" the state beyond those two guiding principles, such as the governmental body's power to contract, raise revenue, and expend funds.[211]

Courts typically do not consider counties, municipalities, and agencies or officers thereof to satisfy the arm-of-the-state test and, therefore, those governmental bodies cannot invoke sovereign immunity as a defense.[212] Thus, whether a governmental body acting as a qualified holder of a conservation easement can utilize *PennEast* to stop a pipeline depends on where that governmental body falls on the arm-of-the-state spectrum. At one end of the spectrum is the state itself, which can undoubtedly invoke sovereign immunity, and at the other end are counties and municipalities, which likely cannot invoke sovereign immunity.

The UCEA defines a qualified holder to include "a governmental body empowered to hold an interest in real property under the laws of [a] State or the United States."[213] One factor weighing in favor of finding any governmental body that is statutorily eligible to be conveyed a conservation easement as eligible for Eleventh Amendment protection is that governmental body's power to contract on behalf of the state.[214] A conservation easement is, after all, a contract between two parties.[215] Beyond this, the closer a governmental body is to the

210. *Cf.* City of Oakland *ex rel.* Bd. of Port Comm'rs v. Fed. Mar. Comm'n, 724 F.3d 224, 227 (D.C. Cir. 2013) ("Determining what entities are entitled to claim immunity tracks a simple constitutional line: Eleventh Amendment sovereign immunity belongs to the states. This means that when the state is not named as a defendant, sovereign immunity attaches only to entities that are functionally equivalent to states (often called 'arms of the state') or when, despite procedural technicalities, the suit effectively operates against the state as the real party in interest. These kinds of suits may offend the state's dignity or assault its solvency no less than if the state were itself named defendant." (citations omitted)).

211. *See* WRIGHT & MILLER, *supra* note 78.

212. *See, e.g.*, Jinks v. Richland Cnty., 538 U.S. 456, 466 (2003) (holding that municipalities "do not enjoy a constitutionally protected immunity from suit"). *But see* Brotherton v. Cleveland, 173 F.3d 552, 566 (6th Cir. 1999) (holding a local official was entitled to Eleventh Amendment immunity where his actions were compelled by state law).

213. UNIF. CONSERVATION EASEMENT ACT § 1(2)(i) (1981) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., amended 2007).

214. WRIGHT & MILLER, *supra* note 78.

215. Julie Ann Gustanksi, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE,

state's purse or the state as an entity itself, the stronger that governmental body's claim to sovereign immunity likely will be.[216]

Looking to the property interests New Jersey held in *PennEast* is helpful to elucidate how a court approaches whether a state's interest in land is entitled to invoke sovereign immunity. In *PennEast*, the Third Circuit did not expressly characterize its examination of the interests in land held by New Jersey as the arm-of-the-state test, but it invoked many of the same principles the test relies on.[217] The court noted that New Jersey's state constitution sets aside tax dollars for open space and farmland preservation, and that, "[f]or decades now, the State has operated preservation programs aimed at preserving such land."[218] The Third Circuit regurgitated the State Defendants' opening brief and noted that these programs are maintained through the New Jersey Department of Environmental Protection (NJDEP) and New Jersey's State Agriculture Development Committee (SADC), as well as a smaller governmental body called the Delaware Raritan Canal Commission (DRCC).[219] The court concluded by emphasizing that "[t]he State has spent over a billion dollars on its preservation efforts."[220]

Neither the court nor plaintiffs or defendants discussed or challenged whether NJDEP, SADC, or DRCC were arms of the state. Both

supra note 177, at 9, 9 ("Simply put, a conservation easement is a legally binding agreement that permanently restricts the development and future use of the land to ensure protection of its conservation values.").

216. *Cf.* Surprenant v. Mass. Tpk. Auth., 768 F. Supp. 2d 312, 317 (D. Mass. 2011) (explaining that "[w]hether an agency is in fact an 'arm of the state' is determined by applying federal law" which "considers, among other factors, the agency's ability to satisfy judgments from its own funds, whether its functions are governmental or proprietary, whether the agency is separately incorporated, the extent to which the State exerts control over the agency, whether the agency has the power to sue in its own right, whether its property is taxed by the State, and whether the State has immunized itself from the agency's acts or omissions" and then holding that the Massachusetts department of transportation is an arm of the state). Note, however, that a state cannot immunize a governmental body by choosing to expend state funds for that governmental body. *See* Christy v. Pa. Tpk. Comm'n, 54 F.3d 1140, 1147 (3d Cir. 1995) ("Although the Commonwealth might well *choose* to appropriate money to the Commission to enable it to meet a shortfall caused by an adverse judgment, such voluntary payments by a state simply 'do not trigger [Eleventh Amendment] immunity.'" (alteration in original) (citation omitted) (quoting Bolden v. Se. Pa. Transp. Auth., 953 F.2d 807, 819 (3d Cir. 1991)).

217. *See In re* PennEast Pipeline Co., 938 F.3d 96, 101 n.4 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

218. *Id.*

219. *Compare id.*, *with* Appellants' Merits Brief at 6–7, *In re PennEast Pipeline Co.*, 938 F.3d 96 (No. 19-1191).

220. *In re PennEast Pipeline Co.*, 938 F.3d at 101 n.4.

plaintiffs and defendants seemed to operate under the assumption that they were,[221] and the Third Circuit simply concluded as much by stating that "New Jersey owns those property interests as part [sic] its attempt to preserve farmland and open space in the State."[222] To say what the Third Circuit left unsaid: these governmental bodies satisfy the arm-of-the-state test due to the amount of public funding that is allocated to them and the significant lengths they go to further the priority of preservation as constitutionalized in New Jersey. Withholding Eleventh Amendment protection from NJDEP, SADC, or DRCC would expose public funds to liability judgments and allow a private actor to disrupt a constitutionalized priority of the state.

PennEast is not the only case ruling on whether state sovereign immunity defeats a private actor's exercise of federal eminent domain delegated under the NGA. In *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange County, Texas*,[223] the United States District Court for the Eastern District of Texas, preceding the Third Circuit in *PennEast*, held that the NGA did not abrogate state sovereign immunity and a FERC certificate does not delegate the federal government's exemption to state sovereign immunity to a private actor.[224] The facts of *Sabine* mirror the facts of *PennEast*: the Texas Parks and Wildlife Department (TPWD) had refused to grant an easement to site a natural gas pipeline to Sabine Pipeline LLC over public conservation land known as the Lower Neches Wildlife Management Area.[225] Unlike *PennEast*, *Sabine* raised the arm-of-the-state test and concluded (because it was undisputed) that TPWD was an arm of the state.[226] As a result, Sabine's condemnation action for an easement over TPWD's property was barred by TPWD's Eleventh Amendment immunity to suits.

TPWD's briefing on the arm-of-the-state test is instructive for determining whether a conservation easement has been conveyed to a governmental body that is eligible for Eleventh Amendment protection. TPWD argued that it was indeed an arm of the state because: (1) "[i]t submits a biennial budget request to the Legislature for funding

221. *See* Appellants' Merits Brief, *supra* note 219; Petition for Panel Rehearing, *supra* note 14, at 7.

222. *In re PennEast Pipeline Co.*, 938 F.3d at 101 n.4.

223. Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cnty., 327 F.R.D. 131 (E.D. Tex. 2017).

224. *Id.* at 141–43.

225. Rule 12 Motion to Dismiss and Answer of the Texas Parks and Wildlife Department and Its Property at 2, *Sabine*, 327 F.R.D. 131 (No. 16-cv383) [hereinafter TPWD Motion to Dismiss].

226. *Sabine*, 327 F.R.D. at 139.

through the General Appropriations Act, and money paid to it is deposited in the State Treasury"; and (2) TPWD "is headed by an executive director who is appointed by and serves under the Texas Parks and Wildlife Commission" whose "members . . . are appointed by the Governor with the advice and consent of the Texas Senate."[227] Additionally, the Fifth Circuit had previously recognized that the TPWD was an arm of the state protected by the Eleventh Amendment.[228] For these reasons, the TPWD in *Sabine*, like the NJPED, SADC, and DRCC in *PennEast*, was an arm of the state and entitled to Eleventh Amendment protection. Holding otherwise would have exposed public funds to liability for judgments and infringed upon the dignity of the state of Texas as a sovereign by allowing a private actor to condemn an easement across land that was part of the state's park system.

There is also a case like *PennEast* from the District of Maryland, *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less*.[229] *Columbia Gas* tells a familiar tale. A natural gas company obtained a certificate of public necessity from FERC and brought NGA condemnation actions to obtain easements for a pipeline against multiple tracts of land over which the company could not negotiate a voluntary acquisition of such an easement.[230] One of the tracts that the company brought a condemnation action against was "owned by the State of Maryland to the use of the Department of Natural Resources as a rails-to-trail bike path."[231] Maryland proceeded to defend the condemnation action by asserting that sovereign immunity barred suits against the Maryland Department of Natural Resources (MDNR).[232] Following a motion hearing, the court issued a perfunctory order granting Maryland's motion to dismiss and "concluded that Defendants State of Maryland and the Department of Natural Resources' . . . Eleventh Amendment immunity bars Columbia Gas's Complaint in

227. TPWD Motion to Dismiss, *supra* note 225, at 3.

228. *See* Baker Farms, Inc. v. Hulse, 54 F. App'x 404 (5th Cir. 2002) ("A federal court may not adjudicate a State's interest in property without the State's consent." (citing Ysleta Del Sur Pueblo v. Laney, 199 F.3d 281, 289 (5th Cir. 2000))); Brief of Appellees at 3, *Baker Farms* (No. 02-10529) (explaining that Baker Farms sued for easement access to use land inside of a public recreational facility owned and operated by the TPWD).

229. No. 19-cv-01444, 2019 U.S. Dist. LEXIS 116524, at *1 (D. Md. July 12, 2019).

230. Memorandum in Support of Motion to Dismiss at 2, Columbia Gas Transmission, LLC v. 0.12 Acres of Land, No. 19-cv-01444, 2019 U.S. Dist. LEXIS 116524 (D. Md. July 12, 2019) (No. 19-cv-01444).

231. *Id.*

232. *Id.* at 3–10 (citing *Sabine* and drawing the same distinction between federal eminent domain power and the federal exemption to state sovereign immunity as both *Sabine* and *PennEast* do).

[c]ondemnation."[233] There was no discussion of the arm-of-the-state test at the motion hearing; the court and the parties both seemed to assume the MDNR was indeed the state for purposes of sovereign immunity.[234]

Important to note across *PennEast*, *Sabine*, and *Columbia Gas* is that no court differentiated between nonpossessory interests in land, such as the conservation easements owned by governmental bodies of New Jersey at issue in *PennEast*, and possessory interests in land, such as the TPWD-owned parkland at issue in *Sabine* or the rails-to-trail land owned by the MDNR in *Columbia Gas*. If an arm of the state has some sort of property interest in the land over which a natural gas pipeline company seeks an easement through federal eminent domain, sovereign immunity is available as a defense to the ensuing condemnation action.

In summary, a conservation easement must be conveyed to the state itself or a governmental body that qualifies as an arm of the state to successfully stop the use of eminent domain by a natural gas pipeline company per *PennEast*. A governmental body is an arm of the state when it is, among other factors, funded by public funds and the programs it administers are integral to the dignity of the state as a sovereign entity. State governmental bodies dedicated to the conservation of natural resources likely satisfy the arm-of-the-state test.

3. . . . for a Specified Purpose . . .

The conservation easement must also be conveyed for a specified purpose. Most states mirror the UCEA requirement that a conservation easement be conveyed for conservation purposes intended to provide public benefit.[235] One typical conservation easement purpose is to conserve open space.[236] A conservation easement can also contain more specific language identifying activities that are prohibited or permitted on the encumbered land.[237] A state could include specific language identifying natural gas pipeline siting as inconsistent with

233. Order at 1, *Columbia Gas*, 2019 U.S. Dist. LEXIS 116524.

234. *See* Transcript of Motion for Preliminary Injunction, *Columbia Gas*, 2019 U.S. Dist. LEXIS 116524.

235. KLEIN ET AL., *supra* note 142 ("To help ensure that conservation easements provide public benefits, the easement enabling statutes generally require that such easements be conveyed to representatives of the public (land trusts or governmental entities) for certain conservation purposes intended to provide significant benefits to the public.").

236. Cheever & McLaughlin, *supra* note 153.

237. KLEIN ET AL., *supra* note 142, at 760 (explaining that conservation easements typically contain a list of prohibited activities).

the purpose of the conservation easement, but the easement must also contain a valid purpose within the parameters of state law to be effective. If a conservation easement contains a purpose that satisfies state law, then the conservation easement satisfies this requirement.

4. . . . for a Certain Period

Finally, the conservation easement must be conveyed for a certain period. The UCEA allows the conservation easement to specify its duration, but otherwise assumes all are conveyed in perpetuity.[238] A state wishing to stop a pipeline must include language in the easement specifying its duration according to any limitations placed by that state's laws to satisfy this requirement.

C. THE ELEVENTH AMENDMENT DEFEATS STATE EMINENT DOMAIN EXCEPTIONS

State conservation easement laws can enable a state to stop a natural gas pipeline with a conservation easement, but, on the surface, those laws can also seem to be a state's undoing. Many states contain a provision in the legislation enabling the conveyance of conservation easements that provides conservation easements may be condemned using eminent domain power. This Note refers to these provisions as "eminent domain exception" provisions. The UCEA does not contain an eminent domain exception, but, as noted above, the Preface to the UCEA leaves the interplay between conservation easements and eminent domain to the laws of the adopting state.[239] However, eminent domain exception provisions are present in both the laws of states that have adopted the UCEA and those that have not.

Alabama adopted much of the language of the UCEA in its conservation easement legislation. But Alabama included a provision that provides "[n]othing in this chapter shall be construed to impair or diminish in any way the rights of any person, entity, or governmental body authorized by the laws of this state or under federal law to acquire property interests through the exercise of eminent domain or condemnation."[240] Unlike Alabama, Hawaii enacted legislation enabling the conveyance of conservation easements without borrowing language from the UCEA, but Hawaii law also contains an eminent

238. UNIF. CONSERVATION EASEMENT ACT § 2(c) (1981) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., amended 2007).

239. *See id.*, commissioners' prefatory note at 4 (providing that "the Act neither limits nor enlarges the power of eminent domain," instead leaving "the scope of that power" to "the adopting state's eminent domain code and related statutes").

240. ALA. CODE § 35-18-2(e) (2020).

domain exception.[241] Section 198-6 of Hawaii Code provides, in part, that "[n]othing in this chapter shall diminish the powers granted by any general or special law to acquire, by purchase, gift, eminent domain, or otherwise, and to use land for public purposes."[242] Several states allow for condemnation of conservation easements through language that references only state eminent domain power.[243] However, both Alabama and Hawaii law contains language that could reasonably be interpreted to encompass federal eminent domain power as well. Before *PennEast*, Hawaii's and Alabama's eminent domain exception provisions would have spelled certain doom for a conservation easement in the way of a natural gas pipeline—but no longer.

The reasoning in *PennEast* allows a state to assert a sovereign immunity defense under the Eleventh Amendment to defeat a condemnation action brought against a property interest held by the state, including a conservation easement. As briefly mentioned above, the nature of a sovereign immunity defense is not settled. Sometimes the Eleventh Amendment is interpreted to be like a jurisdictional bar for a lack of subject matter jurisdiction,[244] and other times it is interpreted to be like an affirmative defense that can be waived in certain situations.[245] These defenses are adjudicated at different stages in litigation. The Supreme Court has ruled that Article III jurisdictional issues must be decided before the merits of a claim.[246] A court must have the power to adjudicate a claim before the court adjudicates the claim. Thus, a subject matter jurisdiction issue must be addressed before the merits of a claim or any affirmative defense.[247]

This difference seems to create two potential outcomes for state-held conservation easements facing NGA condemnation: (1) if Eleventh Amendment immunity is an Article III jurisdictional defense, then a state's sovereign immunity prevents a court from reaching the

241. *See* HAW. REV. STAT. ANN. § 198-6 (West 2020).

242. *Id.*

243. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-272(A) (2020) ("This article neither limits nor enlarges the power or purposes of eminent domain, zoning, subdivision regulations or any right of condemnation under the laws of this state."); *id.* § 33-275(3) (providing that a conservation easement "[i]s subject to the acquisition of real property interests under the laws of this state governing eminent domain"). *See generally infra* Appendix (listing provisions from each state).

244. *See supra* note 101 and accompanying text.

245. *See supra* note 104 and accompanying text.

246. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998).

247. *See* WRIGHT & MILLER, *supra* note 78, § 3524.1 (noting if "Eleventh Amendment immunity raises an issue of subject matter jurisdiction," then "it must be addressed before the merits").

merits of a condemnation action and that state's eminent domain exception provision; or (2) if Eleventh Amendment immunity is not an Article III jurisdictional defense and instead a more traditional affirmative defense, then a state's sovereign immunity does not prevent a court from reaching the merits of a condemnation action and adjudicating whether an eminent domain exception allows condemnation of a state-held conservation easement. Notably, the nature of New Jersey's sovereign immunity defense was not discussed in *PennEast*, nor was New Jersey's eminent domain exception brought up in any of the case briefings.[248] The Third Circuit did not question the nature of the defense because the defense was the only issue at hand—there were no "merits" waiting in the wings behind the sovereign immunity defense.[249]

The murky nature of a sovereign immunity defense might produce two different routes of legal analysis, but it does not produce two different results. Both scenarios above result in Eleventh Amendment immunity shielding a state-held conservation easement from condemnation under the NGA. In the first scenario, Eleventh Amendment immunity is an Article III jurisdictional defense. Thus, a state's sovereign immunity prevents a court from reaching the merits of an NGA condemnation action and that state's eminent domain exception. The conservation easement survives, and the pipeline is stopped.

In the second scenario, Eleventh Amendment immunity is not an Article III jurisdictional defense. Instead, it is a more traditional affirmative defense. Thus, a state's sovereign immunity does not prevent a court from reaching the merits of a condemnation action and adjudicating whether an eminent domain exception allows condemnation of a state-held conservation easement. The legal question becomes whether the Eleventh Amendment or the state's eminent domain exception controls. In other words, which wins: a state's eminent domain exception or the Eleventh Amendment? The Supremacy Clause and sovereign immunity jurisprudence both indicate that the Eleventh Amendment emerges victorious.[250]

248. *In re* PennEast Pipeline Co., 938 F.3d 96, 107 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019) (discussing the sovereign immunity issue in the context of NGA abrogation).

249. *Id.*

250. *See* U.S. CONST. art. VI, cl. 2 (establishing that federal law takes precedence over state laws).

First, a federal law preempts a state law through the Supremacy Clause when there is an "actual conflict" between the two.[251] An actual conflict exists when "'compliance with both federal and state regulations is a physical impossibility,' or when state law is 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[252] There is an actual conflict between state eminent domain exceptions and the Eleventh Amendment because it is a physical impossibility to comply with both at the same time. State eminent domain exceptions allow the condemnation of conservation easements through eminent domain power. Condemnation occurs through a lawsuit brought against the owner of the property being condemned. The Eleventh Amendment attaches to property interests held by the state and prevents states from being subject to lawsuits.[253] A pipeline company cannot invoke a state's eminent domain exception to condemn a state-held conservation easement while simultaneously complying with the Eleventh Amendment's bar on suits against the state. Thus, the dispositive question turns to whether the NGA abrogates a state's Eleventh Amendment immunity, which the *PennEast* court answered in the negative.

Second, sovereign immunity precedents also support the conclusion that the Eleventh Amendment controls over a state eminent domain exception. States can waive their Eleventh Amendment immunity through legislation,[254] but that legislation "must specify the State's intention to subject itself to suit in *federal court*."[255] The Supreme Court has consistently "required that consent to suit in federal court be express and thus has construed . . . ambiguous and general consent to suit provisions, standing alone, as insufficient to waive Eleventh Amendment immunity."[256] No state's eminent domain exception contains clear or express language indicating that state's intent to subject itself to suit in federal court.[257] Kentucky comes the closest to satisfying this requirement by providing that "[a] conservation easement . . .

251. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987). This is known as "conflict preemption," which is one of several types of preemption flowing from the Supremacy Clause. *Id.* at 280–81.

252. Marsh v. Rosenbloom, 499 F.3d 165, 177 (2d Cir. 2007) (quoting *Guerra*, 479 U.S. at 281).

253. *See* discussion *supra* Part I.A.3.

254. *See* discussion *supra* Part I.A.3; *see also* Benitez v. Port Auth. Trans-Hudson Corp., 495 U.S. 926 (1990) (mem.) (by implication).

255. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306 (1990) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)).

256. *Id.*

257. *See infra* Appendix (listing provisions from each state).

shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable as if the conservation easement did not exist."[258] It would be a stretch, however, to find Kentucky's eminent domain exception to satisfy the clear and express requirement for state abrogation of its own Eleventh Amendment protection.[259]

D. How States Could Modify Their Conservation Easement Laws to Take Advantage of *PennEast* and Stop a Natural Gas Pipeline

There are several ways that states could modify their conservation easement laws to utilize *PennEast* to stop a natural gas pipeline. First and foremost, a state could modify its laws to expressly allow conveyance of a conservation easement to a governmental body that satisfies the arm-of-the-state test. Second, a state could modify its laws to remove any provision subjecting conservation easements to eminent domain, though such provisions do not prevent a state from stopping a pipeline as explained above. Third, a state could insulate its lands from natural gas pipeline development by modifying its laws to allow the state to contract around and about the invocation of sovereign immunity. These options are discussed in more depth below.

1. Modify State Laws to Expressly Allow Conveyance to a "Governmental Body" that Satisfies the Arm-of-the-State Test

As detailed above, the conveyance of the conservation easement to the state is the most important piece of a conservation easement's potential to stop a natural gas pipeline.[260] A state cannot invoke sovereign immunity to defend against a pipeline condemnation action without a conveyance of the conservation easement to a governmental body. Any state wishing to stop a natural gas pipeline needs to have legislation that enables the conveyance of a conservation easement to a state governmental body.

Every state authorizes the conveyance of a conservation easement to a state governmental body in some form.[261] Many states do so

258. Ky. Rev. Stat. Ann. § 382.850 (West 2020).

259. *Cf. Port Auth. Trans-Hudson Corp.*, 495 U.S. at 306 (finding abrogation of state sovereign immunity in a state statute that "provides that the States 'consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority'" (quoting N.J. Stat. Ann. §§ 32:1–157 (West 1963); N.Y. Unconsol. Law § 7101 (McKinney 1979)).

260. *See* discussion *supra* Part III.B.2.

261. *See supra* note 235.

in language adopting or modeled on the UCEA.[262] Other states' laws are a bit messier. For instance, New Mexico's Land Use Easement Act excludes governmental bodies from its definition of "holder,"[263] but its Land Conservation Incentives Act authorizes private landowners to convey an "interest in real property," including a "land use easement," to a "public or private conservation agency," which includes "a governmental body."[264] The Land Conservation Incentives Act successfully allows landowners to convey conservation easements to New Mexico; the National Conservation Easement Database reports nine such conservation easements.[265]

Yet, states interested in stopping a natural gas pipeline per *PennEast* could modify their laws to unambiguously allow the conveyance of conservation easements to a governmental body that satisfies the arm-of-the-state test. Doing so would not ultimately change the result of an NGA condemnation action brought against any state-held conservation easement created under current state law. However, even those states that have adopted the UCEA, which provides a "holder" may be "a governmental body empowered to hold an interest in real property under the laws of this State or the United States,"[266] could modify their existing conservation easement laws to expressly clarify that arm-of-the-state governmental bodies are eligible to hold conservation easements. A state's department of natural resources is one such governmental body.[267]

However, as discussed above, the arm-of-the-state test is a judicial creation.[268] This means that the courts will have the final say on whether any governmental body passes the arm-of-the-state test. Thus, even if a state includes such arm-of-the-state language in its conservation easement laws, a court could still hold that the governmental body holding the conservation easement does not pass the test. To

262. *See infra* Appendix (listing provisions from each state).

263. N.M. STAT. ANN. § 47-12-2(A) (West 2020) (defining "holder" to mean "any nonprofit corporation, nonprofit association or nonprofit trust" and excluding any governmental body from being a holder).

264. *See id.* § 75-9-3 (listing applicable definitions).

265. *See Advanced Easement Search*, NAT'L CONSERVATION EASEMENT DATABASE, https://www.conservationeasement.us/adv-search [https://perma.cc/9J4A-7QG5] (narrow search query to "Location (Primary State)" and "New Mexico," and then narrow additional searches to "Easement Holder Types" and "State").

266. UNIF. CONSERVATION EASEMENT ACT § 1(2)(i) (1981) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., amended 2007).

267. *See supra* Part III.B.2 (discussing the governmental bodies at issue in *PennEast*, *Sabine*, and *Columbia Gas*).

268. *See supra* Part III.B.2.

address this potential issue, a state modifying its laws to expressly include a governmental body among eligible conservation easement holders should err toward state governmental bodies dedicated to the conservation of natural resources as likely those bodies likely satisfy the arm-of-the-state test.[269]

2. Modify State Laws to Remove "Eminent Domain Exception" Provisions

A state could modify its laws to remove its eminent domain exception provision and avoid a potential hiccup in its use of a *PennEast*-style conservation easement. This Note argues the reasoning in *PennEast* prevents an eminent domain exception from negating a state's Eleventh Amendment immunity in an NGA condemnation action against a state-held conservation easement. That precise legal question, however, is untested in the courts.

A state could, alternatively, modify its laws to prohibit the condemnation of state-held conservation easements through federal eminent domain power. The power of such a state law to stop the federal government's condemnation of a state conservation easement would likely fail due to the Supremacy Clause, but it would function to remove federal eminent domain from a state's eminent domain exception provision. As argued above, federal eminent domain power delegated to a private actor through the NGA would be defeated by a state's assertion of Eleventh Amendment immunity regardless of the presence of an eminent domain exception in that state's conservation easement laws. A state taking this approach would remove the eminent domain provision from impacting any *PennEast*-style analysis while allowing the state to retain control over the exercise of its own eminent domain authority against conservation easements it holds.[270]

3. Modify State Laws to Insulate Conservation Easements Against Administration Changes or Political Pressures

The state holds the final say in stopping a pipeline even if a conservation easement is conveyed and satisfies all state law requirements. Stopping a natural gas pipeline with a conservation easement

269. *See supra* notes 217–34 and accompanying text.

270. There is some debate whether granting any eminent domain power over conservation easements is wise. *Compare* Derrick P. Fellows, Kelo, *Conservation Easements, and Forever: Why Eminent Domain Is Not a Sufficient Check on Conservation Easements' Perpetual Duration*, 35 WM. & MARY ENV'T L. & POL'Y REV. 625 (2011), *with* Michael Paul Stevens, *Historic Preservations: Prohibit Power of Eminent Domain from Creating, Altering, or Affecting Conservation Easements*, 10 GA. ST. U. L. REV. 207 (1993).

depends on the state easement holder invoking sovereign immunity. The state governmental body holding the conservation easement must assert Eleventh Amendment immunity when the underlying land is subject to a condemnation proceeding brought by a private actor exercising federal eminent domain power delegated by the NGA.[271] This means whether a pipeline will be stopped by a conservation easement is up to the fancy of the state in question and, in turn, vulnerable to changing political pressures or administrations. However, there are several ways a state that wishes to use *PennEast* to stop a natural gas pipeline could attempt to insulate itself from this possibility.

First, a state could modify its conservation easement laws to allow the imposition of affirmative obligations on governmental holders. Not all states currently allow conservation easements to impose affirmative obligations on the holder of the easement.[272] State conservation easement law could be modified to allow the landowner to include affirmative obligations on the governmental holder of the easement. To do this, the state could adopt language from the UCEA, which states "[a] conservation easement is valid even though . . . it imposes affirmative obligations . . . upon the holder."[273] Doing so would enable the conservation easement deed to validly bind the governmental holder of the easement to any affirmative obligation the governmental holder agrees to. A state that modifies its conservation easement laws in this way could then get creative as to what affirmative obligations it would include in such an easement.

Second, and necessarily subsequent to a state allowing the imposition of affirmative obligation through a conservation easement, a state could include language in the conservation easement agreement obligating the state to assert sovereign immunity should the encumbered land ever be subject to an NGA condemnation action.[274] States can and do contract with private parties to waive sovereign immunity

271. *See In re* PennEast Pipeline Co., 938 F.3d 96, 104 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

272. Mayo, *supra* note 205, at 51 n.8 (noting that in legislation circa 2000, the states that allowed conservation easements to impose affirmative obligations were Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin). Today, almost every state allows conservation easements to impose affirmative obligations. *See infra* Appendix.

273. UNIF. CONSERVATION EASEMENT ACT § 4(5) (1981) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., amended 2007).

274. *See* BYERS & PONTE, *supra* note 171, at 430–37 (discussing sample enforcement provisions imposing affirmative obligations on holders that are recommended to be included in conservation easements).

in certain instances.[275] It follows that states could contract to invoke sovereign immunity in certain instances, as well. The supreme court of at least one state has recognized the possibility that a private party would contract with a state to obligate the state to assert sovereign immunity as a defense in certain scenarios,[276] and the Supreme Court declined to grant certiorari to reconsider that holding.[277] The efficacy of this tactic seems to be otherwise untested.

Third, and in addition to the two suggestions above, a state could include language in the conservation easement agreement expressly stating the siting of a pipeline is at odds with the purpose of the conservation easement.[278] Even if a state cannot be contractually obligated to assert sovereign immunity as a defense to a condemnation action, by accepting the deed of a conservation easement the state is legally bound to uphold the restrictions placed upon the land by the easement.[279]

The deed could also contain language specifying clear instructions on how to remedy a violation of the easement.[280] If a pipeline were allowed to be sited on the land restricted by the conservation easement, then there could be detailed instruction contained in the easement itself that a court could look to in ordering the violation to

275. It is settled law that a state may contract with a private actor and agree to waive its sovereign immunity under certain conditions or in certain scenarios. *See generally* Christina Bohannan, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 292–303 (2002) (discussing private contracts of states, reconciling case law surrounding the Contract Clause and the Eleventh Amendment, and concluding that "so long as a court determines that a state's contractual waiver of immunity was given voluntarily and unequivocally, the waiver should be enforced, and the state should not be given an opportunity to reconsider its waiver at the time suit is brought against it to enforce its contractual obligations").

276. *Cf. In re* Individual 35W Bridge Litig., 806 N.W.2d 820, 835 (Minn. 2011) ("Specifically, the 1962 contract does not obligate the State to assert sovereign immunity as a defense to tort claims by a plaintiff against it. Absent an affirmative obligation in the contract, there is no substantial impairment of the contract for the failure to assert an affirmative defense."). This holding leaves open the possibility that a contract could impose an affirmative obligation on a state to assert sovereign immunity.

277. Jacobs Eng'g Grp. v. Minnesota, 566 U.S. 1021 (2012) (denying certiorari).

278. BYERS & PONTE, *supra* note 171, at 395–401 (discussing sample land use provisions for conservation easements and recommending that any such language provide "permitted and prohibited land uses, and should be consistent with the purpose statement" of the easement).

279. *Id.* at 156.

280. *Id.* at 433–37 (discussing remedy provisions that follow the recommended enforcement provisions).

be remedied.[281] For example, if a state fails to assert sovereign immunity to oppose an NGA condemnation action of land underlying a conservation easement (perhaps because a state could not be contractually obligated to assert such a defense), the owner of the underlying land could bring an action to halt the violation of the conservation easement's purpose that would be the siting of the pipeline.[282] A landowner would not experience trouble bringing such an action because the state had initially consented to suit in the condemnation action by failing to raise Eleventh Amendment immunity, which would, in turn, preclude the state from raising that same defense to prevent a landowner from intervening in the action against the state for violating the easement.[283] As a failsafe to this scenario, a conservation easement could also include language waiving state sovereign immunity in the case of any enforcement action by the owner of the underlying land.[284]

Fourth, the state could include a third-party enforcement right for the conservation easement in the easement.[285] A state does not need to allow affirmative obligations in conservation easements to enable the inclusion of third-party enforcement rights—approximately half of the states allow third-party enforcement of conservation easements.[286] Providing a qualified interest in the easement to a third party can help to assure the long-term conservation of the underlying land in the case of many potential modification or termination

281. *Id.* at 159–60.

282. In most states, the attorney general is also authorized to enforce a conservation easement as the corpus of a charitable trust. *See* Mayo, *supra* note 205, at 54 n.60.

283. *See* Lapides v. Bd. of Regents, 535 U.S. 613, 622–23 (2002) (holding that a state may not raise sovereign immunity as a defense after waiving it by litigating the merits of case).

284. *See* Bohannan, *supra* note 275, at 277 ("While some very early decisions seem to suggest that sovereign immunity may not be alienated by contract, a closer analysis of these decisions, coupled with language in *College Savings Bank*, leads to the conclusion that where a state explicitly waives its immunity by contract, that waiver should be enforced . . . .").

285. For example, Alaska defines a third-party enforcement right as "a right provided in a conservation easement to enforce any of its terms granted to a governmental body, nonprofit corporation, charitable corporation, charitable association, or charitable trust that is not a holder." William T. Hutton, *Conservation Easements in the Ninth Federal Circuit*, *in* CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, *supra* note 177, 354, 360 (quoting ALASKA STAT. § 34.17.050(3) (2018)).

286. Mayo, *supra* note 205, at 49–50 (noting that in legislation circa 2000, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nevada, New Mexico, New York, Oregon, South Carolina, South Dakota, Texas, Virginia, West Virginia, and Wisconsin allowed third-party enforcement rights in a conservation easement).

events.[287] The easement could clearly indicate that the third party is qualified to hold the easement and has the power to enforce the easement along with the primary holder (the state) or alone if the primary holder fails to enforce it.[288] Ironically, it is considered good practice to provide a governmental body as a backup, third-party interest in a conservation easement because government bodies are seen as possessing the resources required to monitor and enforce easements that a smaller holder would otherwise not be able to.[289] In the case of a conservation easement conveyed to a state to stop a natural gas pipeline, it is the state's diligence that is being monitored by a private third party rather than the other way around. Such a third party would ideally be an environmental group, a land trust, or some other organization with the resources and wherewithal to monitor and defend a conservation easement from NGA condemnation proceedings.

Importantly, third-party enforcement would function differently in an easement intended to utilize a state's sovereign immunity to stop a natural gas pipeline per *PennEast*. In the typical third-party enforcement structure, the third party would act to prevent the violation by suing the violator.[290] In a post-*PennEast* third-party enforcement structure designed to stop a pipeline, the third party would act to prevent the violation by suing the state as the primary holder of the easement to force the state to uphold the terms of the easement that it agreed to. This strategy loops back around to the scenario mentioned above where a state would be vulnerable to an enforcement action brought against it if it did not raise sovereign immunity as a defense to the condemnation action because its failure to do so constitutes a

287. BYERS & PONTE, *supra* note 171, at 169 (listing such situations as: "if the primary holder ceases to exist; if the primary holder acquires fee title to the property, in which case the [third-party] backup can acquire the easement to prevent a merger of the fee and easement interests; or if the primary holder is unable to fulfill its stewardship obligations").

288. *Id.* at 172 (providing the Maine Coast Heritage Trust as an example of a third party that "holds rights of enforcement").

289. *Id.* at 171.

290. Sean P. Ociepka, *Protecting the Public Benefit: Crafting Precedent for Citizen Enforcement of Conservation Easements*, 58 ME. L. REV. 225, 230 (2006) (discussing existing enforcement case law and concluding that "[m]ost cases brought thus far have been initiated by either the holder of the conservation easement or the owner of the burdened parcel of land"); *see, e.g.*, Bennett v. Comm'r of Food & Agric., 576 N.E.2d 1365, 1365 (Mass. 1991) (deciding an action brought by the owner of land restricted by a conservation easement seeking authorization to construct a residence on the property); Chatham Conservation Found. v. Farber, 779 N.E.2d 134, 134 (Mass. App. Ct. 2002) (deciding an action brought by the holder of an easement seeking enforcement of the easement).

waiver of the defense.[291] Again, including in the conservation easement deed a waiver of state sovereign immunity in easement enforcement actions would nullify the tedious nature of that argument.[292]

In sum, a state that wishes to use a conservation easement to stop a natural gas pipeline could modify its conservation easement laws to allow the imposition of affirmative obligations on the governmental holder. A state could then include express language obligating the state holder of the easement to assert sovereign immunity as a defense to an NGA condemnation action, identifying the siting of a natural gas pipeline as inconsistent with the purpose of the conservation easement, waiving the state's sovereign immunity in the context of an enforcement action, and providing a qualified interest in the easement to a third party capable of holding the state accountable to diligently defend the easement in any condemnation action. The more of these suggestions a state adopts, the stronger that state's chances at stopping a natural gas pipeline with a conservation easement per *PennEast* will be.

CONCLUSION

This Note has explained how states can utilize the Third Circuit's decision in *PennEast* to stop the siting of a natural gas pipeline. A state can do so if it obtains (or already has) a property interest in the land over which the pipeline is proposed to be built and invokes sovereign immunity as a defense to a private actor's exercise of federal eminent domain power delegated under the NGA. States can obtain an interest in land in the way of a proposed pipeline through a conservation easement. A conservation easement will successfully stop a pipeline only if the qualified holder of the easement is a governmental body that is an arm of the state for sovereign immunity purposes. The structure and efficacy of a pipeline-stopping conservation easement are different in each state due to the mosaic of state statutory law enacting and governing conservation easements, but a state can bolster its ability to stop a natural gas pipeline with a conservation easement by enacting legislation that adopts the UCEA or similar language.

The legal framework for the siting of natural gas pipelines is one of many statutory schemes that evolved from and through the complicated and conflict-filled history of natural resource regulation in the

291. *See* Lapides v. Bd. of Regents, 535 U.S. 613, 622–23 (2002) (holding that a state may not raise sovereign immunity as a defense after waiving it by litigating the merits of case).

292. *See* Bohannan, *supra* note 275, at 300–02 (arguing existing case law allows states to voluntarily waive their sovereign immunity via contract with private parties).

United States' federalist system. The NGA conveys significant power to the federal government at the expense of the states and has done so for the past eighty years. Private actors had previously been able to utilize federal eminent domain power delegated under the NGA to condemn private and state land for natural gas infrastructure—but no more. The Third Circuit's holding in *PennEast* is a significant shift in the balance of control over natural gas siting towards the states. States that wish to halt a natural gas pipeline now have a means to do so wholly independent from the federal approval and permitting process. Whether states act to utilize that power remains to be seen.

APPENDIX: STATE CONSERVATION EASEMENT LAWS & *PENNEAST* POTENTIAL

The following Appendix contains a survey structured around the four general requirements for the creation of a conservation easement: (1) the transfer of a nonpossessory real property interest (2) to a governmental body that is a qualified conservation easement holder (3) for a specified purpose (4) for a certain period. Every state in the nation has laws enabling the conveyance of a conservation easement (or a similar interest in land) to the state that satisfies these requirements and can be used to stop a natural gas pipeline per *PennEast*.

However, as mentioned above, not all state conservation easement laws look alike. Most states have adopted the UCEA in some form, but many states have not. This Appendix lists the states that have adopted some form of the UCEA first. Those states can satisfy the four general requirements for the creation of a conservation easement per *PennEast* in the same way as discussed above.[293] This Appendix lists the states that have not adopted any form of the UCEA second. Despite not adopting the UCEA, each of these states have laws that allow the conveyance of a property interest to the state that would function to stop a natural gas pipeline per *PennEast*. This Appendix refers to those laws and explains how they could function to stop a pipeline should the state wish to do so.

This survey is not a comprehensive guide to each state's land conservation laws. Most, if not all, states have additional land conservation legislation beyond conservation-easement-enabling statutes. This Appendix merely lists the applicable laws a state could utilize to stop a natural gas pipeline per *PennEast*.

293. *See* discussion *supra* Part III.B.

A. STATES ADOPTING SOME FORM OF THE UCEA:

The states adopting some form of the UCEA are: Alabama,[294] Alaska,[295] Arizona,[296] Arkansas,[297] Delaware,[298] Florida,[299] Georgia,[300] Idaho,[301] Indiana,[302] Kansas,[303] Kentucky,[304] Louisiana,[305] Maine,[306] Minnesota,[307] Mississippi,[308] Missouri,[309] Nevada,[310] Oklahoma,[311] Oregon,[312] Pennsylvania,[313] South Carolina,[314] South Dakota,[315] Texas,[316] Virginia,[317] West Virginia,[318] Wisconsin,[319] and Wyoming.[320] These states could use a conservation easement to stop the siting of a natural gas pipeline as explained above.

B. STATES NOT ADOPTING ANY FORM OF THE UCEA:

The states not adopting any form of the UCEA fall into two groups: states that have conservation easement laws that track the four general requirements in non-UCEA language and states that do not. The states with non-UCEA-but-similar conservation easement

294. ALA. CODE §§ 35-18-1 to -6, 35-19-1 to -14 (2020).
295. ALASKA STAT. ANN. §§ 34.17.010–.060 (West 2020).
296. ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (2020).
297. ARK. CODE ANN. §§ 15-20-401 to -410 (West 2020).
298. DEL. CODE ANN. tit. 7, §§ 6901–6905 (West 2019).
299. FLA. STAT. ANN. § 704.06 (West 2020).
300. GA. CODE ANN. §§ 44-10-1 to -8 (West 2020).
301. IDAHO CODE ANN. §§ 55-2101 to -2109 (West 2020).
302. IND. CODE ANN. §§ 32-23-5-1 to -8 (West 2020).
303. KAN. STAT. ANN. §§ 58-3810 to -3816 (West 2020).
304. KY. REV. STAT. ANN. §§ 382.800–.860 (West 2020).
305. LA. STAT. ANN. §§ 9:1271–1276 (2019).
306. ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-C (West 2019).
307. MINN. STAT. ANN. §§ 84C.01–.05 (West 2020).
308. MISS. CODE. ANN. §§ 89-19-1 to -15 (West 2020).
309. MO. ANN. STAT. § 442.014 (West 2020).
310. NEV. REV. STAT. ANN. §§ 111.390–.440 (West 2020).
311. OKLA. STAT. ANN. tit. 60, §§ 49.1–.8 (West 2020).
312. OR. REV. STAT. ANN. §§ 271.715–.795 (West 2020).
313. 32 PA. STAT. AND CONS. STAT. §§ 5051–5059 (West 2020).
314. S.C. CODE ANN. §§ 27-8-10 to -110 (2020).
315. S.D. CODIFIED LAWS §§ 1-19B-56 to -60 (2020).
316. TEX. NAT. RES. CODE ANN. §§ 183.001–.006 (West 2019).
317. VA. CODE ANN. §§ 10.1-1009 to -1016, -1700 to -1705 (West 2020).
318. W. VA. CODE ANN. §§ 20-12-1 to -8 (West 2020).
319. WIS. STAT. ANN. § 700.40 (West 2020).
320. WYO. STAT. ANN. §§ 34-1-201 to -207 (West 2020).

laws are: California,[321] Colorado,[322] Connecticut,[323] Hawaii,[324] Iowa,[325] Maryland,[326] Massachusetts,[327] Michigan,[328] Montana,[329] Nebraska,[330] New Hampshire,[331] New York,[332] North Carolina,[333] Ohio,[334] Rhode Island,[335] Tennessee,[336] Utah,[337] Vermont,[338] and Washington.[339] These states could use a conservation easement to stop the siting of a natural gas pipeline by tracking the respective state law requirement with the corresponding general conservation easement requirement.

There are four states that do not have conservation easement laws that readily correspond to the four general requirements found in the UCEA. Those states are listed below along with a short discussion of how the existing laws can be utilized to stop the siting of a natural gas pipeline per *PennEast*.

Illinois[340]—Illinois recently enacted legislation modeled on the UCEA. That legislation took effect in July of 2019. However, the UCEA-modeled legislation only applies to lands undergoing pollution remediation efforts under specific state and federal laws. It did not repeal the prior conservation easement laws in Illinois. Thus, there are currently two frameworks for the creation of a conservation easement-like property interest in Illinois: the Real Property Conservation Rights Act, which was enacted in 1977 and allows the creation of "conservation rights" in property, and the Uniform Environmental Covenants Act, which took effect in 2019 and is limited to pollution

321. CAL. CIV. CODE §§ 815–816 (West 2020).
322. COLO. REV. STAT. ANN. §§ 38-30.5-101 to -111 (West 2020).
323. CONN. GEN. STAT. ANN. §§ 47-42a to -42f (West 2020).
324. HAW. REV. STAT. ANN. §§ 198-1 to -6 (West 2020).
325. IOWA CODE ANN. §§ 457A.1–.8 (West 2020).
326. MD. CODE ANN., REAL PROP. § 2-118 (West 2020).
327. MASS. GEN. LAWS ANN. ch. 184, § 31 (West 2020).
328. MICH. COMP. LAWS ANN. §§ 324.2140–.2144 (West 2020).
329. MONT. CODE ANN. §§ 76-6-201 to -212 (West 2019).
330. NEB. REV. STAT. ANN. §§ 76-2,111–118 (West 2020).
331. N.H. REV. STAT. ANN. §§ 477:45–47 (2020).
332. N.Y. ENV'T CONSERV. LAW §§ 49-0301 to -0311 (McKinney 2020).
333. N.C. GEN. STAT. ANN. §§ 121-34 to -42 (West 2020).
334. OHIO REV. CODE ANN. §§ 5301.67–.70 (West 2019).
335. 34 R.I. GEN. LAWS ANN. §§ 34-39-1 to -6 (West 2020).
336. TENN. CODE ANN. §§ 66-9-301 to -309 (West 2020).
337. UTAH CODE ANN. §§ 57-18-1 to -7 (West 2020).
338. VT. STAT. ANN. tit. 10, §§ 6301–6311 (West 2020).
339. WASH. REV. CODE ANN. § 64.04.130 (West 2020).
340. Real Property Conservation Rights Act, 765 ILL. COMP. STAT. ANN. 120/1–6 (West 2019); Uniform Environmental Covenants Act, 765 ILL. COMP. STAT. ANN. 122/1–15 (West 2019).

scenarios. The Real Property Conservation Rights Act creates a "conservation right" and is not modeled on the UCEA. Despite this, Illinois law authorizes the conveyance of a property interest to a state governmental body through such a "conservation right." Thus, Illinois could use a conservation right under the Real Property Conservation Rights Act to stop the siting of a natural gas pipeline per *PennEast*. The Uniform Environmental Covenants Act creates an "environmental covenant" and is modeled on the UCEA. The Act authorizes the conveyance of a property interest to a state governmental body through such a "conservation right," but is limited to specific scenarios of pollution remediation. Thus, Illinois could use an environmental covenant under the Uniform Environmental Covenants Act to stop the siting of a natural gas pipeline per *PennEast* only on land subject to such a pollution remediation.

New Jersey[341]—New Jersey has three general conservation schemes for land use. The New Jersey Green Acres Land Acquisition Act of 1961, the New Jersey Conservation Restriction and Historic Preservation Restriction Act, and the Garden State Preservation Trust Act. This Note focuses on the New Jersey Conservation Restriction and Historic Preservation Restriction Act. The New Jersey Conservation Restriction and Historic Preservation Restriction Act is not modeled on the UCEA. Despite this, New Jersey law authorizes the conveyance of a property interest to a state governmental body through a conservation restriction or a historic preservation restriction. Thus, New Jersey could (again) use a conservation restriction to stop the siting of a natural gas pipeline per *PennEast*.

New Mexico[342]—New Mexico has two relevant laws: the Land Use Easement Act and the Land Conservation Incentives Act. New Mexico's Land Use Easement Act is not modeled on the UCEA and terms such an easement a "land use easement." Importantly, the Land Use Easement Act does not allow the conveyance of a land use easement to a governmental body or entity. Thus, New Mexico could not use a land use easement conveyed purely under the Land Use Easement Act to stop the siting of a natural gas pipeline per *PennEast*. New Mexico's Land Conservation Incentives Act is not modeled on the UCEA. However, it does allow the conveyance of a nonpossessory property

341. New Jersey Green Acres Land Acquisition Act of 1961, N.J. STAT. ANN. §§ 13:8A-1 to -18 (West 2020); New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J. STAT. ANN. §§ 13:8B-1 to -8 (West 2020); Garden State Preservation Trust Act, N.J. STAT. ANN. §§ 13:8C-1 to -60 (West 2020).

342. Land Use Easement Act, N.M. STAT. ANN. §§ 47-12-1 to -6 (West 2020); Land Conservation Incentives Act, N.M. STAT. ANN. §§ 75-9-1 to -6 (West 2020).

interest (including a land use easement) to a governmental body or entity. Despite the somewhat contradictory nature of New Mexico's conservation easement laws, the NCED contains data showing several such easements held by the state.[343] Thus, New Mexico could use a land use easement or other nonpossessory property interest conveyed under the Land Conservation Incentives Act to stop the siting of a natural gas pipeline per *PennEast*.

North Dakota[344]—North Dakota's easement and servitude laws contain the narrowest scope of valid purposes in the nation and are silent with respect to what kind of entity or person can hold an easement or servitude. Despite this, North Dakota law provides some rights allowed to be conveyed via easement or servitude that overlap with conservation principles and does not expressly exclude a state governmental body from holding an easement or servitude. The NCED contains data showing several easements held by the state.[345] Thus, North Dakota could use a conservation restriction to stop the siting of a natural gas pipeline per *PennEast*.

343. *See Advanced Easement Search*, *supra* note 265 (narrow search query to "Location (Primary State)" and "New Mexico," and then narrow additional searches to "Easement Holder Types" and "State").

344. N.D. CENT. CODE ANN. §§ 47-05-01 to -12 (West 2020).

345. *See Advanced Easement Search*, *supra* note 265 (narrow search query to "Location (Primary State)" and "North Dakota," and then narrow additional searches to "Easement Holder Types" and "State").