

POTAWATOMI LAW AND ORDER CODE

**TITLE 23
EMINENT DOMAIN**

**CHAPTER 23-1
NECESSITY OF EMINENT DOMAIN**

Section 23-1-1. Power to Condemn.

The Nation shall have the power to condemn land within the Prairie Band Potawatomi Nation's Reservation whenever such land is deemed by the Tribal Council to be necessary for a public or quasi-public purpose as set forth in Section 23-1-3 below.

Section 23-1-2. Definitions.

As used in this Title:

(A) "Condemnation" means the process of taking property or an interest therein, temporarily or permanently, for public or quasi-public use through the power of eminent domain.

(B) "Condemnee" means the owner, assignee, lessee, tenant, authorized occupant, or other holder of property or an interest therein taken by condemnation.

(C) "Eminent domain" means the power of the Nation to condemn property for public or quasi-public use.

(D) "Property" means all lands, including improvements and fixtures thereon; lands under water; surface and subsurface rights; every estate, interest, and right, legal or equitable, in lands, water, or the subsurface; all rights, interests, privileges, easements, and encumbrances relating thereto, including tenancies and liens of judgment, mortgage, or otherwise; and any portion of these.

(E) "Fair market value" means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. The fair market value shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods.

Section 23-1-3. Purposes for which Eminent Domain may be exercised.

Subject to the provisions of this Chapter and any other applicable law, the right of eminent domain may be exercised by the Nation for the following uses:

- (A) Buildings and grounds for any public or quasi-public use of the Nation including, but not limited to, economic enterprises of the Nation;
- (B) Reservoirs, canals, aqueducts, flumes, ditches or pipes, whether public, quasi-public or private, for conducting water for the use of the Nation or the inhabitants of the territory of the Nation or for drainage of any area within the territory of the Nation, and for wastewater treatment;
- (C) Raising the banks of streams, removing obstructions therefrom, or widening, deepening, or straightening their channels;
- (D) Highways, roads, streets, alleys, pathways and other roads or ways on the Reservation for the use or benefit of the Nation or its inhabitants;
- (E) Telegraph, cell phone, telephone, two way radio, cable television, and fiber optic lines and towers, and other conduits for public communication;
- (F) Electric light and power transmission and distribution lines, pipe lines used for supplying gas or waste disposal, and all transportation, transmission and intercommunication facilities;
- (G) Aviation fields;
- (H) Recycling facilities;
- (I) Lands used for ceremonial purposes by the Nation's members; and
- (J) All other public and quasi-public uses.

Section 23-1-4. Property subject to Condemnation.

Property which may be taken includes:

- (A) All property belonging to, assigned to, leased, or occupied by any person or entity;
- (B) Property appropriated to public or quasi-public use;
- (C) All easements and rights of way;
- (D) All rights of use, entry upon, and occupation of property;
- (E) The right to remove or take earth, gravel, stone, trees, and timber from property;
- (F) A use in the water of a stream, river, or spring; and

(G) All types of and interests, estates, and rights in property, private or otherwise, not enumerated.

Section 23-1-5. Prerequisites to Taking Property by Condemnation.

Before property may be condemned, it shall appear that:

(A) The use to which the property is to be applied is a use authorized by the laws of the Nation;

(B) The taking is necessary to such use, provided the word "necessary" as used in this subsection shall not be interpreted to mean the only possible option or alternative, but shall mean a viable solution to a problem or opportunity; and

(C) If the property is already appropriated to some public or quasi-public use, the public or quasi-public use to which it is to be applied is a more necessary public or quasi-public use.

**CHAPTER 23-2
PROCEDURES FOR CONDEMNATION.**

Section 23-2-1. Necessity Established by Tribal Council

(A) All condemnations shall be authorized by resolution of the Tribal Council approved by a majority vote of a quorum of the Tribal Council present at the meeting as required by the Constitution of the Nation.

(B) The Tribal Council, before taking any action in condemning any property or interest therein, shall post notice ten (10) days before the proposed action is to be taken at the Tribal Government Office, the Tribal Court and on the property itself so that interested persons will have an opportunity to appear before the Tribal Council to support or oppose the proposed action.

(C) Before condemning any property or interest therein, the Tribal Council shall make specific findings that (i) the purpose for which the property is to be taken is authorized by this Title, (ii) the prerequisites to taking property by condemnation under this Title have been met, (iii) and the property is subject to condemnation under this Title.

(D) The final resolution of the Tribal Council approving condemnation of the property shall identify and describe the land to be taken, the purpose of the taking, the possessory holder and leasehold tenants and the purpose for which the land will be used, and contain the specifics of the findings required by subsection C. above.

Section 23-2-2. Right to Enter and Survey Property.

(A) The Nation, or its authorized agents, may survey and locate property most appropriate for public or quasi-public use.

(B) Upon at least five (5) days notice, posted at the Tribal Office, the Tribal Court and on the property itself, the property may be entered upon to make examinations, surveys, and maps thereof, and the entry constitutes no cause of action in favor of the condemnees of the property.

Section 23-2-3. Filing Petition.

The petition shall include allegations of the authority and purpose of the taking; a description of the land, with map or survey attached, and nature of the interest to be taken; insofar as interests are to be taken, the name of any owner and all lienholders of record and the name of any party in possession. Such petition shall be verified by affidavit. Upon filing the petition, the court shall fix a time on a Notice of Hearing when the action will be taken up, to determine whether there is a necessity of taking the property for a public or quasi-public use and, if so, to appoint appraisers. The Nation shall at least ten (10) days before such hearing date mail to each named interested party whose address is known or can with reasonable diligence be ascertained a copy of the petition insofar as it relates to his interest. In the event that an address of an interested party can not be ascertained at the time of the filing of the petition, the Nation shall cause to be published once in a newspaper of general circulation in Jackson County, and posted on the property, a notice of the proceeding at least ten (10) days in advance of the hearing date fixed by the court. No defect in any notice or in the service thereof shall invalidate any proceedings.

Section 23-2-4. Finding of Necessity; Order Appointing Appraisers; Duties; Appeals.

If the judge finds from the petition that the taking is necessary for the lawful purposes of the Nation, the judge shall entertain suggestions from any party in interest relating to the appointment of appraisers and the judge shall enter an order appointing three disinterested residents of Jackson County, at least two of the three of whom shall have experience in the valuation of real estate, to view and appraise the value of the land to be taken, and to determine the damages to the interested parties resulting from the taking. Such order shall also fix the time for the filing of the appraisers' report at a time not later than 10 days after the entry of such order, except for good cause shown the court may extend the time for filing by a subsequent order. The granting of an order determining that the taking is necessary to the lawful purposes of the plaintiff shall not be considered a final order for the purpose of appeal, but an order denying the petition shall be considered a final order. Appeals may be taken from any final order under the provisions of this Title. Such appeals shall be prosecuted in like manner as other appeals and shall take precedence over other cases, except cases of a like character and other cases in which preference is granted by tribal law.

Section 23-2-5. Appraisers' Oath, Instructions, Reports and Notification to Nation; Notice to Interested Persons by Nation; Fees and Expenses.

After such appointment, the appraisers shall take an oath administered by either the Tribal Court Judge, Tribal Court Clerk or Court Administrator to faithfully discharge their duties as appraisers. The written instructions given to the appraisers at the oath administration shall address the following matters:

- (A) That they are officers of the court and not representatives of the Nation or any other party,
- (B) that they are to receive their instructions only from the judge,
- (C) the nature of their duties and authority,
- (D) the basis, manner and measure of ascertaining the value of the land taken and damages resulting from such taking,
- (E) that, except for incidental contact for the purpose of verifying factual information relating to the subject real estate or to discuss scheduling matters, appraisers shall refrain from any ex parte meetings or discussions with representatives of the Nation or property owner without first advising the adverse party and providing such party with the opportunity to be present, and
- (F) that all written material provided to an appraiser or appraisers by a party shall also be provided forthwith to the adverse party. The fees and expenses of the appraisers shall be determined and allowed by the Tribal District Court.

Section 23-2-6. Compensation Required for Taking And Damage.

- (A) Private property shall not be taken or damaged for public or quasi-public use without just compensation.
- (B) If the entire tract of land or interest in such land is taken, the measure of compensation is the fair market value of the property or interest at the time of the taking.
- (C) If only a part of a tract of land or interest is taken, the compensation and measure of damages is the difference between the fair market value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.
- (D) In ascertaining the amount of compensation and damages, the following nonexclusive list of factors shall be considered if such factors are shown to exist. Such factors are not to be considered as separate items of damages, but are to be

considered only as they affect the total compensation and damage under the provisions of subsections B. and C. of this section. Such factors are:

- (1) The most advantageous use to which the property is reasonably adaptable.
- (2) Access to the property remaining.
- (3) Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.
- (4) Productivity, convenience, use to be made of the property taken, or use of the property remaining.
- (5) View, ventilation and light, to the extent that they are beneficial attributes to the use of which the remaining property is devoted or to which it is reasonably adaptable.
- (6) Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land and needed to make the change in the improvement.
- (7) Loss of trees and shrubbery to the extent that they affect the value of the land taken and to the extent that their loss impairs the value of the land remaining.
- (8) Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.
- (9) Destruction of a legal nonconforming use.
- (10) Damage to property abutting on a right-of-way due to change of grade where accompanied by a taking of land.
- (11) Proximity of new improvement to improvements remaining on condemnee's land.
- (12) Loss of or damage to growing crops.
- (13) That the property reasonably could be or had been adapted to a use which was profitably carried on.
- (14) Cost of new drains or loss of drains and the cost of replacing them with drains of like quality, to the extent that such loss affects the value of the property remaining.
- (15) Cost of new private roads or passageways or loss of private roads or passageways and the cost of replacing them with private roads or passageways of like quality, to the extent that such loss affects the value of the property remaining.

Section 23-2-7. View of Lands by Appraisers and Filing of Report.

(A) The appraisers shall, after they have been sworn and received their instructions, make their appraisal and assessment of damages, by actual view of the

lands to be taken and of the tracts of which they are a part. Upon the completion of their work the appraisers shall file their report, approved by a majority of the appraisers, in the office of the clerk of the Tribal District Court and the court clerk shall immediately notify the Nation of such filing.

(B) The Nation, within three days after receiving such notice, shall mail a written notice of the filing of such report to every person who owns any interest in any of the property being taken, if the address of such person is known, and shall file in the office of the clerk of the Tribal District Court an affidavit showing proof of the mailing of such notice. The form of notice shall be in substantially the following form:

In the Tribal District Court of the Prairie Band Potawatomi Nation.

Prairie Band Potawatomi Nation, Plaintiff, vs.
_____ Defendant,

Notice is hereby given that the undersigned appraisers appointed by the court, have, in accordance with the provisions of TITLE 23 of the Potawatomi Law and Order Code, filed their appraisal of compensation and the assessment of damages for the taking of the lands or interests therein sought to be taken by the Prairie Band Potawatomi Nation in the above entitled matter covering the following described lands (_____). Any party dissatisfied with the appraisers' award may appeal therefrom in Tribal District Court within thirty (30) days from the day of filing.

Section 23-2-8. Payment of Award and Vesting of Rights; Abandonment.

(A) Payment of award; vesting of rights. If the Nation desires to continue with the proceeding as to particular tracts it shall, within twenty (20) days from the time the appraisers' report is filed, pay to the clerk of the Tribal District Court the amount of the appraisers' award as to those particular tracts and court costs accrued to date, including reasonable appraisers' fees. Such payment shall be without prejudice to the Nation's right to appeal from the appraisers' award. Upon such payment being made, the title, easement or interest appropriated in the land condemned shall thereupon immediately vest in the Nation, and it shall be entitled to the immediate possession of the land to the extent necessary for the purpose for which it was taken and consistent with the title, easement or interest condemned. The Nation shall be entitled to all the remedies provided by law for the securing of such possession.

(B) Abandonment. If the Nation does not make the payment prescribed in subsection A. hereof for any of the tracts described in the petition within twenty (20)

days from the time the appraisers' report is filed, the condemnation is abandoned as to those tracts, and judgment for costs, including the appraisers' fees, shall be entered against the Nation. After payment is made by the Nation to the clerk of the court as provided in subsection A. hereof, the proceedings as to those tracts for which payment has been made can only be abandoned by the mutual consent of the Nation and the parties interested in the award.

Section 23-2-9. Appeal from Award; Notice to Parties Affected.

If the Nation, or any defendant, is dissatisfied with the award of the appraisers, it or he/she may, within thirty (30) days after the filing of the appraisers' report, appeal from the award by filing a written notice of appeal with the clerk of the Tribal District Court. In the event any parties shall perfect an appeal, copies of such notice of appeal shall be mailed to all parties affected by such appeal, within three (3) days after the date of the perfection thereof. An appeal by the Nation or any defendant shall bring the issue of damages to all interests in the tract before the court for trial de novo. This appeal shall be docketed as a civil action and tried as any other civil action; provided, however, the only issue to be determined therein shall be that of just compensation to be paid for the land or right therein taken at the time of the taking and for any other damages allowable by law.

Section 23-2-10. Trial on Appeal; Attorney Fees.

In an action on appeal the Tribal District Court shall assign the case for trial to a six person jury. Whenever the Nation shall appeal the award of court appointed appraisers, and the jury renders a verdict for the landowners in an amount at least twenty-five percent (25%) greater than said appraisers' award, the court may allow as court costs a reasonable amount to be paid to the landowner's attorney as attorney fees.

Section 23-2-11. Appeal from Award; Notice; Withdrawal of Payment.

(A) The clerk of the Tribal District Court shall notify the defendants within ten (10) days that the Nation has paid the amount of the appraisers' award into court.

(B) The defendants may by order of the judge and without prejudice to their right of appeal withdraw the amount paid to the clerk of the court as their interests are determined by the appraisers' report.

Section 23-2-12. Final Judgment on Appeal.

If the compensation finally awarded on appeal exceeds the amount of money paid to the clerk of the court, the judge shall enter judgment against the Nation for the amount of the deficiency, with interest. If the compensation finally awarded on appeal is less than the amount paid to the clerk of the court, the judge shall enter judgment in favor of the Nation for the return of the difference, with interest if the amount of the appraisers' award was withdrawn by the landowners.

Section 23-2-13. Dispute as to Division of Award or Judgment.

In any action involving the condemnation of real property in which there is a dispute among the parties in interest as to the division of the amount of the appraisers' award or the amount of the final judgment, the Tribal District Court shall, upon motion by any such party in interest, determine the final distribution of the amount of the appraisers' award or final judgment.

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