

# TAKING 5 IN 2020: EMINENT DOMAIN AND TAKINGS UPDATE

BY STEVEN SILVA, ESQ.

Since adoption in 1791 and 1864, the Takings and Just Compensation Clauses of the U.S. and Nevada constitutions have been in the same places, the Fifth Amendment and Article 1, Section 8. In Nevada, however, there has been a slight change. After the passage of Marsy's Law in 2018, certain provisions of Article 1, Section 8 were moved to Section 8A. Those sections were previously found in the center of Section 8. As a result, Nevada's Takings and Just Compensation Clauses have been renumbered from Section 8(6) to Section 8(3) – adjust your citations accordingly. Additionally, since 2008, the Nevada Constitution also contains a separate section imposing restrictions on the exercise of eminent domain at Article 1, Section 22.<sup>1</sup>

## Taking it to Court

When the government seeks to acquire property for public use from an involuntary landowner, state and local governments file a complaint for condemnation of property in the Nevada district court for the county in which the property is located (condemnation of properties that embrace multiple counties can be filed in a single action). NRS 37.060; NRS 37.070.

The federal government sues in federal district court. FRCP 71.1

When the government is alleged to have taken a person's private property without having properly instituted proceedings (known as inverse condemnation), the rule had been symmetrical.

Claims against the federal government were proper in federal court in a 42 U.S.C. § 1983 action, but state and local governments could not be sued in federal court. *Williamson County Reg'l Planning Com'n v. Hamilton Banks of Johnson City*, 473 U.S. 172 (1985). Instead, state and local governments were amenable to suit only in state court – under the theory that a landowner had not actually been deprived of just compensation in violation of their Fifth Amendment rights unless a state ultimately failed to award just compensation, including through

litigation. Mere acquisition of the property without contemporaneous payment was insufficient; the landowner had to have had their day in state court and lost to ripen the federal claim. Separately, a judgment in state court operated as a bar to subsequent federal litigation under issue preclusion. *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323 (2005). The so-called *San Remo*

trap essentially barred litigation of a federal takings claim in federal court.

But, in *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019), a divided court narrowly overruled *Williamson*. Now local governments may face liability for inverse condemnation in a § 1983 suit in the federal

district court. States themselves remain, for the moment, immune from such suits.

The effect of *Knick* in Nevada will be interesting to observe over the next few years. Nevada has a robust body of takings jurisprudence, recognizing a cause of action for inverse condemnation flowing directly from the constitution. *McCarran Intern. Airport v. Sisolak*, 122 Nev. 645, 669-70 (2006). From my own experience, I expect that most landowner attorneys in the state will continue bringing inverse claims in the state courts, notwithstanding the newly open federal doors.

“[N]or shall private property be taken for public use, without just compensation.”

– U.S. Constitution, Amendment V.

Interestingly, one public entity in Nevada attempted to use *Knick* to remove a state inverse condemnation case to federal court. *Knick* does not directly outline such a procedure, as it focuses instead on the landowner's ability to elect to bring suit under § 1983 ostensibly in addition to the ability to bring a state inverse claim. The viability of this tactic was not decided, as the federal court ruled that the government's efforts were untimely. *180 Land Co. LLC v. City of Las Vegas*, 2:19-CV-1471 JCM(EJY) (Order of Remand, Oct. 18, 2019).

## Clarity in Nevada

While federal inverse claims are generally brought through § 1983 tort claims, in Nevada such claims are brought under a self-executing cause of action for "inverse condemnation" under the Nevada Constitution. In 2016, the Nevada Supreme Court set forth the "clear" and "comprehensive" elements of inverse condemnation, providing much needed clarity for the bench and bar. The elements require: "(1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not instituted formal proceedings." *Fritz v. Washoe Co.* 132 Nev. 580 (2016).

## No Takings Implications When Prior Appropriation and Public Trust Doctrine Harmonized

A recent addition to the body of takings law in Nevada was *Mineral County v. Lyon County*, 136 Nev. Adv. Op. 58 (Sept. 17, 2020), in which a majority of the Nevada Supreme Court answered certified questions from the Ninth Circuit by explaining that the public trust doctrine exists in Nevada, and applies to all waters – navigable and not, and that the public trust doctrine applies to water rights settled under prior appropriation. The majority then explained that Nevada's water statutes embraced and effectuated both the prior appropriation system and the public trust doctrine and thus satisfy each. In so doing, the majority concluded that the second question – whether the application of the public trust doctrine to vested water rights would be a taking of those rights was moot. The dissenting opinion, after analyzing the first question differently, went on to address the second question, concluding that if a vested water right was subject to curtailment

through the public trust doctrine, no taking of the water right would occur.

## Emergency Actions Generally Upheld

With the outbreak of the worst respiratory pandemic in a century, governments across the nation have imposed varying restrictions both on human activity and on the use of real property. Relevant here, many governments have limited or entirely banned economic use of commercial properties for an indefinite period, heavily restricted the ability of people to congregate to worship in person at religious venues, and have imposed moratoria or other restrictions on the ability of lenders and landlords to foreclose. Heave litigation has ensued. Thus far, the governments have generally won, with courts relying on century-old jurisprudence *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) to give broad leeway to government action in the face of the pandemic. See, e.g., *Lukes Catering Service, LLC v. Cuomo*, No. 20-CV-1086 (Sep. 10, 2020). These issues, however, are live, and I fully expect splits to occur over time, especially where restrictions start reaching a year in length with no end in sight.

## A Moment to Honor and Remember Justice Ruth Bader Ginsburg

Toward the end of writing this article, U.S. Supreme Court Justice Ruth Bader Ginsburg died on September 18, 2020. Ginsburg was a trailblazing advocate and jurist. She hoped that she would be remembered as someone who used "whatever talent she had to do her work to the best of her ability. And to help repair tears in her society, to make things a little better through the use of whatever ability she has."

In takings cases, Ginsburg tended to join opinions granting deference to governmental exercise of power – usually

finding against claims of regulatory takings in inverse condemnation cases (i.e. she joined the dissent in the *Knick* case, and would not have overruled *Williamson*). She generally sided with government arguments on process matters in direct condemnation cases (she was in the majority in the controversial landmark *Kelo* case).<sup>2</sup> However, Ginsburg was

not uniformly against landowner claims, as she was the author of the seminal decision *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012), writing for a unanimous court that where the government induces temporary flooding, a claim for inverse condemnation may still lie and that the temporary nature of the flooding does not produce an automatic shield against a takings claim.

Ginsburg's writings and joined opinions demonstrate a commitment to the protection of property rights, while preserving the ability of government to conduct its affairs without incurring liability. As a jurist, she sought to carefully

balance recognition of the public interest weighed against private property rights.

In sum, if viewed through no lens other than her work in eminent domain, Justice Ginsburg demonstrated herself to be someone who used her considerable talents to do hard work to the best of her ability.

"Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made."

– Constitution of the State of Nevada, Article 1, § 8(3).

## ENDNOTES:

1. Of some interest, Nevada's Constitution contains an additional provision for the use of eminent domain by corporations specific to the acquisition of right-of-way. Nev. Const. art. 8(7).
2. *Kelo* is a case that may warrant some attention in the next few years, as it was controversial from day one and the makeup of the court has drastically changed.

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