# Recent Developments in Eminent Domain: Public Use

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## I. Introduction

In *Kelo v. City of New London,*[1] the United States Supreme Court held that a municipality's exercise of eminent domain power supported only by claims that doing so would help the local economy was not a *per se* violation of the Public Use Clause of the Fifth Amendment. The Court's majority—and especially Justice Anthony Kennedy's concurring opinion, which provided the fifth vote to affirm—left open the possibility that some takings would not qualify.[2] In the intervening time, however, the Court has not provided any guidance whatsoever about what takings it would consider unconstitutional private-to-private transfers, or when a proffered justification will be considered a pretext to impermissible private benefit. Despite massive uncertainty and conflicting rulings from the lower courts, the Court has yet to take up a case, despite several viable petitions.

In this article, we summarize the past year's decisions, several of which attempt to discern what *Kelo* means. This article also discusses pipeline takings, the effect on a due process claim of a finding that a taking was pretextual, and other issues related to the power to condemn private property for public use.

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1. 545 U.S. 469, 489-90 (2005).
2. *Id.* at 493 (Kennedy, J., concurring).

**II. Guam: Redevelopment Takings**

In *Government of Guam v. 162.40 Square Meters of Land More or Less, Situated in the Municipality of Agana* ("*Ilagan*"),[3] the Supreme Court of Guam upheld a condemnation supported by the Agana Plan ("Plan"), an economic development plan. The taking resulted in the seizure of a portion of a residential lot, which was subsequently conveyed to an adjoining neighbor who just happened to be the mayor of Agana, for use as a driveway to access his parcel that had been landlocked by an earlier condemnation under the Plan.[4]

The Plan was designed to promote the economic development of Guam, by providing public access to all properties by straightening lot lines and streets following the destruction of the village during World War II.[5] To the extent the redrawing of lot lines created fractional lots, the Plan provided that the owners of the largest contiguous lot would have priority in purchasing the fractional lots.[6] The condemnation was for this lot only, however, and occurred nearly ten years after the Plan was last actively executed.[7] The Ninth Circuit had previously upheld a taking under the Plan as satisfying the public use requirement.[8]

The trial court invalidated the taking because it was for private benefit.[9] The Supreme Court of Guam, relying upon *Kelo,* held that contemporaneous takings under an economic development plan are not necessary to validate a taking for economic development to satisfy the public use requirement.[10] The court found the fact that prior cases such as *Kelo* involved contemporaneous en masse takings was not dispositive.[11] The court concluded the Plan had not been "abandoned" at the time of the taking because the government was still addressing the existing fractional lot problem—trying to fix the earlier poor execution of the Plan—nor had the subsequent land trust acts demonstrated any clear legislative intent to supersede or repeal the Plan.[12] The Plan imposed no time limit, which the court found to be

3. 2011 Guam 17, No. CVA10-004, 2011 WL 4915004 (Guam 2011).
4. *See* Reply Brief of Petitioners at 1, *Ilagan,* 2011 Guam 17 (No. 12-723).
5. *See Ilagan,* 2011 Guam 17; 2011 WL 4915004 at *1.
6. *See id.*
7. *See id.*
8. *See* Gov't of Guam v. Moyland, 407 F.2d 567, 568 (9th Cir. 1969); *see also Ilagan*, 2011 Guam at *6.
9. *See Ilagan,* 2011 Guam 17; 2011 WL 4915004 at *5.
10. *See id.* at *6-7.
11. *See id.* at *7.
12. *See id.* at *9-11.

reasonable because "economic developments are by nature long-term undertakings."[13] That the taking occurred long after the last known taking "[did] not mitigate the fact that it achieved the goals of the original Agana Plan."[14]

This case emphasized that the focus in analyzing condemnations must be the "purpose, and not its mechanics, to determine whether the Public Use Doctrine is met."[15] It also emphasizes that courts believe that it is "not our function to substitute our judgment for that of the legislature" on how the public purpose is effectuated,[16] and that the government's decision to exercise its eminent domain power is subject to deference unless the use "be palpably without reasonable foundation."[17] The court focused on the "ultimate goal" of the Plan,[18] which included providing public access to all properties, to "establish order out of chaos"[19] and a taking that satisfied the ultimate goal was deemed valid.[20] Moreover, "[t]he mere fact that the taking provided an incidental benefit to a private party does not invalidate a taking as long as there is a valid public purpose."[21] Further, apparently an economic development plan once approved (here by the Ninth Circuit) never dies and can be used to justify "selective" and "sporadic" condemnations for years to come.[22] The court also concluded that those affected by a judgment overturning a condemnation—here, the purchaser of the land from the government—has Article III standing to appeal the decision even if the government does not join in the appeal.[23] However, for this case, the United States Supreme Court denied certiorari.[24]

### III. District of Columbia: Redevelopment Takings

This year resulted in the latest, and perhaps the last, chapter in the long-standing Skyland Shopping Center saga that has already resulted in several reported decisions.[25] In 2007, the D.C. Court of Appeals

13. *Id.* at *8.
14. *Id.* at *9.
15. *Id.* at *7.
16. *Id.* at *9.
17. *Id.* (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 230 (1984)).
18. *Id.* at *4.
19. *Id.* at *8.
20. *Id.* at *10.
21. *Id.* at *13.
22. *See id.* at *9 (citations omitted).
23. *See id.* at *3-4.
24. Cert. denied. Apr. 15, 2013, 133 S. Ct. 1802.
25. *See, e.g.,* DeSilva v. District of Columbia*.,* 13 A.3d 1191 (D.C. Cir. 2011); Franco v. District of Columbia*.,* 3 A.3d 300 (D.C. 2010); Rumber v. District of

originally remanded the case, recognizing that property owners may object to a taking on the grounds that the proffered public use is really a pretext hiding private benefit.[26] Now, the D.C. Court of Appeals has heard the appeal after remand of the 2007 *Franco* case, and in *Franco II,*[27] they noted:

> We reversed and remanded because the trial judge had not considered appellant's specific factual allegations, which were misleadingly contained in the section entitled "counterclaims." We instructed that the inquiry into whether or not a project was approved for pretextual reasons should focus on whether or not the project was designed to meet the purported public purpose, not on the subjective motivations of the legislature or officials involved in the project. Finally, we emphasized "that further proceedings, including discovery, should honor the 'longstanding policy of deference to legislative judgments' concerning the public purpose of a taking."[28]

On remand, the trial court struck all of the property owner's defenses, granted the District partial summary judgment, gave the District possession, and ordered the property owner to vacate.

The Court of Appeals first rejected the owner's claim that the D.C. Council exceeded its authority in adopting the Skyland Act, the ordinance that allowed the taking, because the taking was not for a public purpose.[29] The claim was couched as one of subject matter jurisdiction, but the court rejected the argument, holding that "[a]ppellants confuse subject-matter jurisdiction with the merits of the action."[30] The court held that the Act did not exceed the Council's authority. The court also affirmed the trial court's grant of summary judgment to the District:

> First, we note that the District need only show that the D.C. Council approved the Skyland legislation for the purpose of economic development in order to defeat the allegation of pretext. Second, we reiterate the standard of deference to the legislative decision to which we are bound. In *Franco I,* we left open the possibility of a trial on the issue of pretext, but following the prolonged discovery period, appellants have not shown that there remains a triable case regarding the issue of pretext.[31]

The court noted the references in the record that the Council "could rationally have approved the legislation on the basis of economic

Columbia, 595 F.3d 1298 (D.C. Cir. 2010) (per curiam); Oh v. Nat'l Capital Revitalization Corp., 7 A.3d 997 (D.C. 2010); Rumber v. District of Columbia., 487 F.3d 941 (D.C. Cir. 2007); Franco v. Nat'l Capital Revitalization Comm'n, 930 A.2d 160 (D.C. 2007) ("*Franco I*").

26. *See Franco I,* 930 A.2d at 169.
27. Franco v. District of Columbia, 39 A.3d 890 (D.C. 2012) ("*Franco II*").
28. *Id.* at 892 (citing *Franco I,* 930 A.2d at 173-74).
29. *See id.* at 893-94.
30. *Id.* at 893.
31. *Id.* at 894 (citations omitted).

development."[32] "So, in this case, we defer to the D.C. Council's determination, fully supported by the record, that the Skyland Shopping Center was sufficiently distressed to justify a program of economic development."[33] Relying upon *Kelo,* the court rejected the argument that the Council could not have believed that the redevelopment would be successful, because there is no requirement that the expected public benefits would actually come to pass.[34] It is enough that the Council believed—or, more accurately, professed to believe—that the plan would work. The court also held that the taking was executed pursuant to a carefully considered development plan, and that some private benefit is not enough to invalidate the taking.[35]

This opinion elevates form over substance, and essentially makes the first *Franco* opinion a hollow promise: if a condemnor merely *states* it is taking property for redevelopment, no amount of private benefit will overcome it. The court also conflated the public use inquiry with the question of pretext, which is predicated on the stated public use or purpose not being the actual reason for the taking.

### IV. Texas: No Fraud or Malintent in Taking

In *City of Austin v. Whittingthon,*[36] the Texas Supreme Court sought to "examine and define the scope of judicial review of legislative takings" under the Texas Constitution, holding that "judicial review is proper to challenge a taking on the basis of fraud, bad faith, or arbitrary and capricious determinations by the condemnor."[37] Finding no such intent, however, the court reversed a jury verdict and court of appeals' decision in favor of the landowner, and remanded.[38]

At issue was a condemnation of a lot "to build a parking garage for the city's nearby convention center and a facility to chill water used to cool nearby buildings," thereby reducing municipal energy consumption and costs.[39] The condemnation occurred in connection with the city's joint venture with a hotel developer to develop a multi-use project comprised of a hotel, residential and retail spaces, and parking for

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. 384 S.W.3d 766 (Tex. 2012).
37. *Id.* at 733.
38. *Id.*
39. *Id.*

the expanded convention center.[40] Under the Texas Constitution, when condemning property a municipality must demonstrate: "(1) it intends to put the property to public use (the public use requirement); and (2) the condemnation is necessary to advance or achieve that public use (the necessity requirement)."[41] The court rejected the city's assertion that "fraud, bad faith, and arbitrariness and capriciousness are simply means to proving that the City's stated use was actually private," recognizing that, under Texas common law, such intentions are exceptions that may invalidate a taking.[42] Such claims must be raised as affirmative defenses to the legislative declaration of the public use and necessity, and a landowner bears the burden of proving her allegations in support of these defenses.[43] Indeed, absent "allegations that the condemnors' determination of public use and necessity were fraudulent, in bad faith, or arbitrary and capricious, the legislative declaration that a specific taking is necessary for a public use is conclusive."[44]

However, the court did agree with the city that these determinations are questions of law reserved for the court, not the jury.[45] Where affirmative defenses are raised, it is the court, not the jury, which must inquire into the legislature's intentions.[46] The jury may rule on disputed facts, but the court must rule on the legal effect of those facts.[47]

In evaluating public use and necessity, the court defined "fraud" as "the taking of property for private use under the guise of public use, even though there may be no fraudulent intent on the part of the condemnor."[48] This aligns the analysis under the Texas Constitution with the Fifth Amendment "pretext" analysis in *Kelo.* In distinguishing "public use" from "private use," the court noted public use "does not include a benefit to the public welfare or good under which any business that promotes the community's comfort or prosperity might be benefitted from the taking."[49] As to fraud in the necessity of the taking, "the question is whether the condemnor actually considered the taking necessary for public use—not whether the court believes

40. *Id.*
41. *Id.* at 772.
42. *Id.* at 777.
43. *Id.*
44. *Id.*
45. *Id.* at 778.
46. *Id.* at 777.
47. *Id.* at 779.
48. *Id.* (referencing Hous. Auth. of City of Dallas v. Higginbotham, 143 S.W.2d 79, 83 (Tex. 1940)).
49. *Id.* at 779.

the taking was actually necessary."[50] The court looks to "official materials" only for the expression of such beliefs.[51]

The court concluded that providing parking to the expanded convention center was a public use, the benefit to the city's joint venture partner in the multi-use project being "at best, an incidental benefit," which did not invalidate the public use.[52] The court concluded the taking for the district's cooling plan was likewise a public use because it was an extension of the public service of providing electricity and made such service more efficient. The district plant was available to any customer who applied to connect to it. The court also held that the legislative materials and city's testimony established an actual belief in the need for the condemnation for both the garage and district plant.[53] Importantly, the court found that an email from the city's project manager describing the new cooling plant as "a redundancy" of the existing district plant was not evidence of fraud.[54] For one, the email was "in a class of communications not ordinarily relevant to [this] inquiry" and the court restricted its review to "official materials," which materials "expressed a clear belief" in the plant's necessity.[55] Moreover, the condemnation need not be "absolutely necessary" to satisfy the necessity requirement—the taking to address a future need or to back up an existing public utility can, and in this case did, satisfy that requirement.[56]

For bad faith claims, the landowner must show that the municipality "knowingly disregarded [the landowner's] rights;" mere negligence or lack of due diligence will not suffice.[57] The court found no evidence to support such a claim, and indeed, the landowners offered no proof related to it.[58]

For his claims that the condemnation was arbitrary and capricious, the landowner contended the city failed to consider reasonable alternatives and abdicated its decision for the need for condemnation to its joint venture partner.[59] The court disagreed because there was clear evidence the city did consider alternative locations for the parking

50. *Id.* at 781.
51. *Id.*
52. *Id.* at 780.
53. *Id.* at 781.
54. *Id.* at 785.
55. *Id.* at 786.
56. *Id.* at 785-86.
57. *Id.* at 786.
58. *Id.*
59. *Id.* at 783.

garage.[60] Moreover, "[t]he definition of arbitrariness and capriciousness here does not require the chosen course to be more feasible or better than the alternative. "Rather, it forbids decisions not made according to reason or judgment."[61] The court did not need to address whether abdicating the decision to a developer was arbitrary and capricious because no abdication had occurred; the city conducted all aspects of the decision-making process and did not rely on its joint venture partner.[62]

So even with a "smoking gun" email from city personnel in hand, it was still not enough to overturn a municipality's proclaimed need for a condemnation, at least in Texas.[63] An email from a city project manager, even when directly involved in the land acquisition and/or condemnation process, will not overcome the presumptive validity of an official proclamation that the taking is necessary for a public use.[64]

An interesting aside, after issuing the resolution for the taking, Texas adopted Government Code § 2206.001, which prohibits takings for economic development.[65] The court held that the law must be applied in its current state because "a condemnor only obtains a vested right in property it seeks to take once it obtains a judgment in its favor" and having lost in the court below, the city had yet to obtain such a judgment.[66] However, the court found that the exceptions provided in the law for takings for a public building and a taking for the provision of a utility service (here, "assisting in" such service) were applicable to the taking for a garage and cooling plant, respectively.[67]

## V. Pipeline Takings

With the increased production of natural gas throughout the United States, we expect that the issue of takings for pipelines and gas transmission facilities will be a growth area for condemnation attorneys. In decisions by the Colorado and Montana Supreme Courts, the courts reached conflicting results in cases about the power of transmission companies to take private property.[68]

60. *Id.* at 784.
61. *Id.* at 783.
62. *Id.* at 783-84.
63. *See id.* at 785.
64. *See id.* at 786.
65. *Id.* at 790; *see* TEX. GOV'T CODE § 2206.001(b)(3) (2013).
66. *Id.*
67. *Id.* at 790-91.
68. *See* Larson v. Sinclair Transp., 284 P.3d 42 (Colo. 2012); McEwen v. MCR, LLC, 291 P.3d 1253 (Mont. 2012).

### A. *Colorado: Company That Conveys Petroleum Through a Pipeline is Not a "Pipeline Company"*

In *Larson,*[69] the Colorado Supreme Court held that a state statute does not grant a company such as Sinclair the ability to take property for the construction of petroleum pipelines. That statute is not exactly elegant in its wording:

> Such telegraph, telephone, electric light power, gas, or pipeline company or such city or town is vested with the power of eminent domain, and authorized to proceed to obtain rights-of-way for poles, wires, pipes, regulator stations, substations, and systems for such purposes by means thereof. Whenever such company or such city or town is unable to secure by deed, contract, or agreement such rights-of-way for such purposes over, under, across, and upon the lands, property, privileges, rights-of-way, or easements of persons or corporations, it shall be lawful for such telegraph, telephone, electric light power, gas, or pipeline company or any city or town owning electric power producing or distribution facilities to acquire such title in the manner now provided by law for the exercise of the right of eminent domain and in the manner as set forth in this article.[70]

Sinclair owned easements across private land allowing it to run an underground gas pipe, but it wanted a second one. After negotiations with the property owner failed, Sinclair attempted to condemn the easement. Both the trial court and the court of appeals concluded it had the authority to do so.[71]

The Colorado Supreme Court reversed, and held the statute "intended to authorize condemnation for the construction of electric power infrastructure."[72] The court started by applying the narrow rule of construction applicable to eminent domain statutes, which are generally construed against the condemnor, especially in circumstances such as these, where the power is delegated to a private entity.[73] The court rejected the argument that the phrase "pipeline company" covered Sinclair because it is a company and it "conveys petroleum products through its pipelines."[74] That would seem to address the issue, no? Common sense would suggest that a company that relies on pipelines should be a "pipeline company." While the court of appeals thought so, the Colorado Supreme Court held that the statute contains no definition, but other language in the statute shows that the only companies vested with condemnation power are electric companies ("and

69. 284 P.3d at 42.
70. COLO. REV. STAT § 38-5-105 (2013).
71. *Larson,* 284 P.3d at 44.
72. *Id.* at 43.
73. *Id.* at 44.
74. *Id.*

authorized to proceed to obtain rights-of-way for poles, wires, pipes, regulator stations, substations, and systems . . . .").[75] Neighboring statutes also reveal that the power was only meant for electric companies, and "neither the word petroleum nor the word oil is found anywhere in Article 5 of Title 38."[76] But one question remains: Colorado law seems to have provisions expressly granting all sorts of private entities eminent domain power for certain purposes, so why are statutes allowing petroleum pipelines so lacking? Maybe these statutes should exist; but currently the books are empty, and that was all the court needed to know.

### B. *Montana: Power to Condemn Pipeline Includes Related Uses*

A few states to the north, Montana reached a different conclusion about pipeline-related condemnations. In *McEwen v. MCR, LLC,*[77] the Montana Supreme Court approved the condemnation of private property for a "compressor station" which supported a gas pipeline. Absent such a compressor station, the gas would not be able to be transported via the pipeline. Under Montana law, private parties have the power to condemn for certain enumerated public uses, and gas pipelines are one such approved use.[78] The Montana Supreme Court concluded that an "absurd result would ensue" if the legislature authorized a condemnation for a pipeline, but did not authorize one for the compressor station required to transport the gas.[79] The court ultimately remanded the matter to the trial court to ensure that the location of the "compressor station" was necessary for the pipeline.[80]

## VI. Second Circuit: Eminent Domain Abuse is not Outrageous Government Conduct

You may remember the opinion of the New York Appellate Division in *49 Wb, LLC v. Village of Haverstraw,*[81] in which the court held that a taking of private property for affordable housing was an improper use of eminent domain because "the Village invoked its power of condemnation for the sole purpose of benefitting private, and not public,

75. *Id.*
76. *Id.* at 7.
77. 291 P.3d at 1253.
78. *Id.* at 1259 (citing MONT. CODE. ANN. § 70-30-102 (2013)).
79. *Id.* at 1259-60.
80. *Id.* at 1260.
81. 839 N.Y.S.2d 127 (N.Y. App. Div. 2007).

interests,"[82] and the "Village's sole purpose [was] assisting private entities by means of condemnation."[83] In other words, the taking was irrational. The court concluded "[t]he Village's justification for the condemnation, that it serves a public use, benefit, or purpose, is merely pretextual, and hence, improper."[84]

Based in part on that finding, the property owner went to federal court on a substantive due process claim, asserting the government treated it irrationally. The district court denied the owner's motion for summary judgment and granted the Village's cross motion.[85] The Second Circuit, in an unpublished order, affirmed.[86] The court rejected the property owner's claim that the state court's finding of "irrationality" collaterally estopped the issue of "irrationality" in substantive due process. The issues, the court held, are not identical:

> Plaintiff asserts that the Appellate Division's finding of an 'irrational' public purpose in its annulment of Defendants' condemnation attempt is the same finding required for Plaintiff to prove its substantive due process rights were violated. This is simply incorrect. To show that Defendants' condemnation of the property at issue rises to the level of a substantive due process violation, Plaintiff must show that (1) it had 'a valid property interest' (which is not challenged here), and that (2) the 'defendants infringed on the property right in an arbitrary or irrational manner.' For state action to be taken in violation of the requirements of substantive due process, the denial must have occurred under circumstances warranting the labels 'arbitrary and outrageous.' These labels are associated with 'racial animus' or 'fundamental procedural irregularity,' for example. Our de novo review of the record demonstrates no genuine issue of fact as to whether the Defendants' actions, viewed as a whole, were arbitrary or irrational. Indeed, notwithstanding its finding that the Village's public purpose for the condemnation was irrational, the Appellate Division concluded that there was no evidence of bad faith, noting that 'mere allegations of bad faith and suspicious timing, such as those alleged by 49 WB here, do not suffice.' Indeed, the Appellate Division also found that Village's procedures 'honored the parties' rights to notice and due process, were within the Village's eminent domain jurisdiction, and followed the statutory procedures of EDPL article 2.[87]

The court held that the Appellate Division did not conclude that the taking was in bad faith, only that it lacked "a rational factual basis:"

> Thus, contrary to Plaintiff's argument, a mere determination that there is no rational relationship between the condemnation and a valid public purpose is simply not the

82. *Id.* at 141.
83. *Id.*
84. *Id.*
85. 49 WB, L.L.C. v. Vill. of Haverstraw, No. 08-CV-5784, 2012 WL 336152, at 1 (S.D.N.Y. Feb. 2, 2012).
86. 49 WB, L.L.C. v. Vill. of Haverstraw, No. 12-787-CV, 2013 WL 409032, at 2 (2d Cir. Feb. 4, 2013).
87. *Id.* at 2 (citations omitted).

> equivalent of a showing that the condemnation is arbitrary, capricious, or in bad faith such that it rises to a substantive due process violation under the U.S. Constitution.[88]

A municipality's attempt to condemn property for private benefit, while cloaking the private benefit under a veil of public use in violation of New York's eminent domain law (that is how we read "pretext") is not outrageous.[89] We guess it should be expected that a condemnor would try to sneak one by. Given the track record of the Second Circuit, maybe the fact that the court's conscience was not shocked should not be shocking.

## VII. Florida: Indian-Owned Land Is Not "Aboriginal Land" Immune From Eminent Domain

In *Miccosukee Tribe of Indians of Florida v. Department of Environmental Protection,*[90] the Florida District Court of Appeal (Second District) held that land owned by the Miccosukee Tribe was not immune from being condemned by the State of Florida.

The tribe purchased three parcels but did not immediately take action to have the federal government take title in trust for the tribe, an action that apparently would have protected it.[91] Six years later, it filed a "fee-to-trust" application with the federal government, but before the Department of the Interior could take any action, Florida instituted an eminent domain action to take the parcels for an Everglades restoration project.[92] The tribe asserted sovereign immunity, but the court allowed the taking.[93] The appeals court affirmed, concluding that because a condemnation action is "in rem" (against the land) and not "in personam," the tribe's immunity from lawsuits did not extend to an eminent domain action against its property.[94] The court relied on *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township,*[95] "a case that is quite similar to the present case,"[96] holding that the tribe's status as a federally-

88. *Id.*
89. *See id.*
90. 78 So. 3d 31 (Fla. Dist. Ct. App. 2011).
91. *Id.* at 32.
92. *Id.*
93. *Id.*
94. *Id.* at 33.
95. 643 N.W.2d 685 (N.D. 2002).
96. *Miccosukee Tribe,* 78 So. 3d at 33.

recognized tribe did not mean that its property outside its "aboriginal land" is immune:

> The Department of Environmental Protection does not need personal jurisdiction over the Tribe—it needs only in rem jurisdiction over the land. And the land in question is not tribal reservation land, is not within the aboriginal homelands of the Tribe, is not allotted land, and is not held in trust by the federal government for the Tribe. Therefore, on these facts, the Tribe's sovereign immunity is not implicated and does not bar this eminent domain action.[97]

The court also rejected the tribe's argument that federal law prohibited the taking, concluding that the Nonintercourse Act,[98] which prohibits conveyance or purchase of Indian lands unless accomplished by treaty, did not apply.[99] This statute is inapplicable when a tribe acquires land from private parties:

> Since this land was purchased on the open market in fee simple, is not within the confines of the Tribe's reservation, has apparently never been held in trust for the Tribe, and was privately owned for an extended period of time before the Tribe's purchase, the provisions of the Nonintercourse Act simply do not apply to this land. Thus, the protections of the Nonintercourse Act do not preclude this eminent domain proceeding.[100]

## VIII. Pennsylvania: Takings for Utility Easements and Charter Schools

### A. *Utility Easement*

In *Reading Area Water Authority v. Schuylkill River Greenway Association,*[101] the Pennsylvania Commonwealth Court held that a water authority's condemnation of an utility easement was supported by public use despite the trial court's finding that the proposed sewer and water purposes was "purely for the benefit of a private enterprise."[102] In a legislative alliterative wonder, under Pennsylvania's Private Property Protection Act, takings of private property for use by a private enterprise were prohibited.[103] The easement being condemned was necessary to support the water and sewer needs for a private developer's proposed 219 unit adult residential subdivision.[104] The trial court found that the "primary and paramount benefactor of

97. *Id.* at 34.
98. 25 U.S.C. § 177 (2012).
99. *Miccosukee Tribe,* 78 So. 3d at 35.
100. *Id.* at 36.
101. 50 A.3d 255, (Pa. Commw. Ct. 2012).
102. *Id.* at 257.
103. 26 PA. CONS. STAT. § 204(a) (2006).
104. *Reading Area Water,* 50 A.3d at 256.

the proposed condemnation"[105] was the private developer and not the general public, and invalidated the taking because the government was attempting to take land "from one private owner and give it to another."[106]

On largely factual grounds, the Pennsylvania Commonwealth Court reversed. The court catalogued the various statutory provisions supporting the water authority's power to condemn,[107] then summarily concluded that the water authority was not transferring title of the condemned property to another private party; rather, no indication from the trial record showed that the water authority ever intended to relinquish ownership of the easement to the developer.[108] The court acknowledged that the "availability of utilities will undoubtedly make the homes . . . more attractive to potential buyers, such an incidental benefit [to the developer] does not strip the project of its public purpose . . .."[109] This decision begs the question of the relative fairness of requiring one property owner to bear a compulsory burden for a neighbor's development.

B. *Taking for a Charter School*

Second Class Townships in Pennsylvania found that some good intentioned attempts at takings simply could not pass muster when they attempted to expand a charter school's land. In *Bear Creek Township v. Riebel,*[110] the Pennsylvania Commonwealth Court held that a Township's condemnation of vacant land next to a charter school was valid. Earlier, the school attempted to purchase the property but the landowner refused.[111] Ultimately the school, the Township and the Bear Creek Foundation (a non-profit associated with the school), developed a plan to develop recreational facilities including baseball, softball and soccer fields, a community room, basketball courts and a nature trail.[112] The Township entered into a Development Agreement and the Township agreed to condemn the neighbor's land and then convey the property to the Foundation.[113] At trial, the condemnees argued that the Foundation was a "private enterprise" which would run afoul of the aforementioned Property Rights Protection

105. *Id.* at 257.
106. *Id.*
107. *Id.* at 258-59.
108. *Id.* at 259.
109. *Id.* at 259-60.
110. 37 A.3d 64 (Pa. Commw. Ct. 2012).
111. *Id.* at 66.
112. *Id.*
113. *Id.*

Act.[114] The trial court rejected these arguments and approved the condemnation.[115]

On appeal, the landowner asserted that the condemnation was invalid because the true purpose of the condemnation was to acquire land for a school, which, under the Second Class Township statute, Bear Creek was not authorized to condemn.[116] The Declaration of Taking plainly said that the condemnation was for the school[117] and the Township had no plans to develop recreational facilities. Finally, the Township admitted below that but for the Foundation's offer to finance the project, it would not have undertaken the condemnation.[118] The Township pointed out that the planning of the Development Agreement was in place before it filed the Declaration of Taking.[119]

Ultimately, the Commonwealth Court reviewed the proffered justification of the taking—expansion of school facilities—in light of the Second Class Township's powers of eminent domain (which do not extend to schools), and found the public purpose lacking.[120] The recreational facilities plan was a "*post hoc*" justification and not a true comprehensive plan.[121] The Declaration of Taking and other extrinsic evidence revealed the true purpose behind the taking. The Township's use of eminent domain for an unauthorized purpose was invalid.[122]

## IX. Quick Takes

This section is not about the "quick take" procedures in many jurisdictions, but gives short summaries of eminent domain cases that are of interest.

### A. *Ohio: No Federal Preemption*

In *City of Girard v. Youngstown Belt Railway Company,*[123] the court held that federal law did not preempt a local condemnation:

> In this case, we are called upon to determine the extent to which the Interstate Commerce Commission Termination Act ("ICCTA")[124] preempts a state's eminent-domain action over a parcel of property owned by a railway company. Based on our

114. *Bear Creek Twp.,* 37 A.3d at 67 (interpreting 26 PA. CONS. STAT. §§ 201-07 (2006)).
115. *Id.* at 66.
116. *Id.* at 68.
117. *Id.*
118. *Id.*
119. *Id.* at 66.
120. *Id.* at 71.
121. *Id.*
122. *Id.*
123. 979 N.E.2d 1273 (Ohio 2012).
124. 49 U.S.C. § 10101 (2012).

> interpretation of the legislation at issue and its application to the unique facts of this case, we find no preemption, and we therefore reverse the judgment of the court of appeals.[125]

This was not really an eminent domain heavy issue, but if federal preemption is your thing, this case is a candidate for your perusal.

### B. *Texas: iPhone Denial*

According to the *Washington Post,*[126] a Texas county judge has concluded that TransCanada is a common carrier, and therefore may exercise eminent domain to take property for its Keystone XL pipeline. In an unusual twist (but one which we fully expect to see more of as smartphones become ubiquitous), the court apparently informed the parties of his decision by an email or text from his iPhone:

> Dear Counsel,
> My rulings as follows:
> Transcanada's MSJ is GRANTED
> Transcanada's NEMSJ is GRANTED
> Crawford's Plea to the Jurisdiction is DENIED
> Mr. Freeman would you please forward orders consistent with my ruling for my signature?
> Sent from my iPhone[127]

At least he didn't include LOL or ":(" to add further insult to the injury.

### C. *Ninth Circuit: Federal Taking Extinguished State's Tidelands Trust*

In *United States v. 32.42 Acres of Land,*[128] the Ninth Circuit held that a federal taking of state land for a Navy base in San Diego extinguishes the state's tidelands public trust, even if the property is later conveyed to a private party. The State of California argued that the state's public trust lay dormant while the federal government held the property, but was "quiescent" and would "re-emerge" upon any transfer from the federal government to a private party.[129] The land being condemned was subject to California's tidelands trust because it was under water at the time of the state's admission to the

125. *Girard,* 979 N.E.2d at 1276-77.

126. Steven Mufson, *Keystone Pipeline Clears a Hurdle,* WASH. POST (Aug. 23, 2012), *available at* http://articles.washingtonpost.com/2012-08-23/business/35490797_1_eminent-domain-julia-trigg-crawford-keystone-xl.

127. Jane Kleeb, *Julia Trigg Crawford Gets 15 Word Ruling from Judge Iphone,* BOLD NEB. (Aug. 22, 2012), *available at* http://boldnebraska.org/crawford_landrights.

128. 683 F.3d 1030 (9th Cir. 2012).

129. *Id.* at 1032.

Union.[130] The state argued that its public trust rights were not extinguished by federal ownership, but would spring back if and when the federal government conveyed the land to a private owner.[131] The court rejected the argument:

> The Lands Commission contends that the public trust is an aspect of state sovereignty that the federal government is without power to extinguish, or at least has no power to extinguish in this case. The Lands Commission argues that California's interest in its public trust rights is as important as the United States' interest in its power of eminent domain. The Lands Commission urges us to reconcile these interests by holding that the declaration of taking does not extinguish public trust rights, but instead only makes the public trust "quiescent," such that the public trust has no effect while the United States owns the Property, but can "re-emerge" if the land is later sold to a private party. This solution might be considered if we were charged with reconciling immovable public trust rights with the powerful force of eminent domain. But no such conflict of values exists. None of the authorities discussing the equal-footing doctrine cited by the Lands Commission inhibits or restricts the federal government from exercising its constitutional power of eminent domain. When and to the extent that state law public trust rights conflict with federal takings law, the Supremacy Clause dictates that federal takings law prevails.[132]

This result is entirely consistent with the notion that when the government takes property in fee simple absolute, it takes total title, and nothing lies "dormant," whether a claim is based on public or private rights.

## X. Conclusion

The lower courts continue to grapple with how to apply *Kelo* in situations where a property owner alleges that a taking is for private, not public, benefit. The Supreme Court has yet to provide any definitive guidance regarding whether there will ever be a situation presented where the Court will conclude that the proffered public use hides private advantage to the degree that a taking will run afoul of the Public Use Clause. Although two lower courts addressed the issue, both relied on *Kelo* to conclude that a taking was valid. Until the Supreme Court revisits the issue, we predict that this question will continue to plague the lower courts, property owners, and condemning authorities.

130. *Id.* at 1033.
131. *Id.*
132. *Id.* at 1034.