Navajo Nation Law CLE

Section 9

Eric N. Dahlstrom

Navajo Special Prosecutor Law

Part 1

This page has been left intentionally blank

NAVAJO NATION LAW CLE CONFERENCE
NOVEMBER 30, 2012

NAVAJO NATION SPECIAL PROSECUTOR LAW

Eric N. Dahlstrom
The Rothstein Law Firm
80 E. Rio Salado Parkway, Suite 305
Tempe, Arizona 85281

I. NAVAJO NATION SPECIAL PROSECUTOR LAW

A. Navajo Nation Resolution CMA-8-89 (March 1, 1989) (Adopting an act for the appointment of a special prosecutor and to establish such counsel's duties and responsibilities).

B. **Special Prosecutor Act, 2 N.T.C. §§ 2021-2024.** The Special Division of the Window Rock District Court, 7 N.T.C. §§ 291 & 292.

C. The Special Prosecutor Act was adopted by the Navajo Nation Council in 1989 after the Council placed Chairman Peter MacDonald, Sr. on administrative leave. The Special Prosecutor was appointed and then prosecuted Chairman Peter MacDonald, Sr. and other officials in the Navajo Nation Courts. A number of signification decisions of the Navajo Nation Supreme Court grew out of this controversy.

Plummer v. Brown, 6 Navajo Rptr. 86 (March 15, 1989).

Plummer v. Brown, 6 Navajo Rptr. 88 (March 23, 1989).

MacDonald v. Hon. Robert Yazzie, 6 Navajo Rptr. 95 (March 24, 1989).

In the matter of: Certified Questions I, Navajo Nation v. MacDonald, 6 Navajo Rptr. 97 (March 31, 1989).

In re Bowman, Navajo Nation v. MacDonald, 6 Navajo Rptr. 101 (April 6, 1989).

In the matter of: Certified Questions II, Navajo Nation v. MacDonald, 6 Navajo Rptr. 105 (April 13, 1989).

Thompson v. Navajo Nation, 6 Navajo Rptr. 181 (May 25, 1990).

Navajo Nation v. MacDonald, 6 Navajo Rptr. 206 (Sept. 21, 1990).

Boos v. Yazzie, 6 Navajo Rptr. 211 (Sept. 24, 1990).

***MacDonald v. Robert R. Rothstein,* 6 Navajo Rptr. 290 (Nov. 8, 1990)** (The Office of Special Prosecutor is authorized to issue investigatory subpoenas; the Navajo Nation Chairman, Peter MacDonald, Sr., is not protected by the sovereign immunity of the Navajo Nation in this case; and the pendency of criminal charges against Peter MacDonald, Sr. does not bar the District Court from entering an order enforcing a subpoena).

D. 2010-2011 Special Prosecutor

Appointment of Special Prosecutor in 2009 was widely covered in the press. The Special Prosecutor's activities were controversial.

***Acothley v. Perry*, No. SC-CV-08-11 (Navajo Nation 2011).**

Civil Complaint for breach of fiduciary duty filed July 28, 2011 [Excerpts]. *Navajo Nation v. Benally*, WR-CV-218-11 (Window Rock Dist. Ct., filed July 28, 2011)

Appointment of Successor Special Prosecutor on October 12, 2011.

Statement of Louis Denetsosie (June 8, 2012), Motion to Dismiss with Prejudice Re: Louis Denetsosie, Harrison Tsosie, Leonard Tsosie, and Lorenzo Bates. *Navajo Nation v. Benally*, WR-CV-218-11 (Window Rock Dist. Ct., filed July 7, 2012)

II. REPRESENTATION OF A GOVERNMENT OFFICIAL CHARGED WITH WRONGDOING

A. Conflict of Interest

B. Government Payment of Legal Fees

Navajo Nation Department of Justice, 2 N.N.C. §§ 1961-1965.

***Halona v. MacDonald*, 1 Navajo Rptr. 189 (Jan. 24, 1978)** (Enjoining payment of legal fees of Chairman MacDonald).

***Halona v. MacDonald*, 1 Navajo Rptr. 341 (Shiprock Dist. Ct., May 18, 1978).**

***Nelson v. Shirley*, No. SC-CV-03-10 (Navajo Nation 2011).**

Federal Independent Counsel statute, 28 U.S.C. §§591, et seq., allows government to reimburse attorneys' fees of person subject to investigation if no indictment is brought. 28 U.S.C. § 593(f)(1).

Representation of Federal officials and employees by Department of Justice attorneys. 28 C.F.R. § 50.15.

C. Sovereign Immunity

III. EXTRA TERRITORIAL JURISDICTION

***Tracy v. Superior Court*, 168 Ariz. 23, 810 P.2d 1030 (April 23, 1991)** (State court enforcement of order compelling attendance of witness at trial pending in the Navajo Nation District Court)

***Navajo Nation v. Peter D. MacDonald, Sr.*, 180 Ariz. 539, 885 P.2d 1104 (Ariz. App. June 23, 1994)** (State court has jurisdiction over fraud claim by Navajo Nation against former Navajo Nation Chairman where claim involves off-reservation activity).

***Bold text** indicates related documents are attached.

History

CAP–34–93, April 28, 1993.

Library References

Indians ⇐32(4.1).
Westlaw Topic No. 209.

Article 4. [Reserved]

History

CAP–34–93, April 22, 1993.
CF–8–82, February 8, 1982. Rescinded former Article 4, "Office of the General Counsel".

Article 5. [Reserved]

History

CO–59–93, October 20, 1993. Rescinded former Article 5, "Navajo Hopi Legal Services Program" and incorporated the program within the Department of Justice.
ACAU–140–83, August 10, 1983.

Article 6. Special Prosecutor

§ 2021. Application for appointment of a Special Prosecutor

A. The Attorney General shall conduct a preliminary investigation pursuant to the provisions of this Section whenever he/she receives information sufficient to constitute grounds to investigate whether any of the persons listed in Subsection (B) of this Section has committed a violation of any federal or state criminal law or any law or regulation of the Navajo Nation, or committed any act upon which the Navajo Nation may have a civil cause of action. The Attorney General may take no longer than 60 days to conduct such preliminary investigation.

B. The persons referred to in Subsection (A) of this Section are:

1. The President of the Navajo Nation;
2. The Vice–President of the Navajo Nation;
3. Any member of the Executive Staff of the Office of the President or the Vice–President.
4. The Chairperson of any Standing Committee of the Navajo Nation Council;
5. The Attorney General, in which case the Deputy Attorney General shall perform the functions of the Attorney General pursuant to the provisions of §§ 2021–2024 of this title;
6. The Director or Acting Director or Deputy Director of any Division, Department, Program or Office of the Executive Branch of the Navajo Nation; and

7. Any other official, employee or agent of the Navajo Nation, where the Attorney General determines that investigation or prosecution or civil litigation against such person by the Attorney General or other officer or employee of the Department of Justice may result in a personal, financial, or political conflict of interest.

C. In determining whether grounds sufficient to investigate exist, the Attorney General shall consider the degree of specificity of the information received and the credibility of the source of the information.

D. Upon completion of the preliminary investigation, if the Attorney General finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, or that the matter may be handled by the Attorney General, the Office of the Prosecutor or other officials, or employees of the Department of Justice without resulting in personal, financial or political conflict of interest, the Attorney General may take such lawful action or inaction as he/she deems appropriate.

E. Upon completion of the preliminary investigation, if the Attorney General finds that there are reasonable grounds to believe that further investigation or prosecution is warranted, and that the matter cannot be handled by the Attorney General, the Office of the Prosecutor or any other official or employee of the Department of Justice without resulting in personal, financial, or political conflict of interest, the Attorney General shall apply to the Special Division of the Window Rock District Court for appointment of a Special Prosecutor.

F. An application pursuant to Subsection (E) of this Section shall contain sufficient information to assist the special division to select a Special Prosecutor and to define that Special Prosecutor's jurisdiction. The Attorney General shall recommend at least three persons among whom the Special Division shall appoint such Special Prosecutor, shall recommend appropriate compensation, and shall recommend the extent of such Special Prosecutor's jurisdiction.

G. If for any reason the Special Division fails to comply with the provisions of § 2022(A) of this title, then the Attorney General shall exercise the powers of the Special Division under of § 2022 (A) and (C) of this title.

H. Whenever a Special Prosecutor is currently in office, and whenever the Attorney General receives information sufficient to cause him/her to apply for appointment of a Special Prosecutor pursuant to Subsection (E) of this Section, in lieu thereof the Attorney General may apply to the Special Division to enlarge the jurisdiction of such Special Prosecutor to include any such new matter.

I. No application or any other documents or materials supplied to the Special Division in connection with an application or appointment of a Special Prosecutor shall not be revealed to any person outside the Special Division or the Department of Justice without leave of the Special Division, or the written release of the Attorney General.

J. Whenever a matter is within the jurisdiction of a Special Prosecutor, the Attorney General, the Chief Prosecutor, and all officers and employees of the

Department of Justice, shall suspend all investigations and proceedings regarding such matter, except insofar as such Special Prosecutor and the Attorney General agree in writing that such investigations and proceedings may continue.

K. Notwithstanding the provisions of Subsection (J) of this Section, the Attorney General may appear in any proceeding before any court or legislative or administrative body as an amicus curiae concerning any issues of law raised by any case or proceeding.

History

CMA–8–89, March 1, 1989.

Cross References

Window Rock District Court, Special Division, see 7 N.N.C. § 291 *et seq.*

Library References

District and Prosecuting Attorneys ⚿3(1).
Indians ⚿32(6).
Westlaw Topic Nos. 131, 209.

C.J.S. District and Prosecuting Attorneys §§ 50 to 54, 57.
C.J.S. Indians § 51.

Annotations

1. Construction with other laws

"The [Special Prosecutor] Act blends well with the Sovereign Immunity Act because it provides a remedy for the Navajo Nation against officers or employees who exceeded their authority." *MacDonald, Sr. v. Navajo Nation ex rel. Rothstein*, 6 Nav. R. 290, 296 (Nav. Sup. Ct. 1990).

2. Construction and application

"If the Attorney General funds from the preliminary investigation that there are reasonable grounds for further investigation or prosecution and there is a conflict of interest by the Attorney General or prosecution office, he or she may apply to the Special Division of the Window Rock District Court for appointment of a special prosecutor." *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1, 11 (Nav. Sup. Ct. 1992).

3. Investigations

"Once a special prosecutor assumes jurisdiction, the attorney general and chief prosecutor must suspend all investigations except insofar as such special prosecutor and attorney general agree in writing that such investigations and proceedings may continue." *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1, 6 (Nav. Sup. Ct. 1992).

§ 2022. Duties of the Special Division

A. Within 10 days of receipt of an application pursuant to § 2021 (E) of this title, the Special Division shall appoint an appropriate Special Prosecutor from among the persons recommended by the Attorney General, and shall determine such Special Prosecutor's jurisdiction.

B. The Special Division may request, and upon request shall receive, the assistance of the Attorney General in securing the appointment of a Special Prosecutor.

C. The Special Division shall set the fees and expenses to be paid to a Special Prosecutor upon his or her appointment, in an amount agreed between the proposed Special Prosecutor and the Special Division. The Special Division may request, and upon request shall receive, assistance and cooperation from the Division of Administration and Finance and the Budget and Finance Committee of the Navajo Nation Council, in determining and arranging for

funding such fees and expenses. The Special Division shall enter into an appropriate contract with the Special Prosecutor, in the name of the Navajo Nation, and shall comply with the requirements as may be applicable of 25 U.S.C. § 81. Notwithstanding any other provision of law, the presiding judge of the Special Division is hereby delegated the authority to execute, and shall execute the contract on behalf of the Navajo Nation. Such contract shall be a valid, binding and enforceable obligation of the Navajo Nation.

D. If a vacancy in office arises because of the death of a Special Prosecutor, the Special Division shall appoint a successor in the same manner as the initial appointment was made. The Special Division may appoint either a person recommended to the vacant office in the initial application, or one of three other persons to be recommended by the Attorney General at the Special Division's request.

E. If a vacancy in office arises because of the removal pursuant to § 2024 (B), (C) or (D) of this title, the Special Division shall appoint an acting Special Prosecutor to serve until any judicial review of such removal pursuant to § 2024 (D) of this title is either completed or barred by time, after which time the Special Division shall take appropriate action. The Special Division may appoint either a person recommended to the vacant office in the initial application, or one of three other persons to be recommended by the Attorney General.

F. Upon the request of a Special Prosecutor, the Special Division may enlarge the jurisdiction of such Special Prosecutor whenever it appears that there exist new matters related to matters within his or her original jurisdiction which, had they been known by the Special Division at the time of such Special Prosecutor's appointment, would have been included within his or her jurisdiction.

History

CMA-8-89, March 1, 1989.

Cross References

Window Rock District Court, Special Division, see 7 N.N.C. § 291 *et seq.*

Library References

Indians ⇐32(6).
Westlaw Topic No. 209.
C.J.S. Indians § 51.

§ 2023. Authority and duties of a Special Prosecutor

A. A Special Prosecutor appointed pursuant to § 2022 of this title shall have full power and independent authority to exercise all functions and powers of the Attorney General and the Office of the Prosecutor, as defined in 2 N.N.C. §§ 1963(A), (B), (G), (I), and (K); 1972; 1974(B); 1978-1984, with respect to all matters within his or her jurisdiction.

B. A Special Prosecutor shall have full power and authority to appear before any court of the Navajo Nation, the same as if he/she were admitted to

the bar of such court, with respect to any matter within his or her jurisdiction or the duties and responsibilities of his or her office.

C. A Special Prosecutor shall have full power and independent authority to initiate or participate in any proceeding pursuant to 2 N.N.C. §§ 3751–3761, or before the Board of Election Supervisors, the Tax Commission or the Labor Commission, with respect to any matter within his or her jurisdiction.

D. Upon the authorization of the Navajo Nation Council, and subject to its continuing authority and supervision, a Special Prosecutor shall have the power and authority to commence a civil or administrative action against any person or entity, before any federal or state court or administrative body, with respect to any matter within his or her jurisdiction.

E. Notwithstanding the provisions of 17 N.N.C. § 1801, a criminal complaint signed and sworn before a judge of any court of the Navajo Nation by a Special Prosecutor shall be deemed a valid complaint.

F. With the prior consent of the Special Division, a Special Prosecutor shall have the power and authority to appoint, fix the compensation of, and assign the duties to and thereafter supervise such employees, including investigators, attorneys and consultants, as such Special Prosecutor deems necessary.

G. A Special Prosecutor may request, and upon request shall receive assistance from any Branch, Division, Department, Office or Program of the Navajo Nation, which may include access to any records, files or other materials relevant to any matter within his or her jurisdiction. Upon agreement by the Attorney General, a Special Prosecutor may utilize the resources and personnel of the Department of Justice where necessary to perform such Special Prosecutor's duties.

H. A Special Prosecutor shall have all necessary and proper power and authority incident to the exercise of his or her other powers and authority.

History

CMA–8–89, March 1, 1989.

Cross References

Window Rock District Court, Special Division, see 7 N.N.C. § 291 *et seq.*

Library References

Indians ⚿32(6, 13).
Westlaw Topic No. 209.
C.J.S. Indians §§ 51, 157.

Annotations

1. Construction and application

"That includes the power to obtain the production of documents or compel testimony by subpoena and to petition the courts to issue subpoena enforcement orders." *MacDonald, Sr. v. Navajo Nation ex rel. Rothstein*, 6 Nav. R. 290, 291 (Nav. Sup. Ct. 1990).

"The special prosecutor has full power and independent authority to exercise all functions and powers of the Attorney General and the Office of the Prosecutor and has specific authority to proceed against any person or entity in a civil or administrative action." *Navajo Nation*

v. MacDonald, Jr., 7 Nav. R. 1, 5 (Nav. Sup. Ct. 1992).

§ 2024. Termination and removal of a Special Prosecutor

A. The appointment of a Special Prosecutor shall terminate when:

1. The Special Prosecutor notifies the Attorney General and the Special Division that the investigation and prosecution of all matters within such Special Prosecutor's jurisdiction have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions; and

2. The Special Prosecutor files a report in full compliance with Subsection (F) of this Section.

B. The Special Division, either on its own motion or upon the suggestion of the Attorney General, may terminate the appointment of a Special Prosecutor, upon the grounds provided in Subsection (A) (1) of this Section.

C. A Special Prosecutor may be removed upon the two-thirds (2/3) vote of the Navajo Nation Council, or by action of the Attorney General, and only for good cause, physical disability, mental incapacity, or other condition that substantially impairs the performance of such Special Prosecutor's duties.

D. A Special Prosecutor may seek judicial review of any termination of his appointment by the Navajo Nation Council, the Special Division, or the Attorney General, by filing within five days thereof a petition of review with the Supreme Court of the Navajo Nation. Notwithstanding any other provision of law, the Supreme Court shall have and shall accept jurisdiction to hear and determine said petition and to take such remedial action as it deems appropriate.

E. Upon the termination of a Special Prosecutor's appointment pursuant to Subsections (B), (C) or (D) of this Section, such Special Prosecutor shall promptly file a report with the Special Division, the Navajo Nation Council and the Attorney General in full compliance with Subsection (F) of this Section.

F. The report required by Subsections (A) (2) and (E) of this Section shall set forth fully and completely a description of the work of the Special Prosecutor, including the status and disposition of an cases brought, the reasons for not prosecuting any matter within such Special Prosecutor's jurisdiction which was not prosecuted, and an accounting of all funds received and expenditures made in the performance of his or her duties.

History

CMA–8–89, March 1, 1989.

Cross References

Window Rock District Court, Special Division, see 7 N.N.C. § 291 *et seq.*

Library References

District and Prosecuting Attorneys ⇦3(1). Indians ⇦32(6).

Westlaw Topic Nos. 131, 209.
C.J.S. District and Prosecuting Attorneys §§ 50 to 54, 57.

C.J.S. Indians § 51.

Subchapter 40. [Reserved]

Subchapter 41. Navajo Tax Commission

§ 3351. Establishment

The Navajo Tax Commission is hereby established as a part of the Executive Branch of the Navajo Nation government.

History

CJA-6-74, § 1, January 16, 1974.

Library References

Indians ⇐32(4.1, 9).
Westlaw Topic No. 209.
C.J.S. Indians §§ 130 to 132, 134.

§ 3352. Membership

A. The Commission shall consist of five members, at least three of whom shall be Navajos.

B. The President of the Navajo Nation shall, at the times required under Subsection (C) and (E), nominate a person qualified by virtue of education, experience, or office, and upon confirmation by the Government Services Committee of the Navajo Nation Council, such person shall be appointed to serve a term as a Commissioner.

C. The terms of office of commissioners shall be five years; provided, however, that in order to stagger the expiration of terms of office, March 31 of each year shall be the common anniversary date, the three present Commissioners shall continue to serve out their appointed terms, and, of the two new Commissioner appointees, one shall be appointed for a term ending in 1990, and the other for a term ending in 1991.

D. A Commissioner shall be removed only for cause by the President of the Navajo Nation and upon ratification by the Government Services Committee of the Navajo Nation Council; provided that the person so removed may then appeal the removal to the Supreme Court of the Navajo Nation. For the purposes of this Subsection, "cause" means:

1. Incapacity. Physical or mental incapacity, where such incapacity extends or is expected to extend longer than six months.

2. Nonfeasance. Failure to perform the duties of office, including, but not limited to, repeated and unexcused failure to attend the meetings and other official functions of the Commission.

No. **A-CV-32-89**

Supreme Court of the Navajo Nation

Peter MacDonald Sr., and Wanda MacDonald,
Appellants,
v.
The Navajo Nation, ex rel.,
Robert R. Rothstein, et al.,
Appellees.
Decided November 8, 1990

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Appeal from the Window Rock District Court, the Honorable Allen Sloan presiding.

Samuel Pete, Esq., Shiprock, Navajo Nation (New Mexico), for the Appellants; and Robert R. Rothstein, Esq., Santa Fe, New Mexico, for the Appellees.

Opinion delivered by TSO, Chief Justice.

This is an appeal from orders of the Window Rock District Court, made pursuant to 2 N.T.C. § 1982, denying motions to quash investigative subpoenas and requiring Peter MacDonald Sr. and his wife, Wanda MacDonald, to produce certain documents. The appeal is accepted pursuant to 7 N.T.C. § 801(b).

I. THE CASE BEFORE THE DISTRICT COURT

In March of 1989, the Navajo Tribal Council enacted legislation creating the Office of Special Prosecutor and providing powers and authority for that official to undertake civil and criminal action against certain public officials where they have "committed a violation of any federal or state criminal law or any law or regulation of the Navajo Nation, or committed any action upon which the Navajo Nation may have a cause of action." 2 N.T.C. § 2021. That legislation, which we call the Special Prosecutor Act, is designed to deal with official misconduct in public office.

When the Attorney General of the Navajo Nation "receives information sufficient to constitute grounds to investigate," he must undertake a preliminary investigation. If he finds there are "reasonable grounds to believe that further investigation or prosecution is warranted," he then has the option of handling it himself, referring it to the Office of the Prosecutor, or having some other official of the Navajo Nation Department of Justice take action. If the Attorney General finds that no official of the Department of Justice can handle the mat-

ter "without resulting in personal, financial, or political conflict of interest," then he must apply for the appointment of a special prosecutor. 2 N.T.C. § 2021.

The Special Prosecutor Act also established the "Special Division of the Window Rock District Court," which is composed of three judges. 2 N.T.C. §§ 291-292. It hears the Attorney General's applications for the selection, appointment, compensation, and jurisdiction of the special prosecutor. 2 N.T.C. §§ 2021(f), 2022.

When appointed by the Special Division of the Window Rock District Court, the special prosecutor has "full power and independent authority" to exercise criminal prosecution functions of the Attorney General and the Office of the Prosecutor. 2 N.T.C. § 2023(a). That includes the power to obtain the production of documents or compel testimony by subpoena and to petition the courts to issue subpoena enforcement orders. 2 N.T.C. § 1982.

On March 31, 1989, the Special Division entered its order appointing the law firm of Rothstein, Bennett, Daly, Donatelli & Hughes as the Special Prosecutor. The court fixed the jurisdiction of that firm, authorizing it to undertake criminal or civil actions relating to "(i) violations of the Navajo Nation Ethics in Government Law, (ii) violations of the election laws of the Navajo Nation, and (iii) violations of any other Navajo law." The order specifically mentioned "criminal misconduct associated with the purchase of the Big Boquillas Ranch or acceptance or solicitation of payments or other considerations for personal gain," and the targets of criminal or civil actions were "any current or former tribal officials listed in the Act at 2 N.T.C. § 2021(b)." *In Re Appointment of Special Prosecutor of the Navajo Nation*, No. WR-SD-01-89 (Window Rock Dist. Ct. March 31, 1989) .

On June 15, 1989, the Special Prosecutor issued a subpoena duces tecum addressed to Peter McDonald, Sr. [sic] and Wanda Clere McDonald [sic], commanding them to meet with Ed Staffell, Investigator for the Special Prosecutor, to "discuss matters concerning the ... investigation" and to produce certain documents. The documents to be produced were listed in an Exhibit "A" to the subpoena, and the introductory paragraph of the exhibit indicates they were those "relating to an American Express credit card." The exhibit then listed eleven categories of documents to be produced, including checking and money market account records, savings account records, certificates of deposit, loans, safety deposit box records, drafts and money transfers, credit card records, meeting records (regarding meetings with fifteen named individuals), and telephone records. The categories of meeting records included desk calendars, personal diaries, appointment schedules, and itineraries. While the scope of the subpoena appears to be limited to "an American Express credit card," it broadly called for the production of a wide range of records.

On June 21, 1989, the Special Prosecutor commenced a subpoena enforcement action under 2 N.T.C. § 1982. It named Peter MacDonald Sr., Wanda MacDonald and others as respondents, and the petition on file recites a "good

faith belief" the respondents "may have engaged in criminal conduct," and that they possessed unprivileged information and documentation necessary for an investigation. The petition recited that the MacDonalds were served with a subpoena duces tecum on June 15, 1989, but they "failed and refused to produce any of the documents listed in Exhibit 'A' to the Subpoena."

On June 22, 1989, the court entered an order to show cause upon the petition, and a hearing was held upon it on July 21, 1989. On July 10, 1989, the MacDonalds made a motion to quash the subpoena on six grounds.

On August 25, 1989, the district court made amended findings of fact, conclusions of law and an order, requiring the MacDonalds to "completely comply" with the investigatory subpoena within fifteen days. That order addressed only three objections of the motion to quash — service of process, sovereign immunity, and self-incrimination — reserving the other three for later resolution if the parties were unable to resolve objections to the scope and breadth of the subpoena.

When the parties were unable to resolve those differences the court conducted another hearing on September 13, 1989. The court also held a supplemental hearing by telephone conference call on September 29, 1989, and had telephonic discussions with counsel on September 29, 1989.

On September 29, 1989, the court entered an order denying the MacDonalds' motion to quash, and it gave them until 5:00 p.m., on October 6, 1989, to fully and completely comply by producing the documents recited in the subpoena. The order dealt with issues of the overbreadth and burdensomeness of the subpoena. This appeal followed.

An action to enforce an investigative subpoena is civil in nature, and the jurisdiction and scope of authority of the courts is governed by statute, which provides as follows:

> The Office of the Prosecutor shall have the authority to require the production of books, papers and other documents and may issue subpoenas to compel the attendance and testimony of witnesses. If any person shall refuse to obey any subpoena as issued or shall refuse to testify or produce any books, papers or other documents required by the subpoena, the Office of the Prosecutor may petition any court of the Navajo Nation to issue any appropriate order to enforce the subpoena.

2 N.T.C. § 1982.

The issues raised in the appeal are as follows:

1. Was the investigatory subpoena overbroad and therefore invalid?

2. Was the subpoena to Peter MacDonald Sr. barred by the Navajo Sovereign Immunity Act?

3. Given the pendency of criminal charges against Peter MacDonald Sr., should the district court be permitted to enter an order enforcing the subpoena?

II. OVERBREADTH

Investigatory or administrative subpoenas are a modern development, and they are associated with the creation of agencies of the executive branch of government. The Special Prosecutor wants the Court to consider his investigations as "the functional equivalent of a Grand Jury proceeding." The United States Supreme Court has likened executive branch agencies to the grand jury. *Hannah v. Larche*, 363 U.S. 420, 448 n.29 (1960); *United States v. Powell*, 379 U.S. 48, 57 (1964). This is an unfortunate comparison, because a major function of a grand jury is to protect criminal suspects from abuses of prosecutorial discretion. However, we must use the analogy as a foundation for our approach to the problem of an overbroad subpoena. A court may refuse to enforce a subpoena to produce documents (the subpoena duces tecum) if it is overbroad, unreasonable, oppressive, or a "fishing expedition." 81 Am. Jur. 2d *Witnesses* §§ 17, 22 (1976). The usual procedure to challenge a subpoena duces tecum is to move the court to quash, vacate, or modify it. *Id.* at § 22. The general rule is that the subpoena duces tecum should describe the documents in such a way that the witness can identify them without a prolonged or extensive search. *Id.* at § 17.

In *United States v. Powell*, the United States Supreme Court dealt with the power of an administrative agency, the Internal Revenue Service, to summon a corporation officer to produce records relating to tax fraud. 379 U.S. 48. The Court established standards for the valid issuance of an administrative summons by the Commissioner of Internal Revenue, a procedure similar to an investigatory or administrative subpoena duces tecum: "He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.

The court in *In re Grand Jury Subpoena Etc. on Allied Auto Sales* discussed the rule for a valid grand jury subpoena duces tecum to obtain documents relating to odometer, mail or wire fraud. 606 F. Supp. 7 (D.R.I. 1983). In addressing objections to the particularity, time periods, and breadth of subpoenas, that court adopted the rule that there are three criteria for a valid grand jury subpoena duces tecum: 1. The subpoena may command only the production of things relevant to the investigation; 2. Specification of things to be produced must be made with reasonable particularity; and 3. Production of records covering only a reasonable period of time may be required. *Id.* at 12 (citations omitted). In applying these criteria the court considered that "grand juries have consistently been allowed wide latitude in their investigations." *Id.*

In applying these criteria we find that the relevance of the documents sought by the subpoena duces tecum is set out in the Special Prosecutor's petition for subpoena enforcement. It states that the MacDonalds "may have engaged in criminal conduct" and the subpoena itself shows that the Special Prosecutor deter-

mined that records relating to "an American Express card" were relevant to his investigation. The district court conducted two hearings in open court to hear the arguments of the parties, and the subpoenas were discussed with counsel, during two telephone conference calls. Both the MacDonalds and the court had ample opportunity to hear the Special Prosecutor's explanations of why the requested documents were relevant, and the trial court file and transcript of proceedings show that the MacDonalds were under criminal investigation. While there was a great deal of quibbling about the identification of the documents to be produced, the findings of the district court in its two orders gave a finer definition of which documents fall within the scope of its order to comply. The time period covered by the subpoena was from July 1, 1986 to the date of the subpoena, June 6, 1989, or approximately three years. The period of time was reasonable.

The burden of showing the subpoenas were overbroad was upon the MacDonalds. *United States v. Powell*, 379 U.S. at 58. They did not meet that burden by showing that the documents were not relevant to a legitimate purpose, not capable of ascertainment (i.e. they did not know what was sought), or otherwise improper under the overbreath doctrine. They raised many objections, all of which were seriously considered by the trial court. The district court made its determination that the subpoenas were not overbroad, and there is no showing that the court abused its discretion.

The MacDonalds assert that the subpoenas were a prohibited "fishing expedition" and that they constituted "unnecessary harassment." The state decisions they cite in support of that proposition are inapplicable because they address civil discovery proceedings and not criminal subpoenas. More to the point, the MacDonalds raise the rule in *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298 (1923). (Both parties cited this case as rendered in 1979). There the Federal Trade Commission was undertaking an investigation of unfair competition in violation of the 1914 Act which established it, and the Commission sought all the American Tobacco Company's letters and telegrams for a one-year period, plus reports, contracts, and arrangements with certain corporations by the P. Lorillard Company. *Id.* at 305. The Supreme Court affirmed the trial court's refusal to enforce production of those documents based upon the fourth amendment to the United States Constitution, finding that the Commission had failed to show relevance or materiality and that the petition for production was general and overbroad. *Id.* at 305-307. The language the MacDonalds rely upon is: "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." *Id.* at 305-306 (citations omitted). Fourth amendment search and seizure law has changed a great deal since 1923, and now administrative agencies have a great deal of leeway in obtaining records for their investigations. This case does not apply here because, as shown, the Special Prosecutor satisfied the test of rel-

evance, specificity, and restriction to a reasonable period of time.

We agree with the lower court that the subpoenas were not overbroad.

III. THE NAVAJO NATION SOVEREIGN IMMUNITY ACT

Peter MacDonald Sr. argues that the records sought by subpoena are immunized by the Navajo Sovereign Immunity Act's prohibition against compelling the testimony of the Chairman of the Navajo Tribal Council by subpoena or otherwise. The applicable provision is 1 N.T.C. § 353(f), as amended in 1988. It provides as follows:

> Neither the Chairman, Navajo Tribal Council, the Vice Chairman, Navajo Tribal Council, nor the delegates to the Navajo Tribal Council may be subpoenaed or otherwise compelled to appear or testify in the Courts of the Navajo Nation or any proceeding which is under the jurisdiction of the Courts of the Navajo Nation concerning any matter involving such official's actions pursuant to his/her official duties.

MacDonald points out that his subpoena calls for meeting records of contacts with five tribal employees during the period between July 1, 1987 and June 6, 1989, and he asserts that because he was officially in office from January of 1987 through March 10, 1989 (the date he was placed on administrative leave by the Navajo Tribal Council), such records fall within the statutory bar.

The Special Prosecutor argues that MacDonald cannot now be considered a tribal official, the records sought are not official records, and that this Court, in *MacDonald Sr. v. Yazzie*, refused to apply the Sovereign Immunity Act as a bar to a prior action against MacDonald. 6 Nav. R. 95 (1989). That decision held that the Act would provide a bar only if the defendant is acting in an official capacity, and the case was returned for a district court finding on that issue. *Id.* at 96. We decide the present question on other grounds.

This is a question of statutory interpretation. We hold that MacDonald cannot invoke the testimonial privilege of 1 N.T.C. § 353(f) because of the provisions of the Sovereign Immunity Act and because of the legislative intent expressed in the Special Prosecutor Act. In searching for the intent of the Navajo Nation Council within its enactments we look to the purpose of the law. The Sovereign Immunity Act is nothing more than a reinforcement of the common law immunity from suit of the Navajo Nation as an independent sovereign. The Act restates that immunity and provides for exceptions to it in certain instances, where fixed procedures are followed. The testimonial privilege of section 353 is within a section which deals with the general principles of sovereign immunity. However, 1 N.T.C. § 354 contains an extensive list of exceptions to general principles of sovereign immunity. Among them are exceptions where a public official exceeds the scope of his or her employment or authority, or there is a suit against the official to compel the performance of a duty under express laws of the United States or the Navajo Nation. 1 N.T.C. § 354(e), (g). The suit here is against Peter

MacDonald Sr. as an individual, and it seeks to discover documents to determine whether he exceeded the scope of his employment or authority by committing criminal acts. It also seeks to compel him to obey a specific public duty, i.e. to produce records which pertain to violations of law. Thus, the Sovereign Immunity Act does not shield MacDonald.

The Sovereign Immunity Act protects the Navajo Nation, the public body, from suit, primarily civil suit. On the other hand the Special Prosecutor Act is a public corruption statute aimed at dealing with official impropriety in violation of either criminal or civil statutes.

The Special Prosecutor Act specifically provides for criminal or civil actions, by either the Navajo Nation Justice Department or the Special Prosecutor, when they are brought against various categories of public officials for violations of federal, state, or tribal law. 2 N.T.C. § 2021. The Act blends well with the Sovereign Immunity Act because it provides a remedy *for the Navajo Nation* against officers or employees who exceeded their authority. The Special Prosecutor Act specifically incorporates the subpoena provisions of 2 N.T.C. § 1982.

Therefore, reading both laws separately and together, we see that it was the intent of the Navajo Tribal Council to provide for precisely this sort of legal procedure, and that there would be no official immunity against it.

One N.T.C. § 354(e) (Sovereign Immunity Act) protects the common law immunities of public officials, but such an immunity would not apply here. In *United States v. Nixon*, the President of the United States attempted to assert a similar form of executive immunity to avoid production of tapes and transcripts of conversations in response to a subpoena by a special prosecutor, and the United States Supreme Court held that due process of law and the need for the fair administration of criminal justice overcame the president's generalized interest in confidentiality. 418 U.S. 683 (1974).

IV. PENDENCY OF CRIMINAL CHARGES

MacDonald says that because he was charged with "a variety of criminal offenses" on October 11, 1989, an administrative subpoena cannot be used to build a case against him as a criminal defendant. He cites *United States v. Hossbach* in support of his argument. 518 F. Supp. 759 (E. D. Penn. 1980). The Special Prosecutor reads *Hossbach* to suggest that the court was dealing, in dicta, with self-incrimination privilege principles, but he says, "While it is true that Appellant MacDonald, Sr. ('Appellant') is charged in Navajo District Court with a number of criminal offenses, there is no record to suggest that the Special Prosecutor ever intended to utilize the information to 'build' a case against Appellant." This is a rather amazing assertion in light of the petition in the district court record which alleges (at Par. 8, p. 4) that "Petitioners have developed sufficient information to cause them to have a good faith belief that each Respondent [including the MacDonalds] may have engaged in criminal conduct

which would fall within the scope of the jurisdiction of the Special Prosecutor...." The Special Prosecutor's showing of relevance and materiality hinged upon the pendency of a criminal investigation. The Special Division of the Window Rock District Court appointed the Special Prosecutor for the express purpose of undertaking both criminal prosecutions and civil actions against current or former tribal officials. He exercised his power to conduct a criminal investigation when he issued his subpoenas to the MacDonalds and others, and when he asked the court to enforce them, he had to show the relevance of the documents he sought to that mission. The court records show that the MacDonalds were targets of a criminal investigation and that was the precise purpose of the subpoena directed to them.

In any event, the *Hossbach* holdings regarding the use of administrative subpoenas do not support the contentions of either party with respect to the question of whether an investigatory body may use them to obtain evidence while criminal charges are pending. *Hossbach* involved conspiracy charges under the Comprehensive Drug Abuse Prevention and Control Act of 1970, and in that case Drug Enforcement Administration agents used administrative subpoenas to obtain various records from a telephone answering service, a telephone company, and rental agents. 518 F. Supp. at 763-765. The question raised by the defendants was "the right of the Drug Enforcement Agency (DEA) to obtain evidence in furtherance of a purely criminal investigation through the use of 'administrative subpoenas' issued pursuant to 21 U.S.C. § 876." *Id.* at 762.

The court first examined the statutory authority for administrative subpoenas in 21 U.S.C. § 876(a), which provides in pertinent part:

> In any investigation relating to his functions under this subchapter with respect to controlled substances, the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation.

Id. at 765.

This is very close in wording to the subpoena authority of the Office of the Prosecutor and the Special Prosecutor under 2 N.T.C. §§ 1982 and 2023(a). In *Hossbach*, the court found that the scope of the subpoena power under the Comprehensive Drug Abuse Prevention and Control Act was much broader than the powers of other investigative agencies. It also examined the historical fact that normally only grand juries may compel testimony and the production of documents in criminal investigations. *Id.* at 766. However, after finding that there was no constitutional limitation to prohibit the grant of subpoena power to an executive branch agency to conduct criminal investigations, the court upheld the use of administrative subpoenas in a criminal drug investigation leading to prosecutions. *Id.* at 767. The concluding statement on the issue is particularly applicable here:

> Strict construction and careful analysis of the statute may be appropriate, but a court may not usurp the legislative function by taking away from the executive branch powers plainly, unambiguously, lawfully and constitutionally granted by Congress.

Id. The opinion did not mention the issue of the use of administrative subpoenas while criminal charges are pending, and it overruled a motion to suppress evidence obtained directly and indirectly using them. The court's self-incrimination discussions deal with the situation where testimony is obtained through a grant of immunity. *Id.* at 770.

The relevancy of the *Hossbach* decision is that there the court applied a statute which gave broad investigatory subpoena powers, finding no constitutional prohibition to the activities carried out under it. The subpoena power the Special Prosecutor has under our statute is quite similar. Therefore, 2 N.T.C. § 1982 supports the activities of the Special Prosecutor, and we too are hesitant to usurp the legislative function in granting power to secure evidence through the use of subpoenas.

There is no statute or rule of law which prohibits the Special Prosecutor from conducting a criminal investigation when criminal charges are pending against an individual. The limitations upon his powers are those which generally apply in criminal law, including rights against self-incrimination. Those rights apply whether or not an individual is charged with an offense. Therefore, there is nothing that prohibits the Special Prosecutor from using an administrative subpoena to build a case against a criminal defendant after criminal charges have been filed. The third ground raised by the MacDonalds in their appeal is rejected.

We notice other problems, however. Upon a review of the record of proceedings in the district court, this Court found some serious self-incrimination problems.

This Court will not normally address errors which are not raised by an appellant, nor will we relieve counsel of his obligation to properly and adequately represent his client. However, there are some serious self-incrimination problems with the district court's final orders which we will address. Where it is not clear that an individual has made a knowing and intelligent choice between claiming or waiving a fundamental privilege, and where this Court sees errors to which no exception has been taken and they would "seriously affect the fairness, integrity or public reputation of judicial proceedings," we will act. *Johnson v. United States*, 318 U.S. 189, 198, 200 (1942).

Before reaching the precise problems with the district court orders we will review the evolution of the doctrines of when an individual must produce documents and when the privilege against self-incrimination applies.

The original rule was that of *Boyd v. United States*, where the United States Supreme Court held that an accused in a criminal case could not be forced to produce evidentiary items in the form of private books and papers because of the prohibitions of the fourth amendment to the Constitution of the United States as to the unreasonable searches and seizures, and the self-incrimination prohibition

of the fifth amendment. 116 U.S. 616 (1886). We have the same prohibitions in the fourth and fifth articles of the Navajo Bill of Rights. 1 N.T.C. §§ 4, 5.

In 1976 the law changed. In *Fisher v. United States*, the United States Supreme Court found that the *Boyd* rule had "not stood the test of time," and that the "foundations for the rule have been washed away." 425 U.S. 391, 407, 409.

In order to understand how, if at all, Peter MacDonald's claim that his records and papers, held either by himself or by others, are immune from production because of the pendency of criminal charges, we must examine the overall shift in the law of self-incrimination since the 1886 *Boyd* decision. We are discussing whether the law can require an individual to turn over documentary evidence or it can require others to release documentary evidence held for another. We first turn to documents in the hands of others.

In *United States v. Powell,* the Supreme Court dealt with an Internal Revenue Service subpoena which was directed to the president of a business. 379 U.S. at 49. The Court did not directly deal with a self-incrimination issue, but instead it held that the Internal Revenue Service need not make a showing of probable cause to obtain tax records unless the taxpayer could raise a substantial question that judicial enforcement of a summons would constitute an abuse of court process. *Id.* at 51.

The case of *Couch v. United States* involved another Internal Revenue Service summons, this time directed to business records in the hands of an accountant. 409 U.S. 322, 323, 331 (1973). The Court held that the production of documents did not carry with it the sort of personal testimonial compulsion, extortion of information from the accused himself, or enforced communication by the accused which falls within the prohibition against self-incrimination. *Id.* at 328-329.

In *Fisher v. United States*, the Court went on to hold that a tax summons directed to an attorney in order to require the production of his client's records was enforceable and not violative of the stricture against self-incrimination. 425 U.S. 391, 402. The reasoning, again, was that the fifth amendment protects against compelled self-incrimination and not the disclosure of private documentary information. *Id.* at 401. However, the Court did reserve the issue of whether there were any special problems of privacy when the subpoena asked for a personal diary. *Id.* at 401 n.7. In sum, the government can require disclosure of documents in the hands of third persons (with some exceptions related to the law of privilege) because such only requires the production of evidence and not compelled disclosures directly from the accused or suspected individual.

The decisions regarding obtaining business records, including sole proprietorship business records, also show that there is no violation of the right against self-incrimination when they are the subject of a subpoena. In *Andreson v. Maryland,* the Supreme Court allowed an attorney's business records, obtained by a search warrant, to be introduced against him for a real estate fraud prosecution. 427 U.S. 463, 465, 477 (1976). The Court again made the distinction between testimonial disclosures and producing evidence.

> [T]he protection afforded by the Self-Incrimination Clause of the Fifth Amendment 'Adheres basically to the person, not to information that may incriminate him.' Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, a seizure of the same materials by law enforcement officers differs in a crucial aspect — the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.

Id. at 473-474 (citations omitted).

In *United States v. Doe*, a grand jury issued subpoenas to obtain business records from a sole proprietorship. 465 U.S. 605, 606 (1984). It sought a wide range of records to investigate a government contract corruption scheme, and the listing of records is very similar to the situation in this case. *Id.* at 607 n.1. The Court held that the act of preparing business records is voluntary and that no compulsion is present when a subpoena demands their production. *Id.* at 610-611. However, the Court upheld lower court findings that since the government had issued "broad-sweeping subpoenas" and could not independently produce evidence of their possession, existence and authentication without a testimonial admission by the defendant, the privilege against self-incrimination applied to the act of production. *Id.* at 612-614. As noted by the Special Prosecutor in his brief, Justice O'Connor concurred with the majority opinion and said "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." *Id.* at 618. While the thrust of Supreme Court decisions appears to be approaching such a holding, we are not prepared to conclude that such is the actual state of the law. It is sufficient to note that the Court upheld the production of the contents of the documents recited at footnote 1, but found that the breadth of the subpoena was such that there would be self-incrimination in the act of requiring a testimonial communication from the defendant to prove the existence, possession and authenticity of those documents.

Now we reach the decision in *Doe v. United States*, 487 U.S. 201 (1988). That was a case where a court issued an order compelling the target of a grand jury investigation to authorize foreign banks to disclose account records, without identifying documents or acknowledging their existence. *Id.* at 202. There were 12 forms "relating to 12 foreign bank accounts over which the Government knew or suspected that Doe had control," and when those were rejected as calling for a testimonial disclosure, the Government offered a general revised consent form. *Id.* at 203, 204 n.2 (text of form). The Court held that the contents of foreign bank records are not privileged under the Fifth Amendment because the act of executing the form is not "testimonial." *Id.* at 215. The form did not acknowledge that any account in a financial institution was in existence, and it did not indicate that any account was controlled by the suspect. The form did not identify any relevant bank, and it did not point to hidden accounts which would provide infor-

mation to assist the prosecution in uncovering evidence. *Id.* Therefore, the Court held that the consent directive was not testimonial in nature, and a district court order compelling Mr. Doe to sign it did not violate the privilege against self-incrimination. *Id.* at 218.

The Window Rock District Court order of September 29, 1989 is the one most pertinent to this decision. It requires the MacDonalds to undertake the following acts:

1. Sign all necessary consents and authorizations for the release of the financial and other records sought in paragraphs 1, 2, 4, 6, 7, 8 and 11 of the subpoenas which were served upon them on June 15, 1989;
2. Provide Petitioners with a list of names of all financial institutions which are responsive to the categories in the subpoenas and the cities in which the appropriate branches of each are located; and
3. Produce all records within their current possession, custody or under their control responsive to paragraphs 9, 10 and 11 of the subpoenas served upon them on June 15, 1989.

We are not satisfied that a personal diary or other document which is clearly not a business record may be sought through a subpoena because of the doctrine prohibiting compelled production. Assuming there may be a personal diary or other personal document which may have a protected expectation of personal privacy, the district court must make a further determination of whether any document sought by the Special Prosecutor falls within that rule. The procedure will be for the MacDonalds to raise their objections and then provide the document to the court to inspect *in camera*. *Fisher v. United States*, 425 U.S. at 401 n.7.

In order to assure that the act of producing the documents demanded in the "broad-sweeping subpoena" will not require the MacDonalds to give testimonial evidence of their possession of them, their existence, or their authentication and thus violate their privilege against self-incrimination, the district court must make further findings in harmony with *United States v. Doe*, 465 U.S. at 612-614.

The district court must also reexamine the release forms and the requirement to disclose the names and cities of financial institutions in light of a thorough application of *Doe v. United States*, 487 U.S. 201. In particular the court must examine the form approved in the case as well as the manner of its use.

We remand this cause for further proceedings consistent with this opinion.

NAVAJO TIMES

Monday
October 17, 2011
Last update: July 25 04:32 pm MST

RELATED CONTENT

Changes aim to protect cash from spending

Delegates seek 'loophole' around line-item vetoes

A tool to cut wasteful spending

Reform panel bill skirts high court ruling

Fireworks erupt over Shelly's vetoes

TALK TO US

Send a letter to the editor

POLITICS

Special prosecutor named to investigate elected officials and tribal employees

By Noel Lyn Smith
Navajo Times

WINDOW ROCK, Jan. 28, 2010

Text size: A A A

ShareThis

A Washington, D.C., lawyer has been selected by the special division of the Window Rock District Court to investigate allegations of illegal and unethical behavior by elected officials and employees of the Navajo Nation.

In a report to the Navajo Nation Council on Monday, Attorney General Louis Denetsosie said Alan Balaran was named special prosecutor after the three-judge panel reviewed three applications Jan. 20.

Balaran, who served as the court-appointed special master in the Cobell trust fund case, will be under the jurisdiction of the special division, Denetsosie added.

On Dec. 28, Denetsosie asked the special division to appoint a special prosecutor to investigate the tribe's contracts with OnSat Network Communications Inc., a $2.2 million loan guarantee to BCDS Manufacturing Inc., and payments from the Navajo Nation Council's discretionary fund to family members of several legislative branch employees.

"The appointment of a special prosecutor, I alone had to make that decision," Denetsosie said. "I believe I applied the law properly and I believe firmly that I done the right thing."

Denetsosie asked the court for assistance in securing $500,000 from the Budget and Finance Committee and the controller's office to pay the special prosecutor.

Some delegates questioned why only their discretionary funds would be reviewed and not the president's.

"Why doesn't it include everybody that's using the discretionary fund, including the president's office, the speaker's office and the Navajo Nation Council?" Elmer Milford (Fort Defiance) asked.

Denetsosie replied that he is bound to act on information that a violation of the tribal code may have been committed by a tribal official.

"Up to this point we don't have specific (information) relative to the Office of the President and Vice President or the first lady," he said.

He told the council that the office received "significant" information about the use of council discretionary funds through investigative stories written by Navajo Times reporter Marley Shebala.

"She named names, she named amounts and she put dates on them," Denetsosie said. "That is significant for us to conduct our own preliminary investigation."

He pointed out that the Times named four employees from the legislative branch whose family members received more than $100,000 in assistance from the discretionary fund.

Times' stories confirmed

Asked by one delegate why he would trust the newspaper, Denetsosie said his office did its own investigation and confirmed the Times' findings.

He said the special division judges had asked the same question - why believe a newspaper story?

"We told them that we did our own investigation. We would not rely on the reports of the newspapers and we obtained information from the auditor general, from the Office of the Controller and I employed the assistance of the White Collar Crime Unit to check out facts for me," he said.

At that point, Denetsosie read aloud from Article 6 of the Navajo Nation Code, which states that in determining whether grounds sufficient to investigate exist, the attorney general shall consider the degree of specificity of the information received and the credibility of the source of the information.

"I was satisfied that the information I received from the auditor general, the controller and from the White Collar Crime Unit was specific and was creditable," he said.

Denetsosie assured the council that his office will not supervise Balaran. However, he said, his office may file petitions later to expand Balaran's jurisdiction.

The attorney general's office would like this investigation completed this year, Denetsosie said.

Delegate Harry Claw (Chinle), along with other delegates, expressed his disappointment that the special prosecutor's investigation will not cover the president's discretionary fund and that the Navajo Times did not examine how the president spends his discretionary money.

"Why did she (Shebala) not go into the president's (discretionary fund)? Why did specifically she pick on that?" Claw asked. "Because the president also gets the discretionary fund no different from ours. In fact he gets more, a whole lot more."

The Navajo Times stories were based on documents given anonymously to the newspaper, said Duane Beyal, editor of the paper.

The newspaper has made many requests to the president's office for information about how its discretionary funds were used, he said, but has met a stone wall.

"The glaring fact is that the president refuses to release this information," said Beyal, "and appears to want to sit back, let the council take the public backlash, and use the public anger for its own political purposes."

Claw also questioned the members of the panel that picked the special prosecutor, the special division of the Window Rock District Court, to which the chief justice assigns three judges or retired judges for two-year terms.

"Who's sitting on that? Because as we all know the court is so biased against the council," Claw said. "Maybe they went out and recruited somebody. We can't trust them anymore."

Delegate Katherine Benally (Dennehotso) said she is dissatisfied with him basing his preliminary investigation into the discretionary funds on news stories, and accused him of being inconsistent.

Benally was the subject of a Navajo Times story that examined how she spent $9,999 that she allocated to herself from her discretionary fund. At the time, Benally was unable to provide documents to substantiate her claim that she used the money to pay an electrician to wire homes in her chapter.

After the story ran, she took out a full-page ad in the Times that displayed photocopies of a purported invoice from the electrician, and other evidence of her good faith.

"You really have tarnished the office and the position that you're holding," Benally told Denetsosie. "If you are making investigations based on newspaper stories, the reporting about what BCDS and OnSat were doing was in the newspaper four and five years ago. All those charges, all those accusations were in there."

If he'd followed up on those leads, there would be no need to pay for a special prosecutor at this time, she said.

"You have double standards right there," she said. "Those investigations should have happened just based on the newspaper articles."

Prior to receiving recent reports from investigators hired by the council, Denetsosie had refused to seek a special prosecutor for the OnSat and BCDS cases, saying he saw scant evidence of criminal wrongdoing by tribal officials.

Delegate Leonard Tsosie (Pueblo Pintado/Torreon/Whitehorse Lake) supported the way Denetsosie approached the investigation.

"Media is regarded sometimes as the fourth branch of government," Tsosie said, "because sometimes that is the only time information comes out on the operation of the government and it comes to the attention of certain government officials."

Delegate Edmund Yazzie (Thoreau) suggested the FBI should conduct the investigation instead of the special prosecutor.

"That's the only time we will get a total fairness out of this from the president's office and from the council's office with this discretionary (fund)," Yazzie said.

Denetsosie explained that the FBI has no jurisdiction over violations of tribal law.

After a two-hour discussion, the council voted 36-12 to accept Denetsosie's report on the appointment of a special prosecutor.

Back to top ^

NAVAJO TIMES

Monday
October 17, 2011
Last update: July 25 06:24 pm MST

RELATED CONTENT

Changes aim to protect cash from spending

Delegates seek 'loophole' around line-item vetoes

A tool to cut wasteful spending

Reform panel bill skirts high court ruling

Fireworks erupt over Shelly's vetoes

TALK TO US

Send a letter to the editor

POLITICS

Delegates dump bills to fire AG, deputy

By Marley Shebala
Navajo Times

WINDOW ROCK, Jan 6, 2011

When it was time for the Navajo Nation Council to consider removing the attorney general and deputy attorney general, the votes were not there to do it.

And a third bill aimed at reversing the reduction of the Council approved by voters on Dec. 15, 2009, also went down to defeat.

On Dec. 23, the Council voted 3 in favor and 65 opposed on the removal of Deputy Attorney General Harrison Tsosie. A separate bill to remove Attorney General Louis Denetsosie died for lack of a motion to bring it up for discussion during the special session.

The outcome was a significant reversal of the vote on Nov. 4, when the delegates voted 42-0-2 to have the removal bills drafted. They blamed the two officials for allowing the special prosecutor's investigation to veer away from executive branch problems and instead focus on legislative branch activity.

In late October, Special Prosecutor Alan Balaran filed criminal charges against Vice President Ben Shelly and 77 delegates for alleged misuse of discretionary funds.

However, after the Council decided not to remove Denetsosie and Tsosie on Dec. 23, everyone was in a conciliatory mood. Delegate Kee Yazzie Mann (Kaibeto), sponsor of the two removal bills, walked over to the two men, smiled and shook their hands. He chatted with Denetsosie.

Mann, a former prosecutor with the Navajo Nation's Department of Justice, which Denetsosie heads, said he's known Denetsosie for several years.

He said he sponsored the bills because that's what his colleagues wanted.

Denetsosie said the delegates' vote on Harrison Tsosie and their refusal to even discuss his removal shows they want peace and harmony.

"In that same spirit, I promote peace and harmony," he said with a huge smile. "This is a good sign."

Harrison Tsosie said the Council recognized the need for "stability" in the Navajo government.

Delegate Norman John II (Twin Lakes), who voted against removal, said, "The Council sent a strong message to the attorney general that the Council still has a heart."

John added, "The atmosphere kind of lifted. There's a feeling of relief."

Delegates walked across the chamber to shake hands with Denetsosie and Harrison Tsosie.

Delegate Elmer Milford (Fort Defiance) played "Silent Night" on his harmonica as delegates joked with each other and visited.

Delegate Lorenzo Curley (Houck/Lupton/Nahata Dziil), who was among the three votes in favor of removing Tsosie, said the issue was whether the attorneys had been giving "preferential" treatment to some of their clients, which include both the president and the Council.

Denetsosie is a political appointee of Shirley but under Navajo law he serves at the pleasure of the Council. Tsosie is his second in command.

Curley said both attorneys failed to honor the professional code of conduct for attorneys to be loyal to all their clients, mentioning Denetsosie's unwillingness to seek a special prosecutor after the Council first asked for one to investigate Shirley's relationship with OnSat and BCDS, two ill-fated business deals.

Denetsosie later relented after the Council spent $500,000 to have outside law firms investigate OnSat and BCDS, and called for a special prosecutor.

However, soon after Balaran was hired in January 2010, his mandate was expanded to include probes of Council and executive branch discretionary funds, and the tribal ranches program. This led to the charges against the delegates.

Curley believes his fellow delegates decided against firing Denetsosie because they think it will lead to the removal of the charges against them.

During the debate over Harrison Tsosie, a majority of the delegates pleaded with their colleagues to vote no and to also vote against the removal of Denetsosie.

Delegate Leonard Tsosie (Pueblo Pintado/Torreon/Whitehorse Lake) reminded the Council that the tribe's main outside source of development capital, KeyBank, had voiced concern about the Council's interest in removing top officials of other branches.

On Nov. 17, William M. Lettig, KeyBank's Native American Financial Services director, told Grant that he

Nation Supreme Court.

"The independence and separation of the legislative, executive, and judicial branches of the Navajo Nation's government were critical in Key's extension of a full faith and credit loan to the Navajo Nation and Key's landmark agreement to have Navajo law govern the transaction and have disputes heard in the courts of the Nation," Lettig said.

Delegate Edmund Yazzie (Thoreau) acknowledged Mann's "bravery" in sponsoring the controversial bills to remove the attorney general and deputy attorney general, and for a ballot referendum to reverse the reduction of the Council's membership.

But Yazzie, who is among 16 incumbents elected to the Council of 24, said he was going to vote no.

"We have a new year coming and I pray that we move forward," he said. "We've wasted trees and time on this legislation."

Delegate LoRenzo Bates (Upper Fruitland), another incoming member of the smaller Council, said the removal of Denetsosie and Harrison Tsosie would send a message of "fear" to the tribe's college students.

Bates noted out that the only reason given for removal was "displeasure."

"By virtue of that word, we're sending a message out to individuals that we have provided scholarships that if we, as Council, don't like them or for whatever reason, we will send you down the road," he said. "We already have a brain drain. Why promote it by instilling fear?"

On Dec. 22, the first day of the two-day special session, the Council voted 8 in favor and 55 opposed on another bill sponsored by Mann, which would have put a referendum before voters to reverse the reduction of the Council.

Delegate Tsosie said the vote showed the Navajo people and the world that the Council is honoring the people's vote for a 24-member Council and wants stability.

Back to top ^

Text size: A A A E-mail this story

The Navajo Times
Highway 264 & Route 12
Window Rock, AZ 86515–0310
Telephone (928) 871-1130
Fax (928) 871-1159

NAVAJO TIMES
Monday
October 17, 2011
Last update: August 06 03:13 pm MST
Where to BUY the Times

MORE NEWS

Familiar faces chosen as new special prosecutors

Head Start at risk, Shelly says

Sierra Club blasts feds for 'rubber-stamping' mine permits

Groundwater, not wastewater for Dook'o'oosliid?

Resources Committee grapples for footing on over-flight issue

False colors How about some Navajo panties to go with those sox?

'All I could do was pray' Soldier finally receives Silver Star for service in Vietnam

Totah forum spotlights problem of inebriates

Court orders protects documents, Balaran ends job: 'going fishing'

U.S. EPA to begin cleanup Church Rock uranium site

Yé'ii Bicheii patient's family stuck with bill

Task force takes aim at Utah voting districts

Police Blotter: Man battered with firear

Bill would raise qualifications for future justices

NEWS

Civil suits filed against 135 in slush fund scandal

By Bill Donovan
Special to the Times

WINDOW ROCK, Aug 4, 2011

Text size: A A A ShareThis

The Navajo Nation's special prosecutor last Thursday carried through with his plans to file civil suits against members of the Navajo Nation Council in connection with allegations that they converted millions of dollars in discretionary funds to their own use.

These replace the criminal charges Alan Balaran filed earlier against 77 former and present members of the Council and then dismissed them.

(Times photo - Rae Yazzie)

Speaker Johnny Naize, backed by several Navajo Nation Council delegates, speaks at a July 29 press conference in response to new civil charges filed by the special prosecutor, Alan Balaran

Related

Records show 'assistance' account was overspent by last Council, president

Ex-AG: No merit to civil charges

Delegates blast special prosecutor

This time he charged 81 members of the 21st Navajo Nation Council who served in office between 2007 and 2011, as well as former President Joe Shirley Jr., former Attorney General Louis Denetsosie, the current attorney general, Harrison Tsosie, and the controller, Mark Grant.

He also lists "John Does 1-50," unknown individuals and employees who had a part in the illegal distribution of discretionary funds.

The total number of individuals facing charges is 135.

Seven of the members of the 21st Navajo Council who were not named in this lawsuit had been named in the original criminal charges - Jerry Bodie of Sanostee, accused of misappropriating $17,600; Herman Daniels Sr. of Oljato, $4,025; Rex Lee Jim of Rock Point, $3,200; Tom LaPahe of Tachee/Blue Gap/Whippoorwill, $10,400; Laurence Platero of Tohijilee, $2500; Roscoe Smith of Crystal/Red Lake/Sawmill, $650 and Harold Wauneka of Fort Defiance, $650.

These seven reportedly had entered into a plea bargain with the special prosecutor or worked with him on a plea agreement.

Peaks protesters cite rights violations

A helping hand Ministry builds hogans to help elderly, family in need

Project Peace Train Reaching youth through humor, entertainment

Shiprock fair gets last-minute loan to operate

Police Blotter Alcohol involved in gun-happy joyride

Balaran gets court order to protect documents

Mold is suspect in building closure

New special prosecutor to replace Balaran

Rehab fund spending report released Group sought report detailing how money for victims of the Bennett Freeze in the Navajo-Hopi land dispute was spent

Wife says PD escalated incident, lied

TALK TO US
Send a letter to the editor
GO!

Discretionary funds were money allocated to delegates and the president's office to provide assistance to citizens in need.

The suit goes after former and current members of the Navajo Nation government for actions that "covertly manipulated and converted Navajo, federal and state funds resulting in a disparity of wealth whereby the vast majority of the Nation lives precipitously on the edge of poverty while those in positions of authority have amassed considerable wealth."

In short, instead of promoting the well-being of their constituents, the civil suit claims they practiced the "art of self-dealing, ineptitude and secrecy."

Instead of treating their positions in a honest and trustful way, the suit claims delegates used "incompetence and dishonesty."

Balaran said in the suit he not only wants restitution but also the immediate removal of any of the Council delegates and tribal officials who are still in office. Eleven of the Council delegates still serve on the 24-member Council. Tsosie is still attorney general and Grant is still the controller.

Balaran said he also wants the court to appoint a "financial receiver" to take over the duties of the controller.

According to the suit, each member of the Navajo Nation Council received approximately $250,000 between 2005 and 2010, which they "unlawfully appropriated to themselves, their families, friends, other delegates and their friends, resulting in a total unlawful expenditure of tens of millions of dollars of the Navajo Nation."

The suit later claims that the delegates, with the assistance of former Speaker Lawrence Morgan and with the permission of Shirley, "appropriated approximately $35 million during fiscal years 2005 through 2010."

The lawsuit also indicates that the Council delegates may have also violated federal IRS laws when they adopted a policy a month after the fund was created that eliminated the requirement that the awards be reported to the IRS.

"In one sampling of awards, the (delegates) gave more than $2 million to 130 recipients with little regard to the beneficiary's indigency," the suit states. "These recipients were given checks in amounts ranging from $10,000 to $54,000."

Another sampling showed that family members of 14 delegates received awards ranging from $51,000 to $130,000.

The suit singles out Katherine Benally, who represented Dennehotso in the last council, saying that between 2005 and 2010, she "misdirected" $130,000 to herself, various family members and other people who were ineligible to receive the funds.

In giving out the funds, the suit says Benally manipulated the names and social security numbers of her beneficiaries to conceal payments to herself and her immediate family. By doing this, she was able to direct $34,685 from the discretionary fund to her five sisters, one uncle, one daughter and two cousins.

She also used the funds, according to the suit, to purchase a wide range of building supplies and pay off personal debts. Some of the checks went to United Builders ($12,500), Home Depot ($12,000), San Juan Mobile Home Supply ($917) and OnSat ($4,244).

Benally, during a press conference last Friday in which several of the named Council delegates sharply denounced the suit, said she was innocent of all of these charges (see separate story).

Morgan was also singled out with claims that his share of the discretionary funds during those years amounted to $1.6 million.

Although there were laws in place that limited awards to individuals of not more than $300 in any given year, the suit said Morgan ignored this and other restrictions by awarding money to himself and his family members "to pay for legal bills, shopping centers and to subsidize rodeo events."

"Acting in concert with other defendants - particularly Young Jeff Tom, Hoskee Kee, Johnny Naize, Woody Lee and Mark Maryboy - Morgan unlawfully manipulated his position to award discretionary funds to his wife, sister, daughter or grandson," the suit says, adding that the total amount provided to Morgan's family was about $50,000.

The suit also talks about a charitable contributions fund set up by Morgan - with about $2 million of tribal funds between 2004 and 2010. To administer the fund, he hired Laura Calvin.

She received a salary and was supposed not to benefit from the fund but the suit said that Morgan regularly awarded thousands of dollars from the discretionary find and the charitable fund to her and Amanda Teller, who is her daughter with Council delegate Leonard Teller.

Morgan was also accused in the suit of expending money from the charity for the political campaigns of those delegates he favored.

"In total, Morgan awarded approximately $10,000 to himself, as well as untold thousands of dollars to other ineligible employees, and $300,000 to unnamed individuals and organizations under the guise of being contributions," the suit states.

Grant, who has been controller for the tribe for more than nine years, failed, according to the suit, to carry out his responsibilities to make sure that tribal funds were properly distributed.

From 2005 to 2010, Grant failed to adhere to generally accepted accounting principals, thereby "engaging in a continuous violation of both Navajo and federal law." These problems have resulted in the tribe having to return more than $100 million in state and federal grant money.

The suit also claims that Grant allowed a major violation of federal and state law by commingling grant funds and using funds from one grant to support another grant.

In tribal matters, Balaran's suit claims that tribal council delegates received more than $2 million in salary and travel advances during those years and Grant made no effort to follow tribal laws to make sure that these funds were reimbursed by the delegates.

The suit points out that Grant is not a certified public accountant, nor has he hired a CPA to work for his department during the time he has been there.

If he had carried out his duties as required by tribal law, the suit said that the loss of $36 million in misspent discretionary funds would not have occurred.

As for Shirley, the suit claims that he "collaborated" with Morgan and members of the Navajo Nation Council during those years to approve "the passage of dozens of unlawful budget appropriations that resulted in the unlawful conversion of tens of millions of dollars in Navajo nation funds."

The suit claims that Shirley, in signing all of these resolutions, was aware that the monies were being spent to enrich the Council delegates and their families. Shirley, however, has stated that he had no knowledge that tribal laws were being violated by council delegates.

Shirley was brought into the suit because he approved budget resolutions which included funding for the discretionary fund. He didn't have the authority to veto a portion of the budget until voters gave him the line-item veto in a special election in 2009.

Both Denetsosie and Harrison were sued in connection with their approval of a contract with the Phoenix law firm of Gallagher and Kennedy to defend Shirley in the investigation that was being undertaken by Balaran into Shirley's involvement into the OnSat and BCDS controversies. The firm was given $150,000 for these services.

By doing this, the former and current attorney general tried to impede the special prosecutor's investigation. The two should have also known, according to the suit, that approval of the discretionary funds was "not in the best interests of the Navajo Nation" and that the way the council did it contravened Navajo laws.

The matter is now before the Window Rock District Court but so far no decisions have been made as to how the lawsuit will proceed.

Normally, in civil suits, the various defendants have 30 days after being served with the suit to respond to the charges. After that comes months - and sometimes years - of discovery, which will include the sharing of documents and depositions.

Back to top ^

The Navajo Times
Highway 264 & Route 12
Window Rock, AZ 86515–0310
Telephone (928) 871-1130
Fax (928) 871-1159

The 22nd Navajo Nation Council — Office of the Speaker
Contact: Michael Wero, Communications Director

Phone: (928) 871-7160
Cell: (928) 255-3428

nncpress@gmail.com
www.navajonationcouncil.org

July 29, 2011
FOR IMMEDIATE RELEASE

Navajo Nation Council Blasts Newly Filed Complaint from Special Prosecutor

Action causes concern whether Alan Balaran has overstepped his authority

Window Rock, AZ – Flanked by members of the Navajo Nation Council, Speaker Johnny Naize, with several of his colleagues, voice outrage at the latest complaint that was filed by Navajo Nation Special Prosecutor Alan Balaran charging members of the 21st Navajo Nation Council, members of the Executive Branch and 50 other tribal employees and the general public with a "Breach of Fiduciary Duty."

"Mr. Balaran contends that the Legislative Branch has conspired in the misuse and redirection of tribal discretionary funds," said Speaker Naize. "After reading the complaint, Mr. Balaran has cast a net of allegation so broad that he believes that anyone who has done any business with the Navajo Nation government, including constituents, is guilty of corruption."

"In reality, the 22nd Navajo Nation Council is demonstrating a new wave of thinking that encompasses responsibility, change, transparency, and accountability, as evidenced through the Title II Amendments. These principles will carry over to the development of a more financially accountable nation, one with a strong regulatory policy on all financial activities," said Speaker Naize.

Balaran alleges, in a complaint that list more than 130 people, that hundreds of millions of dollars in Federal and State grant and contract funds were lost, causing a cutback in services and programs for children, the elderly, and the indigent. Balaran contends that those monies were unlawfully appropriated to 21st Council Delegates, their families, and friends from 2005 to 2009.

"What Balaran is not telling the public is the $1.1 million he has charged the Nation since starting his failed investigations in 2009," continued Naize. "His first attempt at alleging the Legislative and Executive Branches of wrongdoing resulted in a filing that was eventually reduced from criminal to civil charges. So far no court tribal or federal has acted on them and now it appears he's throwing darts again to see if something sticks."

"He's found a deep pocket in charging the Nation with civil suits that could take years to resolve, if ever, at the real expense of the Navajo people."

Besides the added distraction the new allegations bring while the current Navajo Nation Council contends with running the Nation, there are fears the suit will damage the appearance of the government's is ability to manage and administrate its programs and financial responsibilities.

"Mr. Balaran's actions could lead to unnecessary federal and state scrutiny that will slow the delivery of needed services and programs for the Navajo people," said Council Delegate and Budget &

- more -

Finance Chairman LoRenzo Bates (T'iistoh Sikaad, Nenahnezad, Upper Fruitland, Tse' Daa' Kaan, Newcomb, San Juan). "We also are concerned how these accusations will appear to the outside financial institutions we are working with regarding bond financing. Our economic development depends on ability to attract investors and this frivolous lawsuit threatens that."

Council Delegate Leonard Tsosie (Littlewater, Pueblo Pintado, Torreon, Whitehorse Lake, Baca/Prewitt, Casamero Lake, Ojo Encino, Counselor) expressed dismay regarding the attempt to tear apart the Navajo Nation government during a time of reorganization after the Council was reduced from 88 members to 24 Delegates.

"The Council originally brought Mr. Balaran on board to help us identify ways to make the government more effective and help it become more streamlined. Instead we have a very vague and shoddy document that is more about opinion than proof that the former leadership defrauded everyone."

"He said that every Council Delegate used $250,000 for uses other than helping the Navajo people, I know that is false because I never requested that amount for assistance," said Tsosie.

Likewise, Delegate Katherine Benally (Chilchinbeto, Dennehotso, Kayenta) accused Mr. Balaran of taking political vengeance.

"I refuse to let him demonize me and those who received assistance for scholarships, housing improvements, or funeral expenses."

"Last week I had the honor of joining a group of young bicyclists who rode across the Navajo Nation, said Council Delegate Jonathan Nez (Tsah Bii Kin, Navajo Mountain, Shonto, Oljato). "They look up to our leaders and this attack hurts all of us. This attack is an attack on our sovereignty."

The Balaran complaint regarding Navajo Nation Council involved the flawed system that administered discretionary funds. In 2005, there was an attempt to regulate how the funds were distributed but by last year it was determined that the policy was not working and thus the program was ended. Since December of 2010 there has been no distribution of funds from the Legislative Branch.

"Our new generation of the Council is doing what is necessary to address the discretionary funds problem," said Speaker Naize. "However while this suit remains an unnecessary distraction, I want to assure the Navajo people that the Council is operating and will continue to operate on schedule. As a matter of fact our standing committees will begin budget hearings next week regarding the Fiscal Year 2012 Tribal operating budget."

###

No. SC-CV-08-11

IN THE SUPREME COURT OF THE NAVAJO NATION

Evelyn Acothley, et al.
Petitioners,

v.

The Honorable Carol Perry,
Window Rock District Court,
Respondent,

And

The Navajo Nation,
Real Parties in Interest.

OPINION AND OMNIBUS ORDER AND WRIT OF SUPERINTENDING CONTROL

THE NAVAJO NATION SUPREME COURT
TO THE HONORABLE CAROL PERRY,
THE NAVAJO NATION DISTRICT COURTS,
AND THE NAVAJO NATION

Before YAZZIE, Chief Justice, and SHIRLEY, Associate Justice.

An original action for a writ of superintending control concerning Window Rock District Court Cause Nos. WR-CR-1029/1030/1031/1032/986/863/867/872/875/899/773/774/775/777/946/949/952/953/917/920/923/926/763/764/765/768/975/803/804/805/806/808/772/776/780/784/792/833/836/839/842/983/964/965/972/974/868/873/929/938/940/944/947/903/909/911/1034/1035/851/840/844/847/849/756/757/758/971/1014/930/932/934/937/816/819/821/823/848/853/586/861/879/883/886/890/897-10.

David R. Jordan, Gallup, New Mexico, for Petitioners; Novaline D. Wilson, Window Rock, Navajo Nation, for Respondent; Alan Balaran, Special Prosecutor, Window Rock, Navajo Nation, for the Real Party in Interest The Navajo Nation, and Harrison Tsosie, Acting Attorney General, Window Rock, Navajo Nation, for Amicus Navajo Department of Justice.

On January 26, 2011, Petitioners' Counsel David Jordan filed an application to this court to issue a Writ of Superintending Control in order to disqualify the Special Prosecutor (SP) and Window Rock District Court judges, and dismiss the above cases. The basis for the application

is delay in the proceedings, *ex parte* contact between Respondent Judge Carol Perry and the SP Alan L. Balaran, prosecutorial misconduct, and the SP's unlicensed practice of law. At the time of this application, a motion for Mr. Jordan's disqualification as counsel to Petitioners was pending in the Window Rock District Court. On January 31, 2011, this Court issued an Alternative Writ staying all proceedings in the district court.

Briefs and responses having now been received from the parties and from the Navajo Nation Attorney General as *amicus curiae*, we have become fully aware that the logistical issues raised before the Court encompass not only the instant cases but all the Discretionary Fund Cases *(see infra)* filed to the Window Rock District Court between October 20-21, 2010. It is also now apparent to this Court that solutions being pursued by the trial courts will not resolve the logistical issues and actually create severe difficulties for the prosecution and permit large-scale gaming of the justice system by defendants. Substantial delays foreseeable in all these cases present extraordinary circumstances and a risk of irreparable harm. Therefore, as the Court issues its decision on the Petition, we further issue an *Omnibus Order and Writ of Superintending Control* applicable to all the Discretionary Fund Cases.

I

AUTHORITY

The Supreme Court of the Navajo Nation has the authority to issue "any writs . . . [n]ecessary and proper to the complete exercise of [our] jurisdiction." 7 N.N.C. § 303(A) (as amended by Navajo Nation Council Resolution No. CO-72-03 (October 24, 2003). "Writs are extraordinary remedies issued only when there is no plain, speedy and adequate remedy at law." *Johnson v. Tuba City Dist. Ct.*, No. SC-CV-12-07. slip op. at 3 (Nav. Sup. Ct. November 7, 2007). A writ is appropriate when a lower court or tribunal over which we have appellate review

"abuses its discretion in such an egregious way that only immediate action by this Court will remedy the damage done to a party." *In the Matter of A.P.,* 8 Nav. R 671, 678 (Nav. Sup. Ct. 2005). Furthermore, this court may use its writ authority when the issues at stake are "of significant impact throughout the Navajo Nation." *Id.* In addition, such a writ may be appropriate to ensure public confidence in the Navajo Nation government. "The government of the Navajo Nation belongs to the Navajo people. A government cannot operate effectively unless the citizenry has confidence in its government." *Tuba City Judicial Dist. v. Sloan*, 8 Nav. R. 159, 167 (Nav. Sup. Ct. 2001).

II

DISCUSSION

This matter concerns issues arising from the unprecedented filing of 259 criminal charges in the Window Rock District Court in a two-day period from October 20-21, 2010, all alleging that 78 delegates of the 20th and 21st Navajo Nation Council had committed theft, fraud, forgery, abuse of office, tampering with public records and conspiracy concerning millions of dollars of discretionary funds intended for the assistance of indigent members of the Navajo Nation public (Discretionary Fund Cases).[1] Of the charged delegates, eleven were re-elected in November, 2010 and now serve as delegates on the 22nd Council.[2] Petitioners are 24 of the charged delegates. These cases which concern millions of dollars of Navajo Nation public funds are of immense public concern, and rightly so. The concern is obvious in that the Navajo people need to know what becomes of their money and whether these re-elected incumbents legitimately may serve on the present Council. We perceive no difference between the due process rights of the defendants and the Navajo people to whom the government treasury belongs.

[1] The amounts alleged to have been received by each delegate range from $650 to $279,175.
[2] A further five incumbents who were not charged were also re-elected – Lorenzo Bates, Leonard Tsosie, Katherine Benally, Johnny Naize, and Jonathan Nez.

a. Delays

Mr. Jordan asserts that Petitioners' cases should be dismissed because a witness list was not provided at arraignment pursuant to Nav. R. Cr. P. Rule 25(a) and information listed under Rule 25(b) and (c) was also not timely provided after arraignment. Additionally, a pre-trial conference was not scheduled within twenty days of Petitioners' jury demand pursuant to Rule 31(d). He further asserts a violation of Petitioners' speedy trial rights, as proceedings have not advanced in these three months since charges were filed, during which time taped transcripts show that there were *ex parte* discussions between Judge Perry and the SP on November 8, 2010 and January 10, 2011 regarding transfer of some cases to the other district courts because Mr. Jordan asserts that these communications are highly prejudicial to Petitioners and amounted to judicial and prosecutorial misconduct requiring disqualification. Additionally, the January 10 discussion was during a motion hearing which Petitioners were provided no notice of and did not attend. Finally, he asks for the SP's disqualification due to unauthorized practice of law pursuant to 17 N.N.C. § 377.

Firstly, no rule cited by Mr. Jordan requires mandatory dismissal upon violation of discovery and pretrial time requirements. Nav. R. Cr. P. Rule 25(a) gives the trial judge the option of accepting a list of witnesses at a later date. Rule 25(b) and (c) requires only that the information be made available pursuant to what has been described as an "open file rule." *See Navajo Nation v. Bigman*, 3 Nav. R. 231 (1982). Finally, we agree with the Attorney General that Mr. Jordan has misread Rule 31(d), and the rule plainly sets no time limit within which a pre-trial conference must be held.

This Court is cognizant that we have previously set a high standard for the due process rights to trial of those accused of crimes. Unlike the *bilagaana* courts, which only require a

showing that evidence is lost, memories are dimming, defense witnesses have disappeared, or that defense is impaired, in order to find that delays in criminal proceedings have violated civil rights under the Due Process Clause of the U.S. Constitution, *see, e.g., United States v. Marion,* 404 U.S. 307 (1971), our courts have further taken into account the "anxiety" caused to a charged individual when trial is unreasonably delayed. *See Navajo Nation v. Bedonie et al,* 2 Nav. R. 131 (Nav. Ct. App. 1979) (identifying three interests the speedy trial right was designed to protect, including incarceration, anxiety, and impairment to defense). Under our Navajo Bill of Rights, criminal defendants have a right to a speedy trial. 1 N.N.C. § 6 (2005). In determining whether the right to a speedy trial has been violated, the Court applies four factors: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right, and 4) the prejudice to the defendant caused by the delay. *Navajo Nation v. McDonald,* 7 Nav. R. 1, 11 (Nav. Sup. Ct. 1992); *Navajo Nation v. Bedonie,* 2 Nav. R. 131, 139 (Nav. Ct. App. 1979); *Seaton v. Greyeyes,* No. SC-CV-04-06, slip op. at 5 (Nav. Sup. Ct. March 28, 2006). The Court interprets these factors in light of *Diné bi beenahaz'áanii. Navajo Nation v. Badonie,* No. SC-CR-06-05. slip op. at 4 (Nav. Sup. Ct. March 7, 2006). They are related factors and the Court must consider them together with the relative circumstances, "engaging in a difficult and sensitive balancing process." *Id.* Further, "the right of a speedy trial is necessarily relative," as "it is consistent with delays and depends upon circumstances and secures rights to a defendant, but does not preclude the rights of public justice." *Id*. at 4-5.

It is apparent from the pleadings that the simultaneous filings of numerous cases, the subsequent *en masse* jury demands in separate jury trials, and the prosecutorial burden placed on a single Special Prosecutor present circumstances that are truly unprecedented in the history of the Navajo Nation Courts. Each of the complaints filed in the Discretionary Fund Cases involve

complex, multi-page charges rather than the single page complaints typically received by the district courts. As a result, arraignments have been spaced out over a number of months with arraignments yet to be held for many defendants, including 12 of the Petitioners. Respondent states that the Court discussed the likely delays during the two days during which the complaints were signed. Subsequent to that discussion, defendants in all Discretionary Fund Cases were served by summons and none were taken into custody.

Almost all Petitioners and other defendants in the Discretionary Fund Cases have requested jury trials. We take judicial notice that the annual number of jury trials held in the Navajo Nation courts is miniscule. According to judicial branch statistics maintained by the Administrative Offices of the Courts, only 5 jury trials were held in 2007, all of them in civil cases, the costs of which plaintiffs are required to pre-pay pursuant to 7 N.N.C. § 658(B). Juror fees have ranged from $39 to $7,080 in the 2007 cases. However, in 2006, 2008 and 2009, only one jury trial was held in the entire district court system in Ramah, Chinle, and Ramah again respectively. No jury trials were held in 2010, and there is no allocation for juror fees in present district court operational budgets.

According to the most recent branch annual report, fourteen Navajo Nation district court judges serve in 10 judicial districts and collectively manage a caseload of over 51,000 civil and criminal cases. Respondent states that "there is no way one district court of the Navajo Nation can financially or logistically facilitate the hundreds of trials within a reasonable timeframe." *Window Rock District Court's Response Brief*, at 18. Respondent opines that it may take "decades" to conduct the number of jury trials filed in the Discretionary Fund Cases, *Reply Brief*, Exhibit B, January 10, 2011 Hearing Transcript, p. 8, and the SP agrees that "to do an

adjudication (of) 259 cases is placing an almost unreasonable burden on the court and one that this court or any other court in the Navajo Nation has to deal with." *Id.* at 2.

As a solution, the Window Rock District Court has begun transferring cases to the defendants' own communities for adjudication, and the district courts have been receiving such cases. However, we are aware of the SP's argument that transfer brings on substantial issues, including resolution of issues of first impression shared between co-conspirators in five or six different courts, and different verdicts for co-conspirators tried separately. Additionally, the SP frankly states that he is pursuing settlement because the bulk of the cases will overwhelm his own resources and the district courts were each case to be separately tried by jury.

It is our understanding that when a SP is appointed pursuant to § 2021(E), the Navajo Nation Department of Justice must completely step aside and the SP becomes the sole Navajo Nation prosecutor. Therefore, we have here the spectacle of one man – the SP Mr. Balaran plus one associate – charged with pursuing over 70 individual settlements and jury trials across 10 remote Navajo Nation judicial districts at prohibitive contractual cost to the Navajo Nation. The SP, whose office is on the East Coast, has stated that he is not prepared to spend "decades" pursuing these cases which would require him to remain in the vicinity for a protracted, even indefinite length of time. *Reply Brief*, Exhibit B, January 10, 2011 Hearing Transcript, p. 10. Very likely, the Navajo Nation will be unable to fund a protracted pursuit. It is self-evident that no single human being, even with help from a capable associate, can hope to perform adequate prosecutorial work within any speedy trial time frame for these many jury trials.

It is apparent to this Court that the district courts have yet to find a workable solution for this extraordinary situation. It is beyond doubt that the Discretionary Fund Cases constitute extraordinary circumstances, and would be so viewed even in any sophisticated court system

with far greater resources than our Navajo Nation courts. As previously noted, the complex and multi-page complaints associated with each charge has given rise to a backlog even of arraignments. Indeed, 12 of the 24 defendants represented by Mr. Jordan have yet to be arraigned, meaning that speedy trial time triggers for discovery and pretrial conferences do not yet apply. Additionally, practically each and every defendant arraigned in the Discretionary Fund Cases has requested separate jury trials, a process which entails costs and resources in treasure and staff not presently available in all our district courts combined.

Petitioners have made no showing that impairment has been caused to their defense by the delays. While this Court is fully aware of and compassionate to their anxiety at the prospect of lengthy proceedings, the Discretionary Fund Cases concern allegedly criminal withdrawal of millions from the public treasury by Navajo Nation leaders, and there must be public accountability. In light of the extraordinary circumstances set forth above, we must balance the anxiety caused to Petitioners and all defendants by delays in the proceedings against the rights of public justice.

As previously stated, mandatory timing requirements in the rules of criminal procedure have not been violated. Additionally, the district courts have inherent authority to control the progress of proceedings. *Navajo Policy on Appointment of Counsel and Indigency*, Rule 2.13 (approved by the Judicial Conference of the Navajo Nation on August 21, 1992 (Resolution No. 92AUG01) and by the Judiciary Committee of the Navajo Nation Council on October 2, 1992 (Resolution No. JCO-13-92)). This right includes the ability to set the timing for proceedings.

We find that due to the extraordinary circumstances, the delays thus far in the proceedings as balanced against the rights of public justice do not rise to a violation of Petitioners' rights to a speedy trial. However, due process for both the defendants and the Navajo

people require that a workable solution must be found for the immense logistical issues attendant to these cases.

Against the backdrop of the immense logistical and funding challenges that clearly face the Navajo Nation and the *en masse* jury trial demands in these Discretionary Fund Cases, Mr. Jordan's speedy trial and civil rights arguments are not well taken. As a decades-long practitioner in our courts, he is well aware of the limitations in staff and funding of the Navajo Nation Courts. The fact that arraignments continue to be rolled out makes apparent the extraordinary strain these cases have placed on the present court system. Yet Mr. Jordan asks the Court to dismiss the monumental issues facing us and carry on if the system is able to work normally or not at all. We will not do so.

b. <u>Ex parte Communications</u>

Petitioners demand the disqualification of Judge Perry and the SP due to *ex parte* communication. We note that pursuant to Nav. R. Cr. P. Rule 18 Petitioners should have first filed a motion for disqualification of the judge in the trial court. However, we will address Petitioners' request directly for the sake of economy.

It is uncontested that the taped discussions on November 8, 2010 and January 10, 2011 between Judge Perry and the SP concern transfer of Discretionary Fund Cases generally from the Window Rock District Courts to other judicial districts due to the court's limited resources. Respondent claims that the trial court was seeking a solution within its discretion in accordance with *hash yit'éigo dooleel*, which addresses a concerted effort to determine how to proceed logistically given a monumental task. Nav. R. Cr. P. Rule 17(b) – (d) authorizes the trial court to transfer cases to "any court" *sua sponte*. Respondent further asserts that the subject matter falls squarely within permissible contact pursuant to Canon Ten of the Code of Judicial Conduct,

which permits *ex parte* communication "regarding administrative matters, scheduling, or matters unrelated to the merits of the case." While Mr. Jordan argues that venue has substantive ramifications, Respondents have explained that defendants who object to the receiving venue have an opportunity to challenge the substantive ramifications of the transfer at the receiving court, and that this procedure negates any due process concerns when the transferring court exercises its Rule 17 *sua sponte* transfer authority. The opportunity to generally request relief in the course of proceedings is set forth at Nav. R. Cr. P. Rule 5(b). Additionally, the record shows that Mr. Jordan was present at the tail end of the November 8 discussion and subsequently agreed to the transfers.

Mr. Jordan next argues that the discussion on January 10, 2011 crossed the line when the SP surveyed potential issues that would be impacted by transfer. However, the record shows that Judge Perry declined to engage the SP in discussing those issues and, instead, focused on the trial court's logistical need to transfer.

We note that in the *bilagaana* courts, a trial judge must recuse himself or herself only when the ex parte communication poses a threat to the judge's impartiality. *See, e.g., State v. Lotter*, 255 Neb. 456 (Neb. Sup. Ct. 1998). In these cases, the logistics-centered discussions occurred prior to any critical stage in the proceedings, and for one-half of Petitioners occurred even prior to their arraignment. Furthermore, the judge could have performed the transfer *sua sponte* pursuant to Nav. R. Cr. P. Rule 17 without needing to accept any input from the parties. Therefore, we find neither a threat nor appearance of threat to Respondent's impartiality in this case. Judge Perry shall not be disqualified.

The record shows that there was a bungling of docket numbers in relation to the January 10 hearing. Judge Perry had called the January 10 hearing after the SP had mistakenly filed an

Emergency Motion and Memorandum of Points and Authorities to Retain Venue and Jurisdiction of all the Special Prosecutor's Criminal Complaints in Window Rock, Arizona Before the Honorable Judge Carol Perry and Request for Hearing under No. WR-SD-01-09, which is a Window Rock Special Division docket number. A copy of this motion was served on Petitioners by the SP. No separate service was made by the trial court. Judge Perry's subsequent transfer order was filed under No. WR-CV-09-10, a Window Rock District Court number. There is a likelihood that Mr. Jordan failed to receive notice to the hearing because of the docket number mix-up. Regardless of why notice was not sent, the hearing focused on logistics and no part of the discussion concerned specific venue for Petitioners' cases. Therefore, we find the docket mix-up and lack of notice was harmless error.

Finally, regarding Petitioners' allegation of a third ex parte communication made "on a date at time that is not known to Petitioners," *Reply* at 6, sometime prior to January 18, 2011, Petitioners have been unable to provide even the date, context and content of the communication, let alone transcript or other supporting affidavit, pleading or other documents for the above referenced dockets. Without clear facts to apply, the Court will make no finding on this allegation. Additionally, Petitioners' request that the remaining Window Rock judge, Judge T. J. Holgate, be disqualified for walking into an *ex parte* meeting on case management is denied.

c. <u>Unauthorized Practice of Law</u>

Petitioners claim that 17 N.N.C. § 377, enacted after the Special Prosecutor statute, essentially repealed the earlier statute's express authority for the SP to practice before any court of the Navajo Nation without a license pursuant to 2 N.N.C. § 2023(B),[3] and furthermore, that

[3] which provides: "A Special Prosecutor shall have full power and authority to appear before any court of the Navajo Nation, the same as if he/she were admitted to the bar of such court, with respect to any matter within his or her jurisdiction or the duties and responsibilities of his or her office."

the earlier statute violates separation of powers due to the Supreme Court's exclusive authority in the regulation of the practice of law within the Navajo Nation.[4] The issues turn on the intent of the Council and the purpose of the Special Prosecutor statute.

We recently addressed the unauthorized practice of law statutes[5] in relation to an earlier statutory requirement that the individual filling the Chief Legislative Counsel must carry a state bar license. We found that the unauthorized practice of law statutes added the requirement that the position also carry a Navajo Nation Bar Association (NNBA) license without repealing the former statute, and this is indeed the settled governmental policy. *See In the Matter of Frank Seanez,* No. SC-CV-58-10 (Nav. Sup. Ct. January 20, 2011). In so finding, we stated, "Our Navajo Nation laws must be read comprehensively and in combination, not piñon picked for provisions that support a given position. Policies evolve over time and are written by human drafters, and the wording of earlier visions will not reflect the full evolved governmental policy expressed in later provisions, nor will the later provision always repeal the earlier provision." *Id.,* slip op. at 10.

Even though a specific exception was not carved out for 2 N.N.C. § 2023(B) in 17 N.N.C. §377, it is evident that the Attorney General relied on Section 2023(B) in including the name of Alan L. Balaran, a state-licensed practitioner of national reputation without NNBA license, on the short list for appointment by the Window Rock Special Division. Similarly, the Special Division relied on the provision in appointing Mr. Balaran as SP. Although it may appear that both failed to read our laws comprehensively, we believe these governmental bodies

[4] *See Eriacho v. Ramah Dist. Ct.,* 8 Nav. R. 598 (Nav. Sup. Ct. 2004); *Navajo Nation v. MacDonald,* 6 Nav. R. 222 (Nav. Sup. Ct. 1990); *Boos v. Yazzie,* 6 Nav. R. 211 (Nav. Sup. Ct. 1990); *In re Practice of Law by Avalos,* 6 Nav. R. 191 (Nav. Sup. Ct. 1990).

[5] 17 N.N.C. §377 and 7 N.N.C. § 606

relied on the provision in good faith as settled governmental policy with the purpose of finding the best possible neutral investigator for the good of the Navajo people.

That being said, 17 N.N.C. § 377 and 7 N.N.C. §606 convey strong policy reasons for the NNBA license requirement. The need for a license or for due association with a Navajo Nation barred individual is calculated to protect clients from sub-par representation by practitioners unfamiliar with our laws and culture. We understand that at some point, Mr. Balaran did, in fact, become associated with Mr. Samuel Gollis, who is a Navajo Nation Bar Association member.

The Navajo Nation has previously sought "special admission" for a Special Prosecutor, and said admission was granted by order of this Court. *Order, In re Appointment of Special Prosecutor of Navajo Nation,* No. SC-SP-02-09, June 15, 2000. "Special admission" in the state courts does not require association with a local bar member. However, nowhere in our rules is "special admission" provided for. The one-time special admission granted by this Court does not constitute settled practice, and shall not be revived unless provided for in bar admission rules.

It is clear from the plain wording of the Special Prosecutor statute that the Council intended to provide the Special Prosecutor with maximum independence without undue interference or obstruction from all three government branches with the goal of ferreting out corruption and abuse wherever it may be found. The Council's intent that the individual be unbiased and of some high stature to pursue high governmental misdeeds is plain, as is its concern that such an individual may not be locally found. Given this intent, we find that 2 N.N.C.§ 2023(B) amounts to a most specific *de jure* admission and authority for the SP to practice and that the provision which was not repealed simply because an express exception was left out in 17 N.N.C. § 377. For this reason also, we find no violation of separation of powers.

Petitioners' assertion of unauthorized practice as a basis for disqualification is, therefore, rejected.

That being said, we find that both 2 N.N.C. § 2023(B) and the unauthorized practice of law statutes can and must co-exist and are capable of being read together. The *de jure* admission by statute of the SP into Navajo Nation legal practice must be accompanied by his association with a licensed Navajo Nation Bar member, which has been done in this case. Additionally, implicit in the Special Prosecutor statute is a requirement that the SP, once duly admitted-by-statute, must serve with honor in the public interest as an officer of the Court and is subject to all disciplinary rules.

III

EXTRAORDINARY CIRCUMSTANCES

The "extraordinary circumstances" raised before this Court exist in all pending Discretionary Fund Cases with risk of irreparable harm. Respondent, the Special Prosecutor, and the Attorney General appear in agreement that these extraordinary circumstances necessitate extraordinary solutions. Again, we repeat that due process belongs both to the defendants and the Navajo people. In normal circumstances, the courts are expected to guard against the impairment of the defense; in this instance, the justice system itself is impaired by the flood of cases and the en masse jury demands. It is apparent that no workable solution is yet in place.

The transmitted record shows that conspiracy is a shared charge between multiple defendants in this case. This Court is aware that complex multiple defendant joint trials in which shared charges of conspiracy and also separate charges are tried have never been brought in the Navajo Nation trial courts, at least not in this Court's memory. In the *bilagaana* courts, "there is a clear preference that defendants who are indicted together be tried jointly," particularly in

white collar crime cases where there are multiple defendants.[6] The rules of criminal procedure are to be "construed liberally" in favor of joinder.[7] In the transcript of the January 10 hearing, Judge Perry expressed that co-conspirators in these cases may be "just too large for one court to hear." *Reply*, Exhibit B, p. 8. However, In *United States v. Kipp*, 990 F. Supp. 102 (N.D.N.Y. 1998), more than seventy defendants were indicted and tried together. Motions to sever were denied in *Kipp* following which most of the defendants pleaded guilty.

The prevailing understanding in *bilagaana* jurisdictions – as we are just now discovering ourselves – is that if the government must conduct separate proceedings against numerous defendants, there will be chaos. There is overwhelming recognition of the importance of joint trials. As stated by the U.S. Supreme Court:

> Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. Many joint trials . . . involve a dozen or more co-defendants. Confessions by one or more of the defendants are commonplace . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability — advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Richardson v. Marsh, 481 U.S. 200, 209-10 (1987).

---

[6] *United States v. Jackson*, 180 F.3d 55, 75 (2d Cir. 1999); *see also United States v. Frazier*, 280 F.3d 835, 844 (8th Cir.)(stating that it is rare for a court to "sever the trial of alleged coconspirators"), *cert. denied sub nom. Robinson v. United States*, 122 S. Ct. 2317, *cert. denied sub nom.* Thomas v. United States, 122 S. Ct. 2606, *cert. denied*, 123 S Ct. 255 (2002); *Phillips v. Commonwealth*, 17 S.W.3d 870, 877 (Ky. 2000); *State v. Turner*, 956 P.2d 215, 217 (Or. App. 1998) ("Jointly charged defendants shall be tried jointly unless the court concludes before trial that it is clearly inappropriate to do so ....").

[7] *United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999). *See generally United States v. Novaton*, 271 F.3d 968, 988-89 (11th Cir. 2001) ("Nevertheless, because of the well-settled principle that it is preferred that persons who are charged together should also be tried together ... the denial of a motion for severance will be reversed only for an abuse of discretion."), *cert. denied*122 S. Ct. 2345 (2002).

We note that Evelyn Acothley, the named petitioner, shares a conspiracy charge with 15 other defendants concerning allegedly criminal use of $86,525 in public funds. It is our understanding from the record that some defendants may share conspiracy charges with as many as 56 other defendants. While the numerosity of co-conspirators appears daunting, there is no civil rights reason why there should not be joint trials in recognition of the limited resources of the justice system as well as the need for consistent verdicts, speedy trial, and economy. The needs of defendants to a speedy trial in particular, coupled with the highly unusual circumstance of a governmental prosecution conducted by a single individual and his associate, render this solution absolutely required.

It is without question an untenable burden on the SP to prosecute over 70 delegates in separate jury trials within reasonable time limits. Pursuant to 2 N.N.C. § 2023(G), the SP "may request, and upon request shall receive assistance from any Branch, Division, Department, Office or Program of the Navajo Nation." While pursuant to Section 2021(E), a finding by the Attorney General that a "personal, financial, or political conflict of interest" existed in the Navajo Nation would have necessitated the appointment of the SP, perhaps that situation no longer exists and the SP may now be given some prosecutorial help. Absent a fresh finding that such conflicts persist, we find that the assistance provided for in Section 2023(G) does not exclude the assistance of attorneys and advocates from the Office of the Attorney General and the Office of the Chief Prosecutor in the prosecution of cases that must be provided upon the SP's request.

We take judicial notice that by established practice, criminal jury trials are paid for out of the public treasury, and further take notice that resources are already scarce for the routine adjudication of civil and criminal cases not only in Window Rock, but in all ten Navajo Nation Judicial Districts. While we note that juries in criminal trials in *bilagaana* courts are paid for by

the state, the Navajo Nation must apply its own laws according to the unique reality of its own circumstances. We note that 7 N.N.C. § 658(A) entitles jurors to be paid travel and per diem "provided funds therefore are appropriated by the Navajo Nation Council." Interpreting the provision by utilizing *Diné bi beenahaz'áanii* as required by 7 N.N.C. § 204(A), we find that individuals who serve as jurors must not be expected to bear the costs of their service under any but the most severe circumstance. *Ideenágo* applies, which is the expectation that what you provide will be appreciated. Juries hear the evidence and render the decision, sometimes at great personal sacrifice. We therefore find the above entitlement to be firm, and the plain wording of the statute merely prohibits payment by the Navajo Nation when there are no funds. When there are no funds allocated, we read the statute as requiring juror fees to be paid by the defendant(s) making the jury demand subject to poverty constraints. Only when poverty is pled and proven and there are no allocated public funds may the trial court require jurors to volunteer.[8]

Despite the months of public awareness that jury demands have been made, no funds for jury trials in the Discretionary Fund Cases has been appropriated by the 21st Council, most of whom were charged by the Special Prosecutor, nor by current Council. Furthermore, we take judicial notice that all governmental branches are presently operating on financial shortfalls. As we previously stated, there are presently no funds specifically appropriated for juror fees. Because defendants are former and current government officials all of whom who have retained private counsel, we may assume that none of the defendants are paupers.

The logistical issues in these cases have been so apparent to this Court, that we must ask why the present government and the SP have not informed the public in order to be frank with

[8] We note that 7 N.N.C. §658(B) permits the Court to require that defendants asking for jury trials in civil matters pre-pay juror fees unless they are proceeding *in forma pauperis*. We further note that since August, 2009, the Navajo Nation court system has set juror fees at $7.25 per hour and reimburses mileage at 55 cents per mile.

the Navajo people regarding the actual resources and options available for bringing the prosecution of these cases to completion through the requested jury trials.

Finally, the SP statute expressly recognizes that governmental conflicts of interest will require unbiased outside assistance. 2 N.N.C. § 2021(E). Pursuant to Section 2023, this unbiased outsider acting as SP is empowered to pursue corruption criminally and civilly in the Navajo Nation, and specifically in Federal and State civil and administrative jurisdictions. Additionally, the Council has given him or her the express grant of "full power and independent authority to exercise all functions and powers of the Attorney General and the Office of the Prosecutor." Section 2023(A) *and see Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1, 5 (Nav. Sup. Ct. 1992).

We note that the Navajo Nation Prosecutors in our various districts are able to work independently with federal authorities in the referral to those authorities of relevant criminal matters; therefore the SP has the same authority to do so with the assistance of the full resources of the Navajo Nation pursuant to Section 2023(G), as circumstances dictate.

Whatever solutions are determined, resources within the Navajo Nation may continue to be insufficient to achieve the goal of substantial justice within our Navajo Nation Court system. If *Diné* justice cannot be achieved because of lack of resources, justice can be sought by federal authorities. The Special Prosecutor is hereby urged to seriously consider referral to the federal authorities of cases which cannot be duly resolved through plea bargains, settlement, and trial in our courts within a reasonable time, and which meet the elements of federal crimes pursuant to 18 U.S.C. § 661, § 666, and other relevant provisions.

IV

OMNIBUS ORDER AND WRIT OF SUPERINTENDING CONTROL

Evidently, a solution must be determined that will ensure justice is served in the Discretionary Fund Cases for both defendants and the Navajo people in light of the Window Rock District Court stated incapacity to handle the numerous cases and the extraordinary logistical puzzle posed to the prosecutorial and court system. The principles of *nahat'á* and *haleebee* impose a duty on the courts to plan for proper resolutions. This court may use its writ authority when the issues at stake are "of significant impact throughout the Navajo Nation." *In the Matter of A.P.*, 8 Nav. R 671, 678 (Nav. Sup. Ct. 2005). There is no doubt that the Discretionary Fund Cases are of such significant impact.

Pursuant to these authorities and for the reasons set forth above, this Court now issues its Omnibus Order and Writ of Superintending Control applicable to all pending Discretionary Fund Cases.

A. Petitioners' requests for dismissal and disqualification of Judge Carol Perry, Judge T. J. Holgate, and the Special Prosecutor are DENIED.

B. The Window Rock District Court SHALL immediately enter a ruling on the pending motion for Mr. Jordan's disqualification as counsel to Petitioners.

C. The District Courts SHALL consolidate and hold joint trials for defendants on all outstanding charges in all Discretionary Fund Cases where any single conspiracy charge is shared. The district courts and the Special Prosecutor SHALL provide a plan for the adjudication of the above joint trials to this Court no later than April 30, 2011, during which time

all speedy trial timelines are tolled. The communications between the district courts and Special Prosecutor regarding this plan shall not be considered impermissible *ex parte* communications.

D. The Window Rock District Court SHALL continue transferring Discretionary Fund Cases pursuant to the above plan.

E. The Court AFFIRMS the inherent right of the trial courts to control and manage the proceedings and ORDERS that, due to the extraordinary circumstances, the district courts may set proceedings on a lengthier timeframe than in normal circumstances and may waive otherwise mandatory timeline rules with findings that such delays are necessary in the interest of substantial justice for the defendants and the Navajo people. The trial courts' scheduling shall not be disturbed absent a showing of an abuse of discretion and substantial impairment on defense.

F. The District Courts SHALL require that defendants in all Discretionary Fund Cases prepay the costs of jury trials in the amount of $2,500 per defendant per separate jury trial and up to $15,000 per joint jury trial to be shared among the co-defendants, with any balance remaining reimbursable to the defendants unless the remaining amount is required to pay the judgment. If defendants fail to make these prepayments according to deadlines set by the courts, and furthermore do not plead and prove indigency, jury trials shall be deemed waived and bench trials shall proceed. Indigent defendants SHALL be entitled to jury trials without pre-payment.

G. The Court further LIFTS the stay in the Window Rock District Court for proceedings consistent with this opinion.

H. The Special Prosecutor SHALL request the assistance of attorneys and advocates from the Office of the Attorney General and the Office of the Chief Prosecutor in the prosecution

of the Discretionary Fund Cases. Absent a finding pursuant to 2 N.N.C. § 2021(D) by the Attorney General that any "personal, financial, or political conflict of interest" that initially gave rise to the need for investigation by a Special Prosecutor persists and would impair the prosecutorial performance of such advocates and attorneys, such assistance SHALL be provided in this case upon the SP's request.

Dated this 1st day of March, 2011.

Chief Justice

Associate Justice

Alan L. Balaran, Esq., Special Prosecutor
Post Office Box 2010
Window Rock, Navajo Nation (AZ) 86515
abalaran@balaran-law.com
Telephone: 928-871-6422
Telephone: 202-258-9999
Facsimile: 202-986-8477

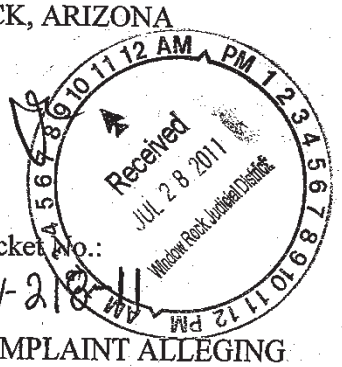
IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF WINDOW ROCK, ARIZONA

THE NAVAJO NATION,

Plaintiff,

v.

ALICE W. BENALLY;
AMOS F. JOHNSON;
ANDY R. AYZE;
BENJAMIN CURLEY;
BOBBY ROBBINS, SR.;
CECIL FRANK ERIACHO;
CHARLES DAMON, II;
CURRAN HANNON;
DANNY SIMPSON;
DAVID B. RICO;
DAVID SHONDEE;
DAVID L. TOM;
DAVIS FILFRED;
EDMUND E. YAZZIE;
EDWARD V. JIM, SR.;
ELBERT R. WHEELER;
ELMER P. BEGAY;
ELMER L. MILFORD;
ERNEST D. YAZZIE, JR.;
ERVIN M. KEESWOOD, SR.;
EVELYN ACOTHLEY;
FRANCIS REDHOUSE;
GEORGE APACHITO;
GEORGE ARTHUR;
GLORIA JEAN TODACHEENE;
HARRIETT K. BECENTI;
HARRY H. CLARK;
HARRY CLAW;



Docket No.:
WR-CV-218-11

COMPLAINT ALLEGING
BREACH OF FIDUCIARY DUTY

HARRY HUBBARD;)
HARRY J. WILLETO;)
HARRY WILLIAMS, SR.;)
HERMAN R. MORRIS;)
HOPE MACDONALD LONE TREE;)
HOSKIE KEE;)
IDA M. NELSON;)
JACK COLORADO;)
JERRY FREDDIE;)
JOE M. LEE;)
JOHNNY NAIZE;)
JONATHAN NEZ;)
KATHERINE BENALLY;)
KEE ALLEN BEGAY, JR.;)
KEE YAZZIE MANN;)
KENNETH MARYBOY;)
LARRY ANDERSON, SR.;)
LARRY NOBLE;)
LEE JACK, SR.;)
LENA MANHEIMER;)
LEONARD ANTHONY;)
LEONARD CHEE;)
LEONARD TELLER;)
LEONARD TSOSIE;)
LESLIE DELE;)
LORENZO BEDONIE;)
LORENZO C. BATES;)
LORENZO CURLEY;)
MEL R. BEGAY;)
NELSON BEGAYE;)
NELSON GORMAN, JR.;)
NORMAN JOHN, II;)
OMER BEGAY, JR.;)
ORLANDA SMITH-HODGE;)
PETE KEN ATCITTY;)
PETERSON B. YAZZIE;)
PHILLIP HARRISON, JR.;)
PRESTON MCCABE, SR.;)
RALPH BENNETT;)
RAY BERCHMAN;)
RAYMOND JOE;)
RAYMOND MAXX;)
ROY B. DEMPSEY;)
ROY LAUGHTER;)
SAMPSON BEGAY;)
THOMAS WALKER, JR.;)

TIM GOODLUCK;)
TOMMY TSOSIE;)
WILLIE BEGAY;)
WILLIE TRACEY, JR.;)
WOODY LEE;)
YOUNG JEFF TOM;)
LOUIS DENETSOSIE;)
HARRISON TSOSIE;)
JOE SHIRLEY, JR.;)
MARK GRANT;)
LAWRENCE T. MORGAN; and)
JOHN DOES 1-50,)
)
DEFENDANTS.)
)

COMPLAINT FOR BREACH OF FIDUCIARY DUTY

Plaintiff, the Navajo Nation, through the Special Prosecutor, Alan L. Balaran, Esq., alleges as follows:

INTRODUCTION

Under Navajo Fundamental Law, "[a]ll public officials in the Nation have a fiduciary responsibility to the Navajo people to execute the trust the People have placed with them in the administration of the government." This action, at its core, revolves around the abdication by Navajo leaders of their legal, ethical and fiduciary responsibilities toward the Nation. It does not describe a random theft or an incident involving individual ineptitude that visits every large organization. Rather, this case seeks redress for a wholesale pattern and practice of corruption conceived and coordinated by the branches and agencies of the Nation.

The conduct recounted below alleges how the Navajo Nation's most senior officials covertly manipulated and converted Navajo, Federal and State funds resulting in a disparity of wealth whereby the vast majority of the Nation lives precipitously on the edge of poverty while those in positions of authority have amassed considerable wealth. In short, rather than promote the well-being of their constituents in accordance with their fiduciary obligations – these officials

have divested themselves of their duties of honesty and transparency, choosing instead to perfect the art of self-dealing, ineptitude and secrecy.

This action alleges the loss of hundreds of millions of dollars in Federal and State grant and contracts funds and the concomitant loss or drastic curtailing of programs vital to children, the elderly and the indigent. It describes the actions of the Office of the Controller; the Office of the President and Vice President; the Office of the Attorney General, the Navajo Nation Council and the Office of the Speaker whose senior officials acted in concert to abrogate their fiduciary duties of trust, honesty, candor and allegiance to the People.

The events alleged in this Complaint are not simply a byproduct of the recent downturn in the economy or tment returns. They are the culmination of a pattern and practice whereby the concepts of trust, loyalty, honesty, accountability and transparency have been traded for incompetence and dishonesty. The Special Prosecutor maintains that the brazenness demonstrated by the Nation's most senior officials demands not only monetary redress – both in the form of restitution and salary disgorgement – but the temporary appointment of a Financial Receiver to assume the responsibilities of the current Controller; and the immediate removal from office and replacement of those Defendants still occupying positions of authority within the Nation.

JURISDICTIONAL ALLEGATIONS

1. The Special Prosecutor brings this action pursuant to 2 N.N.C. §§ 2021 and 2023, and in conformance with the Special Division Order of January 18, 2011, as clarified on January 26, 2011, authorizing the Special Prosecutor to investigate and, if warranted, initiate criminal and civil proceedings against current or former tribal officials listed in the Act at 2 N.N.C. § 2021(8) for:

a. Any criminal violation of state or federal law, and criminal violation of any laws or regulations of the Navajo Nation arising out of matters involving OnSat and/or the E-rate Program, BCDS or the Dine Development Corporation, the Tribal Ranch Program, the disbursement and expenditure of any and all "discretionary funds" by Navajo Nation Council Delegates, the Office of the Speaker, the Office of the President and Vice President, and the Office of the Controller, including the use and accounting of federal grant funds and Navajo tribal funds by the Ofl ice of the Controller and/or any of its offices, programs, departments and/or sections for the disbursement of deferred compensation payments without deductions for salary, travel, tax or any other required deductions.

b. Any civil claims arising out of matters described in paragraph (a), except that no civil action may be filed to the extent it might interfere with actual or planned civil litigation by the Navajo Nation, and to avoid such interference, the Special Prosecutor shall coordinate any civil litigation with the Attorney General of the Navajo Nation; and the Special Prosecutor shall be authorized, at his or her sole discretion, to defer to the Chief Prosecutor of the Navajo Nation concerning the investigation and/or institution of proceedings with respect to any criminal misconduct described in paragraph (a), so long as the Special Prosecutor provides assistance and coordination with the Chief Prosecutor.

2. Each of the acts, occurrences and omissions hereinafter set forth took place on Navajo soil, primarily in Window Rock, Arizona and, thus, within the jurisdiction of this court.

89. At all pertinent times hereto, Defendant HARRISON TSOSIE was both Deputy Attorney General as well as the Attorney General of the Navajo Nation.

90. Plaintiff does not know the true names of Defendants DOES 1 through 50 inclusive, and therefore sues them by those fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when the same shall become known.

91. Plaintiff is informed and believes, and based thereon alleges, that each of the Delegate Defendants is responsible in some manner for the occurrences herein alleged and that Plaintiff's damages were proximately caused by such conduct.

STATEMENT OF FACTS
REGARDING DELEGATE DEFENDANTS

92. Plaintiff hereby re-alleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

93. Each of the Delegate Defendants, which includes Defendant former Speaker Morgan ("Defendant Speaker"), was elected to the 20th and/or the 21st Council of the Navajo Nation and was acting in a delegate capacity within the period October 1, 2005 through September 30, 2009.

94. Each of the Delegate Defendants acted as fiduciaries to the Navajo Nation and was responsible for ensuring the maximum protection of the People's interests by acting at all times with integrity, complete honesty, transparency and total fidelity. As fiduciaries, the Delegate Defendants were obligated at all times to avoid the slightest misrepresentation and concealment and were prohibited from leveraging their position for personal gain.

95. Between 2005 and 2010, each Delegate Defendant received approximately $250,000 in Discretionary Funds which they unlawfully appropriated to themselves, their families, friends, other delegates and their families, resulting in a total unlawful expenditure of tens of

millions of dollars of the Navajo Nation– in direct violation of Navajo Fundamental, common and statutory laws and regulations.

96. These unlawful appropriations and expenditures by the Delegate Defendants could not have been effected without the explicit or implicit assistance of the other named Defendants, either acting in concert with the Delegate Defendants or recklessly refusing to exercise their own powers to stop the Delegates' massive fraud upon the Navajo Nation.

97. Neither the Navajo Nation Council nor the Defendant Speaker is free to spend public funds at will or for any "public purpose" they may fancy. They are, instead, bound to utilize appropriated funds in accordance with properly enacted and legislatively designated purposes. The Government's fiduciary obligation, as set forth in Titles 2, and Chapter 7, Title 12 of the Navajo Nation Code (such as 12 N.N.C. § 800 *et seq*), require that the appropriations and expenditures first be statutorily authorized and then fully justified.

98. By unlawfully passing Supplemental Appropriations reallocating monies to themselves to expend at their own discretion, the Delegates bypassed not only the fiscal controls cited above but also the rigorous procedural requirements articulated in 2 N.N.C. §§ 164(B)(2) and §185(A).

99. In addition to violating the above statutory mandates, the Delegate Defendants acted contrary to their own policies and procedures concerning the distribution of financial assistance to private citizens as well as the well-settled fiduciary principles articulated in fundamental and common law.

100. Recognizing their actions conflicted with Fundamental Law, statutory requirements governing supplemental appropriations, reallocations and expenditures, as well as their fiduciary duties, the Defendant Delegates resorted to two baseless strategies. They either falsely cast their

repeated appropriations as "related to an emergency" – in direct contravention of 2 N.N.C. §164A(7)(a) (currently codified at 2 N.N.C. §164(16)) which limits emergencies to "those instances involving "the cessation of law enforcement services, disaster relief services, fire protection services or other direct services required as an entitlement under Navajo or Federal law, or which directly threaten the sovereignty of the Navajo Nation" – or they purported to waive *all* Navajo Nation Laws which may have impeded their unlawful appropriations and expenditures, in derogation of the Navajo law and the doctrine requiring separation of powers.

101. In derogation of the well-settled legal principles and in reliance on fabricated emergencies and illegal waivers of law, the Delegate Defendants and Defendant Speaker, with the imprimatur of Defendant Joe Shirley, Jr., unlawfully appropriated approximately 36 million dollars during fiscal years 2005 through 2010.

102. These unlawfully appropriated funds were funneled through a "Discretionary Fund" administered by the Office of the Speaker for the Delegates' discretionary use. During fiscal years 2005 and 2006, there were no policies or procedures establishing eligibility for the dispensation of financial assistance nor were there limits in place articulating the eligibility criteria of the recipients or limiting the amounts to be awarded.

103. Finally, in February 2007, the Navajo Nation Council adopted policies and procedures to govern expenditures from the Discretionary Fund. For example, these policies provided that awards were only to be granted once every twelve months for the sole purpose of assisting those constituents without sufficient monetary resources "to maintain the sustenance of life for a significant period of time." They also required that each beneficiary receive an IRS Form 1099.

104. The policies further prioritized the funds to assist impoverished elderly Navajo, students, victims of emergency and associations.

105. The applications for Discretionary Funds were also amended to require a signed statement by the awarding delegate that his or her award did not violate applicable Navajo Nation laws, Ethics in Government Law and the Code of Conduct for Navajo Nation Council delegates.

106. Despite their belated adoption of eligibility requirements and their pledge to adhere to all legal and ethical principles, the Delegate Defendants did not expend their portion of the $36 million dollars solely for the benefit of impoverished constituents lacking the basic material resources to sustain life. In short, the policies and procedures adopted by the Delegates were mere pretext to conceal their true purpose – which was to create a fund designed for their personal benefit.

107. Each of the Delegate Defendants did, in fact, operate and expend their portion of this multi-million dollar fund for his or her own personal benefit, collectively distributing millions of dollars to themselves and their immediate family members. Millions more were awarded to other delegates and their families as well as friends and other ineligible, insider recipients, without regard to the poverty criteria established by the Discretionary Fund policies.

108. One month after adopting their initial policy, the Delegate Defendants, not wanting a public record of their illegals expenditures, eliminated the requirement that the awards be reported on 1099 forms to the IRS.

109. In one sampling of awards, the Delegate Defendants gave more than $2,000,000 to 130 recipients with little regard for the beneficiary's indigency. These recipients were given checks in amounts ranging from $10,000 to $54,000. Another sampling revealed that family members of 14 Delegates received financial assistance ranging from $51,000 to $130,000. Beyond

this, millions in awards went to Navajo Nation employees despite their obvious ineligibility. Twenty one of these employees received amounts ranging from $10,000 to $21,000.

110. Defendant Katherine Benally represents but one example of the indifference demonstrated by the Delegates to their constituents and their callousness to their fiduciary obligation to always act in the best interest of the Nation.

111. Between 2005 and 2010, Navajo records reveal that Defendant Benally personally misdirected almost $130,000 from her Discretionary Fund Account to herself, various family members and other ineligible individuals, organizations and businesses.

112. One method employed by Defendant Benally was to manipulate the names and social security numbers of her beneficiaries to conceal payments to herself or to her immediate family. For example, she gave her "sister" Ms. Billy (named Bishop) at least $15,499 in Discretionary Funds. In her kinship report, Defendant Benally lists herself and Ms. Billy as possessing consecutive social security numbers (***-**-8495 and ***-**-8496) while in other accounting records both Defendant Benally and her "sister" have the identical number (***-**-8495). What is clear is that Defendant Benally spent at least $34,685.00 of the Discretionary Funds she was obliged to distribute to the poor on her five sisters, one uncle, one daughter and two cousins without supplying any documentation verifying their eligibility to receive Discretionary Funds.

113. Defendant Benally also falsely certified in writing that her requests for money did not violate the letter and spirit of the Navajo Nation Law including the Ethics in Government Law and the regulations governing the disbursement of Discretionary Funds. Notwithstanding her repeated violations of the principles inherent in these laws, Defendant Benally falsely attested no fewer than 22 times that her requests for Discretionary Funds did not run afoul of these principles.

114. Defendant Benally's malfeasance did not end there. In addition to the illicit payments to herself and her family, Defendant Benally issued numerous checks to a variety of commercial establishments and individuals in clear violation of policies limiting assistance to those of her constituents lacking all material resources. Defendant Benally used Discretionary Fund monies to pay $41,800 to the "Alpine Lumber Company"; $1,757 to the "21st Mortgage Corporation" to benefit Ms. Billy's husband, Chester Billy; $1,248 to a radio station "KTNN"; $1,250 to "Chuska Mountain Enterprise"; $726 to "Towering House"; $12,500 to "United Builders"; $12,000 to "Home Depot"; $917 to "San Juan Mobile Home Supply"; and $4,244 to OnSat.

115. With respect to these payments, Defendant Benally supplied no invoices, sales slips, contracts or receipts confirming how these extravagant purchases of building and home supplies satisfied the individual poverty criteria articulated in the Discretionary Funds policies.

116. In short, of the $249,132.23 in Discretionary Funds she was allocated, Defendant Benally unlawfully misdirected at least $130,000 of funds intended to assist the Nation's poorest citizens for the benefit of her family. She has also failed entirely to account for her remaining expenditures, which may have been equally misspent.

117. Defendant Benally's wholesale infractions of Fundamental, common and statutory directives and policies constituted a breach of her fiduciary duty which demanded she act with the utmost fidelity and in the best interest of the Navajo Nation.

118. Defendant Benally's disregard for her fiduciary responsibilities represents an exemplar of the contempt the Delegates Defendant's demonstrated to their trust obligations. Each of her fellow Defendant Delegates, to a lesser or greater degree, expended Discretionary Funds for similarly unlawful purposes and in violation of the same governing laws. These Delegate

Defendants are equally incapable of providing an accounting of their expenditures of the tens of millions of dollars entrusted to their care.

119. At all times pertinent hereto, each of the Delegate Defendants acted outside the scope of his or her employment and/or their authority.

COUNT I
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Delegate Defendants)

120. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

121. As a delegate to the Navajo Nation Council, each of the Delegate Defendants owed to the People a fiduciary duty to appropriate, reallocate and expend Discretionary Funds public funds in accordance with a proper legislatively designated purpose in compliance with statutory, common law and regulatory requirements.

122. As a delegate to the Navajo Nation Council, each of the Delegate Defendants owed the Nation a fiduciary duty to accurately account for their expenditure of all Discretionary Funds.

123. In expending their respective allocated portions of the Discretionary Fund appropriations in the manner and for the purposes described above, each Delegate Defendant breached his or her fiduciary commitment to the People.

124. In breaching their fiduciary responsibilities with regard to Discretionary Fund expenditures, the Defendant Delegates proximately caused a financial loss to the Navajo Nation in an amount equal to the amount of discretionary funds allocated to and expended by that delegate from 2005 through 2010.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

COUNT II
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Delegate Defendants)

125. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

126. Delegate Defendants each owed a fiduciary duty to the Nation to appropriate public funds in accord with fundamental, statutory, and common law.

127. Each Delegate Defendant, acting in concert with the other Delegate Defendants, Defendant Morgan and Defendant Shirley misappropriated funds to the Discretionary Fund and to the Charitable Contribution Fund, (see below), in violation of fundamental, statutory, and common law, thus breaching their respective fiduciary obligations to the Nation.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

STATEMENT OF FACTS
REGARDING DEFENDANT FORMER SPEAKER LAWRENCE T. MORGAN

128. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

129. At all times pertinent hereto, former Speaker Lawrence T. Morgan ("Defendant Morgan") served both as a delegate to the Navajo Nation Council and as the Council's Speaker.

130. As his share of the Discretionary Funds, Defendant Morgan received $1.6 Million.

131. The Navajo Nation Council and the Office of the Speaker adopted policies to govern Defendant Morgan's use of Discretionary Funds. These policies limited Defendant Morgan to assisting with burial costs, youth allowance or emergency funds. These policies further prohibited him from giving more than $300 to any one beneficiary within a 12-month period (although Defendant Morgan was allowed a dispensation greater than $300 to assist with the burial costs of fellow delegates).

132. These policies, however, placed no income or need restrictions on Defendant Morgan's prerogative to make awards. The wealthy and the indigent were equally unconstrained from requesting and receiving funds at the Speaker's discretion.

133. Navajo records reveal that Defendant Morgan ignored even these few restrictions. He made multiple awards to the same recipients during a 12-month period; awarded sums that vastly exceeded the $300 limit; and issued checks to himself (under the names of Morgan or Speaker), to his family and to his staff. He also used the Discretionary Fund to pay for legal bills, shopping centers and to subsidize rodeo events.

134. Acting in concert with other Defendant Delegates – particularly Young Jeff Tom, Hoskee Kee, Johnny Naize, Woody Lee and Mark Maryboy – Defendant Morgan unlawfully manipulated his position to encourage other delegates to award Discretionary Funds to his wife, sister, daughter and grandson. Upon information and belief, Defendant Morgan's family was the beneficiary of approximately $50,000 in Discretionary Funds donated directly by Defendant Morgan or indirectly by other Delegate Defendants.

135. In addition to the Discretionary Fund, the Delegate Defendants and Defendant Morgan appropriated funds to a euphemistically denominated "Charitable Contribution Fund," whose expenditures fell within the sole purview and discretion of Defendant Morgan.

136. As with the Discretionary Fund, the Charitable Contribution Fund was facially invalid – neither being properly authorized nor being grounded in any regulatory scheme that would meet the statutory mandates for assuring fiscal accountability.

137. While Navajo law and statutes prohibited the creation of this "charitable" fund, Defendant Morgan and the Delegate Defendants once again resorted to resolutions pretending the appropriations were of an "emergency" nature and once again inserted language allowing them to

"waive" any and all Navajo laws and resolutions that would impede or invalidate the allocation of monies to the Speaker Charitable Contribution Fund. Defendant Morgan's ability to expend monies from this fund was unfettered by resolution or policy.

138. The Council placed no restrictions on Defendant Morgan's expenditure of the Charitable Contributions Fund, with the exception of that contained in the Policies Manual adopted by the Council's Budget and Finance Committee, which defines the Charitable Contribution Fund as one limited to non-employees of the Navajo Nation.

139. Notwithstanding the singularity of this limitation, Defendant Morgan, in keeping with the cavalier manner in which he disregarded the limitations placed on his expenditures from the Discretionary Fund, spent funds from the Charitable Funds with equal abandon and disregard for the law – spending almost $2,000,000 between Fiscal years 2004 and 2010.

140. By way of example, Defendant Morgan retained the services of Laura Calvin to serve as his Financial Advisor. Part of Ms. Calvin's duties was to draft checks for the Speaker drawn from these funds.

141. As an employee of the Navajo Nation Ms. Calvin earned a salary and received benefits rendering her ineligible to receive any awards from the Discretionary Funds. Her position as a Nation employee eliminated her as a recipient of Charitable Contribution Funds. Yet, despite these infirmities, Defendant Morgan regularly awarded her thousands of dollars from both funds and donated considerable "charitable" contributions to Amanda Teller – the daughter of Ms. Calvin and Delegate Defendant Leonard Teller.

142. Defendant Morgan also expended these "charitable" appropriations to donate funds to the political campaigns of those delegates he favored – in violation of numerous statutory

prohibitions against such expenditures by public officials such as those set out in 2 N.N. C. §§ 3745 (B)(1), (2), (4) and (6).

143. In total, Defendant Morgan awarded approximately $10,000 to himself, as well as untold thousands of dollars to other ineligible employees, and $300,000 to unnamed individuals and organizations under the guise of being "contributions."

144. Upon information and belief, Defendant Morgan has not and will not be able to carefully account for the millions he has spent either from the Discretionary Fund or the Charitable Contribution Fund.

145. At all times pertinent hereto, Defendant Morgan acted outside the scope of his employment and/or his authority.

COUNT III
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Defendant Lawrence T. Morgan)

146. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

147. Both as Delegate to and Speaker of the Navajo Nation Council, Defendant Morgan owed the People a fiduciary duty to appropriate and expend public funds in keeping with a proper legislatively designated purpose; to comply with statutory, common law and regulatory requirements; to fully account for the expenditure of the Discretionary, Charitable and all other funds placed under his control; and to manage finances in the best interest of the Nation.

148. In expending public funds from both the Discretionary and Charitable Contribution Funds in the manner and for the purposes set forth above, Defendant Morgan breached his fiduciary duty to the Nation.

149. In breaching his fiduciary duty with regard to the Discretionary Fund, Defendant Speaker proximately caused a financial loss to the Navajo Nation in an amount equal to the monies allocated to, and expended by him, from this fund.

150. In breaching his fiduciary duty with regard to the Charitable Contribution Fund, Defendant Speaker proximately caused a financial loss to the Navajo Nation in an amount equal to the monies allocated to and expended by him from this fund.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

COUNT IV
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Defendant Lawrence T. Morgan)

151. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

152. While acting in his capacity as the Speaker of Navajo Nation Council, Defendant Morgan owed a fiduciary duty to the Nation to appropriate public funds in accord with fundamental, statutory, and common law.

153. Defendant Morgan acted in concert with the Delegate Defendants and Defendant Shirley to appropriate public funds to the Discretionary Fund and the Charitable Contribution Fund in violation of fundamental, statutory, and common law. As such he breached his fiduciary duty to the citizens of the Navajo Nation.

154. This breach by Defendant Morgan was the proximate cause of a financial loss to the Navajo Nation of $36,000,000.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

STATEMENT OF FACTS
REGARDING DEFENDANT CONTROLLER MARK GRANT

155. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

156. At all times pertinent hereto, Defendant Controller Mark Grant ("Defendant Grant") has occupied the position of the Navajo Nation Controller. Defendant Grant was appointed by the Navajo Nation President and has served at the pleasure of the Navajo Nation Council since 2003. He was recently reappointed to that position by President Shelley.

157. In his capacity as the Nation's chief financial manager, Defendant Grant oversees approximately 23 financial divisions and sections and is responsible for formulating and executing the financial plans and policies of the Navajo Nation. He is responsible for insuring the accuracy of the Nation's accounting systems and that the assets of the Navajo Nation are properly protected.

158. In discharging his duties to the Nation, Defendant Grant reports directly to the President of the Navajo Nation on operational matters; is responsible for reporting to the Navajo Nation Council and its committees concerning the financial condition of the Navajo Nation; and is responsible for the propriety of the Nation's financial transactions.

159. In his capacity as Controller of the Navajo Nation, Defendant Grant is equally responsible for formulating overall financial policy and procedures for the Navajo Nation Council and taking such action as is necessary for the accomplishment and enforcement thereof. He is charged with developing and coordinating programs of financial management at all levels within the Navajo Nation government.

160. In addition to the duties enumerated above, Defendant Grant has a fiduciary obligation to perform fiscal oversight duties; serve as the ultimate gatekeeper over the public purse;

and is authorized, if not obligated, to deny the release of any funds that do not strictly comply with Navajo law, the Appropriations Act and other fiscal regulations.

161. As part of his fiduciary obligations, Defendant Grant is responsible for ensuring the maximum protection of the People's interests by comporting himself at all times with integrity, complete honesty, transparency and total fidelity. He is conversely obligated at all times to avoid the slightest misrepresentation or concealment and is forbidden from leveraging his position for personal gain.

162. Despite his responsibilities and the powers of his office, Defendant Grant during fiscal years 2005 through 2010, failed in his management of the Nation's fiscal affairs. He has refused to adhere to Generally Accepted Accounting Principles (as demonstrated by each of the Nation's annual audits performed by KPMG), thereby engaging in a continuous violation of both Navajo and federal law.

163. These violations coupled with Defendant Grant's incompetent fiscal management have resulted in the return of more than $100,000,000 in grant money to federal and state governments – money which if properly managed would have been available to benefit the people of the Navajo Nation.

164. These violations coupled with Defendant Grant's incompetent fiscal management have also resulted in the cessation or curtailing of federal- and state-funded programs vital to the Nation's ability to care for the elderly, the education of its children and the basic necessities of the Nation's indigent citizens.

165. As reflected in each of the Nation's annual audits for 2005, 2006, 2007, 2008 and 2009, performed by KMPG and approved by the Navajo Nation Council,– the Controller abandoned his fiduciary responsibilities,

a. by providing financial statements between fiscal years 2005 and 2009 containing materially misstated, materially incorrect, unreliable, and inaccurate information in violation of Generally Accepted Accounting Principles;

b. by failing to adhere to proper fiscal practices which resulted in the Nation being classified as a "high risk" grantee, which placed additional reporting requirements on the Nation and endangered its ability to obtain and retain grant funds;

c. by permitting the commingling of Federal funds (failing to account separately for each Federal Grant) and by supplanting those funds (using funds from one Federal Grant to support another), in direct violation of Federal law and OMB regulations;

d. by violating federal law and regulations governing the accounting and expenditure of Indirect Costs.

e. by violating federal law and regulations requiring an accounting for interest earned on federal funds.

f. by allowing the accumulation of almost $2,000,000 in unreimbursed Council Members' salary and travel advances, notwithstanding the statutory requirement that these monies be voluntarily returned or immediately deducted from the delegate's next paycheck;

g. by failing to regularly pay taxes to the Internal Revenue Service on these salary and travel advances and then failing to reimburse the IRS pursuant to agreement;

h. by failing to recruit and hire employees sufficiently qualified to assure that the statutes and regulations meant to assure financial soundness and fiscal restraint would be properly enforced;

i. by failing to retain the services of CPAs and accountants experienced in the laws, policies and procedures of proper fiscal management;

j. by failing to maintain an adequate level of accounting and finance personnel resulting in an insufficient level of attention to financial management tasks, to investments, and to proper accounting for expense accruals;

k. by failing to implement any controls to ensure that federal and state awards are properly recorded;

l. by failing to implement the rules regarding grantor pass-through information and comprehend that the Schedule of Expenditures of Federal Awards does not differentiate between direct and indirect funding;

m. by failing to perform periodic and systematic reviews of uncollectable accounts;

n. by failing to implement a comprehensive set of policies, procedures and controls related to the overall financial reporting process;

o. by failing to implement formal, periodic closing procedures, or perform reconciliations in a timely manner;

p. by failing to adequately review the progress reports submitted by contract accounting and program personnel to monitor compliance;

q. by failing to ensure that programs properly maintain necessary documentation to support participants' eligibility prior to distributing funds to the participants'

r. by failing to ensure the proper implementation of the policies and procedures for COPS hiring grants;

s. by failing to implement any internal controls and/or established formal policies and procedures that address equipment management of federal purchased assets with respect to the inventory and reconciliation of assets;

t. by failing to confirm or reconcile allowable costs and applicable credits resulting from direct and indirect cost offsets;

u. by failing to implement any internal controls to ensure allowable costs are net of applicable credits that would involve a refund confirmation process;

v. by utilizing indirect cost rates higher than the final negotiated rate, thus spending federal funds for nonfederal purposes.

w. by failing to adhere to formal policies and procedures regarding the monitoring of programs; and

x. by failing to generate or complete procurement documents necessary to support procurement compliance requirements in a timely manner.

y. Despite Defendant Grant's responsibility for fiscally managing the Nation's billions of dollars in assets and revenues, he is not a Certified Public Accountant, nor has he hired a single Certified Public Accountant during his nine-year tenure.

166. Defendant Grant had both the duty and the power to prevent any expenditure from invalid appropriations, and the duty and the power to prevent expenditures in violation of the policies and procedures adopted by the Council and/or its committees.

167. Defendant Grant was fully aware of the fact that both the appropriations to, and the expenditures from, the Discretionary and Charitable Contributions Fund violated the statutory and regulatory fiscal restraints he was charged with enforcing.

168. Defendant Grant knowingly failed to act in accord with his duty and knowingly failed to exercise his powers as Controller to prevent the wholesale violations of law and regulation being committed by the Delegate Defendants and Defendant Morgan by their joint actions in creating these "charitable" funds.

169. But for Defendant Grant's abandonment of the duties and responsibilities required of his office, and his repeated approvals of unlawful expenditures, the loss of $36,000,000 in misspent "discretionary" and "charitable funds" would not have occurred.

170. To the degree that Defendant Grant acted in violation of law and regulation, as set forth above, he is sued in his individual capacity as an official acting outside scope of his employment and/or authority. In particular, since his conduct in authorizing and approving expenditures from the Discretionary Fund and the Charitable Fund were outside the scope of his authority, he is sued in his individual capacity for those losses resulting from those expenditures.

171. To the degree that Defendant Grant has failed in his duties as Controller without acting beyond his employment and/or authority, he is sued only in his official capacity, but solely for purposes of seeking equitable relief in the form of a temporary receiver to bring the Nation into financial compliance.

COUNT V
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Defendant Controller Mark Grant)

172. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

173. As Controller for the Navajo Nation, Defendant Grant owes the People a fiduciary duty to control the expenditure of public funds and to assure that such funds are expended in accord with a proper legislatively designated purpose that comports in all respects statutory,

common law and regulatory requirements. He is equally responsible to account for the expenditure of such funds and to ensure they are managed in the best interest of the People.

174. By allowing and approving expenditures from both the Discretionary Fund appropriations and the Charitable Contribution Fund appropriations and by allowing these expenditures to take place absent any justifications or fiscal controls, Defendant Grant has breached his fiduciary duty to the people of the Navajo Nation.

175. This betrayal of his fiduciary responsibilities breach has resulted in a financial loss to the Navajo Nation of $36,000,000.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

COUNT VI
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Defendant Controller Mark Grant)

176. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

177. By abrogating his responsibilities with regard to fiscal management, as described above, Defendant Grant has further breached his fiduciary duty to the People of the Navajo Nation.

178. This breach has proximately caused the Navajo Nation to operate without a financial management system adequate to control the expenditure of public funds or to assure that such funds are expended in accord with a proper legislatively designated purpose and in compliance with statutory and common law and regulatory requirements.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

STATEMENT OF FACTS
REGARDING DEFENDANT FORMER PRESIDENT JOE SHIRLEY, JR.

179. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

180. At all pertinent times hereto, Defendant Former President Joe Shirley, Jr. ("Defendant Shirley") was the Navajo Nation President and Chief Executive Officer of the Executive Branch of the Navajo Nation Government serving between 2003 to 2011.

181. In his capacity as the President of the Navajo Nation, Defendant Shirley acted as a fiduciary to the People, responsible for conducting, supervising and coordinating the Navajo Nation's personnel and programs in a manner that ensured the maximum protection of the People's interests and acting at all times with integrity, complete honesty, transparency and total fidelity. In discharging his duties, Defendant Shirley was obligated to avoid the slightest misrepresentation and concealment and was forbidden from leveraging his position for personal gain.

182. During his tenure, Defendant Shirley, in collaboration with Defendant Morgan and the Defendant Delegates and, in direct violation of Navajo Fundamental, common and statutory laws and regulations, sanctioned the passage of dozens of unlawful budget appropriations that resulted in the unlawful conversion of tens of millions of dollars of Navajo Nation Funds.

183. Defendant Shirley was the final signatory approving the resolutions described above, which appropriated public funds to the Discretionary Fund and to the Charitable Contribution Fund.

184. Defendant Shirley approved these resolutions despite the fact that they were facially invalid, were falsely touted as emergency legislation and purported to waive all laws and regulations which may invalidate these appropriations.

185. In so doing, Defendant Shirley breached his sworn fiduciary fealty to the principles of transparency and accountability, to avoid corruption and to prevent the abrogation of the principles governing the separation of powers and checks and balances between the three branches of government.

186. In so doing, Defendant Shirley acted in concert with the Delegate Defendants and Defendant Morgan and abandoned the fiscal controls that he, as the head of the Executive Branch, was responsible for enforcing. Upon information and belief, Defendant Shirley supported appropriations knowing these funds would be expended without any justification and spent to enrich delegates, their families, and other ineligible recipients.

187. In so doing, Defendant Shirley acted outside the scope of his employment and/or authority.

COUNT VII
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Defendant Former President Joe Shirley, Jr.)

188. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

189. Defendant Shirley owed to the People of the Navajo Nation a fiduciary duty to exercise his approval of appropriations of public funds in a manner that assures such funds would be accounted for, managed wisely, expended in compliance with a proper legislatively designated purpose, and spent in accordance with statutory and common law and regulatory requirements.

190. By approving the appropriations to, and expenditures from, the Discretionary Fund and the Charitable Contributions Fund, Defendant Shirley breached his fiduciary duty to the Nation.

191. Defendant Shirley's breach of his fiduciary duty proximately caused a financial loss to the Navajo Nation of $36,000,000.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

STATEMENT OF FACTS
REGARDING FORMER ATTORNEY GENERAL LOUIS DENETSOSIE

192. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

193. At all times pertinent hereto, Defendant Louis Denetsosie ("Defendant Denetsosie") was the Attorney General of the Navajo Nation. He was succeeded by former Deputy General Harrison Tsosie in 2011.

194. The Attorney General is the Nation's Chief Legal Officer, charged with exercising supervisory control and direction over all personnel within the Department of Justice and supervising all legal matters in which the Navajo Nation government has an interest.

195. During his tenure, Defendant Denetsosie served at the pleasure of the Navajo Nation Council.

196. While Attorney General, Defendant Denetsosie was acting in a fiduciary capacity with respect to the interests of the People and was charged with ensuring the maximum protection of the Nation's interests by acting at all times with integrity, complete honesty, transparency and total fidelity.

197. As a fiduciary, Defendant Denetsosie was obligated at all times to avoid the slightest misrepresentation and concealment and was forbidden from leveraging his position for personal gain. He was similarly charged with exercising the duties and responsibilities of his office in accordance with the highest standards of legal ethics as required of members of the

Navajo Nation Bar Association and by the American Bar Association Code of Professional Responsibility.

198. In or about 2001, the Navajo Nation entered into a contract with OnSat Network Communications, Inc. ("OnSat") to provide affordable internet service via satellite to the Nation. What began as a commendable effort soon transformed into an elaborate scheme to defraud the Federal Government out of millions of dollars and unlawfully enrich OnSat officials. During this time, the Nation did not receive the internet connection services for which they had bargained.

199. The Navajo Nation subsequently hired two law firms to investigate and file reports reflecting their findings with respect to possible improprieties on the part of Navajo senior officials with respect to the Navajo-OnSat Contract and modifications thereto as well as with respect to a project known as E-Rate funding. Both of those reports suggested that Defendant Shirley did not act ethically, violated Navajo procurement laws and may have been a participant in criminal activities.

200. On or about December 2009, the Special Division of the Window Rock Court, at the suggestion of the Defendant Denetsosie, who conceded a conflict of interest on the part of the Office of the Attorney General, appointed the undersigned to the position of Special Prosecutor, pursuant to 2 N.N.C. § 2021 *et seq.* That contract directed the Special Prosecutor to investigate and, if necessary, commence criminal or civil proceedings concerning "[a]ny criminal misconduct or violation of the Navajo Nation Ethics in Government Law or any other Navajo Nation Law arising out of matters involving ONSAT or the e-rate program. . . ."

201. On or about December 7, 2009, then Deputy Attorney General Harrison Tsosie ("Defendant Tsosie") executed, on behalf of Defendant Denetsosie a contract retaining the legal services of Gallagher & Kennedy ("G&K"). By its terms, G&K would represent Defendant

Shirley in his official capacity, with respect to all matters arising out of the Navajo Nation Council's suspension of the former President.

202. The G&K contract was subsequently modified four times. The first modification was signed by Defendant Denetsosie, on behalf of the Navajo Nation Department of Justice, on April 16, 2010; the second, on July 1, 2010 by Defendant Tsosie; the third on or about September 14, 2010 by Defendant Tsosie and the fourth, on or about September 29, 2010, by Defendant Tsosie on behalf of Defendant Denetsosie and the Office of the Attorney General.

203. On February 25, 2010, G&K submitted Invoice # 400526, ID 22516-0002-PKC. This invoice was labeled "re: Appointment of Special Prosecutor." G&K submitted at least eight invoices similarly referring to work performed "re: Appointment of the Special Prosecutor" on or about May 24, 2010; June 15, 2010, July 14, 2010, August 16, 2010, September 21, 2010, October 20, 2010, November 8, 2010, December 14, 2010.

204. These invoices described the work performed by up to five associates and partners charged with defending Defendant Shirley against the Special Prosecutor's investigation into OnSat. Upon information and belief, G&K charged the Navajo Nation approximately $150,000 for these services.

205. The most recent of these payments was issued and approved in or about March 2011, while Defendant Tsosie was the Attorney General.

206. By retaining G&K to represent Defendant Shirley against the investigation of the Special Prosecutor, Defendant Denetsosie acted outside the scope of his employment and/or authority: (1) by interfering with and impeding the prosecutorial investigation of the Special Prosecutor; (2) by simultaneously subsidizing G&K and the Special Prosecutor with the Nation's funds to promote opposing legal positions; (3) by unlawfully insinuating himself into the OnSat

investigation; (4) by compelling the Special Prosecutor to expend valuable resources of the Nation responding to frivolous motions; (5) by impeding the Special Prosecutor's access to information; (5) by violating the mandate of the Special Division of the Window Rock Court which ordered the Special Prosecutor to undertake the OnSat investigation; and (5) by suborning the unauthorized practice of law.

207. Possessing "the full power and independent authority to exercise all function of . . . the Office of the Prosecutor," it is a settled proposition of law that "[n]o employees, including Executive Branch personnel, shall intercede, or interfere, attempt to intercede or interfere in the legal functions of the Office of the Prosecutor." Defendant Shirley and Defendant Denetsosie violated this statute when they retained G&K's services.

208. 2 N.N.C. § 2023(A) further provides that a Special Prosecutor appointed pursuant to 2 N.N.C. § 2022 "shall have *full power and independent authority to exercise all functions and powers of the Attorney General and the Office of the Prosecutor*, as defined in 2 N.N.C. §§ 1963(A), (B), (G), (I), and (K); 1972; 1974(B); 1978-1984, with respect to all matters within his or her jurisdiction." (Emphasis added). Underscoring this provision, the Navajo Nation Code further provides that, "[a] Special Prosecutor shall *have all necessary and proper power and authority* incident to the exercise of his or her other powers and authority." Emphasis added.

209. By covertly contracting with G&K and by expending the Nation's funds to obstruct the Special Prosecutor's investigation and to represent Defendant Shirley who was being investigated to determine his possible civil or criminal culpability in the OnSat affair, Defendant Denetsosie was not only acting outside the scope of his or her employment and/or authority, but he was engaging in conduct intended to thwart the investigation ordered by the Nation's Special Division in direct violation of 2 N.N.C. 2021(J) which provides, in pertinent part, that

"[w]henever a matter is within the jurisdiction of a Special Prosecutor, the Attorney General, the Chief Prosecutor, and all officers and employees of the Department of Justice, shall suspend all investigations and proceedings regarding such matter, except insofar as such Special Prosecutor and the Attorney General agree in writing that such investigations and proceedings may continue." (Emphasis added.)

210. Defendant Attorney General and the Special Prosecutor never entered into such an agreement.

211. In addition to his obligation not to impede the Special Prosecutor's investigation, Defendant Denetsosie, as the Nation's Chief Legal Officer, had a fiduciary duty to ensure that all resolutions and appropriations comport with Fundamental, common and statutory law.

212. Defendant Denetsosie, as the Nation's Chief Legal Officer and in keeping with his fiduciary duties, knew or should have known that the Defendant Delegates, Defendant Morgan and Defendant Shirley were promulgating or approving a series of resolutions that were not only at cross purposes with well-established legal principles, but that completely flouted those laws governing appropriations, reallocations and expenditure of Navajo Nation funds.

213. Defendant Denetsosie, as the Nation's Chief Legal Officer and in keeping with his fiduciary dutes, knew or should have known that these supplemental appropriations to, and expenditure from, the Discretionary and Charitable Contribution Funds were void *ab initio* and not in the best interest of the Nation.

214. Defendant Denetsosie, as the Nation's Chief Legal Officer and as a fiduciary, knew or should have known that the Delegate Defendants' attempts to legitimize these resolutions by casting them as emergency legislation or by "waiving" all contravening Navajo law were invalid and unlawful.

215. Despite this knowledge and notwithstanding his position as the Nation's Chief Legal Officer charged with ensuring compliance with the Nation's laws, Defendant Denetsosie took no steps to challenge the flow of funds into the hands of the Delegate Defendants or Defendant Morgan or to nullify or invalidate these resolutions and their subsequent expenditures.

216. Defendant Denetsosie, as the Nation's Chief Legal Officer was familiar both with the Appropriation Act and the Ethics in Government Act. Notwithstanding, he mounted no legal challenge to those unlawful resolutions which resulted to the unlawful expenditures of approximately $36,000,000.

COUNT VIII
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Former Attorney General Louis Denetsosie)

217. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

218. By undermining the functions of the Special Prosecutor to investigate former President Shirley and by secretly entering into contracts subsidized by Navajo Nation funds with outside counsel to engage in the unauthorized practice of law to represent Defendant Shirley, Defendant Denetsosie, the Nation's former Chief Legal Officer, breached his fiduciary duty to the Navajo Nation as well as his ethical duties as an attorney.

219. By so doing, Defendant Denetsosie breached his fiduciary obligations to the Nation and proximately caused a financial loss to the Navajo Nation of those sums paid by the Nation to G&K for defending the President against the Special Prosecutor.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

COUNT IX
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Former Attorney General Louis Denetsosie)

220. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

221. Defendant Attorney General, as the Nation's Chief Legal Officer, had a fiduciary duty to ensure that all Council resolutions comported with Fundamental, common and statutory law.

222. Defendant Attorney General breached his fiduciary duty by failing to take any steps to prevent the unlawful appropriations and expenditures from the Discretionary and Charitable Contribution Funds.

223. By so breaching his fiduciary duty, Defendant Denetsosie proximately caused the loss of $36 Million of Navajo Nation funds.

STATEMENT OF FACTS
REGARDING ATTORNEY GENERAL HARRISON TSOSIE

224. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint.

225. While serving in the position of Deputy Attorney General and Attorney General, Defendant Tsosie was acting in a fiduciary capacity with respect to the People and was charged with ensuring the maximum protection of the Nation's interests by acting at all times with integrity, complete honesty, transparency and total fidelity.

226. As a fiduciary, Defendant Tsosie was obligated at all times to avoid the slightest misrepresentation and concealment, and was forbidden from leveraging his position for personal gain. He was similarly charged with exercising all duties and responsibilities of the office in

accordance with the highest standards of legal ethics as required of members of the Navajo Nation Bar Association and by the American Bar Association Code of Professional Responsibility.

227. As discussed above, Defendant Tsosie – both in his positions as former Deputy Attorney General and in his current position as Attorney General – executed the original contract with G&K and signed several of the modification increasing the firm's remuneration for defending Defendant Shirley against the Special Prosecutor's investigation into the former President's possible criminal and/or civil malfeasance.

228. As recently as March 2011, Defendant Tsosie approved a payment to G&K, as payment in part for services rendered in defense of the President.

229. For the same reasons alleged above regarding Defendant Denetsosie, Defendant Tsosie lacked any authority to impede the prosecutorial investigation of the Special Prosecutor. By so doing, Defendant Tsosie acted outside the scope of his employment and/or authority.

230. As the Nation's Deputy Attorney General and in his current station as the Nation's Chief Legal Officer, Defendant Tsosie was aware that, by signing these contracts with G&K and authorizing payments to the firm for its services, he was: interfering with the investigation of the Special Prosecutor and the orders of the Special Division of the Window Rock Court; violating the terms of the Special Prosecutor Act; ignoring the prohibitions against insinuating himself in the Special Prosecutor's functions; and running afoul of the statutory requirement that he suspend all investigations.

COUNT X
BREACH OF FIDUCIARY DUTY
(Plaintiff v. Attorney General Harrison Tsosie)

231. Plaintiff hereby realleges, as though fully set forth herein, each and every preceding paragraph of this Complaint

232. By acting in concert with Defendant Denetsosie and Defendant Shirley to contract with and pay G&K with public funds to obstruct the prosecutorial efforts of the Special Prosecutor, Defendant Tsosie breached his fiduciary duty to the Navajo Nation as well as his ethical duties as an attorney.

233. Defendant Tsosie's breach of fiduciary duty proximately caused a financial loss to the Navajo Nation of approximately $150,000.

WHEREFORE, Plaintiff seeks damages as set forth in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment and damages as follows:

1. For a sum to compensate Plaintiff for the economic losses suffered as a result of Defendants' breaches of their fiduciary duties;
2. For prejudgment interest according to proof;
3. For a sum equal to the salaries and benefits received by Defendants during the time they acted outside the scope of his or her employment and/or authority and breached their fiduciary duty to the Nation;
4. For other special damages according to proof;
5. For attorneys' fees in bringing this action;
6. For costs of suit herein;
7. For the appointment and retention of a Financial Receiver to temporarily assume the responsibilities of the current Controller;
8. For the immediate removal from office of those Defendants still occupying positions of authority within the Nation; and
9. For such other and further relief as the court finds proper and equitable.

Dated: July 28, 2011

Alan L. Balaran, Esq.,
Special Prosecutor, Navajo Nation
Post Office Box 2010
Window Rock, Navajo Nation 86515
abalaran@balaran-law.com
Telephone: 928-871-6422
Facsimile: 202-986-8477