Navajo Nation Law CLE

Section 9

Eric N. Dahlstrom

Navajo Special Prosecutor Law

Part 3

WILSON HALONA, CECIL LARGO

WILLIS H. PETERSON, RAYMOND R. SMITH,

MARY WALLACE AND JIMMY WOODY

Plaintiffs-Appellees

vs.

PETER MACDONALD AND

ELDON HANSEN

Defendants-Appellants

Decided on January 24, 1978

Donald Benally, Shiprock, New Mexico, for Plaintiffs-Appellees Halona, Largo, Peterson, Smith and Woody

Richard Hughes, D.N.A., Window Rock, Arizona, and Wilbert Tsosie, D.N.A., Shiprock, New Mexico, for Plaintiff-Appellee Wallace

Michael Stuhff, Legal Department of the Navajo Nation, Window Rock, Arizona, for Defendants-Appellants

Before BLUEHOUSE, Acting Chief Justice and LINCOLN (retired Chief Justice sitting by special designation) and NESWOOD, Associate Justices

PER CURIAM

I.

This case comes on appeal from a decision of the Shiprock

District Court issued May 18, 1977, enjoining the defendants from expending any funds appropriated by the Navajo Tribal Council for the legal expenses of Peter MacDonald and declaring the appropriation illegal for failure to comply with certain tribal procedures and for being violative of certain substantive rights of the Plaintiffs.

On May 3, 1977, the plaintiffs filed a complaint in the Shiprock District Court asking for an injunction prohibiting the expenditure of $70,000 appropriated for Chairman MacDonald's private legal expenses by Resolution CAP-32-77, dated April 5, 1977. The complaint asked the Court to declare the action of the Tribal Council void for its failure to have the Budget and Finance Committee of the Navajo Tribal Council consider the matter prior to the Council's action pursuant to 2 N.T.C. 365. The complaint further asked the court to declare the Council's action unlawful because the resolution was not on the agenda approved by the Area Director of the Bureau of Indian Affairs.

The complaint also alleged that the expenditure authorized by the resolution was illegal under 25 U.S.C. 81 as no attorney contract was presented as required therein.

Also on May 3, 1977, the plaintiffs requested a temporary restraining order until the matter could be heard. The motion for the temporary restraining order requested that no security bond be required.

On May 3, 1977, the Shiprock District Court, the Honorable Charley John presiding, issued a temporary restraining order ex parte restraining the defendants from expending any of the $70,000 appropriated by Resolution CAP-32-77. No security bond was required by the Court.

On May 17, 1977, defendants moved the Court for an order changing venue to Window Rock on the grounds that the defendants were all residents of Window Rock, that the cause of action arose in Window Rock and on the grounds that Window Rock would be the most convenient forum for all parties.

At the same time, defendants moved to disqualify the Honorable Charley John on the grounds that he was related to one of the plaintiffs' attorneys.

Both motions were denied by the Court on May 17, 1977. A motion to dissolve the temporary restraining order was filed by the defendants on May 17, 1977.

On May 18, 1977, a hearing was held in the Shiprock District Court on the complaint and request for a permanent injunction.

An order was entered on May 25, 1977, issuing a permanent injunction prohibiting the expenditure of any funds appropriated under Council Resolution CAP-32-77 and declaring the Council's action illegal for failure to comply with 2 N.T.C. 365. The order and written opinion

subsequently issued declared that the matter was not a non-justiciable political question and that the action of the Council represented an illegal use of public funds for a private purpose.

The Court further found that there was no adequate remedy at law as there was little likelihood of the funds being recovered once they were spent.

Subsequently, on June 6, 1977, the defendants filed a motion to correct error and dissolve the injunction.

The motion to correct error was denied by the Shiprock District Court on June 6, 1977.

The defendants filed this appeal on June 19, 1977.

On August 2, 1977, Chief Justice Virgil Kirk, Sr., appointed retired judge Chester Yellowhair as Acting Chief Justice for this case and appointed retired Chief Justice Murray Lincoln and retired judge Tom B. Becenti as Associate Justices.

The plaintiffs immediately filed a motion to vacate the orders of August 2, 1977, stating as grounds therefor that the appointments violated Title 7, Section 203 of the Navajo Tribal Code which states that retired judges may only be called to relieve congestion in the docket of the Navajo courts.

On August 19, 1977, Chief Justice Kirk vacated his orders of August 2, 1977, and disqualified himself in favor of Homer Bluehouse, Acting Chief Justice by prior designation.

Oral Argument on this case was presented on October 19, 1977.

II.

The issues presented on appeal my be summarized as follows:

1. Whether venue as to Peter MacDonald and Eldon Hansen was properly found to lie in the Shiprock district.

2. Whether the District Court erred in not requiring a bond to be posted, pursuant to Rule 18 of the Navajo Rules of Civil Procedure.

3. Whether plaintiffs in this cause of action lacked standing to sue.

4. Whether the Navajo Tribal Council was an indispensable party to this suit.

5. Whether actions of the Navajo Tribal Council are reviewable by courts of the Navajo Nation.

6. If such actions are reviewable, what standards are to be used in reviewing the legislation in question here.

7. Whether the expenditure in question was in violation of 25 U.S.C. 81.

8. Whether the expenditure of Navajo Tribal funds in this instance was for a public or a private purpose and, if for a private purpose, whether Navajo law prohibits such an expenditure.

III.

We find that the Shiprock District Court did not err in determining that venue was proper in that district as to Peter MacDonald and Eldon Hansen.

Venue is both a tool of sound judicial administration and a mechanism to ensure a fair trial for the parties and a minimum burden on them and the courts.

Rule 26 (Venue) of the Navajo Rules of Civil Procedure says "an action shall be filed in the district in which any defendant resides or in which the cause of action arises..." [emphasis added]. The Shiprock District Court entertained the suit against Peter MacDonald on the grounds that he is registered as a voter in Teec Nos Pos, which is within the Shiprock district, and that this was sufficient indication of domicile to bring the suit within the proper scope of the rule. The

peculiar circumstances of Mr. MacDonald's status as the Navajo Nation's chief executive officer carried great weight with the District Court in making decision to rely on this technical indicator of domicile. This point is explained more fully below. Given the finding as to venue for MacDonald, venue as to Eldon Hansen was proper by operation of the rule. We agree fully with the District Court's analysis.

There is another consideration to this issue besides the purely technical analysis. That is the court's concern for fairness. It is a fact that, for all practical purposes, Appellant MacDonald lives in Window Rock, not Teec Nos Pos. But for Navajos, domicile is not as clear or fixed as it might be for non-Indians, if indeed the matter is really all that clear for our non-Indian brothers.

By custom, Navajos consider themselves to be from the same area their mothers are from. Thus, wherever they may be, they return home frequently for religious ceremonies and family functions, as well as to vote. By custom, Navajos are allow to register and vote in the area where they are from, rather than where they live. Even the Navajo Tribal Code's election law is silent on this point. Perhaps this custom may have to be breached in the future, but for the present, Navajos may be considered to be domiciled where they maintain their traditional and legal ties, regardless of where they actually live.

Given the resources available to the Chairman and the Controller to defend against this suit and the underlying tradition concerning residence, we agree with the District Court that it would

have been grossly unfair to have required plaintiffs below to file their action in the Window Rock District Court. This is not to say that we sanction in our opinion here "nationwide" venue as to suits against tribal officials. We do not. We here rule only that the circumstances of this particular suit justified a finding of venue in the Shiprock district by the District Judge there.

Assuming, however, that venue in the Shiprock District Court was improper, that error alone would still not warrant a reversal of the District Court's decision.

It is a well settled principle of law that absent a strong showing a bias to the defendant, venue errors are treated as harmless. See Chicago, Rock Island and Pacific R. Co. v. Hugh Breeding, Inc., 232 F.2d 584 (10th Cir., 1956), cert. den. 355 U.S. 880 (1957).

IV.

The issue of fairness arises again in the question of whether it was error not to require Plaintiffs to post security, pursuant to Rule 18. On its face, that rule seems absolute. It says, at the applicable part:

> No restraining order or injunction shall issue except upon the giving of security by applicant, in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

However, a close reading of the rule indicated the purpose of security: to compensate for damages likely to be sustained. It is entirely within the discretion of the court to determine whether any security at all is needed and , if so, what the sum should be.

Appellants have made no real case for the injury supposedly sustained by them. Instead, they have relied on a technical but erroneous interpretation of the rule in the hopes of erecting an insurmountable barrier to the suit. We reject this argument.

V.

Appellants have insisted that none of the Appellees had standing to bring this cause before the District Court. The point is made that the Appellees suffered no personal injury as a result of the Council's action and the expenditures made thereafter.

The Appellees divide into two categories, the first being composed of the constituents Mary J. Wallace and Cecil Largo and the second being composed of four members of the Council itself. Ordinarily, private citizens lack standing to litigate the validity of expenditures from the public treasury.

But this is not an absolute rule. As the Supreme Court stated in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947:

> When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to

> maintain the action, the weakness of the Government's argument in this case becomes apparent. The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problem arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," Baker v. Carr, 7 L.Ed.2d at 678, and whether the dispute touches upon "the legal relations of parties having adverse legal interests." Aetna Life Insurance Co. v. Haworth, 81 L.Ed. at 621, 108 ALR 100. A taxpayer may or may not have the requiste personal stake in the outcome, depending upon the circumstances of the particular case.

It is not sound practice to open the court's doors to suits by every citizen having a disagreement with policy decisions of the legislative body. Courts are not a second political arena for losing combatants to stage a re-match. However, there are occasions when a private citizen's interests rise above the policy decision represented by the expenditure and reach the level of civil rights which the legislative body is no less charged with protecting than the courts.

These kinds of rights are those which the United States Supreme Court was speaking of in Flast v. Cohen, supra.

We are in agreement with that Court's thinking on this point.

The question is: what fundamental rights of Cecil Largo and Mary Wallace are at issue here?

The answer does not lie in a non-Indian analysis. This expenditure raises a question peculiar to Navajo tradition and law (albeit similar to other American Indian concepts of property). Because this issue is discussed at length in Navajo later in our decision, it is sufficient here to say that we find that on the facts of this case we can agree with the District Court that these two plaintiffs had standing to sue.

As to Wilson Halona, Raymond R. Smith, Willis H. Peterson, and Jimmy Woody, the question of standing is different. They are all members of the Navajo Tribal Council. This petition they presented to the Shiprock District Court raised questions which would not very often be raised in any other government of significance in the United States.

The first question is what law, if any, governs the conduct of Navajo Tribal Council proceedings. The second question is how conflicts among various pieces of legislation are to be resolved. And the third question is who is to review actions of the Council and what standards of review are to be used.

If members of the Council do not have standing to raise these questions, then who does? We cannot imagine under what principles a member of the legislative body would lack standing to bring before the court such momentous issues.

Their interest in having these questions answered by the courts--even if resolved adversely--is clear:

> the questions are really questions about the meaning of "due process" in its most elemental state and the absence or presence of proper procedure in legislative proceedings can materially alter the outcome of any given proceeding.

The question of standing cannot be allowed to deflect our courts from examining the merits of the case when the connection between the plaintiffs and the cause of action is not inconsequential. The connection here is not tenuous nor are the plaintiffs seeking to litigate matters which really do not affect any of their legitimate interests.

Otherwise, "lack of standing to sue" becomes a convenient but abused execuse for courts to avoid dealing with politically sentitive cases. We have no need of such an excuse here.

VI.

The claim that the Navajo Tribal Council is an indispensable party to this suit misses the point of such an argument. Parties are indispensable, according to Black's Law Dictionary, as well as American Jurisprudence 2d, and other scholarly works, when:

> (they have) an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

The objection to the absence of an indispensable party is one best analyzed in light of the underlying policy considerations which give rise to the label in the first place.

The term is not a magic phrase which, when inserted into a defendant's answer, automatically strips a court of its right to hear the case. If an examination of the facts of the case reveals that a party truly must be represented in a given case to do justice, then the court should not proceed without that party. If the party may be joined, then joinder is the proper course for the court. If the party cannot be joined, then the suit must be dismissed.

In Shields v. Barrow, 58 U.S. 130, 15 L.Ed.158, the United States Supreme Court said (quoting itself in Mallow v. Hinde, 12 Wh. 198) that "no court can adjudicate directly upon a person's right without the party being either actually or constructively before the court."

The key word is "constructively". As we understand this term and the general trend of the law concerning indispensable parties, it is possible that the interests of such a party may be in certain cases adequately and fairly represented by another litigant, thus in effect putting the indispensable party before the court for all the purposes which the doctrine seems to effectuate.

Here, the Legal Deprtment of the Navajo Nation represented the Chairman of the Tribal Council, the Controller, and the Council as a whole. The Chairman, as the chief executive officer of the Navajo

Nation and as head of the Council, is charged with seeing to it that the Legal Department (and the Office of the General Counsel, to which the Legal Department is subordinate) represents the interests of the Council.

We do not believe that the Legal Department has been remiss in its duties. Almost all of the arguments propounded by the attorney for Appellants have actually been arguments on behalf of the Council rather than for either Appellant personally.

This entire matter really arises because of a legal fiction. Sovereign immunity protects the Navajo Nation and its governing body, the Council, from suit. However, this doctrine does not protect wrongdoing. Rather, it preserves the dignity of the sovereign. Thus suits are brought against ministers and employees of the sovereign.

For example, the United States cannot be sued without their consent and, therefore, the Congress as such may not be sued. However, many legislative acts are called into question through the mechanism of suits against individuals. Cabinet secretaries are frequently sued in the course of implementing legislation objected to by certain affected individuals or groups. See Sierra Club v. Morton, 40[illegible] U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636; Califano v. Jobst, ___ U.S. ___, 98 S.Ct. ___, 54 L.Ed.2d 228.

Of course, legislation is frequently the issue in appeals fro criminal prosecutions by U.S. attorneys. See Scarborough v. U.S.

___, 97 S.Ct. ___, 52 L.Ed.2d 582 and Jeffers v. U.S., ___ U.S. 97 S.Ct. ___, 53 L.Ed.2d 168.

The Speaker of the House of Respresentatives has been sued by a member of the House in litigation whose central issue was the question of the power of the House itself. The Supreme Court did not hold the House to be an indispensable party to that suit. Indeed, the question was not even raised. Powell v. McCormack, 395 U.S. 486, 23 L.Ed.2d 491, 89 S.Ct. 1944.

What is operative in all of these examples is the fact that important questions about legislation are presented to courts without the sovereign being joined as an indispensable party. Of course, doing this would then raise the protection of immunity and result in the dismissal of the suit if Appellant's logic prevailed. This court will not be trapped by such sophistry and thereby surrender its right and neglect its duty to protect the rights of our people.

We agree once again with the District Court that the legitimate interests of the Navajo Tribal Council were properly before the court and adequately and fairly represented by counsel without the Council's having been joined as an "indispensable party".

VII.

The right and power of the Navajo courts to authoritatively review actions of the Navajo Tribal Council has been called into ques-

tion before, not only in our courts, cf Dennison v. Tucson Gas and Electric (1947), but also in federal courts. See Arizona Public Service v. The Navajo Tribe, (Arizona District, 1977) and Arizona Public Service v. The Navajo Tribe, (New Mexico District, 1977).

There is no question in our minds about the existence of such authority. When the Navajo Tribal Council adopted Title 7, Section 133 of the Tribal Code, it did not exclude review of Council actions from its broad grant of power to the courts.

Indeed, in our opinion, Title 25, Section 1302 of the United States Code precludes such an exclusion of judicial review of legislative actions because that law is a mandate for Indian governments which necessarily assumes and requires judicial review of any allegedly illegal action by a tribal government.

In particular, 25 U.S.C. 1302 (8) prohibits the denial of equal protection of the laws and deprivation of liberty or property without due process of law. We cannot imagine how any legislative body accused of violating these primary rights could be the judge of its own actions and at the same time comply with the federal law. Of course, this is not possible.

Judicial review must, therefore, necessarily follow. If the courts established by Indian tribes cannot exercise this power, then the only alternative is review in every case by federal courts.

It is inconceivable to us that the Navajo Tribal Council would prefer review of its actions by far-away federal courts unfamiliar with Navajo customs and laws to review by Navajo courts. We know that this is not the case because the Council has not limited the power of Navajo courts in this respect and his never indicated a willingness to do so.

The courts of the Navajo Nation, including this Court, have frequently reviewed and interpreted legislation passed by the Council and executive actions of the Chairman of the Council. See Dennison v. Tucson Gas and Electric, (Navajo Court of Appeals, December 23, 1974).

Our right to pass upon the legality or meaning of these actions has been questioned in certain places but never by the Council or its Chairman. That is because they have a traditional and abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo People did not learn this principle from the white man. They have carried it with them through history.

The style and the form of problem-solving and dispensing justice has changed over the years but not the principle. Those appointed by the People to resolve their disputes were and are un-questioned in their power to do so. Whereas once the clan was the primary forum (and still is a powerful and respected instrument of

justice), now the People through their Council have delegated the ultimate responsibility for this to their courts. That is why 7 N.T.C. 133 is so broadly written.

In any case, judicial review by tribal courts of Council resolutions is mandated by the Indian Civil Rights Act, 25 U.S.C. 1302.

We therefore uphold the Shiprock District Court's determination on this point.

VIII.

In analyzing the propriety of Council Resolution CAP-32-77, we must look first to the existing applicable law and then we must determine what effect is to be given to Resolution CAP-32-77, given that it is inconsistent with the codified law.

Appellants urge upon this Court the proposition that the latest legislation automically repeals all prior inconsistent acts, or presumably at least supersedes it in some indeterminate piecemeal manner. At first glance, this seems logical enough and has the appeal of judicial economy and finality. We take judicial notice that certain legislation passed subsequent to CAP-32-77 specifically noted that it repealed all prior inconsistent legislation. See CO-65-77, (Fiscal Year 1978 appropriation legislation).

However, this view is really no help in analyzing the effect

of CAP-32-77, because that legislation did not include an express repealer clause nor was it passed in a manner that indicated a clear intent on the part of the Council as to its effect on existing legislation.

Council Resolution CF-18-77, adopted by the Council February 28, 1977, sets forth the duties and powers of the Budget and Finance Committee of the Navajo Tribal Council. Among the procedures set forth in that statute for the control of the budgetary process of the Navajo Nation's government is the requirement that requests for interim budget revisions be submitted to the Committee for its approval or disapproval prior to their submission to the full Council, if submission to the Council is required at all.

Section 10 of the statute (which section clearly was intended to take effect immediately, as opposed to section 9) makes no exeception for any kind of interim budget revisions. It was not argued by counsel for Appellants that the appropriation at issue here was anything but an interim budget revision, not could it have been anything else since the budget for Fiscal Year 1977 had long before been approved and implemented when this emergency appropriation was requested.

In fact, before approving the appropriation, the Navajo Area Director of the Bureau of Indian Affairs specifically requested the Chairman to identify the source of the funds for this special expenditure. The Chairman did so, apparently without consultation either with the Budget and Finance Committee or the Council.

Therefore, it is clear that the Council intended to and did establish a budget procedure that requires the Budget and Finance Committee's approval of interim budget changes such as the one represented by CAP-32-77 before such changes are voted on by the full Council.

We cannot understand how any court could assume without clear legislative direction that the legislature intended to override in a particular, hastily-drawn and approved resolution the fiscal and legislative system that they had so carefully considered and approved only two months before. If any later minor legislation not passed in accordance with the procedures established by the Council itself can automatically override such procedures, one would rightfully wonder what the point of having procedures would be. What the courts would be left with is chaos. No one could ever be sure whether the procedures established by the Council really had to be complied with. Due process of law would be a joke, available when useful to certain people, something to be ignored when not so useful.

We do not intend to be the ones to tell the Navajo Tribal Council that it was "going through the motions" of approving meaningless legislation when it passed CF-18-77 and that this Court can give no substance to that resolution. In the absence of a clear intent on the part of the Council to repudiate or suspend that act and in the absence of clearly-defined Council procedures, we must rule that CAP-32-77 is the invalid legislation because it was passed in a manner inconsistent with the substantive legislation of CF-18-77.

We are reminded at this point that the Navajo Nation possesses no constitution. It is for this reason that the Navajo courts must be so careful to preserve the concepts of due process of law embodied in the Indian Civil Rights Act. Analyzing legislation so as to guarantee that the process by which the legislature gives us the laws which we must interpret and enforce is consistent and fair to all is absolutely essential to the preservation of Navajo sovereignty and to the avoidance of actions which might otherwise be in violation of federal law.

Had CAP-32-77 expressly repealed all prior inconsistent resolutions (as did CO-65-77) or at least had it expressly suspended CF-18-77, then we would have no problem upholding CAP-32-77. But unfortunately, the drafters of that act were hasty and consequently deficient in their work. As a result, we must rule that CAP-32-77 is invalid.

IX.

This Court, after reading the briefs, on its own raised the question of the relationship between this expenditure and 25 U.S.C. 81. Counsel for both appellants and appellees were questioned on this matter.

This Court has long been aware that the Department of Interior has interpreted this statute to mean that any and all attorneys receiving tribal monies for services rendered to a tribe or officers and organizations of the tribe acting in their tribal capacities must first

have a contract approved by the appropriate tribal governing body and by the Department of Interior.

We cannot understand this long-standing interpretation at all. 25 U.S.C. 81 is clearly intended to cover only those attorneys providing claims services. "Claims attorney" is a term of art. The services such as those which F. Lee Bailey provided to the Navajo Nation on behalf of Peter MacDonald are clearly not covered by 25 U.S.C. 81.

We note that this was the position taken by the Field Solicitor for the Navajo Area in an unlightening memorandum from him to the Area Director, who had raised the same question we now raise. However, the matter concerns us because we are charged with applying federal law when it may be applicable. See 7 N.T.C. 104 (a). We would have had no doubts that 25 U.S.C. 81 was inapplicable except for its common application to all attorneys receiving tribal monies for legal services to the tribe.

It cannot seriously be argued by appellants that Mr. Bailey rendered no service to the Navajo Nation because the very resolution authorizing the payment of money to him required him to submit invoices to the Controller of the Navajo Nation is order to receive payment. In addition, Mr. Stuhff, counsel for Appellants, argued that the expenditure served a public purpose in that the Council was providing legal services for Mr. MacDonald only in his capacity as Chairman of the Navajo Tribal Council. We take him at his word insofar as the

internal consistency of Appellants' argument goes.

We therefore rule that the appropriation was not in violation of 25 U.S.C. 81 and add that we expect consistency in the application of this statute from the Department of Interior. We do not expect that any tribal attorneys rendering non-claims services to the Navajo Nation will be asked to comply with this statute in view of the interpretation (such as it was) rendered in Mr. Bailey's case.

X.

The final issue is whether the expenditure was for a public or a private purpose and, if for a private purpose, whether Navajo law prohibits such an expenditure.

This question can only be answered by reference to Navajo tradition and by an analysis of Navajo history, especially as that history related to the land which produces all Navajo income. The Navajo People are supreme and all residual power lies with the People. In the end, all monies spent by the Navajo Tribal Council are monies of the Navajo People.

Because we cannot adequately explain our ruling on this point in English, we have chosen to announce this part of our decision from the bench in Navajo. This part of our opinion will then be transcribed into Navajo at the earliest possible date and issued as a supplemental part of this decision.

For the reasons we have already stated above in English, the decision of the Shiprock District Court of the Navajo Nation is hereby AFFIRMED.

WILSON HALONA, CECIL LARGO
WILLIS H. PETERSON, RAYMOND R. SMITH
MARY WALLACE AND JIMMY WOODY

vs.

PETER MACDONALD, Individually and in his capacity
As Chairman of Navajo Tribal Council; and ELDON HANSEN
in his capacity as Controller of the Navajo Nation

Opinion Of The Shiprock District Court

Decided on May 18, 1978

Donald Benally, Shiprock, New Mexico, for Plaintiffs-Appellees Halona, Largo, Peterson, Smith and Woody

Richard Hughes, D.N.A., Window Rock, Arizona, and Wilbert Tsosie, D.N.A., Shiprock, New Mexico, for Plaintiff-Appellee Wallace

Michael Stuhff, Legal Department of the Navajo Nation, Window Rock, Arizona, for Defendants-Appellants

JOHN, District Judge

NATURE OF THE ACTION

Ths is an action in which plaintiffs, who are members of the Navajo Tribal Council, are seeking an application for a permanent injunction to enjoin Peter MacDonald, individually and as Chairman of the Navajo Tribal Council and Eldon Hansen, in his capacity as Con-

troller of the Navajo Nation from expending any monies from the $70,000.00 which was by Tribal Council Resolution appropriated on April 5, 1977 for the defense of defendant MacDonald in a criminal case then pending against him in the United States District Court in Phoenix, Arizona.

SUMMARY

On April 4, 1977, a special session of the Navajo Tribal Council was called by defendant MacDonald and the Navajo Area Director of the Bureau of Indian Affairs.

The agenda prepared for the special session contained five substantive items. What was later enacted as Resolution CAP-32-77, and which gave rise to the controversy, was not one of those items. The Tribal Council approved the agenda by a vote of 54-0.

After the special session was underway, the Advisory Committee approved an addition to the agenda consisting of three items. One of those items was a resolution amending the budget for fiscal year 1977 to appropriate $70,000.00 for legal fees and expenses for defendant MacDonald's defense in a criminal case then pending against him in United States District Court in Phoenix, Arizona.

The proceedings for which the funds appropriated by CAP-32-77 were sought arose out of an indictment issued February 9, 1977 charging defendant MacDonald with eight felony counts. The

indictment alleged that defendant MacDonald, in his position as Chairman of the Navajo Tribal Council, defrauded an Arizona utility company doing business with the Navajo Tribe by obtaining money from the company for personal gain.

The Advisory Committee never did see the proposed resolution CAP-32-77 but approved its addition to the agenda for the special session; however, the Tribal Council never approved such an addition.

On April 5, 1977, the Council debated the above resolution at considerable length before approving it by a vote of 35 in favor and 19 against. Resolution CAP-32-77 was never presented to the Budget and Finance Committee of the Navajo Tribal Council.

During the debate on the resolution, the Chairman of the Budget and Finance Committee, Raymond Smith, attempted, without success, to gain the floor to raise a question as to why the Budget and Finance Committee was by-passed, but defendant MacDonald, who was presiding at the session, refused to acknowledge him and the resolution thus passed.

This action was filed on May 3, 1977, and a temporary restraining order was issued on the same day restraining defendant Hansen from paying out any monies pursuant to CAP-32-77, and the Court set May 18, 1977 at 2:00 p.m. for hearing the injunction.

Defendants MacDonald and Hansen filed motions for change of Venue and Disqualification of the presiding Judge on the 17th day of May -- a day prior to the hearing and the motions were denied. This Court heard arguments of both counsel and adduced testimony from plaintiffs and other witnessess on May 18, 1977.

CONTENTION OF THE PARTIES

Plaintiffs contend that the appropriation pursuant to Resolution CAP-32-77 by Navajo Tribal Council absent Budget and Finance Committee review and recommendation is contrary to the laws of the Navajo Nation, and although the Navajo Tribal Council is the law making body of the Navajo Nation, they cannot place themselves above the laws they create and cannot act beyond the scope and authority of the laws they create without first duly amending or repealing those laws.

Plaintiffs further contend that the above referred to acts of the Council violate the mandate of 2 Navajo Tribal Code 365 and any appropriations such as CAP-32-77 in violation of Council procedures and the substantive law of the Navajo Nation is unlawful and void.

Defendants contend that the Navajo Tribal Council, being the only law making body in the Navajo Nation, has the Supreme Authority to do whatever they wish or desire absent any constitutional restriction on their powers, and their legislative actions are above judicial review, that this Court would be dictating legislation to the

Council if it decides this case.

ISSUES

There are a number of minor issues presented to this Court and will be considered in the opinion. The major issue is:

1. Absent any constitution, can the Navajo Tribal Council, as the supreme law making authority on the Navajo Nation, pass and enact legislation in violation of its procedural process and/or the mandate of the Navajo Tribal Code without first duly amending or repealing it?

The plaintiffs filed suit in the District Court of Shiprock, Navajo Nation, New Mexico to enjoin the allegedly unlawful expenditure of the Navajo Tribal Trust Funds under CAP-32-77. The complaint alleged that defendant MacDonald, as Chairman of the Navajo Tribal Council, was indicted by a Federal Grand Jury charging him with felony counts of defrauding an Arizona utility company which was doing business with the Navajo Tribe, and as result of that indictment the Navajo Tribal Council passed and approved Resolution CAP-32-77, which amended fiscal year budget '77, appropriating $70,000.00 of trust funds of the Navajo Nation for the legal defense and expenditures of defendant MacDonald.

This controversial legislation was the subject of a lengthy debate during the second day of a duly convened special session of the

Navajo Tribal Council on April 5, 1977. During this lengthy debate, plaintiff Raymond Smith, Chairman of the Budget and Finance Committee, attempted, several times without success to gain the floor to ask why the Budget and Finance Committee was by-passed in this instance as the matter dealt with a interim budget revision. Defendant, MacDonald, who was presiding over the session, refused to acknowledge plaintiff Smith. The resolution was then approved by simply a majority vote of 35 in favor and 19 opposed.

On April 28, 1977, the acting Area Director of the Bureau of Indian Affairs approved the resolution.

On May 3, 1977, this suit was filed and a temporary restraining order was granted the same day enjoining defendant Hansen from paying out any sums pursuant to CAP-32-77; however, the temporary restraining order was not served until May 11, 1977 for reasons not known to this Court.

On May 17, 1977, Defendants moved to dissolve the temporary restraining on the grounds that the temporary restraining order was issued in violation of Rule 18 of the Civil Procedure requiring notice and hearing; the temporary restraining order was issued in violation of Rule 18 of the Civil Procedure requiring the applicants to post a security bond; the full Navajo Tribal Council has the authority to approve the expenditure of Tribal funds to meet "emergent and unusual circumstances."; the Area Director of the Bureau of Indian Affairs has no power to approve or disapprove the agenda for any

session of the Tribal Council; the complaint fails to join as indispensable parties, the real parties in interest, the Navajo Nation, the Navajo Tribal Council and the United States; the provisions of 25 USC § 81 are inapplicable to any contract by which Peter MacDonald retains counsel to represent him in a criminal trial and the subject matter is a non-justicable political question. Defendant also filed motions to change venue to Window Rock District Court and to disqualify the Shiprock District Judge.

This Court must first deal with the motions for venue and disqualification. Defendants' motion for change of venue was received by the Court a day prior to the hearing on May 17, 1977. Since a trial date had been scheduled prior to the filing of the motion, and that it was received one day prior to date for hearing, arguments on the motion was held the same day the injunction was heard. Defendants' motion was denied. Defendants' contention that Rule 26 mandates that the action shall be filed in the district in which defendant resides is taken into consideration; however, venue is proper in this Court, for the convenience of the parties and witnesses, and furthermore it would be inappropriate to require every person seeking redress against tribal officials to travel to Window Rock to prosecute an action.

Defendants' motion to disqualify the District Judge, on the grounds that Counsel for plaintiff Donald Benally is a nephew to the judge, is also denied on the grounds that such a relationship does exist but only in traditional Navajo clan relationship.

The issue of the temporary restraining order being issued in violation of Rule 18 requiring the posting of a bond requires little attention from this Court. The plaintiffs are members of the Navajo Tribal Council with the exception of plaintiff Mary Wallace. Under our rules, the posting of bond is not required of officers of the Navajo Nation. The Court does, however, agree in part with defendants' contention that the temporary restraining order was issued in contra certain requirements in Rule 18; specifically, the requirement of the certification of counsel as to why the temporary restraining order should issue without notice. Since defendants did not move to dissolve within the two day requirement set forth in Rule 18, he has waived his rights to dissolve.

Defendants have also advanced the argument that the Navajo Tribal Council, Navajo Nation and the United States are indispensible parties. There is no need for joinder of the United States or of any other members of the Tribal Council, as they will not be adversely affectec by the outcome of this suit. The Navajo Tribe has voluntarily appeared and fully participated in this action so that no joinder need be ordered.

During the course of this suit, all parties found no disagreement as to the supreme law making authority in the Navajo Nation being vested in the Navajo Tribal Council. This Court also vigorously supports that contention. The Power and Authority of constitutionless governments such as the Navajo Tribal Government was compared as similar with the law of England and Australia by defendants' counsel--law making authority is exclusively that of the governing

legislative body. In this case the argument which purports the Navajo Tribal Council, being the supreme law making authority, has unchecked power to enact any legislation it deems fit, even those which violate existing law, makes this Court very uneasy in view of the ancient phrase from 11 Coke, 74 NIHIL ALIUD POTEST REX QUAM QUOD DE JURE POSTEST (The king can do nothing except what he can by law do).

It is well settled that the Navajo Nation is not a lawless Nation. Its governmental powers are limited by laws--laws enacted by the Congress of the United States, by the Navajo Tribal Council (Codified in the Navajo Tribal Code), and the Treaty of 1868.

The Navajo Tribal Council, in an effort for more efficiency, established for itself various procedural mechanism by which proposed resolutions are to be brought before it for consideration--they were subsequently codified in the Navajo Tribal Code. Once the Council passes and approves any resolution binding themselves by that law--they are bound by such law--they are then bound by such law and can only do what by law they themselves established allows them to do. The Navajo Tribal Council cannot violate their laws nor can they place themselves above the laws they create. If such a government were to exist in the Navajo Nation, it would violate all the principles of a democratic government.

Tribal Council Resolution CAP-32-77 was an interim budget revision as the term is used in 2 Navajo Tribal Code § 365. The lan-

guage of that section of the code is not ambiguous. It clearly mandates that such an interim budget revision shall be reviewed for approval or disapproval by the Budget and Finance Committee of the Navajo Tribal Council before it is submitted for Tribal Council consideration. In this instance, the Budget and Finance Committee did not have an opportunity to exercise their mandate and the budget revision in the form of CAP-32-77 went directly from the Advisory Committee to the Council. It was stipulated by counsel for defendants that the Code § 365 clearly is the controlling factor in this matter.

The passage of CAP-32-77 was in violation of 2 Navajo Tribal Code § 365 there being no lawful basis existing for any departure therefrom. This Court does not dispute the authority of the Council to expend funds from the Tribal Trust account for "emergent or unusual circumstances." However, no testimony offered by defendants that the situation giving rise to CAP-32-77 was an emergency or an unusual circumstance. There was testimony that the Council has in the past appropriated monies without review by the Budget and Finance Committee. The consensus is that the Council normally approves community projects grants without Budget and Finance Committee review, or during severe drought or storm conditions such as the 1968 devastating snow storms.

The manner in which the Council approved CAP-32-77 is a radical departure from that established practice. The appropriation for community projects or drought and other storm relief benefits multitudes of Navajos--not just one individual as in Resolution CAP-32-77. In this

regard, Resolution CAP-32-77 constitutes appropriation of public funds for a purely private purpose.

It is a fundamental principle of law that public funds may not be used for private purposes, and that any such use must be declared invalid, and that principle must apply to funds of the Navajo Tribe.

The question of misappropriation of tribal funds by the Tribal Council is not a non-justiciable political question; the Navajo District Courts are fully able to measure the action taken against the existing law, and to determine whether the law has been violated, and when called upon to do so in a proper case, the Courts may not decline the obligation. Thus, as in this case for Navajo District Courts to rule as to the legality of an action of the Tribal Council, it no violation of the principle of separation of powers in the Tribal government.

This case presents appropriate grounds for invoking this Court's equitable powers to prevent any further expenditures of Tribal Funds under CAP-32-77, in that there is no adequate remedy at law to prevent such funds from being disbursed and once they are disbursed the likelihood is that they could not be recovered.

Resolution CAP-32-77 was unlawfully brought before the Tribal Council, because of the failure to comply with 2 Navajo Tribal Code § 365, and it is unlawful on its fact in that it appropriates public monies purely for private purpose; therefore, a permanent injunction is granted.

No. SC-CV-03-10

NAVAJO NATION SUPREME COURT

Timothy Nelson,
Petitioner-Appellant,

v.

Initiative Committee to Reduce Navajo Nation Council, Office of the President, Joe Shirley, Jr.,
Respondents-Appellees.

The Navajo Nation Council, represented by Three Delegates,
Real Parties in Interest.

OPINION

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

An appeal from the decision from the Office of Hearing and Appeals, Cause No. OHA-EC-002-09, Administrative Hearing Officer Karen Bernally, presiding.

John Trebon, Flagstaff, Arizona, for Appellant; Albert A. Hale, Window Rock, Navajo Nation, for Appellees; James E. Fitting, Albuquerque, New Mexico, for Amicus Eddie J. Arthur; Frank M. Seanez, Office of Legislative Counsel, Window Rock, Navajo Nation, for Amici The Navajo Nation Council, and Three Delegates Ernest Yazzie, Leonard Chee, and Lee Jack as representatives of the Council as a whole; James W. Zion, Albuquerque, New Mexico, for Amicus *Hada'a sidi*; Louis Denetsosie, Regina Holyan and Henry Howe, Window Rock, Navajo Nation, for Amicus Navajo Nation Department of Justice; Jack Whitehorse, Jr., Amicus pro se, Steamboat, Navajo Nation; and Levon Henry, DNA Legal Services, Window Rock, Navajo Nation, for Amici *Azee' Bee Nahgh1* of the *Din4* Nation, *Din4 Hat' aalii* Association, Inc., and *Din4* Medicine Men Association, Inc.

This matter arises from an appeal of a December 15, 2009 initiative election in which a majority of Navajo voters approved a reduction of the size of the Navajo Nation Council from 88 to 24 delegates. This phase of the appeal concerns whether attorneys' fees may be awarded out of $150,000 in public funds appropriated by the Intergovernmental Relations Committee to "Navajo Nation persons" for purposes of challenging the above election through the hire of

independent counsel. Specifically, the assistance was spent in hiring John Trebon to represent Appellant Nelson in his filing of a grievance against the President of the Navajo Nation and the Initiative Committee to Reduce the Navajo Nation Council before the Office of Hearings and Appeals (OHA), and then appealing the decision of the OHA to this Court.

We find that the enactment and grant agreement procedures regarding the above public funds fail to comply with fiduciary safeguards in place pursuant to 2 N.N.C. § 164(B)(2), 2 N.N.C. § 185(A), the Navajo Nation Appropriations Act at Title 12, Chapter 7 *et seq.* and regulations promulgated pursuant to the Act, the Council's own policies and procedures concerning financial assistance to private citizens, and well-settled fiduciary principles embodied in our fundamental law as noted herein.

I

PROCEDURAL HISTORY

We issued our Opinion in this appeal on May 28, 2010, corrected on June 2, 2010. On June 18, 2010, we issued an *Order for Supplemental Briefing Concerning Attorney's Fees and Costs* requesting clarification as to the source of the appropriated funds, and all relevant regulations, resolutions and minutes regarding the specific appropriation and regarding the general spending of Navajo Nation discretionary funds. Oral argument was held on September 29, 2010 at the Fort Defiance Chapter House with all parties and amici present. As of the date of oral argument, the documents we had requested were not yet received. At oral argument, various sundry matters regarding outstanding documents and admissibility of documents were also discussed and the Court subsequently issued an *Order* setting a further deadline for more information to be provided. Additionally, Amici Three Delegates renewed their jurisdictional challenge and provided information to this Court that showed that their representation by the

Chief Legislative Counsel (CLC) was by formal assignment of the Intergovernmental Relations Committee (IGR) of the Navajo Nation Council, and that the CLC was further required to report on developments in this appeal to the whole Council. Yet, Three Delegates continued to insist that they appear in this case as private citizens.

On October 12, 2010, pending submission of complete information on the appropriation, we issued an *Order and Opinion Denying Jurisdictional Challenge,* No. SC-CV-03-10 (Nav. Sup. Ct. October 12, 2010) *inter alia,* re-designating Three Delegates as representatives of the Real Parties in Interest (RPIs) and disposing of their jurisdictional challenges. On October 21, 2010, RPIs filed a *Response on Conversion of Amicus Curiae to Real parties in Interest and as Representatives*. We address RPIs' response herein. Additionally, Appellees have asked that we reconsider our denial of fees to them as the prevailing party. Appellees failed to submit a request for reconsideration within the proper time limits. However, we will include reconsideration of their request in the context of the appropriation's validity.

The Court now issues its final opinion on all remaining post-review issues.

II

JURISDICTION

Jurisdiction over all post-review matters in this case, including matters raised by amici relevant to attorneys' fees and appropriateness of public funds, is set forth in our *Order and Opinion Denying Jurisdictional Challenge*, *supra,* and is incorporated herein by reference.

III

ISSUES

(a) Whether the Navajo Nation Council is properly designated as Real Party in Interest by representation of Three Delegates;

(b) Whether attorneys' fees and costs may be properly awarded to requesting participants out

of the Navajo Nation Council's appropriation of $150,000 in public funds to pay for Appellant's grievance and appeal.

IV

STANDARD OF REVIEW

When addressing questions of law, we apply a *de novo* standard of review. *Begay v. Navajo Nation Election Administration,* 8 Nav. R. 241, 250 (Nav. Sup. Ct. 2002). The specific issues addressed in this case constitute questions of law.

Additionally, attorneys' fees fits within our Diné concept of *nályéél,* which includes the responsibility to respectfully talk out our disputes and restore harmony through adequate compensation. *Allstate Indemnity Co. v. Blackgoat (I),* 8 Nav. R. 627 (Nav. Sup. Ct. 2005). However, "adequate award" also depends on the ability to pay. *Benalli v. First Nat. Ins. Co. of America,* 7 Nav. R. 329 (Nav. Sup. Ct. 1998). *Nályéél,* which emphasizes relationships, will not support an award of fees, no matter how justly earned, from funds taken improperly from the public treasury.

V

REAL PARTIES IN INTEREST

Three Delegates state that they had made a choice to participate as private citizen *amici* and not to intervene as parties; therefore, they should not be designated representatives of the Council and Real Parties in Interest (RPIs). Citing federal court cases, Three Delegates assert that as amici, they are volunteers who do not assume the risks and obligations of representing parties and, by conscious decision, are not participants and do not step into Appellant's shoes. Additionally, their conversion from amici to RPIs at this late date violates Navajo notions of due process and fundamental fairness. We disagree.

As further elaborated *infra,* RPIs funded Appellant's legal representation by John Trebon in this appeal through a direct payment agreement for retainer fees and costs whereby RPIs have an interest in Mr. Trebon's performance of the grant-related activities, issue payments directly to him, and require his direct reports and compliance while no document was introduced which required either the involvement or consent of Appellant. No Attorney-Client agreement between Mr. Trebon and the purported client, Mr. Nelson, was submitted in the SAS Review process[1] and it is assumed that no such agreement exists. *Supplemental Brief of Louis Denetsosie, Attorney General of the Navajo Nation* at 1, July 16, 2010. The absence of any contract between the attorney and his purported client makes it plain that the primary relationship is between RPIs and the attorney for both performance and fees.

Furthermore, CLC Frank Seanez volunteered that he participated in this appeal by formal assignment of the IGR. RPIs have strenuously and directly participated in this appeal through Mr. Seanez's legal arguments and substantial challenges, which from the very beginning of this appeal were submitted more in the manner of a party. We have treated their submissions as such. In our *Order and Opinion Denying Jurisdictional Challenge, supra,* we fully addressed RPIs' challenges and explained more fully why this designation is proper.

We stated in *Halona v. MacDonald,* 1 Nav. R. 189 (Nav. Ct. App. 1978) that "no court can adjudicate directly upon a person's right without the party being either actually or constructively before the court." *Id.* at 201, *citing Shields v. Barrow, 5*8 U.S. 130 (1855). We stated that "the key word is 'constructively.'" We stated that the interests of a party "may be in certain cases adequately and fairly represented by another litigant, thus in effect putting the indispensable party before the court for all the purposes which the doctrine seems to effectuate."

[1] Statutorily required administrative review of Navajo Nation contracts pursuant to 2 N.N.C. § 164.

Id. We find that RPIs have been constructively parties in this litigation from its inception through its agreement with Mr. Trebon and through Mr. Seanez with Three Delegates acting, essentially, as strawmen for the Council. We further find that the Council had ample notice that the legality of its appropriation was questioned, and has had every opportunity to be substituted as an actual party in order to avoid possible infirmities. There is no due process issue.

The objection of Three Delegates to their designation as representatives of the Real Parties in Interest is duly noted and denied.

VI

DISCUSSION

There are several phases to this appropriation: In the enactment phase, funds for this appropriation were moved from one object code to another in the Office of the Speaker as a "budget reallocation" which, as a post-appropriations budget revision, requires a 2/3 majority vote of the IGR pursuant to 2 N.N.C. § 185 and no external review. In the Navajo Nation contract review or "SAS Review" process, the contract for payment would ordinarily be subject to fiscal management review for compliance with Navajo Nation laws prior to execution, which would be the third phase. However, in this case, a direct payment agreement, styled as a "grant agreement," was entered into between Appellant's counsel and the Speaker before the SAS review even commenced. There are irregularities in the enactment, and use of the "grant agreement" as payment for "financial assistance" that profoundly concern this Court.

A. Program Reallocation Under 2 N.N.C. § 185

On December 23, 2009, the IGR appropriated Navajo Nation General Funds "to fund independent legal counsel for representation of Navajo Nation persons to contest the December 15, 2009 Special Election." *Intergovernmental Relations Committee Resolution IGRD-248-09*

(December 23, 2009). The IGR voted 9-0 to reallocate $150,000 from the Office of the Speaker, Business Unit #101015, Object Code #7110 (Programs) to the same business unit, Object Codes #6660, 6670 and 6680 (Attorneys Fees and Expenses). The legislation had been prepared by the CLC Mr. Seanez at the request of Thomas Walker, Council Delegate for Birdsprings, Leupp and Tolani Lake chapters. *Memorandum from Frank Seanez to Thomas Walker,* December 22, 2009, *Second Submission of Documents to the Court (hereinafter "Second Submission") filed by Louis Denetsosie, Attorney General of the Navajo Nation.* A draft of the legislation was forwarded to Mr. Walker for review on December 22, 2009. *Id.* Mr. Walker also sponsored the legislation. Motion for approval of the legislation was made by Johnny Naize, Vice-Chairperson, Transportation and Community Development Committee; and seconded by Raymond Joe, Chairperson, Public Safety Committee. The legislation was engrossed as IGRD-248-09. Office of Management and Budget (OMB) Budget forms attached to IGRD-248-09 indicate that $50,000 was budgeted as fees and $100,000 as expenses. The funding source is identified as General Funds.

The very brief minutes pertaining to the passage of IGRD-248-09 show that the proposed resolution was read by the sponsor, whereupon the Speaker asked for a motion and a second, the sponsor said thank you, and the vote was taken. *Transcription of IGR Dec, 23, 2009 Committee Meeting,* June 28, 2009, *Submission of Materials Concerning Supplemental Briefing (hereinafter "Supplemental Materials") filed by Appellant Nelson.* The legislation itself consists only of the above reallocation and a direction to OMB to reallocate the funds, plus budget forms attached as Exhibit A, with no justifications, program impact analyses, or other findings.

The circumstances surrounding this funding are obscure. In communications with staff at the Officer of the Controller, the Chief Legislative Counsel describes the reallocated funds as

"financial assistance." *Memorandum of Frank Seanez to Valerie Bitsilly,* February 3, 2010, *Second Submission, supra.* However, there is no information on the original appropriated purpose of the transferred funds, no clear designation of the funds as "financial assistance," no justification and no analyses of how the transfer will serve program purposes. There is no such program purpose as "financial assistance," and no statutory basis for Council "financial assistance."

We note that an "Assistance" object code exists in the Speaker's budget. However, these funds, originally appropriated to "Programs," were moved to the "Attorneys" object codes, and not to "Assistance." The "Attorneys" object code is not proper for funds intended for "financial assistance," and designating it as such obscures an honest accounting of the Council's financial assistance funds. While this may seem a small technicality, it is one of numerous irregularities in this appropriation.

Expenditures by public officials are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment. Fiscal matters are governed by Chapter 7, Title 12 of the Navajo Nation Code. The Speaker and members of the Council are not free to spend public funds for any "public purpose" they may choose, but must utilize appropriated funds in accordance with the legislatively designated purpose. 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." *Thinn v. Navajo Generating Station*, No. SC-CV-25-06, slip op. 7 (Nav. Sup. Ct. October 19, 2007) *citing Thompson v. Navajo Nation*, 6 Nav. R. 181, 183-184 (Nav. Sup. Ct. 1990). This intrinsic principle was codified as follows: "The Navajo Nation government has a fiduciary responsibility to account for public funds, to manage finances wisely, and to plan for the adequate funding of

services desired by the Navajo People… .” 12 N.N.C. § 800. “In Navajo society, the integrity of the government is the key to its viability. If the governed cannot trust that their government is essentially just and accountable, then there arises widespread belief that the government benefits only a few.” *Tuba City Judicial Dist. v. Sloan*, 8 Nav. R. 159 (Nav. Sup. Ct. 2001). This means that governmental fiscal actions must be performed in the light of day and be fully explained.

Mr. Seanez asserts that 2 N.N.C. § 185(A) permits sizeable reallocations of program funds away from the original appropriated purpose based solely on a 2/3 majority vote of a standing committee. In light of the fiscal responsibilities imposed by the whole of our laws, and also to the restrictions contained in Section 185 itself, we cannot agree.

According to the FY2010 Navajo Nation Budget Instructions and Policies Manual (Manual), which sets forth regulations promulgated pursuant to the Navajo Nation Appropriations Act (Act) at Title 12, Chapter 7 *et seq.*, budget transfers that change the program’s original appropriated purpose are to be considered “reallocations,” further subject to the enactment procedure set forth at 2 N.N.C. § 185(A) (Committee Powers). *Manual, Section II(A)(8) and Section VII(E)(3)* (June 10, 2009). The difficulty in *this* appropriation is that the original appropriated purpose was not made known in this realloaction, therefore we cannot know whether the movement of these funds is even properly a “reallocation,” nor do we know what the original program priority was, and if the transfer compromised it in any way.

The following conditions under the Act apply:

> The purpose of a budget revision request shall be thoroughly justified. The justification shall include an analysis of the impact to the object code the transfer is being made from, the remaining balance for the funding term, the sufficiency of the amount being transferred, the object code the transfer is being made into and the impact to the original intent of the fund. . . . For programs funded by Navajo Nation funds, impacts on the programs approved performance criteria must be clearly stated.

Manual, Section VII(E)(1) (Emphases added).

2 N.N.C. § 185(A) provides:

> Subject to existing funding or contract requirements, the committees, Chapters, boards or commissions may reallocate funds appropriated by the Navajo Nation Council to the committees, boards and commissions and to divisions, departments and programs over which the committees have oversight authority, provided that funds are determined available by the Controller; further provided that such reallocation is upon the request of the affected division, department or program and further provided that reallocation of funds is by two-thirds (2/3) vote of the full membership of the committee, board or commission.

Id. (Emphases added)

By requiring that the Controller determine availability of funds and that the reallocation is "subject to existing funding . . . requirement," Section 185(A) reinforces the Act's fiscal conditions for justifications and program impact analysis pursuant to Section VII(E)(1) of the Manual, as these provide the basis for determining whether there are programmatic restrictions on the transfer and if there are sufficient funds to achieve the original appropriated program purpose. The Act and its regulations are comprehensive and "designed to ensure compliance with the mandate" that the Navajo Nation comprehensive budget balance revenues and expenditures. 12 N.N.C. § 820 (D). Therefore, no waiver may be implied as to any of their provisions and regulations.

Mr. Seanez has asked this Court to take Section 185(A) as, essentially, repealing all other fiscal requirements imposed by the Act and its provisions on reallocations. We reject such a position. We note that in his capacity as CLC, Mr. Seanez's frequent position was that a provision favorable to a certain position may be read by itself to the exclusion of all other provisions. We exhort the incoming 22nd Council to apply its statutes comprehensively, and in combination with principles of sound government and our fundamental laws as embodied in our statutes and fundamental law.

Additionally, an element of Section 185(A) requires that the "affected program" request the reallocation. The brief minutes and very brief legislation show no such request was made.

Historically, this Court has looked first to whether the Council strictly adhered to its own enactment procedures in passing the appropriating resolution. *Judy v. White,* 8 Nav. R. 510, 538 (Nav. Sup. Ct. 2004), *citing Peabody Western Coal Co. Inc. v. Nez,* 8 Nav. R. 132, 138 (Nav. Sup. Ct. 2001) (Procedural requirements for the enactment of Navajo Nation legislation must be strictly observed). It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. *Shirley v. Morgan*, SC-CV-02-10, slip op. at 13 (Nav. Sup. Ct. May 28, 2010). We have further stated that "[w]ithout specific findings, the purpose of any government action will be questioned." *Shirley v. Morgan,* SC-CV-02-10, slip op. at 14 (Nav. Sup. Ct. May 28, 2010).

We easily find that at least one element required under the regulations of the Act and Section 185(A) was not performed in this reallocation enactment. We find the appropriation invalid for non-compliance with 2 N.N.C. § 185(A) and Section VII(B)(1) of the Manual.

B. The Council's Financial Assistance Program

Mr. Seanez stated that the grant agreement "is <u>to provide financial assistance</u> to Navajo citizens in the hiring of attorneys in litigation" for the purposes set forth in IGRD-248-09. *Id.* (Emphasis added). *February 3, 2010 Memorandum of Frank Seanez, supra*. However, it is undisputed that there is no statutory authority for such a program, and the ability to disburse discretionary funds is not expressly stated in the limited powers of the Navajo Nation Speaker as set forth at 2 N.N.C. § 285.

That being said, various resolutions submitted by the Navajo Nation Auditor show that the Council has gone forward in promulgating "policies and procedures" for two methods of Council financial assistance to private citizens:

Pursuant to *IGRMA-63-07, March 9, 2007; IGRAP-87-07, April 2, 2007; IGRS-69-09,*

September 21, 2009, passed by the IGR, the heads of the standing committees have set forth "policies and procedures" that empower Council Delegates to award financial assistance as "constituent services" on the basis of a constituent's financial need and a list of priorities that also include "other purposes"; such awards are uncapped, must be paid by the Council's financial officer almost immediately upon approval by the Speaker, and subject to no procedure and no accountability.

Pursuant to *IGRF-15-07, February 5, 2007, IGRMY-64-09, May 13, 2009; IGRF-20-07, February 9, 200*, passed by the IGR, the heads of the standing committees have set forth "policies and procedures" that empower the Speaker to award financial assistance for burial, emergency and youth allowance, in amounts that range between $100 - $3,500, the highest amounts which include burial assistance to Council delegates and other government officials, but otherwise are subject to no procedure nor accounting. The Speaker's awards are subject to his own approval and are disbursed internally by the Council's financial officer with no external review. The documents submitted to this Court suggest there is a similar financial assistance program in the Office of the President and Vice-President.

Amicus *Hada'a Sidi* contends that the availability of "financial assistance" pursuant to the above programs are not publicly known, is not advertised, and there is no clear application procedure for the Navajo People to make full use of this assistance, and that this creates a program that is rife with corruption.

The policies appear to have been enacted by IGR resolutions subject to no full Council vote, no committee review, and no external input. Additionally, the amendments lack the strike-throughs and underlining required for new laws and, therefore, plainly are not properly enacted. *See Judy v. White*, 8 Nav. R. 510 (Nav. Sup. Ct. 2004). They provide that amendments to the

financial assistance procedure may be made by the IGR alone, and Resolution IGRAP-87-07 specifically purports to exclude audits from specific past periods.

We understand from the submitted documents that there is a standing practice of the Council appropriating monies for financial assistance as amendments or budget revisions to a fiscal year's budget, even when there is no surplus. Council Resolution CJA-04-09 (January 28, 2009) provided to the Court shows that the Council expressly waived all Navajo Nation laws when it withdrew $11 million out of the Personnel Lapse Fund and, *inter alia*, appropriated the Office of the Speaker $5.6 million specifically for "assistance." *Id*., *Supplemental Materials*, *supra*. The legislation was passed as an emergency legislation on January 28, 2009 purportedly to buy eyeglasses for Navajo children, but only $300,000 out of the millions in appropriations were designated for that purpose.[2] The laws expressly waived included the Navajo Nation Appropriations Act at Title 12 *et seq.*

There has been a great deal of argument regarding how this Court should approach the "public purpose" requirement of *Halona v. MacDonald,* 1 Nav. R. 341 (Nav. Ct. App. 1978) in light of the lack of statutory basis for the Council's practice of providing "financial assistance" to constituents. It is undisputed that there is no statutory basis for discretionary Council spending, and no actual source of funding known as "discretionary funds." From the documents submitted, it appears that the Controller is called upon by the Council during the course of a fiscal year to identify accounts in which funds are available for appropriation as an amendment, supplemental, or budget revision. The Personnel Lapse Fund was such an identified funding source in 2009 and was raided through Resolution CJA-04-09 that purported to waive all Navajo Nation fiscal

[2] In *Shirley v. Morgan*, *supra*, we invalidated emergency legislation placing President Joe Shirley on administrative leave because there was no indication that it was a bona fide emergency. We stated that, for reasons of checks and balances, all non-emergency legislation are required to be put through the very stringent process of legislative review and must be co-signed by representatives of at least two of the branches. *Id.* at 39. We repeat that here.

laws.

Our courts have said that when called upon, the court may not decline the obligation to address the misappropriation of public funds." *Halona v. MacDonald*, 1 Nav. R. 341, 351 (S.R. Dist. Ct. 1978), *aff'd, Halona v. MacDonald*, 1 Nav. R. 189 (Nav. Ct. App. 1978). Our fiscal laws and regulations ensure accountability and transparency in enacting legislation that impact the public purse and may not be waived, expressly or otherwise, without consulting the People. We have stated that laws which impact the doctrine of checks and balances, which are built-in to our financial system, are part of our organic law, and may only be amended by the People. *Shirley v. Morgan*, SC-CV-02-10, slip op. at 24-25 (Nav. Sup. Ct. May 28, 2010) and slip op. at 12 (Nav. Sup. Ct. July 16, 2010). People expect government to perform properly, that money will be used in a manner which they have been informed, and will not be used for private purposes. The system that appears to have been developed in the Council for "financial assistance" clearly ignores specific codified laws that require accountability, transparency, and public purposes.

The documentation provided to this Court do not show how the funding in this case came to be designated for representation of private citizen Nelson. The obscurity surrounding the choice of Mr. Nelson is another of the countless irregularities here. Without accountability as to even the choice of the person to be assisted with public funds, the door is open to influence peddling, vote buying, and other vices of an unaccountable government.

A program's funding may be reallocated using the 2 N.N.C. § 185(A) enactment process toward a program purpose. We find that "financial assistance" through disbursements of public funds by individual government officials to constituents without strict accountability and an open application process is neither a statutorily authorized nor an identified Navajo Nation priority

purpose, nor is it an identified governmental purpose under Title 2 pertaining to programs and committees of the Navajo Nation Council. While the incoming Council may choose to create such a direct disbursement program for Navajo Nation officials, the present program has not been duly established with the requisite checks and balances. Therefore, any "financial assistance" appropriation in this case also fails for this reason.

C. Navajo Nation Grants

It is undisputed that $50,000 in retainer fees were paid directly to Mr. Trebon through a "Navajo Nation Grant Agreement" made directly between the Legislative Branch and Mr. Trebon. RPIs assert that use of a "grant agreement" is proper because it was Appellant Nelson who chose John Trebon as his attorney, therefore a payment agreement between the Navajo Nation and Mr. Trebon should not be termed an "attorney contract." subject to Navajo Nation procurement laws.

It is apparent to this Court that irregularities abound in the "grant agreement." The Manual clearly defines "Navajo Nation Grants" and provides for very specific conditions, in relevant part:

> A. Purpose and Funds Availability
>
> The Navajo Nation Council may appropriate funds in the form of Navajo Nation grants to eligible non-Navajo Nation governmental entities for purposes consistent with the Navajo Nation priorities and for services to be provided to the Navajo public. The primary purpose of a Navajo Nation grant is to fund needs and services on a one-time basis. Navajo Nation grant awards are administered through policies and procedures developed by OMB and approved by the BFC. Navajo Nation grant awards are subject to availability of funds . . .
>
> B. Grant Budget Requirements
>
> (2) The entity requesting the grant shall have an approved plan of operation, articles of incorporation, and a federal tax identification number, if the entity is a non-profit organization.
>
> (3) The budget request shall be submitted to the OMB in accordance with the budget preparation instructions, formats and appropriate policies contained in this manual.
>
> (4) The Navajo Nation grant budget proposal shall include the following:

a. A completed Navajo Nation grant application form contained in Appendix F of this manual.
b. Budget forms 1 through 5 and 7 (and 6, if applicable) contained in this manual.
c. The entity must provide an authorizing and approving resolution or similar documentation by its Board or Commission.
d. The entity must provide a listing of current Board or Commission members with current addresses.

(5) Before submittal of the proposed budget to OMB, the budget request shall be reviewed and approved by the respective Navajo Nation division/branch providing similar services or activities, and the budget proposal shall be considered and recommended as that division's or branch's budget request. The grant proposal will be subject to processing/reviews in accordance with 2 N.N.C. § 164 (B).

(6) The respective oversight committee for the Navajo Nation division or branch shall make a recommendation on the funding request.

(7) All Navajo Nation grantees are required to comply with the Navajo Preference in Employment Act, Navajo Nation Procurement Act, the Navajo Nation Business Opportunity Act and the Navajo Nation Appropriations Act during the authorized or active term of the grant.

Id. (Emphasis added).

In this case, there was no inclusion of this grant in a budget proposal, therefore no Section IV mandated budget review by OMB; no grant application; no plan of operations, no resolution or list of board members, no properly detailed budget on a Navajo Nation budget form submitted by the grantee; and no showing that the services rendered were for purposes consistent with Navajo Nation priorities or for services to be provided to the public.

Without looking further as to the reasons why the Council chose to proceed with a "grant agreement," we find that the grant agreement is invalid because a substantial portion of the grant conditions were not met. We further find that the "grant agreement" is, in actual fact, an attorney contract between the Council and Mr. Trebon.

We are aware that the device of "grant agreement" was used once before in 2007 by the Council to hire an attorney for Navajo citizens as a class in a litigation against the Bureau of Indian Affairs. *Supplemental Brief of the Three Delegates* at 12. The one-time use of a grant agreement by the Council to hire an attorney is by no means a customary and long-time practice,

and is not supported by this Court.

D. SAS Review

The grant agreement above was fully executed on January 13, 2010. Navajo Nation Grant Agreement between the Navajo Nation and John Trebon, P.C., *Supplemental Materials*, July 1, 2010. 2 N.N.C. § 164(B)(2) prohibit all Navajo Nation contracts to be executed prior to SAS review. The "grant agreement" was executed without any Navajo Nation fiscal administrative review and, therefore, violated Section 164(B)(2). Additionally, the irregularities in the grant-making process, *supra*, should have been caught in the SAS review process.

On January 15, 2010, two days after the grant agreement was executed, the SAS review process commenced. The Office of Management and Budget (OMB), Office of the Controller, and the Business Regulatory Department were to meaningfully review the agreement for compliance with Navajo law. However, on January 20, 2010, Alvin Wauneka, Acting Department Manager of the Business Regulatory Department (BRD), signed the SAS review sheet with the notation that the agreement had already been signed by the Speaker and was "already in effect." In addition, Mr. Wauneka certified that the "[Navajo Business Opportunity Act] will not apply to this Grant Agreement." *NBOA BRD Certification, January 20, 2010*, *Second Submission, supra.* On January 29, 2010, Dominic Beyale of the OMB stated on the SAS review sheet that "review [by OMB is] not required; see 9-25-06 memo." *Id.*, SAS Review No. 5103, *Second Submission, supra.* This Court cannot imagine how a memo supersedes our fiscal accountability laws.

2 N.N.C. § 164(B)(2) specifically requires the Controller to sign off on SAS review before a contract may be executed. On January 25, 2010, staff from the Office of the Controller submitted a "Sub-Contract Checklist" requiring more documentation from Mr. Trebon. On

February 3, 2010, Mr. Seanez informed the Controller's staff that the sub-contract checklist was improperly utilized as this was a "grant agreement . . . similar to agreements [with lawyers previously made], and "not a contract for procurement of legal services by the Navajo Nation." *February 3, 2010 Memorandum of Frank Seanez, supra*. However, the Controller's staff continued to be concerned. On February 4, 2010, Mr. Seanez directly informed the Controller, Mark Grant, that "the payment of these sorts of legal fees through a grant agreement is not new" and that "the additional scrutiny being provided to this grant agreement, especially in light of the prior practices of the Navajo Nation relative to such matters, is becoming a matter of increasing concern." *Memorandum of Frank Seanez to Mark Grant,* February 4, 2010, *Second Submission, supra.* That same day, the Controller requested a "demand payment" and issued a $50,000 check for "retainer fee for appeal" to Mr. Trebon. *Id*. However, neither the Controller's staff nor the Controller signed the SAS review sheet. No other payments to Mr. Trebon have since been made.

The Department of Justice, required pursuant to 2 N.N.C. § 164(B)(2) to also review contracts for legal compliance, was not part of this SAS review process. The SAS review process of the Legislative Branch apparently by-passes the Department of Justice in contravention of Section 164(B)(2), and at present, Legislative Branch contracts are reviewed internally only. As can be gathered from the irregularities in this case, for the public welfare, the legislating body needs greater oversight than it may prefer.

We find that the SAS review process failed the Navajo People in this case, apparently due to political pressure. Of all officials in the chain of review in this process, the Court finds that the Controller has the fiduciary role and statutory authority to deny release of funds where the Act and its regulations are not complied with. However, the Controller has to perform fiscal

oversight duties while serving "at the pleasure of the Council." 12 N.N.C. §202(B). The Office of the Controller must play its statutory role as the ultimate gatekeeper over the public purse and must be strengthened in this role so that he is never subject to political pressure.

The Controller is reminded that his office "ensures compliance with all appropriate fiscal and financial policies." *Manual, Section XII(B).* His duties as set forth at 12 N.N.C. § 850 include monitoring and reporting on actual expenditures versus budgeted expenditures; the authority to restrict expenditures in the event of shortfalls; and for developing a system for evaluating whether requirements have been met for all of Navajo Nation branches, divisions, departments, and programs. Additionally, 2 N.N.C. § 164(B)(2) requires the Controller to participate meaningfully in the contractual review process. Finally, 12 N.N.C. § 810 provides that:

> Appropriated funds or any other funds received by the Navajo Nation on which a condition of appropriation or expenditure is placed may not be lawfully expended until the condition of appropriation or expenditure is met. It is the responsibility of the Controller to ensure that funds are expended in accordance with the conditions placed on the appropriation or expenditure.

12 N.N.C. §810(I).

We urge the political branches, Council and the President to ensure that the Controller's position is secure from political pressures as he or she watches over the public treasury.

VII

FISCAL STANDARDS

The parties and amici have called upon this Court to provide guidelines for the Council's spending of public funds. Amicus *Hada'a Sidi* has asked that we "clarify Navajo Nation law by clearly defining the fiduciary duties of the Navajo Nation Council to the Navajo People when spending their money… ." *Amicus Hada'a Sidi Brief* at 9.

Governmental fiduciary duties are already set forth at 12 N.N.C. § 800, the Act, and its regulations. Pursuant to both Title 2 and 12, policies and procedures regarding spending must first be statutorily authorized before they may be deemed valid. It follows that policies and procedures that are not authorized by statute are invalid. In regards to the Council's "financial assistance" program, monies may not be spent out of that program unless duly authorized, notwithstanding the Council's purported existing powers to appropriate itself surplus Navajo Nation funds or to waive completely Titles 2 and 12.

As a rule, all spending must be based on enabling statutes; on subsequent regulations that ensure transparency and accountability in service of the anti-corruption principle, separation of powers and checks and balances. The government is not free to spend public funds for any purpose they may choose, but must utilize appropriated funds in accordance with properly enacted designated purpose and procedure. The powers of the Speaker, specifically, are expressly defined by statute. *See* 2 N.N.C. § 285. Additionally, "The public treasury belongs to the Navajo people, and the legitimacy of public spending is a civil rights issue under which judicial review is mandated under the Indian Civil Rights Act. *Order and Opinion Denying Jurisdictional Challenge*, No. SC-CV-03-10, (Nav. Sup. Ct. October 12, 2010) *citing Halona, supra*, 1 Nav. R. 189 (Nav. Ct. App. 1978). We stated:

> There are occasions when a private citizen's interests rise above the policy decision represented by the expenditure and reach the level of civil rights which the legislative body is no less charged with protecting than the courts . . . The Navajo People are supreme and all residual power lies with the People. In the end, *all monies spent by the Navajo Tribal Council are monies of the Navajo People*."

Id. (emphasis added).

In the absence of properly enacted legislatively designated powers, purpose and procedure, funds may not be expended. The Court takes judicial notice that the government is

currently operating on a continuing resolution set to expire soon and, therefore, the 22nd Council will have to develop an operating budget for the remainder of the fiscal year. The present direct disbursement "financial assistance" program involving Navajo Nation officials lacks the requisite checks and balances and does not operate within the comprehensive oversight structure of Navajo Nation fiscal laws and regulations. We have previously stated that the incoming Council may choose to create such a direct disbursement program for Navajo Nation officials, but such a program must be duly established with the requisite checks and balances and true public access in service of the anti-corruption principle embedded in the Title 2 Amendments. We urge the incoming 22nd Council to fully address this area of concern as an urgent matter with the President and with the assistance of the Commission on Governmental Reform.

We have stated, "It is a fundamental principle of law that public funds may not be used for private purposes, and that any such use must be declared invalid, and that principle must apply to funds of the Navajo Tribe." *Halona v. MacDonald*, 1 Nav. R. 341 (Nav. Ct. App, 1978). Amicus *Hada'a Sidi* argues that "public monies cannot be expended for non-governmental *purposes* because the money is the property of the Navajo People and the right to it is reserved to and by the Navajo People." *Amicus Hada'a Sidi Brief at 8.* We add that the private purpose prohibition is further intended to prevent governmental conflicts of interest and corruption in the use of public funds, and must be strictly enforced.

VIII

FEES

Mr. Trebon has asked that we affirm the payment of the retainer fee he received in the amount of $50,000 out of the appropriation because he played no part in the "orchestration" of the funding arrangement and has duly performed. Appellee's counsel, Mr. Hale, asks this Court

to either require the return of all monies paid to Mr. Trebon or require that they be distributed to all participants who requested fees pursuant to the public purpose requirement under *Halona, supra.* Amici Department of Justice (DOJ) asks the Court to allow Appellant to be paid but also award fees to amicus Mr. Arthur out of the same funds pursuant to the public purpose requirement under *Halona, supra.* Finally, Amicus Mr. Arthur's counsel Mr. Fitting asks this Court to adopt the "private attorney general doctrine" and additionally, states that it is important for external counsel to be able to rely on the legitimacy of representations made to them by the government that they will be paid. Amicus *Hada'a Sidi* also asks that the Court adopt a rule that encourages public interest litigation in the payment of fees and costs. Counsel for Amicus *Hada'a Sidi* and Counsel for Amici *Azee' Bee Nahgh1* of the *Din4* Nation, *Din4 Hat' aalii* Association, Inc., and *Din4* Medicine Men Association, Inc. specifically note that they do not seek attorney fees and costs.

Firstly, there is no evidence that Mr. Trebon entered into the grant agreement with intentions other than good faith, nor that he was aware that the funds constituted a misappropriation of funds, or that he received "dirty money." Although we find the reallocation and subsequent grant agreement invalid, we agree with Trebon that he earned his retainer fee and should be able to keep it. There is a Latin term, *quantum meruit,* that means "what one has earned." Navajos have a similar concept, *ideenágo,* which is the expectation that what you provide will be appreciated. However, he has no contract-based entitlement to further payments.

We understand the Private Attorney General Rule, as an exception to the American Rule, to stand for the compensation of public interest and civil rights plaintiffs for their costs, not the award of fees to amici. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (striking down the "Private Attorney General Rule"). The rule does not specifically apply

to the requests before us by amici Arthur, who is not a plaintiff, and Appellee, which is a governmental body. Additionally, we decline to adopt such a rule as it would require availability of public funds duly established by the Council for that purpose. The Council may choose to establish such a fund in future.

Finally, Appellees have renewed its request for fees and Amici Arthur also press for fees "to level the playing field" under principles of fundamental fairness in the use of public funds to pay for public interest litigation. We have awarded fees to an amicus once before, in *Shirley v. Morgan, supra,* after recognizing a special circumstance in the advocacy of the People's interests and actual assistance provided to the Court. However, as we previously stated, no discretionary spending out of this appropriation or other funds may be further made until statutory and regulatory bases for such spending are duly enacted. Therefore, no fees may be awarded out of the appropriation. As Appellant Nelson pressed this suit in reliance on governmental promises that his costs will be paid, he cannot be made to suffer as a consequence of that reliance, and no fees will be assessed against Mr. Nelson. The source of funding any award of fees being public funds improperly appropriated, the principle of *nályééh* prevents any award to be made. Therefore, we deny both Appellees and Amicus Arthur's requests.

IX

CONCLUSION

For the foregoing reasons, we FIND that IGRD-248-09 and the ensuing grant agreement both invalid.

We FURTHER FIND that Appellant is entitled on the basis of *ideenágo* to keep the fees he has been paid, but has no contract-based entitlement for further payments.

We FURTHER FIND that in keeping with the principle of *nályééh* which applies even

when an award may be justly made, fees and costs may not be paid to Appellees and Amici Eddie Arthur out of the IGRD-248-09 reallocation or from Appellant personally.

We ORDER **an immediate moratorium on all Navajo Nation "financial assistance" programs** as currently operated by any and all Navajo Nation government officials until a statutory and regulatory basis is in place consistent with this opinion.

We FURTHER ORDER the 22nd Council to work with the President and the Commission on Navajo Government Development as soon as possible to establish statutory and regulatory basis for Council discretionary spending via "financial assistance" programs, if such programs are desirable in the future; and strengthen the powers of the Office of the Controller, consistent with this opinion.

Dated this 4th day of January, 2011.

Chief Justice

Associate Justice Shirley

Page 1030
810 P.2d 1030
168 Ariz. 23
K. Tom TRACY, Petitioner,
v.
The SUPERIOR COURT OF MARICOPA COUNTY and the Honorable Gregory Martin, a judge thereof, Respondents,
and
The NAVAJO NATION, aka the Navajo Tribe of Indians, Real Party in Interest.
No. CV-90-0407-SA.
Supreme Court of Arizona, In Banc.
April 23, 1991.

Page 1032

[168 Ariz. 25] Sacks, Tierney & Kasen, P.A. by David C. Tierney, Paul G. Johnson, Phoenix, for petitioner.

Broening, Oberg & Woods by Jan E. Cleator, Phoenix, for intervenor Francis Duckworth.

Jones, Skelton & Hochuli by A. Melvin McDonald, Jr., Phoenix, for intervenor A. Melvin McDonald.

Stewart & McLean by Harry A. Stewart, Jr., Phoenix, for intervenor Joe Acosta.

Rothstein, Daly, Donatelli & Hughes by Robert R. Rothstein, Richard Hughes, Mark H. Donatelli, Santa Fe, and Navajo Nation Department of Justice by Eric Dahlstrom, Deputy Atty. Gen., Window Rock, for real party in interest.

OPINION

FELDMAN, Vice Chief Justice.

K. Tom Tracy (Tracy) and others who were joined as intervenors for purposes of this special action [1] (collectively petitioners) challenged the superior court's jurisdiction to issue orders compelling their attendance as witnesses in a criminal trial before the district court of the Navajo Nation. The court's order issued under Arizona's Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, A.R.S. §§ 13-4091 through 13-4096 (the Uniform Act).

Petitioners assert that the superior court judge erred in finding that the Navajo Nation is an entity recognized by the Uniform Act. Tracy also argues that he faces a risk of "undue hardship" under A.R.S. § 13-4092(B) in that he will be deprived of his constitutional privilege against self-incrimination if required to testify before the Navajo District Court. The other petitioners make similar claims based on their assumptions that the Navajo District Court will not recognize various professional privileges.

We accepted jurisdiction because this matter constitutes an issue of first impression in Arizona and involves the question of comity between our state and the separate, sovereign jurisdiction of the Navajo Nation, which is located in part within the geographical boundaries of Arizona. We have jurisdiction pursuant to article 6, § 5(1) of the Arizona Constitution and Rule 8(b), Ariz.R.P.Spec.Act., 17B A.R.S. After hearing argument, we denied relief, thus refusing to vacate the orders compelling attendance, and stated that this opinion would follow.

Page 1033

[168 Ariz. 26]

FACTS AND PROCEDURAL HISTORY

This case arises from the Navajo Nation's decision to prosecute its former Chairman, Peter MacDonald, Sr., and his son for crimes resulting from the "Big Boquillas" transaction, an alleged conspiracy between the MacDonalds and several non-Indian businessmen to buy land and then sell it to the Navajo Nation at a profit. The alleged conspiracy caused the tribe to lose several million dollars. After the basis for the charges was revealed during testimony before the Special Investigations Subcommittee of the United States Senate Select Committee on Indian Affairs (the Subcommittee), the Navajo Nation placed Chairman MacDonald on administrative leave and appointed a special prosecutor to investigate and then conduct the criminal proceedings.

Tracy was named during testimony before the Subcommittee as one of those involved in the Big Boquillas transaction. Brief of the Navajo Nation in Special Action Proceeding in the Supreme Court at 2. Aside from these allegations, Tracy does not dispute the fact that he is "a principal in Tracy Oil & Gas Co., Inc., which in February 1987 optioned the ... Big Boquillas Ranch in Northern Arizona for $26,250,000 and then sold the Ranch on July 8, 1987 to the Navajo Nation for $33,400,000." Petition for Special Action at 5.

In October 1989, the special prosecutor filed three multi-count criminal complaints against the MacDonalds in Navajo District Court. One of these complaints concerns the Big Boquillas transaction. The Navajo District Court does not have jurisdiction to prosecute non-members of the Navajo tribe, even for crimes committed in Indian Country, so Tracy is not the subject of any pending or prospective tribal prosecution. See DURO V. REINA, --- U.S. ----, 110 S.CT. 2053, 109 L.ED.2D 693[2] (1990) (Indian tribal courts may not prosecute non-members of the tribe); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) (Indian tribal courts may not prosecute non-Indians).

Anticipating the need for the testimony of several witnesses residing outside the Navajo Nation, the special prosecutor recommended that the Navajo Tribal Council enact the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (Navajo Uniform Act). The provision, codified at 17 Navajo Trib.Code §§ 1970-1974, was duly enacted in September 1989. [3] Pursuant to the Navajo Uniform Act, Judge Yazzie of the Window Rock District Court of the Navajo Nation issued certificates seeking to compel the attendance of Tracy and other named Maricopa County residents at the Big Boquillas trial.

On August 27, 1990, after holding a hearing on the matter, an Arizona superior court judge signed orders compelling Tracy and others to appear as witnesses in the Big Boquillas trial. The judge found that the Navajo Nation is a "state" or "territory" within the meaning of the Uniform Act, that the Navajo Nation had enacted a reciprocal provision of the Uniform Act, and that the courts of the Navajo Nation are "courts of record" within the meaning of the Uniform Act. The Arizona court held, therefore, that it had jurisdiction to order an Arizona resident to testify before the Navajo District Court in criminal proceedings

Page 1034

[168 Ariz. 27] brought against a member of the Navajo tribe.

Tracy then sought special action relief in the court of appeals. The court declined to accept jurisdiction, a majority of the panel finding that the Navajo Nation may be considered a state or territory whose courts are covered by the Uniform Act:

[W]hile the Navajo nation might not have been intended to be included within those entities which would be recognized under the Uniform Act when originally adopted, the underlying rationale of the Uniform Act was to provide mutuality of access between the various

jurisdictions of this country to facilitate the prosecution of criminal cases. In this regard, a majority of this court considers the Navajo Tribal Courts to now provide those safeguards and procedures recognized by courts of other states, including the constitutional protection against self-incrimination and the statutory privilege associated with attorney/accountant/client communication.

Order, October 16, 1990.

Tracy then filed a special action in this court, seeking to quash the superior court's orders. He presented the following issues for our consideration:

1. Whether the moving papers that the Navajo Nation presented to the superior court judge were defective.

2. Whether Tracy can be considered a "necessary and material witness," for purposes of the Uniform Act, in light of his intent to refuse to testify before the Navajo District Court.

3. Whether the superior court judge erred in ruling that the Navajo Nation is a state or territory within the meaning of the Uniform Act.

4. Whether Tracy and the other petitioners face undue hardship under A.R.S. § 13-4092(B) in that they will claim privileges that will not be recognized by the Navajo District Court and hence will risk being jailed unless they "waive those rights."

We find no basis to question the superior court judge's finding that the moving papers were adequately presented. We address the remaining three issues.

DISCUSSION

A. Materiality of Tracy's Testimony

Tracy argues that he cannot be a necessary and material witness given his intention to invoke the privilege against self-incrimination. The superior court judge disagreed. He correctly held Tracy's testimony necessary and material. A witness cannot circumvent the Uniform Act by claiming his intent to assert the privilege before the questions are actually posed in the proceeding to which the privilege will pertain. See State v. Schreuder, 712 P.2d 264, 274 (Utah 1985) (witness's claimed intention to invoke the fifth amendment privilege in the requesting court is not a ground for finding the testimony is not material). The privilege is a matter to be ruled on by the court conducting the trial. In re Pitman, 26 Misc.2d 332, 201 N.Y.S.2d 1000, 1002 (N.Y.Gen.Sess.1960) (where New York witness was compelled to appear in New Jersey criminal prosecution, questions about his privilege against self-incrimination would have to be determined in the New Jersey court, not in the New York court issuing the order). See generally Thoresen v. Superior Court, 11 Ariz.App. 62, 66-67, 461 P.2d 706, 710-11 (1969) (fifth amendment privilege does not prevent asking potentially incriminating questions, and it cannot be claimed in advance of questions actually propounded).

The role of the court issuing the subpoena is only to determine that the testimony of the witness, if given, would be material and necessary to the proceedings. See A.R.S. § 13-4092(B) ("If at a hearing the judge determines that the witness is material and necessary, ... he shall issue a summons.... In any such hearing the certificate shall be prima facie evidence of all the facts stated therein."). Accordingly, Tracy is a necessary and material witness despite his stated intention to invoke his privilege against self-incrimination.

B. Is the Navajo Nation Within the Scope of Arizona's Uniform Act?

Page 1035

[168 Ariz. 28] Arizona's Uniform Act provides that a judge may direct the witness to appear at a criminal proceeding in another state if

a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies ... that there is a criminal prosecution pending in such court ... [and] that a person being within this state is a material witness in such prosecution....

A.R.S. § 13-4092(A) (emphasis added). The definitional section of the Uniform Act reads as follows:

In this article, unless the context otherwise requires:

* * * * * *

"State" includes any territory of the United States and the District of Columbia.

A.R.S. § 13-4091(2). Thus, the validity of the superior court's order turns on whether the Navajo District Court is a court of record [4] of "any territory of the United States."

In People v. Superior Court (Jans), the California Court of Appeal became the first and only court thus far to consider whether the Navajo Nation is a territory for purposes of the Uniform Act. 224 Cal.App.3d 1405, 274 Cal.Rptr. 586 (1990), review denied (Nov. 28, 1990). In a well-reasoned opinion that examined the purpose and policy behind the statute and the jurisdictional relationship between the tribes and the states, the court concluded that the Navajo Nation constitutes a territory for purposes of California's Uniform Act and that the superior court had jurisdiction to summon a California resident to appear as a witness in a criminal proceeding before the Navajo District Court. Id. 274 Cal.Rptr. at 590.

California's Uniform Act is substantially identical to Arizona's. Because we must construe Arizona's Uniform Act in light of our own state policies, however, and because Tracy has pointed to the fact that on a different issue a panel of our court of appeals concluded that the term "territory" did not include Indian tribes, we undertake a thorough analysis of statute and case law to determine whether the Navajo Nation constitutes a territory for purposes of the Uniform Act.

1. There is no Fixed Definition of Territory

a. Various Interpretations of Territory

Arizona's Uniform Act defines state to include "any territory of the United States." Tracy argues that the language "any territory" comprehends only organized territories operating pursuant to congressional law and having a governor appointed by the president. See, e.g., In re Lane, 135 U.S. 443, 10 S.Ct. 760, 34 L.Ed. 219 (1890) (Oklahoma "Indian Territory," which had no organized executive, legislative, or judicial branch, was not a territory for purposes of federal criminal statute); People ex rel. Kopel v. Bingham, 211 U.S. 468, 475-76, 29 S.Ct. 190, 192, 53 L.Ed. 286 (1909) (Puerto Rico is a territory under Lane definition for purposes of extradition of fugitive criminal).

The Bingham- Lane definition of territory encompasses only organized territories that derive their power from Congress and is but one definition courts have given to territory. Significantly, this narrow and technical definition of territory originated at a time in this nation's history when the United States did not have the same relationship with various quasi-sovereign entities--i.e., Guam, the Virgin Islands, the Canal Zone, American Samoa--that it has today, and indeed, before Puerto Rico attained its quasi-sovereign status as a commonwealth.

In cases since Bingham and Lane, the term territory has often been interpreted

Page 1036

[168 Ariz. 29] more broadly to serve the purposes of the statute or enactment under consideration. See, e.g., United States v. Standard Oil, 404 U.S. 558, 560, 92 S.Ct. 661, 662, 30 L.Ed.2d 713 (1972) (American Samoa is a territory for purposes of Sherman Act provision); [5] Puerto Rico v. Shell Co., 302 U.S.

253, 258-59, 58 S.Ct. 167, 169-70, 82 L.Ed. 235 (1937) (whether Puerto Rico comes within a given congressional act depends upon the character and aim of the act; Puerto Rico is not a territory within reach of sixth and seventh amendments, but may be considered a territory for purposes of the Sherman Act); Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431 (3rd Cir.1966), cert. denied, 386 U.S. 943, 87 S.Ct. 977, 17 L.Ed.2d 874 (1967) (Puerto Rico is a territory for purposes of federal full faith and credit statute); Securities & Exch. Comm'n v. Capital Growth Co., 391 F.Supp. 593 (S.D.N.Y.1974) (Puerto Rico is a territory for purposes of the Securities and Exchange Act of 1934); Wolfe v. Au, 67 Haw. 259, 686 P.2d 16 (1984) (Micronesia is a territory for purposes of the Uniform Criminal Extradition Act, even though it is destined for nationhood rather than statehood); cf. Garcia v. Friesecke, 597 F.2d 284 (1st Cir.1979), cert. denied, 444 U.S. 940, 100 S.Ct. 292, 62 L.Ed.2d 306 (1979) (Puerto Rico is not a territory for purposes of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950). [6]

From the authorities cited, it is clear that the term territory is susceptible of interpretation because it does not have a "fixed and technical meaning that must be accorded to it in all circumstances." Americana of Puerto Rico, 368 F.2d at 436. Therefore, we must determine whether the Navajo Nation may properly be considered a territory within the meaning of Arizona's Uniform Act.

b. Legislative Intent

Tracy cites Kriz v. Buckeye Petroleum Co. for the proposition that the intent of the legislature at the time of the enactment governs the interpretation of the act. 145 Ariz. 374, 701 P.2d 1182 (1985). Accordingly, Tracy argues that because the 1937 Arizona legislature that adopted the Uniform Act could not have contemplated tribes as territories for purposes of the Act, we cannot now interpret the Uniform Act to include the Navajo Nation. We do not find this argument persuasive. In Kriz, we also stated that where the statutory language does not indicate the legislature's intent as to a particular application of the statute, we must "read the Act as a whole, looking to its subject matter, effects and consequences, reason, and spirit." Id. at 377, 701 P.2d at 1185; see also Calvert v. Farmers Ins. Co., 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985) (in interpreting statute and determining legislature's intent, supreme court will look to policy behind statute and the evil it was designed to remedy, as well as to the words, context, subject matter, and consequences of the statute).

Arizona's Uniform Act was adopted by the 1937 legislature without indication as to its prospective scope. H.B. 78, 13th Leg., 1st Reg.Sess., 1937 Ariz.Laws, ch. 74 § 2. However, given the status of tribal self-government on Arizona Indian reservations at that time, [7] we can safely conclude that

Page 1037

[168 Ariz. 30] the 1937 legislature could not have contemplated whether the Act could or should be applied to Indian tribes.

c. Methodology of Application

Essentially, Tracy and the dissent argue that because the legislature did not contemplate applying the Act to the Navajo Nation, we may not now make such an application. Under this view of statutory construction, Arizona would also be unable to recognize the Virgin Islands and Puerto Rico as territories for purposes of the Uniform Act. We believe that sound principles of statutory construction preclude such a narrow reading of the Uniform Act. Circumstances constantly arise presenting factual situations that were unforeseen at the time a statute was adopted. Consequently, the interpretation of general remedial statutes cannot fairly be limited to only those specific applications clearly contemplated by the legislature at the time of enactment. Such a limitation would impose an impossible burden on legislatures.

We note that the framers gave Congress power only to raise and maintain an army and navy. U.S. Const. art. I, § 8. Unless they were as prescient as Tennyson, [8] neither those who framed nor those who ratified the Constitution could have contemplated that this language would include an air force. Yet it surely must. See E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 70 and n. 172 (1954). Of course, if a particular application does violence to the text of a statute, our duty is clear: the application cannot be made. But the Uniform Act is not limited to "organized territories." Instead, the text of this statute extends to "any territory" and is broad enough, therefore, to include anything within the commonly understood meaning of the term. See, e.g., State v. Korzep, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990) ("We give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning."). The Navajo Nation passes that test; it clearly fits the dictionary definition of a "geographical area" of the United States "under the jurisdiction of a political authority." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2361 (1965).

We also acknowledge that where a factual application of a statute was considered and rejected by the legislature, the courts are powerless. Again, such is not the case with this statute. The application of this statute to organized tribal governments and their court systems could not have been foreseen in 1937 and was not considered.

We deal, then, with a text broad enough to include the application advanced by the Navajo Nation. We deal also with an application not rejected but simply not foreseen by the legislature. We believe, with Mr. Justice Holmes, that in such cases it is a "wholesome truth that the final rendering of the meaning of a statute is an act of

Page 1038

[168 Ariz. 31] judgment." Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM.L.REV. 527, 531 (1947). Nor do venerable "canons of [statutory] construction save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements." Frankfurter, supra, 47 COLUM.L.REV. at 544. We agree with Mr. Justice Frankfurter that "laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends." Id. at 533. It is in part because legislatures cannot foresee every application that judges are required to interpret and apply statutes. Id.

Thus, in construing a general statute enacted to further a remedial purpose, we do not believe a specific application is outside the statute simply because it was not foreseen. United States v. Jones, 607 F.2d 269, 273 (9th Cir.1979), cert. denied, 444 U.S. 1085, 100 S.Ct. 1043, 62 L.Ed.2d 771 (1980); Eastern Air Lines, Inc. v. Civil Aeronautics Bd., 354 F.2d 507, 510-11 (D.C.Cir.1965); see Shell Co., 302 U.S. at 257, 58 S.Ct. at 169 (that Congress did not have Puerto Rico in mind when the Sherman Act was enacted is not enough to exclude Puerto Rico from the Act's operation; the proper inquiry is whether, had acquisition of Puerto Rico been foreseen, Congress would have intended to exclude Puerto Rico from the Act's operation).

Thus, where there is no contrary textual or legislative expression of intent on a particular application, we must apply the statute in such a manner as will best serve the legislature's purposes, policies, and goals. See State v. Sweet, 143 Ariz. 266, 270, 693 P.2d 921, 925 (1985); Cohen v. State, 121 Ariz. 6, 588 P.2d 299 (1978); State v. Berry, 101 Ariz. 310, 312, 419 P.2d 337, 339 (1966) (statutes must be construed in view of the purpose they are intended to accomplish and the evils they are designed to remedy).

Therefore, we turn to examine the purpose and policy behind the Uniform Act to see whether inclusion of the Navajo Nation is consistent with the Act's general intent.

2. May Tribes Be Considered Territories for Purposes of this Statute?

a. Consideration of Statutes Comparable to the Uniform Act

We must first determine whether tribes are sufficiently analogous to territories to fall within the legislature's general intent to broaden the definition of state by including territories. Indian tribes are quasi-sovereign entities with sui generis status as "domestic, dependent nations" under federal law. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17, 8 L.Ed. 25 (1831). Indian tribes are not "foreign nations," as Tracy would have us believe, and thus do not come within the prohibition against foreign countries being deemed territories. Id.; see Eidman v. Martinez, 184 U.S. 578, 591, 22 S.Ct. 515, 520, 46 L.Ed. 697 (1902) (term territory in ordinary acts of Congress does not include foreign states).

Similarly, Indian tribes are not organized territories whose powers are delegated by Congress and therefore exist as "agencies" of the federal government. Rather, Indian tribes exercise powers of self-government as an aspect of their inherent sovereignty. United States v. Wheeler, 435 U.S. 313, 319-23, 98 S.Ct. 1079, 1084-86, 55 L.Ed.2d 303 (1978). In this respect, the Navajo Nation exercises its judicial power as would a state. Id. at 321-22, 98 S.Ct. at 1085 (tribe is separate sovereign from federal government for purposes of double jeopardy; in prosecuting tribal member for crime, tribe was not exercising federally delegated power, like territory, but sovereign power, like state).

Clearly, then, Indian tribes do not fit within the narrow definition of an organized territory. Instead, they occupy a unique status within our federal system. The tribes are similar to states in terms of their judicial jurisdiction and power of self-government over matters occurring within their territorial boundaries. See Raymond v. Raymond, 83 F. 721, 724 (8th Cir.1897). However, in exercising their powers of self-

Page 1039

[168 Ariz. 32] government, Indian tribes are still subject to the overriding plenary authority of Congress. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S.Ct. 1670, 1676, 56 L.Ed.2d 106 (1978). In this latter respect, Indian tribes are analogous to the territories of the United States, which are also subject to Congress's plenary power. See Inter-Island Steam Nav. Co. v. Hawaii, 305 U.S. 306, 314, 59 S.Ct. 202, 206, 83 L.Ed. 189 (1938) (Congress has full and complete legislative authority over territories).

The political status of Indian tribes has been analogized to that of other quasi-sovereign entities under the protection of the United States, such as Puerto Rico and the Virgin Islands. See generally Comment, Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes, 1981 ARIZ.ST.L.J. 801, 808; Clinton, Tribal Courts and the Federal Union, 26 WILLAMETTE L.REV. 841, 858 (1990).

In any case, Indian tribes, like Puerto Rico and the Virgin Islands, have often been regarded as territories for purposes of various statutory enactments. In United States ex rel. Mackey v. Coxe, for example, the United States Supreme Court held that the Cherokee Nation is a territory for purposes of a federal statute requiring recognition of administrators appointed from the territories. 59 U.S. (18 How.) 100, 15 L.Ed. 299 (1855). In holding that letters of administration issued by the Cherokee Nation should be given full faith and credit in a District of Columbia court, the Court stated:

In some respects [the Cherokee people] bear the same relation to the federal government as a territory did in its second grade of government, under the ordinance of 1787. Such a territory passed its own laws, subject to the approval of congress, and its inhabitants were subject to the

constitution and acts of congress. The principal difference consists in the fact that the Cherokees enact their own laws [subject to some federal restriction], appoint their own officers and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory,--a territory which originated under our constitution and laws.... In no respect can it be considered a foreign State or territory, as it is within our jurisdiction and subject to our laws.

Id. at 103-04 (emphasis added). [9]

Similarly, various lower federal courts and state courts have deemed Indian tribes to be states or territories within the meaning of the statutes under consideration. See, e.g., In re Larch, 872 F.2d 66 (4th Cir.1989) (Cherokee tribe is a state for purposes of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738); Martinez v. Superior Court, 152 Ariz. 300, 731 P.2d 1244 (Ct.App.1987) (Indian reservations are territories or possessions of the United States within the meaning of Arizona's Uniform Child Custody Jurisdiction Act, A.R.S. §§ 8-401 through 8-424); Red Lake Band of Chippewa Indians v. State, 311 Minn. 241, 248 N.W.2d 722 (1976) (Red Lake tribe was a state or territory for

Page 1040

[168 Ariz. 33] purposes of a Minnesota motor vehicle statute that was premised on policy to recognize the validity of automobile registration licenses issued by other jurisdictions); Whitsett v. Forehand, 79 N.C. 230, 232 (1878) (Cherokee Nation is a territory for purposes of state statute governing admission of deed to probate and registration).

A majority of courts has deemed Indian tribes to be territories for purposes of the federal statute extending the application of the full faith and credit clause to the territories and possessions of the United States, 28 U.S.C. § 1738. See, e.g., Sheppard v. Sheppard, 104 Idaho 1, 655 P.2d 895 (1982); Jim v. CIT Fin. Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975); In re Buehl, 87 Wash.2d 649, 555 P.2d 1334 (1976); see also Cornells v. Shannon, 63 F. 305, 306 (8th Cir.1894); Standley v. Roberts, 59 F. 836, 845 (8th Cir.1894); Mehlin v. Ice, 56 F. 12, 19 (8th Cir.1893) (recognizing Indian tribes as territories under an earlier version of the full faith and credit statute); Santa Clara Pueblo, 436 U.S. at 65 n. 21, 98 S.Ct. at 1681 n. 21 ("Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts.") (citing Mackey, 59 U.S. (18 How.) 100; and Standley, 59 F. at 845).

In Brown v. Babbitt Ford, Inc., our court of appeals took the opposite approach, declining to accord full faith and credit to a Navajo tribal statute governing automobile repossessions on the reservation. 117 Ariz. 192, 571 P.2d 689 (Ct.App.1977). The court rejected the analysis of Americana of Puerto Rico that the term territory in 28 U.S.C. § 1738 may be construed to encompass entities other than organized territories. Id. at 196, 571 P.2d at 693. The court distinguished Mackey, pointing out that it dealt with the definition of territory in a different statute. Id. Instead, the court based its opinion on an 1883 district court case, Ex Parte Morgan, 20 F. 298 (D.C.Ark.1883), which held that territory refers only to organized territories that are destined for statehood, and that Indian tribes, as sovereigns predating the constitution, cannot be considered territories. Brown, 117 Ariz. at 196-97, 571 P.2d at 693-94.

We do not consider whether the court of appeals correctly decided that Indian tribes are not territories for purposes of the full faith and credit statute, as that issue is not now before us. [10] However, we disagree with the court's statement that "Indian reservations have never been considered as a 'territory' within the meaning of the laws of the United States, but simply they are the home of the Indians." Id. at

197, 571 P.2d at 694. This statement is contrary to the United States Supreme Court's decision in Mackey, as well as the many decisions of lower federal courts and state courts cited above holding that Indian tribes may be considered territories for purposes of certain statutes. In addition, the court seems to have overlooked the many federal cases holding that the term territory may be applied to quasi-sovereign entities that are not organized territories destined for statehood.

Indian tribes possess a unique political status; however, tribal governments are comparable to states and territories in many ways, and jurisdictionally, Indian reservations are a great deal more than "the home of the Indians." The case law demonstrates that Indian tribes may be considered territories within the meaning of certain statutes. The proper approach is to analyze each statute, in terms of its purpose and policy, to determine whether Indian tribes may be regarded as territories within the statute's intent, as another panel of our court of appeals did in Martinez with regard to Arizona's version of the Uniform Child Custody Jurisdiction Act. [168 Ariz. 34]

Page 1041

152 Ariz. at 303, 305, 731 P.2d at 1247, 1249. Again we note that California, using this analysis, has recently held that the term "territory" in the Uniform Act we are considering includes the Navajo Nation. Superior Court (Jans), 274 Cal.Rptr. 586.

b. The Effect of the Principle of Comity

The controversy over the full faith and credit statute is most relevant to cases in which the issue is the effect to be given to tribal court judgments. In this case, we deal with a tribal law, rather than a judgment. As the court in Brown correctly noted, irrespective of the effect of the full faith and credit statute, tribal laws are entitled to recognition on the basis of comity if they are otherwise in accord with Arizona's public policy. 117 Ariz. at 198, 571 P.2d at 695; see Fremont Indem. Co. v. Industrial Comm'n, 144 Ariz. 339, 345, 697 P.2d 1089, 1095 (1985) (citing Milwaukee County v. M.E. White Co., 296 U.S. 268, 272, 56 S.Ct. 229, 231, 80 L.Ed. 220 (1935)) (comity doctrine may apply even in situations in which the full faith and credit clause is inapplicable).

Arizona courts have consistently afforded full recognition to tribal court proceedings. For purposes of Arizona State Bar disciplinary proceedings, judgments of the Navajo Nation courts are given equivalent weight to judgments of other courts. See In re MacDonald, No. SB-91-0001-D (minute order, March 5, 1991) (granting State Bar's motion for interim suspension of Navajo attorney convicted of bribery, conspiracy, and other misdemeanors in Navajo District Court, pursuant to Rule 57(c), Rules of the Supreme Court, which provides for suspension if an attorney is convicted of a non-felony serious crime). Several other cases have given recognition to tribal court proceedings on the grounds of comity. Leon v. Numkena, 142 Ariz. 307, 311, 689 P.2d 566, 570 (Ct.App.1984) (divorce decree issued by Hopi tribal court was conclusive and binding against challenge in state superior court as a matter of comity and out of deference and mutual respect); In re Lynch's Estate, 92 Ariz. 354, 357, 377 P.2d 199, 201 (1962) (holding that proceedings in Navajo tribal court must be treated the same as proceedings in a court of another state, and therefore that a will admitted to probate in Navajo tribal court should have been given effect in ancillary proceedings in state superior court).

The principle of comity is that "the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect." Brown, 117 Ariz. at 198, 571 P.2d at 695. The Uniform Act under consideration in the present case is premised on the principle of comity, not on full faith and credit. In State v. Jordan, this court held that:

"The Uniform Act does not extend the jurisdiction of the courts of this state beyond its territorial limits, for this is not within the power of the legislature. The operation of the Uniform Act depends upon the principles of comity, and it has no efficacy except through the adoption of the same act by another state."

83 Ariz. 248, 251, 320 P.2d 446, 448 (1958) (quoting State v. Blount, 200 Or. 35, 264 P.2d 419, 426 (1953), cert. denied, 347 U.S. 962, 74 S.Ct. 711, 98 L.Ed. 1105 (1954)), cert. denied, 357 U.S. 922, 78 S.Ct. 1364 (1958); accord State v. Lesco, 194 Kan. 555, 400 P.2d 695, 699 (1965), cert. denied, 382 U.S. 1015, 86 S.Ct. 628, 15 L.Ed.2d 529 (1966); In re Saperstein, 30 N.J.Super. 373, 104 A.2d 842 (App.), cert. denied, 348 U.S. 874, 75 S.Ct. 110, 99 L.Ed. 688 (1954). Therefore, we believe the principles of comity militate in favor of interpreting the word territory to include the Navajo Nation.

c. The Purpose and Policy Behind the Uniform Act

In considering whether to give the Uniform Act a broad or narrow construction, we note that the Act's definitional section provides that the term state includes any territory of the United States. A.R.S. § 13-4091(2). A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than one whose definition declares

Page 1042

[168 Ariz. 35] what the term "means." The word "includes" is most often a term of enlargement, rather than limitation, and a court may find that it encompasses items that were not specifically enumerated. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.07, at 133 (4th ed. 1984 Rev.).

In addition, Arizona's Uniform Act is included within A.R.S. Title 13, the criminal code. The rules of construction for provisions within Title 13 are set forth at § 13-104, which provides:

The general rule that a penal statute is to be strictly construed does not apply to this title, but the provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law, including the purposes stated in § 13-101.

See State v. Tramble, 144 Ariz. 48, 51, 695 P.2d 737, 740 (1985) (rule of strict construction followed by other state courts in interpreting penal statutes is not consistent with Arizona's legislative policy).

We note also the public policy set forth by our legislature at the beginning of the chapter containing the Uniform Act. A.R.S. § 13-101 reads in relevant part:

It is declared that the public policy of this state and the general purposes of the provisions of this title are:

1. To proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests; ...

* * * * * *

6. To impose just and deserved punishment on those whose conduct threatens the public peace.

This language indicates that Arizona's public policy supports interpreting the statutes within Title 13 in a manner that will further effective criminal prosecution. This is also an underlying purpose of the Uniform Act, which requires reciprocal cooperation among jurisdictions for the enforcement of witness attendance orders. See Vannier v. Superior Court, 32 Cal.3d 163, 172, 650 P.2d 302, 306, 185 Cal.Rptr. 427, 431 (1982); Ortez v. State, 165 Ind.App. 678, 333 N.E.2d 838, 846 (1975).

In New York v. O'Neill, the United States Supreme Court upheld the constitutionality of the Uniform Act, noting that it was designed to solve the practical problems created by the constitutional division of powers, and that the "

'policy and necessity ... to preserve harmony between States, and order and law within their respective borders' " motivated the states to adopt the Uniform Act. 359 U.S. 1, 5-6, 79 S.Ct. 564, 568, 3 L.Ed.2d 585 (1959) (citation omitted). The Court further stated:

The primary purpose of this Act is not eleemosynary. It serves a self-protective function for each of the enacting States.... Today forty-two States and Puerto Rico [11] may facilitate criminal proceedings, otherwise impeded by the unavailability of material witnesses, by utilizing the machinery of this reciprocal legislation to obtain such witnesses from without their boundaries. This is not a merely altruistic, disinterested enactment.

Id. at 9, 79 S.Ct. at 570; accord In re Saperstein, 104 A.2d at 846 (New Jersey's Uniform Act was enacted in aid of comity between states to assist the orderly and effectual administration of justice and prosecution of criminal conduct).

In light of the articulated purposes behind the Uniform Act, we must next examine the jurisdictional nature of Indian tribes to determine whether the Uniform Act's purposes will be served by interpreting territory to include the Navajo Nation.

d. The Jurisdiction of Indian Tribes

Indian tribes have historically been regarded as distinct, sovereign political entities, subject only to the plenary authority of Congress. See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232-33 (1982). In Worcester v. Georgia, Chief Justice John Marshall articulated

Page 1043

[168 Ariz. 36] the foundation for the principle that tribal sovereignty over its territory and people, and federal protection of the tribes, combine to eliminate state jurisdiction:

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

31 U.S. (6 Pet.) 515, 561, 8 L.Ed. 483 (1832). Thus, although a tribe may be within the geographical boundaries of a state, the tribe is jurisdictionally distinct from the state, and the state has no authority to impose its laws on the reservation. [12]

In several more recent decisions, the United States Supreme Court has held that the 1868 Navajo Treaty precludes extension of state law to Indians residing on the Navajo reservation. See McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). In McClanahan, the Court acknowledged that the state has no civil or criminal jurisdiction on the reservation absent some affirmative delegation by Congress and pursuant to tribal consent. 411 U.S. at 177-80, 93 S.Ct. at 1265-67.

In accordance with the principles that limit state jurisdiction over Indian Country, various courts have invalidated states' attempts to reach Indians residing on the reservation. Thus, in the area of extradition it has been held that control of the extradition process is inherent in the tribal sovereignty of the Navajo Nation, and therefore a state may not arrest an Indian located on the Navajo reservation, but rather must seek extradition through the Navajo courts. Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970); see also Benally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976);

A.R.S. § 13-3869 (allowing extradition of persons to and from an Indian reservation only if both the Indian tribal governing body and the state have mutually entered into an extradition compact, and providing that the state shall comply with tribal extradition law).

The jurisdiction of state courts has been similarly circumscribed in the area of civil process. State officials may not enforce valid state court judgments against Indians residing on the reservation. See, e.g., Joe v. Marcum, 621 F.2d 358 (10th Cir.1980); Begay v. Roberts, 167 Ariz. 375, 807 P.2d 1111 (1990), rev. denied April 22, 1991 (state court has no jurisdiction to garnish a tribal member's wages, earned on the reservation, where tribal law does not permit garnishment of wages); Annis v. Dewey County Bank, 335 F.Supp. 133 (D.S.D.1971) (state officials may not enforce state judgment by attaching property located on Cheyenne River Sioux reservation). This court has held that state officers lack authority to serve process on Indians residing on the reservation. Francisco v. Arizona, 113 Ariz. 427, 556 P.2d 1 (1976). Automobile dealers must comply with tribal law when repossessing automobiles on a reservation. Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir.1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984).

Page 1044

[168 Ariz. 37] From the foregoing, it is obvious that Arizona courts lack jurisdiction to compel a Navajo witness located on the Navajo reservation to testify in a state court criminal proceeding without resort to the provisions of the Uniform Act. The Uniform Act is only operative where the other jurisdiction has enacted reciprocal legislation, as the Navajo Nation has done here. Therefore, if we decline to recognize the Navajo Nation for purposes of our Uniform Act, we would undercut the process of efficient law enforcement in our own state proceedings by rendering a significant number of people potentially unavailable as witnesses.

The Navajo Nation has nearly 200,000 members on a reservation that consists of more than fifteen million acres, about two-thirds of which is within the geographical boundaries of Arizona. We would do violence to the legislative purpose that prompted the adoption of the Uniform Act were we to exclude the Navajo Nation from recognition, thereby allowing material witnesses to evade testifying in our courts, or those of the Navajo Nation. The close proximity of our respective jurisdictions favors recognizing valid enactments of the Navajo Nation that do not conflict with our own public policy.

e. Other Policy Considerations

Recognizing the Navajo Nation as a territory for purposes of the Uniform Act would support Arizona's policy of facilitating effective criminal prosecution. However, Tracy argues that if we allow an Arizona court to summon an "Arizona citizen" to appear as a witness in a "foreign sovereign's political courts," we will be, in effect, supporting civil rights violations against our citizens. Tracy Memorandum on Special Action at 2. As we have already discussed, the Navajo Nation is clearly a separate jurisdiction within our federal system and not a foreign sovereign. Regarding the civil rights violations, Tracy claims that the Navajo court's use of the Uniform Act is an exercise of criminal jurisdiction, which is prohibited under the opinions of the Supreme Court in Oliphant and Duro, and that Duro casts doubt on the legitimacy of tribal courts in general.

The Uniform Act is a provision to assist jurisdictions in conducting criminal prosecutions. In any prosecution there may be a need for the testimony of a material witness who resides beyond the subpoena power of the prosecuting state. Either the prosecutor or the defendant may utilize the Uniform Act to procure the attendance of such a witness. State v. Smith, 87 N.J.Super. 98, 208 A.2d 171, 174 (App.1965). In fact, where the testimony is critical to the defense, it may violate the defendant's due process rights to deny his request to summon an out-of-state witness to

testify in his behalf under the Uniform Act. State v. Brady, 122 Ariz. 228, 594 P.2d 94 (1979). [13] The Uniform Act, then, serves a truth-seeking function and is consistent with other mechanisms that are intended to assist in the pursuit of a fair trial.

Thus, though the purpose of the Uniform Act is to assist in criminal prosecutions, the proceedings to compel attendance of a witness under the Uniform Act are not criminal in nature. Epstein v. New York, 157 So.2d 705, 707 (Fla.App.1963). In addition, the Uniform Act does not extend the criminal jurisdiction of the requesting jurisdiction beyond its boundaries; rather, the Act's effectiveness depends on principles of comity and reciprocity in the courts of the jurisdiction where the witness resides. See Jordan, 83 Ariz. at 251, 320 P.2d at 448. Once an Arizona court has issued the summons and Tracy appears in the tribal court, he will be subject to the Navajo court's authority to compel his testimony. If Tracy refuses to testify despite a grant of constitutionally adequate immunity, the Navajo court will have the inherent power of any court to cite him for

Page 1045

[168 Ariz. 38] contempt. See Willie v. Herrick, 5 Nav.Rptr. 129, 130 (Nav.Sup.Ct.1987) (Navajo Nation courts have inherent power to punish for contempt). We assume that the Navajo court would be limited to civil contempt sanctions, due to its lack of criminal jurisdiction over non-Indians. See Oliphant, 435 U.S. 191, 98 S.Ct. 1011.

Thus, to the extent that Tracy will be subject to the authority of the Navajo court, this will be an exercise of the court's civil jurisdiction. Oliphant 's discussion regarding the inability of a tribal court to criminally prosecute a non-Indian is therefore irrelevant to Tracy's situation. Instead we must focus on the statements of the United States Supreme Court regarding the civil jurisdiction of tribal courts. The Supreme Court has consistently upheld tribal courts' jurisdiction over civil cases involving personal and property rights of both Indians and non-Indians. Santa Clara Pueblo, 436 U.S. at 65, 98 S.Ct. at 1680-81. In recognition that the tribes' exercise of civil jurisdiction has not been constrained by federal action, the Court has declined to extend the Oliphant limitations to the realm of tribal civil jurisdiction. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 854-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985). In Iowa Mut. Ins. Co. v. LaPlante, the Supreme Court stated:

Tribal courts play a vital role in tribal self-government, and the Federal government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted.

480 U.S. 9, 14-15, 107 S.Ct. 971, 975-76, 94 L.Ed.2d 10 (1987) (citations omitted).

We do not believe summoning Tracy to appear before the Navajo District Court to testify about his transactions with the Navajos poses any inherent violation of his civil rights as a citizen of Arizona. Tracy is not subject to tribal criminal prosecution and the Navajo courts have civil jurisdiction over non-Indians. Williams, 358 U.S. at 222, 79 S.Ct. at 272. Tracy apparently voluntarily entered into consensual dealings with Peter MacDonald, Sr. and/or the Navajo Nation, which renders his testimony material to a valid tribal prosecution of one of its members, and, in addition, indicates that he could have foreseen the possibility that he would become subject to the civil jurisdiction of the tribal court. [14]

Further, by declining to recognize the Navajo Nation for purposes of our Uniform Act, we would impinge on the Navajo Nation's powers of self-government by undercutting the tribe's ability to prosecute a tribal offender. See Wheeler, 435 U.S. at 322, 98 S.Ct. at 1085 (stating that the right of internal self-government possessed by Indian tribes "includes the right to

prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions"). The decisions of the United States Supreme Court have consistently supported the federal government's long-standing policy of encouraging tribal self-government. Iowa Mut. Ins., 480 U.S. at 14, 107 S.Ct. at 975 (citing Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890, 106 S.Ct. 2305, 2313, 90 L.Ed.2d 881 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n. 5, 102 S.Ct. 894, 902 n. 5, 71 L.Ed.2d 21 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 and n. 10, 100 S.Ct. 2578, 2583-84 and n. 10, 65 L.Ed.2d 665 (1980); Williams, 358 U.S. at 220-22, 79 S.Ct. at 270-71). As the California appeals court noted in Superior Court (Jans):

Page 1046

[168 Ariz. 39] [E]ach jurisdiction is encouraged to interpret matters which concern tribal governance in a manner which fosters self-determination. In recognizing the right of the tribal courts to request the attendance of witnesses, we recognize their right to conduct such criminal proceedings. To deny them the power to compel witnesses we risk reducing their criminal proceedings to a farce or sham. If they cannot force necessary and material witnesses to appear they must either proceed in the face of inadequate evidence or be deprived of the ability to prosecute certain criminals.... If we barred Native American nations from the community of jurisdictions which reciprocally recognize one another, we would undermine their self-determination.

274 Cal.Rptr. at 590 (citations omitted). [15]

We conclude that substantial case authority, a proper methodology of statutory construction, the policy goals articulated by the legislature, and principles of comity, together with the specific objectives underlying Arizona's Uniform Act, all require us to read the term "any territory," as used in A.R.S. §§ 13-4091 through 13-4096, to include the Navajo Nation. Such a construction belies neither the text of the statute nor the legislature's intent.

C. Undue Hardship and the Privilege Against Self-Incrimination

Having decided that the Navajo Nation is a territory for purposes of the Uniform Act, we must examine whether the petitioners would face undue hardship if summoned before the Navajo District Court. If so, under A.R.S. § 13-4092(B), the Act could not be invoked to compel the attendance of the petitioners.

Tracy claims he will suffer undue hardship in that he will be forced to testify, under threat of contempt, without a constitutionally adequate grant of immunity, and thus will be required to forfeit his fifth amendment privilege against self-incrimination. Tracy alleges he is the "subject of a pending federal grand jury investigation in Phoenix" that is apparently related to the events leading to this case. Tracy Memorandum on Special Action at 16. Thus, Tracy argues, he faces a real threat of self-incrimination. Consequently, Tracy asserted his federal and state constitutional privileges against self-incrimination during depositions and other proceedings in connection with the Big Boquillas civil case filed by the Navajo Nation in Maricopa County Superior Court. Essentially, Tracy advances two arguments under his fifth amendment claim. First, irrespective of the fact that the Navajo Nation cannot criminally prosecute him, Tracy claims that his testimony as a witness will incriminate him for purposes of any prospective federal prosecution. And second, Tracy claims that the Navajo Nation is using the Uniform Act to obtain an improper advantage in the civil case.

1. The Privilege Against Self-Incrimination as Applied to the Navajo Nation

Tracy contends that the fifth amendment privilege against self-incrimination does not apply to Indian tribes and that the immunity provision in the Navajo Code, 17 Navajo Trib.Code § 208, does not provide constitutionally adequate immunity to a witness

who is compelled to give incriminating testimony.

Historically, Indian tribes were not subject to the Bill of Rights and other constitutional guarantees limiting the federal and state governments. In Talton v. Mayes, the Supreme Court held that the fifth amendment right to a grand jury was not applicable to a tribal prosecution against one of its members because "the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution" and therefore "[these powers] are not operated upon by the Fifth Amendment." [168 Ariz. 40]

Page 1047

163 U.S. 376, 384, 16 S.Ct. 986, 989, 41 L.Ed. 196 (1896). Talton 's holding was subsequently extended to various other constitutional provisions, providing the basis for the Supreme Court's statement in Santa Clara Pueblo that "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those Constitutional provisions framed specifically as limitations on federal or state authority." 436 U.S. at 56, 98 S.Ct. at 1675-76.

The Talton Court recognized, however, that Congress has plenary authority to limit, modify, or eliminate the powers of local self-government that the tribes otherwise possess. 163 U.S. at 384, 16 S.Ct. at 989. In accordance with this power, Congress enacted the 1968 Indian Civil Rights Act (the ICRA), which imposes on the tribes restrictions similar to those contained in the Bill of Rights and the fourteenth amendment. See 25 U.S.C. §§ 1301 to 1303 (1983 & 1990 Supp.). The articulated purpose of the bill that eventually became the ICRA was:

[t]o protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. These limitations are the same as those imposed on the Government of the United States by the United States Constitution and on the States by judicial interpretation.

S.Rep. No. 841, 90th Cong. 1st Sess. (Dec. 1967) (emphasis added).

Although the primary purpose of the ICRA was to provide Indians with protection from arbitrary action by their tribal governments, the protections of the act extend to "any person" subject to tribal jurisdiction, which the courts have read to include non-Indians. See, e.g., Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 934 (10th Cir.1975); Dodge v. Nakai, 298 F.Supp. 17, 24 (D.C.Ariz.1968) (noting that legislative history indicates that "any Indian" language was changed to "any person" so that provision would cover all persons subject to tribal jurisdiction).

The ICRA specifically imposes on the tribes the fifth amendment privilege against self-incrimination, stating in relevant part that "no Indian tribe in exercising powers of self-government shall ... compel any person in any criminal case to be a witness against himself." 25 U.S.C. § 1302(4). The language in section 1302(4) is virtually identical to that of the fifth amendment.

Tracy argues, however, that the privilege against self-incrimination offered by the ICRA provides protection inferior to that of the United States and Arizona Constitutions. We disagree. It is true that certain provisions of the ICRA do not mirror those of the federal constitution and have been interpreted somewhat differently from their federal counterparts. [16] On the other hand, provisions of the ICRA that clearly mirror the federal provisions in language and intent, such as the prohibition against unreasonable search and seizure, have been interpreted under the federal standard and are generally held to be identical to their

Page 1048

[168 Ariz. 41] federal counterparts. See, e.g., United States v. Clifford, 664 F.2d 1090, 1091-92 n. 3 (8th Cir.1981) (fourth amendment standard is used for analyzing search and seizure conduct of tribal officers under ICRA) (citing United States v. Lester, 647 F.2d 869, 872 (8th Cir.1981)); see also United States v. Strong, 778 F.2d 1393, 1397 (9th Cir.1985); Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir.1975). The privilege against self-incrimination appears to fall within this latter category. Strong, 778 F.2d at 1397. The language duplicates that of the federal constitution and clearly could not be interpreted to provide any lesser protection.

We believe, therefore, that when testifying in tribal court, Tracy will enjoy a federally imposed privilege against self-incrimination that is substantially coextensive with the fifth amendment privilege. Presumably, then, the Navajo Nation could not compel Tracy's testimony without a grant of use and derivative use immunity sufficient to meet the dictates of the fifth amendment. See Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

Tracy argues, however, that a provision of the Navajo Tribal Code, 17 Navajo Trib.Code § 208(A) and (B), purports to override the federal privilege. [17] We are unable to conclude from the statute's language and structure that it authorizes a court to order a material witness to testify without any grant of immunity, where that witness faces a threat of incrimination. [18] Even if the statute purports to do this, we believe it would be held invalid by the Navajo Nation's judicial branch as a violation of the privilege against self-incrimination set forth in the ICRA and the privilege against self-incrimination set forth in the Navajo Bill of Rights, 1 Navajo Trib.Code § 5. A tribal code provision cannot operate in violation of the ICRA, and the Navajo courts are the proper forums to adjudicate this issue. As the Supreme Court noted in Santa Clara Pueblo, "[t]ribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." 436 U.S. at 65, 98 S.Ct. at 1680. [19]

Finally, even in the unlikely event that the Navajo courts force Tracy to testify without a constitutionally adequate grant of immunity, he has an adequate remedy in federal court through the habeas corpus provision of the ICRA, 25 U.S.C. § 1303. Section 1303 provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." A writ of habeas corpus is available whether the petitioner is held under civil or criminal process. Wales v. Whitney, 114 U.S. 564, 571, 5 S.Ct. 1050, 1053, 29 L.Ed. 277 (1885).

Page 1049

[168 Ariz. 42] A habeas action may be used to discharge a witness who is restrained under a contempt order made by a court in excess of its jurisdiction. See Ex Parte Hudgings, 249 U.S. 378, 384-85, 39 S.Ct. 337, 340, 63 L.Ed. 656 (1919). When a witness asserts his privilege against self-incrimination and the court improperly denies the privilege, any commitment of the witness in contempt is in excess of the jurisdiction of the court and is therefore void. See Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892).

Moreover, the habeas corpus provision of the ICRA is quite expansive. The petitioner need only be detained by the tribal court order, and need not be in custody. 25 U.S.C. § 1303. Even prior to the effective date of the ICRA, at least one court held that federal habeas review lies where the petitioner has merely been fined by the tribal court, rather than imprisoned. See, e.g., Settler v. Yakima Tribal Court, 419 F.2d 486, 490 (9th Cir.1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970). Apparently, then, Tracy may use the habeas corpus remedy whether he is fined or imprisoned in a civil contempt action.

We hold that issuance of a subpoena by an Arizona court, compelling Tracy's attendance in

Navajo court, creates no undue hardship to Tracy with regard to his constitutional privilege against self-incrimination.

2. The Use of Compelled Testimony in a Subsequent Federal Prosecution

Tracy raises the further issue that immunized testimony given before a tribal court may not be similarly recognized in a federal court proceeding. Obviously, one jurisdiction may not grant immunity to a witness for purposes of a related proceeding in another jurisdiction. However, in Murphy v. Waterfront Commission, the Supreme Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964). The Court made it clear that the reciprocal rule would apply where a federal witness faces danger of incrimination under state law. Id. at 77-78, 84 S.Ct. at 1608.

While there is no case directly on point to determine whether the Murphy doctrine applies in a related federal court proceeding to bar the use of immunized testimony given in tribal court, we believe it does. First, although the facts in Murphy involved only the state/federal relationship, the Court phrased the issue under consideration more broadly, as the question of whether:

[O]ne jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction.

Id. at 53, 84 S.Ct. at 1596 (emphasis added). As we have already discussed, Indian tribes are separate jurisdictions within our federal system. Further, the federal trust relationship of the United States government with the tribes creates a distinct likelihood of dual prosecution by tribal and federal courts of crimes arising from the same events. For example, federal courts have jurisdiction over enumerated "major crimes" that occur on the reservation under 18 U.S.C. § 1153; however, tribal courts may prosecute lesser included offenses arising out of the same event. See Wheeler, 435 U.S. at 330, 98 S.Ct. at 1090. In view of the strong likelihood that testimony given in a tribal prosecution could later be used in a federal prosecution, it seems unthinkable that a federal court would find the Murphy doctrine inapplicable after Congress expressly imposed the privilege against self-incrimination on the tribes through the ICRA.

The eighth circuit has held that Indian witnesses may be compelled to testify under a grant of immunity in a federal grand jury proceeding even though they might later face prosecution in their tribal court. In re Long Visitor, 523 F.2d 443 (8th Cir.1975). The court believed the Murphy doctrine would apply because the ICRA expressly

Page 1050

[168 Ariz. 43] protects Indians from self-incrimination. Id. at 447.

We therefore reject Tracy's arguments that he should not be compelled to testify because the testimony might later be used against him in federal court.

3. The Use of Testimony in Civil Proceedings

Tracy argues that the Navajo Nation's use of the Uniform Act is an improper attempt to gain his testimony for use in the Big Boquillas civil case. We do not agree. The privilege against self-incrimination applies only where the witness is in danger of facing criminal liability. There is no equivalent privilege to refuse to testify to avoid civil liability. 8 WIGMORE, EVIDENCE § 2254, at 331 (McNaughten rev.1961); United States v. Kates, 419 F.Supp. 846 (E.D.Pa.1976); see, e.g., Ex Parte Butler, 522 S.W.2d 196, 198 (Tex.1975) (the fact that

answer might subject witness to civil liability did not constitute ground for asserting privilege against self-incrimination).

Thus, there is no proscription against using compelled immunized testimony against a witness in a civil proceeding. See United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir.1974), cert. denied, 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2d 395 (1975) (testimony given by a party in a civil case under a grant of immunity may be used against him in that case, although it may not be used in any criminal proceeding). We find no impropriety in the Navajo Nation's adoption of the Uniform Act in connection with the multicount prosecutions of the MacDonalds.

D. Undue Hardship and the Professional Privilege Claims

Finally, we address the issues relating to professional privilege raised by the intervening petitioners. [20] Essentially, these petitioners argue that an Arizona court should decline to issue subpoenas based on the undue hardship exception in A.R.S. § 13-4092(B) because the Navajo District Court might not recognize the Arizona statutory privileges for attorney-client and accountant-client relationships.

Quite simply, the professional privileges are a matter for the requesting jurisdiction to rule on and are not appropriately addressed to the state court issuing the subpoena. See In re California Grand Jury Investigation, 471 A.2d 1141, 1145 (Md.App.1984), cert. denied sub nom. Rees v. Los Angeles County, 467 U.S. 1205, 104 S.Ct. 2388, 81 L.Ed.2d 346 (1984) (Maryland witness subpoenaed to testify in California under the Uniform Act could not claim he would suffer undue hardship based on being forced to testify in California regarding matters privileged under Maryland's Press Shield Law, as that law had no extraterritorial application).

Because the professional privileges are not based on any constitutional mandate, the laws of each jurisdiction may appropriately vary. In addition, the testimonial privileges have been held to contravene the fundamental principle that "the public has a right to every man's evidence," and they are therefore strictly construed and weighed against other policy considerations. Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980).

Thus, we need not consider whether the courts of the Navajo Nation recognize the attorney-client or accountant-client privileges as those privileges exist in Arizona. [21] We do not believe that petitioners face any undue hardship by having the Navajo District

Page 1051

[168 Ariz. 44] Court rule on the merits of their privilege arguments at the time the testimony is sought.

CONCLUSION

We conclude that the term "territory," as used in the Uniform Act, has no fixed, immutable meaning but is subject, instead, to interpretation. Although the legislature did not contemplate the specific application of the Uniform Act to the facts before us, the proper question is whether such an application is appropriate given the text of the statute, the policies articulated by the legislature in that and other statutes, and the public policy of the state. Review of these factors and the relevant body of law indicates that a tribe may be considered a territory for purposes of statutory enactments such as the one now before us. The principle of comity, which Arizona courts have applied to enactments and decisions of the Navajo Nation and its courts, also favors interpreting the Uniform Act in such a manner. Interpreting the Uniform Act to include the Navajo Nation also furthers the law enforcement interests of both Arizona and the Navajo Nation, thereby fulfilling the Act's objectives, and does not impair the constitutional rights of the petitioners or cause them any undue hardship.

We hold, therefore, that the term "territory," as used in the Uniform Act, A.R.S. §§ 13-4091 through 13-4096, encompasses the Navajo Nation. The petitioner and intervenors here were properly summoned as material witnesses in criminal proceedings before the Navajo District Court. The superior court judge did not exceed his jurisdiction or abuse his discretion in issuing the subpoenas under the Uniform Act. Having previously accepted jurisdiction, we now deny relief.

Respondents shall be entitled to claim their costs as provided by our rules. See Rule 21, Ariz.R.Civ.App.P., 17B A.R.S.

GORDON, C.J., and SARAH D. GRANT, Chief Judge, concur.

CORCORAN, J., did not participate in this decision; pursuant to Ariz. Const. art. 6, § 3, SARAH D. GRANT, Chief Judge, of Division One, Arizona Court of Appeals, was designated to sit in his stead.

MOELLER, Justice, dissenting.

I respectfully dissent from the majority's holding that the Navajo Nation is a "state" within the meaning of the Uniform Act. In my view, the only question that needs to be addressed in this case is: Did the Arizona Legislature intend to include the Navajo Nation in its definition of "state" when it enacted the Uniform Act? The parties to this case, the court of appeals, and this court all agree that the answer is "no."

Nevertheless, the majority concludes that the Navajo Nation should now be added to the Uniform Act and considered to be a "state." This holding is apparently based on the majority's speculation that the Arizona Legislature, if asked today, would include the Navajo Nation in the Act. Whether the majority's speculation is correct is wholly beside the point, because the legislature is the only proper body to consider and adopt amendments to its statutes. Statutes, unlike constitutions, are easily amendable by the legislature at any time. In the fifty-four years since Arizona enacted the Uniform Act, the legislature has not seen fit to add the Navajo Nation (or any other Indian tribe or nation) to the Act. The Navajo Nation itself did not see fit to adopt the Act until 1989, when it did so solely to use the Act in this case. In adopting the Act, the Navajo Nation recognized the fallacy of its present argument by expressly including itself by name in the Act, obviously recognizing that the Uniform Act would not otherwise embrace it.

This case is one of statutory construction. It should properly be resolved by applying the plain meaning of the language of the statute. The majority, in my opinion, errs in treating the case as one involving comity, rather than as one involving statutory construction. The majority states that we accepted jurisdiction of this special action because the issue is one "of first impression and involves the question of comity between our state and the separate, sovereign jurisdiction of the Navajo

Page 1052

[168 Ariz. 45] Nation," at 25, 810 P.2d at 1032, and goes on to state: "In this case, we deal with a tribal law, rather than a judgment," at 34, 810 P.2d at 1041. The fact is that we deal with no tribal law. We deal only with a state law. If we were to look to tribal law for guidance, and perhaps we should, we would immediately see that the Navajo Nation itself does not consider itself a "state" within the meaning of the Act as enacted by the Arizona Legislature.

When construing a statute, we must ascertain the legislature's true intent at the time it enacted the statute. Bushnell v. Superior Court, 102 Ariz. 309, 311, 428 P.2d 987, 989 (1967). That intent is determined by looking at the language of the statute. If that language is plain and unambiguous, leading to only one meaning, we must follow that meaning. Marquez v. Rapid Harvest Co., 89 Ariz. 62, 64, 358 P.2d 168, 170 (1960).

We have often recognized the dangers of judicial legislation:

The cardinal rule of statutory construction is to ascertain the meaning of a statute and the intent of the legislature at the time the legislature acted. Putvain v. Industrial Commission, 140 Ariz. 138, 680 P.2d 1199 (1984); City of Phoenix v. Superior Court, 139 Ariz. 175, 677 P.2d 1283 (1984). To arrive at legislative intent, this Court first looks to the words of the statute. State ex rel. Flournoy v. Mangum, 113 Ariz. 151, 548 P.2d 1148 (1976).

Kriz v. Buckeye Petroleum Co., 145 Ariz. 374, 377, 701 P.2d 1182, 1185 (1985) (emphasis added).

The most basic rule of statutory construction is that in construing the legislative language, courts will not enlarge the meaning of simple English words in order to make them conform to their own peculiar sociological and economic views. Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P.2d 18 (1970).

Padilla v. Industrial Comm'n, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976).

Courts are not at liberty to impose their views of the way things ought to be simply because that's what must have been intended, otherwise no statute, contract or recorded word, no matter how explicit, could be saved from judicial tinkering.

Kilpatrick v. Superior Court, 105 Ariz. 413, 422, 466 P.2d 18, 27 (1970).

Chief Judge Grant's recent opinion in Begay v. Roberts, 167 Ariz. 375, 807 P.2d 1111 (App.1990), contains an excellent review of the case law leading to the irrefutable conclusion that the Navajo Nation is a separate, sovereign jurisdiction now, just as it was in 1937. Clearly, the Navajo Nation is not a "state" or a "territory of the United States" in any accepted meaning of those terms. Neither the Navajo Nation nor any other Indian tribe or nation is mentioned in the Uniform Act itself, in any version of the Act enacted in any jurisdiction, in any notes to the Uniform Act, or in any Arizona legislative history relative to the Act. After generations of jurisdictional litigation, it is astounding that the Navajo Nation now argues in state court that it should be considered to be a "state" for purposes of a state statute. It is even more astounding that the majority accepts the argument.

Drifting entirely away from principles of statutory construction, the majority makes much of the supposed advantages accruing to the administration of criminal justice if the Navajo Nation is added to the Act, and of the supposed detriments to the criminal justice system if we do not add the Nation to the Act. But the validity of these arguments, if any, should be determined by the legislature, which is the proper body to consider legislative amendments.

Even if this court were the appropriate forum for the arguments advanced by the majority, the record fails to demonstrate their validity. What the record does show is that for fifty-two years following Arizona's enactment of the Uniform Act, the Navajo Nation saw no need to enact it. When it did so, it did so only for this case. The record shows no single instance in Arizona criminal justice history in which the Act has been used to obtain a witness from the Navajo Nation for a state court prosecution. The legislature, not this

Page 1053

[168 Ariz. 46] court, should determine whether the Act should be amended to include one, some, all, or none of the Indian tribes and nations.

I am frankly unable to discern the intended scope of today's ruling by the majority. There are hundreds of Indian nations and tribes within the territorial confines of the United States. Some of the majority's language would suggest that all Indian nations or tribes in the United States are to be deemed "territories of the United States" for purposes of the Act. See, e.g., at 30, 810 P.2d at 1037, contending that the statute

extends to "any territory," and that the Navajo Nation passes "that test" since "it clearly fits the dictionary definition of a 'geographical area' of the United States 'under the jurisdiction of a political authority.' " Other portions of the opinion seem to be case-specific to the Navajo Nation. Whether the opinion covers one, some, or all of the hundreds of Indian tribes or nations within the United States, I reject its rationale because it is not the province of courts to amend statutes on the theory that the legislature would amend them if asked.

Principles of separation of powers and judicial restraint should constrain this court to let the legislature speak for itself on legislative matters. The majority's tour de force of the law of Indians, comity, fifth amendment, territories, and legislative intent cannot obscure the simple fact that the Arizona Legislature did not consider the Navajo Nation to be a state within the meaning of the Act when it adopted the Act. Nor can it obscure the fact that in the fifty-four years since adopting the Act, the Arizona Legislature has not seen fit to add the Navajo Nation to the Act, although it has had abundant opportunity to do so.

In my opinion, the trial court order should be vacated on the jurisdictional ground that the Navajo Nation is not a "state" within the meaning of the Arizona statute. I therefore do not address the several alternative arguments advanced by petitioners.

CAMERON, Justice, concurring.

I concur in Justice Moeller's dissent.

---

1 In Arizona, relief formerly obtained by writs of prohibition, mandamus or certiorari is now obtained by "special action." Rule 1, Arizona Rules of Procedure for Special Actions, 17B A.R.S.

2 Although Congress has suspended the enforcement of Duro until September 30, 1991, pending resolution of bills introduced in Congress that would permanently recognize the inherent jurisdiction of tribal courts over non-member Indians (see Dept. of Defense Appropriations Act, 1991, Pub.L. No. 101-511, 104 Stat. 1892 (1990)), the ultimate dispostition of this issue is not relevant to this case because Tracy, as a non-Indian, is not subject to the tribal court's criminal jurisdiction. See Oliphant v. Suquamish Tribe, 435 U.S. 191, 98 S.Ct. 1011 (1978).

3 The Navajo Uniform Act is substantially identical to Arizona's Uniform Act. The companion provisions of the Uniform Act enable a court, on a showing of materiality and necessity, (1) to compel witnesses who reside outside of its jurisdiction to attend and testify at a criminal proceeding or a prosecutorial investigation; and (2) to require a witness from within the state, on the application of a court of record in another jurisdiction that has enacted a reciprocal provision, to testify in the courts of that state or territory. The Uniform Act has been adopted by all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. The Navajo Uniform Act differs from the Arizona version only in that it enumerates the Navajo Nation in its definition of what constitutes a state. 17 Navajo Trib.Code § 1970(2).

4 We recognize the Navajo District Court as a court of record. See infra note 6, on the structure of the Navajo judicial system. In general, district courts are courts of record. See State v. Pendergrass, 215 Kan. 806, 528 P.2d 1190, 1192 (1974) (quoting State v. Higby, 210 Kan. 554, 502 P.2d 740 (1972)). The district courts of the Navajo Nation are comparable to those of other jurisdictions (see infra note 6), as they keep a written record of the proceedings, have provision for appeal to the Navajo Supreme Court, and have the inherent powers of all such courts, i.e., the power to fine and imprison for contempt. See generally 21 C.J.S. Courts § 4, at 12-13 (1990).

5 The Sherman Anti-Trust Act (15 U.S.C. §§ 1 through 7) proscribes certain acts in restraint of trade or commerce among the states, or "in any Territory of the United States or of the District of Columbia." 15 U.S.C. § 3 (emphasis added).

6 That the term territory must be interpreted in accordance with the purposes of the act in question is also apparent from Supreme Court opinions dealing with the District of Columbia. Compare District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973) with Embry v. Palmer, 107 U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346 (1883).

7 In 1883, the Commissioner of Indian Affairs authorized creation of Courts of Indian Offenses to handle basic reservation law and order problems. These courts operated under Bureau of Indian Affairs regulations and were very much connected to the federal agency system on the newly created reservations. The Courts of Indian Offenses were generally not courts of record, nor were they initially an aspect of "inherent Indian sovereignty." These latter developments took place as the political systems of the tribes evolved, particularly after the Indian Reorganization Act (IRA) was passed in 1934 to allow tribes to assert their sovereign governing powers. Tribes that incorporated under the IRA drafted their own constitutions and laws, and set up independent court systems. See generally D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 384-87 (2d ed. 1986) (quoting NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 7-13, 88-102 (D. Getches, ed. 1978)); V. DELORIA, JR. & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113-116 (1983). Other tribes, such as the Navajo, chose not to incorporate under the IRA but, rather, to strengthen their sovereign status and develop their own political system. The Courts of Indian Offenses are now generally recognized as courts that operate under the residual sovereignty of the tribes rather than as agencies of the federal government. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 251 (1982) (citing Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir.1956)). The Navajo Nation's Court of Indian Offenses evolved into a separate branch of government in 1958. The courts of the Navajo judicial branch are courts of record with rights of appeal to the Navajo Supreme Court, which hears issues of law raised in the lower court record. The Navajo Nation has developed an extensive tribal code that is bound and supplemented. Procedural rules of court are patterned after the federal rules. Decisions of the Navajo Supreme Court are published in the Navajo Reporter, and the Navajo courts use these as precedent. Federal and state opinions serve as persuasive authority. See Tso, The Process of Decision-Making in Tribal Courts, 31 ARIZ.L.REV. 225, 227-28 (1989); Tso, The Tribal Court Survives in America, 25 JUDGES' J. 22 (vol. 2, Spring 1986).

8 See "Locksley Hall" (1842).

9 Tracy asserts that Mackey's definition of territory was rejected by the Court's later decision in In re Lane. We disagree. In Lane, the Court was faced with the issue of whether the Oklahoma Indian territory, a geographical area set aside for several tribes, should be considered a territory for purposes of a federal criminal statute. In concluding that it should not be considered a territory, the Court focused on the fact that the Oklahoma Indian territory "had no legislative body ... no government ... no established or organized system of government for the control of the people within its limits, as the territories of the United States have ... always had." 135 U.S. at 448, 10 S.Ct. at 761. In contrast, the Court in Mackey considered the effect to be given to letters of administration issued pursuant to tribal law by the Cherokee Nation, a tribal body whose laws were "enacted [by a national council], approved by their executive, and carried into effect through an organized judiciary." 59 U.S. at 102. The situation in the case before us is analogous to Mackey rather than Lane because we consider the effect to be given to a tribal law enacted by the Navajo Nation, which possesses legislative, executive, and judicial branches of government.

10 We note that the United States Supreme Court has never decided this issue and that commentators disagree as to whether tribal laws and judgments should be entitled to full faith and credit under the statute. See Ragsdale, Problems in the Application of Full Faith and Credit for Indian Tribes, 7 N.M.L.REV. 133 (1977) (discussing problems in applying the full faith and credit statute to tribes and concluding that statute probably does not extend to the tribes); Comment, supra, 1981 ARIZ.ST.L.J. at 806-09, 820 (finding support for position that tribes qualify as territories, or at least as possessions, for purposes of full faith and credit statute).

11 Again, the Uniform Act applies to states, which includes "any territory." Puerto Rico is a commonwealth, not an organized territory; evidently, however, the Supreme Court assumes that the Uniform Act applies on a broader basis.

12 In Arizona, the considerable amount of Indian land often leads to jurisdictional conflicts. Within Arizona's geographical boundaries lies the greatest amount of Indian land of any state within the continental United States. There are approximately 19,623,000 acres of tribally owned and allotted individual land within Arizona; this is roughly 26.99% of the total acreage within the state. D. GETCHES & C. WILKINSON, supra, at 13 (from T. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS 176 (1972)). The State of Arizona has entered into several cooperative agreements with the

tribes to alleviate jurisdictional problems. See id. at 547.

13 In Brady, we held that the trial court's denial of defendant's request to summon a material out-of-state witness constituted a denial of due process because it interfered with defendant's constitutional right to have compulsory process for obtaining witnesses in her favor. 122 Ariz. at 229-30, 594 P.2d at 95-96. The constitutional right to secure compulsory process is guaranteed by the sixth amendment to the United States Constitution, article 2, § 24 of the Arizona Constitution, and Title 1, § 6 of the Navajo Tribal Code.

14 The United States Supreme Court and lower federal courts have consistently held that voluntary, consensual dealings with a tribe or its members can render a non-Indian subject to the tribal court's civil jurisdiction. See, e.g., Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981) ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians"; in particular the tribes may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements"); Babbitt Ford, 710 F.2d at 593 (tribal court appropriately exercised civil jurisdiction over non-Indian automobile dealer who repossessed automobile on the reservation, in violation of tribal law, even where contract with Indian was entered into off the reservation).

15 See, e.g., discussion in note 12, supra, regarding a defendant's right to use compulsory process to obtain witnesses in his favor. This right is guaranteed by the Navajo Bill of Rights (1 Navajo Trib.Code § 6) and would be seriously undermined if the Navajo courts had no means to summon material witnesses outside their jurisdiction.

16 For example, the equal protection provision guarantees "the equal protection of its [the tribe's] laws," rather than of "the laws." Santa Clara Pueblo, 436 U.S. at 63 n. 14, 98 S.Ct. at 1679 n. 14 (quoting 25 U.S.C. § 1302(8) (emphasis in Santa Clara Pueblo)). In recognition that a strict construction of the equal protection clause could work a significant interference with tribal custom and tradition, the federal courts have declined to construe the provision under the federal standard. See, e.g., Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082-83 (8th Cir.1975) (equal protection clause of the ICRA is not in all respects coextensive with the fourteenth amendment); Tom v. Sutton, 533 F.2d 1101, 1104-05 n. 5 (9th Cir.1976) (terms "due process" and "equal protection" as used in the ICRA are construed "with due regard for historical, governmental and cultural values of an Indian tribe," and such "terms are not always given same meaning as they have come to represent under the United States Constitution"); Howlett v. Salish and Kootenai Tribes, 529 F.2d 233, 238 (9th Cir.1976) (when application of federal equal protection standard would significantly impair tribal custom or practice and individual injury is not grievous, equal protection clause of ICRA may be implemented differently; however, same interpretation governs where tribal procedure parallels that of the larger American society).

17 Section 208(A) applies to investigation proceedings and provides that a witness in possession of material information regarding an offense may be required to testify upon issuance of a court order granting use immunity. Section 208(B) covers the same issue in the context of court proceedings. Section 208(B) provides that the court may issue an order compelling testimony, notwithstanding the witness's privilege against self-incrimination, "if it finds: (1) the testimony ... may be necessary to the public interest; and (2) the person has refused, or is likely to refuse, to testify ... on the basis of his privilege against self-incrimination." Section 208(B) does not explicitly provide for a grant of immunity, and it is unclear whether the provision of § 208(A) regarding use immunity is to be read into § 208(B) as well.

18 In addition, we note that the Navajo courts apparently interpret 17 Navajo Trib.Code § 208 to afford full use and derivative use immunity. The witnesses who testified at the MacDonalds' first trial under a different complaint were granted full use and derivative use immunity under 17 Navajo Trib.Code 208 by the Navajo District Court. Response to Petition (Exhibit B, Hughes Affidavit at para. 6; Exhibit C, Order Granting Use and Derivative Use Immunity).

19 Further, the Navajo Supreme Court has held that where questions under the ICRA arise, the court will look to precedents of the United States Supreme Court and the ninth circuit for guidance. Navajo Nation v. Peter MacDonald, Sr. No. A-CV-36-90, slip op. at 31 (Nav.Sup.Ct. Sept. 26, 1990); see, e.g., Navajo Nation v. Browneyes, 1 Nav.Rptr. 300 (Nav.Ct.App.1978) (interpreting equal protection

clause in accordance with fourteenth amendment guarantee) (the Navajo Court of Appeals became the Navajo Supreme Court in 1985; see Tso, supra, 25 JUDGES' J. at 53).

20 It is asserted that these petitioners have material evidence to give due to their positions as lawyers and accountants to parties allegedly involved in the Big Boquillas transaction.

21 We observe, however, that the Navajo Nation requires attorneys to be members of the Navajo Nation Bar before they may appear before the courts of the Navajo Nation. The attorneys of the Navajo Nation Bar are governed by the same code of professional ethics as that promulgated by the American Bar Association. In re Deschinny, 1 Navajo Rptr. 66 (Nav.Sup.Ct.1972). Thus, the Navajo Nation recognizes the ethical constraints governing the attorney-client relationship. The Navajo Nation appears also to recognize the attorney-client privilege in Rule 13 of the Navajo Nation Rules of Evidence.

Page 1104
885 P.2d 1104
180 Ariz. 539, RICO Bus.Disp.Guide 8679
The NAVAJO NATION, also known as the Navajo Tribe of Indians, Plaintiff-Appellee,
v.
Peter D. MacDONALD, Sr. and Wanda MacDonald, his wife; Byron Terrell "Bud" Brown and Carol E. Brown, husband and wife; Peter D. "Rocky" MacDonald, Defendants-Appellants.
No. 1 CA-CV 92-0113.
Court of Appeals of Arizona,
Division 1, Department B.
May 24, 1994.
As Amended on Motion for Reconsideration June 23, 1994.
Review Denied Dec. 20, 1994. *

Page 1105

[180 Ariz. 540] Byron T. "Bud" Brown, Carol E. Brown, in pro. per.

Peter D. MacDonald, Jr., in pro. per.

Mariscal, Weeks, McIntyre & Friedlander, P.A. by Phillip Weeks, David J. Ouimette, Phoenix, for appellee.

Page 1106

[180 Ariz. 541]

OPINION

TOCI, Judge.

I. INTRODUCTION

Byron T. Brown and Kurion T. Tracy conspired with Peter D. MacDonald, Sr., Chairman of the Navajo Nation Tribal Council, and his son, Peter D. MacDonald, Jr. to defraud the Navajo Nation ("the Tribe") of several million dollars through a double-escrow real estate transaction. When the Tribe discovered the existence of the illegal conspiracy, it filed a civil action against the conspirators in Maricopa County Superior Court. The trial court entered judgment in favor of the Tribe and against Brown, MacDonald, Jr., and MacDonald, Sr. [1] Peter D. "Rocky" MacDonald, Jr., Byron Terrell "Bud" Brown, Carol E. Brown, Peter D. MacDonald, Sr., and Wanda MacDonald all appealed. For the reasons discussed below, we affirm.

A. MacDonald, Jr.'s Appeal

After filing a notice of appeal, MacDonald, Jr. filed a motion in superior court for relief from the Tribe's judgment, pursuant to Rule 60, Arizona Rules of Civil Procedure. He argued that because the Navajo Nation Supreme Court had vacated his criminal conviction for activities related to the ranch transaction, he was entitled to relief under Rules 60(c)(5) and (d). The trial court denied the motion, finding no basis under Rule 60 for exercising its discretion to set aside the Tribe's judgment.

On appeal, MacDonald, Jr. argues that the trial court lacked subject matter jurisdiction over the Tribe's claims and that the trial court erred by denying his Rule 60 motion for relief from the Tribe's judgment. He also raises eleven other alleged errors that he claims warrant reversal.

We conclude that the trial court properly exercised subject matter jurisdiction over the Tribe's claims against MacDonald, Jr. We also conclude that because MacDonald, Jr. did not appeal the trial court's order denying his Rule 60 motion, we do not have jurisdiction to consider his arguments on this issue. Finally, we conclude that by not raising his remaining arguments in

the trial court, MacDonald, Jr. has waived review of those arguments on appeal.

B. Brown's Appeal

Brown argues first that the portion of the judgment against him for fraud and tortious interference with contract is unsupported by the evidence. Second, he argues that the trial court erred by awarding the Tribe damages, costs, and attorneys' fees under Ariz.Rev.Stat.Ann. ("A.R.S.") section 13-2310(C) (1989) (amended Supp.1993) because it was not in effect at the time the wrongful acts allegedly occurred.

We conclude that the trial court's findings on the Tribe's alternative theories of liability, which Brown does not challenge on appeal, are sufficient to support the judgment against him. We also conclude that because Brown did not raise his second argument in the trial court, he has waived review of the argument on appeal. We therefore affirm.

II. FACTUAL AND PROCEDURAL HISTORY

On appeal, we review the facts in the light most favorable to sustaining the judgment. Rogus v. Lords, 166 Ariz. 600, 601, 804 P.2d 133, 134 (App.1991).

In December 1986, after MacDonald, Sr. [2] was re-elected chairman of the Navajo Nation Tribal Council, Tracy [3] and Brown [4] approached

Page 1107

[180 Ariz. 542] him with their plan to defraud the Tribe. Their plan was to purchase the Big Boquillas Ranch ("the ranch") from the Boquillas Cattle Company, a subsidiary of Tenneco West, and simultaneously resell the ranch to the Tribe for a substantial profit. Tracy and Brown, however, needed MacDonald, Sr. to use his authority over the Tribe's legislative and executive branches of government to ensure that the Tribe would purchase the ranch. MacDonald, Sr. agreed to participate in the scheme and said, "I assume I'll be taken care of." The three co-conspirators agreed that Tracy and Brown would split the profits generated by the transaction and that MacDonald, Sr. would receive his share from Brown. The conspirators also agreed that MacDonald, Sr.'s interest in the transaction and the payments made to him would be kept secret.

After he was inaugurated as Chairman, MacDonald, Sr. immediately began using his position, authority, and influence to induce the Tribe to purchase the ranch. He frequently met with the Tribal officials whose approval was needed for the transaction and expressed his support for the deal. He never disclosed, however, that he had a personal financial interest in the transaction. Moreover, he never disclosed that the conspirators intended for Tracy to purchase the ranch from the Boquillas Cattle Company to resell to the Tribe or that Brown was a principal in the transaction rather than an agent.

In exchange for MacDonald, Sr.'s participation, Brown and Tracy paid him secret bribes and kickbacks. Brown arranged for Tracy to wire $25,000.00 to the United New Mexico Bank in Gallup, New Mexico as partial payment on a note which MacDonald, Sr. owed to the bank. Tracy also leased a new BMW 735i automobile for MacDonald, Sr.'s personal use. In addition, Tracy gave Brown a check for $10,000.00, which was used to pay the tuition at a private boarding school that MacDonald, Sr.'s daughters were attending.

In February 1987, Tracy entered into a contract with the Boquillas Cattle Company to purchase the ranch for $26,250,000.00. Although Tracy and Brown both knew that the Boquillas Cattle Company had previously offered to sell the ranch to other potential buyers for as little as $18,000,000.00, the two of them made no effort to negotiate a purchase price lower than the one offered. They also settled for only one-half of the mineral rights in the ranch land even though they knew that the previous buyers had negotiated sales agreements transferring all of the mineral rights to the buyer. Under the contract, Tracy would not become the

legal owner of the ranch until the transaction closed and all required payments were made.

After the purchase agreement with the Boquillas Cattle Company was executed, the conspirators presented an offer to sell the ranch to the Tribe without revealing that the sale would involve a double-escrow. The conspirators falsely represented to the tribe that the Boquillas Cattle Company was the legal owner of the ranch. To conceal his interest in the purchase contract with Boquillas Cattle Company, Tracy changed the name of one of his companies to "Big Boquillas Cattle Company." He purposely chose this name so that the tribal officials would think that they were purchasing the ranch from the Boquillas Cattle Company. Tracy then sent a letter to the Tribe on Big Boquillas Cattle Company stationery, offering to sell the ranch to the Tribe for $33,417,367.00.

Brown and Tracy also retained an attorney to prepare a misleading title opinion about the ownership of the ranch. The opinion falsely represented that the ranch was owned at the time by Big Boquillas Cattle Company. Neither Tracy's interest in the purchase contract with Boquillas Cattle Company nor his interest in the Big Boquillas Cattle Company corporation was disclosed. Brown and Tracy presented the title opinion to the Tribal Council to mislead them about the identity of the owner of the ranch.

On April 30, 1987, the Tribal Council approved the informal proposed agreement to buy the ranch from Tracy's company for $33,417,367.00. At the time, a formal purchase agreement had not yet been prepared. The terms of the proposed agreement provided

Page 1108

[180 Ariz. 543] for a non-refundable $500,000.00 earnest money deposit, payment of $8,229,344.00 at closing, and payment of the balance of $24,688,032.00 in four equal installment payments. The agreement also provided that the Tribe would receive only one-half of the mineral rights in the ranch property.

When the transaction was approved, tribal officials were unaware of MacDonald, Sr.'s deceit. They were still under the impression that Brown was a real estate agent for the true owner of the ranch. And, they had not discovered MacDonald, Sr.'s covert financial interest in the transaction. In addition, the Tribe did not know that the transaction involved a double-escrow.

Although on April 30, 1987, no formal written purchase agreement existed, MacDonald, Sr. immediately began exerting pressure on the Tribe's administrative employees to complete the transaction. He threatened to fire the director of the Tribe's finance department if the director failed to locate the necessary funds to pay the non-refundable $500,000.00 earnest money deposit. He also demanded that a Navajo Justice Department attorney prepare a receipt for the deposit over the attorney's objections that the documentation was inadequate. When the attorney voiced his objections, MacDonald, Sr. said, "I want the money paid. You know what I want. Do it." A one-page receipt bearing only the total sales price of the transaction was prepared and the non-refundable deposit was paid.

Although the closing was originally scheduled for July 15, 1987, MacDonald, Sr. moved it forward to July 8, 1987. In June 1987, several articles had appeared in Phoenix and Gallup newspapers that disclosed the double-escrow and other financial details of the transaction. MacDonald, Sr. accelerated the closing because he feared that rising opposition to the transaction might reveal his interest in it or prevent it from occurring.

When tribal members and officials voiced their opposition, MacDonald, Sr. used his authority and influence to obtain their support for the deal. For example, Michael Upshaw, the Tribe's Attorney General, sent a memorandum to MacDonald, Sr. two days before the closing that raised several questions about the propriety of the transaction. MacDonald, Sr. spoke to

Upshaw in the Navajo language as an elder of the Tribe would speak to a younger subordinate and personally assured him that the transaction was proper, normal, and essential to the Tribe. Upshaw relied on these assurances and allowed the transaction to close.

On July 8, 1987, the parties met in the offices of two Phoenix title companies to close the sale. The Tribe's representatives, however, nearly prevented the transaction from closing when it became clear that Tracy could not guarantee that the Boquillas Cattle Company would use its mineral rights in the ranch property in conformity with the Tribe's environmental regulations. Although a tribal member telephoned MacDonald, Sr. for instructions on whether to proceed with the closing, he was not available. Nevertheless, John Thompson, the Vice-Chairman of the Tribal Council, told the tribal member that MacDonald, Sr.'s instructions were to close the transaction on whatever terms they could get. The sale was then closed.

MacDonald, Jr. joined the conspiracy in February 1988, after the transaction with the Tribe had closed; he participated in the conspiracy, however, for several months before the Tribe made its final installment payments totalling over $22 million. In furtherance of the conspiracy, he acted as a conduit through which kickback payments were paid to MacDonald, Sr. He also collaborated with Brown to contrive a deceptive explanation for the bribes and kickbacks in order to keep MacDonald, Sr.'s involvement in the conspiracy a secret. To explain the $25,000.00 wire-transfer, MacDonald, Jr. prepared a sham note and consulting agreement between companies controlled by MacDonald, Jr. and Brown. The two co-conspirators then agreed to falsely assert that the $25,000.00 paid to MacDonald, Sr. was an advance on the consulting contract and that the BMW was for MacDonald, Jr.

In November 1988, Brown was subpoenaed to give sworn testimony about the transaction to counsel for the United States Senate Select Committee on Indian Affairs. Before he testified, Brown met with MacDonald, Sr.

Page 1109

[180 Ariz. 544] and MacDonald, Jr. to discuss what Brown would say in his testimony. All of them agreed that Brown would testify in accordance with the deceptive explanation that he and MacDonald, Jr. had earlier contrived. Brown, however, confessed the scheme to the Senate Committee counsel in exchange for a promise of immunity. [5]

Before the conspiracy was discovered, the Tribe made payments under the purchase agreement of $31,601,691.36. Out of this sum, the conspirators obtained a total profit of $7,136,307.35. In addition, MacDonald, Sr. received roughly $100,000.00 in bribes and kickbacks from Brown and Tracy.

The Tribe charged both MacDonald, Sr. and MacDonald, Jr. with fourteen counts of criminal conduct relating to conspiracy, bribery, fraud, and violations of the Tribe's ethical code. After a trial before the District Court of the Navajo Nation, MacDonald, Sr. was convicted of thirteen counts of criminal conduct and MacDonald, Jr. was convicted of one count of criminal conduct.

On August 11, 1989, the Tribe filed a civil action against the conspirators in Maricopa County Superior Court, alleging fifteen claims for relief. The claims relevant to this appeal are for racketeering in violation of A.R.S. section 13-2310 through 13-2317 (1989 & Supp.1993) ("RICO statute"), fraud, tortious interference with contract, breach of fiduciary duty, and breach of contract. The Tribe requested relief in the form of compensatory damages, treble damages under the RICO statute, punitive damages, a constructive trust, and in the alternative, rescission of the sales contract.

The Tribe moved for summary judgment on its claims against MacDonald, Sr., Tracy, and Brown for rescission of the sales contract and

restitution of all monies paid under the contract. The trial court granted the motion, finding that MacDonald, Sr.'s breach of his fiduciary duties was "conclusively established by his convictions for bribery and fraud." The trial court also found that "Brown's involvement in that breach of fiduciary duty [was] conclusively established by his testimony before the U.S. Senate Select Committee on Indian Affairs." The trial court entered judgment against MacDonald, Sr. and Brown and ordered that they were jointly and severally liable to the Tribe for restitution in at least the amount of $4,211,404.54. The trial court, however, denied the motion as against Tracy.

The Tribe also moved for summary judgment on its claims for treble damages and punitive damages under the RICO statute. The trial court found that as to MacDonald, Sr. and MacDonald, Jr., the predicate acts of a scheme or artifice to defraud were conclusively established by their criminal convictions. As to Brown, the trial court found that the predicate acts of a scheme or artifice to defraud were conclusively established by his testimony before the Senate Committee. The trial court concluded, however, that issues of fact existed as to causation and the amount of the Tribe's damages.

A nine-day bench trial followed. Brown was present at the trial and participated. MacDonald, Jr., however, waived his right to be present at the trial and did not participate. The claims against the other defendants named in this action were either settled or dismissed before trial.

After all the evidence was presented, the trial court concluded that, under A.R.S. section 13-807 (1989), MacDonald, Jr.'s criminal conviction had collateral estoppel effect. This ruling precluded him from denying in the civil action the essential allegations of the criminal offenses for which he had been convicted. The trial court issued findings of fact and conclusions of law and entered judgment against MacDonald, Sr., Brown, and MacDonald, Jr. In its conclusions of law, the trial court stated:

1. [MacDonald, Sr.] owed both contractual and fiduciary duties to the [Tribe] as its chief elected official and its employee, which he breached....

2. Brown and Tracy conspired and colluded between themselves and with [MacDonald, Sr.] to induce [MacDonald, Sr.] to dishonestly breach his fiduciary and contractual duties to the [Tribe]....

Page 1110

[180 Ariz. 545] 3. ... Brown and Tracy tortiously interfered with [MacDonald, Sr.'s] contractual relationship with the [Tribe].

4. ... Brown, Tracy, [MacDonald, Sr.], and [MacDonald, Jr.] each knowingly and deliberately entered into a scheme and artifice to deprive the [Tribe] of the right to [MacDonald, Sr.'s] honest services (within the meaning of A.R.S. § 13-2301(D) and 13-2310(C) (R.I.C.)) [sic] and each of them benefitted financially from that scheme.

5. ... [MacDonald, Jr.] was both a knowing participant/co-conspirator and an aider and abettor of the scheme ..., but there is no evidence his participation occurred prior to February of 1988....

6. Brown, Tracy, [MacDonald, Sr.], and [MacDonald, Jr.] unjustly profited from the scheme....

7. Pursuant to A.R.S. § 13-807, the conviction of [MacDonald, Sr.] and [MacDonald, Jr.] in the [Tribe's] District Court precludes them from denying the claims made in this cause and those convictions have a collateral estoppel effect in this law suit [sic].

....

9. The marital communities of Byron T. Brown and Carol E. Brown, and of Peter MacDonald, Sr. and Wanda LeClere MacDonald are liable along with the individual defendants Brown and

[MacDonald, Sr.] for the actions of those individual defendants.

The trial court ordered that MacDonald, Sr. and Brown were liable to the Tribe for damages and restitution in the amount of $7,136,307.35. The trial court further ordered that MacDonald, Jr. was liable to the Tribe for $2,688,862.35 in tort damages. The court then trebled both amounts under the RICO statute to $29,985,898.95 and $10,745,160.69 respectively. This appeal followed.

III. DISCUSSION

A. Issues Raised by MacDonald, Jr.

1. Subject Matter Jurisdiction

MacDonald, Jr. contends that the trial court lacked subject matter jurisdiction over the Tribe's civil action because the exercise of state jurisdiction infringed upon the Tribe's right of self-government. The Tribe, on the other hand, argues that the superior court had jurisdiction because the Tribe's lawsuit arose out of a transaction having substantial off-reservation contacts with the State of Arizona. We agree with the Tribe. We conclude that the trial court properly exercised jurisdiction.

We begin our analysis by pointing out that Arizona has not sought to extend Arizona's civil and criminal jurisdiction to Indian reservations through the mechanism provided in 25 U.S.C. sections 1321-1326 (1988) ("Public Law 284"). [6] Nenna v. Moreno, 132 Ariz. 565, 566, 647 P.2d 1163, 1164 (App.1982) (citing Francisco v. State, 113 Ariz. 427, 431, 556 P.2d 1, 5 (1976)). Thus, as a general rule, Arizona courts may not exercise subject matter jurisdiction over transactions arising on Indian reservations. Nenna, 132 Ariz. at 566, 647 P.2d at 1164.

Nevertheless, in Nenna we recognized an exception to this general rule. The issue before us in Nenna was whether the superior court had jurisdiction to enter a support order under the Uniform Reciprocal Enforcement of Support Act in favor of a California resident and against an Indian resident of the Papago Indian Reservation. To decide this issue, we looked to the Montana Supreme Court's decision in Montana ex rel. Flammond v. Flammond, 190 Mont. 350, 621 P.2d 471 (1980), for guidance. There, the Montana court stated that "Montana may not exercise subject matter jurisdiction over transactions arising on Indian reservations unless the transaction entails 'significant' or 'substantial' contacts with the state outside

Page 1111

[180 Ariz. 546] of reservation boundaries." Id. 621 P.2d at 472 (citations omitted) (emphasis added). Applying the Flammond test to the facts in Nenna, we held that the trial court did not have jurisdiction to enter an order for support because there were "absolutely no off-reservation acts in Arizona sufficient to vest the courts of this state with jurisdiction over ... a reservation Indian." Nenna, 132 Ariz. at 566, 647 P.2d at 1164.

Here, however, the Tribe's lawsuit arose out of a transaction in which the contacts with the State of Arizona outside of reservation boundaries were both significant and substantial. The Big Boquillas Ranch itself, the subject matter of the fraudulent conspiracy, is located on land beyond the reservation. The $25,000.00 wire-transfer to the United New Mexico Bank was made by Tracy from Arizona. The BMW automobile provided for MacDonald, Sr. was leased from an automobile dealership in Phoenix. The deceptive explanation for the $25,000.00 wire-transfer and the BMW automobile was contrived by Brown and MacDonald, Jr. at a meeting in Phoenix. Finally, the closing of the double-escrow transaction occurred at the offices of two title companies in Phoenix. Thus, we conclude that these substantial contacts vest the trial court with jurisdiction over the Tribe's lawsuit.

MacDonald, Jr. cites Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), to support his argument that the exercise of jurisdiction by the trial court infringed upon the

Tribe's right of self-government. We find Williams factually distinguishable from this case. In Williams, the Court rejected an effort by a non-Indian to sue in state court to collect on a debt incurred by an Indian on the reservation. The Court held that the tribal court had an overriding interest in adjudicating disputes between Indians and non-Indians arising from business transactions occurring wholly on reservation lands. Id. at 223, 79 S.Ct. at 272. Here, unlike in Williams, the transaction giving rise to the Tribe's lawsuit had significant contacts with the state outside of reservation boundaries. Consequently, Williams does not control this case.

MacDonald, Jr. relies on Littell v. Nakai, 344 F.2d 486 (9th Cir.1965), cert. denied, 382 U.S. 986, 86 S.Ct. 531, 15 L.Ed.2d 474 (1966), as additional support for his argument. Littell is also factually distinguishable from this case. In Littell, the General Counsel and Claims Attorney of the Navajo Tribe, a non-Indian, brought suit to enjoin the Chairman of the Navajo Tribal Council from interfering with the General Counsel's performance of his contract with the Navajo Tribe. Id. at 487. The General Counsel alleged that the Chairman (1) sought to have him removed as General Counsel, (2) prevented him from appearing before the Tribal Council when in session, (3) had him forcibly ejected from the Council Chamber, and (4) prohibited the Tribe from paying him fees of $10,000.00. Id. The court held that the trial court did not have subject matter jurisdiction because the General Counsel's lawsuit involved matters concerning the Tribe's internal affairs. Id. at 490.

Unlike Littell, this case was brought by the Tribe itself against a tribal member to recover funds obtained from the Tribe through a fraudulent conspiracy, most of which occurred outside the reservation. The Tribe's complaint does not raise any issues concerning the scope of the Chairman's authority over the Tribe's executive and legislative branches of government. Consequently, Littell has no application to these facts.

MacDonald, Jr.'s final argument is that the exercise of state jurisdiction infringed upon the Tribe's right of self-government. In support of this argument, MacDonald, Jr. cites Washington v. Bertrand, 61 Wash.2d 333, 378 P.2d 427 (1963). The issue in Bertrand, however, was whether the "business committee" of the Quinaielt Indian Tribe was the Tribal governing body with authority to execute a resolution requesting that the State of Washington extend Public Law 280 jurisdiction to the reservation. Id. 378 P.2d at 429-30. The Supreme Court of Washington held that the state courts were without jurisdiction to resolve the question of who composed the "governing body" of the tribe. According to the Bertrand court, the tribe's "control over its elected officials is peculiarly an internal problem over which the courts of this

Page 1112

[180 Ariz. 547] state have no jurisdiction." Id. 378 P.2d at 431. The case against MacDonald, Jr., however, does not involve a question concerning the Tribe's control over its elected officials. Consequently, Bertrand is not applicable to these facts.

The Tribe is entitled to the same rights as other citizens and residents, including the right of access to Arizona courts, unless the exercise of such rights interferes with tribal self-government. See Felix S. Cohen, Handbook of Federal Indian Law § B.1, at 645, § B.2.d(2), at 651 (Richard Strickland et al. eds., 1982 ed.). And, if the claim arises outside Indian country, a lawsuit in state court based on such claim generally does not implicate a tribe's right of self-government. See Fisher v. District Court of Montana, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (right of Indian plaintiff to bring adoption proceeding in state court preempted by right of tribal self government where substantial part of conduct occurred on the reservation); Cohen, supra, § C.2.a, at 350 n. 15 ("state courts usually have jurisdiction over Indians where the cause of action or some material event occurs outside Indian country").

Because the transaction in this case involved substantial off-reservation contacts with Arizona, there is no infringement on the Tribe's right of self-government. Thus, we conclude that the trial court properly exercised jurisdiction over the Tribe's lawsuit.

2. Rule 60 motion

MacDonald, Jr. next argues that because his criminal conviction was vacated and the criminal charges against him were dismissed, the trial court erred by denying his Rule 60, Arizona Rules of Civil Procedure, motion for relief from the civil judgment. The Tribe argues that we do not have jurisdiction to consider this issue because it was not contained in MacDonald, Jr.'s notice of appeal. We agree with the Tribe. In Lee v. Lee, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App.1982), we held, "[i]n the absence of a timely notice of appeal, ... we are without jurisdiction to determine the propriety of the order sought to be appealed." See also China Doll Restaurant, Inc. v. Schweiger, 119 Ariz. 315, 316, 580 P.2d 776, 777 (App.1978) ("Since this action was not contained in the notice of appeal, and in fact occurred approximately two months after the notice of appeal was filed, we acquired no jurisdiction to determine this issue."). Here, MacDonald, Jr. filed his notice of appeal before the trial court decided his Rule 60 motion, and he did not file another notice of appeal after the trial court issued its decision. Accordingly, because we lack jurisdiction to decide this issue on appeal, we do not consider it on its merits.

3. Waived Claims

McDonald, Jr. also argues that the trial court erred by: (1) giving his criminal conviction collateral estoppel effect in the civil action, (2) finding his marital community liable for the Tribe's damages, (3) finding that he violated the RICO statute, (4) applying the RICO statute retroactively, (5) finding him liable for fraud, (6) finding him liable as a co-conspirator, (7) failing to admit evidence of post-sale offers for the ruled at trial, (8) rejecting his defense that the Tribe failed to mitigate their damages, (9) measuring the Tribe's damages incorrectly, and (10) by trebling the Tribe's damages under the RICO statute. He further argues that the Tribe violated an order in the civil action that prohibited the parties from providing information obtained through civil discovery to criminal prosecutors.

We have reviewed the record and conclude that MacDonald, Jr. did not raise these arguments in the trial court. Because this court will not consider arguments raised for the first time on appeal, Stewart v. Mutual of Omaha Ins. Co., 169 Ariz. 99, 108, 817 P.2d 44, 53 (App.1991), we decline to consider these arguments on their merits.

B. Issues Raised by Brown

1. Sufficiency of the evidence

Brown argues that the trial court erred because no evidence exists to support the judgment against him on the Tribe's claims for fraud and tortious interference with contract. We reject this argument. Here, in addition to the claims for fraud and

Page 1113

[180 Ariz. 548] tortious interference with contract, the Tribe's pleadings raised claims for racketeering, breach of fiduciary duty, and breach of contract. The trial court found that Brown was liable for racketeering under A.R.S. section 12-2310(C), and that he conspired to induce MacDonald, Sr. to breach both his fiduciary and contractual duties to the Tribe. On appeal, Brown has not challenged these findings, any one of which was sufficient to support the trial court's judgment.

These uncontested, alternative theories of liability were framed by the pleadings, and any error in the trial court's findings has been waived by Brown's failure to address the sufficiency of the evidence to support them. See Jones v. Burk, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App.1990). "It is well-settled law that a

reviewing court must affirm a judgment if possible on any theory framed by the pleadings and supported by the evidence." Earthworks Contracting, Ltd. v. Mendel-Allison Constr. of California, Inc., 167 Ariz. 102, 109, 804 P.2d 831, 838 (App.1990). We conclude, therefore, that the trial court's findings on these alternative theories of liability are sufficient to support the judgment against Brown.

2. RICO claim

Brown next argues, for the first time on appeal, that because A.R.S. section 13-2310(C) was not effective at the time the alleged wrongful acts occurred, the trial court erred by awarding the Tribe damages, costs, and attorneys' fees under such section. Because Brown did not raise this issue in the trial court, we do not consider the issue on its merits. See Stewart, 169 Ariz. at 108, 817 P.2d at 53.

IV. CONCLUSION

For the reasons stated above, we conclude that the trial court properly entered judgment in favor of the Tribe. We therefore affirm.

WEISBERG, P.J., and CONTRERAS, J., concur.

FNcents J* Corcoran, J., of the Supreme Court, recused himself and did not participate in the determination of this matter.

---

1 Tracy settled with the Tribe before trial.

2 MacDonald Sr. is an enrolled member of the Tribe and was the Chairman of the Tribal Council from 1987 to 1990. He also served as Chairman of the Tribal Council from 1972 through 1983. As Chairman, MacDonald, Sr. was the leader of both the executive and legislative branches of the Tribe's government.

3 Tracy directly or indirectly owned or controlled several corporations, which he used to facilitate the purchase of the ranch and to deceive tribal officials into believing that they were dealing with the true owner of the ranch.

4 Brown was a real estate agent and close personal friend of MacDonald, Sr. During MacDonald, Sr.'s first term as Chairman, Brown served as Chairman of the Tribe's Agricultural Products Industry Board. Brown also served as an advisor and fund-raiser for MacDonald, Sr.'s 1986 campaign for Chairman of the Tribal Council.

5 Because the transcript of Brown's testimony before the Senate Committee counsel was not included in the record on appeal, we are unable to discuss the testimony in greater detail.

6 Public Law 284 provides, in relevant part:

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this subchapter.

25 U.S.C. § 1324 (1988).