

THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW PUBLICATION



LEGISLATION NO: _0191-22_

SPONSOR: Vince R. James

TITLE An Action Relating to Resources and Development Committee, the Naabik'iyáti' Committee, and The Navajo Nation Council; Approving the Use of the Eminent Domain Statute, 16 N.N.C. §§ 1401 et seq., for American Rescue Plan Act ("ARPA") Funded Projects to Address the Right-of-Way Land User Consent Requirement; Approving December 31, 2024 as the Expiration Date of for Use of the Eminent Domain Statute for These ARPA Funded Projects; Directing the Controller to Report the Amount of Funding in the Land Acquisition Trust Fund Available for Just Compensation as Required by the Eminent Domain Statute; and, Directing the Division of Natural Resources Division and the Department of Justice to Develop Procedures for the Use of the Funds Identified for the Eminent Domain Purpose

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LEGISLATIVE SUMMARY SHEET

Tracking No. 0191-22

DATE: October 4, 2022

TITLE OF RESOLUTION: PROPOSED NAVAJO NATION COUNCIL RESOLUTION, AN ACTION RELATING TO RESOURCES AND DEVELOPMENT COMMITTEE, THE NAABIK'ITYATI' COMMITTEE, AND THE NAVAJO NATION COUNCIL; APPROVING THE USE OF THE EMINENT DOMAIN STATUTE, 16 N.N.C §§ 1401 *ET SEQ.*, FOR AMERICAN RESCUE PLAN ACT (“ARPA”) FUNDED PROJECTS TO ADDRESS THE RIGHT-OF-WAY LAND USER CONSENT REQUIREMENT; APPROVING DECEMBER 31, 2024 AS THE EXPIRATION DATE OF FOR USE OF THE EMINENT DOMAIN STATUTE FOR THESE ARPA FUNDED PROJECTS; DIRECTING THE CONTROLLER TO REPORT THE AMOUNT OF FUNDING IN THE LAND ACQUISITION TRUST FUND AVAILABLE FOR JUST COMPENSATION AS REQUIRED BY THE EMINENT DOMAIN STATUTE; AND, DIRECTING THE DIVISION OF NATURAL RESOURCES DIVISION AND THE DEPARTMENT OF JUSTICE TO DEVELOP PROCEDURES FOR THE USE OF THE FUNDS IDENTIFIED FOR THE EMINENT DOMAIN PURPOSE

PURPOSE: The purpose of this legislation is to approve the use of the Navajo Nation Eminent Domain statute, 16 N.N.C. § 1401 *et seq.*, to address the right-of way consent requirements for Navajo Nation Fiscal Recovery Fund and ARPA funded projects to Navajo Nation residents within the ARPA established timelines in which the Navajo Nation must obligate funds, December 31, 2024. The legislation also includes directives to the Controller to report the amount of funds in the Land Acquisition Trust Fund for the use of the Eminent Domain Statute for “just compensation” purposes; and, a directive to the Division of Natural Resources Director and the Department of Justice to develop regulations to implement the purpose of the legislation.

This written summary does not address recommended amendments as may be provided by the standing committees. The Office of Legislative Counsel requests each Council Delegate to review each proposed resolution in detail.

5-DAY BILL HOLD PERIOD: Johnson
Website Posting Time/Date: _____
Posting End Date: 10-10-22
Eligible for Action: 10-11-22

Resources & Development Committee
Thence
Naabik'iyáti' Committee
Thence
Navajo Nation Council

PROPOSED NAVAJO NATION COUNCIL RESOLUTION
24th NAVAJO NATION COUNCIL – Fourth Year, 2022

INTRODUCED BY

(Prime Sponsor)

TRACKING NO. 0191-22

AN ACTION
RELATING TO RESOURCES AND DEVELOPMENT COMMITTEE, THE
NAABIK'YÁTI' COMMITTEE, AND THE NAVAJO NATION COUNCIL;
APPROVING THE USE OF THE EMINENT DOMAIN STATUTE, 16 N.N.C §§ 1401
ET SEQ., FOR AMERICAN RESCUE PLAN ACT (“ARPA”) FUNDED PROJECTS
TO ADDRESS THE RIGHT-OF-WAY LAND USER CONSENT REQUIREMENT;
APPROVING DECEMBER 31, 2024 AS THE EXPIRATION DATE OF FOR USE OF
THE EMINENT DOMAIN STATUTE FOR THESE ARPA FUNDED PROJECTS;
DIRECTING THE CONTROLLER TO REPORT THE AMOUNT OF FUNDING IN
THE LAND ACQUISITION TRUST FUND AVAILABLE FOR JUST
COMPENSATION AS REQUIRED BY THE EMINENT DOMAIN STATUTE; AND,
DIRECTING THE DIVISION OF NATURAL RESOURCES DIVISION AND THE
DEPARTMENT OF JUSTICE TO DEVELOP PROCEDURES FOR THE USE OF THE
FUNDS IDENTIFIED FOR THE EMINENT DOMAIN PURPOSE

BE IT ENACTED:

Section One. Authority

- 1 A. The Resources and Development Committee is a standing committee of the Navajo
2 Nation Council and is authorized to grant approval for all rights-of-way. 2 N.N.C.
3 § 501 (B) (2) (a).
- 4 B. A proposed resolution requiring final action by the Navajo Nation Council shall be
5 assigned to the Naabik'iyáti Committee. 2 N.N.C. § 164(A)(9).
- 6 C. The Navajo Nation Council is the governing body of the Navajo Nation. 2
7 N.N.C. § 102(A).
- 8

9 **Section Two. Findings**

- 10 A. The Navajo Nation President issued Executive Order No. 001-20 declaring a state
11 of emergency due to the COVID-19 virus on March 13, 2020.
- 12 B. On March 11, 2020, the Navajo Nation Emergency Management Commission
13 declared a state of emergency due to the COVID-19 virus. Resolution No. CEM-
14 20-03-11.
- 15 C. The coronavirus pandemic has caused large scale infections and loss of life
16 throughout the world, the United States and the Navajo Nation. As of October 3,
17 2022, the Navajo Nation Health Command Operations Center has confirmed 1,914
18 COVID-related deaths on the Navajo Nation.
- 19 D. On March 11, 2021, President Biden signed the American Rescue Plan Act
20 ("ARPA") into law. Section 9901 of ARPA established the Coronavirus State
21 Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund (together
22 the "Fiscal Recovery Funds") by amending Title VI of the Social Security Act,
23 which provided \$362 billion for state, local, and tribal governments, including \$20
24 billion designated for tribal governments.
- 25 E. As of May 29, 2021, the United States Department of Treasury allocated
26 \$1,861,554,458.43 to the Navajo Nation under the Fiscal Recovery Funds
27 provisions of ARPA. The Fiscal Recovery Funds are designed to build on and
28 expand the relief provided in the Coronavirus Aid, Relief, and Economic Security
29 Act or CARES Act.
- 30

1 F. The Fiscal Recovery Funds are intended to support governmental efforts to mitigate
2 and contain the spread of COVID-19, as well as to respond to the health, social and
3 economic impacts of COVID-19 suffered by residents and businesses, including
4 making necessary investments in water, sewer, or broadband infrastructure.

5 G. The Navajo Nation Council, through Resolution CJY-41-21, established the Navajo
6 Nation Fiscal Recovery Fund and the expenditure authorization process. The
7 Budget and Finance Committee, through resolution BFS-31-21, approved the
8 Navajo Nation Fiscal Recovery Fund Application Procedures. *See*, Resolutions
9 CJY-41-21 and BFS-31-21.

10 H. Pursuant to ARPA, as stated in Navajo Nation Council Resolution CJY-41-21 (J):
11 1. Fiscal Recovery Fund costs must be incurred by December 31, 2024, meaning
12 the Navajo Nation must obligate funds by that date; and
13 2. The Fiscal Recovery Fund period of performance runs until December 31, 2026,
14 meaning funded projects must be completed by that date.

15 I. The purpose of this resolution is to expedite the approval of Navajo Nation Fiscal
16 Recovery Fund and American Rescue Plan Act (ARPA) expenditures for projects
17 requiring rights-of-way across Navajo lands to mitigate and contain the spread of
18 COVID-19, as well as to respond to the health, social and economic impacts of
19 COVID-19. This resolution is not intended to include commercial projects.

20 J. *Dennison v. Tucson Gas and Electric Co.*, 1 Nav. R. 95 (Nav. Sup. Ct. 1974) is a
21 Navajo Nation Supreme Court case involving a right-of-way issued for an above
22 ground electric powerline across the Navajo land. In this case, the Navajo Nation
23 Supreme Court spoke about the Navajo Nation's Eminent Domain statute, 16
24 N.N.C. § 1401 *et seq.* (Compensation for Improvements and Customary Use Rights
25 Upon Adverse Disposition of Land). The Supreme Court stated:

26 *Eminent Domain is the power of any sovereign to take or to authorize the taking*
27 *of any property within its jurisdiction for public use without the consent of the*
28 *owner. It is an inherent power and authority which is essential to the existence of*
29 *all governments.*

1 Therefore, as in this case, the sovereign (the Navajo Tribal Government), has
2 the power and the authority to take or to authorize the taking of the Dennison
3 property, all or part of it, without their consent. Plaintiffs' consent to the granting
4 of the right-of-way is totally unnecessary.

5 But, before the government can exercise this power of taking private property
6 without the owner's consent, it must provide just compensation for the property
7 taken and provide the owner thereof with due process of law. *Dennison v. Tucson*
8 *Gas and Electric Co.*, 1 Nav. R. 95, 98 (Nav. Sup. Ct. 1974).

9 K. The Navajo Nation Code at 16 § 1401 (A) (Damages to improvements of individual
10 Navajo Indians) states:

11 A. Whenever the Navajo Nation disposes of land containing any improvement
12 belonging to a Navajo Indian who will not donate the same, whether the
13 disposition is made by surface lease, permit, consent to grant of right-of-way
14 or consent to commencement of construction on a proposed right of way, or in
15 any other manner that gives the grantee or proposed grantee exclusive use of
16 the surface of the land containing such improvement, or authorizes the grantee
17 or proposed grantee to use the surface of the land in such manner that said
18 improvement or improvements must be removed, damaged, or destroyed, the
19 Navajo Nation will pay damages to the rightful claimant of such improvement
20 or improvements.

21 L. If the Navajo Nation Eminent Domain statute is used for rights-of-way for Navajo
22 Nation Fiscal Recovery Fund and American Rescue Plan Act (ARPA) projects, due
23 process and just compensation pursuant to 16 N.N.C. § 1401 *et seq.* shall be
24 afforded to those individuals affected by the use of the Eminent Domain statute.

25 M. The Navajo Nation Land Acquisition Rules and Regulations were approved by the
26 Resources and Development Committee Resolution RDCO-78-16. Resolution
27 RDCO-78-16 states in Exhibit A, Navajo Land Acquisition Rules and Regulations,
28 Section VII (A): "The Land Acquisition Trust Fund shall be used to compensate
29 land users for the exercise of eminent domain by the Navajo Nation pursuant to 16
30 N.N.C. §§ 1401-1403."

1 N. The Division of Natural Resources and the Navajo Nation Department of Justice
2 shall be directed to develop ARPA Land Acquisition Trust Procedures for Eminent
3 Domain Purposes (“Procedures”). The Procedures shall specify how “just
4 compensation” will be determined. The Dennison Case, decided in 1974, includes
5 a discussion of just compensation. The Navajo Nation Department of Justice’s
6 legal guidance is needed to determine whether inflation and other such factors
7 should be considered in the determination of just compensation. The Procedures
8 should specify who will conduct the appraisals and procedure to be used to
9 determine just compensation.

10 O. The Procedures should specify which land users should be compensated; such as,
11 whether land users who do not have a current animal tally count should be
12 compensated; and, how to provide for land user permits currently in probate. The
13 Procedures should state whether a grazing permit’s sheep units should be reduced
14 to reflect the reduction in grazing area. The Procedures should include any
15 additional issues to be determined to implement the purpose of this resolution.
16 These Procedures shall be presented to the Resources and Development Committee
17 for approval.

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19 **Section Three. Approving the use of the Navajo Nation Eminent Domain statute,**
20 **16 N.N.C. § 1401 *et seq.*, to address the right-of-way consent requirements for**
21 **Navajo Nation Fiscal Recovery Fund and American Rescue Plan Act (ARPA)**
22 **funded services within ARPA timelines**

23 The Navajo Nation approves the use of the Navajo Nation Eminent Domain statute,
24 16 N.N.C. § 1401 *et seq.*, to address the right-of way consent requirements for
25 Navajo Nation Fiscal Recovery Fund and ARPA funded services to Navajo Nation
26 residents within the ARPA established timelines in which the Navajo Nation must
27 obligate funds, December 31, 2024.

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29 **Section Four. Directives**
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- 1 A. The Navajo Nation Controller is hereby directed to report to the Navajo Nation
2 Resources and Development Committee the amount of funds available in the
3 Land Acquisition Trust Fund from which to compensate land users affected by
4 the use of the Navajo Nation Eminent Domain Statute to address right-of-way
5 approvals for Navajo Nation Fiscal Recovery Fund and ARPA funded projects.
- 6 B. The Executive Director of the Navajo Nation Division of Natural Resources
7 (“DNR”), the DNR Department Managers and the Navajo Department of
8 Justice Natural Resources Unit and the Tax and Finance Unit are hereby
9 directed to develop Land Acquisition Procedures for the expenditure of Land
10 Acquisition Trust Funds to be used to compensate land users affected by the
11 Navajo Nation Eminent Domain Statute pursuant to this resolution. The
12 Procedures are to be presented to the Resources and Development Committee
13 for approval.

14
15 **Section Five. Effective Date**

- 16 A. The provisions of this Action shall become effective pursuant to 2 N.N.C. § 221
17 (B).
- 18 B. The provisions of this Action shall expire on December 31, 2024, unless
19 otherwise determined by resolution of the Navajo Nation Council.
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