

Eminent Domain:

By:

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About the Presenters



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- *Law & Order: Tribal Edition*, Arizona State Law Journal
- *The Future of Native American Reserved Water Rights*, Journal of American Water Law.

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Outline for the Presentation

- Current Law Regarding Eminent Domain on the Navajo Nation.
- Problems with the Current System
- Possible Solutions

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Definition

- “The power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner's consent, conditioned upon the payment of a just compensation.”
 - Ballentine’s Law Dictionary

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Where does it come from?

- “The exercise of this right has been called a ‘compulsory purchase,’ and in this aspect is much like the ancient prerogative of purveyance, which at one time prevailed pretty generally throughout Europe, and was regulated in England by *Magna Charta* . . . whereby the crown enjoyed the right of buying up provisions and other necessities for the use of the royal household at an appraised valuation and in preference to all others, even without the consent of the owner.”
 - *In re Barre Water Co.*, 62 Vt. 27, 31 (1889)

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What about on Navajo?

- “[N]or shall private property be taken nor its lawful private use impaired for public or governmental purposes or use, without just compensation”
 - Navajo Bill of Rights; 1 N.N.C. § 8

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Land

- “The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would exist and without which the Navajo People would be caused to disperse like the Jewish People following the fall of Jerusalem.”
 - *Tome v. Navajo Nation* (Nav. Sup. Ct. 1983)
- “Every acre of land on the reservation not reserved for a special purpose is a part of someone's customary use area.”
 - *In re Estate of Wauneka*, (Nav. Sup. Ct. 1986)

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Dennison v. Tucson Gas & Elec. Co.,

- “[U]nder the customary division of governmental powers into three (3) branches, executive, legislative, and judicial, the right to authorize the exercise of the power of Eminent Domain is wholly legislative (Navajo Tribal Council) and there can be no taking of private property for public use against the will of the owner without direct authority from the legislative body (Navajo Tribal Council) and then the taking must be only in the manner as prescribed by the legislative body (Navajo Tribal Council).”

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Dennison v. Tucson Gas & Elec. Co.,

- Recognized compensation for loss of grazing permits units in a customary use area as property interest that is compensable for purposes of Eminent Domain
- Recognized Customary Use as a compensatory interest

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Code

- 16 N.N.C. § 1401-1403.
- 1401-Damages to Improvements of individual Navajo Indians
- 14002-Economic Damage to intangible interests of Navajo Indians
- 1403-Adverse Disposition of Navajo Nation land not to be made until individual damages are estimated

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Process for Tangible Property

- Price to be fixed by negotiation—if possible—with the President
- If not, President appoints an appraiser, individual does, and the two appointed appoint a third.
- Assessment submitted to RDC; if approved, then final

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Process for Intangible Property

- Same as above
- Unless their livelihood is gravely affected, then they have first priority for settling in lands acquired by the Nation
- Nation will pay expenses of moving, and new property
 - That's it

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Process for Chapters

- 26 N.N.C. § 103(E)(2) states that chapters may “[a]cquire property by eminent domain.”
- 26 N.N.C. § 2005—Eminent Domain Requirements
- Process is the same, but with the Chapter instead of the President, then to RDC

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Compensable Interests

- Damages to “Improvements”
 - Houses, hogans, sunshades, stables, storage sheds, dugouts, sweathouses, etc..
- And “Intangible Interests”
 - Customary Use areas
 - Loss of Grazing Units

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Compensation ≠ Required for

- Unauthorized use of land
- Grazing units in excess of permitted number—
or without a permit
- No compensation when the person at the time of building the person knew or should have known that the property was proposed to be disposed of adverse to the person's interest

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Use It Or Lose It

- *Begay v. Keedah* (Nav. Sup. Ct. 1991)
 - Use it or lose it
 - Only those who actually live on the land and nurture them should have rights to their use
- *Begay v. King* (Nav. Sup. Ct. 2009)
 - Only those who make beneficial use of permits can object to homesite leases

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Delegations

- “The granting of eminent domain powers to privately owned utility companies with the companies having the authority to decide what properties should be taken, and when, has been upheld.”
 - *Benally v. Gorman* (W.R. Dist. Ct. 1987)

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Navajo Land Department

- RDCJN-33-15
- Delegated authority from the Resources and Development Committee of the Navajo Nation Council to the Director of the Navajo Land Department
- Delegated authority to approve land withdrawals—can start the process of eminent domain—but still must follow the process

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Issues with the Current System

- Discourages economic development, housing, and public facilities
- Encourages people with overlapping traditional use areas to challenge eminent domain
- Discourages Parties from coming to mutually-acceptable terms.
- Very political and requires Council Involvement
- Appraisers difficult to obtain.

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Eminent Domain Reform

- Several Reforms Would Assist with these issues:
 - Clarifying the procedures for eminent domain
 - Creating two-tiers of eminent domain process
 - Broadening those who can use eminent domain

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Clarifying the Process for Eminent Domain

- Especially with judicial “gloss,” the current process is confusing for all affected parties.
- Legislative fix is needed to clarify:
 - Who is entitled to damages
 - How damages are calculated
 - Remove the Council from the Eminent Domain Process

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Legislative Changes

- Encourage settlement and agreement on damages.
- Require only one appraisal (not three)
- Remove the Navajo Nation Council from the damages calculation process.
- Provide a clear path to challenge the appraisal through the Courts
- Allow the project to move forward if the Agency posts a bond.

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Broadening Those With Eminent Domain Powers

- Other sovereigns allow their agencies/entities to exercise eminent domain without further Legislative authority. Examples:
 - Universities
 - Counties and municipalities
 - Department of Transportation
 - Housing

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Navajo Eminent Domain Reform

- Additional Navajo Public Entities Should be given the power to use eminent domain without the involvement of the Council. Examples:
 - Navajo Housing Authority
 - Navajo Tribal Utility Authority
 - Navajo Department of Transportation
 - Dine College
 - Navajo Nation Division of Economic Development
 - Navajo Nation Gaming Enterprise

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Possible Solutions

- Two-Tiered Eminent Domain System
 - Public Use
 - Economic Development

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Proposal: Two-Tiered Eminent Domain

- Public Use
 - When the control of the land will stay with the Navajo Nation.
 - Property Interest Owner May request Court hearing to contest damages
 - Damages reasonably limited to ensure feasible public use

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Proposal: Two-Tiered Eminent Domain

- Eminent Domain for Economic Development:
 - Often, land rights holders are not incentivized to allow economic development on their land.
 - A Legislative change can provide for long term lease payments (or other reasonable economic incentives) to individuals whose land rights are effected by eminent domain.

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Proposal: Two-Tiered Eminent Domain

- Non-Navajo Nation Owned Economic Development:
 - When the control of the land may be leased to an individual or corporate entity for economic development purposes
 - May include third party review by Resources and Development Committee to ensure public support.
 - May ensure that the landholders are given a set portion of the profits or lease payments obtained through development.

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Questions?

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