

## Customary Use

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NAVAJO NATION LAW CLE CONFERENCE AT ASU

## Federal Regulations

- 25 C.F.R. § 167.13 Trespass: allowing livestock to drift to another district boundary. EXCEPTION: customary use areas extending across district boundaries when such customary use areas are defined and agreed upon by the District Grazing Committees. [formerly 25 FR 152.13(d) 12/24/1957]
- 25 C.F.R. § 161.1: "Customary Use Area refers to an area to which an individual traditionally confined his or her traditional grazing use or occupancy and/or an area traditionally inhabited by his or her ancestors." 1/5/2006 (NPL)

## Navajo Statutes

- 16 N.N.C. § 1402: Economic damage to intangible interest of Navajo Indians

(A) Whenever as a result of the granting of any lease or permit embracing Navajo Nation land, or of granting permission by the Navajo Nation for the use of Navajo Nation land, or as a result of the use of Navajo Nation land under such lease, permit or permission, the value of any part of such land for its customary use by any Navajo Indian formerly lawfully using the same is destroyed or diminished, the Navajo Nation will compensate the former Navajo Indian user in the manner hereinafter specified.

(D) Where by reseeding, irrigation, or otherwise, the remaining land in the customary use area of any individual damaged by adverse disposition of Navajo Nation land is within a reasonable time made able to provide the same economic return as his or her former entire customary use area, no damages shall be payable to such person, except for the period, if any, between adverse disposition of the land in the customary use area and the time when the productivity of the remaining land achieves equality with the entire former customary use area.

(F) Every person otherwise entitled to damages under Subsection © of this Section shall not be entitled to receive any payment thereof until that person has surrendered for cancellation that person's grazing permit as to all animal units in excess of the carrying capacity of the land remaining in that person's customary use area. Persons so surrendering their grazing permits shall be entitled to an immediate lump sum payment of ten dollars (\$10.00) for each sheep unit cancelled.

- CJA-18-60, 1/22/1960

## Navajo Statutes, continued

- 6 N.N.C. § 1152: Damages to intangible interests. (CS-78-65, 9/2/1965)

- 26 N.N.C. § 2005: Eminent Domain Requirements

(B) Economic damage to intangible interests. Similar to 16 N.N.C. § 1402

(C) Adverse Disposition of Navajo Nation Land Not to be Made Until Individual Damages are Estimated. Neither lessee, permittee, or the grantee of a right-of-way or other interest in or right to use Navajo Nation lands shall commence any construction thereon, nor make any change in the grade or contour thereof or remove any surface vegetation thereon until the damages to the improvements thereon or the customary use rights of all the individuals affected thereby have been estimated by the Navajo Land Department of the Navajo Nation.

## Navajo Case Law 1

- *Dennison v. Tucson Gas and Electric Company*, 1 Nav. R. 95 (1974)
- Plaintiffs had a grazing permit for an undefined area known as their "traditional use area." Received \$5000 for a ROW for a powerline project. Company started removing vegetation and Plaintiffs sought an injunction.
- Bill of Rights: no taking of private property for public use without just compensation. Due Process.
- Procedure for ROW.
- Chapter 11 of Title 16 = modern Chapter 13: Compensation for Improvements and Customary Use Rights Upon Adverse Disposition of Land.

## Navajo Case Law 2

- *Estate of Wauneka, Sr.*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986)
- Land use on the Navajo reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use concept. *Id* at 81.
- In *Dennison v. Tucson Gas and Electric Company*, 1 Nav. R. (1974), the Court recognized customary usage as a property right protected by the Navajo Bill of Rights and the Indian Civil Rights Act, 25 U.S.C. §1301 *et. seq.* (1968). Customary usage is therefore viewed as a property interest by the Navajo Nation. *Id*

## 2: *Wauneka*, continued

- We hold that this customary use area and the improvements incident can pass as property under our laws of succession. *Id* at 82.
- Every acre of land on the reservation not reserved for a special purpose is a part of someone's customary use area. *Id* at 83.

## Navajo Case Law 3

- *Hood v. Bordy*, 6 Nav. R. 349, 354-355 (Nav. Sup. Ct. 1991)
- Appellants purchased an apartment from Becenti. Thereafter, Appellants sold the apartment to the Appellees. Appellees discovered that title rested with the Navajo Nation and stopped paying. Appellants sought to evict.
- Appellants asserted a customary use ownership of the apartment.
- Nowhere in the statute is there an express or implied allowance for the creation of customary use ownership from the mere act of fixing up an already existing and currently owned building. That being so, regardless of who repaired the apartment, it cannot be said that a customary use ownership interest arose from that endeavor, whether originally with Becenti and passed on by sale to appellants or with appellants.

## Navajo Case Law 4

- *In re Mary Ellis Joe's Customary Use Area*, 6 Nav. R. 545 (Ship. Dist. Ct. 1990)
- Initially, grazing permits were issued to persons who had livestock and could identify customary use to a specified area. Customary use is a Navajo concept that defines an individual Navajo's prescribed boundary for the use and occupancy of land to an area traditionally inhabited by his/her ancestors. *In The Matter Of the Estate Of: Charley Nez Wauneka, Sr.*, 5 Nav. R. 79, 81 (1987). Grazing permits were also issued to those people who claimed a specific area of land known as "claimed use area." *Id* at 547.

## 4: Joe's, continued

- Grazing permits changed the nature of customary use in some cases, because Navajo people outside the ancestral pool can obtain grazing privilege by gift or purchase. *Id*
- Thus, those Navajos who follow the tradition of customary use to a particular area based on ancestral use will necessarily clash with "outsiders" who have bought or received a permit by gift.

## Navajo Case Law 5

- *Yazzie v. Catron*, 7 Nav. R. 19, 21 (Nav. Sup. Ct. 1992)
- The great majority of the Navajo reservation is trust land, including the area in dispute. Trust land cannot be owned by individuals outright ("in fee") the way land is owned off the reservation. Rather, the actual title to trust land is held by the United States government in trust for the Navajo people.
- Navajos use their customary use areas for small agricultural plots, homesites, and grazing.
- Livestock grazing is not allowed on Navajo trust land without a valid grazing permit. 3 N.T.C. § 781. Such a permit allows its holder to own livestock and to graze that livestock on Navajo trust lands to which he or she has use rights. No one can hold a grazing permit unless he also holds use rights to land sufficient to support the livestock authorized. A grazing permit alone does not give its owner the right to use land. A permit holder must also have use rights to a particular piece of land in order to keep and exercise his or her permit. Such rights are most frequently held as a customary use area on land occupied by the permit holder's family in previous generations.

## 5: *Yazzie*, continued

- *Id* at 22.
- Unless a Navajo has a grazing or agricultural use permit, a homesite or business lease, or rights to a customary use area, he or she has not rights or interest in trust land beyond those of every other member of the Navajo Nation.

## Navajo Case Law 6

- *Williams v. Peabody Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005)
- A grazing permit is a more formalized version of customary usage. *Id* at 855.
- Under the American fee system, once a person “owns” property, that person has total rights to use it or not use it, as he or she fits,... While the “use it or lose it” requirement would not apply as rigorously to range management units, it certainly applies to possessory interests that are utilized through grazing permits or customary usage. It operates like the legal concept of adverse possession,...

## 6: *Williams*, continued

- However, there is no such prescriptive right against the Navajo Nation, the ultimate owner of all Navajo land. *Id*
- Such a lack of prescriptive right also pertains to claims to customary use areas that are no longer used by the holders of that customary right. This makes the Navajo possessory interest in customary use areas different from the holders of land in fee simple. Customary use in the grazing of livestock, either through traditional use or through grazing permits, is normally done on land that overlaps with other family members or neighbors who are doing the same thing. Boundaries are agreed upon on an informal basis, without recourse to written documents, and the boundaries can change over time, due to changes in family and neighbors who use the land.

## Navajo Case Law 7

- *Gishie v. Morris*, No. SC-CV-36-06, slip op. at (Nav. Sup. Ct. June 4, 2008)
- Held: Grazing Committee may hear a fencing dispute.
- Generally, lands within the Nation are held in trust by the United States for the Navajo Nation as a collective entity. Individual Navajos may possess interests in such lands, through customary use, or through modern interests such as homesite leases, business site leases, or land use permits.

## Issues

- Grazing
- Community Land Use Plans
- Economic Development
- June 2014 Assayi Lake Fire