

Eminent Domain 2021 Year in Review

Abstract

2021 brought multiple developments on the eminent domain front, including the special occasion when the US Supreme Court heard two takings cases. In addition, 2021 saw passage of the Infrastructure Investment and Jobs Act, which aims to provide federal funding for infrastructure projects for many years to come. This article highlights the key 2021 eminent domain court decisions by the Supreme Court and provides a summary of the 2021 federal legislation; both will impact right-of-way consultants, appraisers, and real estate practitioners. In doing so, it makes note of new case law and upcoming projects—both of which will likely shape this industry for many years to come.

The power of eminent domain derives from the US Constitution and from various state constitutions.¹ Thus, the heart of this power is constitutionally granted, but the outer bounds of such power is determined by the courts. Every takings case defines and contextualizes the bounds of the eminent domain power. In 2021, eminent domain and right-of-way professionals received two decisions from the US Supreme Court. These two cases addressed (1) issues pertaining to per se takings, and (2) the reach of the federal eminent domain power against a state of the United States.

While case law plays a primary role in shaping the rules by which eminent domain is conducted, ultimately the power of eminent domain is needed to further the public good through public projects. The passage of the Infrastructure Investment and Jobs Act² in 2021 highlighted the fundamental purpose of the eminent domain power as a mechanism necessary to carry out the development of public projects. The infrastructure legislation is a response to the aging infrastructure in the United States and other gaps in meeting the needs of citizens. While the infrastructure act is not an exercise of eminent domain itself, it is a source of funding for much-

needed development within the county—development that is unlikely to come to fruition without the power of eminent domain.

Therefore, 2021 was significant because it produced US Supreme Court case law that will continue to shape the bounds of eminent domain. The year also saw passage of federal legislation that will expand and shape public projects, which may involve eminent domain acquisition of property for those projects. So, the years to come are expected to be busy for right-of-way and eminent domain practitioners as funding is received and public projects kick off.

US Supreme Court Decisions

The US Supreme Court does not often hear eminent domain and inverse condemnation cases, but when it does, the decisions tend to shift the landscape for eminent domain and right-of-way professionals. For example, the previous Supreme Court decisions in *Hawaii Housing Authority v. Midkiff*, *Kelo v. City of New London*, and *Knick v. Township of Scott, Pennsylvania* all have become part of common parlance in the right-of-way community and impacted the use and rules of

1. US CONST. amend. V; also see for example, CAL. CONST. art. I, § 19.

2. Public Law No. 117-58 (2021), <https://bit.ly/3K0VRX2>.

eminent domain.³ Therefore, it is particularly noteworthy that the Supreme Court heard not one but two takings cases in 2021: *Cedar Point Nursery v. Hassid* and *PennEast Pipeline Company, LLC v. State of New Jersey*. While it always takes a substantial period of time for the impacts of a particular case to be fully understood, these cases are positioned to have impacts similar to their predecessor cases from the Supreme Court.

Cedar Point Nursery v. Hassid

In *Cedar Point Nursery v. Hassid*, the first eminent domain case heard by the US Supreme Court in 2021, the Court took on the validity of a California union access policy that permitted union officials to spend up to three hours a day, 120 days a year, trying to recruit new union members, while on an agricultural employer's private property.⁴ The regulation permitting union officials to directly access farm property is a holdover from when farm workers had little access to media and were essentially cut off from any union messaging.⁵

Cedar Point Nursery was in the middle of the strawberry harvest season when representatives of the United Farm Workers entered the facility and began using bullhorns to inform the workers that they should join the union, thereby disturbing the facility's operations.⁶ Notably, the union representatives did not provide the notice required under the statute. At the Fowler Packing Company, a different facility, union organiz-

ers attempted to gain access but were unsuccessful. Worried about future disruptions, the grower companies joined together and filed suit in federal district court, claiming the access regulation effected an unconstitutional per se physical taking, via an access easement, without compensation of their property. The 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 against the *Penn Central* test, which the growers did not attempt to satisfy.⁷ The Court of Appeals for the Ninth Circuit affirmed.⁸ Subsequently, the US Supreme Court granted certiorari.

The Supreme Court was asked to determine whether this regulation granting labor organizations a right of access to an agricultural employer's private property for purposes of soliciting support for unionization was an unconstitutional per se physical taking—specifically, whether an uncompensated appropriation of an easement that is limited in time effects a per se physical taking.

In discussing the history and differences between per se takings and regulatory takings, the Court noted that “government action that physically appropriates property is no less a physical taking because it arises from a regulation.”⁹ As applied, the union access regulation “appropriate[d] a right to invade the growers’ property and therefore constitute[d] a per se physical taking.”¹⁰ Additionally, the Court noted that the infrequent duration of the union intrusion does

3. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Knick v. Township of Scott, Pennsylvania*, 588 U.S. ____ (2019).

4. *Cedar Point Nursery v. Hassid*, 594 U.S. ____ (2021).

5. “Supreme Court Affirms Property Rights for California Fruit Growers,” Pacific Legal Foundation, accessed February 11, 2022, <https://bit.ly/2021Cedar>.

6. *Cedar Point Nursery*, 594 U.S. ____.

7. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

8. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (2019).

9. *Cedar Point Nursery*, 594 U.S. ____.

10. *Cedar Point Nursery*, 594 U.S. ____.

not preclude recovery for a taking. It stated: “The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.”¹¹ The issue of duration bears only on the amount of compensation, not on whether or not there has been an invasion. Therefore, the access regulation resulted in a *per se* physical taking, entitling the property owners to just compensation.

The Court also addressed three slippery slope arguments. First, it said it would still distinguish between takings and trespass, the latter being isolated physical invasions without a granted right of access. Second, it stated that many government-authorized physical invasions that are consistent with longstanding restrictions on property will not amount to takings. For example, requiring a landowner to abate a nuisance on its property is not a taking, because there was never a right to engage in the nuisance in the first place. And traditional privileges to access private property, such as to make an arrest, are not takings. Third, the Court noted that the government may require property owners to yield a right of access in order to receive certain benefits. Thus, government health and safety inspection requirements generally will not constitute takings.

This expansive view of what constitutes a *per se* taking is viewed as a victory for property owners and raises questions about the government’s ability to regulate private property. While it will take time for other cases to arise and apply the *Cedar Point* rationale and findings, it is possible that other scenarios of government-authorized invasions of property will be deemed a taking.

PennEast Pipeline Company, LLC v. New Jersey

The *PennEast Pipeline Company, LLC v. State of New Jersey* case analyzed whether a private party could exercise the federal eminent domain power to seize land that belongs to a state without violating the Eleventh Amendment.¹²

In order for an interstate pipeline to be built, a natural gas company must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission.¹³ Certificate holders are permitted to use the federal eminent domain power to acquire the land necessary to build the pipelines.¹⁴ PennEast Pipeline Company (PennEast Pipeline) was granted a certificate authorizing the construction of a pipeline. Construction of the pipeline required some land owned, at least in part, by the State of New Jersey, and the gas company intended to use the federal eminent domain power to obtain the land. The State of New Jersey sought to dismiss the eminent domain complaints on the ground of sovereign immunity. The Third Circuit determined that the certificate holders were not authorized to condemn property from nonconsenting states. According to the Third Circuit, while the federal government can delegate its eminent domain power to private parties (i.e., the gas company), it was not apparent that the federal government can also delegate its exemption for state sovereign immunity.

In order to evaluate the State of New Jersey’s sovereign immunity defense, the Supreme Court analyzed the federal eminent domain power. Historically, as the federal eminent domain power evolved, it became clear that a state cannot con-

11. *Cedar Point Nursery*, 594 U.S. ____.

12. *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. ____ (2021).

13. *PennEast Pipeline Co., LLC*, 594 U.S. ____.

14. *PennEast Pipeline Co., LLC*, 594 U.S. ____.

dition or restrict the use of that power. Consent of a state is not a precondition to the exercise of the federal eminent domain power. Further, the fact that the land is owned by a state does not preclude the exercise of the federal eminent domain power. Thus, the Supreme Court made clear that the federal eminent domain power can be used to acquire state lands and that the states do not need to consent to such action. The next question before the Court was whether this power (with the extent of its scope) could be delegated to private parties.

On this question, the Supreme Court determined that there was a long history of delegating the federal eminent domain power to private parties to condemn land for a variety of public works. Thus, taken together, not only does the exercise of the federal eminent domain power not require the consent of states, that power can be delegated to private parties. The Court discussed a long history of case law in the United States that led to this conclusion.

Applying this in the PennEast Pipeline situation, the Natural Gas Act delegated the power of eminent domain to companies that obtain a certificate of public convenience and necessity. This power includes the ability to condemn necessary lands, including land in which a state holds an interest. The State of New Jersey still argued that state sovereign immunity prevented it from being sued without consent. However, the Court concluded that the states consented upon the founding of the federal eminent domain power, and thus waived the sovereign immunity protection.

Therefore, while nonconsenting states are generally immune from suit, the states surrendered this immunity from the exercise of federal eminent domain power when they ratified the Constitution. PennEast Pipeline could condemn land for the State of New Jersey.

This case provides a substantial discussion on 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. Additionally, this case will have implications for natural gas pipeline projects, eminent domain, and states' rights.

Interestingly, a little over a month after this decision came out PennEast Pipeline announced that it would be halting the acquisition of property needed for its pipeline, as there were remaining legal and regulatory hurdles that made construction timing uncertain.¹⁵ Among the remaining permits and legal approvals were Clean Water Act permits, which New Jersey has denied to date.¹⁶ As demand for natural gas remains high, the underlying need for a gas pipeline remains.¹⁷ As such, despite having US Supreme Court approval on some fronts, it will be interesting to see if PennEast Pipeline eventually receives all other necessary approvals and restarts construction of the pipeline.

While the future of PennEast Pipeline's pipeline through Pennsylvania and New Jersey is uncertain, this case still carries precedential value for other natural gas pipeline projects and the exercise of federal eminent domain against states.

15. Peter Hall, "PennEast Was Suing 70 Property Owners to Get Land to Build Its Natural Gas Pipeline. This Week It Suddenly Stopped, Citing Regulatory and Legal Hurdles," *The Morning Call*, August 10, 2021, <https://bit.ly/36AMsXH>.

16. Susan Phillips, "PennEast Cancels Pipeline Project—Months after Winning Its Case at the US Supreme Court," 90.5 WESA, September 28, 2021, <https://bit.ly/WESA-pipeline>.

17. Phillips, "PennEast Cancels Pipeline Project."

Infrastructure Investment and Jobs Act

While the case law discussed above will impact the framework of future eminent domain actions, the catalyst for many such eminent domain actions will likely be the Infrastructure Investment and Jobs Act (P.L. 117-58), which President Biden signed into law on November 15, 2021. The act provides for \$1.2 trillion in federal spending over the next five years. The funding will be allocated to roads, bridges, major infrastructure projects, transit and rail systems, broadband upgrades, airports, ports, waterways, electric vehicles, improvements to power and water systems, and environmental remediation. Some of the funds are to be allocated to existing programs at higher funding levels in the near term, while other parts of the funds will be allocated to create new programs.

The history of infrastructure funding—or lack thereof in more recent times—highlights the importance of this infrastructure funding legislation. The current infrastructure system in the United States received a score of C- from the American Society of Civil Engineers in 2021, thereby demonstrating the need to invest in maintaining and improving our infrastructure system.¹⁸

Projects Eligible for Funding

In the past, infrastructure funding primarily focused on the maintenance of infrastructure, with only modest funding for new improvements.¹⁹ This infrastructure act provides funding

for project initiation in a variety of new programs and sectors as well as maintenance.

Of the \$1.2 trillion provided, there is approximately \$559 billion in new spending. The other portion of the funding is allocated to highways and other infrastructure that is part of normal federal agency spending and programs, including the Inland Waterways Trust Fund, the Transportation Emergency Relief Funds, the Airport and Airway Trust Fund, and the Harbor Maintenance Trust Fund.

Roads, Bridges, and Related Programs

The infrastructure law provides that roads, bridges, and related programs will receive \$110 billion—the largest portion of the new funding. This investment in repairing and reconstructing the nation's bridges is the single largest investment since the construction of the interstate highway system.²⁰ The funding in this sector is anticipated to help repair approximately 15,000 highway bridges.²¹

Each state will have varying needs; state departments of transportation (DOT) will play an important role in identifying priorities. For example, Colorado is expected to receive \$225 million over the next five years to fix aging bridges across the state.²² These bridge replacements “will improve safety and mobility, relieve congestion, and strengthen Colorado's economy as goods and people can move more efficiently between the state's mountain communities and urban centers.”²³ This is but one example of how federal funds will make their way to a state

18. “2021 Report Card for America's Infrastructure,” ASCE, <https://infrastructurereportcard.org/>.

19. Fred Easton Jr., “Once in a Generation Infrastructure Funding,” *Right of Way* 69, no. 1 (Jan./Feb. 2022): 24–30.

20. “President Biden's Bipartisan Infrastructure Law,” WhiteHouse.gov, accessed February 11, 2022, <https://bit.ly/3taSN3D>.

21. Edward Segal, “Biden Administration Announces Program and Funding to Fix 15,000 Bridges across Country,” *Forbes*, January 14, 2022, <https://bit.ly/33SEwA5>.

22. “Bennet, Perlmutter Celebrate Bipartisan Infrastructure Funding Support for CDOT's Future Reconstruction of Aging Bridges,” press release, Michael Bennet, US Senator for Colorado, January 24, 2022, <https://bit.ly/35C4F6E>.

23. “Bennet, Perlmutter Celebrate Bipartisan Infrastructure Funding Support.”

agency—here, Colorado DOT—and be put to use for localized projects.

Energy and Power

More than \$65 billion will be invested towards energy, power, and the electric grid. These investments are designed to upgrade power infrastructure, lower costs, and help reduce emissions.²⁴ Of this, \$7.5 billion will be used for the construction of electric vehicle (EV) charging infrastructure.

For EV charging stations, \$5 billion is designated for high-use corridors, particularly interstate highways, with the goal of making charging stations just as easy to access as traditional gas stations.²⁵ Currently, Texas, California, and Florida are receiving the largest allocations for EV stations, based on a formula that mirrors traditional highway grants to states.²⁶ These expenditures are examples of how the federal funds will be used to not only maintain the existing infrastructure system, but also modernize and upgrade it.

Rail

For passenger rail, \$66 billion is slated for high-speed rail, safety, Amtrak, and other rail modernization projects. The White House noted that the United States lags behind the rest of the world in developing high-speed rail infrastructure.²⁷ The act is designed to help close the gap.

For example, the Northeast Corridor rail route between Washington and Boston is set to receive funding to help repair and replace crumbling bridges and tunnels.²⁸ Improvements to this infrastructure will help increase safety, reduce service disruptions, and make trips faster. In addition, Amtrak will also be able to greatly expand its network into new communities, such as Nashville, Phoenix, and Las Vegas.²⁹

Airports and Ports

Port infrastructure and waterways are expected to receive around \$17 billion, and airports anticipate \$25 billion to address repair and maintenance backlogs, congestion, and modernization. These improvements are intended to strengthen supply chains and reduce bottlenecks that have impacted the United States' competitiveness in global markets.³⁰ Among the many airports receiving funding are Atlanta International Airport, Los Angeles International, and Chicago O'Hare.³¹ Funds will likely be spent on "runways, taxiways, safety, terminal, airport transit connections, and roadway projects."³²

Internet and Broadband

Internet connectivity across rural communities and tribal lands has been severely lacking, a problem exacerbated by the pandemic.³³ The act

24. "President Biden's Bipartisan Infrastructure Law," WhiteHouse.gov.

25. Timothy Puko, "EV Charging Network Will Target Interstate Highways," *Wall Street Journal*, February 10, 2022, <https://on.wsj.com/3MdeSHK>.

26. Puko, "EV Charging Network Will Target Interstate Highways."

27. "President Biden's Bipartisan Infrastructure Law," WhiteHouse.gov. The 2022 Beijing Winter Olympics spotlighted the high-speed rail connecting the various Olympic venues and emphasized how behind, comparatively, the United States is in passenger rail services.

28. Madeleine Ngo, "Billions in Amtrak Funding Could Modernize Aging Rail System," *New York Times*, December 20, 2021, <https://nyti.ms/3HtJhOu>.

29. Ngo, "Billions in Amtrak Funding Could Modernize Aging Rail System."

30. "President Biden's Bipartisan Infrastructure Law," WhiteHouse.gov.

31. David Shepardson, "US to Award \$2.89 Billion to Airports under Infrastructure Law," Reuters, December 16, 2021, <https://reut.rs/3stsWVs>.

32. Shepardson, "US to Award \$2.89 Billion to Airports."

33. Adam Edelman, "Congress Could Spend Big on Broadband. Tribal Nations Say It Can't Come Soon Enough," NBCNews, May 23, 2021, <https://nbcnews.to/3lzA88q>.

includes \$65 billion for broadband infrastructure improvements to develop and expand interconnectivity in underserved rural and tribal communities. Not only will this funding help to develop the physical infrastructure, it will also help to lower prices for internet service, making access more affordable.³⁴

This \$65 billion will be allocated across a variety of existing programs, new programs, and one-time grants, an additional \$2 billion will be appropriated to the existing Tribal Broadband Connectivity Program.³⁵ This program “seeks to deploy or expand high speed internet access services to Tribal lands” to help develop services to address “digital inclusion, affordability, telemedicine, workforce development, and other similar goals.”³⁶ Like with other areas of investment, the funding strives to do more than merely preserve an aging system—it aims to improve it.

Water

Currently, up to 10 million American households and 400,000 schools and childcare centers lack safe drinking water.³⁷ Under the act, water and wastewater infrastructure will receive \$55 billion to replace lead pipes, remove contaminants, and satisfy other safe water and wastewater needs.

The funding and projects will vary by state. For example, Minnesota expects to receive \$680 million over the next five years to make infrastructure upgrades to wastewater and drinking water systems.³⁸ This funding will go towards replacing various service lines and cleaning up water contaminants. One challenge in replacing lead service lines is that many parts of such lines are privately owned, which makes it difficult to determine where these lines are and if they need to be replaced.³⁹ This federal money will be used, in part, to help inventory lead service lines.⁴⁰

Public Transportation

Public transportation will receive approximately \$39 billion in new funding to modernize transit, including improvements to help eliminate greenhouse gas emissions and improve accessibility for the elderly and people with disabilities.⁴¹

For example, the Bay Area Rapid Transit (BART) system located in California’s San Francisco Bay Area, anticipates that the funds will support its Train Control Modernization Program.⁴² BART’s program will increase train frequency, rebuild tracks and other critical infrastructure, and improve accessibility, including through modernizing elevators.⁴³

34. “President Biden’s Bipartisan Infrastructure Law,” WhiteHouse.gov.

35. Danielle Frappier and Victoria Samuels, “Congress Invests Historic \$65 Billion in Nation’s High-Speed Internet Networks and Affordability Program,” *Broadband Advisor* (blog) Davis Wright Tremaine LLP, November 15, 2021, <https://bit.ly/3vxcQMN>.

36. Frappier and Samuels, “Congress Invests Historic \$65 Billion.”

37. “President Biden’s Bipartisan Infrastructure Law,” WhiteHouse.gov.

38. Walker Orenstein and Ashley Hackett, “There’s Big Money for Water Quality Issues in the Federal Infrastructure Bill. What That Means for Minnesota,” *MinnPost*, December 3, 2021, <https://bit.ly/3HfBHXY>.

39. Orenstein and Hackett, “There’s Big Money for Water Quality Issues.”

40. Orenstein and Hackett, “There’s Big Money for Water Quality Issues.”

41. “President Biden’s Bipartisan Infrastructure Law,” WhiteHouse.gov.

42. “Bay Area Transit Agencies Cheer Infrastructure Bill Passage,” BART, November 15, 2021, <https://bit.ly/3tlPp6p>.

43. “Bay Area Transit Agencies Cheer Infrastructure Bill Passage,” BART.

Conclusion

Case law from 2021 and previous years continues to shape the bounds of the eminent domain power. Practitioners should be aware of the legal precedents in their particular jurisdictions. Local courts may have divergent interpretations on the scope and limitations of the eminent domain power, and the underlying grant of constitutional authority may differ in each state. In addition, the US Supreme Court continues to periodically provide overarching guidance and direction on government's ability to employ the power of eminent domain.

Just as it will take time to see the impacts of the recent US Supreme Court cases, it will take time to see the impacts of the rollout of the Infrastructure Investment and Jobs Act. The distribution of funds and the initiation of projects will require coordination across many levels of federal and state agencies and government. In addition to the primary funding categories previously summarized, funding will also be made available to address climate change, cyberattacks, extreme weather events, environmental cleanup, reclaiming mines, and capping abandoned wells.⁴⁴

While many of the anticipated projects are designed to modernize and upgrade existing sys-

tems, some upgrades are likely to require the acquisition of additional property rights—be it for a larger footprint to build improvements or temporary construction easements to allow for the actual construction work to be conducted. The many projects calling for entirely new infrastructure—new Amtrak lines, new pipelines, new electrical grids, etc.—will also involve eminent domain and right-of-way professionals. Funds are already starting to be allocated, and many governmental agencies and levels of government will work together to obtain funds, identify and prioritize projects, and initiate the improvements. The Infrastructure Investment and Jobs Act of 2021 encompasses an enormous source of funding that is likely to drive the right-of-way and eminent domain industries for many years to come.

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44. "President Biden's Bipartisan Infrastructure Law," WhiteHouse.gov.