

Navajo Nation Law CLE

Section 9

Eric N. Dahlstrom

Navajo Special Prosecutor
Law

Part 2



NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

HARRISON TSOSIE
ATTORNEY GENERAL

DANA BOBROFF
DEPUTY ATTORNEY GENERAL

PRESS RELEASE

Dana L. Bobroff,¹ Deputy Attorney General, Navajo Nation
October 13, 2011

APPOINTMENT OF SUCCESSOR SPECIAL PROSECUTOR

The Office of the Attorney General is pleased to announce that on October 12, 2011, the Special Division of the Window Rock District Court appointed the Rothstein Law Firm (Rothstein, Donatelli, Hughes, Dahlstrom & Schoenburg) to succeed Alan Balaran as Navajo Nation Special Prosecutor. The Rothstein Law Firm, led by attorneys Eric Dahlstrom and Richard Hughes, will continue the investigations into the use of discretionary funds, OnSat, BCDS, the Tribal Ranch Program, and other matters assigned by the Special Division. Mr. Balaran has graciously agreed to assist with the transition of the Special Prosecutor cases prior to beginning his new assignment with the federal court.

The Rothstein Law Firm is a nationally prominent firm with extensive experience in the areas of white collar crimes and political corruption cases. Of particular significance, the Rothstein Law Firm was the first firm ever retained by the Special Division as Special Prosecutor and successfully undertook prosecutions of former Chairman Peter McDonald and other tribal officials.

Mr. Dahlstrom, who has been a member of the Navajo Nation Bar Association for at least thirty years, was Navajo Nation Deputy Attorney General from 1987 through 1991. Mr. Hughes was also a member of the Navajo Nation Bar Association for at least thirty years, and was a lead attorney in the McDonald prosecutions.

The Office of the Attorney General is fully supportive of the appointment of the Rothstein Law Firm and stays fully committed to the resolution of these matters pursuant to Navajo laws, principles and cultural values – which requires that those who are proven to have engaged in wrongdoing are held accountable. The Office of the Attorney General has the utmost confidence in the Navajo Nation's system of justice that those who have not engaged in wrongdoing will have their names cleared.

¹ Attorney General Harrison Tsosie has formally delegated all Attorney General responsibilities concerning the Special Prosecutor to Deputy Attorney General Dana Bobroff.

P.O. Box 2010 • Window Rock, AZ 86515 • (928)871-6343 • FAX No. (928)871-6177

STATEMENT OF LOUIS DENETSOSIE

I am Louis Denetsosie and I reside at 611 Jeddito Drive, Window Rock, within the Navajo Nation.

1. I was the Attorney General of the Navajo Nation from January 14, 2003 to January 11, 2011. This statement is made in support of an Agreement with the Special Prosecutor of the Navajo Nation to dismiss all claims against me in *Navajo Nation v. Benally*, WR-CV-218-11 (filed July 28, 2011), which was filed in the Window Rock District Court by Alan Balaran, then the Special Prosecutor for the Navajo Nation.

2. The Attorney General is the Chief Legal Officer of the Navajo Nation, 2 N.N.C. § 1964 (2005), and administers the Department of Justice which provides legal services to the Navajo Nation government. 2 N.N.C. § 1961B (2005). The Attorney General is in charge of all legal matters in which the Navajo Nation government has an interest. 2 N.N.C. § 1964A (2005). The Department of Justice is funded through the Navajo Nation budget enacted by the Navajo Nation Council. The Attorney General is authorized to hire outside counsel with specialized expertise (1) to supplement the legal services available through attorneys employed by the Department of Justice, or (2) when the representation by the Department of Justice would pose a conflict under the *Rules of Professional Conduct*. 2 N.N.C. §§ 1963B, 1964E&H (2005).

3. As Navajo Nation Attorney General, I represented the entire Navajo Nation government, which includes the President, the Executive Branch, and the Navajo National Council. 2 N.N.C. § 552 (2005). If litigation is threatened or commenced by one department or branch of the Navajo Nation government against another part of the Navajo Nation government, the Attorney General might, under some circumstances, represent one part of the government against another part. However, in the more common situation, it would be a conflict of interest for the Attorney General to represent one part of the government against another part. Such a conflict can arise in a dispute between two branches of the Navajo Nation government. Of course not all disputes within a government create a conflict for the Attorney General. Policy disagreements within a branch, or between branches, are commonplace in any government. Such policy disputes are ordinarily worked out through the administrative and governmental processes of the government. Internal disagreements can be resolved by government officials and employees and do not require that each side of the dispute retain separate counsel. The *Rules of Professional Conduct* allow a government attorney to participate in an internal dispute, including by advocating for a position internally or by helping the client resolve the internal dispute. However, if an internal dispute ends up in litigation, then the same attorney or law firm cannot simultaneously represent both sides in the

litigation. The Department of Justice, supervised by the Attorney General, is treated the same as a law firm under the *Rules of Professional Conduct*. The Department of Justice cannot represent both sides in litigation, even if a different Department of Justice attorney represents each side.

4. A dispute between the Executive Branch and the Navajo Nation Council developed in 2009. On October 26, 2009, the Navajo Nation Council adopted emergency legislation, CO-041-09, placing President Joe Shirley, Jr. on administrative leave. President Shirley contended that the action of the Navajo Nation Council exceeded its authority and violated the rights of the President under Navajo Nation law. The President contended that the administrative leave was equivalent to removing the President from his position, but without establishing grounds for removal. The action of the Navajo Nation Council prevented the President from exercising the duties, responsibilities, and prerogatives entrusted to him by the members of the Navajo Nation. The Attorney General ordinarily represents the President. President Shirley wanted to challenge the action of the Navajo Nation Council placing him on administrative leave as invalid and exceeding the authority of the Navajo Nation Council. In addition, the Counsel to the President, who advises the Office of the President and Vice President in its official capacity, concluded that the Navajo Nation Council's action was unlawful. I understood that the Navajo Nation Council was receiving its own legal advice from the Office of Legislative Counsel. The Navajo Nation government was faced with a substantial internal dispute which posed a conflict of interest for the Attorney General. As Attorney General, I decided that the Office of the Attorney General should not represent either the President or the Navajo Nation Council in the dispute. At the same time, I concluded that it was in the best interest of the Navajo Nation that the dispute be resolved in an orderly fashion in the Courts of the Navajo Nation.

5. I decided that exercising the authority of the Attorney General to retain outside counsel would best serve the interests of the Navajo Nation. I therefore agreed to allow President Shirley to retain outside counsel, independent of the Office of the Attorney General, to represent the President and the Office of the President and Vice President. Outside counsel would be able to seek a judicial determination of whether President Shirley was validly placed on administrative leave by the Navajo Nation Council. I also understood that the Navajo National Council would be represented in the dispute by separate counsel of its choice.

6. President Shirley selected Paul Charlton, Esq. of the firm Gallagher & Kennedy to represent him in his capacity as President of the Navajo Nation. The President selected Mr. Charlton and Gallagher & Kennedy without input from or review by the Attorney General. Mr. Charlton was retained to represent President Shirley to avoid any conflict of interest that the Attorney General would have challenging the action of the Navajo Nation Council.

7. The Resolution of the Navajo Nation Council placing President Shirley on administrative leave, CO-041-09, also directed the Attorney General to apply for the appointment of a Special Prosecutor to evaluate and potentially prosecute claims arising out of the Navajo Nation's business relationships with OnSat and BCDS.

8. President Shirley requested that the scope of representation by Mr. Charlton include representation of President Shirley with respect to any of the allegations identified in Council Resolution CO-041-09. The Work Plan attached to the contract approved on December 7, 2009 by the Deputy Attorney General on behalf of the Attorney General stated:

The law firm shall represent President Shirley in his official capacity as President of the Navajo Nation. The work plan shall include representation as it relates to the Navajo Nation Council's suspension of President Shirley, court action in regard to that suspension, investigation regarding the underlying facts of that suspension, court appearances in the Navajo Nation District Court regarding that suspension, liaison with the Navajo Nation Department of Justice and the Attorney General, as well as liaison with the U.S. Department of Justice and the FBI.

The work plan shall also include representation of President Shirley as it relates to any and all criminal and/or ethical charges filed against President Shirley, court action in regard to criminal and/or ethical charges, investigation regarding the underlying facts of the criminal and/or ethical charges, court appearances in the Navajo Nation District Court and/or the Ethics Committee of the Navajo Nation Council regarding the criminal and/or ethical charges, liaison with the Navajo Nation Department of Justice and the Attorney General, as well as liaison with the U.S. Department of Justice and the FBI.

Navajo Nation Attorney Contract with Gallagher & Kennedy (December 7, 2009).

9. The attorney contract between Gallagher & Kennedy and the Navajo Nation was based upon the standard form contract used by the Department of Justice for the retention of outside counsel. The scope of work included in the contract accurately reflects the understanding of the parties. However, another provision, taken from the standard form contract, stated:

8. SUPERVISION

The legal work performed under this Agreement shall be under the direct supervision of the Attorney General or his delegate. Decisions normally made by the client in an attorney-client relationship shall be made by the President or his delegate in consultation with appropriate officials of the Nation.

Navajo Nation Attorney Contract with Gallagher and Kennedy (December 7, 2009).

10. The first sentence of this provision does not reflect the agreement of the parties. The second sentence does. However, the Attorney General did not, in fact, supervise the work of Mr. Charlton. Mr. Charlton and the Attorney General agreed that the Attorney General would not supervise his representation of President Shirley and that President Shirley would make all client decisions.

11. The attorney contract between the Navajo Nation and Gallagher & Kennedy was subsequently modified on four separate occasions to increase the total amount authorized for fees and expenses and to extend the term of the contract. Neither the scope of work nor the work plan was changed. The Fourth Modification extended the term of the Contract to March 31, 2011.

12. On December 28, 2009, I applied to the Special Division of the Window Rock District Court for the appointment of a Special Prosecutor based upon my determination that reasonable grounds existed to require further investigation and evaluation of potential civil claims or violations of criminal laws against designated tribal officials with respect to OnSat and the E-rate program, BCDS, and the disbursement of Discretionary Funds by Navajo Nation Council Delegates.

13. Alan Balaran was appointed as the Special Prosecutor for the Navajo Nation by the Special Division of the Window Rock District Court on January 26, 2010, as provided for in 2 N.N.C. § 2021 (2005). This was several months after Mr. Charlton was retained by President Shirley and after President Shirley had filed the action in the Window Rock District Court which held that CO-041-09 was invalid.

14. I have reviewed the Complaint in *Navajo Nation v. Benally* (the “Benally Complaint”), including paragraphs 192 through 223, which contain the specific allegations against me as the Attorney General. The *Benally* Complaint misstates the facts and the duties and authority of the Attorney General and the Department of Justice. It includes several allegations against me for actions I either took or failed to take as Attorney General, including that I:

- a. Violated the Special Prosecutor Act by approving the retention of Mr. Charlton to represent President Shirley;
- b. Suborned the unauthorized practice of law by Mr. Charlton;
- c. Failed to prevent the Navajo Nation Council from appropriating funds for an unlawful Discretionary Fund Program; and
- d. Failed to prevent individual Council Delegates from approving unlawful expenditures of Discretionary Funds.

I will address each of these in turn below.

a. The Attorney General Did Not Violate the Special Prosecutor Act or Obstruct Justice.

15. Paragraphs 201 to 205 of the *Benally* Complaint set out facts describing the retention of Mr. Charlton. Mr. Charlton was retained before the Special Prosecutor was appointed by the Special Division. The appointment of a Special Prosecutor alters the authority of the Attorney General. The Special Prosecutor Act provides:

Whenever the 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.

2 N.N.C. § 2021(J). However, the Special Prosecutor Act allows the Attorney General to assist and support the Special Prosecutor in his or her work. 2 N.N.C. § 2023(G).

16. In my opinion, the appointment of the Special Prosecutor did not diminish the authority of the Attorney General under 2 N.N.C. §§ 1963-1964 (2005), to approve the retention of outside counsel to represent officials, branches, or departments of the Navajo Nation where providing such counsel is in the best interests of the Navajo Nation.

17. I am not aware of any allegation that any action taken by Mr. Charlton or Gallagher & Kennedy interfered in an inappropriate or unlawful way with the proper exercise of the duties of the Special Prosecutor. The legal positions asserted by Mr. Charlton on behalf of President Shirley, including that various privileges and immunities protected President Shirley against the release of records under a Subpoena Duces Tecum issued by the Special Prosecutor, did not, in my view, amount to an obstruction of justice or improperly interfere with the Special Prosecutor. I am not aware of any actions taken by Mr. Charlton on behalf of President Shirley that were improper or outside the bounds of the law.

18. As Attorney General, I made sure that the Department of Justice provided administrative support to the Special Prosecutor. I never did anything to frustrate the

Special Prosecutor's pursuit of claims within his jurisdiction under the Navajo Nation Special Prosecutor Act, nor am I aware of any improper or obstructive conduct taken by any staff member at the Department of Justice.

b. The Attorney General Did Not Suborn the Unauthorized Practice of Law.

19. Paragraph 6 of the *Benally* Complaint alleges that the Attorney General "suborned the unauthorized practice of law by entering into a contract with Gallagher and Kennedy." Webster's defines subornation as "encouraging another to do something illegal." The Complaint does not allege any specific conduct by the Attorney General that arguably amounted to encouraging Mr. Charlton to engage in the unauthorized practice of law. The unauthorized practice of law allegation is based on the fact that Mr. Charlton and the attorneys at Gallagher & Kennedy were not members of the Navajo Nation Bar Association but, nevertheless, represented President Shirley before the Courts of Navajo Nation. Any attorney practicing law within the jurisdiction of the Navajo Nation is required to comply with applicable Navajo Nation Rules of Procedure, including the rules setting the requirements to practice before the Navajo Nation Courts. These rules apply to all lawyers, including Mr. Charlton. The attorney contract between the Navajo Nation and Mr. Charlton did not by its terms exempt him from any procedural rules of the Navajo Nation Courts. However, even if Mr. Charlton did in fact engage in the unauthorized practice of law, the attorney contract with the Navajo Nation approved by the Attorney General did not "suborn" any such unauthorized practice of law because the Attorney General did not supervise or participate in Mr. Charlton's representation of President Shirley.

20. The *Benally* Complaint alleges in paragraph 218 that the Attorney General "undermine[d] 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." The same paragraph 218 also alleges, very broadly, that the Attorney General "breached his fiduciary duty to the Navajo Nation as well as his ethical duties as an attorney." The *Benally* Complaint does not identify a particular ethical rule or describe any specific conduct that arguably violates an ethical rule. This allegation is apparently based entirely on the retention of Mr. Charlton.

21. The standard form attorney contract used by the Navajo Nation Department of Justice requires that an attorney retained by the Navajo Nation must be a member in good standing of any bar association of which they are a member. Beyond that, it is the responsibility of the attorney retained under a Navajo Nation contract to ensure that he or she is authorized to practice before a court, including the courts of the Navajo Nation, before appearing in that court. In this instance, Mr. Charlton associated with local counsel when he filed *Shirley v. Morgan*, WR-CV-512-09, on December 7, 2009. He was thus authorized to appear in that case under the rules of the Navajo Nation Courts.

Mr. Charlton appeared pro hac vice in that case in the District Court and in the Navajo Nation Supreme Court.

22. Mr. Charlton eventually was disqualified from representing President Shirley in another case, *Shirley v. Balaran*, WR-CV-359-10. That case was not filed until November 29, 2010, nearly a year after the Nation had entered into the contract with Gallagher & Kennedy to represent President Shirley and after the Special Division of the Window Rock District Court had appointed Special Prosecutor Alan Balaran. Special Prosecutor Balaran was authorized under Navajo law to prosecute civil or criminal charges against President Shirley and other officials of the Navajo Nation. On October 4, 2010, the Special Prosecutor issued an Amended Subpoena Duces Tecum to the office of the President and Vice President of the Navajo Nation, and President Shirley decided to challenge the scope of the Subpoena.

23. President Shirley filed a Complaint for Declaratory and Injunctive Relief, and an Application for Temporary Restraining Order and Preliminary Injunction seeking an injunction against the Special Prosecutor to prevent the immediate disclosure of material that President Shirley claimed was privileged and not subject to disclosure. President Shirley moved to have Mr. Charlton admitted pro hac vice on his behalf in that case. The Motion was filed by Michelle Dotson, counsel to the President and a member in good standing of the Navajo Nation Bar Association. On May 2, 2011, the District Court denied the Motion to Appear Pro Hac Vice and Mr. Charlton was not allowed to appear in WR-CV-359-10. By this time, I was no longer the Attorney General. The denial of the Motion to Appear Pro Hac Vice was appealed by President Shirley. President Shirley was represented in the appeal by other counsel, not Mr. Charlton. That appeal was ultimately dismissed by the Supreme Court.

24. The Attorney General did not participate in the issuance of the Subpoena Duces Tecum by the Special Prosecutor or in President Shirley's response to the Subpoena. The Attorney General was not consulted on the filing of President Shirley's Complaint seeking protection from the Subpoena, on President Shirley's selection of counsel, or on the Motion to Appear Pro Hac Vice. Furthermore, the *Benally* Complaint does not allege any specific facts that would support an allegation that I encouraged Mr. Charlton to engage in any unauthorized practice of law.

25. The *Benally* Complaint bases the claim of subornation of the unauthorized practice of law solely on the fact that as Attorney General I approved an attorney contract with Mr. Charlton to represent President Shirley. Nothing in the contract suggests that Mr. Charlton was entitled or encouraged to violate any Navajo Nation law or rule of procedure in the representation of President Shirley. Finally, the *Benally* Complaint does not allege that Mr. Charlton engaged in the unauthorized practice of law once his Motion to Appear Pro Hac Vice was denied by the Window Rock District Court.

c. The Attorney General Had No Legal Right or Obligation to Prevent the Navajo Nation Council from Adopting the Discretionary Fund Program.

26. The *Benally* Complaint claims that I breached my fiduciary duty by not preventing the Navajo Nation Council from adopting the Discretionary Fund Program, and by not thereafter stopping the program. Paragraph 211 of the *Benally* Complaint alleges that the Attorney General has “a fiduciary duty to ensure that all resolutions and appropriations comport with Fundamental, common and statutory law.” The allegations continue at paragraph 216: “[H]e mounted no legal challenge to those unlawful resolutions which resulted in the unlawful expenditure of approximately \$36,000,000.”

27. The *Benally* Complaint alleges that the Attorney General breached a fiduciary duty to the Navajo Nation by not initiating legal action to prevent or to declare invalid the appropriations by the Navajo Nation Council approving funds for the Discretionary Fund Program. In fact, the Navajo Nation Code does not authorize the Attorney General of the Navajo Nation to initiate a lawsuit against the Navajo National Council or to file a lawsuit to declare that an action of the Navajo Nation Council is invalid. The Attorney General of the Navajo Nation represents the Navajo Nation, including the Navajo Nation Council. Only in the most extreme circumstance would it be appropriate for the Attorney General to sue the Navajo Nation Council or to seek a judicial declaration that a resolution or appropriation of the Navajo Nation Council is invalid. I am not aware of any circumstance where the Attorney General of the Navajo Nation has ever brought a lawsuit against the Navajo National Council. In any event, the failure by the Attorney General to bring such an action does not violate any legal or ethical obligation of the Attorney General and, thus, does not breach any fiduciary duty.

28. The *Benally* Complaint asserts that the Attorney General has a fiduciary duty “to ensure that all council resolutions comport with Fundamental, common, and statutory law.” This is inaccurate. The Attorney General is not required or expected to review or opine on the legality of any resolution or appropriation of the Navajo Nation Council either in advance or after it is enacted by the Navajo Nation Council. As of August 29, 2003 when the Navajo Nation Council overrode the Presidential veto of CJY-32-03, which amended 2 N.N.C. § 164(A)(1)(2005), and for the remainder of my term as Attorney General, the Office of Legislative Counsel was responsible for drafting Navajo Nation Council legislation and appropriations. Proposed legislation and appropriations were not subject to legal review by the Attorney General. The so-called “SAS,” the signature authorization sheet, used for approval of contracts and other Executive Branch actions, did not apply during this time to actions of the Navajo Nation Council. The *Benally* Complaint alleges that the Attorney General should have prevented the Navajo Nation Council from adopting budget resolutions or reallocations which allocated funds to the Discretionary Fund Program. However, even assuming that these budget-related actions of the Navajo Nation Council were unlawful, they were not approved in advance by the Attorney General or the Department of Justice.

29. The *Benally* Complaint also alleges a breach of fiduciary duty because the Attorney General failed to mount a legal challenge to the Discretionary Fund appropriations after they were enacted. I am not aware of the Attorney General of the Navajo Nation ever bringing a legal case to declare an action of the Navajo Nation Council unlawful. Certainly in most cases, such a legal challenge by the Attorney General would be counter to the Attorney General's duty to enforce and defend the laws of the Navajo Nation as adopted by the Navajo Nation Council. Even if the Attorney General might, in some limited circumstance, be authorized to bring an action to challenge the legality of the actions of the Navajo Nation Council, there is no such duty which would render the Attorney General liable for failing to mount such a challenge.

d. The Attorney General Sought the Appointment of a Special Prosecutor as Provided By Navajo Law when Abuses of the Discretionary Fund Program Were Discovered.

30. The Attorney General, along with the public at large, became aware of allegations of abuses of the Discretionary Fund Program in October of 2009 from articles published in the *Navajo Times*. At that point, I took it upon myself to obtain further information from the Controller and Auditor General to determine whether the alleged abuses likely occurred. In about November of 2009, the Ethics and Rules Office, within the Legislative Branch, issued a subpoena, which had to be approved by the Ethics and Rules Committee, requesting the Speaker to produce information relating to discretionary fund expenditures by the Navajo Nation Council. The Ethics and Rules Committee refused to issue a subpoena. Without regard to the actions of the Ethics and Rules Committee, the Department of Justice acted appropriately under the Special Prosecutor Act to determine if the allegations were serious. The Attorney General never thwarted or hindered any investigation into alleged abuses in the expenditure of discretionary funds. As Attorney General I ultimately applied for the appointment of a Special Prosecutor precisely to investigate the allegations of abuse of the Discretionary Fund Program. The Special Prosecutor Act provided the means under Navajo law to investigate and prosecute wrongdoing by elected officials of the Navajo Nation. I implemented the Special Prosecutor Act exactly as it was intended. In sum, the Attorney General and the Department of Justice acted appropriately to determine if the allegations were serious.

Dated: June 8, 2012

Louis Denetsosie
Louis Denetsosie
611 Jeddito Drive
Window Rock Navajo Nation

History

CAP-47-95, April 21, 1995. Adopted Enabling Legislation for the Environmental Protection Agency and removed it from within the Division of Natural Resources. Also adopted the Navajo Nation Environmental Policy Act.

GSCJY-50-94, July 13, 1994. Adopted a Plan of Operation for the Environmental Protection Agency.

ACAP-94-76, April 21, 1976.

CAU-72-72, August 10, 1972. Established the Environmental Protection Commission.

Note. Previously codified at 2 N.N.C., § 3401 *et seq.*, but redesignated at 2 N.N.C., §§ 1921-1927.

Library References

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

§ 1927. Amendments

Sections 1921-1926 may be amended by the Navajo Nation Council, upon recommendation from the Resources Committee and the Government Services Committee of the Navajo Nation Council. Amendments by the Government Services Committee shall be subject to approval by the Resources Committee of the Navajo Nation Council.

History

CAP-47-95, April 21, 1995. Adopted Enabling Legislation for the Environmental Protection Agency and removed it from within the Division of Natural Resources. Also adopted the Navajo Nation Environmental Policy Act.

GSCJY-50-94, July 13, 1994. Adopted a Plan of Operation for the Environmental Protection Agency.

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CAU-72-72, August 10, 1972. Established the Environmental Protection Commission.

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Library References

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

Subchapter 38. [Reserved]

Subchapter 39. Department of Justice

Article 1. Generally

History

Note. Sections 1961-1963 of this title, relating to the Department of Justice, were formerly codified at 2 N.N.C. §§ 1301, 1993, 1994 respectively.

"Office of General Counsel" was rescinded and all references to such office are now incorporated in the Department of Justice.

§ 1961. Establishment; purpose; composition

A. There is established the Department of Justice within the Executive Branch of the Navajo Nation government.

B. The purpose of the Department of Justice is to provide legal services to the Navajo Nation government and to administer its programs.

2 N.N.C. § 1961

NAVAJO NATION GOVERNMENT

C. The Department of Justice shall consist of the Attorney General, the Deputy Attorney General; the staff budgeted for the Department by the Navajo Nation Council, and the following programs:

1. Office of the Navajo Public Defender;
2. Office of the Prosecutor;
3. Juvenile Justice; and
4. Navajo-Hopi Legal Services.

History

CF-7-90, February 1, 1990.

CAP-34-93, April 22, 1993 authorized the Office of the Navajo Public Defender and rescinded the Legal Aid and Defender Office.

CF-8-82, February 5, 1982.

1978 Budget.

Note. Slightly reworded for purposes of statutory form.

Library References

Indians \S 32(4.1, 6, 7, 13).
Westlaw Topic No. 209.

C.J.S. Indians $\S\S$ 51, 60 to 62, 139 to 143, 152, 157.

§ 1962. Personnel

A. There is established the position of Attorney General and Deputy Attorney General of the Navajo Nation, and such other positions as may from time to time be budgeted by the Navajo Nation Council or by any other source acceptable to the President of the Navajo Nation.

B. The Attorney General and Deputy Attorney General shall be licensed attorneys. The Attorney General and Deputy Attorney General shall be appointed by the Navajo Nation Council, upon the recommendation of the President, to serve at a negotiated salary. The appointment shall be effective upon the approval of the Navajo Nation Council, for a term concurrent with the term of the President. The Attorney General and Deputy Attorney General shall serve at the pleasure of the Navajo Nation Council. All other attorneys shall serve at a negotiated salary and at the pleasure of the Attorney General.

C. The Deputy Attorney General shall serve in the stead of the Attorney General, with full authority of the Attorney General, in the event of the death, disability, or removal of the Attorney General, until a new Attorney General is approved by the Navajo Nation Council.

D. All other personnel shall be hired and compensated pursuant to usual Navajo Nation Personnel Policies and Procedures.

History

CF-7-90, February 1, 1990.

CMA-6-89, March 1, 1989.

CF-8-82, February 5, 1982.

1978 Budget, page IX-1.

CJA-15-72, January 26, 1972.

Library References

Indians \S 32(6).

Westlaw Topic No. 209.

C.J.S. Indians \S 51.

§ 1963. Authority, responsibilities and duties

The Attorney General is authorized and directed to:

A. Report and be responsible to the Navajo Nation Council through the President for the accomplishment of the purposes and objectives of the legal needs of the Navajo Nation.

B. On behalf of the Navajo Nation and without prior approval of the Navajo Nation Council, or any Committee thereof, the President or any other official of the Navajo Nation, to negotiate and execute attorney contracts, within the approved Navajo Nation budget for attorneys' fees and expenses, to provide for legal counsel to the Navajo Nation government or any other legal representation deemed necessary to protect the interests of the Navajo Nation.

C. Monitor the work of all retained legal consultants and law firms.

D. Formulate overall administrative and operating policies pertaining to the Department of Justice, and to take such action as the Attorney General shall deem necessary for the accomplishment and enforcement thereof.

E. Exercise supervisory control and direction over all personnel within the Department of Justice.

F. Represent the Department of Justice in executive level planning.

G. Represent the Navajo Nation government regarding its legal interests in the Nation's dealings and relations with all persons and organizations outside the Navajo Nation government.

H. Conduct such special projects and programs as may be assigned.

I. Delegate authority to members of his or her staff.

J. Develop programs and budgets for the Department of Justice of the Navajo Nation.

K. Perform 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.

History

CF-7-90, February 1, 1990.
CMA-6-89, March 1, 1989.
CF-8-82, February 5, 1982.

1978 Budget, Page IX-1.
CJA-15-72, January 26, 1972.

Library References

Attorney General ⇨6.
Indians ⇨32(4.1, 6).
Westlaw Topic Nos. 46, 209.

C.J.S. Attorney General §§ 7 to 15.
C.J.S. Indians § 51.
C.J.S. Parent and Child § 251.

§ 1964. Attorney General; Chief Legal Officer

A. The Attorney General is the Chief Legal Officer of the Navajo Nation and shall have charge of the Department of Justice and of all legal matters in which the Navajo Nation government has an interest.

B. The Attorney General shall render legal services to the Navajo Nation government, including its Chapters, branches, and entities, subject to available resources, as may be required.

C. No division, program, enterprise, or other entity of the Navajo Nation government shall retain or employ legal counsel except as may be approved by the Attorney General. The branches shall not retain or employ legal counsel for external litigation except as may be approved by the Attorney General. Navajo Nation Chapters may employ their own counsel, subject to available funds, under the terms and conditions approved by the Chapter membership.

D. The Attorney General shall adopt reasonable rules and regulations to allow for the hiring of independent and additional outside counsel as needed, as provided in this subpart.

E. The Attorney General may retain private counsel to handle any particular matter or types of matters as he deems appropriate, subject to the availability of funds appropriated for such purposes. Such counsel may be retained to represent the Navajo Nation government in distant forums, to provide specialized legal expertise not available from within the Department of Justice, and to respond to exceptional demand for legal services.

F. The Attorney General shall defend and initiate all actions, including appeals, in which the Navajo Nation is a party, including any action brought in the name of Navajo Nation government officials for conduct arising out of their official duties, and may compromise or settle any action or claim by or against the Navajo Nation government. Before concluding any such compromise or settlement which involves a particular branch, division, department or program, the Attorney General shall consult with such branch, division, department, or program.

Where no branch or division is named, or otherwise particularly involved, the Attorney General shall consult with the President prior to concluding any such compromise or settlement.

G. All communications between elected tribal officials, officers, employees, or agents of the Navajo Nation government and its attorneys shall be protected by the attorney-client privilege and shall not be admissible or discoverable in any judicial or administrative proceeding. No waiver of the attorney-client privilege shall be effective against the Navajo Nation government without the express approval of the Attorney General. The Attorney General is authorized to waive the attorney-client privilege when such waiver will advance the overall legal interests of the Navajo Nation government.

H. If the Attorney General determines that he/she is disqualified from providing legal representation or legal services on behalf of any entity of the Navajo Nation government in relation to any matter, the Attorney General shall give written notification to the entity affected. If the entity has received such notification from the Attorney General, the entity is authorized to make expenditures, subject to available appropriations, to employ attorneys to provide the representation or services.

NAVAJO NATION GOVERNMENT

2 N.N.C. § 1965

I. The Attorney General in his or her discretion is authorized to represent an officer or employee of the Navajo Nation against whom a civil action is brought in his or her individual capacity until such time as it is established as a matter of law that the alleged activity or events which form the basis of the complaint were not performed, or not directed to be performed, within the scope or course of the officer's or employee's duty or employment.

History

CF-7-90, February 1, 1990.

Library References

Attorney General ⇨4.
Indians ⇨27, 32(4.1, 7).
Westlaw Topic Nos. 46, 209.

C.J.S. Attorney General §§ 10 to 11, 13 to 14.
C.J.S. Indians §§ 13, 60 to 62, 68, 89, 91, 97,
139 to 143, 152.

Annotations

1. Construction and application

"See also 2 N.N.C. § 1964(I) (authorizing the Attorney General to represent an official sued in their personal capacity until 'it is established' as a matter of law that the official's activities were not in the scope of his or her 'duty or employment')[.] We read these provisions to require an

explicit determination by the district court that the actions of the official or employee were or were not in the scope of his or her authority before moving forward to consider immunity defenses." *Chapo, et al. v. Navajo Nation, et al.*, No. SC-CV-68-00, slip op. at 11 (Nav. Sup. Ct. March 11, 2004).

§ 1965. Opinions of the Attorney General

A. Any branch, division, department, enterprise, Chapter or other entity of the Navajo Nation government, or any elected official of the Navajo Nation government may request the Attorney General to issue an opinion concerning any question of law relating to their respective entity or offices. No adverse action may be taken by the Navajo Nation government against any official or employee of the Navajo Nation government for conduct taken in reasonable reliance upon the advice given in such an opinion.

B. The Attorney General shall, at least annually, publish the official opinions of the Attorney General. The Attorney General shall provide copies to the President, the Speaker, the Chief Justice, and each delegate of the Navajo Nation Council.

History

CF-7-90, February 1, 1990.

Library References

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

Article 2. Office of the Prosecutor

History

Note. Sections 1971–1983 of this title, relating to the Office of the Prosecutor, were formerly codified at 2 N.N.C. §§ 1171–1183.

§ 1971. Generally

The Office of the Prosecutor is continued as a department in the Justice Department of the Navajo Nation government, directly under the Office of the Attorney General.

History

ACS–157–83, September 22, 1983.
CF–8–82, February 5, 1982.
ACF–9–79, February 15, 1979.

Note. Slightly reworded for consistency and statutory clarity.

Library References

Indians Ⓒ32(4.1, 13).
Westlaw Topic No. 209.
C.J.S. Indians § 157.

§ 1972. Purpose

The purpose of the Office of the Prosecutor is to prosecute to completion all cases involving alleged violations of the Navajo Nation Code by Indian persons, to conduct investigations and other activities necessary for the conduct of its affairs, and to assume certain responsibilities with respect to civil matters, including extradition and exclusion proceedings.

History

ACS–157–83, September 22, 1983.
ACF–9–79, Exhibit A, February 15, 1979.

Note. Slightly reworded for grammatical form.

Library References

Indians Ⓒ32(13).
Westlaw Topic No. 209.
C.J.S. Indians § 157.

§ 1973. Chief Prosecutor

A. The Office of the Prosecutor, as established by this article, shall be headed by a Chief Prosecutor, who shall be a member of the Navajo Nation and have original domicile upon the Navajo Reservation, or land under the jurisdiction of the Navajo Nation Courts for a term of six months immediately preceding his or her appointment as Chief Prosecutor.

B. The Chief Prosecutor shall be appointed by the Attorney General and he or she shall serve at his or her pleasure.

C. The Chief Prosecutor shall serve until his or her successor is appointed.

D. Any attorney/advocate positions within the Office of the Prosecutor, other than the Chief Prosecutor's position, shall be appointed by the Chief Prosecutor

and shall serve at the pleasure of the Chief Prosecutor. All other personnel shall be hired and compensated pursuant to the Navajo Nation Personnel Policies and Procedures.

History

ACS-157-83, September 22, 1983.
CF-8-82, February 5, 1982.
ACF-9-79, February 15, 1979.

Note. Slightly reworded for purposes of statutory clarity.

Library References

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

§ 1974. Duties, responsibilities and authority

The Prosecutor shall:

A. Report to the Attorney General with respect to all activities of the office and be responsible to him or her for all administrative and operational matters not relating to the investigation and prosecution of suspects, criminal defendants and cases.

B. Investigate, prosecute and dispose of all cases within his or her jurisdiction, acting independently and upon his or her own authority within the guidance of law and professional ethics in the performance of his or her duties.

C. Formulate overall administrative and operating policies of the Office of the Prosecutor and take action as he or she shall deem necessary for the accomplishment and enforcement thereof.

D. Exercise supervisory control and direction of all sections under the Office of the Prosecutor.

E. Represent the Office of the Prosecutor in executive level planning.

F. Represent the Navajo Nation government, within the areas of the Prosecutor's responsibility as authorized by the Attorney General.

G. Plan and participate with other areas of law enforcement toward full realization of benefits from federal and state programs for technical and financial assistance.

H. Develop programs and budgets for the Office of the Prosecutor, conduct periodic reviews of program and budget executions of the Office of the Prosecutor and participate in overall program and budget review.

I. Delegate authority to members of the staff.

J. Conduct special programs or projects as may be assigned by the Attorney General not inconsistent with the duties and responsibilities contained herein.

History

ACS-157-83, September 22, 1983.
CF-8-82, Exhibit B, February 6, 1982.
ACF-9-79, Exhibit A, § 2, February 15, 1979.

Note. Slightly reworded for statutory clarity and grammar.

Library References

District and Prosecuting Attorneys ⇐8.
Indians ⇐32(6, 13).
Westlaw Topic Nos. 131, 209.

C.J.S. District and Prosecuting Attorneys
§§ 20 to 21, 29 to 30.
C.J.S. Indians §§ 51, 157.

§ 1975–1977. [Deleted]

History

Note. §§ 1975–1977, “Personnel”; “Offices; hours” and “Admission to practice; Oath”, were deleted from the Code.

§ 1978. Assistance of, and coordination with, other agencies

A. The Office of the Prosecutor shall have the authority to call upon the Navajo Division of Law Enforcement or any of its personnel for information, records, reports, etc., and to conduct investigations for the Office of the Prosecutor.

B. The Office of the Prosecutor shall have the authority to call upon all Navajo divisions, enterprises, departments and commissions for assistance in carrying out its work. Such divisions, enterprises, departments and commissions shall provide the Office of the Prosecutor such information and assistance as is necessary to permit the Office of the Prosecutor to carry out its responsibilities and duties under law.

C. The Office of the Prosecutor shall have the authority to call upon United States Governmental Offices serving the Navajo Nation in the name of the Navajo Nation for assistance in carrying out its work.

History

CF–8–82, February 5, 1982.
ACF–9–79, February 15, 1979.

Library References

Indians ⇐32(13).
Westlaw Topic No. 209.
C.J.S. Indians § 157.

§ 1979. Investigations

The Office of the Prosecutor shall have complete authority to initiate and conduct investigations into any alleged violations of the Navajo Nation Code and for the security of the Navajo Nation government, the Navajo Nation Chapter Houses and Officers, the Navajo Nation Courts including the Supreme Court of the Navajo Nation, and any other department, enterprise and entity of the Navajo Nation government.

History

ACS–157–83, September 22, 1983.
ACF–9–79, February 15, 1979.

Note. Slightly reworded for purposes of statutory clarity. Reference to the “Court of Appeals” changed to the “Supreme Court”.

Library References

Indians ☞32(13).
Westlaw Topic No. 209.
C.J.S. Indians § 157.

§ 1980. Civil case intervention

The Office of the Prosecutor shall have the authority to intervene in civil matters involving the interests of the Navajo Nation government, and shall further have the authority to initiate civil actions on behalf of the Navajo Nation government in the Courts of the Navajo Nation, against individuals who violate the laws of the Navajo Nation. The Office of the Prosecutor shall have the authority to initiate civil actions seeking restitution on behalf of the Navajo Nation government against individuals who have caused damage to Navajo Nation property or who have deprived the Navajo Nation government of any property belonging to said government.

History

ACF-9-79, February 15, 1979.

Library References

Indians ☞27, 32(7, 13), 37.
Westlaw Topic No. 209.
C.J.S. Indians §§ 13, 22, 60 to 62, 68, 89, 91,
97, 139 to 143, 152, 157.

§ 1981. Extradition and civil exclusion proceedings

A. The Office of the Prosecutor shall have the authority to execute and initiate extradition proceedings against Indian residents of Navajo Indian Country.

B. The Office of the Prosecutor, on behalf of the Navajo Nation, shall have the authority to execute and initiate civil exclusion proceedings to exclude nonmembers from tribal land, pursuant to 17 N.N.C. §§ 1901 and 1902.

History

ACF-9-79, February 15, 1979.

Library References

Indians ☞32(8, 13).
Westlaw Topic No. 209.
C.J.S. Indians §§ 29, 59, 157.

§ 1982. Authority to subpoena witnesses and documents

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.N.C. § 1982

NAVAJO NATION GOVERNMENT

History

ACF-9-79, February 15, 1979.

Library References

Indians Ⓒ32(13), 38.
Westlaw Topic No. 209.
C.J.S. Indians §§ 157, 163.

Annotations

1. Construction and application

"... 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." *MacDonald, Sr. v. Navajo Nation ex rel. Rothstein*, 6 Nav. R. 290, 298 (Nav. Sup. Ct. 1990).

2. Scope of subpoena

"In addressing the objections to the particularity, time periods, and breadth of subpoenas, . . . 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." *MacDonald, Sr. v. Navajo Nation ex rel. Rothstein*, 6 Nav. R. 290, 293 (Nav. Sup. Ct. 1990).

§ 1983. Criminal investigation equipment

Consistent with applicable federal law and regulations and the duly approved budget of the Office of the Prosecutor, the Chief Prosecutor is authorized to acquire such criminal investigation equipment as he/she deems appropriate. The Chief Prosecutor is further authorized, consistent with applicable federal law and regulations, to permit his/her staff to utilize such equipment in carrying out their duties and responsibilities. The Chief Prosecutor and his/her assistants may carry firearms for their own protection while on official duty, provided however, that no employee of the Office of the Prosecutor shall carry a firearm unless such employee has first received instruction and Certification in the use of the firearm by the Division of Public Safety.

History

ACS-157-83, September 22, 1983.
CF-8-82, February 5, 1982.
ACF-9-79, February 15, 1979.

Library References

Indians Ⓒ32(13).
Westlaw Topic No. 209.
C.J.S. Indians § 157.

§ 1984. Prohibiting interference

The Office of the Prosecutor has an independent responsibility to enforce appropriate provisions of the Navajo Nation Code. No employees, including Executive Branch personnel, shall intercede, or interfere, attempt to intercede or interfere in the legal functions of the Office of the Prosecutor. All inquiries concerning the status of a particular case or policy shall be in writing; additionally, all responses shall be in writing.