

INVASION!
Eminent Domain and Takings Update

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Today’s Presenters



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Overview

- **Case Law**
  - United States Supreme Court
  - Circuit Courts
  - Scattered Cases
- **Legislation**
  - Recent Trends

Themes and Trends

- Overall, increased attention on eminent domain and takings matters.
  - No longer the “poor relation” of the bill of rights.

- Case law and legislation increasingly favorable to property owners.

- Legislation impacting the role of appraisers and valuation opinions

CASE LAW



Cedar Point Nursery v. Hassid, 594 U.S. ___ (2021)

The Big One.

Background:

- A statute granted union representatives access to private agricultural property up to three hours a day, 120 days a year to recruit new union members.
- At Cedar Point Nursery, union representatives entered the facility and used bullhorns to inform the workers that they should join the union, thereby disturbing the facility's operations. Notably, the union representatives did not provide the proper notice required under the statute.
- At the Fowler Packing Company, union organizers also attempted to gain access, but were unsuccessful.



Issue:

- Did the union access regulation constitute a *per se* physical taking of private property?

- Does an uncompensated appropriation of an easement that is limited in time (3 hours a day, 120 days a year) effect a per se taking?

District Court and 9th Circuit:

- District Court dismissed, on the grounds that this was not a per se taking, but rather should be analyzed as a regulatory taking and judged the Penn Central test.

- 9th Circuit affirmed the dismissal.

U.S. Supreme Court:

Holding:

- The union access regulation appropriated a right to invade the growers' property and therefore the statute itself constituted a per se taking.
- Government action that physically appropriates property is no less a physical taking because it arises from regulation.
- The issue of duration only bears on the amount of compensation, not on whether or not there has been an invasion.

Cedar Point Nursery – Right to Exclude

- Increased focus on the right to exclude others from land.
  - Hence, “Invasion.”
  - Where property is subject to any invasion, Court seems inclined to find a taking.

Cedar Point Nursery: Take-Aways

- This expansive view of what constitutes a per se taking is a massive victory for property owners.

- It also calls into question the government's ability to regulate private property.
  - When a regulation allows entry into land – but ties that land to a particular use, what result?

  - *Sisolak v. McCarran*: Nevada case from 2010 finding *regulation permitting* overflights within 500 feet to be a taking, even in absence of actual invasion.

PennEast Pipeline Company, LLC v. New Jersey, 549 U.S. ___ (2021)

Background:

- Gas companies building interstate pipelines require a certificate of public convenience and necessity from the Federal Energy Regulatory Commission to use eminent domain.
- PennEast Pipeline Co. was granted a certificate and sought to acquire land that was owned, in part, by the State of New Jersey.
- New Jersey sought to dismiss the complaint on the grounds of sovereign immunity – meaning property could not be condemned from non-consenting states.



Issue:

- Can a private party exercise the federal eminent domain power to seize land that belongs to a state without violating the Eleventh Amendment?

- Can New Jersey assert sovereign immunity to the condemnation suit?

3rd Circuit:

- The 3rd Circuit determined that certificate holders could not condemn property from non-consenting states.

- Reasoning: While the federal government can delegate its eminent domain power to private parties, the 3rd Circuit did not believe the federal government could also delegate its exemption for state sovereign immunity. Meaning, states did not automatically give consent to be sued.

U.S. Supreme Court:

Holding:

- State sovereign immunity cannot bar a condemnation suit when the condemning entity has been granted the federal eminent domain power via a certificate of public convenience and necessity.

- States consented to the federal eminent domain power upon their ratification of the Constitution and thus waived their sovereign immunity protection.

PennEast Pipeline: Take-Aways

- This case discussed in detail the source and scope of the federal eminent domain power, including its history, its ability to be delegated, and its superior position to state eminent domain power.

- This case also establishes precedential value for other pipeline projects that will need to exercise the federal eminent domain power to build interstate pipelines.

Pakdel

- But first, a little background.

Williamson

- The old rule was set forth by a case called Williamson County.
- In Williamson, the United States Supreme Court had interpreted takings law in such a way that there was no violation of the 5th Amendment until a government (1) took property and (2) refused to pay for it AND the refusal was backed by the courts of that state.
  - So, Reno refuses to let you develop, you say that it's a taking, you have to first litigate in the State Court to see if the state would decide to pay you.

San Remo

- BUT
- If you obtained a final judgment, the United States Supreme Court also said that the final judgment was binding.

- So, you could not go to Federal Court without litigating in State Court, but if you litigated in State Court, you were done.

- This was called by some the San Remo Trap.

- Now, if you think the law ought to be that every violation of a federal constitutional rights (i.e. the 5th Amendment) should be hearable by a federal court, this *Williamson-San Remo* catch-22 was a problem.

- Of course, the door to the STATE courthouse was open.

Knick

- In 2019, in a case called Knick v. Township of Scott, the United States Supreme Court overruled the state court exhaustion requirement.
- Instead, once property is taken and the state has not provided compensation, a Section 1983 claim is ripe.
- Knick did leave in place the requirement that the government action be final. That is in essence that without some final action, there has been no taking.

Main takeaway

- Knick ends the San Reno trap by expressly overruling a part of Williamson County.
  - Important to remember which part of the trap was eliminated.
  - Litigating in state court first is likely still a bar to a subsequent federal suit.

Issues left post-Knick

- There had been some question after Knick as to the extent of the final decision rule.

- Was a person required to run down every iteration of a proposed plan?

- If the agency that had denied the landowners plans had an administrative appeals process, must the landowner first exhaust their administrative remedies in order to arrive at a “final” decision?

Pakdel

- Last summer we got a clarifying answer, and I quote: “The finality requirement is relatively modest. All a plaintiff must show is that ‘there [is] no question . . . about how the “regulations at issue apply to the particular land in question.”’” Very good, it’s all perfectly clear now.

Pakdel

- In *Pakdel v. City and County of San Francisco*, the Pakdels wanted to convert a rental unit into a private residence (by dividing a building owned as tenants-in-common into condominiums). In order to accomplish this change, the City required that the Pakdels give their tenant a lifetime lease.
  - (i.e. it subjected the Pakdels' property to an invasion by unwanted people)

- The Pakdels agreed, and the City approved their conversion. But then the Pakdels requested to get out of their agreed to condition, and the City refused. The Pakdels could have gone through an administrative appeal, but they did not.
  - Question – why agree and then renege? Why not refuse and sue there? Because now we know the exact problem.

Pakdel

- The Supreme Court explained that the administrative appeal in the Pakdels' case was not part of the final decision process – the flat refusal to let the Pakdels out of their deal was the final decision.

- The Supreme Court did note that in other cases, if an agency has an appeal process that is more of a review process that allows the agency to alter its regulation – then a landowner likely has to follow that process to its end.

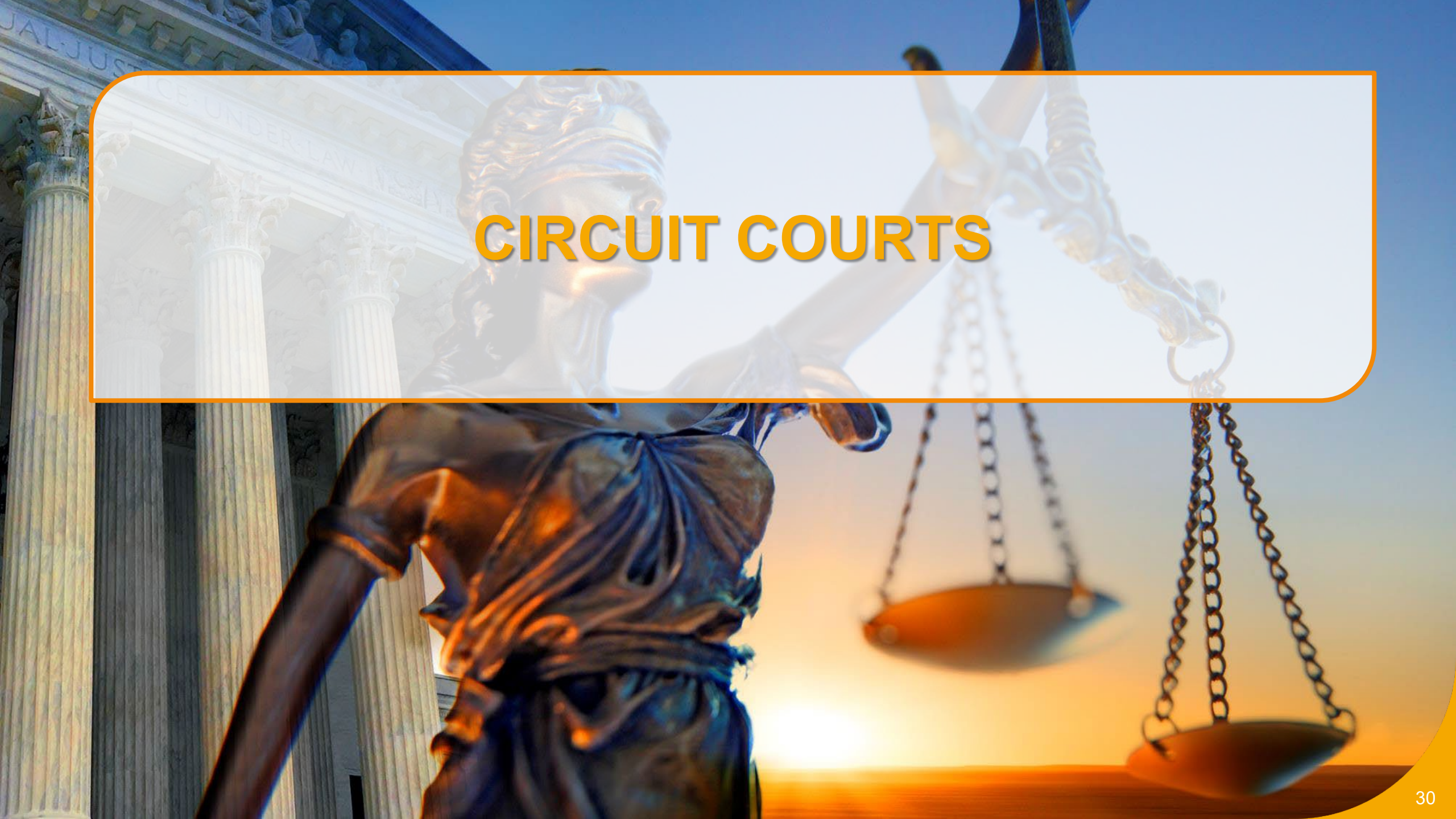
- Likewise, Congress could add additional exhaustion requirements to § 1983, and if Congress did so, a landowner would have to follow those requirements. But, Congress has not, and in the Pakdels' case, the City's decision was clearly final. As such, the Pakdels could proceed directly to Court.

Pakdel

- The take-away here is understanding that where and when a “final decision” is made can be a moving target.
- While the Pakdels’ case was truly fairly straightforward, how might this analysis apply in zoning matters? Downzoning matters? Variance or Special Permit Applications?
- How does this apply to eviction moratoria?

Pakdel v. City of San Francisco

- What is final?
- This is a difficult case for cities.
- Supreme Court decision: When government has reached *de facto* “conclusive” decision, finality is reached.



CIRCUIT COURTS

Golf Vill. North, LLC v. City of Powell, 2021 U.S. App. LEXIS 28845 (6th Cir.)

- Developer property owner filed an inverse condemnation suit alleging a taking by the City building an entrance to a new municipal park on the property owner's private street system and refusing to appropriate certain private streets that the City intends the public to use.
- Later, the City filed a state quick take action to acquire the property for a public use.
- The City moved to dismiss the federal suit, which was granted.



Issue:

- Whether the property owner pleaded sufficient facts that the City appropriated a right of access for the public to two of the streets within the community.

6th Circuit:

Holding

- Dismissal of the federal suit was proper because plaintiff failed to allege a violation of the right to exclude. They did not allege the City appropriated, for members of the public, a right of access to their property. Failed to allege they could no longer exclude the public from the property.
- The property owner needed to demonstrate that the City authorized and licensed the public's use of the streets and therefore deprived the property owner of the right to exclude.

RLR Invs., LLC v. City of Pigeon Forge, 2021 U.S. App. LEXIS 20681 (2021 WL 2932686) (6th Cir.)

- The City decided to construct a riverside pedestrian walkway and initiated condemnation proceedings. The City applied for an order of possession, which was granted.
- The property owner filed a complaint in federal court and alleged that the Tennessee state court opinion was unconstitutional and asked for the federal court to enjoin the state court's order. The Federal District court determined there was no subject-matter jurisdiction under the *Rooker-Feldman* doctrine.



Issue:

- Does the Rooker-Feldman doctrine bar federal actions commenced after the grant of interlocutory relief in a state court proceeding?
  - Rooker-Feldman: Federal courts (outside of U.S. Supreme Court) cannot become courts of appeal for state court decisions.
  - A state court appellant has to find a state court remedy, or obtain relief from the U.S. Supreme Court.

6th Circuit:

Holding

- Rooker-Feldman prohibits the federal court from hearing a suit based on an interlocutory order, not just final orders.
- Rooker-Feldman applies to cases brought by “state-court losers” complaining of injuries caused by a state-court judgment rendered before the federal district court proceedings commenced.

L.K.L. Assocs. v. Union Pac. R.R. Co., 2021 U.S. App. LEXIS 33429 (2021 WL 5227586) (10th Cir.)

- Union Pacific (UP) possessed an easement granted under the General Railroad Right-of-Way Act of 1875 over land owned in fee by a separate property owner. UP entered into a lease with the property owner and its lessee because operations of the lessee intruded into the right of way.
- A later Supreme Court opinion stated railroad rights of way, like UP's, are a nonpossessory easement and the property owner and lessee stopped paying rent to UP. The property owner and lessee filed suit against UP to have the leases rescinded and receive restitution of rent already paid.



Issue:

- The primary issue was the extent of rights granted to UP under the railroad right of way easement – specifically, whether the easement granted UP exclusive rights and whether this permitted UP to enter into leases for uses/encroachments into the right of way.

    - Traditional rule is that easements cannot be leased.

10th Circuit:

Holding:

- The court held the grant of easement for a railroad right of way under the Act of 1875 allows Union Pacific to exclude everyone, including the grantor and fee owner;
- the leases were invalid because neither of the leases or the underlying business furthered a railroad purpose;
- the rescission claims were time-barred; and
- the railroad could exercise its right to exclude without identifying a particular purpose as exclusion from the railroad corridor is itself a railroad purpose.

Analysis:

- UP had the right to an exclusive easement and that it could make other uses of the ROW so long as such uses were for railroad purposes.
- The leases with the property owner and lessee were more about accommodating the existing uses than for a railroad purpose.
- Therefore, the leases were invalid because they were not for incidental railroad uses.

- However, the court concluded that the easement rights to UP were exclusive, such that UP could enforce a clear right of way and prohibit any uses.

- Thus, while the property owner and lessee had the leases invalidated as they requested, the claims for back rent were time-barred, and UP could actually demand that they remove all encroachments within the ROW.

Ballinger v. City of Oakland, 2022 U.S. App. LEXIS 2862 (9th Cir.)

- Property owners rented out home. Later, they planned to move back in and "evicted" the tenants. The City of Oakland municipal code required landlords to pay the tenant a relocation fee when the tenant is evicted under certain circumstances.
- Property owners argued this was a physical taking of their money for a private purpose and without just compensation. Alternatively, they argued that it was an unconstitutional exaction.
- The district court dismissed the case for failure to state a claim on the grounds that the relocation fee is a requirement sourced in the City's legislation and that is was not the result of a property-specific administrative determination or quasi-judicial adjudication.



Issue:

- Was the relocation payment an unconstitutional taking or an unconstitutional exaction?

9th Circuit:

Holding:

- This was not a physical taking of the money or an exaction.
  - The City has the power to regulate the actions of a landlord, and this was just another action, particularly as the property owners chose to enter the rental market willingly. Ninth Circuit held that money can be the subject of a taking. However, that money must be identified as a specific fund of money.
  - The Court determined this was not an unconstitutional exaction as the monetary relocation fee was triggered by the property owners' actions, not a burden on the interest in the property. It does not matter who imposes the exaction (administrative v. legislative), but *what* the exaction does.

United States v. Cox, 2022 U.A. App. LEXIS 4636 (9th Cir.)

- In an eminent domain action, the property owners asserted that the district court erred in awarding the amount of just compensation for the acquisition of a mine because it did not adopt the property owner's proposed use of the mine.
- They also argued that the district court erred by excluding certain survey evidence.



Issue:

- Did the district court err when it declined to accept the property owner's argument for a proposed use of the property and did it err when it excluded certain surveys?

9th Circuit:

Holding:

- The district court did not err when it concluded that the property owner's proposed large-scale use for the mine was too speculative to be considered when calculating the compensation value. The property owners did not meet their burden of demonstrating that the proposed use was reasonably probable.
- As for the survey exclusion, the district court did not err. The property owners had offered insufficient evidence that the surveys in question were designed and conducted by individuals that were sufficiently qualified to render those surveys reliable. The 9th circuit affirmed.

Barber v. Charter Twp. Of Springfield, 2022 U.S. App. LEXIS 9622 (6th Cir.)

- Plaintiff sought a preliminary injunction to prevent the town, county, and parks and rec department from removing a dam near her property.
- She alleged the removal of the dam amounted to an unconstitutional taking and a trespass.
- Defendants filed a motion on the pleadings, alleging her claims were not ripe and she lacked standing, which was granted.



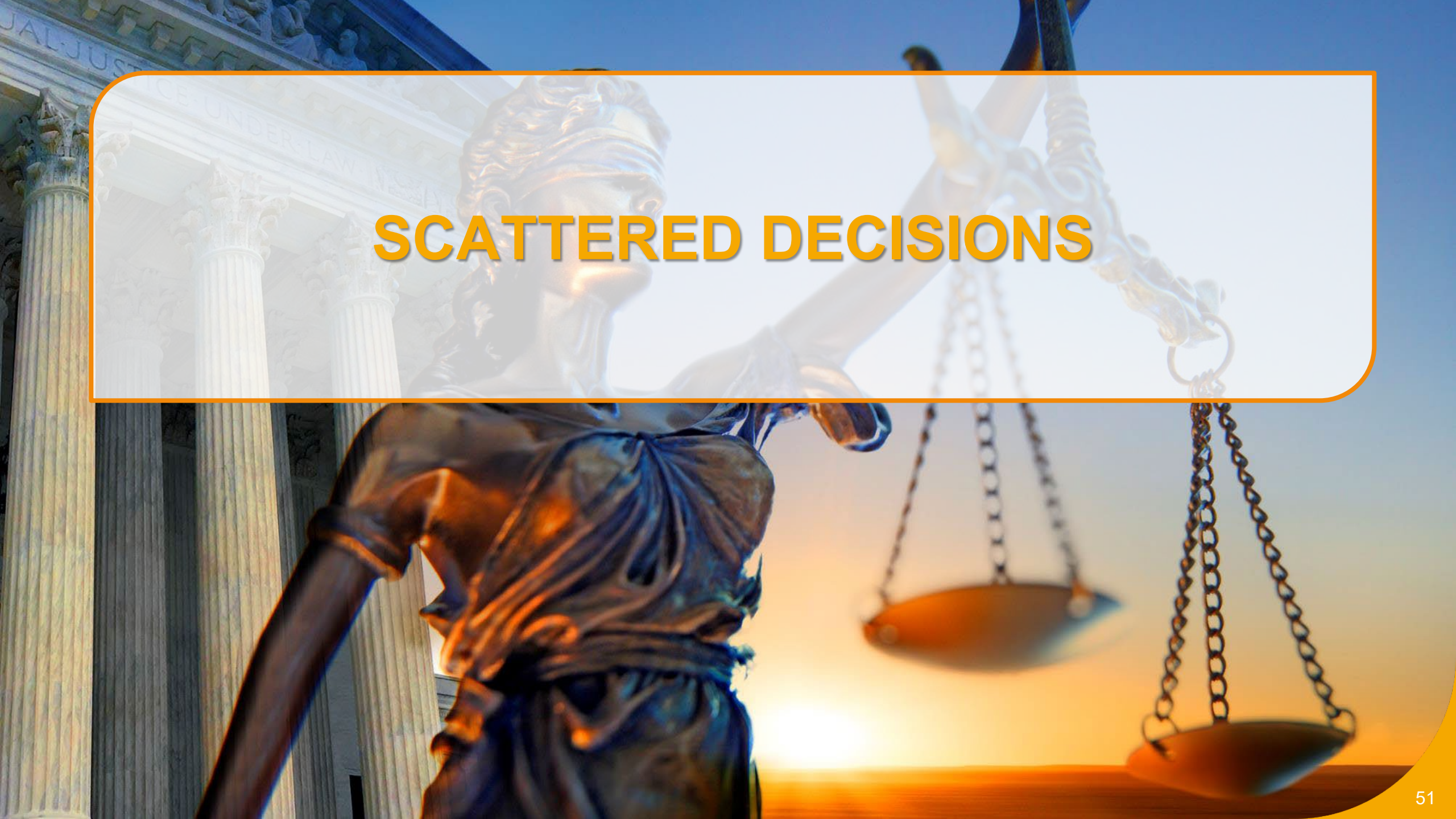
Issue:

- Whether the court had the power to hear her claims (not whether the claims would succeed).

6th Circuit

Holding:

- She should have been permitted to have her claims heard.
  - Based on the recent Cedar Point Nursery case, a claim for injunctive relief is ripe if the government has reached a final decision that will enable a future physical taking.
  - The property owner claimed a regulatory taking (decision to remove dam) and then a physical taking (removal of dam). The court concluded that the final decision to remove the dam had been made and that plaintiffs may sue for injunctive relief even before a physical taking has happened.
  - The property owner's claims were ripe, she had standing, and the matter was remanded to the district court to further consider whether she was entitled to injunctive relief.



SCATTERED DECISIONS

In re Condemnation of Powell, 2021 Pa. Commw. LEXIS 505 (2021 WL 2793374)

- A mobile emergency medical department authority attempted to condemn property for the installation of electric transmission lines to support a neighboring building under construction.
- The property owner argued that the authority did not have the power of eminent domain to condemn for electrical transmission lines and the description of the property was inadequate to determine if it was reasonably required for a public purpose.



Issue:

- Whether the authority had the power of eminent domain to condemn for the specific purposes of electrical transmission lines, and if the description of the property used was adequate.

Pennsylvania Commonwealth Court

Holding:

- A statute that gives some power of eminent domain to the authority must be strictly construed and a strict construction indicated the authority did not have the power of eminent domain for the purpose of erecting electric power lines.
- The property description attached to the declaration makes it impossible for the property owner to determine where the easement to be condemned in located, and whether the taking was actually an easement or a full take. As such, the description was inadequate to determine whether the land taken is only for the extent reasonably required for the public purpose.

North Dakota

- North Dakota Landowners Ass'n v. North Dakota

  August 4, 2022 (2022 ND 150)

Statute depriving surface owners of right to exclude oil and gas operators from subterranean "pore" space is a taking.

Again emphasizing right-to-exclude/invasion paradigm.

California (Fed.)

- DiVittorio v. County of Santa Clara, 21-CV-03501
- Landowners filed an application to develop RV park.
- County identified deficiencies in the application, in that it did not have sufficient information for full review.
- Landowners re-submitted, and again deemed incomplete.
- Landowners sought administrative review and lost.
- Sued for 42 USC 1983 (i.e. Knick/Pakdel).
- District Court concluded incomplete application was not enough under Pakdel standard.
  - Without a complete application—no final decision.
  - Appealed, but abandoned. 2022 WL 4103276


LEGISLATION

Trends

- Property-Friendly Legislation
- Possible State Constitutional Amendments
- Legislation Impacting Appraisers & Valuation
- Removal of Local Control/“NIMBY”

Property-Owner Friendly Legislation

- **2021 TX H.B. 4658:** Revises rules on rights of entry for survey purposes, including requirements for notice and the scope of the right of entry.
- **2022 IN H.B. 1262:** Indiana adopted legislation that gives increased notice to billboard sign owners before a condemnation action can be filed.
- **2022 VA S.B. 9**: Would allow for the potential recovery of attorneys' fees in an eminent domain action if judgment is not paid to a property owner within a specified period.

State Constitutional Changes

- **North Carolina:** Amend the state constitution to prohibit condemnation of private property except for public use and requires the payment of just compensation for the property taken in an amount to be determined by jury trial, if requested by any party (2021 NC H.B. 271).
  - November 2022 ballot
- **Massachusetts:** Amend the state constitution to make the taking of land or interests by eminent domain for private commercial or economic development not a public use (2021 MA H.B. 82).

State Constitutional Changes Cont.

- **New Jersey:** Proposes a constitutional amendment to limit the exercise of eminent domain to acquisition of land for essential public purposes. This amendment would preclude the taking of property to eliminate blight, which is currently a permissible use of eminent domain in New Jersey. The purpose of this proposed amendment is to protect New Jersey residents from the effects of the *Kelo* decision. (2022 NJ S.C.R. 104.)

Legislation Impacting Appraisers

- Legislation that could impact the role of appraisers and increase the demands on appraisers
  - **2021 TX H.B. 2730:** Texas revised its rules pertaining to the initial condemnation offer, including information about damages and the appraisal.
  - **2022 UT H.B. 357:** Utah recently modified its requirements for the final offer before an eminent domain trial and now requires an updated appraisal before the offer is made.

Legislation Impacting Valuation

- **2022 VA S.B. 666**: In Virginia, a bill impacting lost profits and lost access in eminent domain was recently returned to the Senate with the governor's recommendations.
  - If enacted, this bill will modify the definition of "lost profits" for eminent domain valuation.
  - The revised definition would prohibit claims for lost profits that stem from temporary takings that last for fewer than seven days.
  - Thus, where there are short-term interruptions to a business, say for a small repair project or a driveway replacement, there would not be liability for lost profits.

Legislation Impacting Valuation Cont.

- **2022 MO H.B. 2005:** In Missouri, a recently stalled bill would have impacted the amount of just compensation for agricultural and horticultural property.
- In this instance, where utility companies seek to condemn agricultural or horticultural land, just compensation for such land would have been classified based on categories. For the most productive land category, the just compensation would begin with 150% of the fair market value of the land.

Legislation Impacting Valuation Cont.

- **2022 CO S.B. 208:** In Colorado revisions on how property with conservation easements are valued.
  - If property encumbered by a conservation easement in gross is condemned, just compensation must be determined based on the value of the property as if unencumbered by the conservation easement in gross and must be allocated between the fee owner and the holder of the conservation easement based upon the value of their respective interests in the property.

Importance of Paying Attention to Legislation Impacting Valuation

- New rules can be enacted relatively quickly and with little fanfare, but there can be substantial impacts to how valuations are done.
- The law could change what is compensable, change definitions or valuation methods, or impose additional requirements.
- If a valuation opinion does not follow statutory rules, the opinion may lose credibility or be excluded altogether.



INFRASTRUCTURE UPDATE

Overview: Infrastructure Bill (P.L. 117-58)

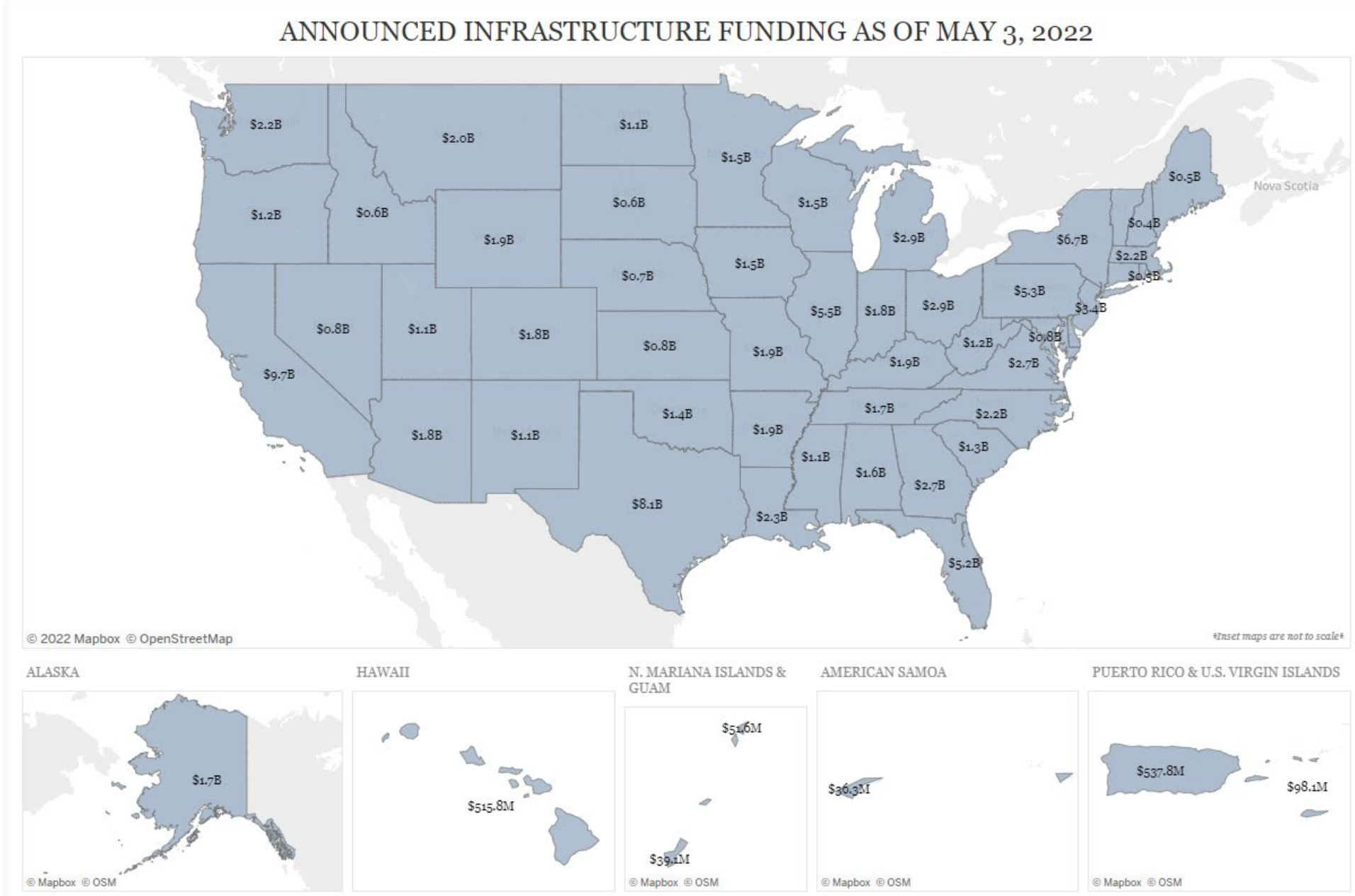
- Provides for $1.2 trillion in federal spending over the next five years.
- Funding will be allocated to roads, bridges, major infrastructure projects, transit, rail, broadband upgrades, airports, ports, waterways, electric vehicles, improving power and water systems, and environmental remediation.
- Some funds are to be allocated to provide existing programs with higher funding levels in the near term, while other parts of the funds will be allocated to create entirely new programs.

Where has funding been received?

- As of 2022:

- $110 billion in funding have been announced and are heading to states, Tribes, territories, and local governments.

- Over 4,300 specific projects have been identified for funding.



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BOTTOM LINE

- The *Kelo* decision and the associated public awareness of eminent domain occurred 17 years ago, in 2005.
  - Post-*Kelo* backlash was immediate – but ran into a recession.

- Now, with the Infrastructure Bill, eminent domain is once again rising in the public's awareness.
  - With massive investment in infrastructure – the post-*Kelo* movement is finally coming into the fore.

- Recent case law and legislation are likely to impact the eminent domain and right-of-way industries for many years to come.

QUESTIONS?

Thank you!



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….unless I'm right. Then probably people wouldn't mind

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