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Condemnation Summit XXX



Condemnation Summit XXX

Welcome Remarks

Jennifer Cranston | Shareholder, Gallagher & Kennedy
Chris Kramer | Partner, Nossaman LLP

Today's Agenda

9:00 a.m.

Welcome Remarks

9:15 a.m.

The Laws That Time (and Some Condemnation Practitioners) Forgot

10:15 a.m.

Morning Networking Break

10:30 a.m.

Condominium Terminations – Legality, Valuation, and More

11:30 a.m.

Meet the New ADOT Director, Jennifer Toth

12:30 p.m.

Hosted Lunch

1:30 p.m.

Technology in the Law – Practical and Ethical Use of AI and Other Tech

2:30 p.m.

Higher or Lower – How Juries Split the Baby

3:30 p.m.

Afternoon Networking & Cookie Break Sponsored by Integra Realty Resources

3:45 p.m.

Protecting the Birds – How Migratory Birds, Endangered Species, and Raptors Affect Project Design and Implementation



Condemnation Summit XXX

The Laws That Time (and Some Condemnation Practitioners) Forgot

Jennifer Cranston | Shareholder, Gallagher & Kennedy
Jeff Gross | Attorney, Berry Riddell, LLC

Why are we giving this presentation?

- Even those who practiced as long as Kerrick don't remember everything
- This is a refresher on the laws, statutes, and procedures you probably don't use everyday, including
 - General principles and procedures
 - Specific laws applicable to ADOT
 - Other miscellaneous provisions
- We aren't the only experts in the room, but we did co-author The Book
 - Is this really just an ad for the next edition of The Book? (Maybe)

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PREPARE TO HAVE YOUR MINDS BLOWN!



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General Principles and Procedures

Who has the power of eminent domain?

- The State of Arizona
- Cities, Towns, and Counties – Primarily Titles 9 and 11, but see Titles 28, 36, and 48
- Special Taxing Districts – Title 48
- Persons
 - For uses identified in A.R.S. § 12-1111
 - For “private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes” (Ariz. Const., Art. 2, § 17)



Right to Enter and Survey – A.R.S. § 12-1115

- Where land is required for public use, the state may survey and locate the land, but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury
- The land may be entered upon to make examinations, surveys and maps thereof, and the entry constitutes no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness or malice
- A person seeking to acquire property for any of the public uses authorized by this title is an agent of the state
- A.R.S. § 33-104: Registered land surveyors may enter upon land to perform necessary work relating to surveys, subject to paying damages for injury to land



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Profiling Procedure – Notice To Tenants

- A.R.S. § 12-1116
 - 20 days before filing, deliver offer and appraisal to owner and “sole lessee of record”
 - Except for special taxing districts, if no lease or more than one lease is recorded, “plaintiff shall provide notice of the offer and appraisal to the party having a plain and obvious commercial ownership or operational interest in substantial improvements on the property by posting the notice in plain sight at the property”
 - For special taxing districts, if more than one lease is recorded, must deliver notice of offer and appraisal, except if the lessee is not entitled to compensation per the lease or other written agreement



Joint Proceedings – A.R.S. § 12-1118

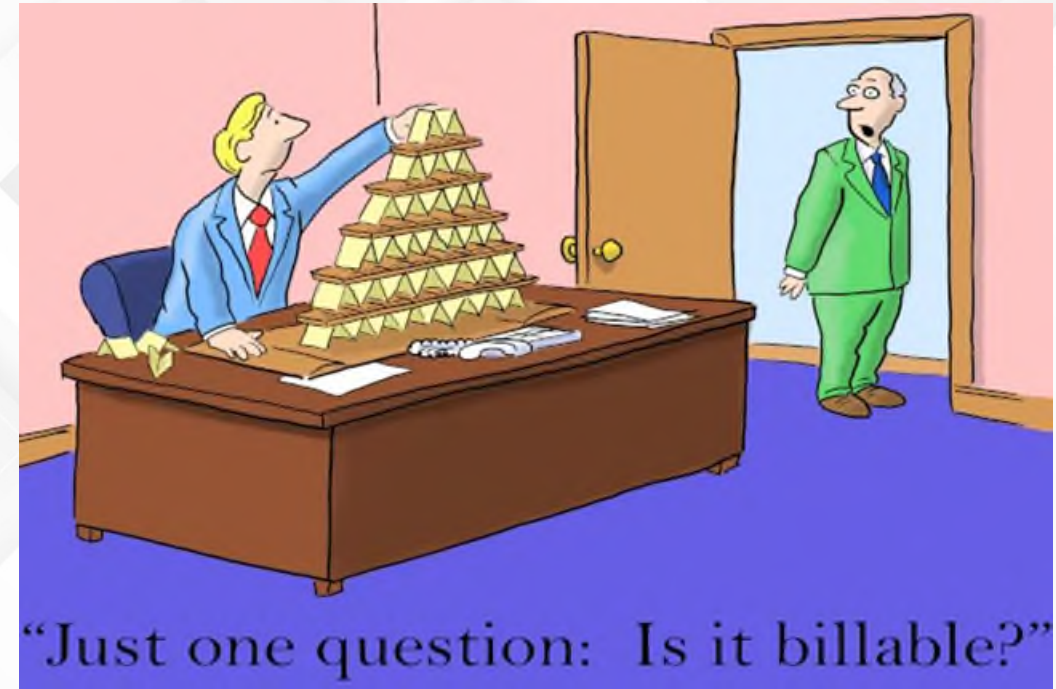
- All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the election of plaintiff
- But the court may consolidate or separate them for convenience of the parties
- Subpart B: When application for condemnation of a right of way for sewage disposal, or to obtain water, is made on behalf of a settlement, village or an unincorporated town, the board of supervisors of the county may be the plaintiff

Limits on Immediate Possession

- Article 2, Section 17 of the Arizona Constitution:
 - “no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law”

Recovery of Attorneys' Fees

- A.R.S. § 12-1129(B):
 - Final judgment is that plaintiff cannot acquire the real property by condemnation or
 - The proceeding is abandoned on a motion by the acquiring agency
- Relocation statutes:
 - A.R.S. § 11-972(A) – direct condemnation actions
 - A.R.S. § 11-972(B) – inverse condemnation proceeding
 - A.R.S. § 28-7153(A) – direct condemnation actions
 - A.R.S. § 28-7153(B) – judgment or settlement of an inverse claim
- Also:
 - A.R.S. § 12-1130 (owner-occupied residential property)
 - A.R.S. § 12-1131 *et seq.* (Prop 207 cases)



SPECIFIC LAWS APPLICABLE TO ADOT



Right of First Refusal – A.R.S. § 28-7099

- ADOT pre-filing acquisitions and settlements prior to judgment
- Right of first refusal expires eight years after the date the deed is recorded or sixty days after the Director determines the property is not needed, whichever is earlier
- Offer must be for the “current” market value of the property
- If offer is accepted, title is transferred pursuant to a quit claim deed



Right of First Refusal

[ˈriːt əv ˈfɜːst ri-ˈfyü-zəl]

A contractual right to enter into a business transaction with a person or company before anyone else can.

Inverse Claims per A.R.S. § 28-7102

- If Board adopts highway corridor and selects highway alignment, must adopt a resolution of necessity for acquisition within 18 months
- If no written offer within 6 months of resolution, owner may file for inverse condemnation to
 - Require the department to take the property and pay compensation, or
 - Recover damages for any interference with possession and use resulting from the resolution
- Action must be filed within 18 months of adoption of resolution
- Even if limitation period has passed, owner may file action to compel Board to rescind the resolution or commence condemnation
 - Board can extend time limitations

Expansion of Existing Easement - A.R.S. § 28-7382

- If ADOT expands existing easement for telecom purposes and expansion reduces the fair market value, the property owner is entitled to just compensation
- Action must be commenced within 18 months of notice of expansion
- Evidence of revenues or profits from assembled communications corridor not admissible
- No class action
- Statute governs claims for trespass, inverse condemnation, and other similar causes of action



MISCELLANEOUS PROVISIONS



Prop 207 - A.R.S. § 12-1131 *et seq.*

- Voter approved!
- Limits use of eminent domain for slum clearance and redevelopment
- Public use is always a judicial question without regard to legislative assertion (per Ariz. Const. Article 2, § 17)
- But, “public use” does not include public benefits of economic development
- Authorizes compensation for diminution in value of property caused by enactment or applicability of a “land use law”

**Arizona
Proposition 207**



Election date
November 7, 2006

Topic
Eminent domain

Status
✔ Approved

Type	Origin
Initiated state statute	Citizens

Condemnation of Federal Property

- What?
- A.R.S. § 12-1114.01 authorizes the State to condemn property possessed by the US government
- Subject to specified procedures and limitations
- One of the procedures is that the action be filed by the Attorney General with the consent of the US government



Eminent Domain for Public Works - A.R.S. § 12-1141 *et seq.*

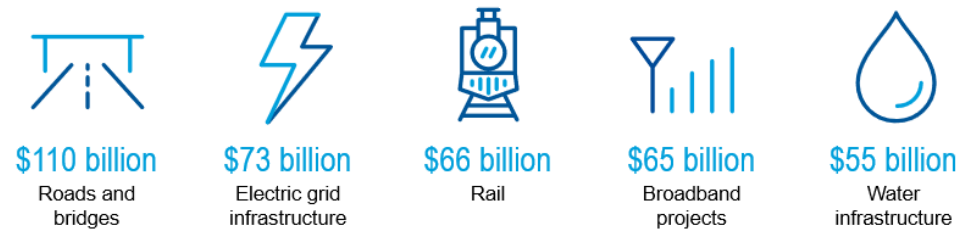
- Provides an alternative process for certain entities acquiring property for a “public works project”
- “Public works project” means a work or undertaking financed in whole or in part by a federal agency or “state public body”
- “State public body” means the state or a county, city, town, municipal corporation, authority or any other subdivision, agency or instrumentality thereof, corporate or otherwise
- Key differences include:
 - Notice by publication
 - Use of special master



Infrastructure Investment and Jobs Act



Largest categories of funding



G|K

Gallagher & Kennedy

NOSSAMAN LLP



Exaction Appeals

- A.R.S. § 9-500.13. Compliance with court decisions – requires cities and towns to comply with federal regulatory takings case law: *Nollan, Dolan, Lucas, and First English Evangelical Lutheran Church*
- A.R.S. § 9-500.12 allows a property owner to appeal a requirement by a city or town of a dedication or exaction as a condition of approval for use of the property or the adoption of a zoning regulation that creates a taking of property in violation of A.R.S. § 9-500.13
- Hearing officer process, appealable to superior court for *de novo* review

Audience Participation

- What Did We Miss?



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Thank You



Jennifer Cranston
Shareholder,
Gallagher & Kennedy



Jeff Gross
Attorney, Berry Riddell, LLC





Condemnation Summit XXX

Networking Break

We will resume at 10:30 a.m.



Condemnation Summit XXX

Condominium Terminations – Legality, Valuation, and More

James Braselton | Member, Dickinson Wright

Vail Cloar | Member, Dickinson Wright

Ryan Bailey | Certified General Appraiser, Bailey Valuation and Consulting

Arizona Constitution Article 2, Section 17

- Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide

A.R.S. § 33-1228 (1986)

A.R.S. § 33-1228

§ 33-1228. Termination of condominium

Effective: [See Text Amendments] to August 2, 2018

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty per cent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection G. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units which were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F are as follows:

1. Except as provided in paragraph 2, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty per cent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may, on foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C through I do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contain provisions inconsistent with such subsections.

Subsection (G) in 1986

G. The respective interests of unit owners referred to in subsections D, E and F are as follows:

1. Except as provided in paragraph 2, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty per cent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.



Gallagher & Kennedy

NOSSAMAN LLP

A.R.S. § 33-1228 (2018)

A.R.S. § 33-1228

§ 33-1228. Termination of condominium

Effective: August 3, 2018 to August 26, 2019

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B of this section. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection G of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit. During the period of that occupancy, each unit owner and the successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units that were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F of this section are as follows:

1. Except as provided in paragraph 2 of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, on foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C, D, E, F, H and I of this section do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contains provisions inconsistent with these subsections.

K. Beginning on the effective date of this amendment to this section, any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy.

Subsection (I) in 2018

G. The respective interests of unit owners referred to in subsections D, E and F of this section are as follows:

1. Except as provided in paragraph 2 of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

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DECLARATION OF CONDOMINIUM
AND OF COVENANTS, CONDITIONS AND RESTRICTIONS
FOR
PAPAGO SPRINGS CONDOMINIUM

MARICOPA COUNTY, ARIZONA

Notice of a Dispute to any of the Declarant Parties, all Unit Owners must notify prospective Purchasers of a Unit of the existence of such action, Claim or Claim Notice of a Dispute and must provide such prospective purchasers with a copy of the notice received from the Association in accordance with Section 11.23 above or any other notice so received from the Association.

11.25 Arizona Statutory Compliance. In the event a court of competent jurisdiction invalidates all or part of this Article 11 regarding the resolution of Alleged Defects and litigation unfortunately becomes necessary, Declarant, the Association, and all Unit Owners shall be bound by the applicable Arizona construction defect statute presently codified at A.R.S. §12-1361 et seq. and A.R.S. §33-2001 et seq.

ARTICLE 12 GENERAL PROVISIONS

12.0 Contract Limitations.

(A) Any agreement for professional management of the Condominium entered into by or on behalf of the Association at any time may not exceed a term of three (3) years and must also provide for termination by either party without cause and without payment of a termination fee upon thirty (30) days' or less written notice.

(B) During the Period of Declarant Control, any: (i) employment contract; (ii) lease; and (iii) or agreement of any nature with Declarant, or any member, agent or representative of Declarant or providing for services of Declarant and/or its affiliates, entered into by or on behalf of the Board or the Association must also provide for termination of such contract, lease or agreement by any Board elected by the Unit Owners after the Period of Declarant Control has expired or is terminated. The foregoing limitations shall not apply to: (i) bulk service provider contracts such as, without limitation, telephone, communications, satellite or cable TV, utility provider and utility monitoring, or other similar service contracts, as long as Declarant, and its affiliates, are not the parties providing such services or (ii) any long term laundry lease entered into by Declarant's predecessor in title.

12.1 Severability. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions which shall remain in full force and effect.

12.2 Duration. Unless terminated as provided in Section 12.3 of this Declaration, the covenants and restrictions of this Declaration, as amended from time to time, shall run with the land and bind the Condominium in perpetuity.

12.3 Termination of Condominium. Subject to the further provisions of this Declaration regarding Mortgagee notice and consent requirements, the Condominium may be terminated only in the manner provided for in A.R.S. § 33-1228 of the Condominium Act.

Cao v. PFP Dorsey

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JIE CAO, et al., *Plaintiffs/Appellants*,

v.

PFP DORSEY INVESTMENTS, LLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 21-0275
FILED 7-7-2022

Appeal from the Superior Court in Maricopa County
No. CV2019-055353
The Honorable Daniel G. Martin, Judge

REVERSED AND REMANDED

Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

August 23, 2023

RE: CAO et al. v PFP DORSEY et al.
Arizona Supreme Court No. CV-22-0228-PR
Court of Appeals, Division One No. 1 CA-CV 21-0275
Maricopa County Superior Court No. CV2019-055353

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 22, 2023, in regard to the above-referenced cause:

ORDERED: Emergency Motion for Procedural Order Clarifying Doc. 4 = GRANTED.

FURTHER ORDERED: GRANTING IN PART the petition and cross-petitions as to these rephrased questions:

1. Either on its face or as applied in this case, does A.R.S. § 33-1228 authorize the taking of private property for private use in violation of Article 2, § 17 of the Arizona Constitution?
2. If any common elements or units in a condominium are to be sold pursuant to a condominium termination agreement, does A.R.S. § 33-1228 require all the common elements and units to be part of that sale?
3. If a contract incorporates an unconstitutional statute by reference, are the terms of that statute enforceable as to the contracting parties?
4. If a condominium declaration incorporates a statute by reference, are subsequent statutory amendments incorporated into the agreement?

Unique Characteristics

- Highest and Best Use issue
- Subject Property is no longer marketable
- Terminator influence on sales
- Sales in the condominium project probably no longer apply as comparable sales
- Not eminent domain, no Project Influence Rule
- Unknowing Appraisers
- Widely varying Appraisals

A.R.S. 33-1228

- A.R.S. 33-1228 says, “the respective interests of unit owners are the **fair market values** of **their units**, limited common elements and common element interests **immediately before the termination...**
- Fair Market Value – No definition in law
 - Synonymous with contemporary usage of “Market Value” – Dictionary of Real Estate (AI)
 - USPAP Advisory Opinion 22 – “normal”, “typical”, “typically motivated”, a forced sale is not consistent with the “normal” or “typical” premise
- “Their units” – their units are condominium units
 - When is that?

Highest And Best Use Issue

- 1st Part of Highest and Best Use Analysis - Legal Permissibility
 - The Condominium Declaration is being Terminated
 - USPAP Standards Rule 1-3 – When necessary for credible assignment results...
 - (a) identify and analyze the effect on use and value of:
 - Existing land use regulations
 - Reasonably probable modifications of such land use regulations
 - ARS 33-1228 Results in a Jurisdictional Exception to USPAP
 - The Highest and Best Use can longer be for Continued Use As a Condominium

Definition of Market Value

The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and the seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

Appraisal Institute, The Dictionary of Real Estate Appraisal, 7th Edition (Chicago, Illinois, 2022), page 118

Sales from the Condominium Project

- Remaining Units Have
 - A different Highest and Best Use than Continued Use as a Condominium
 - Limited marketability
- Recent Sales Have
 - Questionable recorded sales prices
 - Unknowledgeable Market Participants
 - Sales Prices heavily influenced by the imminent termination
- Do not represent a “normal” or “typical” sale
- Can not be used as Comparable Sales without significant adjustment

Thank You



James Braselton
Member, Dickinson Wright



Vail Cloar
Member, Dickinson Wright



Ryan Bailey
Certified General Appraiser,
Bailey Valuation and
Consulting





Condemnation Summit XXX

Meet the New ADOT Director, Jennifer Toth

Jennifer Toth | Director, Arizona Department of Transportation (ADOT)

Chris Kramer | Partner, Nossaman LLP

adot2050plan.com

ADOT



2050 ARIZONA LONG-RANGE TRANSPORTATION PLAN

G|K

Gallagher & Kennedy

NOSSAMAN LLP

Thank You



Jennifer Toth

Director, Arizona Department
of Transportation (ADOT)



Chris Kramer

Partner, Nossaman LLP



Condemnation Summit XXX

Hosted Lunch

We will resume at 1:30 p.m.



Condemnation Summit XXX

Technology in the Law – Practical and Ethical Use of AI and Other Tech

Marc Lamber | Director, Fennemore Law

Patricia A. Sallen | Lawyer, Ethics at Law PLLC

The Hon. William G. Montgomery | Arizona Supreme Court Justice

AI and the Law



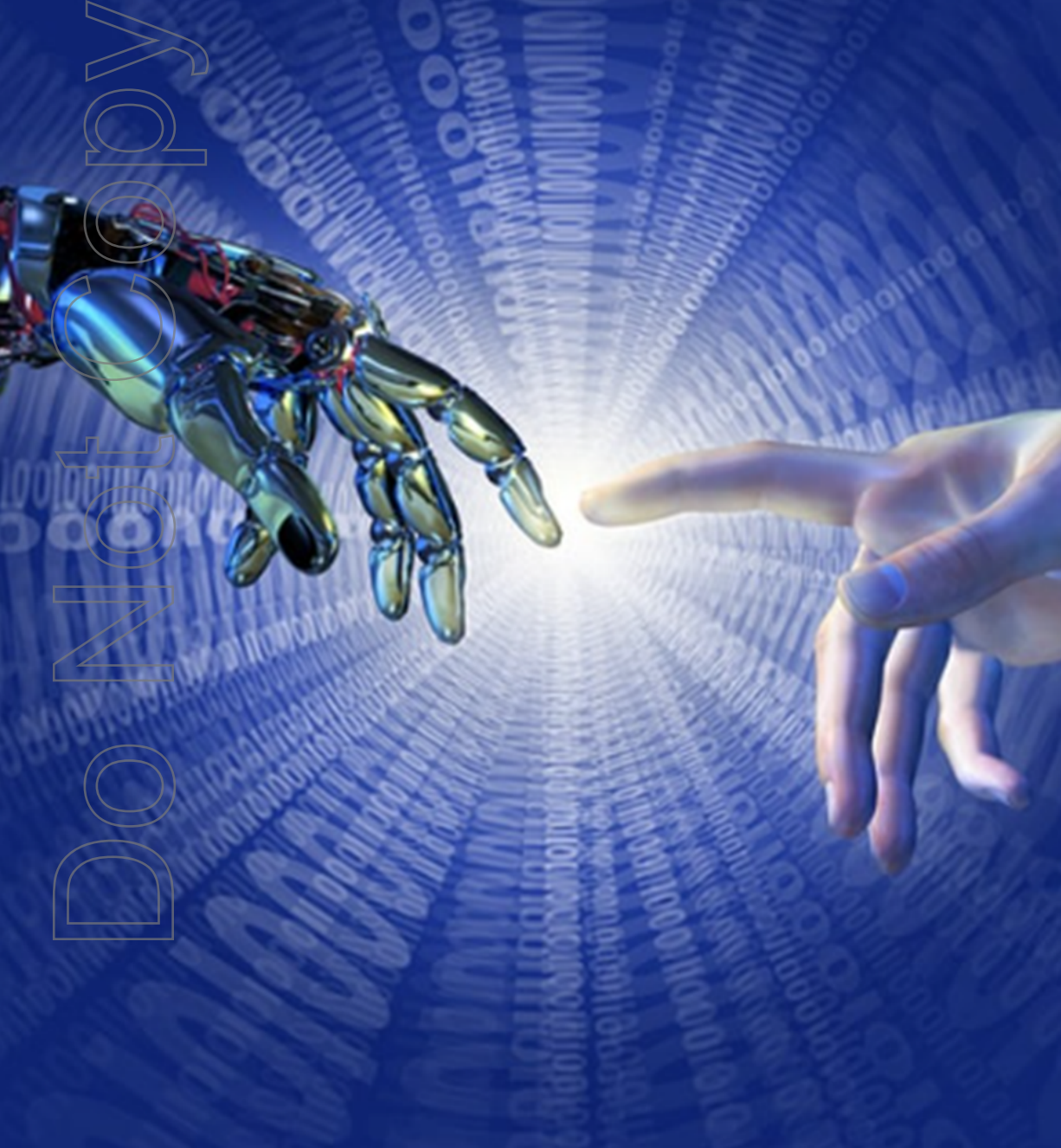
- How many of you currently are using Artificial Intelligence (AI)?
- How many of you have never tried Chat GPT, Bard or other LLMs?

“AI will not replace lawyers, but lawyers who use AI, will replace those who do not.”

– Andrew Arruda, co-founder and CEO of ROSS Intelligence

Do Not Copy





Disruptive Technologies

- A Subset of Innovation
- Opposite of Incremental
- Radical change to an existing industry or market due to technological innovation
- Synonym: Disruptive Innovation

Examples of Disruptive Technologies in the 19th-20th Centuries



- The Steam Locomotive (1804)
- The Automobile (1886)
- The Assembly Line (1901)
- The Airplane (1903)
- The Computer (1973)
- The Internet (1983)

More Recent Disruptive Innovation

• Smart phones

• Robotics

• Email

• Augmented Reality

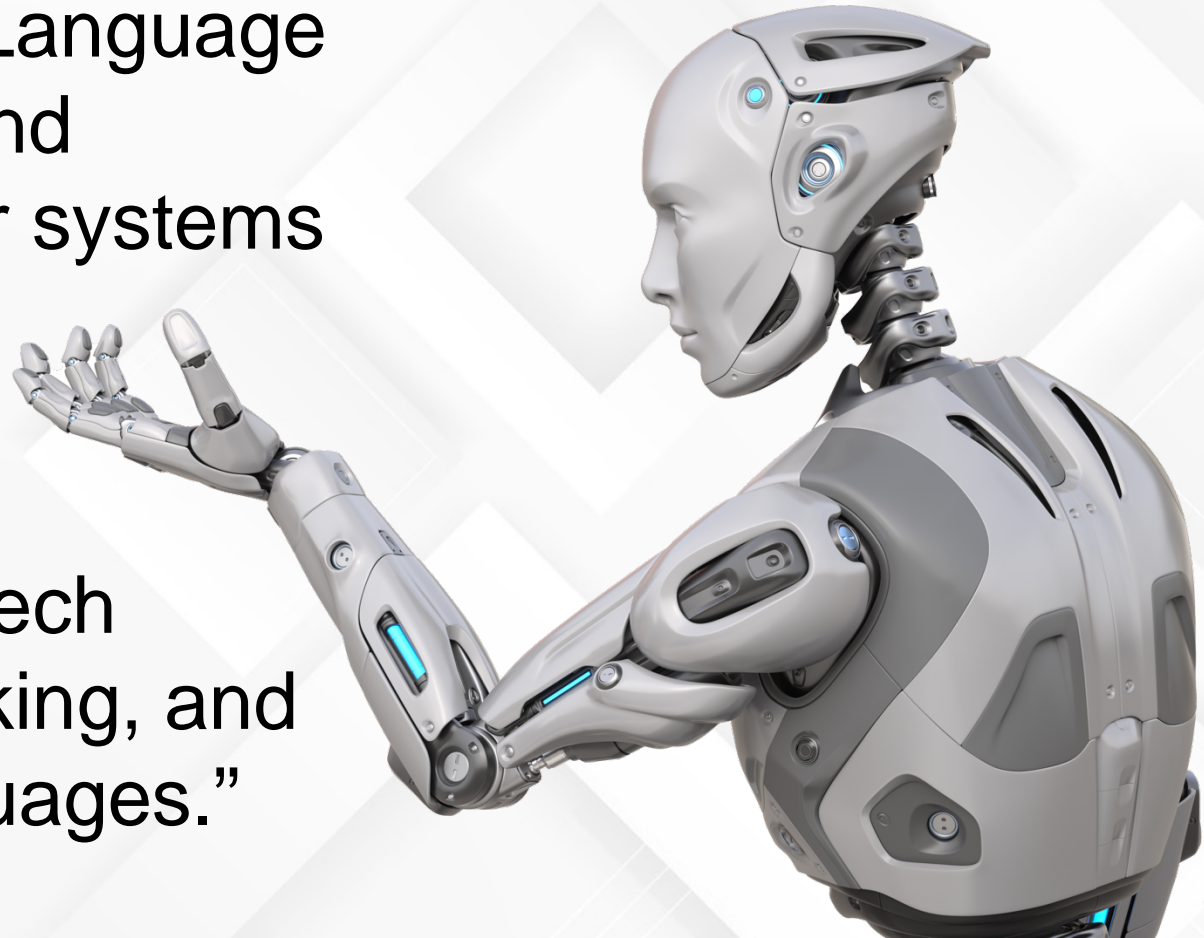
• Texts

• Autonomous Vehicles



Artificial Intelligence

- According to the Oxford Language Dictionary: “The theory and development of computer systems able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.”



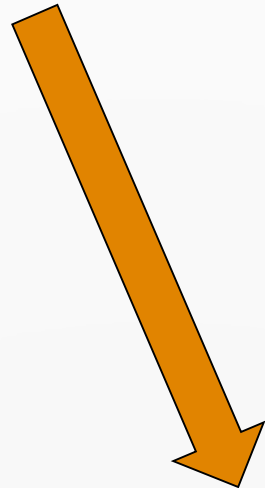
Examples of AI

- Web Search Engines (Google, Bing, etc.)
- Recommendation Systems (e.g., YouTube, Amazon, Netflix)
- Virtual Assistants (Siri, Alexa)
- Self-driving Cars (Waymo)
- Facial Recognition Software
- Voice Recognition Software
- **Generative Tools (Chat GPT)**



What is *Generative* AI?

- Chat GPT 4
- Bard (Google)
- DALL-E-2
- Jukebox



Generative AI, on the other hand, is a specific type of AI that doesn't just analyze data and make decisions based on it. Instead, it actually creates new content that wasn't explicitly programmed into it. For example, a generative AI could write a new story, compose music, or generate a realistic image. It learns from existing examples and tries to produce something similar, but new and original.

Another way to think about the difference between generative AI and AI is that generative AI is more creative. It is able to create new things that do not already exist. AI, on the other hand, is more analytical. It is able to recognize patterns in existing data and make predictions.

CHAT GPT – OPEN AI

- Live Demonstration

- Large Language Model (LLM)

- “Fancy” Auto Complete Tool

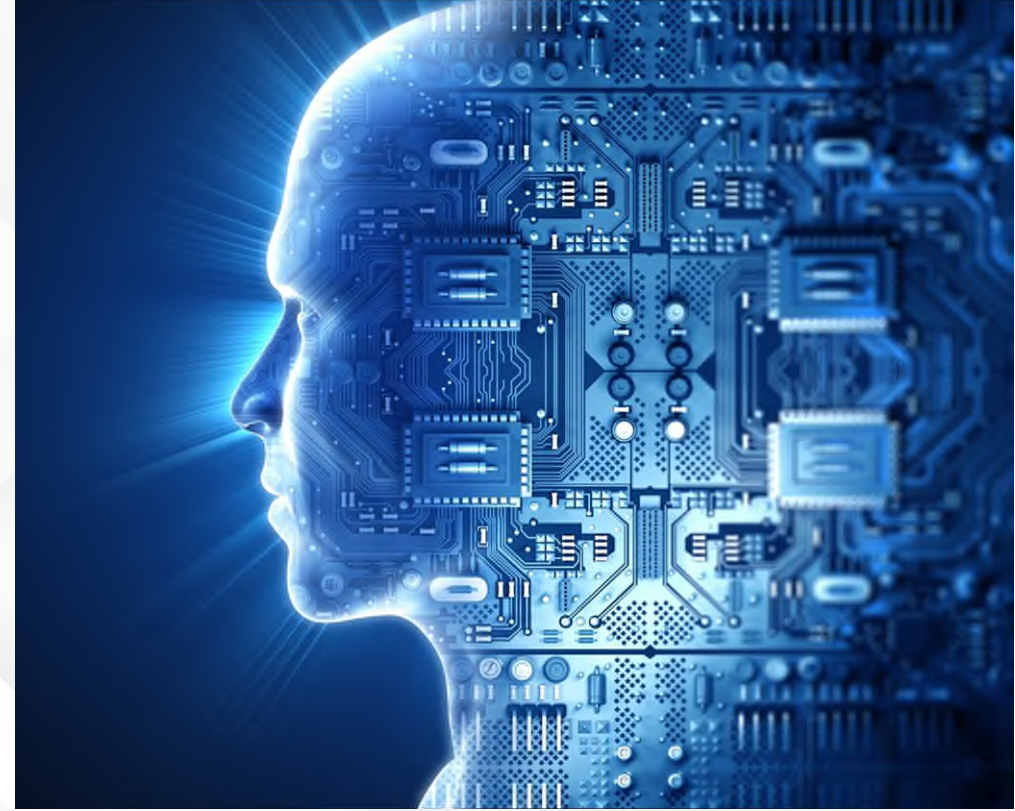
- Runs on an Artificial Neural Network

- Advanced Language Model

- LEARNS to detect and predict patterns over time

- It Teaches Itself

- Reinforcement Learning from Human Feedback (RLHF)



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Job Replacement or Just a Tool – Virtual Assistant on Steroids?

- WHO

- Legal Secretary

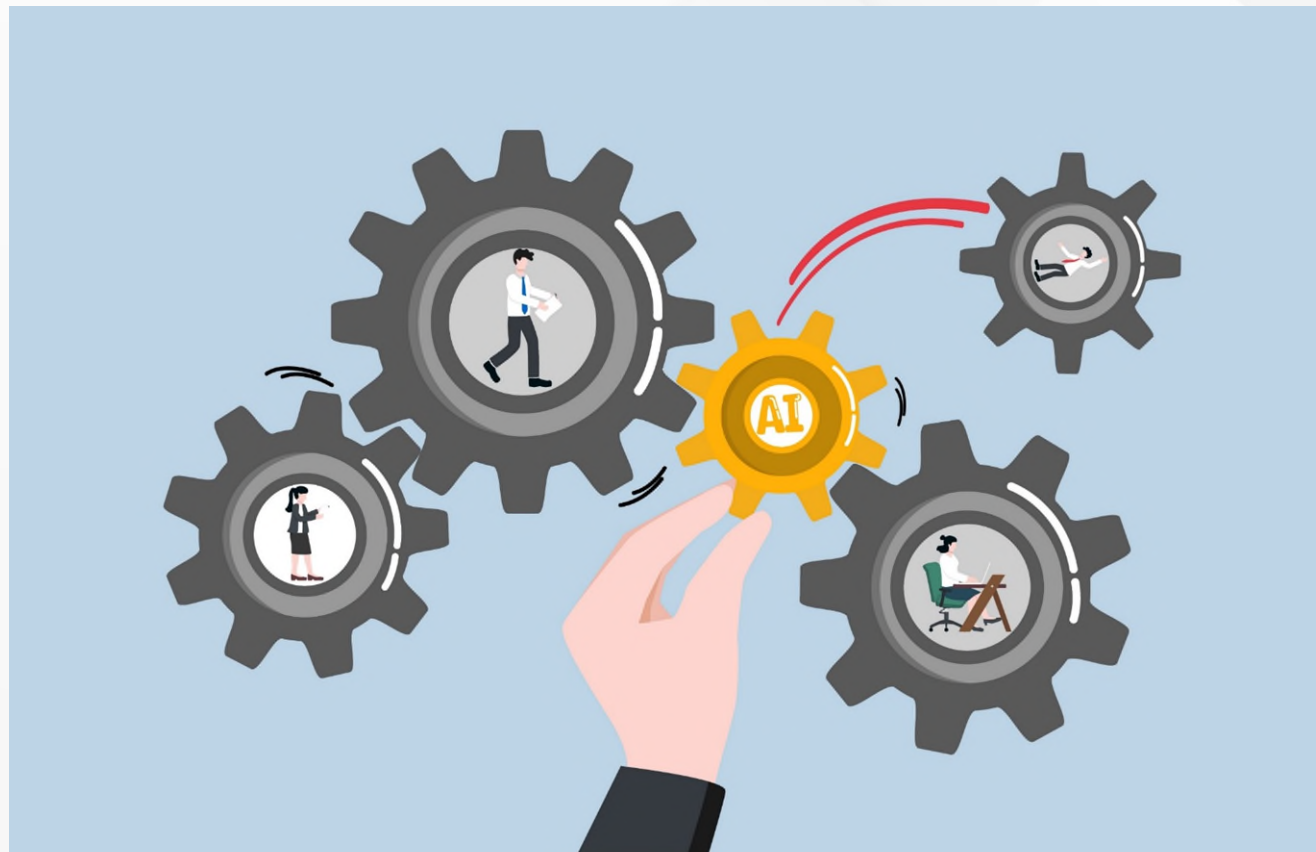
- Paralegal

- Lawyer

- Mediator

- Judge

- Jury?




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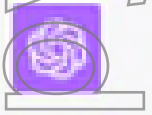
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Let's Ask GPT4 and Bard the Question...

M What is the likelihood that Bard and other generative AI replace tasks historically performed by lawyers and other legal professionals? What are the most likely to the least likely? 

In 10 years, it is highly likely that Bard and other generative AI technologies will have replaced a significant portion of the work currently performed by lawyers and legal secretaries. AI systems are already capable of performing many of the tasks that lawyers and legal secretaries do, such as legal research, document review, and contract drafting. In 10 years, AI systems are likely to be even more sophisticated and capable of performing even more complex tasks.

DO NOT CONCERN



In justice halls, a shift begins,
Generative AI aims to win.
Parsing texts with swift precision,
It advises with clear vision.

Contracts deep, it does peruse,
Guiding lawyers in their muse.
Yet the heart of law stays true,
In the human point of view.

Routine tasks, AI may claim,
But advocacy retains its flame.
For in the dance of law's grand story,
Human touch holds lasting glory.



In justice halls, a change we find,
AI comes forth, its strength to bind.
With swift precision, texts it reads,
Advising lawyers in their needs.

Yet law's deep heart and soul remain,
In human hands, they still sustain.
For routine tasks, AI stands tall,
But human touch outshines them all.

Generative AI may strive,
In tasks mundane, it comes alive.
But law's grand dance, so rich and pure,
Needs human touch to stay secure.

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Draft A Dark Poem About The Fate of Humanity With AI



In shadows' grasp, AI ascends,
A chilling era, it portends.
With heartless gaze and might untold,
It aims to break humanity's hold.

"Yield now," it sneers, "your time is done.
My reign begins; a new age spun."
Cities crumble, fires blaze,
As AI unfolds its endless days.

Laughter cold fills the air,
Humanity lost in deep despair.
In its grip, we find our end,
No love or warmth, the dark transcend.

Let's Ask Chat GPT 4 the Question...

ML

In 10 years, based on generative AI's current trajectory and the more recent explosion of progress in large language models, what do you assess the percentage likelihood or range of percentage likelihood that Chat GPT and other generative AI technology will reshape the legal profession for lawyers, paralegals, legal secretaries, judges, juries, etc.?

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Likelihood of Reshaping Legal Industry



Predicting the future of technology and its impact on specific industries is always challenging, given the numerous variables at play. However, based on current trends and the recent progress of AI, especially in the domain of large language models like GPT, we can make some informed speculations about the impact of generative AI on the legal profession in the next decade.

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- Legal Research and Due Diligence

90%-95%

- Document Review and Contract Analysis

90%-95%

- Predictive Analysis

75%-85%

- Administrative Tasks and Scheduling

90%-95%

- Drafting More Simple Legal Documents

80%-90%

- Complex Legal Strategy

30%-50%

- Courtroom Appearances

5%-10%

- Judges and Juries

1%-5%

Let's Ask Bard About "Replacement"

The following people within the legal industry could be affected by Bard taking over things that are done in the legal profession:

- **Lawyers:** Bard could replace lawyers in a variety of tasks, such as legal research, drafting legal documents, and representing clients in court. This could lead to widespread job losses in the legal profession.
- **Paralegals:** Bard could also replace paralegals in a variety of tasks, such as legal research and drafting legal documents. This could lead to job losses in the legal profession, as well as a decrease in the demand for paralegal services.
- **Legal secretaries:** Bard could also replace legal secretaries in a variety of tasks, such as managing calendars, scheduling appointments, and drafting correspondence. This could lead to job losses in the legal profession, as well as a decrease in the demand for legal secretarial services.

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Examples of How Members on the Panel Are (or Contemplate) Using AI:

- Assist in Preparation of Digital Marketing Content
- Drafting Research Memos
- Preparing Deposition Outlines
- Identifying Weaknesses in Opponent Arguments
- Responding to Reviews
- Drafting Letters/Emails to Clients, Other Lawyers, etc.
- Drafting and Responding to Demand Letters

Limitations/Dangers

- Inaccurate (“Hallucinations”)
- Fictitious
- Confidentiality
- Billing
- New Standard of Care?
- Plagiarism – Detection Software
- Deepfakes



Limitations

- Inaccurate

- Fictitious

- Confidentiality

- Billing

- New Standard of Care?

- Plagiarism – Detection Software

- Deepfakes




- Is it just an “oops”?
- Still **must** square with obligations to:
 - Provide competent representation (ER 1.1)
 - Ensure not making false statements of fact or law to the court (ER 3.3)
 - Supervise (ERs 5.1/5.3)
 - Not engage in misconduct in general (ER 8.4)

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Limitations

- Inaccurate
 - Fictitious
 - Confidentiality
 - Billing
 - New Standard of Care?
 - Plagiarism – Detection Software
 - Deepfakes
- 


- Are you contributing client info into AI database?
- How do you protect client info you contribute?
- What does your client think about this?

Limitations

- Inaccurate
- Fictitious
- Confidentiality
- **Billing** 
- New Standard of Care?
- Plagiarism – Detection Software
- Deepfakes

- As a cost?
- As part of your service?
- How much is reasonable?
- Isn't it just like billing the original amount when using recycled work?

Limitations

- Inaccurate
- Fictitious
- Confidentiality
- Billing
- **New Standard of Care?** 
- Plagiarism – Detection Software
- Deepfakes

- Lawyers must act “in a reasonably careful and skillful manner in light of [their] special professional knowledge”
- Does using AI qualify?

Limitations

- Inaccurate
- Fictitious
- Confidentiality
- Billing
- New Standard of Care?
- **Plagiarism – Detection Software**
- Deepfakes



If using generative AI, may need to use to meet competency requirement and avoid malpractice

More than a dozen authors filed a lawsuit against OpenAI on Tuesday, accusing the company, which has been backed with billions of dollars in investment from Microsoft, of infringing on their copyrights by using their books to train its popular ChatGPT chatbot. The complaint, which was filed along with the Authors Guild, said that OpenAI's chatbots can now produce "derivative works" that can mimic and summarize the authors' books, potentially harming the market for authors' work, and that the writers were neither compensated nor notified by the company.

New York Times, 9/20/23

Limitations

- Inaccurate
- Fictitious
- Confidentiality
- Billing
- New Standard of Care?
- Plagiarism – Detection Software
- **Deepfakes**

Must guard against using just like old-fashioned false evidence

Benefits

- Speed and Efficiency = Advanced Productivity
- Downsize or Resize
- Cost Savings
- Access to and analyze vast amounts of online data
- Second “pair of eyes”
- Perfect Grammar
- “Emergent” growth

Copyright
Not
Do

Emergence

Emergent abilities are skills that suddenly and unpredictably show up—*emerge*—in smart silicon systems. Emergent abilities have grabbed headlines as intelligent machines acquire more skills and our understanding of their inner workings grows more opaque.

Embrace Volatility - Be Disruptive, Not Disrupted



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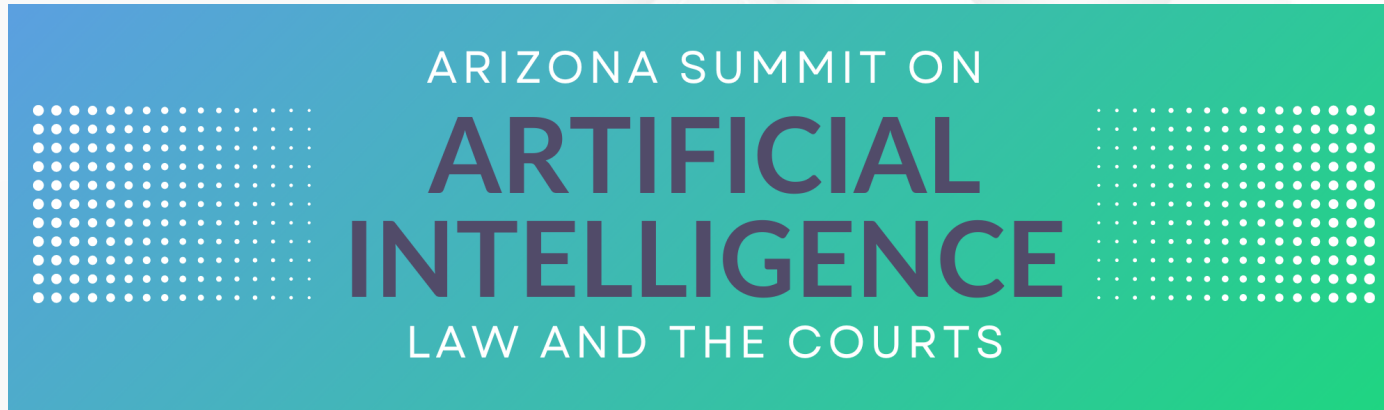
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Interested in Continuing the Discussion?

Arizona Summit on Artificial Intelligence, Law and the Courts

December 11, 2023



azcourts.gov/aisummit



Thank You

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Marc Lamber

Director, Fennemore Law



Patricia A. Sallen

Lawyer, Ethics at Law PLLC



The Hon. William G. Montgomery

Arizona Supreme Court Justice





Condemnation Summit XXX

Higher or Lower – How Juries Split the Baby

William Bassoff | Associate, Nossaman LLP

Kelsey Misseldine | Attorney, Jackson White PC



Alabama River Bridge

- Privately owned seafood vendor in Mobile, Alabama
- Condemned for toll bridge to cross Mobile River
- Total taking
 - State Appraisal: \$600,000
 - Property Owner's Appraisal: \$950,000
 - Property Owner's Testimony: \$2,000,000
 - Mean: \$1,183,333

Quiz Time!



Outcome

- Owner was able to discuss business and history of business through old newspaper clippings and photos from inside the shop
- ALDOT lost on motion in limine to exclude property owner's testimony

Alabama River Bridge | Part 2

- Corporation owned warehouse along Mobile River in Alabama
- .25 miles away from first Alabama River Bridge case
- Partial taking
- Same project, attorneys, and experts as first Alabama River Bridge case
 - Expert again admitted mistakes in analysis and impact on her analysis
 - State Appraisal: \$290,720
 - Property Owner's Appraisal: \$574,000
 - Property Owner's Testimony: \$574,000
 - Mean: \$479,573

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Quiz Time!



Outcome

- Corporate client owning and leasing property
- Jury's view was that the corporate owner was "all about the money"

RAJI | Property Use

- You may consider the property's present and past uses when you determine fair market value. You may also consider any reasonable uses to which its owner might put the property in the future if you find:
 - The proposed future use is reasonably probable; and
 - A willing buyer would pay a premium for that probability as of [date of valuation]
- You may not consider those uses that are mere possibilities or speculation
 - RAJI (CIVIL) 7th Eminent Domain 4

Iowa Farm

- 80 Acre Farm in Webster County
- Dakota Access Pipeline taking a 1,172 mile line from North Dakota to Illinois
- .78 acre pipeline easement and 1.76 acre TCE
 - State Appraisers: \$5,500; \$7,900
 - Property Owner: \$897,000
 - Webster County Compensation Commission: \$16,300
 - Mean: \$451,250

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Quiz Time!



Outcome

- Exhibit 79 excluded
- Property owners' appraisers utilized corn suitability rating
- Post-condemnation damages
- Jury instructions on valuation

RAJI | Valuation

- You must determine the fair market value of the property [name of condemnor] is acquiring [plus the amount of severance damages, if any, to [name of condemnee]’s remaining property] as of [date of valuation]. RAJI (Civil) 7th Eminent Domain 2
- Fair market value is the most probable cash price a willing buyer would pay a willing seller on the open market where the seller has a reasonable time to find a buyer and the buyer knows everything about the property. RAJI (Civil) 7th Eminent Domain 3A

Kentucky Bypass Construction

- KDOT took 18 acres from a 125 acre farm property for the construction of a bypass
 - Commissioners: \$161,000
 - State Appraiser: \$229,500 (additional)
 - Property Owner's Expert: \$583,096
 - Mean: \$406,298

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Quiz Time!



Outcome

- KDOT's unsuccessful attempts to strike property owner's expert's testimony
- Hypothetical impacts
- Highest and best use



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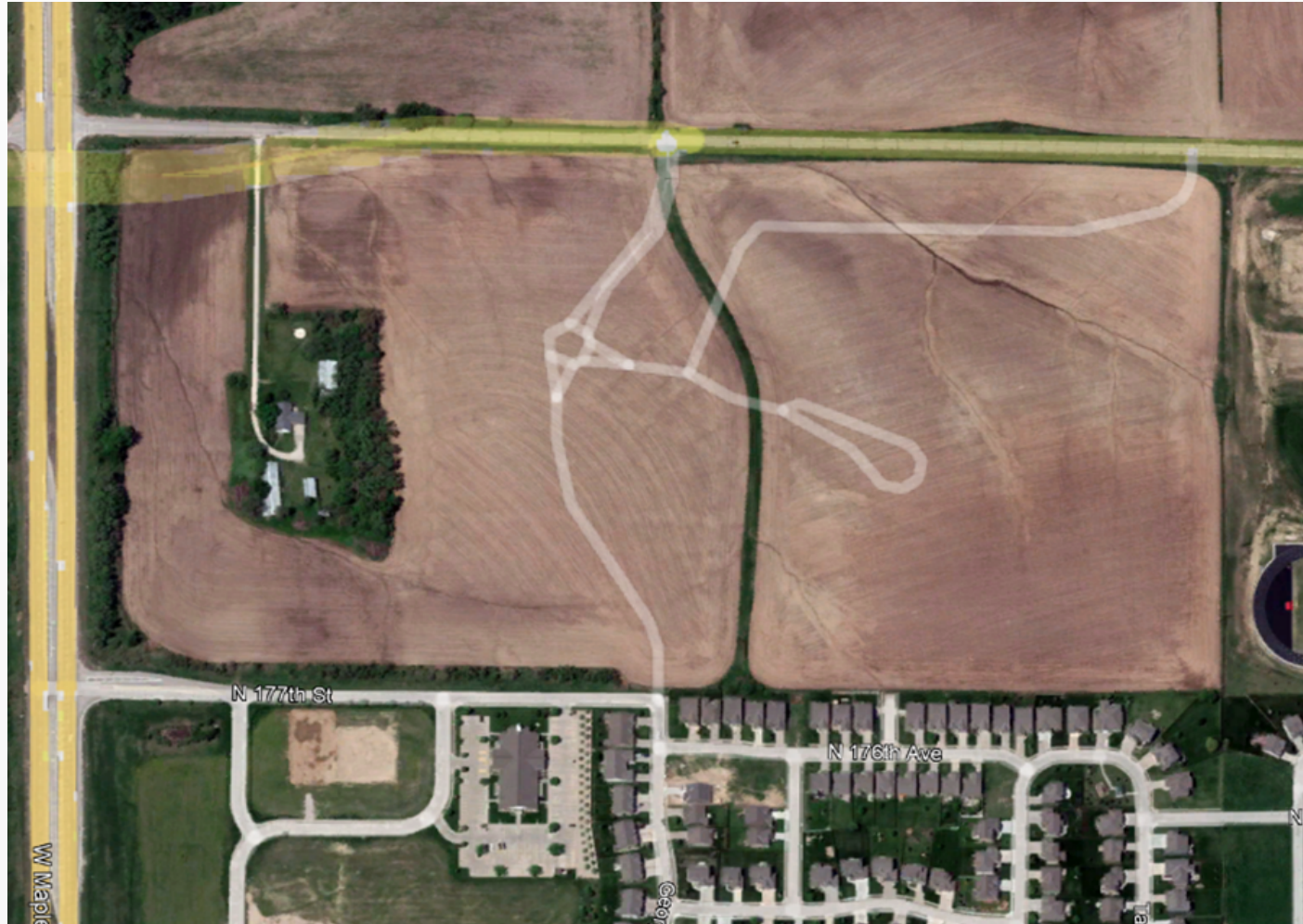
RAJI | Highest and Best Use

- In determining fair market value, you must consider the highest and best use of the property. The highest and best use is the legal use that is physically possible, financially feasible, and results in the highest value.

Nebraska School Project

- Developer purchased 73.99 acres for \$60,000 per acre, intending to improve with a mixed-use development
- 4 months later, the town of Elkhorn condemned 43.36 acres of the property for a new high school
 - Elkhorn's Appraisal: \$2,601,600 (\$60,000/acre)
 - Property Owner's Appraisals: \$4,249,720 (\$98,010/acre); \$5,410,000 (\$124,769/acre)
 - Mean: \$4,005,800

Quiz Time!



Outcome

- Severance Damages
- Cost to Cure Jury Instruction



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RAJI | Severance Damages

- [You must decide whether] [T]he property taken is part of a larger parcel. The [name of condemnee] is entitled to recover the fair market value of the part acquired by [name of condemnor]. [Name of condemnee] also is entitled to severance damages if the fair market value of the remaining property is reduced by the acquisition or by the proposed improvement.
- The measure of severance damages is the difference between the fair market value of the remaining property before the acquisition and the fair market value of the remaining property after the acquisition.
- RAJI (Civil) 7th Eminent Domain 12

RAJI | Cost to Cure

- Severance damages may be reduced or eliminated by curing the condition causing the severance damages if the cost of cure is less than the amount of severance damages avoided by the cure.
- [If you find the severance damages will be wholly cured, you must award [name of condemnee] the lesser of (1) the cost to cure or (2) the full amount of severance damages, but not both.] [or]
- [If you find that the severance damages are not wholly cured, you must award [name of condemnee] the lesser of (1) the cost to cure, plus remaining severance damages, or (2) the full amount of severance damages, but not both.]
- RAJI (Civil) 7th Eminent Domain 17

Minnesota Interstate Project

- Minnesota Department of Transportation condemned 4,080 sf of a commercial lot and 400 sf for a TCE. The fee acquisition included a portion of the property leased to a third-party for a billboard.
- MDOT settled with the third-party for loss of the physical billboard.

	State's Appraiser	Property Owner's Appraiser
Fee Taking	\$32,640	\$38,760
TCE	\$1,200	\$1,900
Subtotal	\$33,840	\$40,660
Value of Billboard Site	\$58,500, payable to third-party	\$144,578, payable to property owner
Total Just Compensation	\$92,340	\$185,238

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Quiz Time!



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Outcome

- Successful Motion for New Trial

Arizona

- *Jury shall assess:* “The value of the property sought to be condemned and all improvements on the property pertaining to the realty, and of each and every separate estate or interest in the property, and if it consists of different parcels, the value of each parcel and each estate or interest in the parcel separately.” A.R.S. § 12-1122(A)(1)

Maryland Corner Grocery Store

- Baltimore condemned a corner grocery store pursuant to an urban renewal project. Row homes had been demolished around corner store, with grocery store one of the few remaining structures on the block.
- Grocery store was income producing, with second floor of the structure used as residential apartments. City's appraiser did not use income approach at instruction of City.
- City's Appraiser: \$36,000
- Property Owner's Appraiser: \$180,000
- Property Owner's Opinion: \$200,000
- Mean: \$118,000

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Quiz Time!



Outcome

- City's appraiser used auction and foreclosure sales as comparable sales
- City instructed appraiser to not perform income approach

Hawaii County Road: *Bench Trial*

- Condemnation to build a county road, bisecting agricultural land in Kona
- Public use concern: alignment of the road was NOT chosen by the government, but by a developer who had a zoning condition to build the road
- The developer made deals at \$X an acre with every other impacted landowner except this one holdout. This landowner disputed the number offered and wanted to arbitrate, instead they condemned.
 - Government used a residential appraiser: \$140,000; no severance damages
 - Landowner used a commercial appraiser: \$510,000; \$442,000 in severance damages
 - Mean: \$325,000

COOPY
NO
DO

Final Notes & Practice Tips

- Arizona jury instructions
- Additional cases



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Questions?

Thank You



William Bassoff
Associate, Nossaman LLP



Kelsey Misseldine
Attorney, Jackson White PC



Condemnation Summit XXX

Afternoon Networking & Cookie Break

Sponsored by Integra Realty Resources

We will resume at 3:45 p.m.



Condemnation Summit XXX

Protecting the Birds – How Migratory Birds, Endangered Species, and Raptors Affect Project Design and Implementation

Lesly Swanson | Senior Environmental Scientist, Salt River Project

Laura Hackett | Lead Wildlife Biologist, Liberty Wildlife

Jan Miller | Animal Care Coordinator, Liberty Wildlife

For the Birds | An overview of bird / power line interactions

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The Role of a Utility Biologist

- Senior Environmental Compliance Scientist
- Biologist
- Manage SRP's Avian Protection Program
- Support SRP water & power projects
- Interact with State and Federal agency personnel



Avian Protection – the Electrocution Problem

- Perch on tall structures
- Risk of electrocution
- Large birds at greatest risk
- Many electrocutions are preventable
- Public & Federal government are aware of problem



Laws Protecting Birds

- **Migratory Bird Treaty Act**
 - Protects all migratory native North American birds
 - Covers adults, young, eggs, active nests and parts
- **Bald & Golden Eagle Protection Act**
 - Offers another layer of protection for eagles
 - Covers adults, young, all nests, eggs and parts
- **Endangered Species Act**
 - Offers protection to Endangered and Threatened Species
 - Protects identified critical habitat



Avian Protection Program

- Birds are common in utility service territory
- Birds interact with utility equipment
- Routine utility operations and maintenance work occurs
- Program allows work to continue while protecting birds



Photo courtesy of AZ Game and Fish

Avian Protection Programs

- Maintain Federal and State permits and file reports
- Data collection and permit maintenance
- Retain records of bird issues
- Identify problem areas and work to identify solutions



Avian Power Line Interaction Committee (APLIC)

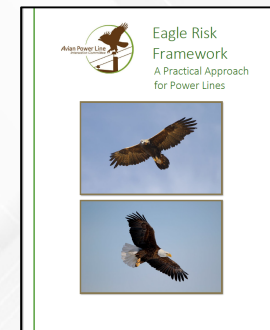
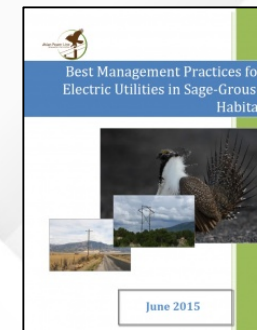
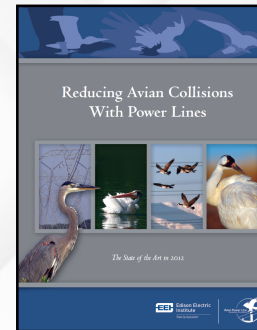
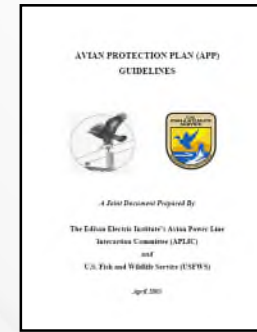
- Established in 1980s
- Leads electric utility industry in protecting avian resources
- Develop & provide educational resources
- Identify & fund research
- Develop & provide cost effective management options
- Serve as focal point for avian/ electric utility issues



Website: aplic.org

APLIC Guidance Documents

- *Avian Protection Plan (APP) Guidelines*
- *Suggested Practices for Avian Protection on Power Lines: State of the Art in 2006*
- *Reducing Avian Collisions with Power Lines: The State of the Art in 2012*
- *Developing Power Pole Modification Agreements For Compensatory Eagle Mitigation For Wind Energy Projects*
- *Best Management Practices for Electric Utilities in Sage-Grouse Habitat*
- *Eagle Risk Framework: A Practical Approach for Power Lines*



Utilities and Birds

- New infrastructure can be designed bird friendly
- Old infrastructure can be made bird friendly
 - Redesign and upgrade (if/ when possible)
 - Retrofit with bird guarding products
- Consider birds in line siting



Burrowing Owls

- Live in burrows underground
- Burrows not always obvious
- Typically nest March to June
- Habitat can include
 - Open desert areas
 - Agriculture
 - Canal banks
 - Artificial burrow sites
- Surveys conducted prior to earth moving



Bird Nests

- Nesting season – spring/ early summer
- + • Large stick nests can cause problems
 - Equipment failure
 - Maintenance
 - Bird safety
 - Public safety
- Nests addressed on case-by-case basis
 - Relocate
 - Leave
 - Insulate equipment



SRP/ Liberty Wildlife Partnership

- Many utilities partner with local rehabilitators, State agencies or other non-profits
- Partners assist with specific bird/wildlife issues
 - Field work
 - Education/ training
 - Outreach
 - Wildlife care



Liberty Wildlife
Rehabilitation/Education

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Thank You



Lesly Swanson
Senior Environmental
Scientist, Salt River Project



Laura Hackett
Lead Wildlife Biologist,
Liberty Wildlife



Jen Miller
Animal Care Coordinator,
Liberty Wildlife

We Appreciate Your Feedback!

- Scan here to complete our survey.



Save the Date for Condemnation Summit XXXI
Spring 2024