

**Hearing  
before the  
United States  
Commission on Civil Rights**

**Enforcement of the Indian Civil Rights Act**

**Hearing Held in**

**FLAGSTAFF,  
ARIZONA**

**July 20, 1988**

## **U.S. COMMISSION ON CIVIL RIGHTS**

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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# CONTENTS

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## Statements

Opening Statement, Subcommittee Chairman William B. Allen .....	1
Opening Remarks, Commissioner Robert A. Destro .....	2

## Sessions

Morning Session .....	1
Afternoon Session .....	48

## Witnesses

Rick Pitts and Cheryl Pitts, Temporary Guardians .....	3
Patricia Keetso, Biological Mother .....	6
Susie Keetso, Biological Grandmother .....	10
Michael Nelson, Attorney .....	13
David Nash, Attorney, Navajo Nation Department of Justice .....	33
Sandy Hansen, Attorney, Boulder, Colorado .....	43
Duane Beyal, Representing Peterson Zah .....	57
Steven B. Ungar, Attorney, Bozeman, Montana .....	67
Deborah Leon, Former Social Worker, White Mountain Apache Tribe .....	74
Claudine Bates Arthur, General Counsel, White Mountain Apache Tribe .....	87
Ivan Sidney, Chairman, Hopi Tribe .....	95
Alene Delgarito, Associate Judge, Hopi Tribal Court .....	96
Tom Kahe, Administrator, Hopi Tribal Court .....	98
Frances Jue, Counsel, Hopi Tribal Court .....	99

## Open Session

Phil Stago, Council Member, White Mountain Apache Tribe .....	106
Lula May Stago, Navajo Tribe, Winslow, Arizona .....	108
Mary Cleland, Fort Peck Sioux Tribe .....	109
Edward Johnson Little, President, Navajo Rights Association .....	111
George Chavez, Former Employee, Navajo Department of Justice ....	114
Alfred Curley, Navajo Tribe, Shiprock, New Mexico .....	115
Vernon Masayesva, Vice Chairman, Hopi Tribe .....	117

Loritta Johnson, Former Employee, Navajo Tribal Prosecutor's Office .....	119
Michael Day, Tewa Hopi, Polacca Village .....	121
Lee Brooke Phillips, Attorney, Big Mountain Legal Office .....	123
John Trebon, Attorney, Flagstaff, Arizona .....	126
Edith Yazzie, Member, Navajo Rights Association .....	127
Timothy Joe, Navajo Lay Advocate .....	128
Lee Blackhoop, Phoenix, Arizona .....	130
Felix Spencer, Former Employee, Navajo Division of Resources .....	130
Matthew J. Strassberg, Attorney, Big Mountain Legal Office .....	132
Alfred Bennett III, Navajo Tribe, Shiprock, New Mexico .....	134

**Exhibits**

1. Indian Civil Rights Act .....	137
2. Resolution of the Navajo Tribal Council, CMY-28-88.....	138
3. Resolution of the Navajo Tribal Council, CAU-43-87, Navajo Nation Bill of Rights, Organization of Navajo Nation Judicial Branch, and Navajo Nation Sovereign Immunity Act .....	143
4. Statement of Sandy Hansen, Attorney, July 15, 1988 .....	199
5. Submission of Dineh Rights Association, Inc., July 19, 1988 .....	335
6. Submission of George E. Chavez, July 18, 1988 .....	344
7. Submission of Deborah Leon, August 9, 1988 .....	348
8. Submission of Robert H. Ames, Chief Judge, Hopi Tribal Court, July 18, 1988 .....	351
9. Letter to Claudine Bates Arthur, General Counsel, White Mountain Apache Tribe, from Brian D. Miller, Deputy General Counsel, U.S. Commission on Civil Rights, July 13, 1988 .....	354
10. Memorandum and Order, <i>Little Horn State Bank v. Crow Tribal Court and Dan Old Elk, Sr.</i> , July 21, 1988 .....	355
11. Supplemental Statement of the Navajo Nation, August 18, 1988....	367

# Hearing Before the United States Commission on Civil Rights

## Enforcement of the Indian Civil Rights Act

Flagstaff, Arizona, July 20, 1988

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The United States Commission on Civil Rights hearing on enforcement of the Indian Civil Rights Act convened at 9:10 a.m. in the 100 North Banquet Room of the Monte Vista Hotel in Flagstaff, Arizona, William B. Allen, Subcommittee Chairman, presiding.

Present: William B. Allen, Commissioner and Subcommittee Chairman; Robert A. Destro, Commissioner; Susan J. Prado, Acting Staff Director; William J. Howard, General Counsel; Brian D. Miller, Deputy General Counsel; Susan T. Muskett and Kerry L. Morgan, attorney-advisors.

### Proceedings

#### Morning Session

SUBCOMMITTEE CHAIRMAN ALLEN. Good morning. I apologize if we are a few moments late in starting, but we are now ready to begin. This hearing is convened.

I am William Allen, chairman of the Commission's subcommittee on enforcement of the Indian Civil Rights Act of 1968.

Joining me today is Commissioner Robert A. Destro, the other member of the subcommittee.

Also here beside me are Acting Director Susan J. Prado, General Counsel William J. Howard, Deputy General Counsel Brian D. Miller, and staff counsel Susan T. Muskett and Kerry L. Morgan.

The purpose of this hearing, like the four that preceded it, is to examine enforcement of the ICRA in the wake of the 1978 Supreme Court decision, *Santa Clara Pueblo v. Martinez*, a decision which held that, with the

exception of the writs of habeas corpus, provisions of the ICRA were enforceable only in tribal forums and no longer in the Federal courts.

A critical part of the Court's reasoning was that "tribal forums are available to vindicate rights created by the ICRA." Put simply, the question this subcommittee has been examining is whether the Court's assumption is true.

Our Declaration of Independence observes that legitimate governments are formed and organized in order to secure the rights of men and women. That precept should not be considered peculiar to the Federal or State governments. Rather, it is a standard maxim by which all governments are to be judged, including, of course, tribal governments.

We are going to hear from five panels today. The first two panels will focus on the ICRA and the matter of baby girl Keetso.

Then we will break for lunch at 12 noon and return at 1 p.m. for panels on the independence of the judiciary and enforcement of the ICRA at the Navajo and the Hopi Nations. Another panel will follow, focusing on the matter of Michelle Rae Dawn Baier and the ICRA.

To conclude our hearing, we will have an open session at the end of the program, which should be approximately 4 p.m. If anyone wishes to speak during the open session, please give your name to our clerk.

The record of this hearing will remain open for 30 days.

Let me also say that our procedure here is that following your testimony, the initial round of questioning will come from Commission staff. Then the Commissioners will join in.

I will add further that we have provided interpreters for anyone who may be hearing impaired. If you will indicate by raising your hand at this point whether you require such a service, we would be delighted to know that so that our interpreters will know whether to continue or to relax until a later time.

Now, with that, I turn to Commissioner Destro to ask whether he has any opening remarks. Bob.

COMMISSIONER DESTRO. Thank you.

I only have a couple of opening remarks. One is to underscore for everyone present that the intention here is to look into the enforcement of the Indian Civil Rights Act, which is a provision of Federal law designed to protect the interests of all Americans, whether or not they live on reservations. It's one that comes to us as a benefit of our citizenship in the United States.

The second is related to the first, and that is that we are not here today primarily to look into Indian Child Welfare Act administration. What we are looking at is whether or not the Indian Child Welfare Act is administered in a manner consistent with the Indian Civil Rights Act.

The same thing is true with respect to the matters involving the Navajo Nation, and I want to underscore emphatically that the Commission has no

interest whatsoever in the ongoing political struggles between factions within the Navajo Nation. That is something related to Navajo tribal sovereignty, which we duly respect and understand. Our only interest in this area is to find out whether or not the judiciary of the Navajo Nation is independent.

So with that I will turn the matter back to the chairman. Thank you for your attention.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

I will now swear in the first panel, and I shall swear you in collectively. I shall administer the oath and you may respond severally "Yes." As you begin your testimony, I will ask you to identify yourself for the record indicating your name and your address.

[Patricia Keetso, Howard Keetso, Susie Keetso, Rick Pitts, Cheryl Pitts, and Michael Nelson were sworn.]

SUBCOMMITTEE CHAIRMAN ALLEN. Mr. Howard.

MR. HOWARD. Thank you, Commissioner Allen.

We would like to begin this morning with Mr. Rick Pitts and Cheryl Pitts. I understand Mr. Pitts has a few remarks that he would like to deliver that would give us, in very broad scope, the sequence of events concerning the baby girl Keetso case. Mr. Pitts.

#### **TESTIMONY OF RICK PITTS AND CHERYL PITTS, TEMPORARY GUARDIANS**

MR. PITTS. Well, in brief, my wife and I started in March of '87, and we contacted some attorneys that specialized in adoption, particularly out-of-State adoption. They told us they had been contacted by a girl of Indian descent and [asked if we] would be interested in an Indian child. We said we were interested in any child.

So they put us in contact with Patricia, and she came to California. She arrived in May, and she lived with us until the baby was born in July. Then she stayed with my parents for approximately a month after the baby was born.

Then she went on back to Utah, and we proceeded through State courts to finalize our adoption, like we were under the impression that was the proper way to go. In January of 1988 we found out that the Navajo Nation was intervening in our case, and that was really the first time that we knew that there could possibly be any problems.

In April we went to court. We had one court hearing in February, the 25th of February, which was continued to April. In April, on April 11 we went to court in Santa Clara County, and at this hearing the jurisdiction was gained by the Navajo Nation.

At that time they requested custody of the child, and we were rather drawn back at that. We had not been prepared to give custody of the child at that time. We found that there was a custody order issued in January by



a tribal court that we had never been allowed the opportunity to respond to.

MR. HOWARD. Did you know about that?

MR. PITTS. No, we did not know of the custody order at that time.

MR. HOWARD. Did your attorney know about that?

MR. PITTS. It has come to my attention that he did know of that. We had not been informed of it though.

MR. HOWARD. Is it your understanding that the Navajo Nation had given notice of that order to your attorney?

MR. PITTS. Yes.

MR. HOWARD. But not to you?

MR. PITTS. Yes. So the judge in California ordered that the child be turned over immediately, and fortunately, an Assistant Attorney General for the State of California was there and said that, in her opinion, it would be detrimental to turn the child over immediately. So the judge gave us 4 days. He gave us until the 14th of April.

He ordered the turnover time at noon, and for Allyssa's sake we tried to arrange things with the Navajo representatives to make the exchange as easy on Allyssa as possible. My wife and Patricia would accompany the natural grandmother and the representatives of the nation to Arizona, where they would care for Allyssa until such time that a hearing would be scheduled.

That ended up not being the case, because we were not allowed to go on the flight that was agreed upon. It came to our attention at the airport in San Jose. Quite by accident, we found out they were taking her on a flight immediately, instead of the agreed-upon flight which was 3 hours later.

MR. HOWARD. You say agreed-upon flight. Who was involved in that agreement?

MR. PITTS. I was called by our attorney in California, Steve Ravel. He told me on the phone that we needed to make arrangements with the Navajo representatives and would I please call the airlines and see what kind of flight arrangements were available.

So I did that. I called and I found that there was a flight at 12:15, that there was seating available for all parties involved from San Jose to Phoenix, but that the connecting flight from Phoenix to Flagstaff didn't have enough room. So I made arrangements with the airlines that there was space available for everybody on the 3:40 flight. So I called him back and said this is what is available with the airlines. He said, "Let me call Patrick Gillory, the Navajos' attorney, and I'll call you back."

Approximately 30 minutes later, he called back and said that he had talked to Gillory, he had talked with Delores Greyeyes and with Louise Grant, and that those arrangements were satisfactory. So, with that in mind, we planned to all leave at 3:40 from San Jose.

So at noon when we turned over the child, they had planned to go on the 12:15 flight. There was a stalemate at the airport, and in brief, I refused to turn the child over at the airport. So the airlines arranged seating for Cheryl and Patricia, and they accompanied them to Phoenix.

In Phoenix, instead of catching a connecting flight to Flagstaff, the Navajo representatives took Allyssa and jumped into a van and sped off, leaving Patricia and Cheryl standing in the airport wondering what was going on. So I think everything is history from there.

MR. HOWARD. If I could go back to the order of the California court. As I understand that order, the California court ordered that the Navajo Nation has jurisdiction.

MR. PITTS. Yes.

MR. HOWARD. Exclusive jurisdiction based on a finding that Patricia was domiciled on the reservation; is that correct?

MR. PITTS. Yes.

MR. HOWARD. And pursuant to that finding they ordered that the child Allyssa be transferred to Delores Greyeyes as a representative of the Navajo Nation; is that correct?

MR. PITTS. That's right.

MR. HOWARD. Why didn't Patricia Keetso as the biological mother of the child have custody awarded to her? That isn't clear to me.

MR. PITTS. That was very unclear to us also. We attempted to go back to Judge Nichols in California. After he had awarded custody, we went back and we withdrew our petition for adoption. We attempted to invoke a section of the Indian Child Welfare Act that gives Patricia the right to reclaim the child anytime for any reason prior to the entering of a final decree of adoption, and the judge refused to listen. He just said, "My order stands."

We told him that the allegations in the custody order that was handed in January by the tribal court were incorrect. For what they were, there really were no allegations because there was no allegation of neglect or abuse of the child, which even the Navajo Children's Code mandates that there be some form of police report or some conclusive evidence of neglect or abuse of a child before a custody order can be given. There was none, and we were not ever afforded the opportunity to respond to that order.

The judge in California said, "If the custody order is wrong, then let them handle it in their own court." He said, "My order stands and the child must be turned over at noon on Thursday or I will hold Patricia," myself, and my wife in violation of the Parent-Child Kidnapping Act.

MR. HOWARD. And he included Patricia in that statement to you, even though she was the mother of the child?

MR. PITTS. Yes, he did.

MR. HOWARD. Going back to the January 28 order of the Navajo court, who was present at that proceeding?

MR. PITTS. I have no idea.

MR. HOWARD. You hadn't been advised of it, obviously, and you didn't learn about it until a few months later.

MR. PITTS. The only people present at that proceeding, I believe, were representatives of the social department of the Navajo Nation.

MR. HOWARD. Was Patricia there?

MR. PITTS. No. Patricia was in Utah, living in Utah at that time. So that order was never sent to her in Utah, and the order was never sent to us. It has come to my attention that—I believe that order was sent to our attorney, but still was never shown to us, and it was never presented to us in the respect that the nation is going to try and take the child away. We were never under that impression.

MR. HOWARD. Cheryl, did you want to comment?

MRS. PITTS. He has pretty much said it all.

MR. HOWARD. Then, if I could direct a question or two to Patricia Keetso, inasmuch as your domicile was very much in issue. Could you tell us briefly where you lived since grade school?

#### **TESTIMONY OF PATRICIA KEETSO, BIOLOGICAL MOTHER**

MS. PATRICIA KEETSO. I was raised on the reservation as a young child until I got into fifth grade. That is when I went on the Indian placement program which was run by the LDS, the Mormons. So when I got into fifth grade, I went to school in California, and I stayed there until I graduated. I would come back and forth during the summer to visit my parents. I always came back during the summer and spent summers with my parents. I also had sisters and brothers that were on the placement too.

But I did know a lot about my culture and language and everything else. After I graduated from high school, I went straight to Brigham Young University. I stayed there. I lived in Utah, but still continued to visit my parents from there.

Then it was September of 1985, I think it was, that's when I moved to Los Angeles because I had some friends living there. I stayed there until—it was like almost a year, until the following summer in '86 when I returned to my parents to visit them.

MR. HOWARD. And how long was that visit?

MS. PATRICIA KEETSO. I had come home to visit with my parents for a week because I used to carpool back and forth with friends of mine.

MR. HOWARD. I see.

MS. PATRICIA KEETSO. That's about the time when Allyssa was conceived. My intention was to go back to work in Los Angeles, but after I discovered my pregnancy, my whole plans changed. I knew I had to

make some serious decisions about how I'm going to deal with my baby and how to take care of it.

So I talked to several people at the hospital—the midwives, a couple of them, but I never told anyone about my pregnancy, even my parents or anybody else. I looked into different adoptions.

I thought, you know—being a young mother, I realized I couldn't take the responsibility of a child because I had my goals to accomplish, and I wanted what was best for my baby.

MR. HOWARD. Yes.

MS. PATRICIA KEETSO. So I went about looking into adoptions in different places, but for some reason Ravel and Latch came through.

MR. HOWARD. How did you learn of Ravel and Latch; that is the law firm that—

MS. PATRICIA KEETSO. It was in the newspaper.

MR. HOWARD. Which newspaper?

MS. PATRICIA KEETSO. There was an ad in the newspaper. It was in the *Navajo-Hopi Observer* newspaper.

MR. HOWARD. I see, and where were you living at that time?

MS. PATRICIA KEETSO. I was visiting my parents during that time. I was in Tuba City. I have some friends in Tuba City too.

So one day I just picked up the papers, and I saw the adoption ads listed. So I kept the article for several weeks before I wrote to them just to check it out, and they responded right away. Then I wrote to them again and then we started communicating. That's how I learned about Rick and Cheryl. Then I told the lawyer over there in San Jose that I wanted to meet this couple that were going to take my baby.

MR. HOWARD. You told whom, I'm sorry?

MS. PATRICIA KEETSO. Steve Ravel, that's the adoption lawyer, and I guess he talked to Rick and Cheryl, and they agreed to it because I wanted to know what this couple was like, just to learn their family background and just to basically learn about them.

I was flown up there in May; I think it was May 24. I flew up there, but I had never met Rick and Cheryl before, and I had no idea what they looked like. They picked me up from the airport, and we went back to their home. They said they had found a place for me to stay. We went out to dinner that night, and I immediately fell in love with them. They were just wonderful. I ended up staying in their home, and I stayed there until I had Allyssa, which was just a year ago on July 20 of '87.

MR. HOWARD. One year ago today.

MS. PATRICIA KEETSO. Yes, a year ago today.

MR. HOWARD. So how long had you lived with Rick and Cheryl prior to giving birth to Allyssa?

MS. PATRICIA KEETSO. It was like 2 months and a half, wasn't it?

MR. PITTS. Yes. May 26 to July 20.

MS. PATRICIA KEETSO. Yes, May 26 through July 20.

MR. HOWARD. All right.

MS. PATRICIA KEETSO. And after I had Allyssa, I went over and stayed with Rick's parents. They also live in San Jose. But we still got together, and I went over there to visit them and the baby. I stayed there for about a month, and I came back. I was really concerned about my parents' feelings. My intention was to go down to LA again, like I had planned before, but my worries were full of my mom because I wanted my mom to understand my decision about what I went through.

I wanted to be there just to comfort her and just to be by her side, and I ended up staying there with my parents until December of last year. Then, finally, in January I went back to Utah, hoping to go back to school at Brigham Young, but somehow my scholarship didn't go through. So I just worked.

It was in March—I talked off and on with Cheryl and exchanged letters and pictures and words just to say hi and to see how things were going. Then one day Cheryl asked me if I wanted to visit them, and I said I would like that. So they made arrangements for me to go out to San Jose, and I went out there just to visit for a week. It was like a week. It was supposed to be a week.

It was that time that they were going to go to a hearing with the social department, which was—what day was that?

MR. PITTS. That was April 11.

MS. PATRICIA KEETSO. April 11, and I didn't see any problems. I didn't expect this to happen, and I just wanted to know what the outcome of it would be. So I stayed for that, and Rick told you everything from there, and I ended up staying there.

MR. HOWARD. Rick, could you walk us through the adoption proceeding in California in a little greater detail? At what point did you initiate the adoption proceeding in the State of California?

MR. PITTS. I'm not sure I understand your question. At what point?

MR. HOWARD. The Ravel firm had arranged to introduce Patricia to you. At what point did you then go into court to attempt to adopt Allyssa?

MR. PITTS. Well, our petition for adoption was filed the day after she was born. That would be the 21st of July, '87.

We really never went into court until February 25. We were told that we didn't have to go to court to file the adoption. The only time we would have to go is when the final consents were signed, and that would be 6 or 7 months after the child was born.

That never happened because 7 months after she was born we were notified that the tribe was going to intervene. So that is when the case, instead of adoption, it turned into a jurisdictional case. When we appeared in court on February 25, it was the first time.

Everything as far as the adoption goes was handled through the social department of California. They did all the proper home studies the week after Allyssa was born, and I assume that they filed and filled out all the proper forms.

We also notified the tribe of the pending adoption. We were under the impression that that [notification] was a requirement of the Indian Welfare Act, that anytime an Indian child is up for adoption the tribe be notified. So we did try to comply with the Indian Child Welfare Act to the best of our ability.

MR. HOWARD. When did you attempt to give them notice?

MR. PITTS. We gave them notice—I think it was about 10 days after Allyssa was born. Our understanding was that they had approximately 15 days to respond to our notification. So after 6 months and we hadn't heard a word, we assumed that there wasn't going to be any problems.

MR. HOWARD. Patricia, did you receive any letters or telephone calls from the Navajo Nation attempting to persuade you that you should not place the child up for adoption?

MS. PATRICIA KEETSO. No. When I first decided on the adoption for my baby, I didn't think there was going to be any problems because Rick, he is not an Anglo; and another thing is she is not—her nationality, she is not full Navajo. So I didn't think there would be any problems.

Also, there were some agreements between my family and Rick and Cheryl. Before she was even born, we had intended for her to visit the reservation so that she can always know about her culture and her background and her family. Those were our plans. I thought if there was agreement [on this point], there wouldn't be any problems.

I had no idea this was going to happen. It just happened like overnight and it was a shock. As far as I am concerned, we were doing what was right, and we were willing to go through the Navajo courts if they wanted us to do that, but there was no communication there, especially from the San Jose Airport.

MR. HOWARD. But while you were in Utah, it is my understanding that you did receive telephone calls; is that correct?

MS. PATRICIA KEETSO. That all started in February.

MR. HOWARD. February of?

MS. PATRICIA KEETSO. I can't remember the exact date.

MR. HOWARD. Of '87?

MS. PATRICIA KEETSO. Yes, this past year. It was in February.

MR. HOWARD. '88?

MS. PATRICIA KEETSO. I received a phone call from a social worker, Delores Greyeyes, and she called off and on, and I told her what happened and what I had been through and my decision and how I went about it.

It was in March, or I think it was the end of February, that I went home, and that is when my mom told me that there was a social worker that

comes around and just bothers them that she didn't like, and that she was pressuring them to have her grandchild—

MR. NASH. Mr. Chairman, excuse me for speaking out of order, but if I may address the Chairman?

SUBCOMMITTEE CHAIRMAN ALLEN. No, you may not. You might, however, speak to staff and indicate who you are. Would one of the Commission's counsel like to meet with the gentleman?

Please don't interrupt the testimony.

MS. PATRICIA KEETSO. So, anyways, she started calling, and I was nice. The way she came out was she was a very nice person, and I told her how I felt and my main concern was my parents, my parents' feelings, too. But when she pressured my parents like that, I wasn't very pleased with that, and I knew there was something behind it when she was pressuring my parents, especially telling them that if they didn't cooperate with her, with the social department, that there is a possibility that they might go to jail.

I thought that was kind of wrong, and I thought, why is she stating that? And I just told my parents, "Don't worry about it." But it continued and it got really heavy, just talking to my mom and exchanging letters and stuff. I knew they were up to something, and I got really worried.

One day she called, and that was the last time I heard from her. I guess she went out searching for who the father was. Nobody knows who the father is. And she must have talked to several people. She contacted this guy, a friend of mine that I knew, and he called me. He said, "I have this social worker who is on my tail and I want to know what is going on. She is stating to me that I have a child in California, and what's going on?" That's when I told him, "There is nothing; it's none of your business and this is my life, you know, and just don't worry about it," and that is the last time I've heard from him.

That is when I told Delores Greyeyes never to call me again, that I didn't appreciate the things she was doing. There was a lot of pressure there. That was the last time I heard from her, and I just told her, "I won't take any more of your calls; I don't appreciate what you're doing." That was it.

MR. HOWARD. Susie Keetso, I wonder if I could ask you for your version of the events that Patricia has just related to us.

## **TESTIMONY OF SUSIE KEETSO, BIOLOGICAL GRANDMOTHER**

MS. SUSIE KEETSO. Delores Greyeyes, she came to visit me starting from March. She was pressuring me to get Allyssa back from California, but at that time I didn't even know what was going on, you know. I just talked with her. She comes around everytime, and she asked me a lot of questions, and then I just told her it's up to my daughter; that's her baby.

And she pressed me around and she wants me to go to the jail, and I got scared.

MR. HOWARD. Tell me more about that. What did she say to you about that?

MS. SUSIE KEETSO. She says she wants to have Allyssa back to Arizona.

MR. HOWARD. Yes.

MS. SUSIE KEETSO. And she told me that if I don't want the grandchild back, then she just wanted to give it to someone else that is Navajo. And after that, about four times when she came around again, she says she wants to take me to San Jose with them to the court, and I went with them over to San Jose. We left from here on April the 10th on Sunday. I have never been in the airplane before and I got scared, and I was there and spent the night with them. I don't even know what was going on really.

The next day we went to the court, and they don't want me in the court. I just stayed out and I didn't go into the court. They didn't tell me what was going on and what they had been saying. I would like to visit with my daughter and Cheryl and Pitts, but they don't want me to be with them. So I got away from them to stay with Delores and the other lady in the motel and stayed there for 4 days.

We left on Thursday with Allyssa, and Pitts and Cheryl and my daughter, they got on the plane with us. They were sitting in the front of us, and those ladies, they didn't want to look at them, you know. I said, "Let's talk with them," and they don't want to talk with them, and they wanted to sit in the back. So we moved way in the back of the plane.

We get up at Phoenix and I said, "Let's talk with them," you know, and the way she said she doesn't want to see Cheryl and Pitts in the face. We got off the plane, and she grabbed the baby and she just ran off. I was trying to catch them but, you know, I was scared to grab them, and I just stopped there. My daughter just pushed me and said, "Follow them, follow the baby," and I just took off and ran, and we went into the van with them.

We went to one of Delores Greyeyes' brothers' house, and we stayed there. We left from there at 5:30 in the evening, and we came back around about 9:30 here in Flagstaff—we spent in the motel. There are some ladies that came around from Window Rock, and we spent the night with them, and we left the next morning, on Friday morning, and I thought I was going to take Allyssa home at that time.

We just stopped in Tuba City, and they just took the baby away from me and they said they are going to keep the baby, and I just went back by myself to Red Lake. Then the next day I came around again to Tuba City, and Cheryl and Pitts and my daughter was there and they were looking for the baby, and we couldn't find the baby at that time, and we just stayed at one of our friend's house.



Then on Sunday morning I was going to look for the baby in the low-rent housing. There is some low-rent housing in Tuba City, and I was looking around and looked everywhere. I know I can recognize the voice of the baby. It was crying inside, and I was knocking at the door, and nobody was answering me. I just went in there, and there was a lady who was in there. Maybe she was sleeping or something, and Allyssa was crying in there, and she was sick at that time.

I just went in there, you know, and I grabbed the baby. She said, "What do you want? You're not supposed to be in here," she said, that lady. And I said, "I want to see my baby. She is my baby." She says, "Get out," and I was just standing there with the baby holding it, and that baby was sick. She had never been changed for 2 days and she was just dirty, and I said, "I'm going to have this baby back. Where is Delores Greyeyes? I want her phone number." And she doesn't know the phone number.

Then I said, "Where is the head of this? Who is your boss?" I asked her, and she doesn't know, and I said, "I'll just go and take her to the hospital." I just took her and there was nothing that I can use to cover the baby, and I just used my mom's jacket to take her to the Tuba City Hospital. Her temperature was 102. I think the doctor called Pitts and Rick and Cheryl, and they came around right away. At that time they are taking a picture, you know, and that's it.

**MR. HOWARD.** Rick Pitts, did you want to tell us a little bit more about what you saw when you arrived at the hospital and Allyssa's condition?

**MR. PITTS.** Actually, Cheryl should do that or Patricia because when Susie refers to "Pitts" she means my mother. I was not in Tuba City yet at that point.

**MS. PATRICIA KEETSO.** Just like my mom said, we didn't know where the baby was. At the time we left Flagstaff Airport, we stayed in Flagstaff for a couple more days. During that time, we were trying to get ahold of my parents. At the time, we thought my mom had Allyssa, and later—it was on Friday when I learned that my mom didn't have Allyssa.

Friday night we got the anonymous phone call from somebody that knows Delores Greyeyes, and during that time it was all over the news. She was crying and she said, "I am really sorry for what happened, but your poor child isn't with the grandmother. The baby, Delores Greyeyes has the baby." So that's when I tried to contact my parents. So that Saturday morning we drove out there.

**MR. HOWARD.** Did she tell you who had the baby at that point?

**MS. PATRICIA KEETSO.** The lady that called said that Delores Greyeyes had the baby in Kayenta, in her home. We came out here Saturday morning and met with my parents, and we spent the day in Tuba City just talking things over about what happened, and she didn't know where Allyssa was, and we were really surprised.

So the following morning, on Sunday, my parents went out looking for her. She said they would, and it was about 1 o'clock when we got a call from the hospital stating that Allyssa was there, and right then Cheryl and I rushed to the hospital.

She looked really sick. She was crying and she couldn't calm down for a long time. She was even afraid of me. The only person she hung onto was Cheryl. She was really frightened. She was throwing up and she smelled really awful.

I was really surprised that the social department allowed this to happen, that they had neglected this child. So Cheryl and I stayed there for several hours while the doctor examined her. Then we drove back to the house, to our friend's house, and she didn't calm down for a long time. That night she kept getting up crying and crying, and we were both really sad about the way everything was handled.

The next morning my mom and dad and my grandparents came and said that they wanted to perform a ceremony if it was okay, and Cheryl agreed to it. So my mom and I took the baby back to the house, and my dad came home. It was around noon when he came home, and he said, "I have been getting all these calls from the social department wanting to know where the baby was," because I guess they saw a picture of Cheryl and Allyssa on the front cover of the newspaper, and that is when they realized that Cheryl had Allyssa, and they wanted to know if this white woman had run off and gone back to California with Allyssa.

My dad told me that he had told them that the baby was at the house with his wife and the daughter having a ceremony. So later that afternoon, there were about four or five social workers that came to the ceremony while we were having it and wanted to know if Allyssa was really there, and that's when my grandparents and my mother told them to get off their property, just to leave. They were really upset and disappointed at the way they handled this whole thing and how they put a lot of danger to their grandchild. That was how it happened basically.

MR. HOWARD. Mr. Nelson, would you care to comment on anything that you have heard?

#### **TESTIMONY OF MICHAEL NELSON, ATTORNEY**

MR. NELSON. I acted as their lawyer in the tribal court. That was my role in this. I first came in contact with them on the Friday when the child was being transferred out here.

The real difficulty with this case was that the case was never transferred. It was supposed to be transferred.

COMMISSIONER DESTRO. Excuse me, Mr. Nelson, would you identify for the record—when you say "them," who did you act as the lawyer for and in what forum?

MR. NELSON. I acted as the lawyer for Rick and Cheryl Pitts and for Patricia Keetso in the Tuba City Children's Court.

COMMISSIONER DESTRO. Thank you.

MR. NELSON. As I was saying, the California State proceeding was never transferred to the Navajo Tribal Courts, and that made dealing with this as a legal matter a very difficult task, for me, for the judge, and perhaps for the lawyers on the other side. I don't know. The lawyers on the other side had been acting on this matter before the California courts as well. So I think they probably were the best informed people on the legal proceedings, but the judge and I were equally in the dark as to why we were in this forum and just how this had happened.

When Cheryl Pitts and I first met, which was on the Saturday that they came to Tuba City, they really didn't know how they had wound up in that place in that situation, and it was a very, very difficult time. It was a very tense situation. They were very upset, obviously. A little baby was out somewhere and no one knew where. I talked to them and I interviewed them and tried to piece together as best I could what the legal situation was, and we started considering our options.

One thing I would like to bring up, since I have now heard the focus of your inquiry, is we did have a Federal forum, and we did have a possible habeas corpus action that we could have brought in Federal district court, and that was an option that we considered.

At the time my feeling was that Judge Watchman would be able to deal with this and he would be able to see that a mistake had been made and correct his mistake, and that that was the better way to deal with it, and in fact that is how it worked out.

COMMISSIONER DESTRO. Can I interrupt?

MR. HOWARD. Please.

COMMISSIONER DESTRO. When you say that a mistake was made, what mistake?

MR. NELSON. Well, a children's court judge, which is what Judge Watchman is, 99 percent of their business is neglected children, juvenile delinquents, neglected children, abused children, and bad situations involving children.

As a matter of course, they act on petitions such as this, a dependency petition that makes allegations of those sort, and they order transfers, not transfers of custody, but transfer of responsibility based on petitions presented by the division to them. That is what happened here. I don't believe there was a hearing initially, and that is really what went wrong with this proceeding is there was no hearing as to the best interests of the child before the custody was transferred.

MR. HOWARD. So you are referring back to the January 28 order; is that right?

MR. NELSON. Yes. Had there been a hearing on the best interests of the child, I think the result would have been very different and all of this would not have taken place.

MR. HOWARD. Now temporary guardianship has been awarded to the Pitts and a hearing has been scheduled for August 19, 1988, on permanent guardianship? Is that correct?

MR. NELSON. Yes.

MR. HOWARD. I want to clear something else up as well. At some point, while in California, the Pitts had been pursuing adoption with the consent of Patricia Keetso and, correct me if I am wrong, but this approach was also in keeping with the desires of the natural grandparents as well.

Susie Keetso, is that correct? Originally, you had no objection to the Pitts adopting Allyssa; is that correct?

MS. SUSIE KEETSO. Yes.

MR. HOWARD. That is correct?

MS. SUSIE KEETSO. Yes.

MR. HOWARD. But at some point when the case was referred back to the Navajo courts, the focus changed to guardianship as opposed to adoption. Mr. Nelson, at what point did that happen and why did it happen?

MR. NELSON. Well, the why I believe is—what Rick and Cheryl and Patricia had originally envisioned was what they called an open adoption where the natural mother's rights would continue in some form. She would be able to continue to visit the child, and the child would still be allowed to come to the Navajo Reservation to see what it was to be a Navajo.

In Navajo courts an adoption is a much more final proceeding. It terminates all of the natural mother's rights, and what we found was that the terms did not have the same meaning. What they envisioned was much closer to what permanent guardianship would provide, and once we got sort of beyond that linguistic problem, it fell into place.

As to why it came about, that was negotiations really between the extended family and Rick and Cheryl Pitts and Patricia Keetso.

SUBCOMMITTEE CHAIRMAN ALLEN. Mr. Nelson, I wonder if you could expand on that in terms of the status of the guardianship provisions under comity provisions within the State of California. That is, if you now say that guardianship in the Navajo court is roughly equivalent to open adoption in the California courts, would it also follow, then, that California, say 5 years from now, would look at the category of guardianship awarded by the tribal forum as the equivalent of an open adoption in a California forum? What do you think about that?

MR. NELSON. Well, they could. I think the terms of this arrangement will be set by the decree, and that is what any court will look to. No matter what name you put on it, the rights that flow from the decree and not from the classification in the statute.

SUBCOMMITTEE CHAIRMAN ALLEN. You mean the decree will spell out the terms and not just use the term "guardianship," which also exists, of course, in the California law?

MR. NELSON. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. But you're saying it exists differently. So that the California courts won't look at its guardianship, but will look at the express terms of the Navajo decree in order to apply it?

MR. NELSON. Yes.

MR. HOWARD. I have one further question at this time, and I will defer to you.

At one point Patricia referred to Rick Pitts as not being Anglo. Mr. Pitts, could you tell us what she meant by that?

MR. PITTS. I think what she was referring to is that I am one-quarter Tarascan Indian.

MR. HOWARD. Thank you.

Commissioners.

COMMISSIONER DESTRO. I'll address this generally, but probably the best person to start with is Patricia Keetso.

To your knowledge, what was the basis of the original order that the tribal courts entered in the case? Was it simply that they had received notice that you had started an adoption proceeding and that the proceeding in the Navajo courts was, in effect, their official response to your notice commencing the adoption in California? Do you understand what I'm asking you? What prompted the tribe to starting to intervene in this?

MS. PATRICIA KEETSO. I really can't answer that clearly because, as far as I am concerned, we were doing the right thing. We had contacted them. Like Rick said, when Allyssa was born, we had contacted them, and I wanted to hear from them, but I didn't hear from them until in February. They didn't notify me until in February.

COMMISSIONER DESTRO. What made you decide to proceed in the California forum instead of starting in the tribal court? If you thought that the tribe might raise some problems, what prompted you to start in California rather than tribal court?

MS. PATRICIA KEETSO. Well, like I said, they had been notified, and I depended a lot on our lawyer, Steve Ravel. I thought he knew what was going on. I called him and asked him, "Have you heard from the tribe and do you know what is going on?" And he said, "No, don't worry about it; just don't worry about it; things will be fine." He kept stating that to me. So I just assumed that everything was going well.

I had no idea how to go about this. So he being the lawyer, he knew the laws. So I depended on him a lot to handle this whole procedure of Allyssa's adoption case.

COMMISSIONER DESTRO. Mr. Pitts, do you basically feel the same way? As I told you before the hearing, I just went through an adoption proceeding myself, and being a lawyer and not knowing a whole lot about how that is done, I know that one does rely on the lawyer, but did he talk to you about the option of going to California or tribal court, or did you just assume at the outset that you were going to start with California?

MR. PITTS. Right. We assumed that California was the place that it was supposed to be taken care of. Steve Ravel never gave us any inclination that it was anything otherwise. I don't really know if he even knew that it probably should have originated in a tribal forum.

COMMISSIONER DESTRO. Did you discuss at any time the significance of why you had to give the tribe notice?

MR. PITTS. No. The only thing we knew was that there was some form of notice that was supposed to go through the tribe, and that he said that he had filed that notice and that was that, and that if they didn't respond within a certain period of time, then they would not be able to respond.

When the time period that he had given us the impression had expired, then we figured that there was no problem, that they weren't going to intervene in the case and there wasn't going to be any problems.

COMMISSIONER DESTRO. Let me go back to Patricia Keetso for a minute. With respect to the original order, the award of temporary custody, were you given any indication of why temporary custody wasn't just given to you? Why was it transferred to the tribe or to the department of social services?

MS. PATRICIA KEETSO. I really don't understand that myself. I think back and I—

MR. PITTS. I think that I can maybe answer that for you.

MS. PATRICIA KEETSO. I really don't know.

MR. PITTS. The allegations in the custody order were this. There were three basic allegations in the order. One was that the child was abandoned in California; two, that the child was a ward of the State of California and that the child was dependent; that the child had no one looking out for its best interests. Those were the bases for the custody order in January.

If at any point anybody, either be it a judge or a social department worker or anybody, had bothered to pick up a phone and call, one phone call could have verified that none of those things were true, that the child was never abandoned in California, that the child was not placed in an agency, that the child wasn't dependent, and that the child was not a ward of the State.

It seems to me that the judge in California, obviously, if he had bothered to read the custody order, would have seen and would have realized that these things were not true.

COMMISSIONER DESTRO. Ms. Keetso, let me quote for the record the relevant parts of the order of January 11. Paragraph 3 states: "That it is in

the best interests of the minor child that this court accept jurisdiction of the State court proceeding that is pending in the Superior Court of California, Juvenile Court, Santa Clara County, State of California.”

And the operative paragraph, “That the natural parent is presently unable to properly provide for the care and maintenance of the above-named child, making the child dependent as defined by the Navajo Nation Children’s Code, Title IX, Section 1002, Subparagraph 15.”

It’s dated the 11th of January and it is signed by Louise Grant as the advocate.

Did you ever speak to Louise Grant before that time?

MS. PATRICIA KEETSO. No. I never heard of that name, and I didn’t know who she was until I saw both her and—well, I knew Delores Greyeyes, and I briefly spoke to her on the phone several times starting from February, but Louise Grant—I didn’t know who she was, and I have never even heard of her before.

MR. PITTS. The first contact with Louise Grant and Delores Greyeyes, the first physical contact, was on April 11 when we appeared in court.

COMMISSIONER DESTRO. In San Jose?

MS. PATRICIA KEETSO. Yes, that’s right.

COMMISSIONER DESTRO. So, basically, about 3 months later was your first contact with Louise Grant. Had you had any contact with Delores Greyeyes prior to January the 11th?

MR. PITTS. Patricia?

COMMISSIONER DESTRO. Yes.

MS. PATRICIA KEETSO. Physical contact?

COMMISSIONER DESTRO. Well, telephone or physical contact.

MS. PATRICIA KEETSO. It was at the end of February; that is when she started calling.

COMMISSIONER DESTRO. I mean February 1988, right?

MS. PATRICIA KEETSO. Yes.

COMMISSIONER DESTRO. But prior to January 11, 1988, had you had any contact with Delores Greyeyes or any of the other social service staff?

MS. PATRICIA KEETSO. No, I didn’t.

COMMISSIONER DESTRO. You did not.

MS. PATRICIA KEETSO. No, I did not.

COMMISSIONER DESTRO. Ms. Susie Keetso, did you have any contact with the social service department people prior to January 11?

MS. SUSIE KEETSO. No, not until February or March.

COMMISSIONER DESTRO. Mr. Nelson, did you have anything you wanted to add to this?

MR. NELSON. Well, yes, I did. Under the Navajo Children’s Code, an adoption in violation of the Indian Child Welfare Act is considered grounds for dependency.

COMMISSIONER DESTRO. Oh, all right. You've anticipated what I was getting at. Then the notice, it was perceived by the Navajo Nation as the equivalent of making the child a dependent or abandoned child then, right?

MR. NELSON. If the adoption was done in violation of the Indian Child Welfare Act. That was the allegation that was made because the adoption should have been done in tribal court. That's basically the position.

COMMISSIONER DESTRO. Let me explore that for a minute though, if I can. The Indian Child Welfare Act doesn't say that it has to be done in child court, does it?

MR. NELSON. Well, if the residency or the domicile of the natural mother is on the reservation, then it is exclusive in tribal court.

COMMISSIONER DESTRO. Okay. But as long as there is a dispute over that, that is an open question.

MR. NELSON. Correct.

COMMISSIONER DESTRO. The jurisdictional question, as I understand it, is if the mother is a domiciliary of the reservation, then there is exclusive jurisdiction in the tribal court.

MR. NELSON. Correct.

COMMISSIONER DESTRO. And that can't be waived.

MR. NELSON. Correct.

COMMISSIONER DESTRO. And the tribe can't choose not to exercise it, right?

MR. NELSON. That is correct. That is why the residency inquiry was so important in the California court.

Now, at the point that the California State court made their decision that Patricia's residency was located at Red Lake, then they ceased to have jurisdiction over the case, and the case was floating at that point.

SUBCOMMITTEE CHAIRMAN ALLEN. Let me just follow up on this a bit because I am still a little unclear.

Are you saying that Congress has mandated tribes to assume jurisdiction whenever domicile is determined to be on the reservation and does not leave it to the tribe to exercise any discretion whatever on that question?

MR. NELSON. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. So they are acting on the order of Congress in that respect?

MR. NELSON. Yes. The proper forum is tribal court.

SUBCOMMITTEE CHAIRMAN ALLEN. The exclusive forum, not the proper.

MR. NELSON. The exclusive and proper.

SUBCOMMITTEE CHAIRMAN ALLEN. There is no discretion on the part of the tribe under the act as you understand it?

MR. NELSON. That is my understanding.

COMMISSIONER DESTRO. Let me go one step further then. Assuming that jurisdiction was properly founded in the tribal court, how far does this



assumption of dependency and neglect go? I mean, is it sufficient to assume jurisdiction of the cause, and I can understand that, but under governing Navajo law, is it sufficient to also transfer jurisdiction to the tribe? I mean, is the assumption made in the proceeding that the parent who has instigated or cooperated in such an adoption proceeding in violation of the code has neglected the child, and then it serves as a further foundation for a transfer of custody?

MR. NELSON. Well, it is one of the allegations that was made. In this case, the inability of Patricia to provide care and maintenance for this child was based on representations made in the California court as part of that adoption proceeding.

COMMISSIONER DESTRO. All right.

MR. NELSON. And whether those were correctly interpreted or not, that was the basis for the allegation.

As to your question, under Navajo law it is not sufficient just to make those allegations. There needs to be an opportunity to be heard, a showing concerning the best interests of the child, and an opportunity to be heard as far as those best interests.

COMMISSIONER DESTRO. But that hearing never took place.

MR. NELSON. Well, it took place after custody was transferred.

COMMISSIONER DESTRO. After physical custody was transferred?

MR. NELSON. Yes.

COMMISSIONER DESTRO. So, in other words, the baby was removed from the physical custody of the mother, of the birth mother, and the proposed adoptive parents, and then the hearing was held afterwards.

MR. NELSON. Yes, that is correct.

COMMISSIONER DESTRO. Was that just a slip-up, I mean as far as you can see? When I look at the papers of this particular case, having been involved in such cases when I was in private practice, there are irregularities but not any that I haven't seen in State courts in some of this. Is it simply that the situation got out of hand, and by the time they got everybody together it was after all this had taken place?

MR. NELSON. That's part of it. I think part of it is that these are unfamiliar proceedings. This is not the usual fare for children's court. I am only aware of one other case where something evenly remotely similar happened, and that was with the Carters. It's not something that the children's court judges are used to dealing with, and it's not something that the division of social welfare is used to dealing with, and the first time through you make mistakes. I think that is what happened. It appeared to me that the division confused jurisdiction of the tribal court with custody of the child.

COMMISSIONER DESTRO. That is what it appeared to me, too, and I wanted to make sure that the record is clear that we are not pointing the finger at anybody with respect to intending to do anything wrong. This

looked like, or at least in my reading of the record, it looked like a case where events got away from things, and those happen in State courts as well as in tribal courts. So, again, I just wanted to make sure that the record does not reflect any judgment on our part with respect to the kinds of questions we are asking. We are just trying to find out what happened.

Commissioner Allen.

SUBCOMMITTEE CHAIRMAN ALLEN. Yes, I do have a few questions.

Ms. Keetso, you have been through a long and trying series of circumstances, and as often happens to people at any level or kind of government, whether the United States Federal Government, State government, city governments, or tribal governments, sometimes we have to go through trying circumstances. People make mistakes; office holders sometimes make mistakes.

Often in the end of that long process, mistakes get corrected, or they don't, depending on how it comes out. But we like to think very often they get corrected, and in the end, in spite of pain and suffering, everything comes out all right.

I would like to ask you how you judge the circumstances now, and leave aside any particular mistakes individuals might have made. Do you think that the processes that are in place in the Navajo in the long run will turn out for the good, that though you may have suffered, you have had a chance to state your case and you have confidence in the results? Do you think it's going to be all right in the end and are you satisfied, even though you had to suffer, that there is a chance to get your case heard?

Ms. SUSIE KEETSO. No. The way they handled my grandchild, you know, I don't think it's right. It makes bad feeling. I never ate and no one was sleeping that night, and I'm just the same way right now. They just put my name in the newspapers and they are just making a lot of big news. They are not supposed to do that unless they get my permission to do it. They are just making a big mistake in everything and that's not right.

SUBCOMMITTEE CHAIRMAN ALLEN. I can see that there might have been things that happened that, as you say, are not right, or that you still feel the pain from.

Ms. SUSIE KEETSO. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. But do you think that in the end everything can come out all right?

Ms. SUSIE KEETSO. No, it's not right.

SUBCOMMITTEE CHAIRMAN ALLEN. So you are not confident at this moment about the future?

Ms. SUSIE KEETSO. Yes, I think it's going to work right if everybody works right for us.

SUBCOMMITTEE CHAIRMAN ALLEN. So that no matter how much suffering, you think there is a chance still for everything to fall into place properly?

**MS. SUSIE KEETSO.** Yes.

**SUBCOMMITTEE CHAIRMAN ALLEN.** Patricia Keetso, I would like to ask you a question going back to the very beginning when you were reading the advertisements that Mr. Ravel placed in the newspaper and thinking about adoption. Did you ever consult the social welfare agency about possible adoptions directed by the tribe?

**MS. PATRICIA KEETSO.** No.

**SUBCOMMITTEE CHAIRMAN ALLEN.** Could you elaborate and explain to me why that didn't occur to you?

**MS. PATRICIA KEETSO.** It never occurred to my mind to contact the social department. It was not my intention to have my baby adopted out of State. The most important thing that I thought about was what was best for my baby, the interests of my child, to be able to be raised in a good environment with both sets of parents and to sit in a good home.

It was never my intention to have my baby adopted in an Anglo home or other nationality. I could have went through the Navajos, but I never even thought of going to the social department. It just came to me. Like I said, what was important to me is to have what was best for my baby. That was all I wanted.

**SUBCOMMITTEE CHAIRMAN ALLEN.** So that it wasn't a question of the most convenient method of adoption, but you were trying to exercise a judgment about your child's future which you thought you had the right to do?

**MS. PATRICIA KEETSO.** The only thing I was concerned about was the future of my child. That was my only concern. That was about it. And I was aware, I basically knew some things about the Indian Child Welfare Act, but I didn't know enough.

**SUBCOMMITTEE CHAIRMAN ALLEN.** Your concern about your child's future, was that part of the reason that you agreed with the Pitts to pursue an open adoption?

**MS. PATRICIA KEETSO.** That's what I wanted for my baby, was an open adoption right from the beginning. You know, being a woman, a young person, I feel that I have a right to do whatever I want to do with my baby. I could have went through an abortion. I could have done that, and I just couldn't do it right from the beginning. I love this child and I just wanted what was best for her. That was all I wanted.

**SUBCOMMITTEE CHAIRMAN ALLEN.** Thank you.

Cheryl, as you know, even under ordinary circumstances adoptions are slow and tedious processes. When you don't have the complications of differing States or States and tribes, it's still a long, slow, and difficult process ordinarily.

Looking at the situation you have confronted now and weighing the alternatives between carrying the process through the State of California or carrying it through the tribe, does it appear to you that the

inconveniences are any degree greater in working through the tribe as opposed to working through the State of California?

MS. CHERYL PITTS. Explain that to me again. I don't understand.

SUBCOMMITTEE CHAIRMAN ALLEN. Does it seem to you that the inconveniences of the process, the adoption process or the guardianship process, are any greater working through the tribe than working through the State of California?

MS. CHERYL PITTS. Well, I think that if they had explained, if our lawyer had explained that to us in the beginning, this whole situation wouldn't have happened, but we didn't know. We trusted him and thought that he knew what he was doing. So that is why we went through the California courts. I had no idea to go through the tribal courts. If we had known, we would have done that.

COMMISSIONER DESTRO. If I can just clarify though, and I think my colleague is asking that, given the hassles of going through California—I mean, in meeting with the social workers and having all the meetings and all the statements and all the examinations and all the things you have to do to become an adoptive parent—I mean, do you find that what you have gone through with the department of social services and the Navajo courts is really that much different than what you went through with California, other than it being in a different physical location with different people, you know, going through the motions with you?

MS. CHERYL PITTS. No, I don't think so.

COMMISSIONER DESTRO. So had your attorney explained that this is the way you have to go rather than that having to be the way to go, have you found the process, once it got on track and everybody knew what was going on, have you found that the process was fair and similar to the one in California? That may be a hard question for you.

MS. CHERYL PITTS. I think it may be somewhat similar and maybe in different cultures there.

SUBCOMMITTEE CHAIRMAN ALLEN. So you think it could be similar if I am reading you correctly?

MS. CHERYL PITTS. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. And you have no objection to pursuing the process through the Navajo system?

MS. CHERYL PITTS. No.

SUBCOMMITTEE CHAIRMAN ALLEN. What I am trying to get at with this line of questioning is to draw a distinction between your interest in adopting and the forum in which you pursue that interest and what I have heard you testify to this morning as the element of surprise, legal surprise, that has gotten you entangled between California and the Navajo.

If I am hearing correctly, and tell me if I am wrong, but I'm going to tell you what I'm hearing and then you correct it if I state it incorrectly. What I hear you saying is that your chief concern is that the laws have operated

in such a way, independent of anything individuals might have done—and leave out any individuals from Social Services or from the State of California or your lawyer or anyone else’s lawyer—the way the laws in general have operated have been such as to multiply the difficulties you have confronted and to create the confusions that have made this such a trying case for you. Is that what I am hearing this morning?

MR. PITTS. Yes. I think that the laws were not explained or clarified to us, and I personally don’t even know if our attorney was clear on the proper laws to follow. I would assume that he felt he was going through the right court system when he tried to go through California courts.

But, in answer to your question, I think that the tribal forum operates in very much a similar manner as California, and I don’t think that it is really any more problem or any more trouble to go through the tribal court than it is to go through a California court, that their procedures are relatively the same.

I would like to say, though, that I have heard a few comments to the fact that, in essence, there may have been just a slip-up or some form of problem there, but I honestly don’t believe that. I honestly believe that there was much more of a power statement here than a slip-up of a court system.

COMMISSIONER DESTRO. When you say that, though, I mean—does that mean when you say a “power statement,” that it’s basically, “This is our problem to deal with,” and it’s basically a jurisdictional assertion?

MR. PITTS. Exactly, and it had relatively little to do with the best interests of an 8-month-old child. It had to do with the jurisdictional issue that, “This is our jurisdiction and we are going to have it at whatever costs.”

SUBCOMMITTEE CHAIRMAN ALLEN. Let me say, and you obviously respond to the line of inquiry I was pursuing, was this just a slip-up and will it now be all right, and some of the things you’ve said this morning lead us to think that.

But there is also something else that seems to lead in that direction. Mr. Nelson testified a moment ago, and I have since checked it and find that he is largely correct in this regard, that the tribe has no choice. It is mandated to assert this jurisdiction by the Congress of the United States, which claims a plenary power over Indian tribes. Therefore, rather than being merely a power play, it seems that they were really carrying out orders.

MR. PITTS. I believe that in the interim after the jurisdiction was granted them that, yes, they were carrying out the congressional orders.

SUBCOMMITTEE CHAIRMAN ALLEN. So you think the problem centers in the finding of the California Superior Court with regard to jurisdiction, that it falls back on the question of domicile or residence?

MR. PITTS. Yes.

**SUBCOMMITTEE CHAIRMAN ALLEN.** Let me ask Patricia a question. Patricia, when you speak of your rights as a mother, and you do so very feelingly, do you have any sense of what you mean by that and where you get those rights? How are you speaking? I have heard you speak before of your pride in your Navajo heritage and your desire to protect that and nurture it, and I have heard you speak of your ambitions as a student and as a prospective member of the United States Armed Forces.

When you talk about your rights as a mother, just what source do you refer to for those rights? Are you thinking of yourself as an American and therefore having rights as a mother or as a Navajo or what?

**MS. PATRICIA KEETSO.** Well, basically both. Before this whole thing happened, I really didn't know much about the Navajo laws and of their practices, not very much. When I speak of my rights as a mother, I think that not only for myself but a lot of people.

I see a lot of young people on the Navajo Reservation, people my age with three or two children, and it's really sad to see some of them just depending a lot on the welfare. I'm not trying to criticize anybody, but the way I feel, I have my pride.

Even when I was young, I never thought this would happen, but just like any other person, a lot of people make mistakes, and I was one of them. I got pregnant and I knew it was serious. It took me a long time to decide to go through the adoption. It was very hard to tell my parents, but I told them about what I was going to do, and they just said, "It's up to you. You are old enough to make your own decisions. You've always done things right." She said, "We trust you and we are willing to support you," and I went through the procedures with the adoption.

Being a citizen of the United States, I think I have a right to make my own choices to do what I want to do with my life and my child, Allyssa. I thought what I did was right as far as I was concerned, but apparently—it hurt to see the Navajo social department didn't see it that way and having them to criticize me, not knowing the things I went through without having communication there. It hurts, and I just don't feel that it's right.

This whole thing was like an invasion into my privacy, too, of my life, and I really feel that something needs to be done to prevent the tribal officials to do that to their own people.

It was never my intention to bring shame on the Navajo Nation. I know a lot of people see it that way, especially in California. I have spoken to people—I have talked with people there, and a lot of people are looking at the whole nation as a bad nation, but they're not. It's the tribal officials, and what they are doing to their own people is wrong.

I feel that it's wrong that they are fighting for this one particular child who is loved for and cared for by this couple and that they ought to be concerned about their own nation here on the reservation, about the old

people and the young people there, instead of being concerned and spending a lot of money on this one child. That's how I feel.

I am proud of who I am, and I am proud of my parents, and I am not ashamed of who I am at all.

SUBCOMMITTEE CHAIRMAN ALLEN. Ms. Prado.

MS. PRADO. Thank you.

I would like to follow up, Mr. Nelson, with you, if I could, please, on a couple of things that I need clarification on.

Commissioner Allen was going through a line of questioning about if everyone had understood the law properly, then the procedures would have fallen into place in a more orderly fashion, and then there was also the question of the tribe having no choice.

Now, did I understand you to say that that tribal jurisdiction kicks in mainly on the establishment of domicile or residency?

MR. NELSON. Yes. Under the Indian Child Welfare Act, if the mother of the child resides or is domiciled within the reservation, then tribal courts have jurisdiction.

MS. PRADO. It seems to me that there is some confusion, then, over what exactly is the factor that clarifies domicile or indicates domicile for the purposes of this act.

MR. NELSON. Well, domicile is what the whole proceeding in California was about, and there is a lot of law on that. Domicile is not a short term concept, whereas residency is. Residency you can establish in a week. Domicile is a more long term thing, and you look to where your roots are, basically, especially with someone of Patricia's age who is attending college, whose parents are located someplace, who continues to receive mail at a certain place, where do they vote, and things like that.

Looking at California law, I think the determination that was made was the correct one. Had it been made in tribal court, and I looked at the possibility of raising that as a Navajo law issue, but under Navajo law, her residency clearly was at Red Lake. There was no question about that.

MS. PRADO. So that really isn't a point of dispute then?

MR. NELSON. I didn't see it as such, and I don't think their California lawyers did either; otherwise, they could have appealed it on that, that point. It was a justiciable issue. It was something that a court had to decide. So it wasn't clear going in how it was going to turn out. But with hindsight, having seen what was produced in that court proceeding, it appears that her domicile was at Red Lake.

MR. HOWARD. What is the Navajo standard with respect to domicile?

MR. NELSON. Well, there is a case of the Navajo Court of Appeals, *Halona v. MacDonald*, that deals with residency and venue, and they look to things such as voting records and Navajo tradition. It's where your umbilical cord is buried. That's how you determine residency. That's

Navajo common law, and that's referred to in that case and that is how we do it for venue purposes.

SUBCOMMITTEE CHAIRMAN ALLEN. Can you lose domicile in the Navajo law?

MR. NELSON. No. It's fixed from the time your umbilical cord is buried.

SUBCOMMITTEE CHAIRMAN ALLEN. That's a conflict, isn't it?

MR. NELSON. Yes, there is a potential conflict of laws there. Under tribal law, you can have a choice of forums and a choice of venues based on the various indices of domicile.

COMMISSIONER DESTRO. But you can never change your domicile under Navajo law from the Navajo Reservation to Kansas, for example, if you decided you were going to leave and never come back.

MR. NELSON. There are a number of indices you look at, including where you vote.

COMMISSIONER DESTRO. So, in other words, it's an open question then. It's not really treated as a question of nationality then.

MR. NELSON. No.

COMMISSIONER DESTRO. Because domicile does in the end turn on intent, long term intent and action.

MR. NELSON. Yes.

COMMISSIONER DESTRO. So a Navajo could potentially change their domicile from their domicile of origin to a new one.

MR. NELSON. Yes.

MS. PRADO. Patricia, let me just ask you a question about that. When you went back to the reservation, were you involved in applying for a student loan?

MS. PATRICIA KEETSO. Yes. I wanted to receive a Navajo tribal scholarship through the Navajo Tribe. So I went over there to sign up, and there was one of the ladies there who said, "You have to register to vote in order to get that." So I did that.

MS. PRADO. Where did they tell you you had to register to vote?

MS. PATRICIA KEETSO. This was Tuba City Navajo Agency.

MS. PRADO. It's a social service agency?

MS. PATRICIA KEETSO. So I went ahead and registered to vote, but I never voted.

MS. PRADO. And this is the first time you registered to vote?

MS. PATRICIA KEETSO. Yes, and that is how they determined my domicile on the reservation. I had no idea. I just did what they told me to do.

MS. PRADO. Was that, Mr. Nelson, a principle or a criteria used, because it seems to me from what you were saying that that was one of the factors?

MR. NELSON. That was a factor, yes. Where she voted and the scholarship were both considered in California.



Ms. PRADO. And when you registered to vote was after the baby was born?

Ms. PATRICIA KEETSO. Yes, it was after the baby was born, but it was like in September. Yes, it was in early September.

Ms. PRADO. That was before you had been contacted by the tribe then?

Ms. PATRICIA KEETSO. Yes, that was before.

Ms. PRADO. Is there anything else you want to ask on domicile before we leave that?

MR. HOWARD. Yes. I would like to return to Mr. Nelson. I have here a copy of proposed amendments to the Indian Child Welfare Act that are under consideration now by the Senate Select Committee on Indian Affairs, known as S.1976, and among many other things, those amendments would change or would include in the ICWA a definition of residence which reads as follows: "Residence shall be defined by the tribal law or custom of the Indian child's tribe or, in the absence of such a law or custom, shall be defined as a place of general abode or principal actual dwelling place of a continuing or lasting nature."

Under Navajo law, which does include a consideration of the tradition that the person's domicile is where the umbilical cord was buried, would there be any escape from the Navajo Reservation with respect to establishing one's domicile?

MR. NELSON. Well, for instance, this child was born in California. I think under the definition you read if she had resided in California long enough to reach the criteria of a continuing, lasting presence, then the domicile would not be located on the reservation.

As far as a child that was born and raised on the reservation, I think there would be difficulty in claiming that the domicile was elsewhere.

MR. HOWARD. Let me read to you the definition of domicile that would be included in the ICWA.

COMMISSIONER DESTRO. Could you make clear for the record that the domicile and residence that we are concerned about isn't the domicile of the baby, but it's the domicile of the mother that we have got to get clear for the record.

Ms. PRADO. Because Mr. Nelson mentioned that the baby was born in California.

MR. NELSON. Right. Well, the definition that was read I thought was the residence of the child.

MR. PITTS. Excuse me. In reference to Mike Nelson's saying that the child was born in California, there could be a slight problem with determining her domicile being that her umbilical cord has been sent to Arizona to be buried on the reservation.

Ms. PRADO. According to Navajo custom.

MR. PITTS. So where would you look for domicile?

Ms. PRADO. That's a very interesting point.

COMMISSIONER DESTRO. You see, that's why we asked the question with respect to the domicile proposal in the amendments because it's defined as "Domicile shall be defined by the tribal law or custom of the Indian child's tribe, or in the absence of such law or custom, by Federal common law applied in a manner which recognizes, first, that many Indian people consider their reservation to be their domicile even when absent for extended periods." So the intent of the act is to defer to tribal jurisdiction whenever possible.

But your testimony, Mr. Nelson, is that Navajo law at least, and I'm not speaking for any other tribes, but Navajo law is sufficiently flexible to allow a person who wants to change domicile, even given this definition, to do that?

MR. NELSON. Yes. I think it would be an issue for the courts to decide, just as this one was. They are often not simple inquiries.

COMMISSIONER DESTRO. Oh, no, that's assumed.

MR. HOWARD. But in the California proceeding, the California court looked to California law; is that correct?

MR. NELSON. Correct.

MR. HOWARD. And under the ICWA as amended by these proposed amendments, the court in California would be required to look to the law or custom of the Navajo Nation.

MR. NELSON. Correct.

MR. HOWARD. Which law or custom states that the domicile is where the umbilical cord is found.

MR. NELSON. Well, it's not that black and white.

MR. HOWARD. I see.

MR. NELSON. The case that I referred to, *Halona v. MacDonald*, lists I believe five different indices of domicile.

MR. HOWARD. Do you recall what the other indices are?

SUBCOMMITTEE CHAIRMAN ALLEN. I was just going to ask how you would expect, and I would like to hear what the others are, but also tell us how do you expect a California court to deal with this inquiry?

MR. NELSON. Well, I think that is the purpose of the notice to the tribe. It's the tribe's responsibility to bring this information forward and present it to the court.

SUBCOMMITTEE CHAIRMAN ALLEN. To follow up just a moment, then you would be saying California would refer to a decision of a Navajo court, but there still is an element of review, for example, manifest error. How would a California court make that judgment?

MR. NELSON. Manifest error in—

SUBCOMMITTEE CHAIRMAN ALLEN. In the proceeding in the tribal court making the domiciliary decision that you're now describing.

MR. NELSON. Well, I think that the California court would look to Navajo law to make the initial decision themselves. It wouldn't be referred to tribal court.

SUBCOMMITTEE CHAIRMAN ALLEN. That's what I'm asking. So looking at Navajo law and these five or six indices you now mention, and you may list them, how would a California court get through that?

MR. NELSON. How would they waive indices?

SUBCOMMITTEE CHAIRMAN ALLEN. Is it codified?

MR. NELSON. Yes, it is in a reported decision of the Navajo Court of Appeals. It's in 1 *Navajo Reporter*, which is available at most western law schools. So they are available; they are cited in Federal court decisions, and they are used. They are in the Harvard blue book now. So they are real decisions.

MS. PRADO. You were going to list the other indices.

MR. NELSON. As I recall, they look to where Chairman MacDonald's grazing permit was, where his family was from, where he actually resided at the time of the lawsuit, and where he made his permanent home, I believe, was one of them. The finding of the court was that venue would be proper either in the Shiprock District or the Window Rock District. So they looked at those elements and they went both ways. But that is the authority that we use on venue questions in that case.

MS. PRADO. Do you want to leave the issue of domicile now?

SUBCOMMITTEE CHAIRMAN ALLEN. Yes.

MS. PRADO. Can you just clarify for me again that if we are saying that if there had been no confusion, then the laws, once the confusion was rectified, would have gone into place, and the proceedings have proceeded as they should have; would you clarify again in this context where you mentioned there was an earlier mistake or error?

MR. NELSON. Well, the custody shouldn't have been transferred without a shelter care hearing.

MS. PRADO. And that would have occurred when, again?

MR. NELSON. That should have occurred after the petition was filed.

MS. PRADO. What date?

MR. NELSON. That was in January, I believe, January '88. Rick and Cheryl and Patricia should all have received a copy of that petition, which they never did, and they should have had an opportunity to respond to it, and the court should have had an opportunity to assess the best interests of the child before the custody was transferred.

MS. PRADO. And that hearing that should have taken place didn't take place until 4 months later; is that correct?

MR. NELSON. Right. The order was signed without that hearing.

MS. PRADO. Ms. Keetso, if I can turn to you for a moment. You spoke before about some newspaper articles. I understand that you say that there

have been newspaper articles that have appeared concerning your character or making statements about your character; is that correct?

Ms. SUSIE KEETSO. Yes.

Ms. PRADO. And these appeared during what period of time? Is this something that is still going on or did this just happen for a short time and when did it occur?

Ms. SUSIE KEETSO. I don't really remember. I just saw them in the newspaper everytime when it comes out.

Ms. PRADO. Do you have copies of those articles that you can provide for us?

Ms. SUSIE KEETSO. No. I just leave it that way, you know. I just looked at it, and I don't cut it out, but just leave it that way.

Ms. PRADO. I just want a clarification from you as to whether or not we could get those for the record.

Ms. SUSIE KEETSO. I just got one for Trish. I brought it, but I think somebody lost it.

[Discussion among the witnesses.]

MR. PITTS. There was a very recent one from a couple of days ago in the *Observer*?

Ms. SUSIE KEETSO. The *Navajo Observer*.

Ms. PATRICIA KEETSO. It was back in June, June 7.

MR. PITTS. June 7 in the *Observer*.

Ms. PRADO. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Are there any questions over here?

[No response.]

All right. We are pleased that you have been with us. I will ask if there is any final comment that any of you wish to make before we close this phase of our hearing, for we are now reaching that point. Is there anything that you expected to be asked this morning that you were not asked, or is there anything that you would now like to say, any one of you?

Yes, Mr. Nelson.

MR. NELSON. There is one thing I would like to say. I think it's important to draw a distinction between the courts of the Navajo Nation and the division of social welfare. I don't think the courts did anything inexcusable here.

I do think the way the division handled this case was improper, and that the interests of the child were not properly considered, that it was viewed as a way to make law, and that came first to the division.

I don't think the courts believed that, and we reached what I think is a satisfactory result because the courts were willing to look at it. But I think some of the things the division did are not excusable.

SUBCOMMITTEE CHAIRMAN ALLEN. When you say the division viewed it as a way to make law, did I hear you correctly?

MR. NELSON. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. Do you mean essentially by that what Rick Pitts said earlier, that he thought it was a power play?

MR. NELSON. Yes, I think that was part of it. I don't think the interests of the child came first in this case.

Let me expand on that a little. The facts going into this case were that the natural mother agreed to the adoption and the natural grandmother did not agree to the adoption.

Under Navajo tradition, there is a strong case that can be made that the wishes of the natural grandmother should be respected and that the child should remain with her, and that was the law I think they were trying to put into place. As it turned out, the facts changed and they weren't able to, but that was the law.

SUBCOMMITTEE CHAIRMAN ALLEN. Very well.

Any followup?

[No response.]

I thank you all very much. While you are still in place allow me to call out the names of our next panelists who will be Sandy Hansen, Duane Beyal, and Mr. Nelson again.

The people who were due to appear, but who are, so far as I know, are not present at the moment, but I will ask if you are here I would like you to identify yourselves to me, Patrick Gillory, Delores Greyeyes, Louise Grant, and Violet Lui.

[No response.]

Very well, they are not here, and the next panel will be as I indicated. Was there someone?

MR. NASH. Mr. Chairman, my name is David Nash. I am an attorney with the Navajo Nation Department of Justice, and I am making a limited appearance here today on behalf of the individuals that you named, with the exception of Mr. Gillory, who I was unaware had been subpoenaed.

SUBCOMMITTEE CHAIRMAN ALLEN. Very well. Then would you speak to our counsel.

I am going to call a 5-minute recess now while we arrange the next panels and have you speak to our counsel about that.

MR. NASH. Yes, sir.

[Recess.]

SUBCOMMITTEE CHAIRMAN ALLEN. Will you all take your places, please? If you would line up with your name tags, it would be easier for the recorder. The meeting is called back to order.

We want to begin at this point with the representation from Mr. David Nash regarding which I will turn to General Counsel William Howard.

**STATEMENT OF DAVID NASH, ATTORNEY, NAVAJO NATION  
DEPARTMENT OF JUSTICE**

MR. HOWARD. Thank you, Mr. Chairman.

I would like to clarify for the record at this time, if I could, that we had planned to hear testimony at this point from a panel of witnesses who would respond to the allegations that we have just heard from the Pitts and the Keetsos, and that panel was to consist of Mr. Patrick Gillory, Ms. Delores Greyeyes, Louise Grant, and Violet Lui.

The Commission subcommittee issued subpoenas to Delores Greyeyes, Louise Grant, and Violet Lui. Subpoenas were served upon Louise Grant and Violet Lui, but service was not obtained upon Delores Greyeyes.

A letter of invitation was sent to Mr. Patrick Gillory, not a subpoena. Mr. Gillory advised us yesterday that he could not come or that he didn't see any point in coming given that his client, the Navajo Nation, had exercised an attorney-client privilege and had told him that he could not testify to matters with respect to his representation of the Navajo Nation.

Now, you can confirm this for me, Mr. Nash, but I will say at this time that the next panel that we were to hear from consisted of three judges of the Navajo Nation, Chief Justice Tom Tso, Judge Wayne Cadman, and Judge Robert Yazzie. They were in turn to be followed by Sandy Hansen, Duane Beyal, and William Riordan.

Let me say at this time that subpoenas were issued and served upon Judges Tom Tso, Wayne Cadman, and Robert Yazzie and upon William Riordan. It is my understanding that they will not appear either.

Is that correct, Mr. Nash?

MR. NASH. Mr. Howard and Mr. Chairman, thank you for the opportunity to respond. The judges that you mentioned—the Chief Justice of the Navajo Nation, Tom Tso, Judge Robert Yazzie, and Judge Wayne Cadman—determined, based on the arguments and reasons that I have submitted in a letter to the Commission and on some oral statements that I will make in a moment, that they would not attend this hearing, and as counsel for them, the Navajo Nation Department of Justice concurred in that result. Mr. William Riordan will also not attend.

MR. HOWARD. At this time I am ready to hear from Mr. Nash.

SUBCOMMITTEE CHAIRMAN ALLEN. Very well, you may proceed, Mr. Nash.

MR. NASH. With the Commission's approval, I would like to highlight some of the points made in this letter and make a couple of other points.

At the outset, let me just state for the record that I interposed an objection during the earlier testimony, and I apologize for the disruption of the proceedings at that point, but I felt that it was important to object on the record as to evidence which appeared to be coming forward, allegations that might tend to defame or incriminate certain individuals that I represent, and I wanted the Commission to recognize—

SUBCOMMITTEE CHAIRMAN ALLEN. Permit me to interrupt you, Mr. Nash, to say to you that your record was not received earlier when you attempted to give it for the good and sufficient reason that, as I instructed staff before we began our hearings this morning, we were not to verge into areas of defame and degrade violations, and I can assure you that we paid very close attention to all that was said, and had there been any violation, we would indeed have interrupted the testimony ourselves. It is, therefore, our ruling that that did not take place.

MR. NASH. Thank you for that ruling.

SUBCOMMITTEE CHAIRMAN ALLEN. You may continue.

MR. NASH. I would just like to state that I did make my objection in detail to Counsel Brian Miller, and I understand from him that he conveyed that to the Commissioners.

SUBCOMMITTEE CHAIRMAN ALLEN. Indeed.

MR. NASH. I am here making a limited appearance on behalf of the individuals that have been named who are tribal judges and lawyers who were subpoenaed to appear here today.

The purpose of my appearance is to challenge the scope of authority of this Commission to investigate enforcement of the Indian Civil Rights Act in Indian country and to issue the subpoenas that have been issued to these individuals. Certain other legal objections are raised as well.

I would refer the Commission to the letter which I have delivered 10 copies of to Counsel William Howard a few minutes ago, and which I believe was telefaxed to Commissioner Allen's office, although perhaps he didn't receive it yesterday.

I would also refer the Commission to the statement submitted by the tribe on September 11, 1987, which sets forth a number of legal arguments regarding the Commission's jurisdiction and scope of authority.

At the outset, let me say that the Navajo Nation takes great pride in its laws and procedures as they relate to civil rights. The Navajo Nation has an independent judiciary, an independent court system, a Bill of Rights which was enacted prior to the Indian Civil Rights Act, and a long tradition in Navajo custom and tradition, as I understand it, of fair and meaningful procedure as to any decision involving individuals.

The nation has, although it questions this Commission's authority, has voluntarily provided significant amounts of information as to tribal law and the judicial procedure. The nation was willing to provide information on a voluntary basis as to the Commission's most recent inquiry.

The problem that arose is that the Commission issued subpoenas and served them on a number of tribal judges and lawyers, and the tribe, given its concerns about the Commission's scope of authority and its arguments that the Commission lacks authority to investigate this matter, led us to the conclusion and led the individual judges, who made this determination

independently, to the conclusion that it could not comply with the subpoenas issued.

Briefly, the powers of the Commission are limited to studying and investigating allegations relating to deprivation of voting rights and appraising the laws and policies of the Federal Government with respect to discrimination or denials of equal protection under the Constitution.

It is a basic principle of Indian law that the Constitution itself does not apply to Indian tribes. The key case in that regard is *Santa Clara Pueblo v. Martinez*, which also is instructive as to the scope of a Federal entity's powers regarding investigation and/or review of the Indian Civil Rights Act. These matters are discussed in our letter and in the statement I referred to earlier.

The Commission's actions, we feel, indicate disregard for the sovereignty of the Navajo Nation and unwillingness to work with the Navajo Nation on a government-to-government basis to provide information about this inquiry.

Despite our willingness in the past to accommodate the Commission, it has overreached its authority by issuing these subpoenas to the tribe. The objection to the subpoenas, and I will summarize the objection as to the judges, who I understand would be called later, and as to the other officials who were named to be on the panel at this moment—the subpoenas are overbroad.

The judges are protected by the doctrine of judicial immunity from inquiries into the exercise of their judicial duties. They are also required under the principles of judicial ethics not to discuss cases that are presently before them or issues that may appear before them in the future.

We understand that one of the subjects of inquiry would be the case of *Upshaw ex rel., Benally et al. v. Gorman et al.*, for which I believe Ms. Hansen and Mr. Beyer are here. That case is now pending before the Navajo Supreme Court and issuance of subpoenas to judges to talk about that case indicates a disregard for the Navajo tribal court system.

Let me make one more comment that is not in the letter, but arose out of the testimony that was given earlier by the individuals involved in the *Baby Keetso* case.

As I understand it, Mr. Nelson had concerns about notice of hearing that were provided to those individuals. I also understand that he made a motion to the Navajo Tribal Court on that matter. Whether that motion was eventually heard, I believe it was made moot by the settlement agreement between the tribes, and Mr. Nelson may be able to confirm that.

In any case, I believe that if there are any concerns about civil rights, due process, and procedure in that case, then those concerns should have been raised or should be raised to the Navajo court system and appealed, if necessary, to the Navajo Supreme Court, and I believe that justice would be done if there were a violation in that instance.



SUBCOMMITTEE CHAIRMAN ALLEN. Would you pardon me just a moment. I am guilty of a grave oversight. I meant at the outset of this session to announce to the assembled audience that if there were anyone present who is hearing impaired, I would appreciate their informing us by raising their hand for we have interpreters available. If no one would identify themselves as such, the interpreter will be free to relax.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

Now you may carry on, Mr. Nash.

MR. NASH. I appreciate the Commissioner's comments at the outset of that inquiry that the Commission is not investigating the Indian Child Welfare Act, that the Commission's responsibilities, if any, are to investigate civil rights. I am characterizing what you say, and if I misstate it, I'm sure you will correct me.

I do not think it's appropriate, given the publicity that that case has received, to bring the parties before this Commission in a public session and make public the matters as to the correctness of the decision and/or positions of the parties in that case. Those matters were litigated or are in litigation.

SUBCOMMITTEE CHAIRMAN ALLEN. Mr. Nash, permit me to interrupt you one more time. I don't mean to be at all difficult and I want to hear what you have to say. I have not at the outset sworn you in as a witness because you wished to represent the Navajos with respect to the particular issue drafted in your letter.

But if you wish to testify more broadly and generally, I would be glad to swear you in as a witness today.

MR. NASH. No, I do not wish to testify, and if I overreach that effort, then—

SUBCOMMITTEE CHAIRMAN ALLEN. Then I would ask you to represent as you requested.

MR. NASH. And I am sure you will inform me when I am stating too broadly.

I do not believe it is consistent with the due process owed to the individuals that I represent and to the Navajo Nation to relitigate the *Baby Keetso* case before this Commission.

SUBCOMMITTEE CHAIRMAN ALLEN. I don't believe that is the subject which you are representing this morning, if I understand your letter.

MR. NASH. Well, I'll move on then.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

MR. NASH. As to the issuance of subpoenas to lawyers, the Navajo Nation and I, on its behalf, would assert privileges to matters within the knowledge of those lawyers and point out to the Commission that it is the ethical responsibility of those attorneys and representatives not to publicly disclose any information relating to the representation of their client. That

I derived from the Arizona Rules of Professional Ethics, which are based on the Model Rules of Professional Responsibility, rule 1.6.

There is a presumption that other law, for example, the subpoena of this Commission, would not supersede that ethical responsibility unless it were issued by a tribunal of competent jurisdiction. Given our concerns that this Commission lacks authority in that regard and lacks authority to issue those subpoenas, it would be a violation of those attorneys' ethical responsibilities to appear and state such matters.

One further note as to the *Baby Keetso* case. There are statutory restrictions on the disclosure of matters that occurred in those proceedings and orders of the Navajo and California courts, as I understand it, to that effect.

I also represent Ms. Delores Greyeyes, who was not served with a subpoena by the Commission, as I understand it, from Mr. Howard's statements. The Division of Social Welfare of the Navajo Nation—

MR. HOWARD. Just to clarify, we attempted to serve her with a subpoena, and having giving her advance notice that she had been invited, we did send a letter to her as well that she did presumably receive. We were told by the Deputy Attorney General of the Navajo Nation that she would be produced, but shortly before our subpoenas were issued, she went on vacation and we have not been able to locate her.

MR. NASH. I am sure that the Deputy Attorney General of the Navajo Nation may have some statements about what he said to Commission counsel and, if the record is open, that may be submitted at a later date.

Ms. Delores Greyeyes works for the Navajo Nation Division of Social Welfare. The division of social welfare has a contract with the United States Bureau of Indian Affairs which makes the Privacy Act, the Federal Privacy Act, applicable to their operations. Concerns were raised with Commission counsel in advance that Ms. Greyeyes' testimony would violate her Privacy Act obligations that are imposed through that contract.

One further comment. It is very disturbing to the Navajo Nation that this Commission has taken a, let us say, heavy-handed approach to this investigation by issuing subpoenas to these individuals that are broad and tend to go into areas of privilege and immunity and we say are beyond the scope of the Commission's authority.

That is disturbing to us because the hearings before this Commission have been used by the United States Justice Department to justify to Congress changes in Federal law which we believe would seriously diminish tribal sovereignty and the ability of Indian tribes to regulate themselves and the ability of Indian people to self-governments and self-determination in accordance with the policy that President Reagan has endorsed and that the Congress has endorsed.

As we say at the conclusion of our letter, the attorney general and/or deputy attorney general are available to discuss these matters further with

Commission counsel or with the Commissioners if appropriate. The intention of the Navajo Nation at this point is to, unless such discussions occur, is to seek a judicial determination as to the scope of the Commission's authority.

COMMISSIONER DESTRO. Mr. Nash, let me just ask a quick question.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you, Mr. Nash. I interrupted my colleague only because I think it's important that I officially receive the letter for our record and allow that it be entered into the record without objection, and additionally indicate for the record that I have written to Judge Tom Tso, a letter dated July 18, 1988, in response to his concerns previously addressed to me and the Commission and which responded in advance to the letter we received from you this morning.

I will read that letter into the record to close this portion of our discussion.

Dear Chief Justice Tso:

I am in receipt of your letter dated July 6 delivered to the Commission by overnight express on July 12 in which you refused my written invitation of June 29 to appear and give testimony at the Commission's hearing on July 20.

I am pleased that you have since reconsidered. Still, I wish to answer the legitimate concerns in your July 6 letter, for I firmly believe that your disinclination to appear was based on a misapprehension of the scope and jurisdiction of our hearings.

As Commission staff has explained to you, no question will be asked of you that will require you to violate the American Bar Association Code of Judicial Ethics. As they have further explained to you, you will not be asked to comment on pending cases or to render advisory opinions.

To the contrary, the only areas that the Commission wishes to explore with you are the areas of the independence of the Navajo Nation judiciary, both historically and presently and the administration of justice insofar as it does not involve pending litigation or require that you render advisory opinions.

As you know, Commission staff volunteered to provide you with written questions in advance of the hearing and to ask additional questions during the hearing only as necessary as to clarify your responses to the written questions.

You also are aware that Commission staff volunteered to place you first on the agenda so that you would not inadvertently hear the testimony of others that might be inappropriate for you as a sitting judge to hear.

In sum, I think it clear that Commission staff has fully explained the areas that we intend to explore with you, has made every effort to facilitate your appearance, and has made it evident that the dignity of your office as Chief Justice would be fully respected.

Indeed, I would think that in light of these explanations you would, as Chief Justice of the Navajo Nation, relish the opportunity to provide testimony before the Commission.

While the information your office has previously supplied to Commission staff has been helpful, questions remain which we wish to explore with you. The Commission staff has received allegations that the independence of the judiciary of the Navajo Nation has been recently threatened.

Clearly, it is in the interest of the Navajo Nation's judiciary that the Commission on Civil Rights requested that you appear to provide us with testimony. It is precisely the independence of tribal judiciaries that has been a principal interest of the Commission's subcommittee on enforcement of the Indian Civil Rights Act. Indeed, with strong and independent judiciaries, enforcement of the ICRA flourishes. I trust that my comments respond to your concerns.

I look forward to seeing you on July 20 and believe that you will leave the hearing pleased with the result.

Sincerely, William B. Allen, ICRA Subcommittee Chairman.

MR. NASH. May I interrupt the Commission briefly?

SUBCOMMITTEE CHAIRMAN ALLEN. If you will hold for a moment, because we are in fact considerably off our schedule and we wish to return to it shortly, but I would like to allow another 5 minutes for my colleague, Commissioner Destro, to ask the question he wishes to pursue and then for the General Counsel to raise any further issues with you that they may have in mind.

COMMISSIONER DESTRO. Perhaps you can't answer the question, Mr. Nash. I think the record in terms of the back and forth between the Commission and the Navajo Nation more or less speaks for itself, and if it is necessary, then we will have some kind of determination made.

Acknowledging that you are speaking for the tribe, and assuming there is certainly no discrepancy between Commissioner Allen and myself, we have no interest in getting into privileged materials, whether they are judicially privileged or attorney-client privileged or dealing with matters in pending litigation.

· As I read your letter or as I read the tribe's letter, the real issue here is whether or not the Commission has jurisdiction to investigate the operation of the Indian Civil Rights Act. Isn't that really the tribe's bottom line position?

MR. NASH. That is one of the most significant issues facing the tribe at this point.

COMMISSIONER DESTRO. Even if we just threw all those other issues out and were able to reach a very amicable understanding, the real issue still is whether or not the Commission has the jurisdiction to investigate the operation of the act.

MR. NASH. That issue would certainly remain. I don't think that this letter forecloses discussions about voluntary provision of information if it were not made pursuant to a subpoena and if other real assurances were made.

Let me just say the Commissioner read a letter that he sent to Chief Justice Tso. I have not had an opportunity to consult with Chief Justice Tso since that was received yesterday afternoon. So I can't respond on his behalf, but if he has a response, I'm hopeful that the Commission will leave the record open so that that can be submitted.

Two points. The letter does not address the subpoena issue, and as I understand it, the questions that counsel promised to provide to the Chief Justice were never provided.

COMMISSIONER DESTRO. All right. I just wanted to make sure that the record is clear that the Commission certainly has no intention of asking any kind of questions subject to privilege, and I certainly would not approve of asking any such questions, but that we take our jurisdiction very seriously and that I think we need to, if you are going to be going back, and I know you will, in terms of understanding the tribe's position with respect to the Commission's authority; it's that we still, or at least I, certainly, as a member of this subcommittee, have some questions as to just how far the tribe's position with respect to jurisdiction goes.

The letter has within it the words "under the Constitution" underlined, and my understanding is that Congress has the right to make laws under the Constitution which govern the rights of American citizens, whether they be Indian or Asian or European or whatever, whatever their descent is.

So basically, if I understand the underlining correctly, the tribe's position is that this is not an investigation and the tribe is not covered by the Constitution insofar as the Indian Civil Rights Act. Is that correct? Do I read the documents correctly that way?

MR. NASH. Would you restate the last part of your question?

COMMISSIONER DESTRO. One of the opinions of the attorney general that we have in our file notes that the tribe takes the position that the Indian Civil Rights Act is not mandatorily binding on the tribe and that it is advisory and was superseded in effect by the Navajo Bill of Rights.

MR. NASH. I don't believe at this point that it would be productive for you and I to debate the merits of that question. I would refer you to the tribe's arguments—to the statement that we submitted on September 11, 1987, to the Commission.

COMMISSIONER DESTRO. Okay. So for the record, then, what we are looking at is a resolution of the tribal council. The numbers on it appear to be CMY28-88, amending 1 Navajo Tribal Code, sections 352, 353, and 354 of the Navajo Sovereign Immunity Act and paragraph 9.

MR. MILLER. It's May of 1988.

COMMISSIONER DESTRO. May of 1988. I am quoting:

The recognition and redress for individual rights of the people of the Navajo Nation enacted in the Navajo Nation Bill of Rights in the Navajo Sovereign

Immunity Act exceeds and therefore supersedes the provisions of the Federal Indian Civil Rights Act as the source of jurisdiction of the courts of the Navajo Nation in such matters.

Would you like to refer to this?

MR. NASH. I will assume that you read it accurately.

COMMISSIONER DESTRO. Should we take that as the definitive statement of the governing body of the tribe?

MR. NASH. Well, assuming that you read accurately from a resolution of the Navajo Tribal Council, then that resolution speaks for itself. I don't think it's helpful for me to give an opinion as counsel for the nation as to what that means.

COMMISSIONER DESTRO. I understand that. I just wanted to know whether or not is that the most recent, to your knowledge, statement of the tribal council's position?

MR. NASH. To my knowledge, that is the most recent amendment of the Navajo Sovereign Immunity Act. I don't know that the tribal council has stated anything else.

Let me just say that whether or not the Indian Civil Rights Act applies to the Navajo Nation, which I don't know what the position of the Navajo Nation is on this at that point, in Navajo tradition there is a great respect for procedural fairness and for fairness generally.

Further, the Navajo Nation has enacted its own Bill of Rights prior to the Indian Civil Rights Act. The protections are there in place for Navajo individuals, and there is an independent judiciary which was, in 1985, strengthened by tribal law, and those protections are there whether or not the Indian Civil Rights Act applies to the tribe. Let me clarify again: I don't know what the tribe's position is on that technical question.

SUBCOMMITTEE CHAIRMAN ALLEN. Mr. Miller.

MR. MILLER. There are so many statements that are crying out for clarification, and I would like to just pick one or two and try to clarify.

First of all, concerning the questions that were to be provided to the Navajo judiciary, there is an agreement between Deputy Attorney General Erik Dahlstrom and myself concerning the date when those questions were to be provided.

Before that date came, I received a call from Mr. Dahlstrom stating that the judges would not appear and that our agreements were no longer in effect. Therefore, the questions were not then provided, as the agreements were called off.

On page 2, paragraph 1, of the letter you refer to certain information that was not followed up upon. I would like to state that requests were made. There were disputes about whether or not those documents were publicly releasable, and we left it to the Navajo Nation to send those documents to us, and we have not received them.

For the record, I would like to state that a number of telephone conversations took place between Erik Dahlstrom and myself beginning at least during the week of June 27. In those conversations, the scope of the hearing and the issues that would be discussed at the hearing were discussed. Various items and concerns were raised, and we reached certain agreements. We discussed all the matters. The Commission tried to accommodate every concern of the Navajo Nation, and we were working toward an adequate compromise.

All of a sudden, around July 15, Erik Dahlstrom called and informed me that all of our discussions and compromises were off and that the Navajo officials would not appear.

Mr. Chairman, I would like to enter for the record the tribal council resolution of last year dated August 12, 1987, where the tribal council reached a resolution basically barring Navajo employees from participating in our hearing last year. I would like to submit that for the record and comment that, in light of that resolution, the subcommittee felt that subpoenas were necessary to ensure that Navajo officials did indeed appear and give testimony, given the fact that the Commission went to great expense to hold the hearing.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you, Mr. Miller.

We do need to proceed with our discussion of independence of the judiciary.

I would like to comment, in general, for the benefit of the audience assembled and who has listened to this colloquy, that the Commission is, as Commissioner Destro has indicated, confident about its authority and jurisdiction, but perhaps one needs to be reminded that that jurisdiction does not extend over any corporate body per se, whether the Navajo or any State or the Federal Government.

It is primarily concerned with Americans wherever they be found. Many people have spent time calculating the percentages of blood that this or that Indian might have in a given nation.

We don't make those calculations at this Commission, and we don't think there are any calculations of American bloodedness, but that every American, in any degree whatever, is a full-blooded American, and that is where our writ runs and that is where we conduct our inquiries.

I would like to turn to the panel and ask you to all take the oath swearing you in collectively to the following terms, that is, to Sandy Hansen, Duane Beyal, and Michael Nelson.

[Sandy Hansen, Duane Beyal, and Michael Nelson were sworn.]

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

MR. NASH. Mr. Chairman, may I respond briefly to the statements that were made at the close of the former—

SUBCOMMITTEE CHAIRMAN ALLEN. I don't think that is appropriate or necessary, Mr. Nash. You have given us a full response and we have it on

the record. The record does remain open for 30 days, and if you have something additional to submit, you may do so.

MR. NASH. Thank you very much.

SUBCOMMITTEE CHAIRMAN ALLEN. But we do need to carry on. Thank you.

Mr. Miller.

MR. MILLER. Ms. Hansen, would you state your name, your experience in tribal court, and give us a brief statement for the record.

### **TESTIMONY OF SANDY HANSEN, ATTORNEY, BOULDER, COLORADO**

MS. HANSEN. My name is Sandy Hansen. That is H-a-n-s-e-n. I am an attorney in Boulder, Colorado. I guess my experience in tribal court has been limited to appearing on behalf of the Navajo Education and Scholarship Foundation in the District Court of Window Rock for the Navajo Nation.

MR. MILLER. Do you have a written statement that you would like to submit?

MS. HANSEN. Yes. I believe I mailed it to you all and I would just like to submit it in its entirety as you received it.

MR. MILLER. Mr. Chairman, I move that we submit Ms. Hansen's statement for the record.

SUBCOMMITTEE CHAIRMAN ALLEN. Very good. It is received and, without objection, entered into the record.

MR. MILLER. I understand that you are testifying today with some mixed feelings. Would you care to comment on that?

MS. HANSEN. I have worked with Indian tribes since 1976 and took 3 years off to go to law school, but while I was in law school I worked with various Indian law professors and remain current in the field.

I have a great deal of respect for tribes' authority and ability to govern their own affairs, but I also have a great deal of respect for individual Indians' rights vis-a-vis their tribal government.

On my first trip to Window Rock, which was precipitated by the events that resulted in *Upshaw ex rel., Benally v. Gorman* case, we filed an action against the tribe and were dismissed on grounds of sovereign immunity.

I went back to the foundation's offices, and several Navajo people, some of whom were members of the board of directors, who are our clients, and some of whom were not, asked, "We are Americans; don't we have rights, too?"

To me it was extremely poignant, and based on those two conflicting beliefs in the sovereignty of tribes and their ability and authority to run their own affairs and also based upon the Navajo people's traditional respect for their individual rights, I am testifying today.



I believe that, regardless of what government you have, that government's authority is and ought to be limited when it intrudes on basic individual liberties.

MR. MILLER. Thank you.

I would like to make it clear for the record that our concern in hearing your testimony and our concern in the foundation case is not one of the merits and not one of who is right and who is wrong. Our concern is a concern for due process, for civil rights, for the availability of forums and the ability to bring an action against the Navajo Nation for violation of civil rights. With that in mind, could you give us a thumbnail sketch of your involvement in the foundation case?

MS. HANSEN. The foundation was created by resolution of the advisory committee in 1983 and operated along fine for a little over 3 years. It built the building to house the educational programs of the Navajo Nation, and it collected money from private sources to fund a scholarship program. That happened between 1983 and February 25, 1987.

I should backtrack. At the time the foundation was created, the tribe had no Corporation Code. So it was chartered by the advisory committee.

In January of 1986 the tribe enacted a Corporation Code which included a provision for chartering nonprofit corporations. Eleven months later the advisory committee authorized the foundation to apply for incorporation under the tribe's Corporation Code, which the foundation did, and it was issued a certificate of incorporation on, I believe, December 16, 1986.

On February 25, 1987, a new advisory committee enacted two resolutions which affected the foundation. The first one declared that the foundation was an entity of the Navajo Nation, and the second one, subject to the plenary control of the advisory committee. In the second resolution, the advisory committee purported to approve the Chairman's removal of the then-sitting members of the board of trustees of the foundation and appoint successor members.

The persons appointed by that resolution, ACF-5387, have been referred to as the Benally board, and the persons removed by that resolution have been referred to as the Gorman board indicating those names were picked by virtue of their chairmen, the chairmen of those boards.

We filed suit against the tribe on February 27 asking to enjoin enforcement of those two resolutions and declaring that they violated the Corporation Code and the due process provisions of the Navajo Bill of Rights and ICRA.

We were dismissed on sovereignty immunity grounds because we had named the Chairman and vice chairman and delegates to the advisory committee in their official capacities. We submitted a brief arguing that they had exceeded the scope of their authority, but resolving whether or not they had exceeded the scope of their authority required going to the

merits of the case, and the judge determined that he couldn't go to the merits of the case because it was a jurisdictional condition precedent to determine that they were acting outside the scope of their authority.

I believe the action was dismissed on March 5, and on March 6 Mike Nelson and I prepared an identical complaint naming the parties and a lot of the rest of the world in their individual capacities.

Just as we were ready to file that with the judge, we were called to a conference with the attorney general and counsel that represented by the Chairman and vice chairman, and were persuaded that the parties ought to try to settle the dispute outside the judicial system, and as a demonstration of our good faith, we agreed not to file the complaint.

One week later the first negotiating session was held, at which time the Benally board presented the nonnegotiable demands that the Gorman board concede that the foundation was a tribal entity subject to the plenary authority of the advisory committee and that they fire Peterson Zah as chairman of the foundation's fundraising arm. They didn't want to throw out the baby with the bath water. So they asked us to file our individual complaint. That was on March 12.

On March 13, as we were going down to the courthouse, the justice department beat us and filed their complaint in the nature of an action *quo warranto*.

MR. MILLER. An action *quo warranto* is to dissolve a corporation; is that correct?

MS. HANSEN. Well, we were directed to show by what authority we claimed ownership of the corporation.

MR. MILLER. Thank you.

MS. HANSEN. That case was decided on September 18 by Judge Robert Yazzie. He ruled that the foundation had been, since its inception, an entity separate from the Navajo Nation, and that as a result of the tribe's Bill of Rights and the Corporation Code, the February 25 resolutions were, in his words, invalid and of no effect.

After the September 18 decision was handed down, the tribe filed both an appeal with the supreme court and motions for reconsideration. Everything was left in limbo for about a month because the supreme court assumed Judge Yazzie had jurisdiction and Judge Yazzie assumed the supreme court did.

When a procedural order worked that out, we all responded to the tribe's motions for reconsideration, motions for stay of execution, and their post-trial motions, and we filed a post-trial motion for award of attorneys' fees. The attorneys' fees are substantial in this case for a number of reasons.

Anyway, everything rocked along with just lawyers passing papers back and forth until February 4 when, without any notice to us, the tribal council considered a resolution which had the effect—well, it recommended that the advisory committee solve the problem of the foundation.

We were concerned about that because at the January meeting where the advisory committee considered this resolution, the legally operative portion of the resolution merely expressed the tribal council's support for the attorney general's post-trial motions, but when it was presented to the tribal council, it was presented in the form that the advisory committee and the attorney general's office should do what they could to see that the foundation was operated as an entity of the Navajo Nation.

Again, that resolution was presented to Judge Yazzie by Assistant Attorney General Bill Riordan in a letter dated February 16, 1988, and in that letter he asked Judge Yazzie to take judicial notice of the resolution, and I believe the language of his letter was "particularly these are motions for reconsideration of your decision of September 18, 1987." That is all the letter said.

We responded with a 26-page brief saying that the February 4 resolution of the tribal council was invalid as a legislative usurpation of judicial authority under Navajo law, not under *INS v. Chadha* or other Anglo cases, but under Navajo law.

We also argued that if it was presented as an attempt for the 1988 legislature to proscribe what the intent of the 1983 legislature that created the foundation was, that it was entitled to no deference, and there we had to rely on non-Navajo law.

The attorney general didn't respond to the substance of our memo, but a hearing was held on April 22 of 1988 on all of the post-trial motions, and we just got up and did what lawyers do.

We didn't hear anything again until May 24 or 25, and the advisory committee, again with no notice to us, passed a resolution terminating the foundation's lease to its space in the Navajo Education Center and directing the Benally board to assert control over the foundation and again declaring the foundation to be an entity of the tribe.

That night Mr. Peterson Zah got a tip that someone was tampering with the lock on the foundation's door. At this time we were unaware that this resolution had even passed. I'm told that it was passed at 5:25 on the evening of May 24.

Around 6:30 Mr. Zah got a tip that somebody was tampering with the door to the foundation's offices. He and Duane acted on the tip and went down to the foundation's office and found a man named Lloyd House and a workman preparing to change the lock on the foundation's office.

Mr. Zah told Mr. House to stop and then called me, and I stayed up and wrote a motion for a temporary restraining order and a complaint.

Mr. Zah spent the night at the foundation's offices to avoid being locked out. The next day Judge Yazzie issued our temporary restraining order restraining anyone from interfering with the foundation's employees' access to the building.

May I pause for a moment?

COMMISSIONER DESTRO. Ms. Hansen, would you state for the record what you are referring to, the document that you are referring to just so the record is clear.

MS. HANSEN. I am referring to my written statement that I submitted and you all admitted into the record.

COMMISSIONER DESTRO. Thank you.

[Pause.]

MR. MILLER. Ms. Hansen, the documents that you have referred to, are they exhibits to your written testimony?

MS. HANSEN. Oh, yes, they are.

The resolution terminating the lease was passed on May 24. That is the night that Mr. Zah spent at the foundation's office. And on May 25 we filed a motion for a TRO in Judge Yazzie's court.

On the night of May 25, Lloyd House and a tribal police officer appeared at the foundation and delivered Mr. Zah a letter saying that he had been fired by the Benally board and directing him to turn over all the foundation's records to Mr. House, who was purportedly appointed as executive director of the foundation.

That night Judge Yazzie signed our temporary restraining order in which we had requested an injunction against anybody from interfering with the Gorman board's authority to direct the foundation.

Also on that night, and unbeknownst to Mr. Zah and anyone else associated with the foundation or myself, Judge Wayne Cadman of the Chinle District enjoined Mr. Zah and anyone from interfering with the Benally board's access to the foundation.

We found out about the Chinle order on May 26 when Lloyd House and at least two, Duane knows how many, Navajo policemen attempted to serve it on Mr. Zah at the foundation's offices.

I called Judge Cadman, concerned that this TRO had been issued by his court when the action was filed or all the foundation's actions had been filed in Window Rock and it was, under Navajo law, the court of proper venue. Based on those concerns, he dissolved the order later in the day on the 26th, by noon on the 26th, and transferred that action to Window Rock in Judge Yazzie's court.

On Friday, May 27, or I guess on the 26th, the attorney general's office filed a motion to dissolve our temporary restraining order, and Judge Yazzie held a hearing on that, and I appeared by telephone and Erik Dahlstrom appeared in the judge's chambers.

In the meantime, after the judge issued the TRO enjoining anyone from interfering with the Gorman board's access to the foundation, that night or the next night—I guess it's May 26—Bobby Charley, the chief executive administrator of the tribe, issued an executive order closing the Navajo Education Center. At that time the closure was supposed to be effective through June 3.

MR. MILLER. Ms. Hansen, if I could interrupt for just a moment because lunchtime is approaching.

If I could just summarize some of the highlights that you have mentioned so far, and correct me if I'm wrong.

In September the Window Rock District Court issued a decision, I guess, determining the status of the foundation.

In February the tribal council issued a resolution clarifying the status of the foundation.

Then in May certain temporary restraining orders were entered. There were two conflicting temporary restraining orders entered, and the building was sealed off.

Perhaps if the Chairman decides to break for lunch, you could pick up there and summarize the events in May.

Have I accurately summarized it?

MS. HANSEN. Well, in May, before the temporary restraining orders were issued, the advisory committee passed a resolution asserting control over the foundation again. The February resolution of the tribal council only expressed—there is conflict over what it did. At one point, we were told by the attorney general's office that it only expressed the sense of the legislature, but the advisory committee's actions indicate that it included—their perception was that the February 4 resolution included specific directives to the advisory committee.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

This is a propitious moment for the Commission to break. We are a little ahead of our scheduled lunchtime. So that means we can come back a few minutes earlier as well. But given what we have yet to develop, if it's all right with the panel—

VOICE. We are running a little bit late.

SUBCOMMITTEE CHAIRMAN ALLEN. We are a little bit late someone said, not by the new schedule, but only by the old schedule. We are early by the new schedule.

We would want to bring Mr. Beyal, Mr. Nelson, and Ms. Hansen back after lunch if that is all right with them, and I want to make sure.

[Panelists nodding in agreement.]

Good. Then let us recess until 15 minutes after 1.

[Recess.]

### Afternoon Session

SUBCOMMITTEE CHAIRMAN ALLEN. The Commission is again in session for our hearing on enforcement of the Indian Civil Rights Act. I thank you, Ms. Hansen and Mr. Beyal, for indulging us a little lunch. We are now ready to go again, and I return to the General Counsel.

MR. HOWARD. Mr. Miller.

MR. MILLER. Ms. Hansen, I believe right before the break you were beginning to briefly describe the events around May 24, I believe.

SUBCOMMITTEE CHAIRMAN ALLEN. Excuse me, Mr. Miller, if you wouldn't mind.

I would once again invite those in the audience to signal whether we have present anyone who is hearing impaired. Simply raise your hand if that be the case and, if not, I will ask the interpreter to take her seat.

MR. MILLER. Ms. Hansen, if you could briefly summarize those events, we would appreciate it.

MS. HANSEN. On May 25 we had the conflicting temporary restraining orders. The one from the Chinle court was dissolved by noon of that day.

On May 27 we had a hearing on a motion to dissolve Judge Yazzie's temporary restraining order, and at that point I brought up the issue also of Mr. Charley's closure of the building and the inconvenience that would impose on the foundation employees.

Judge Yazzie issued a verbal order that was later committed to writing, ordering the tribe to keep the building open to the foundation employees until 5 o'clock on Friday, but permitting it to be closed until the hearing on our motion for a preliminary injunction that was scheduled for 4 days later.

The employees were permitted access to the building at around 2:30, which was several hours after the judge issued his verbal order, but only a few minutes after he committed it to writing, and they left at 5 and have not been in since, have not been permitted in their office since 5 o'clock May 27.

On May 31, at a hearing held on our motion for a preliminary injunction, Judge Yazzie reappointed an interim board comprised of three members of each of the competing boards to direct the affairs of the foundation, hoping that that would temper the situation.

A similar interim board had been used to operate the foundation from February 27 through September 18, 1987.

He stated at the hearing on May 31 that that interim board, the order appointing the interim board, would be in effect until 30 days after he issued his final order on the post-trial motions before him. He entered the final orders on those post-trial motions on June 2.

So, according to his statements in chambers, the order appointing the interim board should have expired on July 2. However, I got a letter from Erik Dahlstrom, the deputy attorney general, on June 15 stating that it was the tribe's opinion that the order appointing the interim board had expired on June 2 when the judge issued his final orders on the post-trial motion.

So, basically, throughout the month of June the foundation was in limbo, with us taking Judge Yazzie at his word and the tribe taking an opposing view of the duration of his order appointing the interim board.

To our knowledge, no one has had access to the foundation's records except for an auditor that was commissioned by the tribe to, against the

foundation's will, audit its accounts. The foundation was willing to have an audit conducted, but just not in the manner in which it was conducted. As a matter of fact, we asked if the order requesting the audit couldn't come from the interim board.

That brings us up to date, except on July 1 and July 5 the tribe appealed Judge Yazzie's order and we appealed his ruling on our motion for attorneys' fees.

MR. MILLER. Ms. Hansen, if we could back over some of the major events.

Do you feel that you got due process and a fair hearing by Judge Yazzie in the issuing of the September opinion?

MS. HANSEN. Absolutely. Judge Yazzie conducted himself as you would expect any jurist to in terms of according everybody the rules that are granted to them under the Navajo Rules of Civil Procedure.

MR. MILLER. What about with the February tribal council hearing and resolution?

MS. HANSEN. There I don't believe we were accorded due process. Attached to my statement is a transcript of the February 4 proceeding of the tribal council, and it demonstrates that Bill Riordan, who was opposing counsel in the case; Rebecca Martgan, who was a member of the Benally board and director of the tribe's educational programs; either Mike Upshaw or Erik Dahlstrom, who are from the attorney general's office; and four council delegates who voted in favor of the February 4 resolution were permitted to speak.

The transcript shows, and newspaper accounts of the meeting show, that several councilmen who opposed the measure indicated their desire to be recognized by the Chairman so that they could speak out against it. One of those persons is a member of the Gorman board and a delegate from Jeddito, and he had his hand raised indicating his desire to speak out during the speeches made by three council members, and when it became apparent that the debate was going to be terminated before he was given an opportunity to speak, he stood, which is extremely uncharacteristic; he stood, indicating his extreme desire to be recognized, and yet he was not.

No one was permitted to speak out against the measure, and it finally ended up in a 38 to 38 tie, with the Chairman casting the tie-breaking vote.

MR. MILLER. What about with the more recent events with the temporary restraining orders?

MS. HANSEN. I believe that Judge Yazzie followed the rules in granting our temporary restraining order. I can't say the same about Judge Cadman, but I don't know what pleadings were presented to him because copies of them have never been served on Mr. Zah, who is a named party, or any other members of the foundation's board, the Gorman board.

MR. MILLER. Were you given notice of the petition for the TRO?

Ms. HANSEN. No, and I wasn't contacted, and to this day I have not gotten notice, nor has Mr. Zah nor has any other member of the foundation's board. The only thing we have seen from the Chinle action is the temporary restraining order.

COMMISSIONER DESTRO. Is there any indication in the record that you have, because we don't have it in your statement, that the Chinle order was dissolved later? You said it was later dissolved, but we don't have any indication that it was, I don't think.

Ms. HANSEN. We do have an order from Judge Cadman stating that it is dissolved and transferred, and if that is not included in this record, I can send it to you.

COMMISSIONER DESTRO. Okay. Then, once it was dissolved and transferred, do you think then the procedure went back to basically the normal way of doing things?

Ms. HANSEN. Yes.

COMMISSIONER DESTRO. So, then, even in the end with Judge Cadman things worked out?

Ms. HANSEN. Yes, and Judge Cadman's order presented a problem for less than 4 hours.

MR. MILLER. What about with the actions of the police and the executive branch generally?

Ms. HANSEN. From my perspective, since February 25 they have been in direct violation of a tribal court order, and that order is Judge Yazzie's temporary restraining order of May 25 and his subsequent orders.

Judge Yazzie ruled on September 18, 1987, and again on June 2, 1988, that the foundation is and always has been an entity separate from the Navajo Nation. It's the Navajo Nation that is denying the persons whom Judge Yazzie has declared to be lawfully entitled to direct the foundation access to the foundation.

The Navajo Nation is, in fact, encouraging persons whom Judge Yazzie determined were appointed pursuant to invalid resolutions to direct the affairs of the foundation. I guess my comment on that is it's an example of lawlessness. The Navajo Nation executive is not obeying the orders of its own court.

MR. MILLER. Is this particular with the foundation case and do you see a pattern developing?

Ms. HANSEN. Yes. The degree to which the tribe has violated its own court orders is unique to my experience in the foundation case, but I don't live on the reservation, so I don't know the degree to which it happens in regards to other cases.

I do know from the reported decisions of the tribal courts and the resolutions passed by the tribal council that a pattern seems to have emerged within the last several months that if the administration doesn't like the opinions of the tribal council, it seeks a legislative reversal.



My experience is also that when it seeks a legislative reversal, it fails to fully inform the tribal council so that the council is fully aware. I think when the council takes actions on these legislative reversals, it's not fully informed, and the pattern I am speaking of is the legislative reversal of the *Gould* case.

In that case the supreme court determined that the insurance exception to the Sovereign Immunity Act doesn't expire if the insurance company goes bankrupt. Within a matter of weeks after the supreme court came down with that decision, a resolution was passed, presented to the council and passed by them with no discussion, reversing that. There was no debate on that resolution, and now the law, according to the council, is that if you bring a cause of action under the insurance exception to the Sovereign Immunity Act, your case dies if before you get final judgment the insurance company goes belly up.

And then our case, too, where the February 4 resolution appears to have been interpreted as legislatively reversing Judge Yazzie's opinions.

COMMISSIONER DESTRO. Let's, again, make the record clear here that courts or legislatures often pass legislation to remedy what they consider to be erroneous court decisions. They didn't reverse the result in that case, did they?

Ms. HANSEN. In the *Gould* case they did. I think it will be interpreted as reversing *Gould*. The *Gould* case has never been tried on the merits. So there is no judgment. The supreme court said that Mr. Gould's cause of action hasn't died yet, and the resolution of the tribal council appears to say, oh, yes, it has.

COMMISSIONER DESTRO. But it still remains to be seen as to whether the resolution would be given retroactive effect to a case pending though. We don't know that yet, do we?

Ms. HANSEN. We don't know it for sure, but that is the pattern that has been argued, or that is what has been argued in our case.

COMMISSIONER DESTRO. Fine. Thank you.

Ms. HANSEN. And I would expect it to be argued in the *Gould* case.

MR. MILLER. A minute ago you referred to it had been argued concerning the February resolution, that that was an overruling of the September decision. Who argued that and what are you referring to?

Ms. HANSEN. That is my interpretation of Bill Riordan's February 16 letter to Judge Yazzie and the subsequent actions of the advisory committee. If, as Judge Yazzie determined, the February 25, '87, resolutions of the AC were invalid, then any taking of the foundation or any attempt to control the foundation with anyone other than the Gorman board is also invalid.

According to law, Judge Yazzie's opinion remains law until it is overturned, if it is, by the supreme court, or unless the February 4 and May 24 resolutions dispose of the case. The tribal government is acting as if the

February 4 and May 24 resolutions are the law of the case rather than Judge Yazzie's opinions.

MR. MILLER. I see. You mentioned that the foundation's building was basically sealed off; is that correct?

MS. HANSEN. Yes. It was sealed off and access was denied to not only the foundation's employees, but all employees of the education division for 17 days until June 13, and on June 13 the public was invited back to the building, except that the foundation's offices are sealed and no one is permitted into those offices.

MR. MILLER. Do you feel that you could bring an action in tribal court for a taking of that property without due process? Could you get an injunction? Could you comment on that? Why haven't you done that or what would be the outcome as you see it?

MS. HANSEN. We considered doing that, but there are a lot of procedural hoops you have to jump through.

First of all, the persons who are responsible for the action—under the Sovereign Immunity Act you can't get injunctive relief against the Chairman, vice chairman, or delegates to the tribal council. That necessarily includes the advisory committee, and it is by resolution of the advisory committee that access to the office is being denied.

So, in order to get any kind of injunctive relief, you have to allege that the advisory committee is acting outside the scope of its authority. The advisory committee is a committee of enumerated powers, and one of its enumerated powers is control over leases. But, of course, its control over leases is limited by the Bill of Rights. If it is going to cancel the lease, it has to do it in accordance with the Bill of Rights.

But there for the judge to determine whether or not he has got jurisdiction over the case, he would have to go to the merits of the case because he doesn't have jurisdiction to issue an injunction against the AC if they are acting within the scope of their authority. So you've got this poor judge trying to juggle things.

Other procedural hurdles you have to jump through is you have to give the tribe 30-days' notice that you intend to sue. After that 30 days has passed, you can file your complaint. Then you have to wait 60 days for the tribe to answer, and the court cannot enjoin any tribal officials until the expiration of those 60 days the way the rules are written. So you've got 90 days elapsed, assuming that you don't get dismissed on sovereignty immunity grounds.

MR. MILLER. Assuming you jump through all those hoops and assuming that you are not dismissed on the basis of sovereignty immunity, in your opinion, what would be the effect of an injunction enjoining the police from sealing off the foundation's building?

MS. HANSEN. I can't guess at what the effect would be. You can always hope that the rule of law would prevail, but that hasn't been the case in the

past. There are court orders saying that the Gorman board are the only people entitled to direct the affairs of the foundation, but they have been prohibited from exercising those adjudicated rights since May 25.

MR. MILLER. Are the foundation's assets frozen?

MS. HANSEN. No, they are not. I don't believe they are. They are having difficulty. A donor several years ago gave the foundation some Exxon stock to be used for the administration of the foundation and not for scholarship purposes, and after Judge Yazzie issued his September 18 order, the foundation passed a resolution asking that those stock be sold and the holder of those stock is Fiduciary Trust of California.

They refused to sell the stock based on orders of the attorney general's office. We tried to explain to them that the mere filing of a motion for reconsideration or stay does not in fact stay a judge's decision, but to date they have refused to sell those stock, although I understand that discussions with the attorney general's office and Fiduciary Trust are getting Fiduciary Trust to lighten up a little bit.

MR. MILLER. Did the foundation plan to use any of the proceeds of that sale to pay attorney's fees, do you know?

MS. HANSEN. I haven't discussed it with them. That would be in the parameters of the gift. We are talking about \$10,000 or \$15,000.

MR. MILLER. Is there a problem with the foundation's ability to pay attorneys?

MS. HANSEN. Absolutely. They have incurred more than \$100,000 worth of legal fees as a result of this case.

MR. MILLER. Why can't they pay that?

MS. HANSEN. Pardon?

MR. MILLER. Why can't they pay their attorneys?

MS. HANSEN. They don't have the money. They are a nonprofit charitable foundation, and the bulk of their contributions go as they were intended to go, to give scholarships to Navajo students who don't qualify for tribal or Federal scholarships. They have several hundred thousand dollars in their scholarship accounts, but I'm not going to go ask a judge to raid those funds to pay for my dog food.

MR. MILLER. Okay. Are you familiar with the resolution of May, I believe it's May 8, 1988, and, Mr. Chairman, I would like to submit for the record a copy of the resolution of the tribal council dated May 6, 1988.

SUBCOMMITTEE CHAIRMAN ALLEN. You didn't produce that previously?

MR. MILLER. Commissioner Destro quoted from it, but it was never formally introduced.

SUBCOMMITTEE CHAIRMAN ALLEN. Very well, you can introduce it for the record, without objection.

MR. MILLER. Would you like a copy to look at?

MS. HANSEN. Is that the resolution amending the Sovereign Immunity Act?

MR. MILLER. Yes, it is.

MS. HANSEN. I am familiar with it. Thank you.

MR. MILLER. Mr. Nelson, I understand that you are familiar with that resolution also; is that true?

MR. NELSON. Yes.

MR. MILLER. Please feel free to comment on any of the questions. What was the impetus for that resolution, do you know?

MS. HANSEN. I believe it was the *Gould* case and the ruling in that case that was adverse to the tribe's position.

MR. MILLER. Does the resolution make it easier or harder to bring a civil rights action?

MS. HANSEN. I believe it makes it harder, the section that Commissioner Destro read where it declares that the Navajo Bill of Rights supersedes the Indian Civil Rights Act.

Although in the *Gould* case the court rejected the argument that the Civil Rights Act was an implied waiver of sovereignty immunity, I have read the briefs that were submitted, and that wasn't Mr. Gould's strongest argument and it wasn't briefed as thoroughly as someone might have briefed it.

I think the argument could have been made to the Navajo courts that the Sovereign Immunity Act, by requiring jumping through all these hoops in a 90-day waiting period before you could get injunctive relief, would be a violation of the Civil Rights Act because somebody's rights could be gone by the end of a 90-day waiting period. So I think it makes it harder in that respect.

MR. MILLER. Mr. Nelson, would you care to comment? Are you in total agreement with Ms. Hansen's testimony so far?

MR. NELSON. Basically, yes. The *Gould* case that she was referring to dealt with insurance coverage. There was one other change made in this amendment that I felt was very important, if I could find it. In the *Gould* case, the court had found a remedy under the Indian Civil Rights Act that had interpreted the Navajo Bill of Rights and the Indian Civil Rights Act to find a cause of action, and the amendment made by this resolution took away from the courts the power to interpret the act and said the court shall apply the act.

So if it is not expressly given, you know, if it's a remedy that is not given by the Sovereign Immunity Act, the remedy does not exist. The court can't look behind the act itself, and it can't interpret other caselaw. It narrows down any avenues that we might have to seek redress under this statute.

MR. MILLER. I see.

MS. HANSEN. And if I could add, based on that, when you asked about injunctive relief, under the Sovereign Immunity Act the express terms are you can seek injunctive relief to compel an official to perform his lawful duty. That is mandamus relief and not injunctive relief. So it requires you again, if what you wanted to do is to stop doing something, you have to go in through the back door and say, "I don't want them to stop doing it; I just want them to do something else," and it can become mind boggling.

MR. MILLER. Mr. Nelson, did you agree with Ms. Hansen's statement that the sovereign immunity amendments would be retroactively applied to the *Gould* case?

MR. NELSON. Well, my understanding is that the *Gould* case was remanded for further action. This is the law now, and under the law as it presently exists, they cannot get their remedy.

One peculiarity of the limitation of liability based on insurance coverage is that it does change as the coverage changes. So, during the course of a lawsuit, the liability of the tribe can disappear, and that's basically what happened with *Gould*. Ambassador Insurance went out of business and the coverage was no longer there. Even though the wrong had clearly taken place and the lawsuit had proceeded normally, the remedy was no longer there.

MR. MILLER. Is it possible, then, that if the Navajo Nation cancels an insurance policy during trial, that the remedy would disappear?

MR. NELSON. Yes.

MR. MILLER. Are there other statutes or anything in that resolution that would require the Navajo Nation to keep an insurance policy in force?

MR. NELSON. Not that I am aware of.

MR. MILLER. What would happen, in your opinion, if a case was pleaded, if a civil rights action was pled on the basis of the Indian Civil Rights Act alone? What would the likely action be?

MS. HANSEN. Dismissed.

MR. NELSON. Right. The position of the tribe now is that those rights flow from the Navajo Bill of Rights, as I understand it, and not from the Indian Civil Rights Act. That is one effect of this amendment. There is a choice of laws question because there is authority in the Judicial Reform Act that says Federal law will be applied before tribal law, and that is normally the way Indian law is handled. It's Federal law, then tribal law, and then whatever other law may be applicable.

MR. MILLER. So are you saying that on that basis you still could plead on the Indian Civil Rights Act? I'm a little unclear.

MR. NELSON. In my opinion, you could.

MR. MILLER. Do you know if that has ever been tried?

MR. NELSON. The way, as a practitioner, what we do is we plead in the alternative, Indian Civil Rights Act and Navajo Bill of Rights. We are not looking for trouble on this issue. We just want to stay in court.

MR. MILLER. That's right. You wouldn't want to be dismissed.

MR. NELSON. No.

MR. MILLER. I have no further questions.

Mr. Beyal wanted to present a statement from Mr. Zah but, Mr. Chairman, if you would like to proceed with the discussion, you may, or we can proceed with Mr. Beyal right now.

SUBCOMMITTEE CHAIRMAN ALLEN. Let's permit Mr. Beyal to give us the statement.

MR. MILLER. Mr. Beyal, I understand that you are here at the request of Mr. Zah who could not attend and that you are here to present Mr. Zah's statement; is that correct?

MR. BEYAL. That is correct.

MR. MILLER. Please proceed.

### TESTIMONY OF DUANE BEYAL, REPRESENTING PETERSON ZAH

MR. BEYAL. This is a statement of Mr. Zah that he drafted before leaving for the convention in Atlanta. So it's not in final form, well, not in clean form. There are a lot of marks on it. So I would like to read it orally, and then perhaps when we can type up a clean copy, we'll send it to you if that is okay.

MR. MILLER. That's fine.

MR. BEYAL. I will proceed with Mr. Zah's statement.

[The following is Mr. Zah's statement as read by Mr. Beyal.]

Good afternoon, ladies and gentlemen. It is an honor to address the U.S. Civil Rights Commission.

First, I will briefly describe my background and then describe some events and issues that may be relevant to your inquiry.

I graduated in 1963 with a degree in education from Arizona State University. I returned to the Navajo Nation where I taught for a year at Window Rock High School. Then I returned to ASU where I was a coordinator for VISTA, a component of the War on Poverty programs.

I came back to the reservation and joined DNA, a legal services program, as a tribal court advocate in 1967. I practiced law in the Navajo tribal courts and later became the director of DNA's advocate program. In 1972 I became the director of DNA. In 1982 I resigned to run for the chairmanship of the Navajo Tribal Council and I served as the Chairman from 1983 to 1987.

While I was the director of DNA, I oversaw the work of 20 tribal court advocates and about 25 lawyers. We handled several landmark cases, some of which went all the way to the U.S. Supreme Court.

In *McClanahan v. Arizona Tax Commission*, the U.S. Supreme Court ruled that Indians on reservations are exempt from paying State income tax on wages and salaries earned on the reservation.

In *Big Man v. San Juan County, Utah*, the Utah Supreme Court ruled that county money can be used to build facilities on Indian reservations.

In *Rock Bridge v. Lincoln*, we sued trading posts on the reservation which were engaged in unfair business practices with Indians. This case resulted in new Federal regulations governing traders on the Navajo Reservation.

In *Goodluck v. Apache County*, we extended the one-man, one-vote rule to reservation residents and forced the reapportionment of the Apache County, Arizona, Board of Supervisors to allow Navajo representation.

*Natonabah v. Board of Education* forced McKinley County, New Mexico, to equalize education expenditures throughout the county, including the Navajo Reservation public school districts.

Most of these cases promoted the civil rights of Indian people and fought violations against those civil rights by county, State, and the Federal governments. The list of these cases is long, but they all had the inherent goal of protecting civil rights and at the same time strengthening tribal sovereignty.

Tribal governments are still young and growing. The Navajo Nation is like any other underdeveloped nation and the potential is unlimited. So tribal sovereignty is an important issue.

We also handled several cases in which DNA was in direct conflict with the Navajo tribal government.

In *Halona v. MacDonald*, some members of the Navajo Tribal Council sued to overturn an action of the full tribal council which had approved \$70,000 to pay for Chairman Peter MacDonald's legal fees when he was indicted.

The councilman who attempted to overturn the use of tribal money for Mr. MacDonald's legal fees did so because proper tribal procedures were not followed. The councilmen, including Mr. Halona, won the case. The judge who decided the case, Charley John, was removed from his job 7 months later.

In *Yazzie v. Board of Election Supervisors*, the plaintiffs from the five agencies on the reservation sued to reapportion the Navajo Tribal Council into election districts with equal populations. DNA won the case and the tribal court imposed a plan, and the tribal council incorporated much of the plan into voting districts that are still being used today.

However, the judge who decided that case, Merwin Lynch, also was removed from the bench shortly thereafter.

As a result of these and other decisions in the Navajo Tribal Courts which interpreted Navajo Tribal Council actions, Chairman MacDonald hired Edgar Cahn, an eastern Anglo lawyer, to study the situation. Mr. Cahn came up with the idea of the supreme judicial council in which selected members of the tribal council reviewed some tribal court

decisions. The effect of this was to place councilmen in a position to overrule the decisions of the tribal courts.

Among the many objectionable aspects of the supreme judicial council was that it placed members of the tribal council in the position of being both legislators and judges. Fortunately, the supreme judicial council was active only in 1979 and was abolished by the enactment of the Judicial Reform Act of 1985.

Regarding the enforcement of the Indian Civil Rights Act, the turning point for many Native Americans was *Martinez v. Santa Clara Pueblo*, another U.S. Supreme Court case which DNA handled.

Before *Martinez*, many ICRA cases were enforced in Federal courts without harassment from tribal politicians. After *Martinez*, which held that tribal court and not Federal court was the proper forum for ICRA cases, there was an awakening among tribal governments as they recognized that the ruling meant that civil rights cases would not go to Federal court, that there was no Federal forum, and that they would be resolved solely in tribal courts. Tribal governments, therefore, saw the need to have their own tribal members become judges, advocates, and lawyers to defend and decide civil rights cases in tribal courts.

However, individual ICRA cases began to question the authority of tribal government officials. This caused reluctance on the part of the tribal governments to hear these kinds of cases.

The Navajo government today is a good example. The Navajo Tribal Council recently passed a law amending its Sovereign Immunity Act which, in effect, says there is no forum to enforce the ICRA and that the Navajo Bill of Rights supersedes the Federal Indian Civil Rights Act.

In other words, the amended act says that although Navajos have civil rights, they are rights determined only by the Navajo government. By approving a law that says Navajo law supersedes the Indian Civil Rights Act, the Navajo government is demonstrating a contempt of Congress and the U.S. Supreme Court. To me, civil rights with no remedy or forum means you have no rights at all.

The amended Sovereign Immunity Act also prevents the Navajo people from suing their government and seeking redress in tribal court. For example, despite the ongoing Federal investigations into the purchase of the Big Boquillas Ranch and the fact that the main principals in that transaction, Bud Brown and Tom Tracey, are not cooperating with a tribal investigation and are using the fifth amendment to protect themselves, the Navajo leadership still wants to give additional payment to these highly suspect individuals. This is at a time that a Federal grand jury is investigating the ranch purchase. But because of the amended Sovereign Immunity Act, the Navajo people cannot file action against the Navajo government to prevent release of this tribal money.



As an employee of the Navajo Education and Scholarship Foundation, Incorporated, for the past 18 months I have been put in the unfortunate position of being forced to use our meager resources to fight the immense power and resources of the Navajo government.

In February and March of 1987, the Navajo government used strong-arm tactics to try to take over this nonprofit corporate entity which had been duly incorporated under the Navajo Nation Corporation Code. With no due process hearing and no advance notice and basically overnight, the tribal council's advisory committee replaced the foundation board of trustees and tried to fire me.

The highly questionable actions by the tribal administration included having Bill Cook, the non-Navajo former director of the foundation, look into my personal bank checking account and remove money I had recently earned. He did this without my knowledge or consent.

Officials of the local bank allowed him to do this without raising questions. Bill Cook also froze all bank accounts for the foundation. To make matters worse, our post office box was frozen, the lock changed, and to this day I still do not know what happened to some of my personal mail which was seized by the tribal government.

Subsequently, we were sued by the tribal government in the Navajo Tribal Court. On September 18, 1987, the court ruled in favor of the foundation's independence from the tribal government.

However, beginning on May 24, 1988, the tribal government attacked the foundation again when the advisory committee rescinded and terminated the lease which allows the foundation to use and occupy three offices in the Navajo Education Center.

This occurred the day after we hosted a luncheon to honor 10 Navajo students who had earned their college degrees with financial assistance from the foundation.

Once again, we were not aware of the action and were not given any notice or the opportunity to be heard by the advisory committee. The action of the advisory committee was explained by tribal spokespersons as simply the implementation of legislation previously enacted by the Navajo Tribal Council. This referred to a resolution that was voted on during the tribal council's spring session.

On February 4, 1988, the council voted 38 to 38 on the resolution, which was presented and interpreted by the tribe's lawyers handling our cases in court to mean that the foundation is an entity of the government and not an independent corporation.

The tribal lawyer, William Riordan, had done three things simultaneously. He made a motion to the district court to reconsider the September 18, 1987, decision; he appealed the case to the Navajo Supreme Court; and he also drafted this resolution. In simple terms, the resolution was an attempt

to legislatively reverse the Navajo Tribal Court's September 18, 1987, decision.

Chairman MacDonald broke the tie vote of the tribal council on this resolution by casting his own vote to take over the foundation, and the resolution was passed 39 to 38.

At this point this portion of Mr. Zah's written statement covers matters from May 24 to June 2 of this year which Sandy has already covered. So I will just skip over that and begin at the current status of the foundation.

The current status of our situation, the Navajo Education and Scholarship Foundation, is that we cannot enter our offices, and the necessary documents and materials we need to conduct the business of the foundation are locked up. These include our personal belongings, telephone numbers, brochures, scholarship applications, transcripts, and the files of students who have applied for scholarships.

In one case a check was made out to a student and is among the documents to which we do not have access. Because of this, the student was not able to attend summer school because we were unable to give him his financial assistance.

The foundation is also having difficulties making timely payments to vendors. We are being penalized by the Internal Revenue Service because of late Federal tax deposits. Since May 27, 1988, the staff of the foundation has not received a salary. The staff also went without pay for 2 months in 1987.

Since the end of May 1988 we have received 90 to 100 requests from Navajo students seeking financial assistance. Under normal circumstances, we receive about 300 requests for each semester, but we cannot assist these students while everything is locked up. The tribal government is, therefore, denying these students a right to attend college.

In the events regarding the Navajo Education and Scholarship Foundation, the tribal administration ignored a tribal court order and continues to do so today using the Navajo police to enforce their actions. We are exploring legal options, but at the same time we are unable to do our work and our money is running out. Lack of money effectively shuts the door to further attempts on our part to assert our rights in court.

Except for the questionable action of the Chinle District Court, the Navajo courts have ruled on the matter and issued orders, but all have been ignored by the Navajo Chairman's office, the advisory committee, the budget and finance committee and the Navajo Police Department.

Should the Navajo Nation Supreme Court eventually rule in our favor, it is doubtful that the tribal administration will respect and honor their decision. The attitude of tribal government officials is best expressed by a staunch supporter of the current administration. On June 7, 1988, during a meeting of the tribal council's budget and finance committee, Virgil Kirk, a member of the committee and a councilman representing the Shiprock

Chapter, remarked that tribal courts have no authority. He made this remark when the committee was given copies of the Window Rock Court order which enjoins the tribe from taking action against the foundation. Mr. Kirk also said, and I quote, "If we wanted to, we could wipe out the courts tomorrow."

Attached to my statement is a letter of complaint that I sent to Mr. Wilson Barber, the Bureau of Indian Affairs Navajo Area Director, in which I object to the improper and excessive use of police force throughout these events, particularly in light of the fact that a large portion of the Navajo Police Department's operations are funded with Federal funds.

I do not believe Congress intended that Federal funds be used to execute actions that may be violations of civil rights.

Also attached is a letter to the Navajo Nation Bar Association from David J. Tsosie, a member of the Navajo Tribal Council representing the Jeddito Chapter. Mr. Tsosie raises questions about the ethics of the tribal lawyers involved in the foundation issue. I feel his questions are very relevant and that the conduct of tribal lawyers is highly questionable, to say the least, in this matter.

The foundation controversy and the several other issues that have occurred during the current MacDonald administration have serious implications, not only for the Navajos, but for all Indian tribes. Congress is seriously considering legislation that will diminish tribal sovereignty by amending the Indian Civil Rights Act to provide for Federal court review of civil rights cases initiated in tribal courts.

The purpose of the Indian Civil Rights Act was to secure for Indian people the broad constitutional rights afforded other Americans and thereby protect individual Indians from the arbitrary and unjust actions of tribal governments. But civil rights have been violated by the current Navajo leadership in several situations. For example, in February of 1987 the Navajo government used police force to shut down the *Navajo Times Today*, and the entire staff was fired with only a few hours' notice. There are many instances where the tribal government has failed to respect the rights of tribal employees and in fact has adopted a strategy of outlasting aggrieved employees through delay until an individual runs out of money and can no longer afford legal representation.

Because the Navajo government does not respect the tribal courts and their proper role in a democratic government, Congress may act to ensure that the rights of American Indians are enforced through Federal court review.

Ideally, there should be no Federal interference in the affairs of tribal governments, but sometimes this idea can be destroyed as is the current situation in the Navajo tribal government. If we are not able to provide internal checks and balances, then these checks, unfortunately, may be

imposed by the Federal Government. We should take care of our own affairs with no outsiders, but we are unable to because the MacDonal administration does not respect the limits imposed by law.

Ultimately, the rights of individuals are more important than the power of tribal governments.

This concludes my statement.

Thank you.

[End of reading the prepared statement of Mr. Zah by Mr. Beyal.]

MR. MILLER. Thank you, Mr. Beyal.

I had one or two additional questions.

Ms. Hansen, do you know if Mr. Zah and the foundation are currently represented by counsel?

MS. HANSEN. The firm that is currently representing them has filed a motion to withdraw on the grounds that they have not been able to pay their bills for more than a year or a year and a half.

MR. MILLER. Has he filed a motion *pro se*?

MS. HANSEN. Yes. He filed his appeal of Judge Yazzie's ruling on the attorneys' fee issue *pro se*.

MR. MILLER. Thank you.

Mr. Nelson, did you have further comments about the recent resolution that we were discussing? It occurred to me that perhaps I cut you off inadvertently.

MR. NELSON. No, I didn't.

I did have one comment to make in regard to a question you asked Ms. Hansen about other instances where the law is not being followed.

MR. MILLER. Yes.

MR. NELSON. In Mr. Zah's statement, he alluded to the situation with the fired employees. This is a very prevalent situation. People are fired. According to tribal code, they have very specific rights in that situation, very tight time lines, 5 days to appeal, 5 days to get an answer, and that sort of thing.

There are a number of employees who have been lingering for over a year without employment and without any sort of decision on their cases because they choose to ignore the law, and to enforce the law requires compliance with the Sovereign Immunity Act, which for someone without work is an impossibility.

MR. MILLER. Mr. Nelson, on a slightly different matter, did you speak with Judge Cadman after he signed the conflicting TRO order?

MR. NELSON. Yes. At that time I was assisting Ms. Hansen with the foundation legal matters. That particular one appeared to be a separate case, which I could have represented the foundation on had it gone forward.

At the time of all this confusion over the conflicting orders, I had talked to both Judge Yazzie and Judge Cadman about them. When Judge

Cadman called me back, he told me that he was dissolving the order, and he told me that the reason he had signed the order was because Donald Benally, who is a member of the advisory committee and the chairman of board 2, had threatened to terminate his employment as a judge if he failed to sign the order. He was most apologetic about it, but it was clear that that is what happened.

MR. MILLER. Thank you.

I have no further questions.

SUBCOMMITTEE CHAIRMAN ALLEN. All right, counsel.

Bob?

COMMISSIONER DESTRO. I have no further questions. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Let me make one comment rather than a question and then we will go on.

As I listened to the reading of Mr. Zah's letter, I was reminded of a discussion with him several years, before I was on the Commission, in which he spoke of the foundation, and the impression I had at the time was that that was his pride and joy during the period of his chairmanship, that more than anything else is what he distinguished as a contribution he was going to make to the Navajo.

I asked him a question about that at that time as to whether he was able to do anything that would allow it to continue to exist when he was no longer in office and whether he could establish it independently, and he allowed as how that is precisely what he hoped to do, to take the steps to move it into a posture of independence and preserve it long after he was out of office.

So the tale you have to tell is particularly poignant to me given those exchanges which we enjoyed several years ago.

Thank you all.

MS. HANSEN. Chairman Allen?

SUBCOMMITTEE CHAIRMAN ALLEN. You have a comment to make, yes.

MS. HANSEN. Since this case is pending and Mike and I have at one time or another represented the foundation, may I ask that nothing that we say at this hearing be used as an admission against the foundation in any pending case?

SUBCOMMITTEE CHAIRMAN ALLEN. You ask a question that poses several complex conditions.

MS. HANSEN. Could I just make a statement, that nothing that we have said is binding on the foundation.

SUBCOMMITTEE CHAIRMAN ALLEN. We understand that you have not done anything here that you intended to be used against the foundation.

MS. HANSEN. Thank you.

MR. MILLER. It maybe should be noted that they were both here by virtue of a subpoena.

SUBCOMMITTEE CHAIRMAN ALLEN. Indeed.

Thank you very much.

I would like to call forward at this time the panel consisting of Steve Ungar, Claudine Arthur, and Deborah Leon. Are they all present?

While we are assembling, we will say to the rest of you that we will now discuss the *Baier* case, and that should run until approximately 3:30, at which time we will take a break, and we will begin our discussion of the situation at the Hopi Tribe between 3:30 and 3:45, but we will take a break before going into that so that you all know where you stand.

Welcome. We are delighted you could all join us. We will begin with our standard introduction and ask you all simultaneously to take the following oath.

[Steven B. Ungar and Deborah Leon were sworn.]

MS. ARTHUR. Mr. Allen, the White Mountain Apache Tribe is not here to testify specifically as such. We will respond to those allegations that may or may not be raised by Mr. Ungar in this particular case. That was my understanding, and I did not understand that as an attorney for the White Mountain Apache Tribe and for the social services department that I would be a witness in this case.

SUBCOMMITTEE CHAIRMAN ALLEN. I will consult with counsel momentarily, but permit me to say that our proceedings are not an adversary proceeding, and we do not customarily make provision for direct response to witness testimony, but we do make wide open invitation for further testimony.

What is your understanding, counsel?

[The Chairman confers with counsel.]

Our ruling, Ms. Arthur, is that we can accept your testimony. It is, as I said before, not an adversarial proceeding, and we would assume that, in giving that testimony, you may very well say something which may be taken as a response to what Mr. Ungar has to say, but you are not being called upon literally to respond to Mr. Ungar.

MS. ARTHUR. Mr. Allen, when I spoke with Mr. Miller about this, I explained to him that we would be here for the specific purpose of responding to Mr. Ungar and only for that purpose, and the White Mountain Apache Tribe, in asking me to represent the social services department here, is not here.

Generally, we are here in a very limited capacity and only for the purpose of responding to allegations made in the Montana proceedings. I am not here and I have no authority to speak for the White Mountain Apache Tribe with regard to any matters other than the ones that Mr. Miller outlined for me in our conversation by phone.

SUBCOMMITTEE CHAIRMAN ALLEN. If I understand what you are saying correctly, it is certainly compatible with our expectations, namely, that you will testify in the limited areas in which you have been asked to testify about by those whom you represent.

MS. ARTHUR. I would also point out that the White Mountain Apache Tribal Court proceedings are privileged and that our Social Services Act is under a Federal contract which binds us by the Privacy Act. So we would not be able to discuss those things.

I do understand that the parties have waived their right to privacy and confidentiality in the Montana proceedings. That is not so as to the tribal court situation.

SUBCOMMITTEE CHAIRMAN ALLEN. Counsel?

[Pause while the parties confer.]

We request a 5-minute recess that you might consult with counsel.

[Recess.]

SUBCOMMITTEE CHAIRMAN ALLEN. We are ready to resume the session.

While people are regaining their places, I will start with you, Mr. Ungar, and ask you to, for the record, tell us what your name and affiliation is.

MR. UNGAR. Thank you very much, Mr. Chairman.

My name is Steven Ungar. I am a private attorney and I work out of Bozeman, Montana.

In this particular case, I represent a woman named Oliviana Baier who is the natural mother of the child involved, and if the Commission would like, I could give you a brief overview of the facts to date in this case.

SUBCOMMITTEE CHAIRMAN ALLEN. Hold on for a moment and we will come to that. I only wanted to get the identifications to begin with. I will ask Ms. Leon to do the same.

MS. LEON. My name is Debbie Leon. I was a social worker for the White Mountain Apache Tribe from July of 1984 through August of 1987, and I was the caseworker on this case beginning in September of 1984 until the time that I resigned in August of '87.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

Counsel.

MR. MILLER. Susan Muskett.

MS. MUSKETT. Ms. Leon, we wanted to begin with you and ask you to give a brief skeletal outline of how it came about that the White Mountain Apache Tribe intervened on behalf of Oliviana Baier in the 1985 Colorado adoption, along with a skeletal outline of what proceedings took place in the White Mountain Apache Court prior to Ms. Baier's return to Montana.

MS. ARTHUR. I respectfully object. I said we could not talk about the White Mountain Apache Tribal Court hearings.

SUBCOMMITTEE CHAIRMAN ALLEN. I beg your pardon, Ms. Arthur, but you are not counsel, I don't believe, to Ms. Leon.

MS. ARTHUR. The records she is going to talk about are the records of the White Mountain Apache Tribe, Mr. Allen.

SUBCOMMITTEE CHAIRMAN ALLEN. Counsel, I will leave it to you to give us the final word on this, but I must insist, apart from what you might

say at this point, that as a matter of procedure you are not counsel for Ms. Leon, as I understand it. You have not presented yourself as that.

This is not an adversarial proceeding, and it is not, therefore, open to intervene and to interrupt the proceedings, and I would kindly appreciate your abiding by that.

Do you wish to proceed?

MR. MILLER. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. Carry on.

MS. MUSKETT. Mr. Ungar, maybe we will go ahead and begin with you, then, and ask you to go ahead and give your opening statement and fully explain any civil rights violations that you believe may have occurred.

### **TESTIMONY OF STEVEN B. UNGAR, ATTORNEY, BOZEMAN, MONTANA**

MR. UNGAR. I would like to start out by saying that I have only become involved with this case about 3 or 4 months ago.

The baby was born about 4 years ago. She is not yet 4 years old. Approximately 13 days after her birth in Montana, she was placed by Oliviana and her parents with a family in Fort Collins, Colorado, who the Baier family knew for over a decade.

The baby went to Colorado and was in Colorado for about a year and a half total. A lot of my figures and things like that might not be absolutely exact, but somewhere between 15 and 18 months, I believe.

During that time, a proceeding was filed for private placement adoption in Colorado. Sometime during the course of that proceeding, notice was given to the White Mountain Apache Tribe under the Indian Child Welfare Act that the proceeding was taking place, at which time the tribe intervened pursuant to the act and essentially objected to the proceeding being conducted in Colorado, asserting the Indian Child Welfare Act.

Certain negotiations and other events took place, which I don't think really concern this board or Commission, but at some point in time Oliviana, the natural mother, withdrew her agreement or consent that the child would be adopted by this family in Colorado and, therefore, essentially terminated the Colorado proceeding. This was in 1985.

Simultaneously, a document was prepared by a tribal council from the White Mountain Apache Tribe that I believe has been supplied to the Commission, as it is attached to my brief which was filed in this case now pending in Montana, and it purported to transfer jurisdiction of the case to the White Mountain Apache Tribe. As soon as that document was received by the tribe, the child was transported back to the White Mountain Apache Reservation, and Oliviana herself also returned to the reservation.

At this point in time, another document was prepared and signed by the juvenile court judge of the tribal court. It's entitled "An Order Accepting



Jurisdiction," and this particular order has also been provided to the Commission attached to my brief.

I would perhaps interject at this point that this was the first evidence that I assert was an improper order entered by the tribal court, and perhaps not at that very moment, but later very definitely affected adversely the civil rights of Oliviana Baier. The reason is this. The document that accepts jurisdiction makes inconsistent findings. It finds, on the one hand, that the child is to be placed in Oliviana's custody because she is a fit and proper person to be the child's parent, and simultaneously finds that the child is a ward of the tribal court.

Now there are several other documents, and rather than take you document by document, I think it is sufficient to say for this hearing that the question of whether the child is, in fact, a ward of the tribal court is critical under the Indian Child Welfare Act. If the child was at the time in question and continues to be during this dispute a ward of the tribal court, as that term is used in the Indian Child Welfare Act, then under that act the tribe has exclusive jurisdiction over the matter and the case would be properly returned from Montana to the tribal court. So, from a legal standpoint, one of the central issues in dispute in this case is whether or not the child was a ward of the tribal court.

Let me take you along in the proceedings. After Oliviana and her child moved back to the reservation, problems occurred, and I also don't think it's significant to go into the details, but communication and other problems occurred between Oliviana and Social Services, which kept tabs on the case by virtue of the court's accepting jurisdiction in what I consider to be a facially irregular manner, your fit and proper person to be the parent of this child. However, the child is still a ward of the court.

These differences between Oliviana and Social Services grew to a level that, at a point in time, neglect proceedings were brought by tribal social services against Oliviana. The result of those proceedings was a 1-page order that states that the child was found to be dependent or neglected, I'm not sure which term was used, and that the child's custody was transferred to tribal social services. This was, I believe, towards the end of 1986.

Following that determination, the child was placed in foster care on the reservation, and Oliviana then took steps to retain counsel to get her child back. She retained counsel off the reservation, an Anglo counsel, if you will, although I will state parenthetically that I have a real problem with that word because I think there are others in this country besides Anglos and Indians, but since that is the word of art, that is often used.

An attorney from Pine Top, Arizona, entered an appearance on her behalf and in December of 1986 filed a motion for the return of the custody of that child to Oliviana. There were a couple of continuances that were filed apparently, and for reasons that I'll get into, but I'm not sure what other proceedings or other matters might or might [not] be in the file

because of difficulties I have had with the tribal court, and I will address those momentarily.

In any event, the tribal counsel through the beginning of 1987, presumably in conjunction with tribal social services, filed some pleadings opposing Oliviana's attempt to get her child back that essentially contains scurrilous accusations against her. Whether or not they are true, they were filed of record, and no hearing was held until October 27 of 1987, some 10 months after she filed a motion with an attorney to get her child back into her custody.

At that hearing, two tribal social services representatives were present. The tribal council who had railed against her in these pleadings filed in the interim was not present and Oliviana's counsel was present. I have read the transcript of that hearing and, without going into detail, essentially what became of that hearing was that tribal social services was not able to come up with any firsthand basis, firsthand knowledge, direct knowledge to provide to the court as to why Oliviana should not have regained custody of her daughter. And I think we all recognize that, absent some showing by a government, an individual is entitled to his or her child.

In any event, the judge entered an order finding Oliviana to be a fit and proper person to care for her child, and he returned custody of her child to Oliviana on October 27 of 1987.

At that point in time from my point of view, from a legal standpoint, there is no question but that whatever wardship might have existed due to ambiguities and so forth in the law, and parenthetically the Indian Child Welfare Act doesn't define ward of the court, and I have been able to find no case that addresses the definition of ward of the tribal court in that context. But in any event, when a person is a fit and proper person to have custody of their child, to me it is inconsistent to go beyond that and to at the same time impliedly limit what rights that individual might have.

The judge did not, in our view, conditionally grant the return of custody to Oliviana. He simply returned custody to her.

At that point in time, being not only a resident of the White Mountain Apache country down there, but also being a citizen of the United States, she was free to travel and free to travel with her daughter, and so she did. She returned to Montana where her parents reside and where the baby was born, and she enrolled in college in Montana, in Bozeman, Montana.

Several months later some communications were had between Oliviana, who was having difficulty with the idea and with the fact of raising her child, similar to the testimony you heard earlier from Ms. Keetso. She had personal goals that were such that if she were to pursue them, she had difficulty in her mind in raising the child as well at the same time. She was about 21 at this time, I would mention. She wanted to go back to college.

In any event, she contacted the Collins and sought counsel in Montana. Montana has a private placement adoption statute, and pursuant to the

terms of that statute filed for the adoption of the child by the individuals, the same individuals in Colorado who for the 15- to 18-month period had the child in their custody and possession before the entire matter was transferred back to the reservation.

Notice was duly given to the White Mountain Apache Tribe, and soon after, I think it was in early April of this year, the tribe did two things, and that is where we have parallel proceedings in this case.

(A) The tribe moved to dismiss the case based on the Indian Child Welfare Act, claiming that the child was a ward of the tribal court and that exclusive jurisdiction would lie with the tribal court. Secondly, the tribal court promptly filed a motion for order to show cause and filed documents with the tribal court alleging that Oliviana was in contempt of the tribal court's order which returned custody of the child to her because, at the time she went through the proceeding on October 27, she had harbored an intent—and counsel can state this argument otherwise, but this is the way that I understand it—that she was harboring an intent not to truly raise the child, but rather to place the child for adoption and, therefore, misrepresented—or a harsher word would be defrauded—the tribal court into giving her her child back.

Now, at this time the motion to dismiss was filed, but at the same time notice was given to Oliviana's then-counsel in the adoption proceeding, which I think counsel in Montana at that point hoped would be very simple, but suddenly grew into an extraterritorial jurisdictional dispute.

He told her that he couldn't handle either matter. She sought me to represent her right around—on the 20th of May, a week before the order to show cause hearing was to be held, bearing in mind that this was a hearing on the OSC to hold her in contempt of court. So there would have been criminal ramifications of that hearing at the same time that there would have been ramifications in respect to the custody matter.

I promptly contacted the tribal counsel whose name was on some of the pleadings and thereafter made application to the White Mountain Apache Tribal Clerk of Court to get an application out so that I could practice before that court, and I have some documents which I have circulated and I will hand a packet of them to Ms. Arthur, although I think she has seen or received each of these.

MR. MILLER. Mr. Chairman, I move that we include these documents into the record at this point.

SUBCOMMITTEE CHAIRMAN ALLEN. Would you identify them for the record, please.

MR. UNGAR. If you would like. I have attached together my letter to the tribe, which sends me an application to practice law before the court, and it's obviously a response to my phone call on the 20th, which was the day that my client, Oliviana, came to my office.

The following letter is dated May 24, the very next day where I Federal Expressed to Ms. Arthur an explanation that I represented Oliviana and that I had tried to reach the judge to express to him my scheduling problem because I was not able to get to White River, Arizona, on a week's notice. I had a conflict with the sentencing in a criminal case.

I then Federal Expressed a letter, the next exhibit here, to the tribal court, which were a motion for continuance and my own affidavit asking the court to continue the hearing and setting forth the reasons why in my affidavit. That was also copied to tribal counsel.

The next in this series of correspondence is a day later, is my application, and my application is attached as of May 26, together with my \$10 admission fee as requested.

The next document is about a week and a half later, and this follows some telephone calls where I requested documents from the file which were telephonically indicated to be in existence by the court clerk. They were requested and not received in about 10 days. So I wrote and renewed my request.

I also requested a copy of the tribe's constitution, if one existed, and I copied that to tribal counsel so that if there was some communication that was required, the two contacts that I was aware of in order to gain access to this forum would both be apprised of my request.

On June 16th, the next in this series of documents here, I requested from the clerk a certified copy of the Juvenile Code. The purpose of requesting that is because portions of the Juvenile Code are relevant to the Montana proceeding in relation to the tribe's motion to dismiss. If the Juvenile Code were taken by the judge, as I would anticipate, I don't know that he would take judicial notice of the provisions without having a certified copy.

I also again renewed my request for the constitution, if one existed, and also I renewed my request that my application for admission be processed.

On July 1, 1988, just a couple of weeks ago, I received a statement asking that I pay \$50 for a license fee, and it says admission to practice in tribal court. I presume that means that I have been admitted to practice in tribal court, although it seems somewhat ambiguous, but, being that they asked for a fee, and I presumed that a tribunal would not ask for a fee if you were not so admitted. So I sent \$50. That is the last letter there.

I have also supplied the Commission with the order to show cause that was filed against my client and my motion for a continuance and affidavit that were filed in support thereof.

Those are the documents, the only documents that I ask the Commission consider as I explain in a little more detail the consequences of them.

SUBCOMMITTEE CHAIRMAN ALLEN. Okay. If you have all those documents there, they shall be included in the record, without objection.

COMMISSIONER DESTRO. No objection.

MR. UNGAR. From a civil rights standpoint, I would like to say this. Having brought the proceedings up to date, if you will, and, incidentally, the hearing on the tribe's motion to dismiss is scheduled for August 11, a couple of weeks away in the Montana forum.

It is clear that the Indian Child Welfare Act and the Indian Civil Rights Act can collide in a situation such as this. For example, I have a client who comes into my office who obviously needs an attorney with fairly specialized skills in order to represent her in a tribal court proceeding in Arizona where she is 2,000 miles away, where she is being ordered to show why she should not be held in contempt of court and where she could potentially be deprived of her liberty in two respects, no. 1, being put in jail if the judge would so decide and, no. 2, by having her child taken away from her again, bearing in mind that on October 27th of '87 she had her child returned to her.

So regardless of the merits of that situation, from my point of view as an attorney with approximately 10 years of experience in civil rights litigation, I view this a very, very serious matter, and at that point in time testify here today that I did everything possible so that I might protect Oliviana's rights, her rights as an individual, as a U.S. citizen, as a tribal member, and as a woman.

Facing the jeopardy that she was facing, I thought it was most reasonable to request that the matter be continued until her counsel could travel to Arizona. I talked with tribal counsel and was told courteously and I think very professionally that the judge simply doesn't have another date for 2 months, that, "It will have to be heard next Friday; I'm sorry."

My next step is to (a) file documents. I asked for a continuance supported by an affidavit showing good cause, I believed, for the continuance and indicating the rights that were at jeopardy, which are clear to any judge, I believe, when you send out an OSC, and I also telephoned him. It took me several times to get through, but I telephoned the judge and urged him to give me even an extra week. I followed that up by letter, and I'm not sure if I have the letter before me, but forgetting the letter, I advised the judge that I would be available the following week or any time thereafter, and he told me his calendar just couldn't permit that.

So that being the case, that particular hearing was held *ex parte*, and the judge granted the tribe's motion to find Oliviana in contempt of court, and she has been so found and, secondly, ordering the child back to White River, Arizona. And the judge took those two actions after some sort of a hearing at the tribal court, the nature of which I am not completely certain.

So from a civil rights standpoint at that point in time, I reviewed the Indian Civil Rights Act, and unless I were to take the risk of telling my client to proceed to Arizona and be incarcerated or detained, the Indian

Civil Rights Act would, under the Federal system of the United States, would offer no relief in this situation.

Ordinarily, in a situation like this, if I were facing in a piece of litigation where an individual could be incarcerated and time were needed and a judge told me, "No way, you are not going to have that time," I would ordinarily file for some kind of relief at an appellate court.

In this particular situation, I suppose the argument could be made that should I have desired to continue this proceeding and go over the juvenile judge's head, if you will, that I should have sought the appellate procedure available in the Apache tribal court. For a variety of reasons, I chose not to do that and felt that I had no choice, given the directives of my client and her experiences with that system to date. I felt that that would have been a futile gesture and it was far easier and more facile, at that point in time, simply to tell her not to return physically to the reservation and for us to resolve some of these legal issues in the Montana district court.

I would testify today that I suppose I have now been admitted to practice before the White Mountain Apache Tribal Court. I have sent in my \$10 admission fee and my \$50, I suppose, annual licensure fee. I have not received anything since then, but it has not been but a week or so.

I have still never received one pleading that I have requested from the tribal court clerk. I can speculate that there may be substantive reasons as to why these have not been released to me, but I have never received any communication as to why I have not received them.

This, at the same time that tribal counsel on behalf of the tribe has urged and filed motions asking the Gallatin County District Court judge to hurry up the proceedings in Montana, and I have never objected to any motions attempting to expedite Montana proceedings, except at the very outset when I got involved in the case. I think I asked for 10 days or so to file a responsive brief.

But the inconsistency here and what has been very frustrating to me is that documents that are going to be relied upon, for instance, the Apache Juvenile Code, need to be certified if they are going to be admitted and relied upon in the Montana proceeding, and it's now approximately 2 months after having requested these that I still don't have them.

I don't know if this hearing were held tomorrow in Montana, if tribal council would simply bring one up to court and say, "Here it is." I presume, given the nature of the pleadings, that the tribe would need this document as well, and I would certainly invite tribal counsel to respond to that, but it really hamstring the proceeding when those kinds of things happen.

SUBCOMMITTEE CHAIRMAN ALLEN. Let me interrupt you for a moment, Mr. Ungar. I can't tell exactly where you are at this stage, but one of the things I do want to hear you speak more clearly about, though briefly

ultimately, is precisely how you envision dealing with the conflict that you have just described, the situation in which your client is caught.

But before you do that, I wanted to clear up some other matters independent of that, and I wanted to ask a question or two, Ms. Leon, if I might.

You have worked for some time presumably in child care services; is that correct?

**TESTIMONY OF DEBORAH LEON, FORMER SOCIAL WORKER, WHITE MOUNTAIN APACHE TRIBE**

Ms. LEON. I worked for 3 years, as I said, for the White Mountain Apache Tribe. I worked as a medical social worker on the obstetrics and pediatrics units at Good Samaritan Medical Center in Phoenix for a year. I received my master's of social work from ASU in '83 and then immediately began working.

Prior to that I was employed as a physical therapist and was forced to change careers for physical reasons.

SUBCOMMITTEE CHAIRMAN ALLEN. So it's 3 years' experience with child care services?

Ms. LEON. Four years.

SUBCOMMITTEE CHAIRMAN ALLEN. Can you give me some idea of how these things are handled generally, these kinds of cases, or have you seen very many cases of this character?

Ms. LEON. I have seen many cases within the tribal system. I have not seen any within Arizona State. My experience at Good Samaritan was with people as inpatients, so that we did not follow them after they left the hospital.

SUBCOMMITTEE CHAIRMAN ALLEN. In the tribal situation, how are these cases handled in general?

Ms. LEON. Could you be more specific with the question?

SUBCOMMITTEE CHAIRMAN ALLEN. Just walk me through the kinds of steps you would take as a child care service officer dealing with the questions that arise either from children on the reservation or children off the reservation but enrolled in order to ascertain, one, whether one should undertake court proceedings to establish wardship; two, to evaluate the parents as to their suitability for raising the children; three, the determination of questions of adoption and placement. Just walk me through that process if you will.

Ms. LEON. If there was a question as to the safety of the child or the fitness of the parent to have or the caretaker to have the child in the home, if it was a serious enough concern, a petition might be filed in the tribal juvenile court stating that this child is alleged to be neglected or abandoned or whatever the particular allegation was.

SUBCOMMITTEE CHAIRMAN ALLEN. Excuse me. Who might file that petition?

MS. LEON. Someone who had firsthand knowledge, who had seen evidence. It could be a social worker, it could be a family member, or it could be a police officer—anyone with firsthand knowledge. But they could not file it if they had not witnessed a problem themselves; if they heard, "I hear that this child might be neglected, so I am filing a petition"—that was not allowed.

So then, according to tribal code, there was to be an initial hearing within 48 hours after the petition was filed. That was to make an initial assessment of the case.

When the petition was filed, sometimes it was so serious that the child was removed for protective custody by a police officer and put into foster care, or there is a nursery on the reservation run by a mission or the youth group home which is for adolescents, if it was felt that the child would be in danger to remain in the home until the first hearing. If not, then the child could go with a family member or stay in the home.

A petition was basically a request for a hearing. Then the hearing was held, and witnesses would be subpoenaed to court and testimony given in court. Now, that is on a potential neglect or abuse.

In adoptions, an adoptive parent had to file a petition to adopt a child within the tribal court at the juvenile court, and the judge generally reviewed the petition and made a decision. Pending the hearing, a child may or may not stay with you, the petitioners. Then a preliminary adoption hearing would be set up, a home study may or may not be presented, and a decision was made based on testimony given in court as to whether or not the child could remain with this family. Then the adoption could be finalized a year after the initial hearing.

SUBCOMMITTEE CHAIRMAN ALLEN. Is the testimony of the caseworker definitive?

MS. LEON. No, it is not.

SUBCOMMITTEE CHAIRMAN ALLEN. As far as the recommendations for the treatment of the child?

MS. LEON. The recommendations of the social worker were not always followed, if that is the question.

SUBCOMMITTEE CHAIRMAN ALLEN. Yes, that's what I am asking you.

In cases where those recommendations are not followed, is there anything that characterizes them or distinguishes them why they are not followed, or is it random?

MS. LEON. There were times, and I am not speaking at all to the *Baier* case at this time, there were times when the judge overruled the social worker's recommendation because he stated that he knew the family and they were fine for the child.



There were many adoptions where there was no home study and was no social worker involved. So it was strictly the judge's decision. It was basically up to the judge's discretion whether or not to follow the recommendation of the social worker. We usually were not given a reason why other than, "I know these people."

SUBCOMMITTEE CHAIRMAN ALLEN. And in what way do these processes vary when you are dealing with children who live abroad?

Ms. LEON. I'm sorry?

SUBCOMMITTEE CHAIRMAN ALLEN. In what way do these processes vary, if any, when you are dealing with children who live abroad, off the reservation in distant States or whatever?

Ms. LEON. I don't know if I can really answer that question, not having had direct experience with very many. Those were primarily in the tribal attorney's office and tribal social services was not involved.

SUBCOMMITTEE CHAIRMAN ALLEN. What do you mean when you say in the tribal attorney's office but not Social Services? What does that mean?

Ms. LEON. The tribal attorney's office may have received a notice of an adoption proceeding in another State regarding a White Mountain Apache child. The tribal attorney's office then dealt with the legal proceeding and did not ask Social Services for assistance.

SUBCOMMITTEE CHAIRMAN ALLEN. Have there been many cases of this character, one or two or what?

Ms. LEON. I believe there have been many, but again I can't speak to that.

SUBCOMMITTEE CHAIRMAN ALLEN. To the best of your knowledge, when a case that involves diversity of jurisdiction arises, the attorney's office does not consult the social services department?

Ms. LEON. That's correct.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

Go ahead, counsel.

Ms. MUSKETT. Ms. Leon, Mr. Ungar has indicated that in the *Baier* case there was a motion made that took some 10 months to have a hearing on. Now, I don't want to speak with respect to that particular motion. I just wanted to ask you, in general, is it unusual to have a delay in the scheduling of a hearing in the White Mountain Apache Tribal Court?

Ms. LEON. It is not unusual. In this particular case, I would like to mention that Ms. Baier's attorney requested the continuance, not the tribal court or the tribal social services.

Ms. MUSKETT. In your experience, though, as a social worker before the court, maybe you could speak to your own experience in terms of delays. Is there any problem with respect to that with respect to the court?

Ms. LEON. Within the juvenile court was my primary experience, and there were multiple problems of getting timely hearings. The tribal code

states that a hearing must be held within 48 hours after a petition is filed. That doesn't apply to this case directly.

I have had numerous instances where anywhere from 6 weeks, and 6 weeks was the norm to obtain an initial hearing where the child would be in custody somewhere else and in limbo before an initial hearing was held, up to 15 months with no hearing. Several were a year, 8 months, 10 months, 5 months, and that's within the juvenile court. The juvenile court did not schedule the hearings despite numerous requests.

MS. MUSKETT. Now, are these situations where the child has been removed from the home—

MS. LEON. Generally, yes.

MS. MUSKETT. —by Social Services and then you want to schedule a hearing?

MS. LEON. Right.

MS. MUSKETT. And do you have any indication as to why there was generally a delay in the scheduling of these hearings?

MS. LEON. Not really. The reasons I was given were that the juvenile judge was out of town or he was too busy. Generally, no, I was not given a reason, but just, "We're not having them."

MS. MUSKETT. Mr. Ungar has also indicated that he has a problem in obtaining documents from the tribal court. In your experience as a social worker, did you have any similar problems?

MS. LEON. Yes, I did.

MS. MUSKETT. Could you elaborate, please?

MS. LEON. Obtaining court orders after a decision had been rendered in the juvenile court. We then wanted a court order to put into our files to say okay, the child is now a ward of the court, or the child is returned home, or the adoption has been finalized. We would make repeated requests, written and verbal, and were consistently ignored. We just simply did not receive them.

MR. MILLER. Ms. Leon, in Portland we heard testimony from tribal judges that oftentimes there are contacts by either the tribal Chairman or tribal councilmen, and they said that is particularly bad in custody cases.

In your experience have you ever experienced anything like that in the White Mountain Tribal—

MS. LEON. I haven't witnessed a meeting between any political people and a judge, but I have been in court where tribal council members or political appointees who are not related to the case were allowed to come into the courtroom. They were not subpoenaed, and they were allowed to speak either on the witness stand or at their whim in the courtroom on behalf of the parent, for example, defending the parent and what a good person he or she was, and the Social Services had no grounds for what they were saying. And then one case in particular where the judge

dismissed the petition alleging abuse by another social worker and said, "I am dismissing it with prejudice because I do not want you to appeal this."

He has made statements to me and/or other social workers when I have been present stating that, "This is a political case. Elections are coming up. I won't remove the child," or "I will remove the child."

MS. MUSKETT. Well, do you think that was unusual, that one case where the judge felt for a political reason he had to render a particular decision?

MS. LEON. I felt that the judge was pressured by community members, parents of children, or caretakers of children to make the decision that they wanted rather than the decision that was best for the child.

I did observe parents and caretakers making life very difficult for those involved in custody proceedings, of going to their own tribal council members and saying, "I want you to go to the court and get my child back." Whether or not they did that, I don't know, but I know that the parents did do that, exerting a tremendous amount of pressure on the judges who are also community members and tribal members and have families and relatives there.

MS. MUSKETT. Now these particular tribal councilmen that came into that one case that you mentioned, were they scheduled to testify?

MS. LEON. No, they weren't, and they were not subpoenaed.

MS. MUSKETT. So how did they partake in the proceedings?

MS. LEON. They stood up at various points during the proceeding and shouted what they had to say.

There were several points that Mr. Ungar made that were incorrect that I would like to address, if that would be possible at this time or later.

MS. MUSKETT. Well, we would be happy to hear it, and if you would like to discuss it with Ms. Arthur, that's fine. We are willing to hear anything that you are willing to tell us.

MR. MILLER. Ms. Arthur is not her counsel.

MS. MUSKETT. All right.

MS. LEON. Ms. Arthur and I did talk about the fact that we would like to rebut things that are not true. I was the caseworker for 3 years, 3 full years on the *Baier* case, and I have extensive knowledge of it.

COMMISSIONER DESTRO. Excuse me, Ms. Leon, could you just tell us at the outset how did you get involved in the *Baier* case? Where did this start? I mean this is the one piece that I don't have yet, and it would be very useful.

MS. LEON. Oliviana Baier came to Social Services requesting assistance. At the time, it was not regarding her child. She later then asked for assistance regarding her child, but initially she came for services that the agency could offer.

I would like to mention that when the child was placed with the Collins, the adoptive parents, the potential adoptive parents in Colorado, when the child was 15 days old, Ms. Baier was coerced by her adoptive parents to

do so. She was threatened that if she didn't do that, she would be disowned. Those were the circumstances under which the child was placed.

Oliviana was on the reservation from August of 1984 to at least August of 1987 and maybe later. I have seen allegations to the contrary, and the fact is she was there for a good 3 years, not for 1 year or 2 months or whatever she is saying now. The child was there from July 26 of 1986 until whenever Oliviana took her away, at least August of 1987. She spent most of her life on the reservation.

The objection that the tribe accepting jurisdiction violated her civil rights—Oliviana wanted the tribe to take jurisdiction. She went to the tribal attorney's office on her own, of her own free will, asking the tribe to take jurisdiction, that she wanted her child back. There was nothing saying that her civil rights have been violated.

The point that Mr. Ungar raised about inconsistency is not accurate. Ms. Baier's adoptive parents, who are non-Indian, began raising allegations against their daughter regarding their fitness to parent after Oliviana revoked her consent to adopt. They were very serious allegations, extremely serious when you are talking about putting a child into a home.

For that reason, the child was made a ward of the court in the event that her parents were right. We, as the tribal agencies, didn't think they were, but these allegations were so serious that it was necessary to ensure the safety of the child. That is why the child was made a ward of the court.

The point of the child being returned to the reservation was to reunite the child with her mother. That is why she was put into the mother's home. We didn't bring her back to the reservation to go to foster care. We brought her to be with her mother, but we needed to ensure should something happen that the child was in danger, the tribe had the authority to remove the child for her safety. That was the rationale.

I don't recall what was stated in the court order. It has been at least a year since I have seen the records.

COMMISSIONER DESTRO. Were the allegations made by her parents reduced to writing or did they call you or what?

Ms. LEON. Both. They were made in writing in the court proceedings in Colorado, in Larimer County. In fact, her parents were co-petitioners against her in the Colorado court proceedings. They were made in writing there in court, and they were made by telephone to me and to others working for the tribe, and they were made while they were sitting in my office face to face on two separate occasions.

COMMISSIONER DESTRO. Now let me see if I have the chronology right, which obviously is important to our understanding of it. Fifteen days after the child was born, the baby was placed with the Collins.

Now where did Ms. Baier go? Where was she after the birth of the baby? Did she go back to the reservation?

Ms. LEON. No, she didn't. She went back to live with her parents for about 6 months after she had placed the baby in Colorado, and then she came to the reservation.

COMMISSIONER DESTRO. And at what point was the petition in Colorado filed?

Ms. LEON. I really don't remember.

COMMISSIONER DESTRO. Was that before or after she returned to the reservation?

Ms. LEON. I believe it was after. The strategy of the people in Colorado at that time was that private adoptions, and there is no private adoption statute—as it was put to me, private adoptions are not legal in Colorado. Therefore, the strategy of the Collins attorney was to have the child placed in their home for 1 year and then claim abandonment by the natural mother and then allow the Collins to adopt the child.

She was specifically instructed, "Do not visit the child and do not bring the child presents." She was allowed to visit the child, but at least she told me that she was instructed not to do too much.

COMMISSIONER DESTRO. And then after the Colorado proceeding terminated, then would you continue with the chronology there.

Ms. LEON. Sure. The child was returned to the reservation in July of '85, and Oliviana did quite well until February of '86 with the child in her home. There was very close supervision of her by Social Services, by myself primarily. I made unannounced home visits, you know, this type of thing, to monitor.

Her situation began to deteriorate very rapidly, and it was clear that the child was being severely affected. Her behavior changed dramatically, and that is why she was removed from the care of her natural mother and put into a foster home.

COMMISSIONER DESTRO. Excuse me, can I interrupt? Would you give when that happened then?

Ms. LEON. The first time, there was a temporary removal on a weekend. It was March 7, 1986. It was 2 days after the child's second birthday, and she was returned to her on March 10.

COMMISSIONER DESTRO. Was that done by an order or just by the department?

Ms. LEON. The tribal police had to make any physical removal. I don't know if a tribal court order was issued. The tribal court was informed as to the whereabouts of the child and the situation. Then the mother did not make any strides towards improving her situation, and on April 1, 1986, she was removed permanently and placed in a foster home.

After that, the policy regarding foster care was explained to her, and the natural mother chose not to come in to Social Services for 6 days regarding her own child. She demonstrated no interest in visiting the child whatsoever for over a year. She objected very strenuously to the policies

of tribal social services regarding visitation of a child in foster care. She alleged to us that we were discriminating against her. We were just carrying out agency policy.

The goal of all foster care, which was all supervised by Social Services, was reunification of the family. It was never the separation of the family. At the same time, the safety of the child had to be considered.

I believe in the summer of '86 is when she retained her off-reservation attorney, stating that there were no reasons, as Mr. Ungar discussed, stating that there were no reasons that she shouldn't have the child.

However, everytime a hearing was scheduled, Mr. Varbel asked for a continuance. Mr. Varbel did not ever come to Social Services to ask for information. He simply believed whatever his client told him.

When the child was returned to Oliviana in October of '87, Mr. Ungar made the statement from the court proceedings that there was no firsthand knowledge of neglect, that the mother had not been proven to be unfit. The reason there was no firsthand knowledge is because all of the evidence of all of the happenings while I was the caseworker were not entered into the record, so that the social worker who took over after I left had been working on the case for maybe 7 weeks. He had seen no evidence of neglect. So that was what was reviewed. The evidence was not entered.

SUBCOMMITTEE CHAIRMAN ALLEN. Can you state why the record was empty?

MS. LEON. I have no idea why. I was not privileged to that. I was not.

SUBCOMMITTEE CHAIRMAN ALLEN. So you are saying to us not that you failed to enter the records, but that they disappeared?

MS. LEON. No, I'm not saying that. I am saying that any testimony that I might have given in that October '87 proceeding was not given because I was not informed of the proceeding and there was an agreement made that—

SUBCOMMITTEE CHAIRMAN ALLEN. I understand that, but what about the case file? Did I not understand you to say that there were no notations that you had made in the case file when the next social worker took it up?

MS. LEON. There are great gaps in the file that I did. I am the first to admit that. There were supposed to be four social workers in the office and there was one, and that was me, and I was also for a period of time the acting director. I was responsible for all social service delivery and the administration of the program and the supervision of employees. I was not writing notes; that's correct.

However, the social worker came before I left and was fully briefed on the case. I live locally still. I do not live away. I repeatedly told the staff remaining that I was available and I was more than willing to testify. I requested the opportunity to work on the case file and I was denied that request. So the case file is extremely poor as a result of my recordkeeping.

However, I asked and I offered to put those notes in on my own time, and I was denied that request.

So that when the court hearing was held in October—the information that I have was not that the record was there and reviewed, but that it was the testimony that was given. Since there was no testimony from the new social worker regarding neglect, therefore, Mr. Ungar stated there was no firsthand knowledge of neglect. That is because I was not asked to appear in court. There could have been. I don't know why.

SUBCOMMITTEE CHAIRMAN ALLEN. Whose job was it to ask you to do that?

Ms. LEON. Excuse me?

SUBCOMMITTEE CHAIRMAN ALLEN. Whose job was it to ask you to do that?

Ms. LEON. I would imagine the Social Services and/or the tribal court would subpoena me. The normal procedure in tribal court was that, for example, if I filed a petition alleging that a child was neglected and I had seen it myself, but I had also had witnesses, I would ask the court, "Please subpoena the following people to be witnesses on this case," and that was routinely done.

SUBCOMMITTEE CHAIRMAN ALLEN. And you had filed such a petition in this case earlier?

Ms. LEON. Yes, I had.

SUBCOMMITTEE CHAIRMAN ALLEN. And, as you told me initially, those petitions are filed giving basically eyewitness accounts, if I recall the statement?

Ms. LEON. Right.

SUBCOMMITTEE CHAIRMAN ALLEN. So that that much was still in the record. Was that not consulted?

Ms. LEON. Apparently not. I don't know. I was told that anything that happened prior to the end of July would not be admitted into the record—July of '87 for the October '87 hearing.

COMMISSIONER DESTRO. Did tribal counsel represent the department of social services or did you take care of those proceedings yourself?

Ms. LEON. Most of the time we took care of the proceedings ourselves. At the time there was a different tribal counsel. The only time we requested assistance or consultation was in a particularly difficult or unusual case.

SUBCOMMITTEE CHAIRMAN ALLEN. Counsel.

Ms. MUSKETT. I had a couple of followup questions for you, Ms. Leon. What was the advantage of making the child a ward of the court when it was initially brought back to the reservation? Doesn't Social Services have the procedure where if they found that the mother was unfit, they could file a petition for abuse or neglect at that time?

MS. LEON. That's correct. As I stated earlier, Oliviana's adoptive parents made extremely serious allegations about her fitness to parent. We had her evaluated by a psychologist, and more questions were raised as to her fitness to parent, but there was no proof that she was unfit. They were concerns and they were allegations by her parents, and I might mention that her parents' primary concern was their friends having the child. They did not want their daughter to have the child.

The advantage as—again the tribal counsel was involved in this more than I was; the decisionmaking on this particular issue, as I understood it—if she was already made a ward of the court, the police would be able to remove her without receiving express permission from the tribal court or the juvenile court. It was for the child's protection should she be endangered. That was my understanding of it.

When any child was in foster care, they were wards of the court committed to tribal social services for supervision, for placement and supervision. The tribal counsel's office felt that it was best to have her as a ward of the court right from the beginning so that the situation could be monitored, so that the child's safety would be more ensured.

MS. MUSKETT. I had another followup question going back to the case that we discussed earlier in which you felt that tribal council members had put pressure on the judge. What were the general circumstances of that case?

MS. LEON. The circumstances were that the child came to school. He was 4 years old and he came to Head Start with a rope burn on his neck, and any child protective worker knows that certain marks indicate abuse or neglect. A rope burn on a neck means that a rope was put around their neck and they probably were hung or grabbed somehow, something that is not necessarily healthy.

The child was very withdrawn that day, and the social worker at Head Start asked the child what was wrong, and he wouldn't talk. She said, "What's the mark on your neck?" and he wouldn't talk. So she said, "Draw me a picture and show me what happened," and he drew a picture of himself hanging from a tree with his older brother, who was 18 or 19 and had children of his own, standing under the tree, and he said, "My brother did it." That was about all he would say. The brother lived in the home with his own family.

I had had previous experience with the family. This child had been adopted by the mother, and I had recommended against the finalization because I did not feel that the mother was an appropriate caretaker. The judge overruled that and finalized it. Then 2 years to the month later this happened.

The child was immediately picked up by the tribal police at Head Start after the social worker filed the petition and spoke with the judge. Then the child was placed in protective custody and was kidnapped by the



mother and then again put in protective custody. It was one of those cases where everyone was running around screaming about it all over town, and it was all the social worker's fault basically.

So when we went to court, it was the social worker who filed the petition, myself, and the adoptive mother who were subpoenaed. The courtroom was packed. There were three or four benches in the courtroom and the walls were lined and the benches were filled. There was a tribal advocate and there were council members and there were political appointees who were not related to the family and did not live in the household. They were there to speak on behalf of the character of the adoptive mother.

The social worker who filed the petition was required to take the witness stand, I was required to take the witness stand, and then it sort of turned into a free for all where the tribal officials would jump up and object, and call us liars and say that we didn't know what we were talking about and the child was happy.

There was no objective evaluation of what had happened to the child. It became very emotional, very emotional. Later, the judge simply said, "I'm going to dismiss this with prejudice. That means you will not be able to appeal it," and that was the end of the case.

MS. MUSKETT. Mr. Ungar, do you know why when the petition for adoption was filed in the Montana court, why that wasn't filed in the tribal court originally?

MR. UNGAR. Well, I think that Ms. Leon has maybe stated a dozen good reasons why the matters that she has adduced do not exactly render confidence that a system like that is going to treat one fairly. So I would almost say that the record speaks for itself, after Ms. Leon's testimony, as to why my client, Oliviana, and the proposed adoptive parents had no confidence that the tribal court would fairly address the adoption issue.

I had prepared a few other perhaps more esoteric arguments as to that issue, and I think if I cite these, then some of the exact examples, real examples that Ms. Leon has given, will fit within these categories.

One wants to see an independent judiciary and a meaningful route of appeal in any case that is brought before a tribunal so that the litigants are treated fairly, and the proceedings that I viewed, and I can only speak in terms of this case, and also the general feeling and statements that my client made to me, which accord precisely with some of the situations that Ms. Leon described, which do not engender that sort of confidence and, to the contrary, would make one very uneasy in bringing something of this import before a tribunal.

It is my legal stand on this case that once Oliviana travels in exercise of her privileges and immunities as a U.S. citizen to Montana, she could invoke the Montana court's jurisdiction and was free to do so.

Secondly, when you have a system which is rather ill defined, and you have a juvenile court judge who, as Ms. Leon stated, is oftentimes inflexible as to scheduling—I mean I am horrified to hear as a civil libertarian that children could be removed from their parents' home for as much as 15 months without the parents having a hearing. Now, under *Stanley v. Illinois* and a whole slew of caselaw in the so-called Anglo system, I mean that is grossly unconstitutional, actionable under section 1983 and so forth.

Knowing about those things in general and having them confirmed here today by someone with actual knowledge of how the system works again gives further pause about that jurisdiction.

SUBCOMMITTEE CHAIRMAN ALLEN. Let me interrupt you just a moment, Mr. Ungar. I hate to do this because I want to hear all that you have there, but we also are pressed for time.

MR. UNGAR. Yes, sir.

SUBCOMMITTEE CHAIRMAN ALLEN. I have the sense that you have them written which emboldens me to suggest that we might profit from adding them to the record in their written form rather than listening to them at this moment.

I had asked you earlier and told you there was one thing I wanted to you to do very briefly, and if I might, counsel, I think we really do need to begin to close, and I would ask you to close just by telling us very briefly. You have placed all your eggs in the Montana State basket at the moment, and you have described for us the conflict between the ICWA and the ICRA. What I would like to know every briefly is what you will do about your client's rights if you fail on the jurisdiction battle in Montana?

MR. UNGAR. It depends upon how that eventuality would come about. If the district court judge rules in favor of the tribe's motion to dismiss and the case is then transferred to tribal court, then I suppose we have a couple of routes. One would be to seek Federal judicial review either in Montana or in Arizona, and you are asking me to show my hand here strategically, but that's no problem, either Federal forum to appeal the decision made by the State court judge as being in violation of the ICWA and possibly some other precepts which I have cited in my brief.

Another route would possibly be to proceed in tribal court with certain conditions and assurances, I suppose, if those assurances could be satisfactorily given. At this point in time, I would say that that's unlikely, very unlikely, but I think that we are confident that our position would succeed in front of a Federal judge.

We would have a choice, depending on what happened to the child. If the child were ordered back to Arizona, then we would potentially have a habeas situation, and you could invoke the ICRA.

Getting to the business of this committee is going to put us in somewhat of a bind unless we decide to litigate the matter to a point where

potentially portions of the *Santa Clara* decision could be rendered unconstitutional or in some ways the remedies under the ICRA could be judicially expanded if Congress doesn't do so in the interim.

SUBCOMMITTEE CHAIRMAN ALLEN. Okay. Was there anything very briefly that either of you want to address?

COMMISSIONER DESTRO. Just a question for the record. Do we have the background documents that Mr. Ungar submitted in the record? Have those ever been submitted for the record?

SUBCOMMITTEE CHAIRMAN ALLEN. They were accepted for the record, yes, and I am asking him to submit those that he was just referring to as well.

MR. UNGAR. I will submit within the 30-day period, and to clarify the request, the reasons why the Montana forum was chosen.

SUBCOMMITTEE CHAIRMAN ALLEN. Precisely.

MR. UNGAR. Yes, sir.

MS. PRADO. I have one quick question of Ms. Leon, if I could, please. Just for clarification, when the child was returned, when Oliviana and the child returned and the child was made a ward of the court, that was in July of '85?

MS. LEON. Yes.

MS. PRADO. You said that your initial visits with her showed that she was doing well as a mother. Would it have been possible for you to make a recommendation then, at any point when she was doing well, that custody be transferred back to her?

MS. LEON. Absolutely. That was the goal. It was to observe them together and then have Michelle removed from the ward of the court and be fully in the custody and care of Oliviana without the court's supervision.

MR. UNGAR. Mr. Chairman?

SUBCOMMITTEE CHAIRMAN ALLEN. Yes.

MR. UNGAR. If I could just follow up Ms. Prado and your question. The initial order did state that Oliviana had custody of her child. So I would like to clarify that. It stated both findings, that she had custody, was a fit and proper person to have custody over her child, and that the child was a ward of the court, which is one of the bones of contention at the outset.

SUBCOMMITTEE CHAIRMAN ALLEN. Very well.

It is clear that our review of the ICWA, which is strictly from the perspective of the ICRA, has a long way to go as we sort through these things.

We thank you for sharing what you have with us this afternoon.

It is time for us to take a break, and we will limit it to 10 minutes. Following the break, we will assemble the next panel, which will consist of Chairman Ivan Sidney, Frances Jue, Delford Leslie, and Tom Kahe. I don't know if I pronounced those all correctly.

Ms. ARTHUR. Excuse me, Mr. Allen, you invited me here so I could respond to Mr. Ungar, and I expect equal time and request that.

SUBCOMMITTEE CHAIRMAN ALLEN. Are you ready to take the oath?

Ms. ARTHUR. I will do that, yes. That is why you invited me here and that is why I am here.

SUBCOMMITTEE CHAIRMAN ALLEN. I wish you had told us before. Very well, Ms. Arthur.

Ms. ARTHUR. And I expect equal time.

SUBCOMMITTEE CHAIRMAN ALLEN. I wish I had been informed that we had come to that conclusion. I had the opposite impression that you were not intending to say anything.

Ms. ARTHUR. Nobody asked me a second time if I was going to take the oath, but just what I was going to testify to, and Mr. Miller and I agreed that that is what our agreement had been and he said, okay, that was his understanding and that was it. No one said, "Are you going to take the oath again?"

MR. MILLER. I do have a letter inviting her to testify.

SUBCOMMITTEE CHAIRMAN ALLEN. Yes, I understand. Let me simply administer the oath, Ms. Arthur, and we will take the time required.

[Claudine Bates Arthur was sworn.]

#### **TESTIMONY OF CLAUDINE BATES ARTHUR, GENERAL COUNSEL, WHITE MOUNTAIN APACHE TRIBE**

SUBCOMMITTEE CHAIRMAN ALLEN. Do proceed.

Counsel.

Ms. MUSKETT. I was just going to ask you to please go ahead and respond to Mr. Ungar's allegations.

Ms. ARTHUR. The panel seems particularly interested in the background events, and it might be helpful rather than having "Well, I think it was about that time, and it was about this time," if we went through specifically the events that did occur and clarified that just for the record.

Furthermore, on the record, you should be informed that the Montana court has indicated that it is appropriate for me to respond with regard to the confidentiality and the privacy in the Montana proceedings and has granted me permission to put on the record the entire Montana proceedings. I think it is only fair that if portions of the record are here, as Mr. Ungar has done, that the entire record be put before this panel, and I am prepared to give you a complete copy of the Montana proceedings.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you. Do you have those with you or will you submit them?

Ms. ARTHUR. They are like this—[indicating]. I have them out in my car, and I will go and get them when we are through here.

SUBCOMMITTEE CHAIRMAN ALLEN. So we can take them together. Thank you. We will admit those into the record, without objection.

MS. ARTHUR. In the Colorado proceedings, it was May of '85 that Ms. Baier withdrew her consent to the Colorado proceedings. As Ms. Leon mentioned, she came to the legal department requesting assistance. The proceedings in Colorado were carried on at her instigation, at her request, and were for the specific purpose of reuniting her with her child on the reservation where she had been since 1984. Ms. Baier lived on the reservation from 1984 until January of 1988.

COMMISSIONER DESTRO. Excuse me, Ms. Arthur, so that the record is very clear on all this, are the proceedings or whatever papers are available from the Colorado proceedings, are those available, too?

MS. ARTHUR. I was not the attorney of record in Colorado, and I cannot speak to the Colorado court's view of whether or not their custody proceedings are confidential. I assume so. I would expect that the court, as Montana did, would be required to make an order with regard to the court proceedings themselves and the records in particular themselves.

COMMISSIONER DESTRO. The only reason I ask is Ms. Leon made some statements with respect to the foundation of some of the proceedings in Colorado with respect to the allegations, and if you looked at the bare record of the Montana proceedings as we have seen them today, one would assume that some of those allegations came out of the blue.

One of the connecting factors that Ms. Leon added today, to my knowledge, is that some of those may have preexisted and could be found in that Colorado record. My only question was did you have them? Your answer is no.

MS. ARTHUR. I do have them. My difficulty is with discussing the specifics in them. I can tell you the types of documents that are in the Colorado court. There is a motion to intervene by the Collins and the grandparents, the Baiers themselves, Oliviana's parents, as Ms. Leon stated, that they entered the proceedings against their daughter. There was a decision made that the child was no longer available for adoption because the parental consent had been withdrawn. There was a great deal of motions back and forth, temporary injunctions to keep the child in Colorado, etc.

The end result was that the Colorado county social services, Larimer County social services filed a petition for neglect based on the allegations that were made by the Collins and particularly by Oliviana's own parents.

Because of that petition for neglect, the White Mountain Apache Tribal social services, which had entered an order early in May of 1985 with regard to this child, asked and with Oliviana's consent had some psychological evaluations which are confidential but which raised additional questions.

The Colorado court on July 25, 1985, Judge Sullivan granted the county attorney's motion to dismiss, disallowed the temporary restraining order,

and turned the child over to, and this may get to Ms. Muskett's question about why the child was initially a ward of the court.

The Larimer County tribal court order turns the child over to the custody of the White Mountain Apache Tribal social services. So when the child came to the White Mountain Apache tribal jurisdiction, came into the tribe's jurisdiction, she came there as a transfer already under the care and supervision of Social Services.

It is not in child custody situations unusual, particularly when you are trying to get the mother and the child back together, to have the child be a ward of the court in a legal sense and have physical custody with the mother with supervision from Social Services such that an ultimate resolution of the problem can be had. That is what occurred at that moment.

The tribal court order, regardless of what Mr. Ungar has said to you and it is part of the exhibits in the Montana court, the tribal court order does not find Oliviana to be a fit and proper person, and the reason that was so was because the questions had been raised about her fitness to parent. She was, however, allowed at that time to have physical custody of the child with supervision by the tribal social services. As a matter of fact, Ms. Leon and the tribal attorney at that point made an allegation, and they are simply allegations when you file petitions; they are not the facts; the court later finds the facts in its order—they made an allegation that in fact Oliviana was a fit and proper person, and perhaps that is where Mr. Ungar read that. They did allege and her affidavit did say that she was a fit and proper person.

The tribal court did not find that and did not make that finding. They made a finding allowing her to have physical custody of the child pending supervision, evaluation, continued counseling, she was ordered into parental classes, counseling sessions, and in fact two different kinds of counseling, one in which there could be more or less someone who would help her look at herself and that might be adversarial, so she had to have a private, other counsel.

The White Mountain Apache Tribe, as Ms. Leon correctly stated, was always interested in reuniting this mother with her child. That was the situation in which the child was brought back in July to the White Mountain Apache Tribal Court jurisdiction.

The petition for transfer was May 29, 1985, the court order accepting jurisdiction was May 30, 1985, and the court ordered that Social Services should keep the court informed on a weekly basis—that is how serious the charges were—about the care of the minor child until there be further proceedings.

The court then did hold a hearing in which they looked at the whole situation and continued the situation involving Social Services' looking out for the interest of this child while the child remained with her mother.

Thereafter, the court records indicate and substantiate Ms. Leon's testimony that at first Oliviana did quite well, and later on, for a variety of reasons, there was real questions about the danger that this child was in, occasioning tribal police removing the child from the home on two occasions, and the second time in which the court put the child in a foster home because it found that it would be in the child's best interests rather than being in a dangerous situation at home.

Ms. Baier, during the time that the child was in a foster home, did not comply with the orders of the court with respect to supervision. She didn't comply, as Ms. Leon said, with the visitation schedules; she didn't comply with the need to carry on counseling services so that she could be united with her child.

In July of '87, the Baiers, the parents of the mother, wrote to the tribal Chairman saying, "We understand things aren't going very well down there in White Mountain for our grandchild. We want our grandchild back." And in fact the Baiers paid an attorney to help Oliviana go to court in October and attempt to regain custody of her child.

The motion to return the minor child to the mother was filed December 1, 1986. On December 3, 1986, there was a order to Social Services to make an investigation and a report regarding that matter. On December 5, 1986, Mr. Varbel, who was then her attorney, filed a motion to continue. The tribe's legal counsel filed a response on 12/10/86. Another motion to continue was filed by Mr. Varbel that same month. There was a motion to continue then in December of '86 by the tribe awaiting a psychological evaluation of Ms. Baier.

In October 1987 the court did hear Mr. Varbel and Oliviana and found that the child could be returned to her mother based on the evidence that the court had before it. And as a matter of record, the court did not allow prior testimony and questioned the present social worker on his particular knowledge. Since the court hearing was held at a time when Ms. Leon was leaving the tribe or had just left the tribe and the new social worker had come on, there was not testimony that the court took notice of, and we feel there was testimony on the record. However, your interest is in not relitigating the factual issues of the case. So I won't go into those sorts of things.

However, as you well know, when the court makes an order, they say to the winning counsel, "You draft me an order to that effect." Counsel did that. Counsel for Ms. Baier did that. The court looked at the order and in its own handwriting, which Mr. Ungar has failed to bring to your attention, in its own handwriting wrote that Ms. Baier should go for another evaluation and that there should be home study so that the court could make further orders in this case, which we have alleged in Montana and we think is a correct reading, that the court intended continuing jurisdiction at the October hearing.

It was simply returning to the status that we had before. We had a mother who was going to be allowed physical custody of her child while Social Services was looking into it. Then we had the child taken away. We were returning to that status. The child would be allowed to go back to her mother, there would be home studies, and there would be other things to see what further orders this court needed to make.

Ms. Baier did not comply with the order saying contact the psychologist who may do a home study and evaluation, and the evaluation should be completed on December 8, 1987, so that the court will be fully advised in making any further orders it deems necessary.

The court looked at the file, did not see that that had been done. So on December 18, 1987, the court ordered that Ms. Baier complete the evaluation and file it with the court.

Ms. Baier by that time had decided to return to Montana, did so in January by her own testimony, and put the child up for adoption in February, but on March 21 she submitted to the tribal court the evaluation that indicated that she had told the psychologist that the child was in her home when in fact that child was not in her home and was already up for adoption, and those proceedings had been filed in February. It was on that basis that the court, when that was brought to the court's attention, the court decided to have her appear before it and show cause why she shouldn't be held in contempt.

The motion for an order to show cause and the modification for custody was heard on May 2, 1988, and, as generally happens, the court didn't like the order and had us redo it according to its findings, and on May 3, the next day, he signed the court order ordering her to show cause why she should not be held in contempt.

On Monday, May 2—well, I need to go back before then. On April the 28th after the Social Services had contacted me personally and said there is a case going on in Montana, I contacted Duane Varbel, the attorney for Ms. Baier. He indicated to me that her parents had not paid him, so he wasn't going to get involved, but he would call her on the phone, and subsequent to that time that has been verified by Ms. Baier in pleadings in the Montana case, that she indeed was called by her Arizona attorney, the attorney of record in the tribal court proceedings, that she was called and advised that there were tribal court proceedings going on.

I then spoke, after trying to track down who her attorney was, I did get in touch with a person on Monday, May 2, named Michael Coil. I gave him the information with respect to my filings before the tribal court; I informed him that if he wanted to participate there were procedures that he needed to go through, just as there were procedures for me to go through in Montana.

If I expect to go to Montana, or if I expect to go to California, or if I expect to go anywhere to represent the White Mountain Apache Tribe, I



don't simply assume that that court is going to allow me to practice. I go and look up the rules, or I call an attorney in that forum and I say, "How do I do this? Help—I am in White River, Arizona, and I don't have access to Montana's statutes, please help," and I find out what I need to do in order to practice.

But, out of courtesy, I told Mr. Coil that there were procedures in the White Mountain Apache Tribal Court for practicing and that he should follow those procedures. He informed me that he wanted to participate in the tribal court hearing and that perhaps we could work something out before the judge with respect to a telephone conference call.

I also, later that month, and I don't have the date right in front of me because this was a note I wrote to myself at the time this case came up, but later in the month I did receive a call from Mr. Ungar, and I don't dispute his stating that he got in touch with me a few days before the hearing and asked for an extension, and the court, as in many cases—and it happens to me all the time. If you want to hear my complaints about the Montana court, I would be real glad to go into that.

The court chose not to grant an extension of time. That is in the sound discretion of any court. Ms. Baier had notice from three different attorneys. It was her choice not to show up. For her to come here and to publicly complain about a hearing, an *ex parte* hearing that she and her attorney here has said that he advised her not to come, that is her choice.

However, if they didn't like what the tribal court did, there is a very simple remedy. When I lose I appeal. If the Baiers and the Collins didn't like the Colorado, Larimer County transferring this case to the White Mountain Apache Tribe and giving the child back to its mother at that point in time, they could have appealed in Colorado. They chose not to. That is their choice.

Throughout all these proceedings these people have been represented by attorneys. Both in Federal district court rules and in the White Mountain Apache rules, notice to the attorney, and I think in other jurisdictions in which they had adopted pretty much the Federal district court rules, notice to an attorney in the case is notice to the party.

Frankly, attorneys get frustrated all the time that they can't get their clients to do or to say or to act as they would like to have them act, but that doesn't negate the rule. Ms. Baier had notice early in May, May 2nd before that, that there were going to be tribal court proceedings. She deliberately chose not to show up.

Mr. Ungar's statement that she could go to jail is simply not true. We were not requesting that she be put in jail. Furthermore, it's the one situation under the Indian Civil Rights case where she could have gotten out of jail because there is a remedy for that particular fear.

So it's a little strange to bring it up in that way. I mean, it struck me as kind of an interesting twist on all of this.

The motion to continue was denied. The court, as most courts do, looked around and said, "Who is here?" and it didn't issue an order to Oliviana Baier because she wasn't there. So courts sometimes can't make people do something if they are not in front of them.

It issued an order to Social Services to take some action, and that action was to do everything to bring that child back to the appropriate jurisdiction. Social Services and I as their attorney have assisted them in that regard.

So those are the proceedings at the present time. I intend to put the entire Montana proceedings before you. The tribal court has not taken any further action other than to order my clients to go forward and return the child to the jurisdiction of the White Mountain Apache Court. The child is a ward of the White Mountain Apache Tribal Court; that is a particular legal issue before the Montana proceedings; and that basically is the background or chronology.

I want to just respond to an interesting observation. As Ms. Leon said to you, I have not been with the White Mountain Apache Tribal Court as general counsel for very long. I came full time in February, and as you are trying to accommodate a new place and a new job, it occurred to me that I would need to practice in the tribal court at some point in time.

I filed a motion to be allowed to practice before the White Mountain Apache Tribal Court and it took 63 days for them to grant me application. It took me much longer to become a member of the Arizona bar or the New Mexico bar. I don't think Mr. Ungar's 35 days requires comment. I don't think it's very long.

There are a number of attorneys who apparently have filed in White Mountain Apache Court to practice and they filed in February, and they have not been admitted because they haven't paid their money. And if you know anything about bar associations, if you don't pay your money, they are not going to let you practice. I mean, I don't think that is unusual either.

SUBCOMMITTEE CHAIRMAN ALLEN. Ms. Arthur—

MS. ARTHUR. Just a second. Don't cut me off yet. I'm not quite through. I'm just looking through my notes. Please. Thank you. I'm sure it won't be very much longer.

I must state for the record that, whatever Ms. Leon's experience was, it is no longer the practice in the White Mountain Apache Tribal Court for the tribal attorneys to not contact Social Services when we get notices of Indian Child Welfare Act jurisdiction cases in other States. We always contact them, and we have no problem with the State of Arizona. They consistently ask our opinion, and they consistently transfer cases back to White Mountain Apache court, and they consistently work with our social services department with respect to Indian children who are off the White Mountain Apache Reservation.

SUBCOMMITTEE CHAIRMAN ALLEN. What I was going to say a moment ago, not so much in cutting you off, was that in addition to appreciating your testimony, which has been highly useful, I want you to know also that the record remains open for 30 days, and you are certainly free to supplement anything that you have given here in addition to those records from Montana, which you have promised us.

We do have scheduling difficulties which we have only now exacerbated, and I would like to beg your indulgence.

COMMISSIONER DESTRO. Especially, if I can just add, the chronology was very, very useful. If you have a written version of it, it would be great, if you have a docket sheet that you could submit.

MS. ARTHUR. I believe that the Montana proceedings have all of this before it.

COMMISSIONER DESTRO. All right, fine. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. I thank you very much, and I thank all of you.

We shall still take that 10-minute break, and I'm sure most of you now wish it would be 15 minutes instead of 10, but we can only afford 10. Then we shall begin anew.

[Recess.]

SUBCOMMITTEE CHAIRMAN ALLEN. The Commission is again in session. Now we will have a new panel, and we have a substitute, I believe, for Delfred Leslie.

What I shall do is ask each of you to identify yourselves first as we begin. Give us your name, your title, and where you are from, and we'll start with the substitute for Delfred Leslie.

JUDGE DELGARITO. I am Alene Delgarito. I am the associate judge for the Hopi Tribal Court, and I am here on behalf of Delfred Leslie, Judge.

MS. JUE. My name is Frances Jue. I am an attorney, and I am the court counsel attorney.

MR. SIDNEY. My name is Ivan Sidney. I am the Chairman of the Hopi Tribe.

MR. KAHE. My name is Tom Kahe. I am the administrator for the Hopi Tribal Court.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you all. We are glad to have you with us.

Let me administer the oath to you collectively as I have been doing all day.

Before I do this, I will announce to the audience that we have interpreters present for the hearing impaired. If there is someone here who requires this service, we would appreciate your signaling us at this moment, for, if there is not, we will permit the interpreters to relax and call it a day for them.

Thank you.

[Alene Delgarito, Frances Jue, Ivan Sidney, and Tom Kahe were sworn.]

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

We are particularly happy to have the time on this visit to Flagstaff to meet with representatives from the Hopi Nation, which we have not had occasion to do. So we would like to hear from you especially about some of your concerns and also will doubtless have a question or two regarding circumstances, particularly the administration of justice, there at the reservation.

But let us start with you, and I don't have a sense of which of you wishes to go first, but perhaps I should go to Chairman Sidney out of mere protocol if nothing else.

#### **TESTIMONY OF IVAN SIDNEY, CHAIRMAN, HOPI TRIBE**

MR. SIDNEY. Mr. Chairman and members of the Commission, thank you for giving us the time to be here and welcome to Arizona, our homeland.

Mr. Chairman, I am here primarily to meet the Commission. I have never been before this distinguished Commission.

We, the Hopi, have lived with our traditional laws for many years, and today with the tribal government, there are problems arising, and especially as we go toward ensuring that tribal sovereignty is maintained and enforced, we find that we are going to begin to present testimony and to go out and talk about different issues and have our people be given an opportunity also to express themselves.

I am here primarily this afternoon, Mr. Chairman, to thank you for the work you have done, and I believe it's very important that the Commission continue.

I am also here to express my support of our tribal court and our vice chairman, Mr. Vernon Masayesva, who will also offer some testimony in the public comment time, and I fully support him as well.

In these times we don't seem to appreciate what efforts you are trying to do, and I might say, Mr. Chairman, I am here to say we appreciate the work you are trying to do here, and sometime our people will see what we are trying to do, sometime tomorrow or the following days to come, but I feel we have the same objective.

I apologize that I can't stay here very long. I have another appointment to go to, but I felt it was very important that I come at least to meet all of you with my personal appearance here and to give our people the support in whatever their testimony may be. Whether it is for or whether it is against, I feel it's important that we hear these things and go forward.

As one of the leaders of this country said, we are better to resolve our own differences here, but with your help we can do so and the horizon looks very promising for us.

Thank you, Mr. Chairman and members of the Commission for allowing me to be here, and I turn the time to our representatives here. Again, thank you for the time, and I am sorry that I cannot be here throughout this hearing.

SUBCOMMITTEE CHAIRMAN ALLEN. Well, thank you very much. We are glad to have had you for as long as we could.

MR. SIDNEY. Also, excuse me, Mr. Chairman, I would like to state that if the record could be left open so if something should arise, that maybe we can present that later. I feel that if we can ask that, it would be helpful for us.

SUBCOMMITTEE CHAIRMAN ALLEN. By all means, Chairman Sidney, the record will remain open for 30 days so that anything can be added to it.

MR. SIDNEY. Thank you, Mr. Chairman, and do come and see our reservation sometime.

SUBCOMMITTEE CHAIRMAN ALLEN. We shall be happy to.

MR. SIDNEY. Thank you and have a good day.

SUBCOMMITTEE CHAIRMAN ALLEN. Ms. Delgarito.

#### **TESTIMONY OF ALENE DELGARITO, ASSOCIATE JUDGE, HOPI TRIBAL COURT**

JUDGE DELGARITO. I also thank you for giving me the opportunity to make a statement on behalf of the Hopi Tribal Court and the Hopi people.

There was a complaint filed with the Commission by Mr. Lee Phillips against the Hopi Tribe complaining about a certain process that was denied to his client. I am going to read verbatim, almost verbatim from the statement that was prepared for Judge Leslie. I was not prepared to appear before the Commission today, but I am happy I am here today.

It states that to summarize the legal proceedings of the case which Mr. Lee Phillips had complained about against the Hopi Tribe was that there were criminal complaints filed against his clients, namely, Willie Lone Wolf, Scott Sam Tso, Thomas Catney, and Reggie Deer.

The complaint alleged that they had destroyed certain fences on the Hopi partition land and resisted arrest. Those were the criminal complaints that were filed against the four defendants.

The defendants appeared for arraignment, and I believe the criminal complaints were filed on April 7, 1986, and they appeared before the court shortly after that for arraignment, and each one of the defendants entered a plea of not guilty to the charges. Thereafter, they were released on their own personal recognizance pending a pretrial hearing.

At the pretrial hearing, the defendants' attorney, I believe, who was Mr. Lee Phillips, requested an immediate evidentiary hearing on the jury venire, and the court granted the Hopi Tribe's request for some time to prepare for the hearing and giving the defendants 2 additional weeks to answer to the Hopi Tribe.

During that time, the defendants filed four motions to dismiss complaints, including one for inability to impanel an impartial jury, which is central to Mr. Phillips' complaint before the Commission.

There is a copy. I do not know if you do have a copy of the order issued by the tribal court which includes the statement of the proceedings. The order cites only the provisions of the Indian Civil Rights Act of 1968 which addresses the requirement of a jury in section 1302, subsection 10, which states a jury shall consist of not less than six persons. The criteria for selection of jurors to sit in Hopi Tribal Court is based on tribal membership, residence, and competency.

I will also add of my own knowledge that the Navajo Tribal Code also requires that the jurors be members of that particular tribe, the Navajo Tribe.

In the order it also states and cites a United States Supreme Court case, namely, *Morton v. Mancari*, which can be found in 417 United States Supreme Court, page 535, a 1974 decision which rejects the argument that laws protecting the separate status of tribal Indians are in violation of equal protection which requires strict scrutiny by the courts. On the contrary, because Indians have been classified as distinct political entities rather than distinct racial groups, laws protecting the separate status of tribal Indians do not violate the principle of equal protection if they are rationally related to the distinct constitutional status of the tribes and to the unique Federal-tribal relationship.

In the Hopi rules, it also contains a challenge process for the jury selection. During the jury selection, the defendants' attorneys were given an opportunity to challenge procedures. The court allowed the defendants' attorneys a great deal of time to question the potential jurors on almost an unlimited scope of questions.

After the jury was seated, the trial was conducted in a fair manner. However, the counsels had agreed to defer prosecution. I believe prosecution was set for a term of 6 months with the conditions that these four defendants were not to engage in any unlawful activities such as what was alleged to have been committed by the four defendants.

And upon the fulfillment of the requirements of this deferred prosecution, the case was dismissed. This was deferred for 6 months, which began, I believe, on March 31, 1987, and Mr. Phillips had filed his complaint with the Commission shortly after that, before the deferred prosecution had been fulfilled.

It is disturbing to us that Mr. Phillips had filed this certain complaint without having exhausted all the remedies of the court, namely, the appellate procedures which were available to him. We do have an appellate court in the Hopi Tribal Court, but no appeal was made on this particular case here.

The writ of habeas corpus to the Federal district court was also available, and I do not believe he had filed any such writ to the district court for relief for his clients there.

The statement that I am making to you is based on what I do know about the case. I was not the sitting judge at that time. I was a court advocate practicing in the Hopi Tribal Court. I had occasion to sit in through the hearings at that time. So this is based on what I do know about the case and what I have read in the case after having become a judge with the Hopi Tribal Court.

Although our courts are not perfect, however, we try to conduct our courts in a fair and just manner and in a professional manner which provides substantial justice to those who come before our courts. That is the reason why I am very happy and pleased to present this statement on behalf of our tribe, the Hopi Tribe, and the Hopi Tribal Court.

In light of the principles established by the United States Supreme Court, I feel that the complaint that Mr. Phillips had filed with the Commission was unjustified.

Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

Mr. Kahe.

#### **TESTIMONY OF TOM KAHE, ADMINISTRATOR, HOPI TRIBAL COURT**

MR. KAHE. Thank you. Thank you for the opportunity to address the members of this Commission.

As administrator for the Hopi Tribal Court, it is my job to ensure that the courts address the needs of the people it serves. I am here today to testify to the significance of tribal courts and the need to maintain the jurisdiction of tribal courts.

I attended the hearings which the Commission conducted in August 1987 and heard numerous complaints then as I have heard today. I wish to point out that not all tribal governments and tribal courts operate like those on which complaints have been filed.

The Hopi Tribal Court has not, to my knowledge, had any complaints filed, except for violations of individual civil rights filed by Mr. Phillips. Given the applicable law on the large violations, it is my opinion that the complaint against the Hopi Court is not justified.

I believe Judge Leslie bent over backwards to ensure the defendants a fair and just proceeding. I am concerned that the complaints filed with and heard by the Commission will result in recommendations by the Commission to take certain actions which will affect all tribes, including those whom no complaints have been filed.

The tribal courts were established in recognition of rights of tribes to preserve their customs and traditions, as well as the right to self-

government. Any amendment to the Indian Civil Rights Act which would broaden the review process of Federal courts would result in an erosion of tribal sovereignty and self-determination. This is not to say that the concerns of individuals who allege violations should not be addressed.

We applaud the efforts of the Commission to listen to the concerns. However, the Commission should keep in mind the necessity of preserving tribal sovereignty, as well as protecting individual rights.

The tribal courts are the new kids on the block in terms of experience with the Anglo-American judicial system. In addition, the tribal courts, not unlike the Anglo-American courts, are facing new and more complex legal questions.

In order to address these complex issues which are occurring more frequently, the tribal court must better equip in terms of personnel, data, and equipment. The human and material resources of tribal courts is usually very limited due to limited funds. However, given time and resources, I believe the tribal court can well operate in a manner whereby such incidents of alleged violations will occur with less frequency.

It is my sincere hope that the tribal courts will be permitted to maintain their existing jurisdiction and will be given the opportunity to exhibit their ability to carry out their duties in a fair and just manner.

Again, I thank you for giving me this opportunity to testify before the Commission.

**SUBCOMMITTEE CHAIRMAN ALLEN.** Before you close, Administrator, could you tell us a few things about the court system in Hopi? Is your court system established in your constitution or is it established by the tribal council, for example?

**MR. KAHE.** The Hopi Tribal Court is established by the tribal council by an ordinance which we call ordinance 21.

**SUBCOMMITTEE CHAIRMAN ALLEN.** Do you also have among your ordinances a sovereign immunity statute? Do you know whether the Hopi has a sovereign immunity statute in the code?

**MR. KAHE.** No, I don't believe we have a sovereign immunity statute there.

**SUBCOMMITTEE CHAIRMAN ALLEN.** So if a plea of immunity is made before the courts, it's referred to tradition and not to any particular statute or legal ruling?

**MR. KAHE.** Yes.

#### **TESTIMONY OF FRANCES JUE, COUNSEL, HOPI TRIBAL COURT**

**MS. JUE.** The tribes maintain that there still is the inherent right to sovereignty.

**SUBCOMMITTEE CHAIRMAN ALLEN.** The inherent right to sovereignty?

**MS. JUE.** Yes.



SUBCOMMITTEE CHAIRMAN ALLEN. From time immemorial. Yes, understood.

MR. MILLER. Sovereign immunity or sovereignty?

MS. JUE. Sovereignty.

MR. MILLER. What about sovereign immunity, has that been judicially adopted, the doctrine of sovereign immunity?

JUDGE DELGARITO. The doctrine of sovereign immunity is not addressed in the constitution. However, each village has its own sovereign powers and the villages themselves do not, the people in those villages will not accept any infringement on the sovereignty of the people. It can be addressed at the village level.

MR. MILLER. I'm still unclear as to whether or not in that kind of a situation the village would be immune from a lawsuit against it or the Hopi Nation would be immune from a lawsuit against it.

JUDGE DELGARITO. Our government is unique. Each village has the powers and the authority to regulate its business in its own village, and therefore, I believe that if someone was to, and I hate to address this right now, but I do believe there would be some sort of remedy available to the village and to the complaining person.

COMMISSIONER DESTRO. I just want to make sure, and we don't want to get to issue advisory opinions on what would you do if, and we just want to make sure that you understand that. But basically what you are saying is that, assuming a situation came up, you feel that it could be handled expeditiously both preserving the integrity of the village's sovereignty as well as giving the complaining party some kind of remedy that would leave them to go away, maybe not completely happy, but feeling that they had been heard.

JUDGE DELGARITO. That's correct.

SUBCOMMITTEE CHAIRMAN ALLEN. What do you take to be the status of the ICRA in Hopi? How are cases brought under the Indian Civil Rights Act and what, in your judgment, is the status of that act?

JUDGE DELGARITO. Is that directed at any one person?

SUBCOMMITTEE CHAIRMAN ALLEN. Any one of you who would choose to respond.

MS. JUE. The Hopi Tribe recognizes the Indian Civil Rights Act and we do the best in the courts to adhere to this Civil Rights Act. As a tribe we have to weigh, as was stated earlier, the considerations of the need of the tribe to be sovereign and to have the right to self-government versus individual rights, and I think that the Hopi system itself, the traditional system, has addressed that pretty well.

SUBCOMMITTEE CHAIRMAN ALLEN. Is it actually the case that you may sometimes have to consider sacrificing the individual for the sake of the tribe? Is that what I am understanding you to say?

MS. JUE. I don't think that it would be sacrificing the individual. That's a difficult question because that is a difficult question that all tribes have to face, that balancing.

COMMISSIONER DESTRO. Let me interject because you made a connection that may answer our question. I mean, in the traditional adversarial systems of justice that exist in the State and Federal systems, it's usually somebody wins and somebody loses.

Now, if I understand you correctly, that the traditional system may not operate that way, that in tradition you may be able to give everybody a little bit of something. Could you describe how that is done? What is the hallmark of the traditional Hopi way of resolving disputes, if it is not the all or nothing proposition in the Federal and State systems? Is it like a mediation or is it like an arbitration? You don't have to use those terms, but if you could describe the process a little bit, it would be helpful for the record.

MS. JUE. According to Hopi tradition, in the villages the person that one would go to, who would I guess serve in the sense of the mediator, would be the Kikmongwi, who is the village leader. The concerns would be taken to him and based upon what he has been taught is the way that the society should be run in order to maintain the society, then his decision would be made upon that basis.

That is not to say that in all cases everyone would be happy. There is certainly that, you know, someone wins and someone loses. It's not—everyone isn't happy.

COMMISSIONER DESTRO. Can that decision in one way or another be appealed up into the tribal court system if someone felt that they were not treated fairly in that traditional system?

MS. JUE. Yes, it could be.

JUDGE DELGARITO. That has happened. There are village decisions that have been appealed to the Hopi Tribal Court. During this process, the village Kikmongwi, the leader or the chief of the people, waives its jurisdiction, and then it goes on to the appeals court, to the Hopi Tribal Court.

COMMISSIONER DESTRO. And during that process, basically, would you say in your experience up to today, because you have indicated that there has only really been one claim that you violated the ICRA, that the specifics of the ICRA in one way or another are handled in that informal process at the beginning and then throughout the process?

JUDGE DELGARITO. Let me make a distinction between the new tribal courts and the village process. The tribal courts have the ordinances, as we have informed you. The laws which are contained in these ordinances are subject to the Indian Civil Rights Act.

In my court I assure the defendant, that that particular defendant is given all the rights as prescribed by the Indian Civil Rights Act; that is, the

criminal defendant is given the rights prescribed by the Indian Civil Rights Act, and those rights are also prescribed by ordinance 21. So the criminal defendant is assured and given those rights.

In the village level, at one time the same criminal violations were handled in a manner where the defendant was disciplined and not very harshly. However, they were disciplined and given sanctions, and they still have the right to speak for themselves or to defend themselves at these hearings.

But since the Hopi Tribe has adopted the laws of the Anglo court system or the Anglo system, then those types of disputes are no longer settled at the village level. I would say now that only the civil matters are resolved at the village level.

SUBCOMMITTEE CHAIRMAN ALLEN. That is a very important distinction. I assume, then, that you are beginning to build caselaw in collecting these decisions.

JUDGE DELGARITO. Yes, we are.

SUBCOMMITTEE CHAIRMAN ALLEN. It would be useful if you could share those with us, any that touch upon civil rights questions and not just complaints such as the one to which you refer, but any particular cases in which you had to arrive at judgments pertaining to the Indian Civil Rights Act.

If we might be able to get a set of those from you, we would greatly appreciate that. I don't know if you can pull them together for us, but I'll leave it to counsel to talk with you and see what we might be able to pull out of that.

JUDGE DELGARITO. Okay.

COMMISSIONER DESTRO. I understand very well the concern that all of the tribes have with respect to maintaining their sovereignty while accepting, and some of the tribes do and some of the tribes don't, accepting the ICRA as being determinative.

Now, usually the issue is posed as, is there going to be any review at all of ICRA claims. And then the question is, is it going to be in Federal court or is it going to be somewhere else? Usually nobody ever talks about where that somewhere else might be that would be consistent with notions of tribal sovereignty.

Several of the judges that I have spoken to in the northern plains have indicated that their idea would be an intertribal court of appeals of sorts, so that you were dealing with judges that had an appreciation for the needs of tribal sovereignty and tribal customs.

If there were to be recommendations, and I am not saying that there are going to be, with respect to review of ICRA determinations by tribal courts, assuming that you don't want it to be in Federal court, where ought it to be?

MS. JUE. Well, you're correct. I think that we feel that that's one of the positions that we are stating, that we do not wish any more of the review process to be taken away from the tribes. I think that the idea of having an intertribal court system is certainly one that could be considered, and I think that perhaps that might be one of the more agreeable recommendations.

However, I think our position here today is that before that happens, we feel that, as Mr. Kahe said, for us this is a pretty new system. The Hopi Tribe, in particular, has been around for centuries, and our Village of Oraibi is reputed to be the oldest continuously inhabited village in the United States, if not the North American continent. So we have had in place a system, and to be able to mesh the system with the Anglo-American system I think, as Tom stated, that we would be able to do it.

Unfortunately, maybe we have made some mistakes along the way, meaning the tribal courts and tribal governments, but I think our position would be that we need some more time and some help because one of the problems you would get into if you develop an intertribal court council is then you would have to deal with what is the particular tradition and custom of each of the tribes, and I think just getting over that first hurdle before you even get to the issues in the case would create a tremendous workload.

COMMISSIONER DESTRO. Well, it's certainly not a complete answer to sovereignty. I just thought I would put it on the table.

The last question I have for you is probably the most important in the sense that all of the tribes have indicated the same feeling that you have, that this is new, we need to have our opportunities to make our mistakes, and before you judge us harshly, why don't you give us an opportunity to show what we can do.

As a practical matter, what steps do you think that we could recommend to Congress and the President with respect to helping you to develop your system and do that meshing? Let me just give you a couple of examples that I've heard. One would be that instead of passing the funding through the tribal councils or the BIA to have it directly appropriated for the support of tribal systems. Other questions like training and bringing people into the Federal judicial system training process where you actually work with judges and come under the wing, the protection, if you will, of the Chief Justice of the United States, and any number of questions like that that I've heard.

What would you suggest that we recommend?

MS. JUE. I like those suggestions. I think that the tribal courts—I know at least the Hopi Tribal Court has attended many training sessions in an effort to be able to deal not only at the basic level of how tribal courts should operate, but increasingly as the issues get more complex, it has placed more of a burden on the tribal courts because most of the tribal

court judges are not attorneys nor have they gone to law school, but yet they are having to listen to the arguments and make decisions on some very complex issues. I think to date, and I would like to commend the Hopi Court, they have done a pretty good job in being able to decipher the law as it is and come to some very good decisions.

I think that the other suggestion, of having the funds come directly to the tribal court system, I think is a very good one because many times if it goes to the administration, it tends to get lost, you know, in administration and not too much for programs.

From my experience, the advocates and the tribal court judges are very willing to attend seminars and to learn as much as they can about current caselaw and about the whole American jurisprudence, and I think that those are good recommendations.

SUBCOMMITTEE CHAIRMAN ALLEN. I just have one last question. You have listened to us spend a lot of time today discussing the ICWA, the Indian Child Welfare Act, in relation to the ICRA, and I would just like to inquire generally what your experience is under the ICWA at the Hopi. Have you run into difficulties administering the law or have you been called upon to do so at all?

MS. JUE. Yes. As a matter of fact, we do have a couple of cases pending right now with an Indian child whose mother resides on a pueblo in New Mexico, but we have not reached a result in that case. That case has just been filed.

SUBCOMMITTEE CHAIRMAN ALLEN. Well, as you know, we have looked at it to date primarily from the perspective of plaintiffs who were trying to consummate or effectuate an adoption. We haven't had presented in any comprehensive way the perspective of a tribe, and I know that there are tribal concerns. I am aware that the Cherokees, for example, have an Indian child welfare agency, but they are frustrated because they haven't been able to do anything yet. They haven't gotten technical support from the BIA, and therefore, they are expressing great frustration, and I regret that we don't have them here today to talk to us.

From your perspective in trying to keep the tribe in order and to administer the affairs of the tribe, do you find the ICWA to be workable or does it impose pressures and tensions that you would rather see altered in some way?

JUDGE DELGARITO. I will speak for myself on that issue there. Since I have become a sitting judge with the Hopi Tribal Court, there has been some ICWA cases before the court, but what is provided by that particular law for placement of children has been complied with. Most agencies out in California and Utah and other agencies have been notifying the Hopi Tribe of these placements. Therefore, I do believe that we are in compliance and they are in compliance with placing children in other homes, non-Indian homes or Anglo homes, and we are fortunate to have

Hopi Tribal Children's Court counselors who act very quickly to go and tend to these matters.

SUBCOMMITTEE CHAIRMAN ALLEN. When they do this, do you begin by simply asserting a broad jurisdiction and bringing the child back to the reservation or do the child court workers visit the States where the adoption is pending and make an analysis on the spot about what is best for the child?

JUDGE DELGARITO. They usually make a visit to the other State and make an analysis and evaluation, and they are quick to notify, again in this case, the village chief leaders. If they wish to intervene at that time, then they will do so.

SUBCOMMITTEE CHAIRMAN ALLEN. Anything else from my colleagues?  
[No response.]

I am very grateful again for your coming here. We enjoyed having the opportunity to talk with you, and we expect we will do so again at some time. We look forward to hearing your reaction to not only the transcript of this hearing, but the ultimate report that will come out of it. Thank you.

JUDGE DELGARITO. Can I say one last word?

SUBCOMMITTEE CHAIRMAN ALLEN. By all means.

JUDGE DELGARITO. This is on behalf of all the Indian courts that I have worked with, namely, the Hopi Tribal Courts, of course, and the Navajo Tribal Courts and other small tribal courts that I have had an opportunity to appear before and practice before their courts.

Although the Indian courts are not perfect and we have made mistakes, but because of those mistakes we have become stronger, and I believe that the judges, the people who are now practicing before these courts are competent enough to bring forth issues that are challenged or that make us aware of what is happening now and what we should be aware of, like these reviews by the Commission and so on. So that keeps us on our toes. I do appreciate having come before this court, but this is for all the Indian courts, and I think we should keep our own courts on our reservations. Thank you.

## **Open Session**

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much.

We come now to that portion of the program which is set aside for public comments. Anyone who is present has the right to request to appear before the Commission and to speak for 5 minutes.

There are several of you who have signed up. I am going to call off four names at a time and ask you as I call your name to come up and take a place at the table with a microphone.

Edward Johnson Little, Mary Cleland, Coretta Johnson, and Lula May Stago, and if I mispronounced that, forgive me, but I am doing my best.

We will identify you one by one and have you spell your names for the court reporter as you do so.

Before we reach that position, I will call out the names of the next four so that if you are here, you can be prepared to come up afterwards.

George Chavez, Michael Day, Vernon Masayesva, and Alfred Curley would be the next four.

Meanwhile, I will administer the oath to the four we have, and then I will ask you to tell your names and give us your addresses.

[Edward Johnson Little, Mary Cleland, Phil Stago, and Lula May Stago were sworn.]

SUBCOMMITTEE CHAIRMAN ALLEN. We will begin on my left. If you will tell us who you are, how to spell your name and give your address.

MR. STAGO. My name is Phil Stago. I am with the White Mountain Apache Tribe. Stago is spelled S-t-a-g-o.

SUBCOMMITTEE CHAIRMAN ALLEN. And your address?

MR. STAGO. My address is Post Office Box 220, White River, Arizona.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you. Next?

MRS. STAGO. My name is Lula May Stago. My address is 921 North Campbell, Winslow, Arizona.

SUBCOMMITTEE CHAIRMAN ALLEN. Next.

MS. CLELAND. My name is Mary Cleland. I am a member of the Fort Peck Sioux Tribe. My address is 6819 South 41st Street, Phoenix, Arizona.

SUBCOMMITTEE CHAIRMAN ALLEN. Could you spell your last name, please?

MS. CLELAND. C-l-e-l-a-n-d.

SUBCOMMITTEE CHAIRMAN ALLEN. Next.

MR. LITTLE. My name is Edward Little. I am the president of the Navajo Rights Association. My address is Post Office Box 855, Tuba City, Arizona.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

We will begin with Mr. Stago, 5 minutes. I will have to hold you all to the time and I hope you understand.

#### **TESTIMONY OF PHIL STAGO, COUNCIL MEMBER, WHITE MOUNTAIN APACHE TRIBE**

MR. STAGO. I thank you, Mr. Chairman, for giving me the opportunity to let my views be known.

I am also a member of the White Mountain Apache Tribal Council. I have been a member on the tribal council for 8 years. I am a graduate from Northern Arizona University right here locally, and I have worked with the tribal government as one of the top executives in management for the tribe.

What I would like to express today is I am a strong believer in the civil rights of people, and believe me, I have paid some heavy prices in the past

because of it. Because of being a young Apache leader, a young person and not a traditional person per se, I have different views and a different outlook on civil rights than my elders would.

Back in 1976 I became the youngest tribal council person on the White Mountain Apache Tribal Council. At the time I was fresh out of college. I was only 24 years old and the rest of the council people were around 70 or 80 plus. So the differences of things on how civil rights is viewed is totally different from the way I look at it as a young Apache and as an educated leader than how they look at it, the other, elder people.

So in my tenure on the tribal council, now going on 6 years right now, I have seen many tribal leaders abuse the rights of our own people, Apache people.

I, as a leader, even though I am a high-ranking official of the nation, I do not have the right I feel to abuse the every-day Joe Apache on the street or in the village. I do not believe in that, and that's the reason why I'm here. And if you look around the chambers, here all day there are not many tribal leaders, and I am proud to be here.

I'll be probably tied down over the anthill, one of the Apache tortures they used to do years ago, put honey in my ears and tie me on the anthill, but that's okay. I've been there before.

The reason why I'm here is that we as Indian nations and as Indian leaders should not stand behind the guise of sovereignty and under some of the laws that have been passed over the years by the Federal Government. We should not use them as a shield, even though we are sovereign nations as we call ourselves.

I have a problem, and I wish somebody would answer, "What do you mean by when you call yourself a nation, or when you call yourself a sovereign nation or you have sovereign immunity and all these legal terms that are used all the time?"

Many tribes use these terms to shield themselves while they go and violate the people's civil rights. I don't like that, and I do not agree with that. I would like to see you, the people, or somebody with the Federal Government make up your mind, what do you mean when you have tribal sovereignty, you have jurisdiction and all these things? Define the words, and how do you relate these definitions to the tribal nations?

I don't speak for other nations. I'm just speaking for myself here, because I have seen many abuses of civil rights of my own people by high-ranking leaders, and they say, "Well, we have sovereign immunity; we have jurisdiction," and all these terms that you've been hearing all day long here, but let's do not stand behind that.

I speak as a leader, not in an official capacity right now, but I do not want to see me abusing one little Apache down here in the village and say, "Hey, I'm a high-ranking official, and therefore, I'll do anything to you and get away with it." I don't care for that.



It's just that we as Indian people have our individual freedoms. The Hopi Nation expressed a few minutes ago their traditional beliefs and their traditional sovereignty.

I, as an Apache, a lot of times I've seen that traditional Apache justice is not very fair at all, and this is where we are adopting this new American, and some people call it the Anglo way of life, but I do not really care to use that term either.

Thank you, sir.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much.

Ms. Stago.

### **TESTIMONY OF LULA MAY STAGO, NAVAJO TRIBE, WINSLOW, ARIZONA**

MRS. STAGO. Again, my name is Lula May Stago. This is my husband right here. I graduated from the university here in Flagstaff in 1974. I got a BS degree in elementary education and then again in 1975 got an MA in school administration. Right now I continue with my education, and I am also employed with the BIA as a school principal and am going on my seventh year.

I am here today because I am being abused by tribally elected leaders, and I feel discrimination based on political influences and pressures. The conflicts that so far I have had with my school board members have absolutely nothing to do with my performance. In fact, I have demonstrated an outstanding performance as a school principal.

I have even been physically attacked by a tribal member, a tribally elected member as a school board member in December of 1987. I feel that my rights, basic civil rights to employment, to job security, and safe working conditions have been violated.

As I have mentioned, I am a member of the Navajo Tribe and also a Federal employee. Yet, I have been made to believe that I have no recourse. Who then do I turn to? And I would like somebody to answer that for me, because so far I have not been offered relief except just to be content with problems which, in spite of doing a good job, makes my job even harder than it already is if you want to do a good job.

My supervisors and my superiors are limited as well by statutory regulations which have no control over elected tribal members and even from just the talk here the tribe as an entity.

I have been told that there are our traditional problems and these are the reasons why. I have been told there is nothing that can be done even if jurisdictional issues were not concerned. The tribe does not even have ethics laws in place.

So I am here, and everything that I have been saying do have school board minutes and I have written documentations to support what I am saying. I strongly believe, and in fact I should say I know, that my

problems that I am having with my board members as a school principal, a Federal school principal, have implications for other principals employed by the Government.

Also, 25 CFR needs to be amended to define perhaps more specifically the roles of school boards and have some procedures for enforcement for situations like I have.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

You all are doing a very fine job of staying on time, and I appreciate it. Ms. Cleland.

#### **TESTIMONY OF MARY CLELAND, FORT PECK SIOUX TRIBE**

MS. CLELAND. I have here on my left side a copy of the Indian Civil Rights Act. I have it open to *Red Elk v. Silk*. I bring with me a complaint from Iris Red Elk, who was a practicing lay advocate. She established this caselaw in the Indian Civil Rights Act here, the basis for it.

Since then she has angered the political people on our reservation, on the Fort Peck Sioux Reservation, and she has been disbarred. Her disbarment is that the Fort Peck Tribe disbarred her from practicing as a lay advocate in the Fort Peck Tribal Court without any established authority. They had no statutes available to implement disbarment. The Fort Peck court refused to accept a civil lawsuit regarding this act of disbarment. There were no statutes regarding disbarment when this disbarment occurred. I have been denied redress of grievance of my civil rights.

I would also like to present another issue, and that is the cross-deputization of the State of Montana Roosevelt County Sheriff's deputies. This cross-deputization gives total arrest authority, but also lacks statutes for redress of grievance, which is a basic constitutional law.

The abuse of power is flagrant. No one wants to be responsible for the abuse of actions of the Roosevelt deputies. The Federal law specifies that the offense, the assault offense must be of a felony level for the Federal courts to take action. The Fort Peck Tribal Court say they cannot prosecute non-Indians for minor assaults.

That is hers that I bring for her.

And I am here because I also was disbarred without notice because I tried to represent her in getting her reestablished. What they did was they just said, "You can't file in here. You are not allowed to participate as an advocate, and we won't accept your paperwork."

So I went to the appellate court, the tribal appellate court, and I wanted to know why. I hired an attorney with a jurisprudence degree, and she got me reinstated through the appellate court because the tribal court couldn't establish why they were doing this to me. Shortly thereafter, they disbarred Mary Zimmian, the attorney that represented me, and they are again not accepting myself before the tribal court.

During this time I had a child get in trouble, my 15 year old. What happened then was that the tribal court severed my parental rights. I petitioned the court and I petitioned saying that, "Petitioner believes and therefore alleges that said custody of my child is improper and without valid court order, because petitioner was never properly served any valid court orders concerning her son, nor has she been summoned to juvenile court for any such custody hearing or trial."

I was never notified of the severing of my parental rights. They did it on this one child. I had four other children. Nobody presented any petitions against me, and my question as a parent has never ever been questioned. They took my child and they used him as a political pawn here.

They took him and they put him in solitary confinement for 45 days, which is a violation of the American Correctional Association rules. You cannot take a 15 year old and put him in solitary confinement past 30 days.

When I got him out I took him to—they let me file the writ of habeas corpus, and they gave him back to me after 45 days. I took him to Indian Health Service. He was suffering from malnutrition, and his muscles had grown fibrous from inactivity and from sitting and standing in solitary confinement.

I'm sorry, but I'm just a little angry over it.

And then from there I became very concerned about what was going on with this Bureau of Indian Affairs-operated detention center. I started asking questions, "What are you feeding these kids?"—I have a whole list of things. I went to John Melcher in Washington, D.C., concerning this Bureau of Indian Affairs-operated detention center. They had no cook, no nutritionist, no exercise plan, no dietician, no exercise plan that was in operation, and John Melcher stated, "If your allegations are found to be so, we will close the detention center."

My allegations were found to be so. The documentation of my child was found to be so, and the detention center closed.

But what has happened next is that the tribal court is now emancipating these Indian children. With no place to put them, so what they do is they emancipate them into adults and place them in the adult jail for their misdemeanors.

SUBCOMMITTEE CHAIRMAN ALLEN. You have several documents there, Ms. Cleland, which I would ask you to take just a few seconds to identify each for the record, and then present them to us so that we can enter them into the record of this hearing.

MS. CLELAND. The first one is Iris Allrunner's notice to the court, her complaint that she has been disbarred.

My notice to the Civil Rights Commission on my complaint as to how I was treated as an advocate, what was done to my child as political repayment, my writ of habeas corpus.

This one goes with Iris Allrunner's. It is a cross-deputization agreement, what it covers and what it is.

A memorandum at law in support of petition for writ of habeas corpus.  
A motion to amend complaint.

I also wrote to Marvin Sonosky, and I stated to him that I claimed that there was a violation of the Indian Child Welfare Act and there were civil rights violations in regard to my child.

I have an affidavit from my child. A supplemental claim that has been signed. The affidavit from my child is notarized. I have an affidavit as to what happened from what I had seen of what they did to him.

My child is in custody of the United States attorney. He was sent there because of faulty charges. This is a brief done by J. Douglas McVay, 1701 First Interstate Tower, 3550 North Central Avenue, Phoenix, Arizona.

In this brief he states, "This certainly raises an inference of ineffective assistance of counsel, and it is also incriminating evidence that the government relied upon in deciding to file its information was a direct product of potentially illegal arrest."

SUBCOMMITTEE CHAIRMAN ALLEN. Okay. If we could just have them all identified and then entered into the record, whatever it is that you are leaving with us.

Ms. CLELAND. This here brief is fully intact and true and accurate as I have here, and I want the Civil Rights Commission to read it.

SUBCOMMITTEE CHAIRMAN ALLEN. That is a copy of the brief from which you were just reading?

Ms. CLELAND. Yes. This is here.

SUBCOMMITTEE CHAIRMAN ALLEN. Could you pick those up, those documents, and they will be entered into the record of this hearing, without objection.

Thank you.

Ms. CLELAND. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Mr. Little.

#### **TESTIMONY OF EDWARD JOHNSON LITTLE, PRESIDENT, NAVAJO RIGHTS ASSOCIATION**

MR. LITTLE. On June 18, 1988, former Navajo Tribal Judge Jerome McCabe declared to disband the Navajo Rights Association.

The Navajo Rights Association is an independent, bipartisan, nonprofit association. The group advocates civil rights.

On June 24, 1988, the Navajo Tribal Division of Social Welfare denied funds to handicaps on the Navajo Reservation. They were denied freedom of expression under the first amendment of the United States Constitution. The funds are needed to maintain their survival.

On July 19 Navajo attorneys, judges, and other Navajo people were told not to attend the ICRA hearing in Flagstaff, Arizona. Some of those

people were tribal employees. They were threatened with their jobs of being fired or being replaced immediately if they ever attend the ICRA meeting.

The Navajo tribal government denied independence of the judicial system which the Navajo tribal government had the Navajo Education and Scholarship Foundation dispute and a decision was supposed to be made. Instead, the tribal government overruled the court decision, and the judges were threatened to be replaced, and for that reason none of the judges are attending the ICRA.

The Navajo people on the reservation questioned the legality of the land purchase from Tom K. Tracey, but were told by Chairman Peter MacDonald that the Navajo people had no rights to question the Navajo tribal government's purchase of any land or anything that is being done by the Navajo tribal government.

On July 19, 1988, Navajo Attorney General Michael Upshaw said Peter MacDonald told him to take civil rights panel probing cases to Federal court to question whether the Commission has the right to investigate the tribal government code. Any civil rights group, whether it's the U.S. Civil Rights Commission, has no damn authority to investigate the Navajo tribal government, said Peter MacDonald. Chairman Peter MacDonald commanded the advisory committee and the budget and finance committee to oppose the heavy-handed tactics of the Commission because the tribe feels it does not have the jurisdiction to investigate the tribal government.

The Chairman of the Navajo Tribal Council, Peter MacDonald, said the Commission's actions are contradictory to the recent statement by President Reagan that he would treat the tribe as equal partners. Peter MacDonald said the Navajo tribal advisory committee and budget and finance committee are upset that the Commission continuously fails to realize that the tribe has a Bill of Rights which affords tribal members due process and equal protection.

He stated, we are more than willing to take any suggestions regarding improvement of our judicial system, but the advisory committee and the budget and finance committee make the laws for the Navajo people and not the Federal Government, said Peter MacDonald.

For that reason, a lot of tribal employees and a lot of former tribal employees were threatened if they come to this meeting. They were told yesterday that if they ever come to this meeting, there will be somebody here to see them and they will lose their jobs. That is why not very many of them are attending this hearing.

We concerned persons hereby petition against interference of the Navajo Tribal Council in the operation of the Navajo Education and Scholarship Foundation. We petition for the Navajo Education and Scholarship Foundation to remain a private foundation and not a tribal entity.

Furthermore, we petition that the Indian Civil Rights Act be acknowledged and adhered to. All the violations of the Indian Civil Rights Act must cease. We petition that the Indian Civil Rights Act no longer be violated by disobeying tribal court orders.

Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

You're reading from a document there. Do you wish to submit that for the record, Mr. Little?

MR. LITTLE. I will submit this document, sir.

SUBCOMMITTEE CHAIRMAN ALLEN. Very good. We will receive it into the record, without objection, as your testimony.

Thank you all.

We will proceed to the next panel which consists, as I read before, of George Chavez, Michael Day, Vernon Masayesva and Alfred Curley.

While we are waiting, I will ask if Coretta Johnson is in the room yet? [No response.]

Is there a Coretta Johnson?

VOICE. Right here, sir. It's Loritta Johnson.

SUBCOMMITTEE CHAIRMAN ALLEN. Have her take a place right at the end there. We missed her before.

Again, I will start on my left-hand side and ask you each to identify yourselves by name and address and after you have gone through doing that then I will administer the oath of office. I will like you each to spell your last name for the court reporter.

MR. CHAVEZ. Thank you, Mr. Chairman. My name is George Chavez. That is C-h-a-v-e-z. My mailing address is P.O. Box 2453 in Gallup, New Mexico 87305.

MR. CURLEY. My name is Alfred Curley. I am a Navajo. My mailing address is P.O. Box 1562, Shiprock, New Mexico 87520.

MR. MASAYESVA. Vernon Masayesva. That is spelled M-a-s-a-y-e-s-v-a. I am vice chairman of the Hopi Tribe. The address is Post Office Box 123, Kykotsmovi, Arizona 86039.

MS. JOHNSON. I am Loritta Johnson, P.O. Box 1048, Window Rock, Arizona 86515.

MR. DAY. My name is Michael Day, D-A-Y. I am a Hopi and Tewa from Polacca Village in the Hopi Reservation. My mailing address is P.O. Box 1211, Keams Canyon, Arizona 86034.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you. We will begin with Mr. Chavez. I remind that it is 5 minutes and I will give you the high sign at 30 seconds.

[George Chavez, Alfred Curley, Vernon Masayesva, Michael Day, and Loritta Johnson were sworn.]

**TESTIMONY OF GEORGE CHAVEZ, FORMER EMPLOYEE,  
NAVAJO DEPARTMENT OF JUSTICE**

MR. CHAVEZ. Thank you, Mr. Chairman and members of the Commission. I appreciate the committee's indulgence in allowing me to make this appearance and this presentation.

Briefly, let me just give you a personal history of myself. I was in born in northern New Mexico. I was raised there and I ultimately married a Navajo lady, who also happens to be one of the first attorneys from the Navajo Nation, which ultimately brought me to work at Window Rock for the Navajo Nation.

I worked for the attorney general's office for the department of justice from August 1982 until February 20, 1987. At that time I was terminated by the individual who has been talked about here on and off today and through the Commission's previous correspondence, Mr. Michael Upshaw.

At the time that I was terminated, the only reason I was given for my termination was that I was a Mexican American and not a Navajo. Clearly to me that seems like racial discrimination.

I advised the attorney general that I had from my previous experience with the department of justice and with the Navajo Nation that the attorney general did not have the authority to terminate me on the basis of my race. I indicated that the Indian Civil Rights Act, the U.S. Constitution, the Treaty of 1868, the Navajo Nation Bill of Rights as well as the Navajo Nation's personnel policies and procedures prohibited him from taking such action. He ignored the advice and he did not consult, or if he did consult with other more senior attorneys, I did not receive any kind of different response.

I was terminated. I, at that time, followed the tribal processes. I filed for a grievance. The grievance was unilaterally denied by the personnel office. I requested a review by the Office of Navajo Labor Relations, and that was refused. I filed for a writ of prohibition with the Window Rock District Court, and I was advised that I had not followed the Sovereign Immunity Act, and so, therefore, I was denied.

The request for a grievance was denied, at which point I filed a lawsuit. That was the only recourse that I had. Six months later, after I had filed my lawsuit, the personnel office advised that they were going to allow a grievance, very untimely, totally without any due process, and totally in violation of any equal protection that I should enjoy under the Constitution of the United States, and I appreciate the comments by the Commission earlier that we are all U.S. citizens.

Now, in this case I did not have the appropriate guarantees and even though the laws of the Navajo Nation existed, they did not follow them, and they did not comply with them and they continued to do so.

Now, I have subsequently filed a lawsuit, which I have filed a copy with the Commission, and I am prepared to submit an amended complaint for the Commission's official file.

SUBCOMMITTEE CHAIRMAN ALLEN. It will be received without objection.

MR. CHAVEZ. Additionally, I have prepared a memorandum in response to a newspaper article indicating that Mr. Ed Meese as the Attorney General for the United States has recommended that the tribal court decisions be reviewed by Federal district courts. In support of that, I believe that in my particular case there were certain discriminatory actions taken by a government that failed to provide and to comply with its own laws. Secondly, that the equal protection of the laws of the United States has been ignored and continues to be ignored, and perhaps I should just submit a copy of my memorandum to Mr. Meese as part of an additional exhibit.

SUBCOMMITTEE CHAIRMAN ALLEN. Accepted without objection.

MR. CHAVEZ. My biggest complaint and concern is that even though and I do believe that I have a prima facie case of discrimination in this matter, that I will not be able to secure a judgement from the tribal courts, and even if I did that I would not be able to receive that judgement.

I have additionally been advised, and I just received a copy of the resolution that was alluded to by the Commission earlier, CMY-2888, which is a resolution of the tribal council within which the Sovereign Immunity Act has been amended to now say that if there is any insolvency or if there is not enough tribal funds to protect or to satisfy the judgement, then it's too bad.

That leaves me, Mr. Chairman and members of the Commission, out in the cold. I bring this matter to your attention, and I am prepared to provide or answer further questions at your direction. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much, sir.

Yes, sir. I will ask you to repeat once more your name for me.

#### **TESTIMONY OF ALFRED CURLEY, NAVAJO TRIBE, SHIPROCK, NEW MEXICO**

MR. CURLEY. My name is Alfred Curley. The last name is spelled C-u-r-l-e-y. My mailing address is P.O. Box 1562, Shiprock, New Mexico. The zip code is 87420.

I would like to bring to the Commission's attention—but first of all I would like to commend the Commission members. Ladies and gentlemen of the Commission, I appreciate you putting in an extra effort to hear our complaints. Thank you, again.

I would like to read into the record the Navajo Nation is a sovereign nation with its rights given to them by the Treaty of 1868 and reinforced by the 1968 Indian Civil Rights Act. These rights are guaranteed by



Congress so that every Navajo has a right to be heard in administrative or judicial proceedings.

Civil and criminal proceedings are heard in open court unless there is a minor under the age of 18 years of age. What I feel is inappropriate and violates one of my client's civil rights is that I was involved in a land dispute issue. We were the plaintiffs in the foregoing proceedings, and the amount of proof that was needed for me to prevail was by the preponderance of the evidence presented at trial.

The evidence and testimony presented at trial, I felt there was enough evidence presented in our favor, and furthermore I felt that the respondents in those particular proceedings had not adduced enough testimony and evidence for the judge to enter a ruling in their favor. But to my astonishment, the court entered a ruling in respondents' favor, and the court further misinterpreted the testimony entered in our favor. Thereby, I feel that my client's civil rights were violated.

This land was a land dispute, and the land dispute developed from an act the U.S. Congress passed, 25 CFR subsection 700, to address and meet the needs of the Navajo-Hopi relocatees. Congress not only addressed the needs of the relocatees, but also unscrewed a can of land disputes.

In these judicial proceedings, BIA personnel would go on the stand and testify under oath that grazing permits issued by the agency superintendents gives the permittees a right to graze their livestock on a certain portion of the Navajo Reservation.

These grazing permits, as the permittees believe, gives them the right to say that the land is there for them to graze their livestock, which they say is the customary use area. BIA asserts that a grazing permit is nothing more than a piece of paper that gives no legal authority to the permittee to assert ownership of the assumed grazing use area.

Now, the U.S. Congress in putting BIA personnel on the Navajo Reservation is to help the Navajo people, the Indian people within certain reservations. I am sure Congress did not put BIA personnel on the reservations to rouse up land disputes and tell the permittees that their piece of paper is not worth anything.

So, therefore, I feel if this Commission is going to do any good, I think that the Commission should also review the BIA personnel that are employed with the Navajo Nation.

And getting technical support from BIA personnel is broad as interpreted by BIA personnel. You tell them to come to court to testify to certain facts, and they will go up on the witness stand and testify that they are not experts. Whether they have bachelor or master's degrees does not sway them. They just go up on the witness and testify that they do not have the authority to say that they are experts.

Sovereign nation, some people use it to abuse other people's rights, and I feel that certain judicial members of the Navajo Nation use that power to

abuse the Navajo people's rights guaranteed to them by the 1968 Civil Rights Act.

I feel that since Congress enacted the 1968 Indian Civil Rights Act, it also gives Congress broad power to review that act. And I feel that if court advocates can present arguments in open court, then they should also be given authority to interpret the 1968 Civil Rights Act and the U.S. Constitution. And I feel that certain judges of the Navajo Nation misinterpret the Indian Civil Rights Act.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much. I hate to interrupt you, but you have come to the end of your time. If you have documents that you want to submit, please feel free to do so.

MR. CURLEY. Excuse me, Mr. Chairman, but I did have a document which I gave to one of my clients to hand carry up here, but I think he took it over to the Navajo-Hopi Relocation Commission. When I get hold of that document, I will send it to you.

SUBCOMMITTEE CHAIRMAN ALLEN. The record will be open for 30 days, and you may get the address from the clerk and send it to us.

MR. CURLEY. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. We thank you.

#### **TESTIMONY OF VERNON MASAYESVA, VICE CHAIRMAN, HOPI TRIBE**

SUBCOMMITTEE CHAIRMAN ALLEN. We will ask you once again to spell your name.

MR. MASAYESVA. I hope this doesn't take away from my 5 minutes.  
[Laughter.]

SUBCOMMITTEE CHAIRMAN ALLEN. No, it won't, I promise you.  
[Laughter.]

MR. MASAYESVA. It's a long name. M-a-s-a-y-e-s-v-a.

SUBCOMMITTEE CHAIRMAN ALLEN. All right, you may begin.

MR. MASAYESVA. Thank you very much.

I would like to extend a welcome to you to this part of our land. The Chairman was here earlier and extended his acknowledgments also.

We had a difficult time deciding whether we should come before this forum with a very unique grievance, and after lengthy discussion the elders of the Hopi Tribe felt it was time that we make a statement. So I am here essentially to make a statement in their behalf.

I understand that you will be accepting written comments. So we will take advantage of that offer.

I have three members who are able to get away, and I would like to just briefly introduce them. Burt Puhuyesva, who is the Pumpkin Clan, who is the Initiation Priest for Mishongnovi Village; Dalton Taylor of the Bear Sun Clan, who is the spokesman for Bear Clan leaders of Shungopavi

Village; and Harlan Williams of the Eagle Clan, who is from the Village of Mishongnovi.

The Hopis have lived in the area of northern Arizona longer than any other people. The Federal district court in Phoenix reached this conclusion in a case between Hopi and the Navajo Tribe when it said "No Indians in this country have a longer authenticated history than the Hopis. As far back as the Middle Ages the ancestors of the Hopi occupied the area between Navajo Mountain and the Little Colorado River and between San Francisco Mountains and Lucachukais."

The Indian Civil Rights Act, ICRA, provides that no Indian tribe shall make or enforce any law prohibiting the free exercise of religion. Unfortunately, the Navajo Nation is violating the ICRA by enforcing Navajo tribal laws which interfere with rights of the members of the Hopi Tribe to freely exercise their religion. Specifically, the Navajo Tribe has attempted to enforce fish and game laws upon the Hopis engaged in eagle gathering, which is essential and indispensable to the Hopi religion and the Hopi way of life.

This year the Navajo Nation issued criminal citations to four Hopis, including a 13-year-old boy, who were gathering eagles in their traditional gathering areas near Gap, Arizona. Other Hopis were threatened with similar citations. Similar arrests and interference by officials of the Navajo Tribe in Hopi religious activities have occurred in recent years.

Although the Navajo Nation dismissed charges against four Hopis in early July, it is too late for them to resume gathering for religious purposes. These arrests and threats by Navajo officials has deterred other Hopis from gathering.

The Navajo Tribe has also authorized construction and other development projects so close to Hopi eagle shrines that many of the traditional nesting areas can no longer be used by eagles for breeding, an important and relevant fact which the wildlife biologist for the Navajo Tribe failed to mention when he publicly attributed the decline of eagle population to Hopi gathering.

This year only 12 eaglets have been brought home to the villages. These eaglets, if distributed evenly among all villages, will amount to one eagle per village. Hopis have reported that most nests have now been permanently abandoned because of Navajo housing construction, water and power line construction, gravel mining, picnic and recreation areas, and road construction near nesting areas.

This is particularly exasperating to the Hopis who are now mandated by the Federal judge to consult with attorneys for Navajos resisting relocation from Hopi lands, and Chairman Peter MacDonald, before they can undertake any type of new construction on their own land.

The reason for Navajo consent is to protect the sacred archaeological and historical sites of the Navajos on Hopi partitioned lands. If the Hopi

Tribe and individual members of the Hopi Tribe are going to be restricted from developing their lands and building new homes because of Navajo objections, then the United States Government should provide similar protection to Hopis by restricting all new Navajo construction near Hopi eagle shrines. Failure to provide equal protection to Hopis will send a signal to the world that Navajo religion is somehow more important and more ancient than the Hopi religion.

Individual Navajos and chapters have also threatened and interfered with eagle pilgrimages. Just last month Indian Wells Chapter House passed a resolution to prohibit Hopis from gathering in the area. If the resolution is enforced, the Bear and Eagle Sun Clan of Mishongvi will be barred from their traditional eagle gathering areas. This will be akin to barring Christians from entering a church to worship.

If other Navajo chapters followed suit, Hopi eagles will be seriously jeopardized.

I need to mention at this point that a vast majority of our Navajo neighbors are law abiding, and this is not to implicate that all Navajos are engaged in this activity.

SUBCOMMITTEE CHAIRMAN ALLEN. I thank you. If you wish to submit your document, we will be glad to receive it for the record.

MR. MASAYESVA. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Ms. Johnson.

#### **TESTIMONY OF LORITTA JOHNSON, FORMER EMPLOYEE, NAVAJO TRIBAL PROSECUTOR'S OFFICE**

Ms. JOHNSON. Mr. Chairman and members of the Commission, I come before you that—I believe that my right has been violated in the ICRA, 25 U.S.C. 1302, subsection 8.

On January 25, 1988, I received a letter from the Navajo Nation Bar Association admission committee that they had determined to revoke my membership as a full fledged advocate.

In February 1987 I took an examination which I received a letter from the previous admission committee that I have officially passed the examination and was set for a date and time for swearing in. My parents were there to witness that ceremonial.

On April 13, 1987, I was employed with the Navajo Tribe Prosecutor's Office as a juvenile representative, meaning to handle the cases of the dependencies, juvenile delinquency, and ICWA State proceeding cases, which I said, "This is a challenging job I'm going to take. If the other women within my tribe can do it, I don't see why I can't do it."

And from there on, from April 13, 1987, I enjoy my job very much. I was dedicated to that job; I stayed there from 7:30 a.m. to about 8 p.m. in the evening, and I also worked on Saturday and Sunday. Not any of those

days I have come before my supervisor and complained about the job. I enjoy it too much.

On January 25, 1988, almost a year, the present admission committee had determined to revoke my membership. For what reason, we don't know.

I hired an attorney. We argued the case and they still upheld the decision or some irregularities. What were they? We didn't get an answer from them.

This membership was given to me by the Navajo Nation Supreme Court by Chief Justice Tom Tso. That is a property of me. I paid my own membership. I attended my classes. By what meaning can they take this away from me?

On April 29, 1988, the chief prosecutor, Melvin Tso Scott, made a decision to terminate me from my job because I was no longer a member of the Navajo Nation Bar Association.

To this day Michael Upshaw, the attorney general, has not at all reviewed my letter to set up a grievance hearing. Why did that happen? Why after January 25 and all of a sudden on April 29 they tell me, "You will be terminated"? Why has it taken them 2 months to set a date? I think it is an opportunity that I be able to speak against those people.

Now I am wondering why is the Navajo Nation Bar Association delaying a decision that I appealed before them? Two months have elapsed. Why is it taking them so long to find out what happened, what really happened? Is it merely because of a hearsay statement that was made or what? I don't know.

I come before you. Is there such a thing that any person could come into my home and into my property just to take it away like that?

Right now my Vega was repossessed; my credit cards are being cancelled. What do I do to support my daughter right now? Does that mean I've got to go public and ask for donations just to get her back financially? Right now, she is being carried under the Crippled Children Services, a handicap child, but I don't consider her like that. We are merely right now on a good buddy system.

But I want to know why these two governments are taking their time. They have put me in a really bad reputation among my friends that I associated once with. I can't even get a job as a cashier because they are saying, "Well, what happened to your last job?"

I have all the documents here that I would like for you to review, and I really thank you that you have come here. This was the last decision that I made.

Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much.

MS. MUSKETT. Mr. Chairman, I would like to ask Ms. Johnson one quick question.

SUBCOMMITTEE CHAIRMAN ALLEN. Sure.

MS. MUSKETT. Ms. Johnson, in the course of your work did you ever deal with the *Keetso* case?

MS. JOHNSON. At that time I was aware of the case as well as typing up the pleadings as well as staying there in the evening and preparing for the case, but I never did appear in court on this case.

MS. MUSKETT. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Mr. Day.

### TESTIMONY OF MICHAEL DAY, TEWA HOPI, POLACCA VILLAGE

MR. DAY. Thank you, Mr. Chairman.

Let me begin by introducing myself. I am a Tewa Hopi Indian from the Polacca Village. I graduated from the University of Albuquerque and received an undergraduate degree. I graduated in 1985 from the University of New Mexico School of Law, was a staff attorney for Community Legal Services in Phoenix before I went back to the reservation and began working for the Hopi Tribal Court as a children's court counselor, and among the duties that was assigned to the children's court counselor were ICWA cases.

I would like to draw the Commission's attention, however, to two cases, one of them in Hopi Tribal Court and the other one in Federal court. I hope that by drawing this tribal court case to the attention of the Commission I am also not disbarred.

I am a practicing member of the Hopi Tribal Court. I carry approximately 30 cases at this time in Hopi Tribal Court. Myself and another attorney from Tuba City carry the largest caseload in Hopi Tribal Court, and I am, therefore, familiar with the practice and procedure in Hopi Tribal Court.

The first case I want to bring to the attention of the Commission is a case involving my running for the office of vice chairman. There was a special election in Hopi Tribal Council in February, and I attempted to run for that office, and I was disqualified by the Hopi Tribal Election Commission on the basis that I was unable to speak Hopi.

The Hopi Constitution specifically provides that the reservation and the constitution is created for both Hopi and Tewa people. By enforcing the separate provision of the Hopi fluency provision, in effect, the tribal council through the election board discriminated against all Tewa people who are members of the Hopi Reservation.

During the course of the proceeding, the judges excused themselves from hearing the case, and a judge pro tem was assigned. I was notified of this judge approximately the Thursday before the hearing, which was to be held on Wednesday, and we had agreed to this judge pro tem.

On Tuesday, the day before the hearing and 2 days before the primary election was to be held, I was informed that the judge we had agreed on was not going to be the sitting judge.

Subsequently, I lost the case because myself and three other candidates who were disqualified for being unable to speak Hopi fluently, we lost the case, or the TRO was not granted. I filed a lawsuit at the same time I filed the appeal from the election board to the tribal court. The new judge pro tem, who I had not agreed to, granted a summary judgment in favor of the tribal council, and I was unable to pursue any appeal.

Even assuming that I could appeal the case to the Hopi Appellate Court, there are at this time no, except I believe there might be one sitting appellate court judge. However, the other two judges who are appointed to the appellate court are not sitting as appellate court judges.

In effect, the Hopi Tribal Appellate Court does not exist, and any appeals taken from Hopi Tribal Court could be held there indefinitely until the tribal council itself appoints the appellate judges.

I also want to bring to your attention the case involving the People's Rights Committee in Polacca Village in which they attempted to organize under a village constitution. The tribal Chairman, using heavy-handed tactics, went to Federal court instead of tribal court and persuaded the Federal court judges to issue a TRO to stop the election or referendum on the constitution, which in the first place is rare, and in the second place, because it was on an Indian reservation, the people were denied at Polacca the right to vote on the date that the Bureau of Indian Affairs scheduled the referendum election.

That issue has been resolved. However, there is still a lawsuit pending in tribal court on several issues related to that case.

SUBCOMMITTEE CHAIRMAN ALLEN. It is clear, Mr. Day, that you haven't completed all that you want to share with us and that we want to hear. Permit me to ask you to reduce it in writing and send it to us during the period during which the record remains open, and that is the next 30 days. You're time has expired, I'm afraid.

MR. DAY. I would like to answer a couple of questions, however, that the Commission posed to the Hopi Tribal Court judge and the attorney who was representing the court and Mr. Kahe—

SUBCOMMITTEE CHAIRMAN ALLEN. Would you be kind enough to do that in writing for us? We will certainly make reference to the record that was established earlier when you do that.

MR. DAY. That's fine.

SUBCOMMITTEE CHAIRMAN ALLEN. But it's important for us to keep this on schedule.

MR. DAY. That's fine.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

Thank you all.

We will now assemble the next panel. I am going to call some names. There are some people we seem to have lost, and I want to see if they are here yet.

Edith Yazzie, Lee Brooke, John Trebon. You may all come forward if you're here. Felix Spencer, Tom Joe, and how about Lee Blackhoop? Come forward, sir.

All right. Did I call one too many? If you will just take a seat to the side there for the moment, we will get to you. I obviously got one more than I had room for, but that's all right. No problem. Just stay where you are.

I will ask you again in turn from my left to right to give your name and address and spell your last name for the sake of the court reporter, after which then I will swear you in.

MR. PHILLIPS. My name is Lee Brooke Phillips, and it's spelled P-h-i-l-l-i-p-s. My mailing address is P.O. Box 1509, Flagstaff, Arizona 86002.

MR. TREBON. John Trebon, 121 East Bird, Suite 506, Flagstaff, Arizona, T-r-e-b-o-n.

MS. YAZZIE. My name is Edith Yazzie, Y-a-z-z-i-e, Box 11, Window Rock, Arizona.

MR. JOE. My name is Timothy Joe. My address is P.O. Box 502, Mexican Hat, Utah.

MR. BLACKHOOP. My name is Lee Blackhoop. That is spelled B-l-a-c-k-h-o-o-p, 3325 West Willada Street, Phoenix, Arizona 85009.

SUBCOMMITTEE CHAIRMAN ALLEN. You might as well go ahead, sir.

MR. SPENCER. My name is Felix Spencer, address 7232 North 27th Avenue, Phoenix, Arizona, zip code 85051.

SUBCOMMITTEE CHAIRMAN ALLEN. Very good. Thank you very much.

[Edith Yazzie, Lee Brooke Phillips, John Trebon, Felix Spencer, Timothy Joe, and Lee Blackhoop were sworn.]

SUBCOMMITTEE CHAIRMAN ALLEN. We will begin with Mr. Phillips.

#### **TESTIMONY OF LEE BROOKE PHILLIPS, ATTORNEY, BIG MOUNTAIN LEGAL OFFICE**

MR. PHILLIPS. Thank you, and I appreciate the opportunity to address the Commission at this time.

So far the focus of the Commission's inquiry has involved disputes or allegations of disputes between individual Native Americans and their tribal governments.

The issue that I wish to raise and the concern that my clients who I represent share is situations where individual Native Americans' rights are being violated or allegedly violated, not by their own tribal government, but by the tribal government of another tribe. This is a situation, then, where you are dealing with the jurisdiction of a tribe over nonmember Indians.



I am an attorney with the Big Mountain Legal Office, and I am the attorney that was referenced in the presentations made by the Hopi Tribal Court and by the last panel. I represent individual Navajo persons who are subject to relocation by the Federal Government under the Navajo-Hopi Indian Relocation Program.

I would like to say at this time that I think that there are some very serious issues obviously being raised to the Commission. Clearly, Indian tribes have a very important interest in preserving their own jurisdiction and their own sovereignty, and certainly situations, those, for example, which have been raised today concerning the Navajo Tribe, I would say that I would share their concerns that they be allowed to govern and that they have certain authority and sovereign authority which perhaps should not be interfered with by the Federal Government, at least to the degree that that is possible.

I think we have a very different situation where you have members of certain tribes involved with members of another tribe and where the tribal government of one tribe asserts jurisdiction over a nonmember Indian. In those situations you don't have the same considerations: you don't have the right to vote, you don't have the right to receive tribal benefits or services, you don't have the right or the understanding perhaps of tribal customs, laws, language, and the other types of things which I think give credence to strong tribal jurisdiction.

In the situations we are involved in through our office, we are representing individual Navajos, some 15,000 originally who were subject to relocation. The land that they have been living on has been transferred or partitioned from Navajo use or Navajo occupancy to the Hopi Tribe, and as a result the Hopi Tribe now is asserting jurisdiction over those Navajo individuals.

In two situations, one of which we testified about last year and in a separate matter, both criminal cases brought by the Hopi Tribe against individual Navajos who were charged with criminal violations which grew out of their resistance to the relocation program.

One involved the efforts by the United States and the Hopi Tribe to impound livestock of individual Navajos. In that situation an elderly Navajo woman was arrested and charged in Hopi Tribal Court.

In the second case, which is the case of *Willie Lonewolf et al.*, which was referenced earlier, four young Indian men were charged by the Hopi Tribe in their court with having in a sense confronted and stopped fencing and construction projects which those young men and the Navajo people living in the area believed were destroying religious sites.

In those situations you have, I think, a very unique circumstance, and you don't have the situation where these persons have the normal rights that would be afforded them in their own tribe. In those situations, Mrs. Tso, for example, does not speak Hopi or English. She speaks only Navajo.

To suggest that she could be tried by a Hopi jury under Hopi law, we think, raised very serious questions of whether or not an impartial jury really could be provided her in that case.

More importantly, because of the underlying nature of the charges and the issue at hand, you really are placing Navajo individuals in a virtually impossible situation where they are being asked to defend themselves for resisting Hopi law and this relocation program which seeks to divest them of what they believe to be their land and their religious requirements.

They are being asked to defend themselves in Hopi Tribal Court where they are being prosecuted, and at the same time they are not being afforded any of the normal protections in terms of the right to vote in that tribe. They don't speak the language, and they don't know the custom. They would be no different than you or I, who normally could not be tried in a tribal court because we are not members of that tribe.

Nevertheless, in those situations those people have been tried. We raised through the court proceeding our objection that there was no way that there could be an impartial jury of these persons' peers. The Hopi people, many of the prospective jurors, testified that they themselves had applied to move out onto the land where my clients were currently living and trying to maintain their occupancy of that land. So you had a clear pecuniary interest or a conflict of interest, we believed, between potential jurors and the persons who they were supposed to judge.

We think this situation is something which is unique and needs to be addressed, if not by Congress, then by some independent body.

I would close by saying that we recently have been successful in obtaining a temporary restraining order in Federal court where on behalf of individual Navajos we were able to block Federal construction which we allege was destroying religious sites only because it was federally funded, even though it was being done by the Hopi Tribe.

If the Hopi Tribe goes back out there without Federal funding and destroys religious sites, my clients are without anyplace to turn for any kind of relief or review. There is not, as you know, under the Indian Civil Rights Act, any civil review to the Federal court system. So unless they commit a criminal act and get arrested, they really don't have Indian Civil Rights Act to be reviewed by an independent body, and we would ask that this Commission consider those circumstances.

SUBCOMMITTEE CHAIRMAN ALLEN. I want to thank you, Mr. Phillips, and thank you also for extending your remarks from last August's transcript, which makes it an even broader contribution to our work.

MR. PHILLIPS. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Mr. Trebon.

**TESTIMONY OF JOHN TREBON, ATTORNEY, FLAGSTAFF,  
ARIZONA**

MR. TREBON. Thank you, Mr. Chairman and the committee.

I would just like to briefly raise an issue with the committee which I believe may be better resolved by Congress than it is currently being resolved by the courts. I believe that the committee has earlier heard some discussion about the decision of *Duro v. Reina* in the Ninth Circuit involving the jurisdiction of tribes, as Mr. Phillips just spoke about, tribal jurisdiction over nonmember Indians. I represent Mr. Duro in the Ninth Circuit and have throughout all proceedings before the district court and tribal court.

There is currently in the Ninth Circuit in *Duro* decided an amended opinion that was issued on June 29 that amended the previous decision at 821 F.2 1358. The amended decision continues to provide that the tribe, the Salt River Tribe in this case, has jurisdiction over nonmember Indians, but it does it on a case-by-case basis.

The Ninth Circuit is essentially saying that it depends on the context that exists between the individual defendant and the tribe involved in the prosecution of the case. So we have for the first time, I believe, in American jurisprudence a case-by-case context test for criminal jurisdiction. That is common in civil cases, but fairly uncommon in criminal cases.

At the same time, the Eighth Circuit in *Greywater v. Anthony Charboneau* in 87-5233 recently also decided the same kind of issue the opposite way. So there is now a dispute in the circuits about what kind of jurisdiction exists by tribal courts.

The problem I believe that really exists here is created by *Oliphant*, which is the Supreme Court opinion that has ruled that the tribal courts do not have jurisdiction over non-Indians. We argued in *Duro*, and believe, that non-Indians and nontribal members ought to be treated the same way in that they were both not tribal members of the particular tribe that is prosecuting them, their own members could sit as jurors and so forth.

The Ninth Circuit decided *Duro* really on a policy decision basis. It decided that since law enforcement is a problem on the Indian tribes, they should have jurisdiction over nonmember Indians. I think that statistics provide that there are more non-Indians living on reservations than nontribal members. So it's a problem, it seems to me, that creates one of policy, and also the factual predicate for that problem is best addressed in a legislative factfinding setting rather than a judicial one because there is simply no record in the *Duro* case on the kinds of law enforcement problems that existed particularly for this reservation and so forth.

Since *Oliphant* exists at the Supreme Court, what you are going to get, I believe, is different circuits deciding the case differently on policy reasons based upon the particular facts that come before it. I believe it's an issue that should be addressed by Congress, and some decision should be made

as to whether or not Indian tribes have jurisdiction over nonmember Indians and non-Indians treated in the same way and, if so, whether or not any further protections should apply such as broadening the scope of review for Indian Civil Rights Act's claims and so forth.

I believe this is one other issue, since this committee is addressing the problems of the Indian Civil Rights Act, one other problem that should be addressed and resolved at the same time. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you, sir.

Ms. Yazzie.

### **TESTIMONY OF EDITH YAZZIE, MEMBER, NAVAJO RIGHTS ASSOCIATION**

Ms. YAZZIE. Thank you, Mr. Chairman and members of the Civil Rights Commission.

I am a member of the Navajo Rights Association and also assist the Recall MacDonald Committee. We have so far, about 3 weeks ago, 16,700 signatures.

I appeal that we need justice for the Navajo people. I appeal that the Navajo Tribe is abusing, namely, the Navajo Tribal Chairman has abused his authority over his people.

The Navajo Sovereign Immunity Act, it seems like it hurts, and what it has done to the Navajo people is irreparable harm to the Navajo people all over.

We are in the United States, and we are not in Russia or any other country. I feel very hurt for the Navajo people by the action of the tribal government. I always thought we have individual rights, and I feel that we need justice for the Navajo people. There are 200,000 according to records, 200,000 Navajos, but only about maybe 1,000 gets the benefit from all the money that comes to the tribal government. I feel very strongly that we need justice for these Navajos.

I have here that one of the Federal funds that comes to the reservation, and in here I want to submit these documents for your review.

SUBCOMMITTEE CHAIRMAN ALLEN. Would you identify them, please?

Ms. YAZZIE. In here it says that I was hired by one of the Federal funding, and then they turned around and said I was not supposed to be hired, that they should be cautioned who they hire and it's Federal money.

SUBCOMMITTEE CHAIRMAN ALLEN. So it's correspondence.

Ms. YAZZIE. And Chairman MacDonald has signed all these agreements, and he says in there that he is going to abide by the Civil Rights Act and all that, and his signature is on all these pages, that he is going to abide by and comply with these laws. He signed this. To me it's a breach of contract.

SUBCOMMITTEE CHAIRMAN ALLEN. So it's general correspondence and agreements?

Ms. YAZZIE. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. We will accept them into the record, without objection.

Ms. YAZZIE. And I also have here a document where Mr. Chairman MacDonald has paid \$1,400,000 to keep the civil rights group off the reservation to Minor and Frazer in Washington, D.C. That's part of this record, and also attached is the Sovereign Immunity Act amendment.

And also here is a tribal proposed 1989 organizational chart, but I can't find what happened to the tribal council. It's not even in there. And also the Navajo people should be on top and it didn't even have it there. So I put question marks on there.

It seems like there is no tribal council, no Navajo people, and that he is the only authority. That's the way this one is written.

SUBCOMMITTEE CHAIRMAN ALLEN. We will accept your documents. You have more. Go on.

Ms. YAZZIE. And I have a document here where the Navajo Tribal Council voted on the \$100,000 loan without informing the people. They didn't inform the people on this proposal.

And here is another one that is the same thing. It's a resolution that was passed by the Navajo Rights that they want to withhold the \$22,800 until the full investigation is done, and they also did vote on that.

Also, a report by one of the attorneys on the Big Boquillas and how they mismanaged all of this money.

I want to introduce all these documents for the record.

SUBCOMMITTEE CHAIRMAN ALLEN. We will accept them without objection. If you would pass them to the clerk, please. We don't want to lose them.

I thank you very much.

Now we have Mr. Joe.

#### **TESTIMONY OF TIMOTHY JOE, NAVAJO LAY ADVOCATE**

MR. JOE. Thank you, Mr. Chairman and members of the Commission.

This will be my second time coming before you, I believe. I was before you also on August 14, 1987, last year just right across the street from here.

My name is Timothy Joe, and I am a private practitioner. I do a majority of my practice or all of my practice in Navajo Tribal Courts, and I have also practiced in the Southern Mountain Ute Tribal Court in Colorado and also in White Mesa, Utah.

I am appearing before you as a private citizen with a concern for the judicial systems and structures of not only the Navajo Nation, but the court system throughout Indian country.

I certainly have heard some comments in the other sessions and also today, and there has been some overtones as to attacking the judicial system of the Navajo Nation courts. I have been in practice for 11 years,

and I have not seen in the judicial process any flagrant and just outrageous violation of civil rights. I don't remember a scene or I don't recall a particular incident. However, most of these incidents are within the administrative branch and legislative branch, and it's appearing that a lot of these violations are within the legislative processes and also administrative processes of employment. So it's not exactly within the judicial systems and the operations that I know of.

The Commission and the United States of America and the Congress has to remember that the Navajo Nation's courts has only turned 30 years old on April 1, 1988, compared to the United States court systems since in the late 1700s and early 1800s. That's over 200 years of development that you are comparing our system with.

However, basically, history will tell you that the United States, the judicial system, and also the checks and balances system has been founded and copied off the Iroquois Leagues of Government of the Iroquois and Mohawks. So I think that needs to be given credit.

We have the court system, and we also have a system, but it has just been lacking funding, which is what we call the peacemaker court, which is designed to have the disputes resolved at local levels with the intention of recognizing the values of the cultural and customs in methods of resolving disputes, and is an indication that the Navajo Nation judicial system has always been interested in fairness and the promotion of what should be fair.

Out of the 14 judges, we have 2 judges are law school graduates and the others are mostly from experience. However, I must admit that we do have some judges that lack some experience and lack some training, and then we request that there should be more funding from the Federal Government and also the tribe to put more funds into the training and the continuing upgrading of the tribal court.

We also have a bar association and we have rules of procedures, civil and criminal and probate, and also the same applies to children's court. I do certainly believe that we have a fair system and an effective system. It's just that we need more time to work with it and create either through judicial or the legislative process to help it grow and develop some more.

I must also indicate that the Navajo Court is also a court of record. It records opinions and has written opinions from volumes I through V, and right now there is a *Navajo Digest* system that outlines the various subject matters.

If we are concerned about the judicial unfairness, the rights violations, people's rights violations, I have been into courts off the reservation in border towns, and I'll tell you that I have appeared in some of them as a defendant and my rights, I was railroaded through. I have seen off-reservation border town courts in session, and they are much less informal

compared to the Navajo tribal court System. Some are worse off, especially with nonattorney judges.

I have seen court situations where it seems like they don't know or they don't care about the rules of evidence. I have seen outside systems and a lot of situations that is worse than our system. So I think that should be looked into rather than just in the Indian country.

I certainly do appreciate the time and opportunity to be here. Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much.

Mr. Blackhoop.

### **TESTIMONY OF LEE BLACKHOOP, PHOENIX, ARIZONA**

MR. BLACKHOOP. Thank you, Mr. Chairman and members of the Civil Rights Commission for letting me speak about a problem that I have encountered.

My son was involved in a criminal procedure in 1987 and through this procedure was convicted to a term of 8½ years in prison.

On June 23 of this year he was granted a retrial by the appellate court due to court errors. The attorney general from Phoenix has filed a motion to reconsider to the Supreme Court stating his concern that this case sets a bad precedent and that other Indians or other minorities will try to take advantage of the case and destroy the criminal justice system.

My main objective of this visit is asking support from the Civil Rights Commission and to give me counsel or guidance to the appropriate personnel and bring this case to the light of the public, for I believe my son's rights were violated due to his ethnic background.

Again, I thank the Commission for letting me speak.

I have documents for review with me.

SUBCOMMITTEE CHAIRMAN ALLEN. If you have any documents you wish to enter into the record, you may do so at this time or submit them later.

Thank you.

We now have Mr. Spencer.

### **TESTIMONY OF FELIX SPENCER, FORMER EMPLOYEE, NAVAJO DIVISION OF RESOURCES**

MR. SPENCER. Thank you, Mr. Chairman and members of the Commission.

My name is Felix Spencer. My case is involving an employment matter. In 1984, March, I was terminated from the Navajo Tribe from the division of resources during when Peterson Zah served as the Chairman, his administration, and I believe I was labeled as a MacDonald supporter twice. I have a speculation that was the reason why I was picked on, but the reason was an allegation that was charged against me.

The appeal procedures I have complied with, with all the 5 days and 30 days, and they have played around with what they call administrative resolution which never resolved. One year later, until I got an attorney that threatened them that we wanted to take them to court and sue them, and finally they said they will hear my case at the grievance level.

I have won my case at that level, and they appealed against me again at the appeal authority, which usually the tribal authority, the Chairman appoints the appeal authority. So at that level I won again. This person that was assigned to uphold the grievance committee, the previous grievance committee decision.

After that what they did, they weren't satisfied. So they gave it to another appeal authority, another advisory committee member, thinking that they will change the decision. But apparently, and fortunately, this particular individual didn't change the decision. He upheld the decision again.

So after that what they did, they took it to court, and the least they should have done is to file at the district court level. What they did, they went to the supreme court. It wasn't until recently that the supreme court dismissed the case because of a lack of jurisdiction.

The reason why is it says in the procedure that the decision, in the bylaws here, it says that the decision of the appeal authority shall be final in all cases, and no tribal official, employees, committees, or legislative group shall countermand the decision of the appeal authority. The judge is a tribal employee. So, therefore, I believe that the court has dismissed for lack of jurisdiction.

Now all of the documents that I have here I have submitted to Brian Miller on June 25, 1987, and I have received a copy back from the Postmaster. So you have the record.

I was given this opportunity to enlighten the Commission here and to hear my matter, and also this could ensure for the future that this would not happen again within the Tribal Government. Now, my matter is against Mr. Peterson Zah's administration. As of today I have not gotten paid back, although the present administration has not told me that they are not going to pay me, but I'm looking forward to getting paid.

Thank you.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

You have the documents, Mr. Miller, that he referred to?

MR. MILLER. Yes.

SUBCOMMITTEE CHAIRMAN ALLEN. Okay. We will admit them into the record, without objection.

We thank you all.

We have two final panelists who wish to address us if they remain present.

I will call forward Matthew J. Strassberg and Alfred Bennett.



While they are coming up, I would like to tell you all that there is a Federal statute which makes it a crime for anyone to retaliate against a Federal witness, and if you experience any form of retaliation or coercion for your testimony today, please give us a call in Washington, D.C. at area code (202) 376-8351. That is (202) 376-8351.

Very good. We have Mr. Strassberg and Mr. Bennett. Will you give us your name and address, please, and spell the name for the court reporter.

MR. STRASSBERG. My name is Matthew J. Strassberg, S-t-r-a-s-s-b-e-r-g. My address is P.O. Box 1509, Flagstaff, Arizona 86002.

MR. BENNETT. My name is Alfred Bennett III, B-e-n-n-e-t-t. Post Office Box 321, Shiprock, New Mexico 87420.

[Matthew J. Strassberg and Alfred Bennett III were sworn.]

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you.

You may begin, Mr. Strassberg.

### **TESTIMONY OF MATTHEW J. STRASSBERG, ATTORNEY, BIG MOUNTAIN LEGAL OFFICE**

MR. STRASSBERG. Thank you.

I would like to expand on some of the things the previous panel spoke to. I myself am an attorney also working with the Big Mountain Legal Office, and much of my work involves representing nonmember Indians in other tribes' courts. We run into a great problem with the only source of appeal being that of habeas corpus, and I think that causes some problems that I would like to elaborate on.

Most of our work, however, does deal with projects that have Federal funding. For example, we have filed a first amendment lawsuit challenging the use of Federal dollars for forced relocation of Navajo Indians as a violation of the first amendment.

We have recently filed another lawsuit challenging the BIA's contracting out to the Hopi Tribe of building various developments on the Hopi partition lands that have destroyed sacred sites, religious sites, cultural sites, and historical sites as a violation of both the first amendment and the National Historic Preservation Act.

If these lawsuits are successful, one would think that the Navajo individual's rights should be safeguarded. However, the Hopi Tribe could then undertake the same programs without the use of Federal funds, for example, try to forcibly remove the Navajo people or go about developing the lands partitioned to them, and we would not be able to have any Federal court jurisdiction, and we would be stuck in working in tribal court.

The previous Hopi tribal members spoke about Navajo insensitivity to Hopi religious sites such as eagle gathering areas. That is not a one-way street. In a recent case, *Attakai v. U.S.*, Hopi tribal members testified that when they developed sites out on the Hopi partitioned lands, they perform

an archaeological clearance and also looking for religious sites. They, however, are only trained to find Hopi sites or remnants of Anasazi ruins. That leaves Navajo sites potentially to be destroyed, and we recently were granted a temporary restraining order because those sites have been destroyed in the past.

If the tribal court is the last stop in the road of due process in this instance, we feel that our clients would be suffering a great harm. The effect would be that if the Hopi Tribe undertook these projects and destroyed sites, the Navajo individuals could bring a civil action in Hopi Tribal Court. Their only hope of appeal would be habeas corpus, and there would be no hope of that in a civil action.

This, I think, unfortunately leaves the Navajo people with no other option but to try to defend their land by any means possible. Mr. Phillips previously testified how there have been arrests where Navajo people have just been trying to defend sacred sites, and I think that any situation where we have a statute that exists in such a way that forces people to potentially get involved in confrontations must be amended in some way.

I am not suggesting that tribal sovereignty is nothing that we need to be sensitive to. I think it would be ideal to somehow draw a line on what can be appealable and what cannot be appealable. I myself do not know exactly where that line should be, and perhaps part of the task of this Commission is trying to figure out where that line shall be.

However, it is clear from my experience both in Federal district court in trying to protect and preserve some of these sacred sites on behalf of the Navajo individuals and also my experience in tribal court that that line must be broader than just allowing for habeas corpus appeal. That line must embrace core individual human rights such as free exercise of religion that is protected by the Indian Civil Rights Act.

Finally, I would just like to add on to a point that Mr. Trebon made in reference to the *Duro v. Reina* situation. It seems that we are now at a point where we are saying that tribal courts are competent to assert jurisdiction over nonmember Indians, but not nonmember non-Indians, and that seems to make no sense to me. It has already been asserted that they stand in the same footing, neither can sit on juries, vote, receive travel benefits, and so forth.

It seems the only sensible solution would be either no jurisdiction over nonmembers or full jurisdiction over all people who want to go to that particular land. If you venture into a foreign country, you subject yourself to the jurisdiction of that country, and the same should apply to tribal courts.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much.

COMMISSIONER DESTRO. I have one request. Mr. Strassberg, if you wouldn't mind, and I don't want to impose on you, but you suggested that it was possibly the role of the Commission to suggest where the dividing

line might be. If you would for us, if you might ruminate a bit in writing for us where you think it ought to be, because as I read *Northwest Indian [Cemetery] Protective Association v. Lyng*, that the Supreme Court decided this last term, it doesn't seem to me, at least in my reading of the case, that the Federal courts are particularly open minded when it comes to protection of Indian religious sites.

So it seems to me that if you are going to get any kind of recourse, it is going to have to be from Congress, and you all are far more expert than we are. So if you have some suggestions, please give them to us in writing.

SUBCOMMITTEE CHAIRMAN ALLEN. Do send them in in the next 30 days when the record remains open if you please.

Thank you.

Mr. Bennett, you get the last word.

MR. BENNETT. Yes, and I'm nervous, too.

[Laughter.]

### **TESTIMONY OF ALFRED BENNETT III, NAVAJO TRIBE, SHIPROCK, NEW MEXICO**

MR. BENNETT. My name is Alfred Bennett. My background is I've been a union laborer and I tried to run for a business manager office at one time and vice president of our local union 16 in New Mexico.

I have worked with the Office of Navajo Labor Relations as a compliance officer for about a year and a half and worked for the United States Department of Justice Civil Rights Division in the *United States of America v. City of Gault* discrimination lawsuit in employment practices.

I guess in all the experience I've learned how to take grievances and stuff like this. In 1986, in November I guess, the Navajo tribal election was held, and I was assigned to go to Shiprock, New Mexico, just to go up there and look around. I was going to vote up there. And the one thing I've noticed who that a lot of the people that were voting said that there was a lot of MacDonalld supporters manning the polls, being the registrars and the clerks and all this stuff. They were telling me all this stuff.

It didn't really hit my mind until I got back to Window Rock. I went back and I started seeing all these results coming in, and something just ticked inside of me because I had been through election fraud at one time with the labors union.

So I went running back up there that night, and I started taking testimony from people, and there were a lot of irregularities in the Shiprock Chapter concerning the ballot box where the votes are cast in one ballot box and then all the people that signed in it wouldn't match. They recounted them three different times—this is what the poll watchers were telling me. That's what they testified to me about and that is what I wrote down from them, that three times and nothing would even match up, the numbers and the ballots that were in the box.

As I started probing more into this, I started calling across the reservation, and there were irregularities across the Navajo Reservation. Like there was one guy who put in for an absentee ballot. He thought he wasn't going to be home, and he didn't get his absentee ballot. So he went down to go vote, and he said next to his name it said absentee ballot, but he said he never received it, even in the past election.

Other people across the cities, like in Tucson, Phoenix, Albuquerque, and Denver, the people that sent in for absentee ballots got them either late on the day of election or they said they submitted them a couple of months ahead of time, and when it came down to turning in the ballots, they said they couldn't even mail them off.

Then on challenge votes, the election commission never really informed the Navajo people that they had so many days to file a complaint, and I think it was 5 days, 5 or 10 days anyway, that they had to file a complaint with the election commission if there were irregularities.

One of the registers turned in a whole list of names. She used to Xerox everything she turned in and she kept good records. I had one individual, or two of them that went in to vote and they said their names weren't on the list, and she showed me their names on that list. I looked at it and compared it, but they weren't listed and the election office said they never received that. So she filed a complaint with the election commission because a lot of her people she signed up didn't get to vote.

There was another individual who was registered in one chapter house all his life. He was moved about 15 miles down the line to another chapter through the computer, I guess. That came about too. I talked to him. But there was politicking in line, and that's all I can say.

But I think with the next tribal election coming up, that some measures need to be taken to ensure that there is a fair election process. There may need to be Federal observers there to record what is going on. But after being ripped off in one union election and after seeing this tribal election, I really believe that something needs to be done to ensure that there is a fairness and there are legal ways for these people to go address their grievances.

I have another thing too. Like this individual was saying that he was a tribal employee—when I was working for the Office of Navajo Labor Relations, I was a complaints officer and I represented people in grievances, and I represented a tribal employee once, and then the second time I represented another one, and I won him backpay, the second one. We started out on that, and I got threatened with my job. They said, "This is a tribe versus tribe situation and what you're doing is you're working for the tribe and here you are representing these tribal employees," and they threatened to fire me.

That's the thing about it, is that the tribal employees right now have no rights or no guarantees that they will ever have any rights. The only thing

I can tell them is to unionize or to get something done through these hearings.

Thank you very much.

SUBCOMMITTEE CHAIRMAN ALLEN. Thank you very much, sir.

Thank you all for coming out. As you know, this process will continue for quite some time, but we assure you you will hear the results.

This hearing is recessed.

[At 7 p.m. the hearing recessed.]

## Exhibit No. 1

25 § 1301

INDIANS 52

Tribal court jurisdiction over civil disputes involving non-Indians: An assessment of *National Farmers Union Insurance Co. v. Crow Tribe of Indians* and a proposal for reform. 20 U.Mich.J. L.Ref. 217 (1986).

is impermissible unless Congress has expressly consented to the imposition of the tax. *Blackfeet Tribe of Indians v. State of Mont., C.A.Mont.* 1984, 729 F.2d 1192, affirmed 105 S.Ct. 2399, 471 U.S. 759, 85 L.Ed.2d 753.

### Notes of Decisions

#### 9. Taxation

State taxation of tribal income from activities carried on within the boundaries of the reservation

#### § 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall--

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(As amended Pub.L. 99-570, Title IV, § 4217, Oct. 27, 1986, 100 Stat. 3207-146.)

1986 Amendment. Par. (7). Pub.L. 99-570, § 4217, substituted "for a term of one year and a fine of \$5,000" for "for a term of six months or a fine of \$500".

Enhancement of Ability of Tribal Governments to Prevent Traffic of Illegal Narcotics. Section 4217 of Pub.L. 99-570 provided in part that amendment of par. (7) of this section was "To enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics in Indian reservations".

Legislative History. For legislative history and purpose of Pub.L. 99-570 see 1986 U.S. Code Cong. and Adm. News, p. 5393.

West's Federal Practice Manual

Reverse discrimination, see § 15873.

#### Law Review Commentaries

Supreme Court removal of Tribal Court jurisdiction over crimes by and against Reservation Indians. (1984-1985) 20 New England L.Rev. 247.

The status of Indian tribes in American law today. Honorable William C. Canby, Jr., 62 Wash.L.Rev. 1 (1987).

Tribal court jurisdiction over civil disputes involving non-Indians: An assessment of *National Farmers Union Insurance Co. v. Crow Tribe of Indians* and a proposal for reform. 20 U.Mich.J. L.Ref. 217 (1986).

#### Library References

Indians §32(13), 38(1) to (7).  
C.J.S. Indians §§ 16 et seq., 75.

### Notes of Decisions

Cruel and unusual punishment 34a

#### 6. Power of sovereignty of tribal government

Indian tribes' sovereignty is not absolute, but subject to limitation by specific treaty provisions, by statute at the will of Congress, by portions of the Constitution found explicitly binding on the tribes, or by implication due to tribes' dependent status. *Babbitt Ford, Inc. v. Navajo Indian Tribe*,

## Exhibit No. 2

CMY-25-88

Class "C" Resolution  
No BIA Action Required

### RESOLUTION OF THE NAVAJO TRIBAL COUNCIL

#### Amending 1 Navajo Tribal Code, Sections 352, 353 and 354 of the Navajo Sovereign Immunity Act

#### WHEREAS:

1. The Navajo Tribal Council is the governing body of the Navajo Nation; and

2. The Navajo Nation is recognized as a sovereign Indian Nation reserving broad inherent attributes of sovereignty, including the powers appropriate to establish, maintain and adopt its own form of self-government, as deemed most suitable for the preservation and advancement of the unique social, cultural, religious, economic and other needs and goals of its own People; and

3. As a sovereign nation, the Navajo Nation, like other sovereigns, cannot be sued, except only to the limited extent, purpose and forum, to which its governing body, the Navajo Tribal Council, explicitly and unequivocally expresses its specific consent, by duly enacted resolution, or in accordance with explicit and unequivocal Congressional legislation; and

4. The Courts of the Navajo Nation are created by the Navajo Tribal Council within the government of the Navajo Nation and the jurisdiction and powers of the Courts of the Navajo Nation, particularly with regard to suits against the Navajo Nation, are derived from and limited to the Navajo Tribal Council as the governing body of the Navajo Nation; and

5. Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation by any other nation or government; and

6. The special authority of the Congress of the United States relating to Indian affairs derives from and is consistent with the recognition and fulfillment of its unique trust obligations to protect and preserve the inherent attributes of Indian tribal self-government; and

7. The Navajo Tribal Council has enacted the Navajo Nation Bill of Rights in recognition of the interests and rights of the People of the Navajo Nation, from whom the sovereignty of the Navajo Nation derives, as express self-limitations upon the

Exhibit No. 2 (cont.)

exercise of its sovereign powers and has provided for specific remedies and redress for individuals from the government of the Navajo Nation as only the governing body of the Navajo Nation is empowered and responsible to determine on behalf of the People of the Navajo Nation; and

8. The courts and other agencies of the Government of the United States are without jurisdiction and are not empowered by tribal or federal law to enforce or otherwise implement the provisions of the Indian Civil Rights Act, except to the expressly limited extent of federal court review of tribal court decisions in criminal cases involving habeas corpus proceedings; and

9. The recognition and redress for individual rights of the People of the Navajo Nation enacted in the Navajo Nation Bill of Rights and Navajo Sovereign Immunity Act exceeds and therefore supersedes the provisions of the federal Indian Civil Rights Act as the source of jurisdiction of the Courts of the Navajo Nation in such matters; and

10. By Resolution ACF-22-88, the Advisory Committee of the Navajo Tribal Council has recommended that, in order to further clarify the provisions of the Navajo Sovereign Immunity Act, it is necessary that the Navajo Tribal Council as the governing body of the Navajo Nation enact the following amendments to the provisions thereof because of recent actions instituted in the Courts of the Navajo Nation and federal tribunals and certain pronouncements thereof which are inconsistent with or contrary to inherent sovereign attributes, including the sovereign immunity of the Navajo Nation.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council, as the governing body of the Navajo Nation, affirms the sovereign immunity of the Navajo Nation as the inherent attribute of the Navajo Nation as a sovereign nation.

2. The Navajo Tribal Council as the governing body of the Navajo Nation further affirms that the jurisdiction and powers of the Courts of the Navajo Nation derive from the Navajo Tribal Council as the governing body of the Navajo Nation and that the courts are without jurisdiction or power to waive the sovereign immunity of the Navajo Nation or that of its authorized officials, representatives or employees acting within the scope of their official duties and authority.

3. The Navajo Tribal Council as the governing body of the Navajo Nation, hereby enacts the following provisions and amendments to the Navajo Sovereign Immunity Act in accordance with the above stated principles, including additions thereto as underlined and by deletions thereto as stricken, effective this date of enactment:



Exhibit No. 2 (cont.)

1 Navajo Tribal Code, Section 352 is amended as follows:

For the purposes of this subchapter, "Navajo Nation" means:

- (1) The Navajo Tribal Council;
- (2) The Chairman, Navajo Tribal Council;
- (3) The Vice Chairman, Navajo Tribal Council;
- (4) The Delegates to the Navajo Tribal Council;
- (5) The Certified Chapters of the Navajo Nation;
- (6) The Grazing Committees of the Navajo Nation;
- (7) The Land Boards of the Navajo Nation;
- (8) The Executive Branch of the Navajo Nation Government;
- (9) The Judicial Branch of the Navajo Nation Government;
- (10) The Commissions of the Navajo Nation Government;
- (11) The Committees of the Navajo Tribal Council;
- (12) The Legislative Secretary of the Navajo Tribal Council;
- (13) The Enterprises of the Navajo Nation;
- (14) Navajo Community College.

Section 353 is amended as follows:

(a) The Navajo Nation is a sovereign nation which is immune from suit.

(b) Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation by any other nation or government.

(c) The Courts of the Navajo Nation are created by the Navajo Tribal Council within the government of the Navajo Nation and the jurisdiction and powers of the Courts of the Navajo Nation, particularly with regard to suits against the Navajo Nation, are derived from and limited by the Navajo Tribal Council as the governing body of the Navajo Nation.

(d) The special authority of the Congress of the United States relating to Indian affairs derives from and is consistent with the recognition and fulfillment of its unique trust obligations to protect and preserve the inherent attributes of Indian tribal self-government.

(e) The Navajo Tribal Council has enacted the Navajo Nation Bill of Rights in recognition of the interests and rights of the People of the Navajo Nation, from whom the sovereignty of the Navajo Nation derives, as express self-limitations upon the exercise of its sovereign powers and has provided herein for specific remedies and redress for individuals from the government of the Navajo Nation as only the governing body of the Navajo Nation is empowered and responsible to determine on behalf of the People of the Navajo Nation.

Exhibit No. 2 (cont.)

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

Section 354 is amended as follows:

The purpose and intent of the Navajo Sovereign Immunity Act is to balance the interests of individual parties in obtaining the benefits and just redress to which they are entitled, under the law and in accordance with the orderly processes of the Navajo Nation government, while at the same time protecting the legitimate public interest in securing the purposes and benefits of their public funds and assets, and the ability of their government to function without due interference in furtherance of the general welfare and the greatest good of all the people. All of the provisions of this act shall be applied as hereinafter set forth in order to carry out this stated purpose and intent of the Navajo Tribal Council, as the governing body of the Navajo Nation.

Paragraphs (a) through (d) are reenacted as set forth in 1 Navajo Tribal Code, Section 354.

Subparagraph (e)(2) is amended as follows:

(2) Any such judgment, order or award may only be satisfied pursuant to the express provisions of the policy(ies) of liability insurance and/or established self-insured or government claims program of the Navajo Nation which are in effect at the time of each such judgment, order or award. Regardless of the existence of applicable and collectible commercial insurance coverage at the time any cause of action arises or suit is filed against the Navajo Nation, in no event shall any funds or other property of the Navajo Nation be liable for satisfaction of any judgment against the Navajo Nation and/or other insureds thereunder, beyond the limits of any amounts specifically appropriated and/or reserved therefor at the time of judgment, which shall be modified by law in accordance with such limitation of funds. This limitation shall apply to any deductible or retained liability or otherwise resulting from any inability or insolvency occurring any time prior to entry of such judgment;

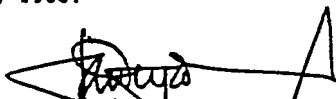
Subparagraphs (e)1, (e)3 and (e)4 are reenacted as set forth in 1 Navajo Tribal Code, Section 354.

Paragraphs (f) and (g) are reenacted. Section 355 is reenacted as set forth in 1 Navajo Tribal Code, Section 355.

Exhibit No. 2 (cont.)

CERTIFICATION

I hereby certify that the foregoing resolution was considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 67 in favor and 0 opposed, this 6th day of May, 1988.

  
Chairman  
Navajo Tribal Council

**Exhibit No. 3**

CAU-43-87

Class "C" Resolution  
No BIA Action Required

RESOLUTION OF THE  
NAVAJO TRIBAL COUNCIL

Affirming the Navajo Nation's Recognition and Respect for Human Rights Set Forth in the Navajo Nation Bill of Rights and the Indian Civil Rights Act and Petitioning the President, Congress and United States Commission on Civil Rights for Due Process, Recognition and Respect for American Indian Rights of Self-Government

WHEREAS:

1. The Navajo Tribal Council is the duly organized and elected governing body of the Navajo Tribe, a federally recognized sovereign Indian Nation, which as a distinct political community retaining its original natural rights, retains the power of regulating its internal and social relations by its own substantive laws in internal matters; and

2. The intent of the United States Congress to promote the well-established federal policy of recognizing Indian self-government in its enactment of the Indian Civil Rights Act of 1968 (75 U.S.C. §1301-1303) was clearly discerned by the highest and Supreme Court of the United States, in addition to the objective of strengthening the position of individual members, in their internal relations with their own tribes; and

3. In the landmark first case decided by it pertaining to the Indian Civil Rights Act, the high court wisely examined its legislative history to discern that resolution in a non-tribal forum of disputes arising on the reservation, affecting reservation Indians could undermine the authority of Tribal Courts and governments and thereby infringe as well upon the rights of Indians to govern themselves (Santa Clara Pueblo vs. Martinez, 436 U.S. 49, 62 (1978)); and

4. The Navajo Tribal Government, during the ensuing nineteen (19) years has continued to overcome its setbacks as does the government of the United States, while marking this two-hundredth (200th) anniversary of striving to strengthen and make its own commitment to fundamental human rights more perfect; and

5. With means less drastic than a Civil War, the Navajo Nation is reforming its own government as intended by Congress, by broader amendments to its Bill of Rights than those enumerated in the Indian Civil Rights Act (Exhibit "A" attached hereto); by such implementation as a Judicial Branch vested with separate powers of injunction, mandamus and declaratory relief (Exhibit "B" attached hereto); by providing the accountability of other forums and remedies such as its new Ethics in Government Law (Exhibit "C" attached hereto); even by removing governmental immunity from compensatory redress to the extent its means and other public obligations permit (Exhibit "D" attached hereto); and

### Exhibit No. 3 (cont.)

6. The United States Civil Rights Commission is now conducting "investigations" inviting Tribal members to "expose" past setbacks and even attempting to intrude and interfere with ongoing Tribal efforts to resolve its internal affairs and disputes without any attempt to justify their authority from a Congress which expressly intended to be first addressed by such Tribal reforms and which the Navajo Nation can only perceive as ignoring and undermining its demonstrative efforts to achieve full vindication of individual rights, together with the goal of self-government which the Navajo Nation believes was intended by both the Congress and Supreme Court of the United States of America.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby objects to the violation of its sovereign rights and the denial of substantive and procedural due process and fundamental fairness, by the intrusive, divisive, destructive and unlawful manner in which these activities are being conducted by the Chairman and certain members of the United States Commission on Civil Rights, contrary to the laws, policies and expressed intent of the Congress and the Supreme Court of the United States of America.

2. The Navajo Tribal Council further petitions the President and the Congress of the United States of America, to intervene and require these members of the United States Commission on Civil Rights to immediately desist from exceeding their authority, under the policies, laws and treaties of the United States applicable to its government-to-government relationship with recognized Indian Tribes.

3. The Navajo Tribal Council, as the governing body of the Navajo Tribe, further instructs its governmental officers, in their respective official capacities, to refrain from facilitating such continued actions by the United States Commission on Civil Rights, until such time as such lawful and appropriate governmental relationship is re-established, by justification of the Commission's defined authority as requested by the Chairman of the Navajo Tribal Council and the Attorney General; so that in this bicentennial anniversary of the American Bill of Rights, the sovereign governments of the Navajo and all other recognized Indian Tribes may also share in the American experience of furthering the cause of universal human rights and dignity.

#### CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed with a vote of 44 in favor and 14 opposed and 12 abstaining on this 12th day of August, 1987.

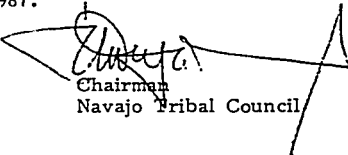
  
Chairman  
Navajo Tribal Council

Exhibit No. 3 (cont.)

Exhibit "A"

AMENDMENTS  
Title 1, Navajo Tribal Code  
CHAPTER 1, NAVAJO NATION BILL OF RIGHTS

Section

1. Other rights not impaired; Abridgement or deletion only by public referendum
2. Equality of rights not abridged by Tribal entitlements, benefits or privileges; nor by affirmative action necessary to support rights of the Navajo People to economic opportunity.
3. Denial or abridgement of rights on the basis of sex; Equal Protection and due process of Navajo Nation Law
4. Freedom of religion, speech, press, and right of assembly and petition
5. Searches and seizures
6. Right to keep and bear arms
7. Rights of accused; trial by jury; right to counsel
8. Double jeopardy; self-incrimination; deprivation of property
9. Cruel and unusual punishment; excessive bail and fines

§ 1. Other rights not impaired; Deletion or abridgement only by public referendum

The enumeration herein of certain rights, shall not be construed to deny or disparage others retained by the people. No provision of this Chapter, the Navajo Nation Bill of Rights, shall be abridged or deleted by amendment or otherwise, except by referendum vote of the Navajo electorate, in accordance with applicable provisions of the laws of the Navajo Nation.

§ 2. Equality of rights not abridged by Tribal entitlements, benefits or privileges; nor by affirmative action necessary to support rights of the Navajo People to economic opportunity

Recognition, enactment, lawful implementation and enforcement of provisions for specific entitlements, benefits and privileges based upon membership in the Navajo Tribe or in other recognized Tribes of Indians and affirmative action in support of Navajo or other Indian preference in employment and business contracting or otherwise necessary to protect and support the rights of Navajo People to economic opportunity within the jurisdiction of the Navajo Nation, shall not be abridged by any provision herein nor otherwise be denied.

§ 3. Denial or abridgement of rights on basis of sex; equal protection and due process of Navajo Nation law

Life, liberty and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law. Nor shall such rights be deprived by any bill of attainder or ex post facto law.

§ 4. Freedom of religion, speech, press, and right of assembly and petition

The Navajo Tribal Council shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Navajo Tribal government for a redress of grievances.

### Exhibit No. 3 (cont.)

**§ 5. Searches and seizures**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

**§ 6. Right to keep and bear arms**

The right of the people to keep and bear arms for peaceful purposes, and in a manner which does not breach or threaten the peace or unlawfully damage or destroy or otherwise infringe upon the property rights of others, shall not be infringed.

**§ 7. Rights of accused; trial by jury; right to counsel**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him or her; and shall have compulsory process for obtaining witnesses in their favor. No person accused of an offense punishable by imprisonment and no party to a civil action at law, as provided under Title 7 NTC, Chapter 5, Subchapter 3, shall be denied the right, upon request, to a trial by jury of not less than six (6) persons; nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of this inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.

**§ 8. Double jeopardy; self-incrimination; deprivation of property**

No person shall be subject for the same offense to be twice put in jeopardy of liberty, or property; nor be compelled in any criminal case to be a witness against themselves; nor shall private property be taken nor its lawful private use be impaired for public or governmental purposes or use, without just compensation.

**§ 9. Cruel and unusual punishments, excessive bail and fines**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## Exhibit No. 3 (cont.)

Exhibit "B"

### Ch. 3 JUDICIAL BRANCH T.7 § 204

#### SUBCHAPTER 3. DISTRICT COURTS

- 256. Temporary or preliminary injunctive relief
- 257. Sovereign immunity of the Navajo Nation

#### SUBCHAPTER 7. JUDGES

##### Article 1. Generally

- 354. Qualifications for judicial appointment
- 355. Appointment; term of office

##### *Subchapter 1. Generally*

#### § 201. Establishment; composition

There is hereby established the Judicial Branch within the Navajo Tribal Government.

The Judicial Branch of the Navajo Tribal Government shall consist of the District Courts, the Supreme Court of the Navajo Nation, and such other Courts as may be created by the Navajo Tribal Council.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

#### § 202. Seals of Courts

The Courts of the Navajo Nation shall each adopt a seal which shall be used to authenticate their respective judgments and other papers. The form of the seals and regulations for their use shall be specified by rules of court adopted and placed in effect as provided in 7 N.T.C. § 601.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Substituted "Courts of the Navajo Nation" for "Trial Court and the Courts of Appeals."

#### § 203. Copies of laws

Each Court of the Navajo Nation shall be provided with copies of applicable federal, Navajo Nation and state laws and regulations.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

#### § 204. Law applicable

(a) In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.



(b) Where any doubt arises as to the customs and usages of the Navajo Nation the court may request the advice of counsellors familiar with these customs and usages.

(c) Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Amended generally.

1. Navajo law and custom. This section clearly expresses the intent that Navajo law apply wherever possible. *Johnson v. Dixon* (C.A. 1983) 4 Nav. R. 108.

The application of custom depends on a good many circumstances and all the facts of the case. *Lente v. Notah*, Navajo Nation Court of Appeals (Decided May 25, 1982).

When applying custom, the courts should see whether a particular custom or tradition is generally accepted and applicable to the parties before the court. *Id.*

2. Common law. Navajo Common Law is a body of law which is fully binding on the Navajo Court of Appeals and consists of the customs, traditions and usages of the Navajo People. *Tome v. Navajo Nation* (C.A. 1983) 4 Nav. R. 159.

3. State law. Courts should carefully make certain that the matter is "not covered" by Navajo law, under subsection (c) of this section, before considering or proceeding to the use of state law. *Johnson v. Dixon* (C.A. 1983) 4 Nav. R. 108.

Under this section, the traditions and customs of the Navajo People are to be applied where the Navajo Tribal Code is silent and federal law does not prohibit the application of tradition and custom; it is only in a situation where there is no tradition or custom that the Tribal Courts are authorized to apply State Law. *Johnson v. Johnson* (C.A. 1980) 3 Nav. R. 5.

4. Divorce—Division of property. Since nothing is specifically stated in the Navajo Tribal Code as to how either separate or community property is to be divided upon divorce, this section is controlling in the matter. *Johnson v. Johnson* (C.A. 1980) 3 Nav. R. 5.

Since, under Navajo tradition, a land use permit given from a father to a son cannot be characterized as his separate property, nor as community property—the land use permits belonging to the entire family and to be used for the benefit of the entire family—district court properly applied Navajo tradition and custom in awarding land use permits, grazing permit and all other property connected with a farm to wife in divorce proceedings and the award and distribution of the property rights between the parties was a fair and just settlement pursuant to Title 9 Section 404 of the Navajo Tribal Code. *Id.*

5. —Alimony. The courts of the Navajo Nation are empowered to award alimony in dissolution of marriage cases. *Johnson v. Johnson* (C.A. 1980) 3 Nav. R. 5.

Nothing in Navajo tradition or custom would prohibit the court from applying New Mexico law pursuant to this section and therefore, an award of alimony in a marriage dissolution action in the tribal courts is both proper and authorized. *Id.*

6. —Child custody. Since Navajo customs and traditions is but one of many factors to be considered in child custody cases, a trial judge may be justified in disregarding old ways, and the court of appeal will not overturn such a decision unless it was clearly an abuse of discretion. *Lente v. Notah*, Navajo Nation Court of Appeals (Decided May 25, 1982).

## Exhibit No. 3 (cont.)

Ch. 3

JUDICIAL BRANCH

T.7 § 207

### § 205. Record of proceedings

Each Court of the Navajo Nation shall keep a record of all proceedings of the court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the appropriate court and shall be available for public inspection unless prohibited by order of the court or by applicable laws.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

### § 206. Cooperation of federal employees

(a) No employee of the federal government shall obstruct, interfere with or control the functions of any Court of the Navajo Nation or influence such functions in any manner except as permitted by federal laws or regulations or in response to a request for advice or information from the Court.

(b) Employees of the federal government, particularly those who are engaged in social service, health and educational work, shall assist the Court, upon its request, in the preparation and presentation of the facts in the case and in the proper disposition of the case.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

### § 207. Action against provider of an alcoholic beverage

(a) Any person who has been injured or damaged by an intoxicated person, or as a consequence of the intoxication of any person, may maintain an action in the courts of the Navajo Nation against any person, individual, partnership, association or corporation selling or furnishing liquor or intoxicating beverages for consumption within the Navajo Indian Country if such liquor or intoxicating beverage was a cause of the intoxication.

(b) Damages under this section shall include all damages to person or property, including, but not limited to, damages for wrongful death, personal injury and loss of income, and shall include loss of support, companionship, service and affection resulting from the death of a spouse, a minor child or the parent or guardian of a minor child.

Exhibit No. 3 (cont.)

T.7 § 207

COURTS AND PROCEDURE

Ch. 3

(c) In addition to any remedy available through subsection (a) above, the prosecutor of the Navajo Tribe is authorized to maintain an action for the benefit of an injured party under this section at the request of or after notice to such injured party.

(d) Nothing in this section shall be construed to impose civil liability on any person as a consequence of:

(1) The bona fide sale or furnishing of liquor or intoxicating beverages for scientific, sacramental, medicinal or mechanical purposes;

(2) The transportation of liquor or intoxicating beverages in unopened containers and, where applicable, containers with unbroken federal tax stamps, through Navajo Indian Country on any highway, roadway or railway right-of-way in conformance with 18 U.S.C. § 1154.

Source. Tribal Council Res. CJA-10-78, passed Jan. 24, 1978.

Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Subsection (d): Former subsection (d)(2) deleted and former subsection (d)(3) renumbered as (2).

*Subchapter 3. District Courts*

§ 251. Appointment

The District Courts of the Navajo Nation shall consist of such judges as shall be appointed by the Chairman of the Tribal Council, with confirmation by the Tribal Council.

Source. Tribal Council Res. CD-88-78, §§ 2, 3, passed Dec. 20, 1978.

Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Amended generally.

1978 amendment. Subsection (a): Deleted sentence providing that council chairman may nominate person satisfying two-year probationary period as a permanent judge, and with council's advice and consent may appoint such a person as a permanent judge.

Subsection (d): Added.

Revision note. In view of deletion of subsections (b), (c) and (d), designation of subsection (a) was omitted as unnecessary.

Prior law. Former subsection (b) has been recodified at 7 N.T.C. § 354(a) and (b); former subsection (c) has been recodified at 7 N.T.C. § 355(c); former subsection (d) has been recodified at 7 N.T.C. § 355(d).

§ 252. [Reserved]

Prior law. Provisions of former § 252, relating to term of office of judges, was recodified at 7 N.T.C. § 355(b), by Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

### § 253. Jurisdiction—Generally

The District Courts of the Navajo Nation shall have original jurisdiction over:

(1) *Crimes*. All violations of laws of the Navajo Nation committed within its territorial jurisdiction.

(2) *Civil Causes of Action*. All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation.

(3) *Decedents' Estates*. All cases involving the descent and distribution of deceased Indians' unrestricted property found within the territorial jurisdiction of the court.

(4) *Miscellaneous*. All other matters over which jurisdiction has been heretofore vested in the Navajo Tribal Court of Indian Offenses, or which may hereafter be placed within the jurisdiction of the District Courts by the Tribal Council.

Source. Tribal Council Res. CF-19-80, § 1, passed Feb. 13, 1980.  
Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Amended generally.

1980 Amendment. Subsection (2): Added second sentence.

Subsection (3): Deleted. Formerly provided for trial court jurisdiction of all cases involving the domestic relations of Indians.

3. Navajo Tribal courts. The courts of the Navajo Nation are empowered to award alimony in dissolution of marriage cases. *Johnson v. Johnson* (C.A. 1980) 3 Nav. R. 5.

Nothing in Navajo tradition or custom would prohibit the court from applying New Mexico law pursuant to 7 N.T.C. § 204 and therefore, an award of alimony in a marriage dissolution action in the tribal courts is both proper and authorized. *Id.*

This section does not exclude review of Tribal Council actions from its broad grant of power to the courts. *Halcona v. MacDonald* (C.A. 1978) 1 Nav. R. 189.

4. Crimes. Paragraph (1) of this section enables the Courts of the Navajo Nation to issue summons or warrants applicable to a criminal prosecution. *Navajo Nation v. Atcitty* (C.A. 1983) 4 Nav. R. 130 (1983).

5. Particular cases. Navajo Nation has the power to grant its courts personal jurisdiction over foreign corporations as a consequence of such corporations' acts in Navajo territory, such as wrongful repossession alleged in instant case, according to modern expansions of the "minimum contracts" due process standard. *Thompson v. Lovelady's Frontier Ford* (C.A. 1978) 1 Nav. R. 282.

This section's provision for jurisdiction over all other matters over which jurisdiction has been or may be vested implicitly asserts Navajo Nation jurisdiction over non-Indian, non-resident businesses and individuals, and court has jurisdiction over a non-Indian, non-resident business which allegedly wrongfully repossesses personal property upon Navajo land. *Id.*

District court has civil jurisdiction, under this section's provision for jurisdiction over "all other matters . . . which may hereafter be placed within the jurisdiction of the Trial Court", to enjoin a threatened criminal trespass prohibited by the code. *Salt River Project Agricultural Improvement and Power District v. International Brotherhood of Electrical Workers Local Union No. 266* (C.A. 1978) 1 Nav. R. 277.

**§ 254. —Territorial jurisdiction**

The Territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians.

Source. Tribal Council Res. CJY-57-85, Exhibit A, passed July 25, 1985.  
Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Amended generally.

Preamble. CJY-57-85 contained the following in the preamble:

"7. It is the intent of these amendments that the reference to 'all land' is comprehensive and includes rights-of-way, fee land, and any other lands, notwithstanding the nature of title thereto, within the exterior boundaries of the Navajo Reservation, Eastern Navajo Agency, dependent Navajo communities, Navajo Indian allotments and all lands held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians. Nothing herein shall be construed as constituting authorization for the purchase or lease of lands by any Band of Navajo Indians; and

"8. 'Dependent Navajo Indian communities' is intended to encompass all lands currently within the Eastern Navajo Agency and such other lands as may be determined consistent with Federal law to constitute dependent Navajo Indian communities."

**§ 255. —Writs or orders**

The District Courts shall have the power to issue any writs or orders necessary and proper to the complete exercise of their jurisdiction.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Substituted "District Courts" for "Trial Court".

1. Garnishment. Enabling language of this section and former version of 9 N.T.C. § 1303 enable the District Courts of the Navajo Nation to order wage garnishment to any employer, trustee, financial agency or other person within the territorial jurisdiction of the Tribe for child support. *Heredia v. Heredia* (C.A. 1983) 4 Nav. R. 124.

Pursuant to 7 N.T.C. § 705 and this section, coupled with Rule 23, Rules of Navajo Civil Procedure, garnishment is permitted. *Tracey v. Heredia* (C.A. 1983) 4 Nav. R. 149.

**§ 256. Temporary or preliminary injunctive relief**

No District Court of the Navajo Nation shall enter an order for temporary or preliminary injunctive relief in any proceeding in which there is no appearance by the defendant, unless:

(1) The District Court judge certifies in writing as to the specific irreparable harm which would occur were the temporary relief not to be ordered; and

(2) The legal counsel for the plaintiff certifies by affidavit as to the efforts which have been made to locate the defendant or defendant's legal counsel to notify him or her of the hearing on preliminary or temporary injunctive relief.

Source. Tribal Council Res. CF-19-80, § 4, passed Feb. 13, 1980.

Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Substituted "District Court" for "court", and "legal counsel" for "attorney" wherever such terms appeared.

### § 257. Sovereign immunity of the Navajo Nation

Jurisdiction of the District Courts of the Navajo Nation shall not extend to any action against the Navajo Nation without its express consent.

Source. Tribal Council Res. CF-19-80, § 3, passed Feb. 13, 1980.

Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Substituted "District Courts" for "Trial Court" and "Navajo Nation" for "Navajo Tribe".

## *Subchapter 5. Supreme Court*

### § 301. Composition

(a) The Supreme Court of the Navajo Nation shall consist of the Chief Justice of the Navajo Nation and two Associate Justices of the Supreme Court.

(b) The Supreme Court of the Navajo Nation shall sit at Window Rock, Navajo Nation (Arizona).

Source. Tribal Council Res. CMY-39-78, § I, passed May 4, 1978.

Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Substituted "Supreme Court of the Navajo Nation" for "Navajo Court of Appeals" wherever it appeared.

Subsections (c)-(e): Deleted.

1978 amendment. Amended generally.

Prior law. Former subsection (d) or this section was recodified and amended at 7 N.T.C. § 355(b). Former subsection (e) of this section was recodified and amended at 7 N.T.C. § 355(a).

### § 302. Jurisdiction—Generally

The Supreme Court shall have jurisdiction to hear appeals from final judgments and other final orders of the District Courts of the Navajo Nation and such other final administrative orders as provided by law. The Supreme Court shall be the court of final resort.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Amended generally.

§ 303. Writs or orders

The Supreme Court shall have the power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction, or to prevent or remedy any act of any Court which is beyond such Court's jurisdiction, or to cause a Court to act where such Court unlawfully fails or refuses to act within its jurisdiction.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

1985 amendment. Substituted "Supreme Court" for "Court of Appeals", and substituted "Court" for "Trial Court" wherever it appeared.

*Subchapter 6. Supreme Judicial Council*

§§ 321-330. Repealed. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

The Judicial Reform Act of 1985, Tribal Council Res. CD-94-85, passed Dec. 4, 1985, abolished the Supreme Judicial Council. The Preamble to that Resolution provided in part as follows:

"Since its inception, the Supreme Judicial Council has heard only three (3) cases, yet its very existence has continuously given rise to serious questions and challenges to the competence of the Courts of the Navajo Nation in various legal actions now pending or completed in Federal courts; and

"If the Navajo Nation is to continue as a sovereign Nation and to move forward toward the reality of a three branch form of government, the Supreme Judicial Council must cease to exist, as Tribal sovereignty requires strong and independent Tribal courts to enforce and apply the law."

Pending cases before Supreme Judicial Council. Tribal Council Res. CD-94-85, § 4, stated as follows: "All cases presently pending before the Court of Appeals and the Supreme Judicial Council shall be transferred to the Supreme Court for final disposition."

*Subchapter 7. Judges*

Article 1. Generally

§ 351. Salaries

(a) Salaries for Judges of the Courts of the Navajo Nation shall be established at the following base levels and negotiable thereon.

- (1) Probationary District Court Judges      \$25,000 per year
- (2) District Court Judges                      30,000 per year
- (3) Probationary Associate Justice            30,000 per year
- (4) Associate Justices                         35,000 per year
- (5) Probationary Chief Justice                45,000 per year
- (6) Chief Justice                                55,000 per year

(b) The probationary period for District Court Judges, the Chief Justice and Associate Justices shall be two years from the date of appointment by the Chairman of the Tribal Council.

suant to such recommendation, may remove such probationary judge from office. Any judge so removed shall not be eligible for the status of retired judge and shall not be called to sit in any case pursuant to 7 N.T.C. § 353. At the conclusion of the two-year probationary term, the Judiciary Committee shall review the record and qualifications of each probationary judge and shall recommend to the Chairman whether or not each probationary judge has satisfactorily completed the probationary term and should be appointed to a permanent position. The Chairman shall not appoint to a permanent position any judge not recommended by the Judiciary Committee, but the Chairman, at his discretion, may appoint any judges recommended by the Judiciary Committee to permanent positions. The appointments shall be submitted to the Navajo Tribal Council for confirmation.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.

## Article 2. Chief Justice

### § 371. Administrative duties

In addition to his judicial duties, the Chief Justice of the Navajo Nation shall have the duty of supervising the work of all justices and judges of the Navajo Nation and shall have the duty of administering the Judicial Branch. He shall advise the Chairman of the Tribal Council and the Judiciary Committee of the Tribal Council as to whether probationary justices and judges shall be offered permanent appointments.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

### § 372. Acting Chief Justice

The Chief Justice of the Navajo Nation shall designate one Associate Justice of the Supreme Court to act as Chief Justice whenever the Chief Justice is absent from the territorial jurisdiction of the Navajo Nation, is on vacation, ill or otherwise unable to perform the duties of his office. The Chief Justice shall delegate to the acting Chief Justice some or all of the powers of the office of Chief Justice. The Chief Justice may at any time change his designation of the Associate Justice empowered to act as Chief Justice.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.



*Subchapter 9. Clerks and Bailiffs*

**§ 401. Clerks and Bailiffs—Appointment**

(a) Each judge of the District Courts of the Navajo Nation shall, with the approval of the Chief Justice, appoint clerks and bailiffs of the Court.

(b) The Chief Justice shall appoint the clerk of the Supreme Court.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

**§ 402. —Duties and authority**

The clerks of the court shall have such duties and authorities as provided herein, or by rules of court adopted and placed in effect pursuant to 7 N.T.C. § 601, or as may be hereafter provided by resolution of the Tribal Council, or as may be hereafter delegated by the Justices and Judges of the Navajo Nation.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

**§ 403. Salary and grade**

The beginning salary and increments for clerks and bailiffs of the court shall be in accordance with the prevailing rates established by the Navajo Nation, and the positions shall be graded in accordance with the established personnel policies and procedures.

Those presently serving as clerks and bailiffs shall be subject to the above provisions upon their appointment and approval by the Chief Justice.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

**§ 404. Application of Judicial Branch Personnel Policies and Procedures**

All employment in positions, other than Judicial appointments, within the Judicial Branch shall be in accordance with the established Judicial Branch Personnel Policies and Procedures.

Source. Tribal Council Res. CD-94-85, Exhibit D, passed Dec. 4, 1985.  
1985 amendment. Amended generally.

Prior law. Former provisions of this section, concerning judicial appointments of bailiffs and other court attendants, were recodified in part at 7 N.T.C. § 401.

Exhibit No. 3 (cont.)

T.2 § 3724

ADM'N OF TRIBAL AFFAIRS

Ch. 5

actions as the Director shall deem necessary for the accomplishment and enforcement thereof.

(3) Represent the Navajo Nation Washington Office in executive level planning.

(4) Represent the Tribal Government within the areas of the responsibility of the office in dealings and relations with persons and organizations outside the Tribal Government.

(5) Conduct such special projects and programs as may be assigned.

(6) Delegate authority to his or her staff.

Source. Advisory Committee Res. ACAU-102-84, Exhibit A, § IV, passed Aug. 23, 1984.

*Chapter 6. Ethics in Government*

SECTION

SUBCHAPTER 1. NAVAJO NATION ETHICS IN GOVERNMENT LAW

- 3751. Title
- 3752. Legislative purpose and intent
- 3753. Standards of conduct and restricted activities of public officials and employees
- 3754. Certified Statement of Economic Interests; filing requirements
- 3755. Disclosure information required
- 3756. Implementation and compliance with Ethics in Government Law; duties and responsibilities; investigation, hearings, findings, reports and recommendations
- 3757. Sanctions and penalties
- 3758. Definitions
- 3759. Severability
- 3760. Effective date
- 3761. Prior inconsistent law superceded

SUBCHAPTER 3. ETHICS AND RULES OFFICE

- 3771. Establishment
- 3772. Purpose
- 3773. Personnel and organization
- 3774. Duties, responsibilities and authority
- 3775. Political practices prohibited
- 3776. Office location and hours

Exhibit No. 3 (cont.)

Ch. 6

ETHICS IN GOVERNMENT

T.2 § 3752

3777. Construction

3778. Amendments

*Subchapter 1. Navajo Nation Ethics in Government Law*

§ 3751. Title

This chapter may be cited as the Navajo Nation Ethics in Government Law.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 1, passed Aug. 9, 1984.

§ 3752. Legislative purpose and intent

(a) *Purpose.* Where government is founded upon the consent of the governed, the people are entitled to have complete confidence in the loyalty and integrity of their government. The purpose of the Navajo Nation Ethics in Government Law, therefore, is to require accountability to the people of the Navajo Nation by their elected, appointed and assigned public officials and employees in exercising the authority vested or to be vested with them as a matter of public trust, by:

(1) establishing and requiring adherence to standards of conduct to avoid such conflicts of interest as the use of public offices, employment or property for private gain, the granting and exchange of favored treatment to persons, businesses or organizations; and the conduct of activities by such officials and employees which permits opportunities for private gain or advantage to influence government decisions;

(2) providing for a more informed electorate by requiring the disclosure of significant economic and business interests and affiliations of public officials which involve any potential for conflict with the primary interests of the people and government of the Navajo Nation.

(3) requiring public officials and employees to abstain from using any function of their office or duties, in a manner which could place, or appear to place, their personal economic or special interests before the interests of the general public.

(b) *Intent.* It is the intention of the Navajo Tribal Council that the provisions of this Navajo Nation Ethics in Government Law be construed and applied in each instance, so as to accomplish its purposes of protecting the Navajo people from government decisions and actions resulting from, or affected by, undue influences or conflicts of interest.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 2, passed Aug. 9, 1984.

Exhibit No. 3 (cont.)

T.2 § 3753

ADM'N OF TRIBAL AFFAIRS

Ch. 6

§ 3753. Standards of conduct and restricted activities of public officials and employees

(a) *Conduct in Conformity With Applicable Rules and Laws.* Public officials and employees shall at all times conduct themselves so as to reflect credit upon the Navajo people and government; and comply with all applicable laws of the Navajo Nation with respect to their conduct in the performance of the duties of their respective office or employment.

(b) *General Prohibitions; Conflicts of Interest.*

(1) No public official shall use, or attempt to use, any official or apparent authority of their office or duties which places, or could reasonably be perceived as placing their private economic gain or that of any special business interests with which they are associated, before those of the general public, whose paramount interests their office or employment is intended to serve.

(2) It is the intent of this subsection (b) that public officials and employees of the Navajo Nation avoid any action, whether or not specifically prohibited by the Standards of Conduct set out herein, which could result in, or create the appearance of,

(A) using public office for private gain;

(B) giving preferential treatment to any special interest organization or person;

(C) impeding governmental efficiency or economy;

(D) losing or compromising complete independence or impartiality of action;

(E) making a government decision outside official channels;  
or

(F) adversely affecting the confidence of the people in the integrity of the government of the Navajo Nation.

(c) *Use of Confidential Information for Private Gain.* No public official or employee shall use or disclose confidential information gained in the course of or by reason of their official position or activities, to further their own economic interest or that of anyone else.

(d) *Restrictions Against Incompatible Interests or Employment.*

(1) Public officials and employees shall not

(A) have direct or indirect financial or other economic interests nor engage in such other employment or economic activity which, as determined in accordance with the provisions of this chapter and other applicable laws of the Navajo Nation, neces-

sarily involves inherent substantial conflict, or appears to have such substantial conflict, with their responsibilities and duties as public officials or employees of the Navajo Nation; nor

(B) engage in, directly or indirectly, financial or other economic transactions as a result of, or primarily depending upon, information obtained through their public office or employment; nor

(C) acquire any economic or other financial property, contractual or other economic interest at a time when they believe or have reason to believe, that it will directly and substantially affect or be so affected by their official actions or duties.

(2) Subject to the restrictions and conditions set forth in this chapter, public officials and employees are free to engage in lawful financial transactions to the same extent as the general public. Governmental bodies and agencies of the government of the Navajo Nation may, however, adopt further approved restrictions upon such transactions or employment as authorized herein and by other applicable laws of the Navajo Nation, in light of special circumstances or their particular duties.

(3) No business or other entity shall employ a public official or employee if such employment is prohibited by or otherwise violates any provision of this chapter.

(4) The term "employment", within the meaning of this subsection (d), includes professional services and other services rendered by a public official or employee, whether rendered as an employee, consultant or other independent contractor.

(e) *Abstention From Official Action.*

(1) When a public official or employee is required to take official action on a matter in which such public official or employee has a personal economic interest, they should first consider eliminating that interest. If that is not feasible nor required under subsection (d), such public official or employee shall

(A) prepare and sign a written statement describing the matter requiring action and the nature of the potential conflict, as soon as such public official or employee is aware of such conflict and they shall deliver copies of such statement to the responsible party for inclusion in the official record of any vote or other decision or determination and also to the Ethics and Rules Committee; and

Exhibit No. 3 (cont.)

T.2 § 3753

ADM'N OF TRIBAL AFFAIRS

Ch. 6

(B) abstain from sponsoring, influencing or in any manner attempting to influence any vote, official decision or determination which would favor or advance such person's personal economic interest in such matter; and

(C) abstain from voting or otherwise participating in the official decision or determination of such matter, unless otherwise directed by the authorized presiding official of the governmental body making such decision or determination, or otherwise legally required by law, or unless such person's vote, position, recommendation or participation is contrary to their personal economic interest.

(2) Unless otherwise provided by applicable law, the abstention by such person from voting or otherwise participating in the official determination or decision shall not affect the presence of such person for purposes of establishing a quorum necessary for a governmental body, agency or commission to take such action or vote upon such matter.

(3) Public employees shall also deliver a copy of such statement to the Committee and to their immediate superior, if any, who shall assign the matter to another. If such employee has no immediate superior, he or she shall take such steps as the Committee shall prescribe or advise, to abstain from influencing actions and decisions in the matter.

(4) In the event that a public official's or employee's participation is otherwise legally required for the action or decision to be made, such person and the presiding official or immediate superior requiring such participation shall fully report the occurrence to the Committee.

(f) *Tribal Government Contracts; Restrictions and Bid Requirements.*

(1) No public official or employee or any member of such person's immediate family shall be a party to, nor have an interest in the profits or benefits of, any governmental contract of the Navajo Nation or of any investment of funds of the Navajo Nation, unless the contract or the investment meets the following requirements:

(A) The contract is let by notice and competitive bid or procurement procedures as required under all applicable laws, rules, regulations and policies of the Navajo Nation, for necessary materials or services for the governmental agency or entity involved; and

(B) In the continuous course of a business commenced before the public official or employee assumed their current term of office or employment; and

(C) The entire transaction is conducted at arm's length, with the governmental agency's full knowledge of the interest of the public official or employee or a member of their immediate family; and

(D) The public official or employee has taken no part in the determination of the specifications, deliberations or decision of a governmental agency with respect to the public contract; and

(E) The public official or employee is not a member, office holder, employee or otherwise directly associated with the same governmental agency or entity primarily responsible for letting, performing, receiving, regulating or otherwise supervising the performance of the contract.

The requirements of subdivision (f) (1) shall not apply to the negotiation, execution, award, transfer, assignment or approval of mineral or non-mineral leases, permits, licenses and like transactions other than contracts involving the investment, award or payment of government funds; provided, that such leases, permits, licenses and like transactions shall be subject to all other provisions of this section and to all other applicable laws, rules and regulations of the Navajo Nation and its governmental bodies; and provided further that subdivision (f) (1) shall likewise fully apply to all contracting and other activities, conducted thereunder, which are subject to this chapter. Provisions in accordance with the purposes and intent of this chapter shall be incorporated as part of the rules, regulations and guidelines applicable to the negotiation, approval and assignment of such leases, permits, licenses and like transactions.

(2) In the absence of bribery or a purpose to defraud, a public official or employee or a member of their immediate family shall not be considered as having an interest in a public contract or the investment of public funds, when such a person has a limited investment interest of less than ten percent (10%) of the ownership of net assets, or an interest as creditor of less than ten percent (10%) of the total indebtedness of any business or other entity which is the contractor on the public contract involved or in which public funds are invested, or which issues any security therefor.

(g) *Restrictions on Assisting or Representing Other Interests Before Governmental Bodies for Compensation.* No public official

or employee except an employee of a governmental body duly established and authorized for such purposes by the Navajo Nation shall represent or otherwise assist any person or entity other than the Navajo Nation or a governmental body or political subdivision thereof, for compensation, before any governmental body where the matter before the governmental body is of a non-ministerial nature. This section shall not be construed to prohibit the duties of elected or appointed public officials to represent their constituents' interests before government agencies or entities nor the performance of ministerial functions, including but not limited to the filing or amendment of tax returns, applications for permits and licenses, and other documents or reports. It does, however, prohibit representation of such other interests for any fee or compensation in seeking to obtain any legislation, contract, payment of any claim or any other governmental benefit.

(h) *Restrictions on Assisting or Representing Other Interests Subsequent to Termination of Public Office or Employment.*

(1) No former public official or employee nor partner, employee or other associate thereof shall, with or without compensation, after the termination of such public office or employment, knowingly act as agent or attorney for or otherwise represent any other person or entity (except the Navajo Nation, its governmental bodies or political subdivisions) by formal or informal appearance nor by oral or written communication, for the purpose of influencing any governmental body of the Navajo Nation or any officer or employee thereof, in connection with any proceeding, contract, claim, controversy, investigation, charge or accusation, in which such former public official or employee personally and substantially participated, through approval, disapproval, recommendation, rendering of advice, investigation or otherwise, while so acting or employed.

(2) With respect to any such matter which was actually pending among such former public official's or employee's responsibilities, but in which such person did not participate as set forth in paragraph (1), the prohibitions set forth hereunder shall apply for the period of two (2) years following the termination of such public office or employment.

(3) Nothing in this chapter shall prevent a former public official or employee from appearing and giving testimony under oath, nor from making statements required to be made under penalty of perjury, nor from making appearances or communica-



tions concerning matters of a personal and individual nature which pertain to such former public official or employee or are based upon such person's own special knowledge of the particular subject involved, not otherwise privileged from disclosure by other applicable law; and provided further, that no compensation is thereby received other than that which is regularly provided for witnesses by law or regulation.

(4) The Navajo Nation, its governmental bodies and political subdivisions shall not enter into any contract with, nor take any action favorably affecting or economically benefitting in any manner differently from members of the public at large, any person, business, governmental or other entity, which is assisted or represented personally in the matter by a former public official or employee whose official act, while a public official or employee, directly contributed to the making of such contract or taking of such action by the Navajo Nation or any governmental body or political subdivision thereof.

(5) Nothing contained in this subsection shall prohibit a former public official or employee from being retained or employed by the governmental entity which he or she formerly served.

(i) *Unauthorized Compensation or Benefit for Official Acts.*

(1) No public official or employee shall accept or receive any benefit, income, favor or other form of compensation for performing the official duties of their office or employment, beyond the amount or value which is authorized and received in their official capacity for performing such duties.

(2) Subsection (i) shall not be construed to prohibit the receipt of authorized compensation for the performance of other distinct and lawful public duties by public officials or employees.

(3) No public official or employee, however, shall accept any benefit, income, favor or other form of compensation for the performance of the duties of any other office or employment not actually performed or for which such official or employee is not otherwise properly authorized or entitled to receive.

(j) *Unauthorized Personal Use of Property of the Navajo Nation.* No public official or employee shall use any property of the Navajo Nation or any other public property of any kind for other than as authorized and approved for official purposes and activities. Such persons shall properly protect and conserve all such property, equipment and supplies which are so entrusted, assigned or issued to them.

Exhibit No. 3 (cont.)

T.2 § 3753

ADM'N OF TRIBAL AFFAIRS

Ch. 6

(k) *Staff Misuse Prohibited.* No public official or employee shall employ, with funds of the Navajo Nation, any unauthorized person or persons, nor persons who do not perform duties commensurate with such compensation, and shall utilize authorized employees and staff only for the official purposes for which they are employed or otherwise retained.

(l) *Anti-Nepotism.* No public official or employee shall employ, appoint, or otherwise cause to be employed, nor nominate, nor otherwise influence the appointment or employment to any public office or position with the Navajo Nation or any governmental or political subdivision thereof, any person or persons related by consanguinity or affinity within the third degree, nor any member of the same household as said public official or public employee. Assignment of such persons to duties, positions, governmental offices or other entities shall in all instances be made in strict compliance with the current provisions of the Personnel Policies and Procedures of the Navajo Nation, as amended from time to time.

(m) *Restrictions Against Gifts or Loans To Influence Official Acts.*

(1) Except as otherwise provided herein or by applicable rule or regulation adopted hereunder by the Ethics Committee of the Navajo Tribal Council, or by other applicable law, no public official or employee shall solicit or accept for themselves or another, any gift, including economic opportunity, favor, service, or loan (other than from a regular lending institution on generally available terms) or any other benefit of an aggregate monetary value of one hundred dollars (\$100.00) or more in any calendar year, from any person, organization or group which.

(A) has, or is seeking to obtain, contractual or other business or financial relationships or approval from any governmental office or entity with which the public official or employee is associated or employed; or

(B) conducts operations or activities which are regulated or in any manner supervised by any governmental office or entity with which the public official or employee is associated or employed; or

(C) has any interest which, within two (2) years, has been directly involved with, or affected by, the performance or non-performance of any official act or duty of such public official or employee or of the government office or entity with which the

public official or employee is associated or employed or which the public official or employee knows or has reason to believe is likely to be so involved or affected.

(n) *Permitted Gifts, Awards, Loans, Reimbursements and Campaign Contributions.* Subsection (m) shall not be construed to prohibit

- (1) an occasional nonpecuniary gift, insignificant in value;
- (2) gifts from and obviously motivated by family or social relationships, as among immediate family members or family inheritances;
- (3) food and refreshments customarily made available in the ordinary course of meetings where a public official or employee may properly be in attendance;
- (4) an award or honor customarily and publicly presented in recognition of public service;
- (5) a political campaign contribution, in accordance with all applicable election laws and provided that such gift or loan is actually used in the recipient's political campaign for elective office of a governmental body or political subdivision thereof and provided further that no promise or commitment regarding the official duties of office or employment is made in return for such contribution.

(o) *Adoption of Supplemental Codes of Conduct for Officials and Employees of Governmental Entities of the Navajo Nation.*

(1) The chief executive or administrator of every governmental entity of the Navajo Nation which is subject to the provisions of this chapter is authorized to submit for approval and adoption by the Committee and the Chairman of the Navajo Tribal Council such supplemental rules, regulations and standards of conduct for the public officials and employees of such entity, which are necessary and appropriate to the special conditions relating to their particular functions, purposes and duties and not in conflict with the purposes and other provisions of this chapter. Upon adoption, such supplemental standards, rules and regulations shall be implemented in the same manner and to the extent applicable, as are all other standards, rules and regulations provided and adopted in accordance with the provisions of this chapter.

(2) Certified Chapters and other political governing bodies of the Navajo Nation are authorized and encouraged to draft, adopt, implement and administer standards of conduct, disclosure

requirements and other procedures, rules and regulations in conformity with the purposes and provisions of this chapter.

Any lawful authorization for any sponsorship or conduct of participation or involvement in any business activity by any political subdivision of the Navajo Nation shall be conditioned upon its prior adoption of such provisions, and enforcement thereof, as approved by the Committee.

(3) The Committee and the Navajo Nation Department of Justice shall provide such assistance as needed and requested by such governmental entities and political governing bodies of the Navajo Nation, in the preparation and drafting of such supplemental and implementing provisions as authorized and which are not in conflict with the purposes and provisions of this chapter.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 3, passed Aug. 9, 1984. Tribal Council Res. CD-93-85, § 1, passed Dec. 4, 1985.

1985 amendment. Subdivision (f)(1)(E): Added second paragraph. Subdivision (o)(2): Added second paragraph.

Purpose of 1985 amendment. Tribal Council Res. CD-93-85, Summary of Proposed Amendments, states as follows:

Subdivision (f)(1)(E):

"The addition is to conform with a written advisory opinion by the Ethics and Rules Committee (EOP-002). In their opinion, it was determined that due to the language of this section, i.e., 'contracts'; 'competitive bid or procurement'; 'specifications . . . with respect to the public contract', that it did not apply to the negotiations and award procedures for tribal leases.

"Rather than proposing a new subsection within the 'Act', it is more feasible for the Commerce Department to incorporate 'conflict of interest' clauses in their 'Business Site Leasing Guidelines'. This will be similar to the 'conflict of interest' provision in the Navajo Nation Business Preference Law.

"Those other general provisions of Section 3753 do remain applicable to leasing activities and other contracting engaged in by the lessee. Through the above-mentioned Advisory Opinion, the Ethics and Rules Committee requested the Commerce Department to draft this 'conflict of interest' provision in their 'Business Site Leasing Guidelines'. The adverse impact with failure to do this will mean that everybody that is applying for a business site lease will have to get clearance from the Ethics and Rules Committee. To avoid this, and rather than create another 'red tape', the appropriate place would be in the 'Business Site Leasing Guidelines'."

Subdivision (o)(2): "The present provision of the 'Act' is not applicable to Navajo Nation Chapters, it merely 'encourages' adoption of chapter ordinances in conformance with the 'Act'. With the growing interest by Chapters to become involved in business activities (sewing plants, coalmining, bingo, etc.), it is felt that Chapters be required to adopt standards of conduct, disclosure procedures, etc., should they choose to become involved in the sponsorship of any business activities. This requirement for those Chapters involved in business activities would be in the best interest of the Chapter residents and compatible with the intent of the 'Act'."

**§ 3754. Certified Statement of Economic Interests; filing requirements**

(a) *Persons Required To File Annual Statements.* On or before

February 15 of each year (or as otherwise extended by approved resolution of the Committee, further providing for at least thirty-five (35) days prior distribution thereof, as set forth in subsection (b)), the following persons shall fully and truthfully complete and file with the Committee, all information required, covering the twelve (12)-month period applicable thereunder, on the official form prescribed and designated as "Navajo Nation Economic Disclosure Statement", in accordance with all provisions of this chapter:

(1) Each person elected or appointed to any public office of the Navajo Nation as defined in section 3758 of this chapter, whose term of office or appointment included any part of the previous calendar year.

(2) All candidates for election or appointment to any public office.

(3) Those persons so notified by the Committee as provided hereunder, employed or otherwise assigned to any position of public employment with or by the Navajo Nation as defined in section 3758 of this chapter, during any part of the previous calendar year, and whose duties, as determined by the Committee, involved such participation in activities, advice, decisions or responsibilities as to have an effect upon the economic interests of the Navajo Nation or upon any Navajo person or persons, or are likely to have an effect thereon, in the current calendar year.

(b) *Availability and Distribution of Economic Disclosure Forms.*

(1) It shall be the further responsibility of each public official, and candidate for public office subject to this requirement, to obtain such disclosure forms, which the Committee shall distribute and provide in sufficient supply, together with the current Disclosure Guide and copies of the current rules and regulations of the Committee, at the offices of Legislative Affairs, and of the Election Commission in Window Rock, Arizona, and at such other locations as the Committee deems appropriate, beginning no later than November 1 of each year.

No later than November 30 of each year, the Committee shall determine, compile, adopt and publish as a current amended Committee resolution, a complete list of the names all public employees from whom such disclosure statements shall be required, including the position, job titles, or office of public employment of each employee so designated.

Exhibit No. 3 (cont.)

T.2 § 3754

ADM'N OF TRIBAL AFFAIRS

Ch. 6

(2) No later than January 10 of each year, the Committee shall have mailed, delivered or otherwise distributed notice thereof to each public employee required to complete and file such annual statement of economic interests in accordance with this chapter and applicable rules and regulations pertaining thereto. Such notification shall include one (1) copy of the current Disclosure Guide, current Committee rules and regulations and at least two (2) prescribed Statement of Economic Interests disclosure forms (one (1) of which may be retained for the personal record of the public employee). The notice and enclosed materials shall also include a current directive of the Chairman of the Navajo Tribal Council for completion and filing of such disclosure form, in accordance with this chapter.

Adequate additional supplies of such forms, guides, rules and regulations shall also be maintained at the Office of the Director of Personnel of the Navajo Nation in Window Rock, and at such other locations as the Committee shall determine appropriate, beginning not later than November 1 of each year.

*(c) Periods To Be Included in Statements of Economic Interests; Other Public Officials, Candidates, Nominees and Employees Required To File.*

(1) All elected public officials and public employees described in subsections (a)(1) and (a)(3) shall include all information required to be disclosed in the Statement of Economic Interests for the entire twelve (12)-month period of the previous calendar year.

(2) Any person who becomes a public official, or candidate for election or appointment to public office or any public employee designated by the Committee after the end of the previous calendar year, shall within fifteen (15) days after first assuming such office, publicly announcing or authorizing any promotion for candidacy; being nominated for appointment; or receiving notice from the Committee, whichever is applicable, shall file a Statement of Economic Interests as required hereunder, covering the twelve (12) months immediately preceding the date so required to file. Provided that, if any such person has otherwise already filed a Statement of Economic Interests covering the twelve (12) months of the previous calendar year, any Statement subsequently required hereunder need only cover the period(s) of the current calendar year not otherwise reported.

A candidate for public office shall also file copies of all Statements of Economic Interests as and when required hereby, with

the Navajo Nation Election Commission, as a further condition for such candidacy. Such candidates shall continue to file annual Statements of Economic Interests with the Election Commission and with the Committee until no longer a candidate by reason of election, withdrawal or defeat.

(d) *Copies of Elected Officials' and Candidates' Statements Filed and Maintained as Public Records.* All Statements of Economic Interests filed by elected public officials and by candidates for elected public office shall be public records of the Navajo Nation and shall be maintained and made available for all purposes in the manner of such public records and in accordance with the provisions of section 3756(a) (8) hereof.

(e) *Confidentiality of All Disclosure Statements Filed by Public Employees.* A public employee filing any statement with the Committee pursuant to this chapter shall, on the same date, file copies of that statement with the Director of the Department of Personnel of the Navajo Nation and with the duly appointed Director or designated Administrator of the governmental body, as defined in this chapter, with which said employee is employed, or to which said employee is assigned, according to the official records of the Personnel Department. Such statement and all copies thereof filed by public employees pursuant to this chapter shall be deemed and maintained by the Committee and the responsible governmental bodies of the Navajo Nation in the same manner and to the same extent as confidential employment personnel records of the Navajo Nation and shall not be deemed, maintained or used for any purpose or in any manner as a public record; nor shall any contents thereof in any manner be divulged or made available for inspection or copying by any person in any manner nor for any purpose except as required for determination of relevant information pertaining to examinations, investigations and hearings conducted in accordance with this chapter or otherwise authorized by the laws of the Navajo Nation pertaining to the confidentiality of official governmental records of employee personnel. Violation of any provisions of this section shall be punishable in the same manner and to the same extent as provided by any provision of law applicable to unauthorized disclosure of confidential information of any privileged official information or records of the Navajo Nation.

(f) *Nondisclosure of Privileged Information.* Notwithstanding any provision of this chapter, nothing herein shall be construed as requiring the disclosure by any person of any information which

is privileged from disclosure by any applicable law of, or recognized by, the Navajo Nation.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 4, passed Aug. 9, 1984. Tribal Council Res. CD-93-85, § 1, passed Dec. 4, 1985.

1985 amendment. Subsection (a): Inserted "(or as otherwise extended by approved resolution of the Committee, further providing for at least thirty-five (35) days prior distribution thereof, as set forth in subsection (b))".

Subsection (d): Amended generally.

Subsection (f): Former subsection (d) redesignated as subsection (f).

Purpose of 1985 amendment. Tribal Council Res. CD-93-85, Summary of Proposed Amendments, states the purpose of amendment to subsection 3754(d): "The disclosure process serves to remind elected public officials of their obligation to put the public interest above personal considerations. It helps the electorate to monitor the activities of those who spend their dollars and participate in public policy decisions. It does not apply to government employees who are not elected by the public."

### § 3755. Disclosure information required

(a) The Statement of Economic Interests shall disclose the following information for the preceding disclosure year, as certified to be true and complete by each person required to file such statement in accordance with this chapter:

(1) The name, address and, if applicable, census number of the public officer, candidate or employee and each member of his immediate family and the names and addresses of all businesses with which each person is associated.

(2) A description of any public office or employment held with any governmental body or jurisdiction other than the Navajo Nation.

(3) A description of the position held and services rendered and of the ownership and/or direct or indirect investment, security or other beneficial interest of each person in each business with which the person is associated.

(4) A description of the kind and nature of the income or other form of compensation received by each person from each business or other public office or employment with which the person is associated and the amount or value thereof.

(5) A description of the goods or services provided by each business with which the person is associated and name and address of any single source of income or other form of compensation to such business which was twenty-five percent (25%) or more of the gross income of the business at any time during the disclosure period. (This shall not require disclosure of such information pertaining to clients or customers in their private individual capacities.)

(6) Location and description of all real property, in which the



person or a member of the person's immediate family, or dependent business, separately or combined, held any legal title or leasehold, business site, investment or other beneficial interest at any time during the preceding disclosure period and the annual income, if in excess of one thousand dollars (\$1,000.00) during said period, derived by the person from such interest. This paragraph does not apply, however, to any interest in real property and improvements thereon used as the primary personal residence or for the personal recreational use of the person required to submit the verified financial disclosure statement.

(7) The names and addresses of all creditors to whom the person and/or members of the person's immediate family, in their own names or in the name of any other person, owed a debt of more than five hundred dollars (\$500.00) or to whom a business with which said person or persons are associated owed a debt which was twenty-five percent (25%) or more of its total business indebtedness at any time during the preceding disclosure period, listing each such creditor. This paragraph shall not be construed to require disclosure of personal debts owed by the person or any member of the person's immediate family, resulting from the ordinary conduct of their personal affairs; nor of debts on residences or recreational property exempt from disclosure under paragraph (6).

(8) The identification and amount of each debt exceeding five hundred dollars (\$500.00) owed at any time during the disclosure year to the person or members of the person's immediate family in their own names individually or combined, or to any other person for the use and benefit of such person or persons. The disclosure shall include the identification and amount of each debt owed to a business with which such persons are associated and which was twenty-five percent (25%) or more of the total indebtedness owed to the business at any time during the preceding disclosure year.

(9) The name and address of each source of any gift or loan the amount or value of which accumulated gifts or loans from any single source exceeds one hundred dollars (\$100.00) received by the person and/or by members of the persons immediate family in their own names or by any other person during the preceding disclosure year, for the use or benefit of such person or persons, except any gifts permitted under section 3753(n) of this chapter.

(10) A list of all business licenses, permits, certifications and site leases issued to, held by or in which the person or any member

Exhibit No. 3 (cont.)

T.2 § 3755

ADM'N OF TRIBAL AFFAIRS

Ch. 6:

of the person's immediate family or business with which such persons are associated with had any interest at any time during the preceding disclosure year, including the name in which each was issued and the type and location of each such business.

(11) A list of all bonds or any other evidences of indebtedness, together with their value, issued by the Navajo Nation or by any governmental body or political subdivision and held at any time during the preceding disclosure year by the person or by members of the person's immediate family in their own names, or by any other person for the use or benefit of such person or persons, which bonds or other evidence of indebtedness issued by a single entity had a value in excess of three hundred dollars (\$300.00).

(12) The statement shall further disclose the terms and parties to any transfer or encumbrance of any reportable interest which occurred during the disclosure period and the consideration therefor.

(13) If an amount or value is required to be reported pursuant to this section, it is sufficient to report whether the amount or value of the interest falls within:

Category 1: One thousand dollars to ten thousand dollars (\$1,000-\$10,000).

Category 2: More than ten thousand dollars to fifty thousand dollars (\$10,000-\$50,000).

Category 3: More than fifty thousand dollars (\$50,000 or more).

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 5, passed Aug. 9, 1984. Tribal Council Res. CD-93-85, § 1, passed Dec. 4, 1985.

1985 amendment. Subdivision (a) (5): Added second sentence.

Purpose of 1985 amendment. Tribal Council Res. CD-93-85, Summary of Proposed Amendments, states the purpose of amendment to subdivision (a) (5): "This provision is necessary in order to avoid undue disclosure of information which is more private than public. In accordance with recent Court decisions to this effect, the Ethics and Rules Committee has not required the disclosure of such information on its approved disclosure forms."

**§ 3756. Implementation and compliance with Ethics in Government Law; duties and responsibilities; investigation, hearings, findings, reports and recommendations**

(a) *Ethics and Rules Committee of the Navajo Tribal Council.* In accordance with all duties and authority as provided in this chapter and in the Plan of Operation of the Committee and as further directed by the Navajo Tribal Council, the Committee shall have the duties, responsibilities and authority to:

Exhibit No. 3 (cont.)

Ch. 6

ETHICS IN GOVERNMENT

T.2 § 3756

(1) Adopt, amend and publish, after notice and approval by the Advisory Committee of the Navajo Tribal Council, rules and regulations to implement all provisions of this chapter.

(2) Prescribe and make available appropriate forms for disclosures of economic interests as required by this chapter, for distribution to all persons required to complete and file such disclosure forms.

(3) Prepare and publish a Disclosure Guide clearly explaining the procedures for completing and filing Statements of Economic Interests by all persons required under this chapter to complete, certify and file such disclosure statements.

(4) Compile and maintain current lists of all persons required to file such disclosure statements, together with required filing dates and current lists of persons failing to file required statements when due, which lists shall be made available as matters of public record.

(5) Provide for preservation of all statements and information filed pursuant to this chapter, for not less than eight (8) years from the date of filing.

(6) Ensure that all appropriate measures are taken for protecting the confidentiality of all statements, records, documents, other materials and information designated as such by this chapter or by any other applicable rules or regulations of the Navajo Nation or other competent jurisdiction.

(7) Audit, review and evaluate all disclosure statements filed with the Committee.

(8) Provide that required disclosure statements of elected public officials and candidates for elected public office filed with the Committee are made available during regular office hours for public inspection and copying at the Ethics and Rules Office and at identified Tribal offices located in the respective agencies of the Navajo Nation, where agencies is to mean Western Navajo, Chinle, Shiprock, Eastern Navajo and Fort Defiance. No fee shall be charged therefor, which exceeds the cost of making such copies.

(9) Provide and maintain written advisory opinions on the requirements of this chapter upon request from persons whose conduct is subject thereto and who have the specific need to use such opinions to guide their own conduct. Provided, that any such opinion rendered by the Committee, until amended or revoked, shall be binding on the Committee in any subsequent complaint

Exhibit No. 3 (cont.)

T.2 § 3756

ADM'N OF TRIBAL AFFAIRS

Ch. 6

concerning the person who requested the opinion and who acted in reliance on it in good faith prior to notice of any amendment or revocation, to the extent of its application to the material facts as presented by the person in requesting the opinion. Unless specifically waived in writing by the person requesting such a personal advisory opinion, or otherwise made public by such party, the Committee shall maintain the confidentiality of the party's identity and of specific details of material facts (such as names, dates, locations, etc.), except when required to determine relevant information pertaining to examinations, investigations, hearings, findings or other official proceedings required under this chapter.

(10) Receive, examine and investigate complaints and conduct such hearings, in accordance with the rules and regulations lawfully adopted and authorized hereunder and in accordance with the Committee's Plan of Operation and all applicable requirements of due process of law, as the Committee shall deem necessary to make its determination whether facts exist which constitute any violation or violations of, or noncompliance with, any of the requirements, restrictions, prohibitions or other provisions of this Ethics in Government Law and which further establish the identity of the party or parties in violation or noncompliance therewith.

(11) Dismiss any complaint which does not allege facts sufficient to constitute a violation or noncompliance as provided herein; or when, upon completion of the Committee's examination and investigation prior to hearing thereof, it finds no credible evidence tending to support allegations of such violation and/or noncompliance. In such event, the Committee shall further determine whether any complaining party was motivated by malice or other purposes contrary to the spirit of this chapter, such as harassment or embarrassment for political, personal or other improper purposes. If the Committee makes such determination, it shall thereupon report the matter to the Navajo Tribal Council and appropriate law enforcement authorities, for appropriate action, including the imposition of penalties or sanctions as applicable. By filing any complaint alleging any violation or noncompliance under this chapter, such complaining party thereby submits himself to the jurisdiction and all applicable laws, rules and regulations of the Navajo Nation.

(12) Implement, facilitate and require compliance with all provisions of this chapter, in accordance with its stated purposes and intent, together with all rules and regulations lawfully adopted

Exhibit No. 3 (cont.)

Ch. 6

ETHICS IN GOVERNMENT

T.2 § 3756

hereunder and the provisions of the Committee's Plan of Operation. Wherever practical, however, the Committee shall first seek to obtain voluntary compliance and remedial action as appropriate hereunder, prior to institution of hearing proceedings and/or recommendation or petition for imposition of sanctions or penalties as provided herein.

(13) Institute and conduct hearings on any matter which cannot be resolved by voluntary compliance and remedial action, with the capacity of a quasi-judicial body, to make determinations of fact and where appropriate, to seek or recommend sanctions or remedial actions for approval, adoption and implementation by the Navajo Tribal Council and other appropriate governmental bodies, as provided herein. The refusal or unexcused failure of any party to voluntarily comply or take such remedial action as directed by the Committee shall not constitute unintentional noncompliance but, if determined after opportunity for hearing hereunder to be contrary to the requirements of this chapter, shall be deemed a violation thereof, subjecting the accused to imposition of any or all penalties and sanctions applicable thereto.

At any stage of proceedings hereunder, when probable cause has been shown to the satisfaction of the Committee that a violation of the applicable criminal laws of the Navajo Nation or of any other competent jurisdiction has occurred, the Committee shall also refer such findings for further action by the appropriate law enforcement agency or agencies.

(14) Employ the services of director and such other administrative and secretarial staff of an Administrative Office of Ethics and Rules as authorized by the Committee's Plan of Operation and in accordance with the Personnel Policies and Procedures of the Navajo Nation, together with such facilities and equipment as it deems necessary for administrative assistance to carry out the legislative policies and duties prescribed in this chapter, to the extent permitted by funds budgeted therefor.

(15) Report quarterly to the Advisory Committee and annually to the Navajo Tribal Council, summarizing the activities and recommendations of the Committee and recommending any changes to the chapter, or to any of the Committee's rules, regulations, policies or guidelines adopted pursuant to this chapter.

(b) *Committee Hearings, Findings and Recommendations.* Pending adoption by the Navajo Tribal Council of laws and procedures applicable to the conduct of such activities by the various adminis-

Exhibit No. 3 (cont.)

T.2 § 3756

ADM'N OF TRIBAL AFFAIRS

Ch. 6

trative bodies and agencies of the Navajo Nation, the Ethics and Rules Committee of the Navajo Tribal Council is hereby authorized to adopt, with the approval of the Advisory Committee and Department of Justice of the Navajo Nation, appropriate rules and procedures governing the conduct of all administrative examinations, investigations, hearings, findings, recommendations and other proceedings required to fully carry out the provisions of this Ethics in Government Law. Such rules and procedures shall also be in accordance with all requirements of due process of law consistent with such administrative proceedings, including the rights of any person accused of violation of, or noncompliance with, any of the provisions of this law or any rule or regulation lawfully adopted hereunder, to retain and be represented by counsel of choice at such person's own expense at all stages of such proceedings; to have adequate notice; and to be fully informed of the nature and extent of all complaints and allegations of such violations or noncompliance; to confront and cross-examine any complainant and adverse witnesses; to be heard and to call and examine witnesses and to introduce evidence and exhibits in defense of such allegations.

In order to carry out such proceedings as authorized herein, the Committee is further empowered as a quasi-judicial body to administer oaths and to issue subpoenas to compel attendance of witnesses for examination and/or testimony and to produce such books, records, documents, reports or other information or material objects as may be relevant to the subject matter of such proceedings. The Committee shall compile and maintain a complete record of all proceedings hereunder, including all statements and testimony of witnesses, documents and other materials obtained and considered at any stage of its examination, investigation or hearing and the accused shall have the right to first examine any material intended to be introduced at any hearing conducted hereunder for the purpose of making any determination or recommendation pertaining to the imposition of any sanction or penalty authorized by law.

The Committee may delegate and supervise its quasi-judicial powers to conduct hearings to determine factual issues, to duly constituted and authorized review boards within the Executive, Administrative, or Judicial Branches of the government of the Navajo Nation, when the respondent or respondents are appointed

members or employees or otherwise under the supervision and authority of such branches. The Committee shall itself review, amend or adopt in whole or in part, such recommended findings in making the Committee's final report and recommendations.

All hearings shall be at closed session, unless the accused petitions otherwise in writing; and all records, transcripts of any examinations, investigations and hearings shall remain confidential until final determination is made upon the report and recommendation of the Committee as provided herein. Subject to these requirements, the Committee need not be bound, however, by unduly restrictive rules of evidence in the conduct of any hearing hereunder.

Disobedience of any lawful order, process, writ, finding or direction of the Committee and/or any Executive, Administrative or Judicial body acting under the Committee's authorization as provided herein, shall constitute contempt and shall be heard and punished under the rules and procedures of the Courts of the Navajo Nation.

The Committee shall close any hearing when completed and review the entire hearing record, and where applicable, the recommended findings by any delegated review board of the Administrative or Judicial Branch; and thereupon, the Committee shall determine and adopt by resolution, its findings of fact together with its recommendations, if any, for imposition of such sanctions and penalties provided hereunder, with the reasons therefor. The Committee shall forthwith deliver such resolution of findings and recommendations to the Chairman or Vice Chairman for presentation, review and approval by the Advisory Committee of the Navajo Tribal Council as provided herein.

(c) *Committee To Refrain From Improper Political Practices.* The Committee shall at all times refrain from using any information or conducting any proceeding without justification as required hereunder and for the purpose of causing harm or injury to the political standing or reputation of any member of the Navajo Tribal Council or the Chairman or Vice Chairman of the Navajo Tribal Council or of any other person or entity, rather than for the intent and purposes set forth in this chapter.

(d) *Committee Conflict of Interest; Advisory Committee Powers.*

(1) In the event that any Committee member or member of his or her immediate family is the subject of any complaint filed with or pending before the Committee, then the Advisory Com-

mittee of the Navajo Tribal Council shall sit as the Ethics and Rules Committee and in all such proceedings the Advisory Committee shall have and exercise all powers and duties conferred on the Ethics and Rules Committee by this chapter.

(2) No Committee member shall participate in any matter pending or before the Ethics and Rules Committee in which such member or any member of his or her immediate family is involved or has any material conflicting personal or economic interest, except to testify or to produce other relevant and material evidence, as a witness duly subpoenaed for such purposes. The Advisory Committee of the Navajo Tribal Council shall appoint any member of the Advisory Committee in the place of each Ethics and Rules Committee member so disqualified or otherwise unable to participate, which member shall have all the powers and duties conferred upon members of the Ethics and Rules Committee by this chapter, for all purposes of such proceeding.

(e) *Advisory Committee of the Navajo Tribal Council.* The Advisory Committee of the Navajo Tribal Council shall have the duties, responsibilities and authority under the provisions of this chapter, in addition to all other duties, powers and authority under all other applicable laws of the Navajo Nation and under the Powers and Duties enumerated in the Plan of Operation of the Advisory Committee, as approved and adopted by the Navajo Tribal Council and shall:

(1) Receive and review for final approval all rules, regulations and procedures proposed for adoption by the Ethics and Rules Committee of the Navajo Nation in consultation with the Department of Justice to implement provisions of this chapter.

(2) Receive and review all findings, determinations and recommendations reported by resolution of the Ethics and Rules Committee as provided herein.

If the Advisory Committee approves in full the resolution of findings and recommendations by the Ethics and Rules Committee, the Advisory Committee shall thereupon adopt the same by resolution and forward all materials for final determination as provided herein.

If the Advisory Committee disapproves of all or any part of the resolution of the Ethics and Rules Committee, both Committees shall first meet to review and determine the extent, if any, to which such differences may be resolved and shall modify their resolutions accordingly. The Advisory Committee shall adopt any revised



findings or determinations which it approves and shall specify the findings and recommendations of the Ethics and Rules Committee which the Advisory Committee disapproves after such review and revisions, if any, together with any additional recommendations of the Advisory Committee and attach thereto a statement of the reasons for any dissent or disapproval by the Advisory Committee, of specified findings or recommendations of the Ethics and Rules Committee resolution.

The Advisory Committee shall, immediately upon passage of its resolution as provided herein, and in no event later than sixty (60) days following its initial receipt of the resolution of findings and determinations of the Ethics and Rules Committee, deliver the resolutions of both Committees for final determinations, resolution and orders as follows:

(A) In any case where an accused party is an elected public official of the Navajo Nation, the Advisory Committee shall forward the resolutions of both Committees to the Chairman of the Navajo Tribal Council for final determinations, resolution and action by the Navajo Tribal Council.

(B) In any case where any accused party is a public employee or otherwise appointed to and under the supervision and authority of the Executive or Administrative Branch of the Navajo Nation, the Advisory Committee, in addition to forwarding the resolutions of both Committees to the Chairman of the Navajo Tribal Council, shall simultaneously deliver duplicate copies of such resolutions to the Attorney General of the Navajo Nation; the chief executive administrator of the governmental body by whom such respondent is employed or otherwise having supervision and jurisdiction thereof; and to the Tribal Council Committee having the jurisdiction and responsibility to monitor the operations of the governmental body designated above.

(C) In any case where the accused party is an appointed official, member or employee or otherwise under the supervision and authority of the Judicial Branch of the Navajo Nation; to the Chief Justice of the Courts of the Navajo Nation and the Solicitor of the Courts of the Navajo Nation and the Chairman of the Judiciary Committee of the Navajo Tribal Council, in addition to the Chairman of the Navajo Tribal Council and Attorney General of the Navajo Nation.

Exhibit No. 3 (cont.)

T.2 § 3756

ADM'N OF TRIBAL AFFAIRS

Ch. 6

(f) *Executive or Administrative Branch.* Within ten (10) days of receipt from within the Advisory Committee of the Resolutions of Findings and Recommendation of both the Ethics and Rules Committee and of the Advisory Committee, the Chairman of the Navajo Tribal Council, as Chief Executive of the Administrative Branch of the Navajo Nation, or in his absence, the Vice Chairman of the Navajo Tribal Council in such capacity, in consultation with the parties designated in subsection (e) (2) (B), together with the Director of Personnel, and, if applicable, the Executive or Administrative Branch review board which conducted the hearing of the case, shall meet and review such resolutions and make a draft final written decision of the case, for submission to and final review by the Navajo Tribal Council at its next regular or special session. The Navajo Tribal Council may order any amendment thereto at its next regular or special session and in the event that the Navajo Tribal Council declines to so act, the decision of the Executive or Administrative Branch shall become final.

(g) *Judicial Branch.* Within ten (10) days of receipt from the Advisory Committee of the Resolutions of Findings and Recommendations of both the Ethics and Rules Committee and of the Advisory Committee, the Chief Justice of the Courts of the Navajo Nation, in consultation with the parties designated in section 3756(e) (2), together with the Administrator of the Courts of the Navajo Nation and if applicable, the Judicial Branch review board which conducted the hearing of the case, shall review such resolutions and make a draft final written decision of the case, for submission to and final review by the Navajo Tribal Council at its next regular or special session. The Navajo Tribal Council may order any amendment thereto at its next regular or special session and in the event that the Navajo Tribal Council declines to so act, the decision of the Judicial Branch shall become final.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 6, passed Aug. 9, 1984.  
Tribal Council Res. CD-93-85, § 1, passed Dec. 4, 1985.

1985 amendment. Subdivision (a) (8): Added "at the Ethics and Rules Office and at identified Tribal offices located in the respective agencies of the Navajo Nation, where agencies is to mean Western Navajo, Chinle, Shiprock, Eastern Navajo and Fort Defiance" at the end of the first sentence.

Subdivision (a) (14): Amended generally.

Purpose of 1985 amendment. Tribal Council Res. CD-93-85, Summary of Proposed Amendments, states as follows:

Subdivision (a) (8): "The Navajo Tribal Council objected to placing the burden upon officials for filing such documents at a local public office. The Ethics and Rules Committee feels that it is necessary to have local access to

ensure that the intent of the 'Act' is accomplished by having an informed electorate. This amendment places the responsibility on the Ethics and Rules Committee for such filing at a local identified tribal office."

Subdivision (a)(14): "This section recognized the establishment and status of the Ethics and Rules Office in accordance with the Ethics and Rules Committee, Plan of Operation, adopted subsequent to the stated purposes of the 'Act.'"

**§ 3757. Sanctions and penalties**

*(a) Administrative Sanctions.*

(1) Upon final determination by the Navajo Tribal Council after opportunity for hearing, findings, review and recommendations as hereinabove provided, that any elected public official, candidate for public office or public employee has violated any provision of this chapter, the Navajo Tribal Council may, in accordance herewith and with any procedures applicable thereto under other applicable law of the Navajo Nation and with due consideration for the seriousness of the violation or offense and the culpability of such party, resolve to approve, adopt, order or impose any and all of the following sanctions and penalties:

(A) Removal, discharge or termination from public office or employment in accordance with applicable Tribal law and procedure.

(B) Disqualification from candidacy for any specified elective office(s) or for all elective public offices of the Navajo Nation and/or appointment to or employment in any public office of the Navajo Nation, for four (4) years from the effective date of removal, discharge or any other termination of public office or employment of the Navajo Nation which such person occupied or held on the last date of any violation determined hereunder.

(C) Suspension from public office or employment and forfeiture of all compensation and benefits accruing therefrom, for not less than thirty (30) days nor for more than one (1) year.

(D) Issuance of a written public reprimand, which shall be entered into such person's permanent record of employment or office and upon the permanent record of the public office or entity of which such person is a member or employee, according to provisions of applicable Tribal law and procedures.

(E) Issuance of a private reprimand to such person, with or without suspension of any or all other sanctions provided herein, upon such terms and conditions the Navajo Tribal Council shall deem appropriate.

Exhibit No. 3 (cont.)

T:2 § 3757

ADM'N OF TRIBAL AFFAIRS

Ch. 6

(F) Imposition of such other civil penalties as hereinafter provided under subsection (b), which the Navajo Tribal Council shall deem appropriate.

(G) No sanctions or penalty provided herein shall limit any other powers of the Navajo Tribal Council, Navajo Nation Courts, Judicial, Executive or Administrative Branches of the Navajo Nation, nor of any other entity or administrative officials or employees under other applicable law, rules, regulations or procedures.

(H) Accordingly, any public employee of the Navajo Nation is further subject to discipline, including suspension without pay or other benefits and dismissal as provided by other laws, regulations and personnel policies or procedures applicable thereto.

(I) The Navajo Nation Election Commission shall have the authority to disqualify any candidate for elective public office of the Navajo Nation and to withhold issuance of or revoke the certificate of eligibility to take or hold any such public office for which a candidate has received the highest number of votes and to institute all proceedings for other remedies, sanctions and penalties as provided herein or under any other applicable law of the Navajo Nation, upon final determination of violation or noncompliance with the requirements of this chapter, as herein provided.

(J) Any candidate receiving the highest number of votes for elected public office of the Navajo Nation who fails or refuses to file any disclosure statements or report, as required under this chapter, shall not receive a certificate of election and shall not be eligible to take or assume any public office until the statement is filed as required herein.

(K) Any candidate for elected public office of the Navajo Nation who knowingly and willfully misrepresents, conceals or otherwise fails to fully disclose the nature, value or amount of any information required to be disclosed by this chapter shall not receive a certificate of election and if such person received the highest number of votes in the election for such public office for which he or she declared candidacy, shall not assume or hold such office, and shall be barred for a period of four (4) years from holding any elective public office of the Navajo Nation.

(L) The imposition of any sanction herein shall not operate to bar institution of or liability for any other civil, criminal or

misdemeanor action, judgment, liability or punishment applicable hereto, nor shall any sanction hereunder be barred thereby.

*(b) Other Civil Damages.*

(1) Public officials and employees shall, upon opportunity for hearing and final determination as provided hereunder, and without regard to the imposition of any administrative sanction or criminal conviction, be further subject to, and personally liable for, violation of the following provisions:

(A) Any public official or employee who violates any economic disclosure or reporting requirement of this chapter may be held liable to the Navajo Nation for civil damages in an amount not to exceed the value of any interest not properly reported.

(B) Any public official or employee who realizes an economic benefit as a result of violation of any prohibition or restriction set forth in section 3753 of this chapter shall be liable to the Navajo Nation for civil damages in an amount not exceeding three (3) times the amount or value of the benefit or benefits so obtained.

(2) If two (2) or more persons are responsible for any violation, each of them shall be liable to the Navajo Nation for the full amount of any civil damages prescribed herein, the full amount of which may be imposed upon and collected from each of them individually.

(3) Any civil penalties imposed hereunder shall be collected in any manner authorized for recovery of debts or obligations owed to the Navajo Nation and shall be paid into the general fund of the Navajo Nation.

(4) No imposition of any or all civil damages provided herein shall be a bar to institution of any civil, criminal or misdemeanor action, liability, judgment, conviction or punishment otherwise applicable hereto, nor shall determination of any such civil damages be barred thereby.

*(c) Misdemeanor Violations; Punishments.*

(1) Any person who is convicted or found guilty of knowingly and willfully violating any provision of section 3753 of this chapter is guilty of a misdemeanor and for a first offense shall be fined not more than \$500.00 and may be sentenced to labor for not more than 180 days, or both.

(2) Any person knowingly and willfully filing any complaint authorized under this chapter or by any other applicable law, without just cause and with malice or other improper purpose, including personal, political or other harassment or embarrassment, shall be guilty of a misdemeanor and for a first offense shall be fined not more than \$500.00 and may be sentenced to labor for not more than 180 days, or both.

(3) Upon conviction of any subsequent offense prescribed in paragraph (1) or (2) of this subsection, such person shall be fined not less than \$500.00 and shall be sentenced to labor of not less than 30 days nor more than 180 days.

(4) A person convicted of a misdemeanor under this chapter shall not be a candidate for elective public office, nor be eligible for any appointive office of the Navajo Nation, nor any of its governmental entities or political governing bodies, for four (4) years following the date of conviction.

(5) A plea of nolo contendere shall be deemed a conviction for purposes of this chapter.

(6) No criminal or misdemeanor action, judgment, conviction or punishment hereunder shall operate to bar any action for civil damage or penalty or imposition of any administrative sanction provided hereunder; nor be barred thereby.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 7, passed Aug. 9, 1984.

### § 3758. Definitions

As used in this chapter:

(1) "Business" includes any enterprise, organization, trade, occupation or profession whether or not operated as a legal entity for profit, including any business, trust, holding company, corporation, partnership, joint venture, or sole proprietorship, consultant or other self-employed enterprise.

(2) "Business with which the person is associated" includes any business in which the person or a member of the person's immediate family is a director, officer, partner, trustee or employee, holds any position of management or receives income in any form such as wages, commission, direct or indirect investment worth more than \$1,000 or holds any ownership, security or other beneficial interest, individually or combined, amounting to more than ten percent (10%) of said business.

(3) "Candidate for public office" means any person who has publicly announced such intent, authorized promotion for, or filed

Exhibit No. 3 (cont.)

Ch. 6

ETHICS IN GOVERNMENT

T.2 § 3758

a declaration of candidacy or a petition to appear on the ballot for election as a public official; and any person who has been nominated by a public official or governmental body for appointment to serve in any public capacity or office.

(4) "Committee" means the Ethics and Rules Committee of the Navajo Tribal Council.

(5) "Compensation" or "income" means any money or thing of value received, or to be received as a claim on future services, whether in the form of a fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital gain, or any other form of recompense or any combination thereof.

(6) "Confidential information" means information which by law or practice is not available to the public at large.

(7) "Conflict of interest" means the reasonable foreseeability that any personal or economic interest of a public official, or employee, will be affected in any materially different manner from the interest of the general public, by any decision, enactment, agreement, award or other official action or function of any governmental body or political subdivision of the Navajo Nation.

(8) "Dependent business" means any business, as defined herein, in which the person or members of the person's immediate family, individually or combined, have any direct or indirect ownership, investment, security or other beneficial interest amounting to more than twenty percent (20%) of such business.

(9) "Employee" means any person or entity working for, or rendering or exchanging any services or performing any act for or on behalf of another person, organization or entity in return for any form of pay or other compensation or thing of value received or to be received at any time temporarily, permanently or indefinitely, in any capacity; whether as agent, servant, representative, consultant, advisor, independent contractor or otherwise.

(10) "Employment" means the status or relationship existing or created by and between a person designated or acting as an "employee" as defined herein and the person, organization, group or other entity for whom or on whose behalf any such work, acts, services or other benefit has been, is being or will be rendered or performed for pay or any other form of compensation.

(11) "Economic interest" means an interest held by a person, members of the person's immediate family or a dependent business, which is:

Exhibit No. 3 (cont.)

T.2 § 3758

ADM'N OF TRIBAL AFFAIRS

Ch. 6

(A) any ownership, income, investment, security or other beneficial interest in a business, or

(B) any employment or prospective employment for which negotiations have already begun.

(12) "Gift" includes any gratuity, special discount, favor, hospitality, payment, loan, subscription, economic opportunity, advance, deposit of money, services, or other benefit received without equivalent consideration and not extended or provided to members of the public at large.

(13) "Governmental body" means any branch, entity, enterprise, authority, division, department, office, commission, council, board, bureau, committee, legislative body, agency, and any establishment of the Executive, Administrative, Legislative or Judicial Branch of the Navajo Nation, together with such political subdivisions and Certified Chapters of the Navajo Nation as shall adopt local ordinances, resolutions or other lawful enactments in accordance with the provisions of this chapter.

(14) "Immediate family" includes spouse, children and members of the household of public officials, public employees and candidates for public office, as defined in this chapter.

(15) "Ministerial action" means an action that a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to, or in the exercise of, the person's own judgment upon the propriety of the action being taken.

(16) "Official discretionary action" means any official function of public office or employment, including any vote, decision, opinion, allocation, recommendation, approval, disapproval, finding, delegation, authorization, contract, commitment, settlement, disbursement, release or other action which involves the exercise of discretionary authority, for, on behalf of or in any manner affecting any interest or property of the Navajo Nation, including any governmental body, political subdivision or member thereof.

(17) "Public employee" means any employee, as defined herein, temporarily, periodically, permanently or indefinitely in the employment of the Navajo Nation, and/or any governmental body thereof as defined herein, including intergovernmental personnel.

(18) "Public office" means any elected or appointed office or position of permanent or temporary employment in any governmental body of the Navajo Nation as defined herein.



Exhibit No. 3 (cont.)

Ch. 6

ETHICS IN GOVERNMENT

T.2 § 3772

(19) "Public official" means any person holding an elective or appointed office in any governmental body of the Navajo Nation as defined herein, including grazing committee members.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 8, passed Aug. 9, 1984.

**§ 3759. Severability**

If any provision of this chapter or the application of such provision to any person, firm, association, corporation or circumstances shall be held invalid, the remainder of the chapter and the application of such provision to persons, firms, associations, corporations or circumstances other than those as to which it is held invalid shall not be affected thereby.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 9, passed Aug. 9, 1984.

**§ 3760. Effective date**

The effective date of all provisions of this Navajo Nation Ethics in Government Law shall be October 8, 1984.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 10, passed Aug. 9, 1984.

**§ 3761. Prior inconsistent law superceded**

Upon the effective date of this Navajo Nation Ethics in Government Law, all prior inconsistent enactments, laws, rules, policies, ordinances and regulations of the Navajo Nation and all branches, divisions, departments, offices and political subdivisions thereof, are superceded hereby and/or amended to comply herewith.

Source. Tribal Council Res. CAU-40-84, Exhibit B, § 11, passed Aug. 9, 1984.

*Subchapter 3. Ethics and Rules Office*

**§ 3771. Establishment**

There is hereby established the Ethics and Rules Office within the Navajo Tribal government, pursuant to Resolution CJA-1-83, dated January 25, 1983; Resolution ACMA-35-84, dated March 14, 1984; and Resolution CAU-40-84, dated August 9, 1984, the Navajo Nation Ethics in Government Law (codified in subchapter 1 of this chapter, 2 N.T.C. §§ 3751-3761).

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

**§ 3772. Purpose**

The purpose of the Ethics and Rules Office shall be to provide administrative assistance to the Ethics and Rules Committee of the Navajo Tribal Council in ensuring adherence to legislative

Exhibit No. 3 (cont.)

T.2 § 3772

ADM'N OF TRIBAL AFFAIRS

Ch. 6

mandates under the Navajo Nation Ethics in Government Law, Ethics and Rules Committee Plan of Operation, and other applicable laws of the Navajo Nation; and:

(1) To represent the interests of the Navajo Nation in maintaining the highest standards of ethical conduct by the elected and appointed public officials, officers and representatives of the Navajo Nation, in the performance of their public and official duties and functions. (Includes candidates and public employees.)

(2) To maintain and make available for official information, complete and current written records of all laws, resolutions, rules, regulations and other official enactments, rulings, decisions or opinions relating to requirements, prohibitions or standards of ethical conduct or disclosure by elected and appointed public officials, officers, employees and representatives of the government of the Navajo Nation; together with current and complete records of such written disclosures as may be required by the laws of the Navajo Nation.

(3) To protect the interest of the Navajo people in fair, honest and efficient conduct of the government of the Navajo Nation, in accordance with the laws of the Navajo Nation and the will of the Navajo people, through review, recommendation and sponsorship of projects, legislation, rules and standards in furtherance of these ends.

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

§ 3773. Personnel and organization

(a) There is hereby established the position of Director for the Ethics and Rules Office and administrative/secretarial staff as may be budgeted by the Navajo Tribal Council.

(b) The Ethics and Rules Committee and the Executive Director of the Office of Legislative Affairs shall have the authority to employ the Director of the Ethics and Rules Office.

(c) The Director shall have the authority to hire the administrative/secretarial staff, pursuant to the Navajo Tribal Personnel Policies and Procedures.

(d) All Ethics and Rules Office personnel shall be subject to the Navajo Tribal personnel compensation, benefits, policies and procedures.

(e) The Director of the Ethics and Rules Office shall be administratively responsible to the Executive Director, Office of Legislative

Exhibit No. 3 (cont.)

Ch. 6

ETHICS IN GOVERNMENT

T.2 § 3774

Affairs in carrying out policies authorized and directed by the Ethics and Rules Committee of the Navajo Tribal Council, as provided under section 3772 of this subchapter.

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

Revision note. Reference to organizational chart omitted for purposes of statutory form.

**§ 3774. Duties, responsibilities and authority**

(a) The Director shall have the authority necessary and proper to carry out the purpose set forth in section 3772 of this chapter.

(b) Under general direction, the Director of the Ethics and Rules Office shall have the duties, responsibility, and authority to assist the Ethics and Rules Committee of the Navajo Tribal Council to:

(1) Provide recommendations to the Ethics and Rules Committee concerning rules and regulations necessary to implement provisions of the Navajo Nation Ethics in Government Law and to publish same after proper approval.

(2) Prescribe and make available appropriate forms for economic disclosure statements and distribute such forms to all persons required to complete and file with the Ethics and Rules Committee of the Navajo Tribal Council.

(3) Establish policies and procedures for completing and filing economic disclosure statements and provide training as deemed necessary.

(4) Maintain current list of all persons required to file economic disclosure statements.

(5) Provide for the preservation of economic disclosure statements filed with the Ethics and Rules Committee and ensure their confidentiality in accordance with the Navajo Nation Ethics in Government Law and all applicable rules and regulations.

(6) Audit, review and evaluate all economic disclosure statements and make available for public access those deemed public records during regular office hours.

(7) Provide and maintain written advisory opinions on the requirements of the Navajo Nation Ethics in Government Law, upon request from persons whose conduct is subject thereto and who have specific need to use such opinions.

(8) Receive, examine and investigate complaints and conduct such hearings, in accordance with rules and regulations lawfully adopted and authorized to determine facts of allegations or non-

Exhibit No. 3 (cont.)

T.2 § 3774

ADM'N OF TRIBAL AFFAIRS

Ch. 6

compliance with provisions of the Navajo Nation Ethics in Government Law.

(9) Implement, facilitate and require compliance with all provisions of the Navajo Nation Ethics in Government Law in accordance with stated purposes and intent, together with lawfully adopted rules and regulations, and the provisions of the Ethics and Rules Committee, Plan of Operation.

(10) Assist in instituting and conducting hearings on any matter which cannot be resolved by voluntary compliance and/or remedial action.

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

Revision note. Slightly reworded for purposes of statutory form.

**§ 3775. Political practices prohibited,**

The staff shall not, for the purpose of personal gain, use any information or conduct any proceedings for the intent of causing harm or injury to the political standing or reputation of any member of the Navajo Tribal Council, the Chairman and Vice Chairman of the Navajo Tribal Council, or any other employee, or officer of the Navajo Nation.

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

**§ 3776. Office location and hours**

The administrative office of the Ethics and Rules Office shall be located in Window Rock, Arizona. Mailing address is as follows:

P.O. Box 308, Window Rock, Arizona 86515

The office shall be open Monday through Friday, between 8:00 a.m. and 5:00 p.m., in the absence of any directive to the contrary from the Director, Ethics and Rules Office.

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

**§ 3777. Construction**

Nothing contained in this Plan of Operation shall be construed to limit the authority of the Ethics and Rules Committee of the Navajo Tribal Council and/or their representatives in ensuring adherence to and carrying out the legislative intent of the Navajo Nation Ethics in Government Law and the Ethics and Rules Com-

Exhibit No. 3 (cont.)

Ch. 7

PERSONNEL

T.2 § 3805

mittee's Plan of Operation, and all applicable laws of the Navajo Nation.

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

§ 3778. Amendments

This Plan of Operation may be amended by the Ethics and Rules Committee of the Navajo Tribal Council and subject to the approval by the Advisory Committee of the Navajo Tribal Council.

Source. Advisory Committee Res. ACJN-109-85, Exhibit B, passed June 12, 1985.

*Chapter 7. Personnel*

SUBCHAPTER 1. GENERALLY

NEW SECTION

3812. Compensation of members of Tribal commissions

SUBCHAPTER 3. TRAVEL AND TRAVEL EXPENSES

3851. Definitions

3852. Governing law

3853. Requirements for official travel

3854. Travel Authorizations

3855. Advances against salary to cover travel expenses

3856. Allowable travel expenses—Generally

3857. —Privately-owned vehicles

3858. —Tribal vehicles

3859. —Commercial aircraft

3860. —Chartered aircraft

3861. —Lodging

3862. —Meals

3863. —Telephone

3864. —Taxis, buses and limousines

3865. —Tips

3866. —Registration and conference fees

3867. —Other expenses

3868. —Payment of per diem or expenses of other authorized travelers

3869. Reimbursable expenses

Exhibit No. 3 (cont.)

Exhibit "D"

NAVAJO SOVEREIGN IMMUNITY ACT

(Amended December 11, 1986 by CD-60-86)

1 N.T.C. Sections 351-355

Received  
01/25/87

Navajo Tribal Code: Title 1: General Provisions

Section 351. Establishment:

There is hereby established the Navajo Sovereign Immunity Act.

Section 352. Definitions:

For the purposes of this subchapter "Navajo Nation" means:

- (1) The Navajo Tribal Council;
- (2) The Chairman, Navajo Tribal Council;
- (3) The Vice Chairman, Navajo Tribal Council;
- (4) The Delegates to the Navajo Tribal Council;
- (5) The Certified Chapters of the Navajo Nation;
- (6) The Grazing Committees of the Navajo Nation;
- (7) The Land Boards of the Navajo Nation;
- (8) The Executive Branch of the Navajo Nation Government;
- (9) The Judicial Branch of the Navajo Nation Government;
- (10) The Commissions of the Navajo Nation Government;
- (11) The Committees of the Navajo Tribal Council;
- (12) The Legislative Secretary of the Navajo Tribal Council;
- (13) The Supreme Judicial Council of the Navajo Tribal Council;
- (14) The Enterprises of the Navajo Nation;
- (15) Navajo Community College.

Section 353. General principles of sovereign immunity:

(a) The Navajo Nation is immune from suit.

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

Section 354. Exceptions to the general principles of sovereign immunity;  
Purpose and intent:

The purpose and intent of the Navajo Sovereign Immunity Act is to balance the interests of individual parties in obtaining the benefits and just redress to which they are entitled, under the law and in accordance with the orderly

### Exhibit No. 3 (cont.)

processes of the Navajo Nation government, while at the same time protecting the legitimate public interest in securing the purposes and benefits of their public funds and assets, and the ability of their government to function without undue interference in furtherance of the general welfare and the greatest good of all the people. All of the provisions of this act shall be construed as set forth in order to carry out this stated purpose and intent.

(a) The Navajo Nation may be sued in the Courts of the Navajo Nation when explicitly authorized by applicable Federal law.

(b) The Navajo Nation may be sued only in the Courts of the Navajo Nation when explicitly authorized by resolution of the Navajo Tribal Council.

(c) Any exception to the immunity of the Navajo Nation and assumption of liability pursuant to this act does not apply in circumstances in which such liability has been or is hereafter assumed by third parties, including any other governmental body or agency, nor for which the Navajo Nation has been or is hereafter indemnified or held harmless by such parties, to the extent of such assumption or indemnification of liability. Nor does any liability assumed by the Navajo Nation pursuant to this act extend to any party or parties as third party beneficiary or otherwise, other than the party or parties to whom such liability is expressly assumed, and then only to the extent, circumstances and conditions specified thereby.

(d) Any liability of a public entity or public officer employee or agent assumed pursuant to this act is subject to any other immunity of that public entity or person and is subject to any defense which would be available to the public entity or person if they were private entities and/or persons.

A public entity is not liable for any injury or damage resulting from an act or omission of any public officer employee or agent if that party is not liable; nor for the actions or omissions of public officers, employees or agents which are determined to be contrary to or without authorization or otherwise outside or beyond the course and scope of such officer's employee's or agent's authority.

This section does not immunize a public officer, employee or agent from individual liability, not within Tribal insurance coverage, for the full measure of the recovery applicable to a person in the private sector, if it is established that such conduct was outside the scope of his or her employment and/or authority.

Volunteers duly authorized by the Navajo Nation or any political subdivision thereof, in performing any of their authorized functions or duties or training for such functions or duties, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of the Navajo Nation and its governmental entities performing similar work.

(e) The Navajo Nation may be sued only in the Courts of the Navajo Nation with respect to any claim which is within the express coverage and not excluded by either commercial liability insurance carried by the Navajo Nation or an established Navajo Nation self-insured and/or other claims program, of the Navajo Nation government, approved and adopted pursuant to the laws of the Navajo Nation and further subject to the following provisions and limitations:

### Exhibit No. 3 (cont.)

(1) No judgment, order or award pertaining to any claims permitted hereunder shall be for more than the limits of valid and collectible liability insurance policies carried by the Navajo Nation covering each such claim and in force at the time of such judgment, including deductible amounts to the extent appropriated by the Navajo Tribal Council; nor for more than the amount of coverage provided for each such claim under established claim reserves as appropriated by the Navajo Tribal Council, or otherwise established pursuant to any self-insured liability and/or other Navajo Nation government claims program, approved and adopted pursuant to the laws of the Navajo Nation;

(2) Any such judgment, order or award may only be satisfied pursuant to the express provisions of the policy(ies) of liability insurance and/or established self-insured or government claims program of the Navajo Nation which are in effect at the time of each such judgment, order or award;

(3) No cause of action shall lie and no judgment may be entered or awarded on any claim for punitive or exemplary damages against the Navajo Nation; nor against any officer, employee or agent of the Navajo Nation acting within the course and scope of the authority of such office, employment or agency;

(4) Notwithstanding any provisions of this subsection (e), there shall be no exception to the sovereign immunity of public entities, officials, employees or agents of the Navajo Nation from claims for injury or damage alleged to have been sustained by:

Policy decisions or the exercise of discretion made by a public official, employee or agent in the exercise of judgment or discretion vested in the entity or individual;

A decision made in good faith and without gross negligence in carrying out the law, except that this provision does not immunize a public entity, officer, employee or agent from liability for false arrest, false imprisonment or malicious prosecution;

Legislative or judicial action or inaction or administrative action or inaction of a legislative or judicial nature, such as adopting or failure to adopt a law or by failing to enforce a law;

Issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, nor by the termination or reduction of benefits under a public assistance program; if the public entity, officer, employee or agent of the Navajo Nation is authorized by law to determine whether or not such authorization or benefits should be issued, denied, suspended or revoked;

Probation, parole, furlough or release from confinement of a prisoner or other detainee or from the terms and conditions or the revocation thereof, except upon a showing of gross negligence;

Any injury or damage caused by an escaping or escaped person or prisoner, a person resisting arrest, or by a prisoner to himself or herself, or to any other prisoner, except upon showing of gross negligence;



### Exhibit No. 3 (cont.)

The enumeration of the above immunities shall not be construed to waive any other immunities, nor to assume any liability except as explicitly provided in this act.

(5) Subject to all other provisions of this Act, the express coverage of any commercial liability policy insuring the Navajo Nation or of any self-insurance program established by the Navajo Nation, for sums which the Navajo Nation as insured shall become legally obligated to pay as damage because of personal injury and/or property damages, shall include liability for such actual monetary loss and damage which is established by clear and convincing evidence, to be the direct and proximate result of the wrongful deprivation or impairment of civil rights as set forth in Chapter 1 of Title 1 of the Navajo Tribal Code, the Bill of Rights of the Navajo Nation. In the sound exercise of judicial discretion, the Courts of the Navajo Nation may, to the extent deemed proper and appropriate in any action for damages for wrongful deprivation or impairment of civil rights as provided herein, award necessary costs of suit and/or reasonable fees, based upon time and value, incurred for legal representation; or require each or any party thereto, to bear their own respective costs and/or legal fees incurred therein.

(f) Any officer, employee or agent of the Navajo Nation may be sued in the Courts of the Navajo Nation to compel him/her to perform his/her responsibility under the expressly applicable laws of the United States and of the Navajo Nation, which shall include the Bill of Rights of the Navajo Nation, as set forth in Chapter 1, Title 1, Navajo Tribal Code.

(1) Relief awarded by the Courts of the Navajo Nation under this subsection (f) shall be limited to declaratory or prospective mandamus or injunctive relief and in accordance with the express provisions of the laws of the United States and the Navajo Nation establishing the responsibility for such performance. The Courts may further, in the exercise of judicial discretion, award necessary costs of suit and/or reasonable fees for legal representation, in the same manner and to the same extent provided in paragraph (5), subsection (e) hereof.

(2) No relief as provided under this subsection (f) may be awarded by the Courts of the Navajo Nation without actual notice to the defendant(s), nor before the time provided in this act for answering complaints, motions or orders to show cause, nor without opportunity for full hearing of all defenses and objection thereto, in accordance with all provisions of this act and all other applicable law(s).

(3) This subsection (f) shall not apply to the Chairman of the Navajo Tribal Council, the Vice Chairman of the Navajo Tribal Council, or the delegates to the Navajo Tribal Council.

(g) Contracted or otherwise retained counsel and other attorneys employed by the Navajo Nation may be sued for malpractice when authorized by the Advisory Committee of the Navajo Tribal Council.

### Exhibit No. 3 (cont.)

Section 355. Procedure with respect to actions authorized by this subchapter:

(a) Any person or party desiring to institute suit against the Navajo Nation or any officer, employee or agent of the Navajo Nation as authorized by this subchapter shall, as a jurisdictional condition precedent to institution of such suit, provide notice to the Chairman of the Navajo Tribal Council, and to the Attorney General of the Navajo Nation, as provided herein.

(1) Such notices shall be sent by certified or registered mail, addressed to the main administrative offices of the Chairman of the Navajo Tribal Council and of the Attorney General of the Navajo Nation, return receipts requested. The time of such notice shall commence to run only from the date following actual delivery of both notices as evidenced upon such receipts, and filed together with such notices with the Court in which such action is subsequently to be commenced. The Chairman of the Navajo Tribal Council and the Attorney General of the Navajo Nation shall ensure the availability, during all regular office hours, of office staff personnel duly authorized to accept and receipt for delivery of such notices provided herein and their receipt thereof shall not waive the assertion of any appropriate defense pertaining to the validity of such notice or service.

(2) Such notices shall state the name of each prospective plaintiff; the identity of each prospective defendant; the nature of all claims and relief which will be sought, and the correct address, name and telephone number of each prospective plaintiff's attorney or counselor (if any).

(3) 1. No action shall be accepted for filing against the Navajo Nation or any officer, employee or agent of the Navajo Nation unless the plaintiff has filed proof of compliance with this subsection (2) by service of the notices as required by this subsection at least thirty (30) days prior to the date on which the complaint or any other action is proposed to be filed with such Court.

ii. In any action against the Navajo Nation or any officer, employee or agent of the Navajo Nation, the time for responding to valid service of any summons and complaint shall be sixty (60) days; to valid service of any order to show cause, not less than thirty (30) days; and to valid service of any motion, not less than twenty (20) days. Any claim against the Navajo Nation or any public entity, officer, employee or agent thereof, which is filed pursuant to this act, is deemed generally denied sixty (60) days after valid service of the complaint, unless the claimant or claimant's attorney or counsel filing the complaint is advised of acceptance or of a specific or otherwise limited denial in writing or by responsive pleading filed before the expiration of sixty (60) days; and any such claim shall otherwise proceed in the same manner as upon the filing of such general denial thereof. These time periods may not be shortened by Rule of Court or Judicial Order, but shall be extended by any longer period provided by other applicable law, rule or order of Court.

### Exhibit No. 3 (cont.)

iii. Any person or party filing a complaint against the Navajo Nation or any officer, employee or agent of the Navajo Nation shall serve by certified or registered mail, return receipt requested, a copy of this complaint together with summons duly issued, upon the Chairman of the Navajo Tribal Council and the Attorney General of the Navajo Nation. Service of summons and complaint against any officer, employee or agent of the Navajo Nation shall be made by any means authorized under the Rules of the Courts of the Navajo Nation, provided that the time for response thereto shall be as provided herein and service upon such parties shall not be effected by such required service upon the Chairman of the Navajo Council and the Attorney General of the Navajo Nation.

iv. In any action in which any claim is asserted against the Navajo Nation or any public entity thereof, upon written demand of the Navajo Nation Department of Justice, made at or before the time of answering, served upon the opposing party and filed with the Court where the action is pending, the place of trial of such action shall be changed to Window Rock, Navajo Nation.

Exhibit No. 4

UNITED STATES COMMISSION ON CIVIL RIGHTS  
ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT

Statement of Sandy Hansen  
Attorney at Law  
July 15, 1988

## Exhibit No. 4 (cont.)

### INTRODUCTION

At the request of Brian Miller, deputy general counsel for the United States Commission on Civil Rights, I am submitting this written statement to supplement testimony that I have been asked to give at the Commission's hearing on enforcement of the Indian Civil Rights Act, scheduled for July 7, 1988, in Flagstaff, Arizona.

My name is Sandra (Sandy) Hansen. I am a 1986 graduate of the University of Colorado School of Law and am admitted to practice law before the courts of the State of Colorado, Federal District Court for the District of Colorado, and Tenth Circuit Court of Appeals.

Before enrolling in law school, I worked for the Cherokee Nation of Oklahoma as director of personnel (1980-1981); communications director (1981-1983); and legislative aide (1981-1983). From 1976-1980, I assisted various Tribes and Pueblos in Oklahoma and New Mexico develop merit-based personnel management systems. Since graduating from law school, I have worked for a law firm that specializes in federal Indian law. I have served as the lead counsel representing the Navajo Education and Scholarship Foundation, Inc., in its dispute with the Navajo Nation since February 25, 1987. I have also served as the lead counsel representing the Oglala Sioux Nation and Ft. Mojave Indian Tribe in Indian Child Welfare Act cases tried in Boulder County (Colorado) District and Santa Cruz (California) Municipal Court.

## Exhibit No. 4 (cont.)

### THE DISPUTE BETWEEN THE NAVAJO EDUCATION AND SCHOLARSHIP FOUNDATION, INC., AND NAVAJO NATION

On October 12, 1983, the Advisory Committee of the Navajo Tribal Council<sup>1</sup> enacted a Resolution establishing the Navajo Education and Scholarship Foundation (NESF). The purposes of the Foundation were to raise funds from private and public sources (1) to finance the construction of a building to house the educational programs of the Navajo Nation (and related programs) and (2) to fund a scholarship program for Navajo students who were ineligible to receive scholarships from the tribal or federal government. The original Articles of Incorporation authorized the Chairman of the Navajo Tribal Council, with the consent of the Advisory Committee, to appoint the members of NESF's Board of Trustees. The original Articles also required the Advisory Committee's approval of any amendments to the Articles. Dr. Robert Roessel was instrumental in the creation of NESF and served as its first executive director. He testified at the Commission's Hearing on August 13, 1987, that the original incorporators and the tribal government intended NESF to be separate from the tribal government from the Foundation's inception.

On January 30, 1986, the Navajo Tribal Council enacted the

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<sup>1</sup>The Advisory Committee is comprised of 18 delegates to the Navajo Tribal Council and is charged with, among other things, conducting the business of the Navajo Nation when the full Council is not in session. The members of the Advisory Committee are selected by the Chairman of the Navajo Tribal Council. There are no geographic or other criteria for selecting the Advisory Committee members.

#### Exhibit No. 4 (cont.)

Navajo Nation's first corporation law. The law took effect in August 1986. From January 1986 until November 1986, the Board of Trustees and staff of NESF debated various amendments to NESF's Articles of Incorporation. On November 13, 1986, certain amendments were approved by the executive committee of NESF's Board of Trustees. The amendments divested the Chairman of his authority to appoint future members to the Board of Trustees. They also divested the Advisory Committee of any future authority to approve appointments to the Board of Trustees or amendments to the Articles of Incorporation.

By Resolution adopted on November 13, 1986, the Advisory Committee approved the proposed amendments and authorized NESF to file the amended Articles of Incorporation with the Navajo Department of Commerce for issuance of a certificate of incorporation. That certificate of incorporation was issued to NESF on December 16, 1986.

On December 30, 1986, the Advisory Committee accepted a transfer of the Navajo Education Center from NESF to the Navajo Nation.<sup>2</sup> NESF transferred ownership of the building to the Tribe on the condition that the Foundation be granted a 25-year lease, at a cost of \$1 per year, of 535 square feet of office space in the Center. The transfer agreement and lease were expressly incorporated into the Resolution by which the Advisory Committee

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<sup>2</sup>The Navajo Education Center was built by NESF from 1983-1986 with \$2.5 million in private funds raised primarily by then-Chairman Peterson Zah and \$1 million contributed by the Navajo Nation. The building presently houses the Navajo Division of Education and Navajo Education and Scholarship Foundation, Inc.

#### Exhibit No. 4 (cont.)

accepted ownership of the Center. By its terms, the lease may be renewed for 25 years, at a rate of \$1 rent per year, and may be cancelled only upon (1) mutual agreement of the parties; (2) unilateral decision of NESF; or (3) a decision by the Navajo Nation not to rebuild the Center in the event of its destruction.

On January 12, 1987, Peter MacDonald succeeded Peterson Zah as Chairman of the Navajo Tribal Council. Because of his past success in raising funds for the Foundation, NESF's Board of Trustees employed Mr. Zah as chairman of the Foundation's National Advisory Council on or about February 1, 1987. The Council is primarily responsible for raising funds to finance NESF's scholarship programs.

On February 25, 1987, the Advisory Committee enacted two resolutions affecting NESF.<sup>3</sup> In the first, the Advisory Committee declared NESF to be an entity of the Navajo Nation, rescinded NESF's amended Articles of Incorporation and reinstated NESF's original Articles of Incorporation as the Foundation's governing document. In the second, the Advisory Committee approved Mr. MacDonald's removal of the then-sitting members of the Board of Trustees and his appointment of their purported successors.

We<sup>4</sup> immediately filed suit, naming Chairman MacDonald, Vice-

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<sup>3</sup>The Resolutions are attached as Exhibit A.

<sup>4</sup>"We" refers to Dale White, formerly an associate at Fredericks & Pelcyger and now a partner in Whiteing, Thompson & White, Boulder, Colorado; Mike Nelson, a lawyer who practices in Window Rock, Arizona; and myself. Later, Mr. Nelson recused himself from the case and Richard Hughes, of Luebben & Hughes,



## Exhibit No. 4 (cont.)

Chairman Johnny R. Thompson, the delegates to the Advisory Committee, and the purported appointees to the Board of Trustees as defendants. The suit was filed in the Navajo District Court for the District of Window Rock and alleged that the February 25 Resolutions were contrary to the Navajo Bill of Rights, Indian Civil Rights Act, and Navajo Corporation Code. Our principal claim was that the Resolutions constituted an impermissible "taking" without due process of law.

The honorable Robert Yazzie presided over the case.<sup>5</sup> Initially, the Foundation was granted a temporary restraining order, enjoining the defendants from assuming control of the Foundation. At the hearing on our motion for a preliminary injunction, Assistant (Navajo) Attorney General William A. Riordan raised the defense of sovereign immunity. He argued that, because we had named the defendants in their official capacities and had asked for injunctive relief, the Court was without jurisdiction to hear the case. Judge Yazzie ruled that the Navajo Sovereign Immunity Act does deprive the Courts of the Albuquerque, New Mexico, appeared as local counsel.

<sup>5</sup>If there is a hero in this case, it is Judge Yazzie. Although he is a probationary judge, he had the courage to rule on the basis of law and principle, rather than self-interest and political expedience. Therefore, I use the term "honorable" not merely as a courtesy or convention, but also as an expression of my respect for Judge Yazzie as an honorable, courageous and learned jurist.

If Judge Yazzie is representative of the calibre of judges and justices sitting on the Navajo bench, the Navajo People can rest assured that they will receive a fair and impartial hearing in tribal court, whatever their claims and whoever the defendant. His actions reflect that he believes that no person - and no group of persons - is above the law.

#### Exhibit No. 4 (cont.)

Navajo Nation from hearing cases against the Chairman, Vice-Chairman or delegates to the Navajo Tribal Council acting as such when the relief sought is equitable. As a consequence, the Judge dismissed our case, without prejudice.

Mike Nelson and I then prepared an identical complaint, naming the same defendants in their individual capacities. As we were preparing to file the complaint, we received a telephone call from Michael P. Upshaw, attorney general of the Navajo Nation. Mr. Upshaw invited us to a meeting, attended by himself, Bill Riordan, Larry Ruzow (representing Chairman MacDonald or Vice Chairman Thompson) and another attorney whose name I can't presently recall (representing Chairman MacDonald or Vice Chairman Thompson). At the meeting, we were persuaded to withhold filing our complaint as a demonstration of our good faith intent to attempt to negotiate a settlement to the case.

On March 12, 1987, representatives of each of the competing Boards of Trustees met to begin negotiations. The "MacDonald" appointees presented the "Zah" appointees with a list of "non-negotiable" demands. Those demands included (1) recognition that NESF was an entity of the Navajo Nation, subject to the plenary control of the Advisory Committee and (2) termination of Peterson Zah as an employee of the Foundation.

Rather than throw out the baby with the bath water by conceding to the "MacDonald" appointee's non-negotiable demands, the "Zah" appointees asked us to file a new Complaint. However, the "MacDonald" appointees won the race to the courthouse with

Exhibit No. 4 (cont.)

the Attorney General filing a quo warranto action against the "Zah" appointees on March 13, 1987.

The parties stipulated that the action could be decided on cross-motions for summary judgment. The Judge entered an order appointing three persons from each Board to conduct the affairs of the Foundation and directing that those persons employed by the Foundation as of February 25, 1987, continue their employment unless they were removed by the "interim Board" while the case was pending.

After briefs were filed and oral argument was heard, Judge Yazzie issued an Opinion and Order.<sup>6</sup> On September 18, 1987, the Judge held that NESF was and always had been an entity separate from the Navajo Nation. He expressly declared that the February 25 Resolutions of the Advisory Committee were "invalid and of no effect" because they had been enacted without due process of law.<sup>7</sup>

The Attorney General filed motions for reconsideration, stay of execution, and additional findings of fact and conclusions of

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<sup>6</sup>Attached as Exhibit B.

<sup>7</sup>Despite the Judge's declaration, the Navajo tribal government continued to assert control over NESF. In November 1987, the ("Zah") Board of Trustees passed a resolution directing Fiduciary Trust of New York to sell certain stock and remit the proceeds to the Foundation. Counsel for Fiduciary Trust responded that the Attorney General's office had blocked the sale on the ground that no action by NESF was valid unless approved by the interim Board. Fiduciary Trust ignored our argument that the mere filing of a motion to stay the execution of the Judge's Opinion and Order did not operate to continue the interim Board. To this date, Fiduciary Trust has not complied with NESF's demand that the stock be sold.

#### Exhibit No. 4 (cont.)

law. As the prevailing party, we filed a motion for an award of attorneys' fees on behalf of the "Zah" Board of Trustees. While those motions were pending, the Advisory Committee enacted a Resolution recommending that the Navajo Tribal Council adopt legislation in support of the filing of the Attorney General's post-trial motions.<sup>8</sup>

The Advisory Committee's Resolution was presented to the Tribal Council on February 4, 1988. However, the legally operative portion of the Resolution had been changed. Instead of merely indicating the Council's support for the Attorney General's post-trial motions, the Resolution (1) declared NESF to have been, since its inception, an entity "fully owned and controlled by the Navajo Nation" and (2) directed the Advisory Committee "to take all actions necessary to implement the mandates of th[e] Resolution and ensure the continuing status and operation of [NESF] as a government non-profit corporate [sic] entity of the Navajo Nation." See Resolution Clauses 2-3, Resolution CF-8-88 (Navajo Tribal Council, February 4, 1988).<sup>9</sup>

During the debate on proposed Resolution CF-8-88, a member of the "MacDonald" Board of Trustees, the Attorney General, Assistant Attorney General Bill Riordan, and four council delegates who supported enactment of the Resolution were permitted to speak in favor of the Resolution. See Transcript of Navajo Tribal Council Meeting (February 4, 1988).<sup>10</sup> The Chairman

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<sup>8</sup>Attached as Exhibit C.

<sup>9</sup>Attached as Exhibit D.

<sup>10</sup>Attached as Exhibit E.

#### Exhibit No. 4 (cont.)

refused to permit any opponent of the Resolution to speak during the Council's debate. One delegate who opposed the measure, who is also a "Zah" appointee to NESF's Board of Trustees, had his hand raised, signaling his desire to be recognized by the Chairman, during three speeches made in favor of the Resolution. When the Chairman refused to recognize him, the Councilman stood during the fourth, and final, speech made in favor of the Resolution. At least three other Council delegates signaled their desire, but were not permitted by the Chairman, to speak out against the proposed Resolution.<sup>11</sup>

Despite the lopsided "debate", the initial vote on Resolution CF-8-88 ended in a tie, with 38 delegates voting in favor and 38 delegates voting in opposition to the measure, and one delegate abstaining.<sup>12</sup> Chairman MacDonald cast the tie-breaking vote, and the measure became law.

On February 16, 1988, Assistant Attorney General Bill Riordan sent a copy of Resolution CF-8-88 to Judge Yazzie by way of a letter. In the letter, Mr. Riordan asked the Judge "to take judicial notice of [the] contents [of the Resolution], particularly for reconsideration of the basis for the District Court's decision herein dated September 18, 1987, viz: the Court's imputation of the legislative intent of the governing body of the Navajo Nation." See Letter from William A. Riordan

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<sup>11</sup>See Various Newspaper Articles, attached as Exhibit F.

<sup>12</sup>See Tally of Council Delegate Votes, Resolution CF-8-88 (February 4, 1988), attached as Exhibit G.

Exhibit No. 4 (cont.)

to the honorable Robert Yazzie (February 16, 1988).<sup>13</sup>

We responded by way of a 26-page memorandum in which we argued that Resolution CF-8-88 was invalid because it constituted an ex post facto law and impermissibly intruded upon the authority of the Courts to interpret statutes in violation of Navajo principles of separation of powers. In the alternative, we argued that the Resolution was entitled to no weight if it was introduced as evidence of the present legislature's interpretation of a prior legislature's actions. Finally, we argued that Resolution CF-8-88 was invalid because it constituted a "taking" without due process and just compensation.

Judge Yazzie scheduled oral argument on all of the post-trial motions for April 22, 1988. Deputy (Navajo) Attorney General Eric Dahlstrom did not respond to our memorandum addressing Resolution CF-8-88 at the hearing. His only response to the substance of our memorandum was to state, in a post-hearing memorandum:

Respondent [sic] urged in their supplemental memorandum that the [sic] Navajo Tribal Council Resolution CF-8-88 is invalid or, in the alternative, if it is valid, respondents should be compensated for a taking of the assets of NESF without due process. Petitioners' supplemental memorandum attempts to discredit CF-8-88 as evidence of intent [sic] of the Advisory Committee. The action of the Navajo Tribal Council, CF-8-88, is not concerned with the 'intent' of the Advisory Committee. Its actions supersede those of the Advisory Committee. The powers of the Advisory Committee derive entirely from the Navajo Tribal Council.

Petitioner's Response to Supplemental Memorandum in Opposition to  
Petitioner's Motion for Reconsideration and Findings of Fact and

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<sup>13</sup>Attached as Exhibit H.

## Exhibit No. 4 (cont.)

Conclusions of Law at 1-2, Upshaw ex rel. Benally v. Gorman, No. WR-CV-96-87 (Window Rock D. Ct., May 2, 1988).

Acting pursuant to the authority delegated to it by Resolution CF-8-88, the Advisory Committee enacted another Resolution affecting NESF on May 24, 1988.<sup>14</sup> By Resolution ACMY-107-88, the Advisory Committee:

1. "terminated and rescinded [the "Lease or use agreement"] with regard to the current tenant and occupants of the Navajo Education Center, who are unlawfully claiming private ownership and control of the Navajo Education and Scholarship Foundation";

2. requested "the Chairman of the Navajo Tribal Council [to] immediately take any and all actions necessary to enforce the termination of the Lease and use agreements as to said private individuals and to secure possession of the premises by the Navajo Nation for the use and benefit of the Navajo Education and Scholarship Foundation as a wholly owned public entity of the government of the Navajo Nation";

3. directed the "Navajo Education and Scholarship Foundation Board, appointed by Advisory Committee Resolution ACF-53-87 and confirmed by Navajo Tribal Council Resolution CF-8-88, [to] hold a formal meeting as soon as possible to begin the challenging task of implementing the goals and purposes for which the Navajo Education and Scholarship Foundation was created as a governmental entity of the Navajo Nation"; and

4. requested the "Chairman, Navajo Tribal Council, and the Department of Justice [to] implement and enforce the purpose and intent of this Resolution, should there be a failure by any former Trustee, Officer, employees or other persons unlawful [sic] claiming private ownership or control of the Navajo Education and Scholarship Foundation, and compel them to comply with delivery of all Foundation books, accounts, minutes, records, and [sic] in his/her possession, to the Trustees of the Navajo Education and Scholarship Foundation, by authority of ACF-53-87, confirmed by Navajo Tribal Council Resolution CF-8-88."

Resolution ACMY-107-88 (May 24, 1988).

Mr. Zah telephoned me at home on the evening that Resolution ACMY-107-88 was enacted. As he stated in an affidavit later

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<sup>14</sup>See Resolution ACMY-107-88, attached as Exhibit I.

#### Exhibit No. 4 (cont.)

filed with the Court,<sup>15</sup> Mr. Zah said that he had received a tip that someone was tampering with the lock on the exterior door to NESF's suite of offices in the Navajo Education Center around 6:30 p.m. on May 24. Acting on that information, he and another Foundation employee (Duane Beyal) went to the Center. Upon entering NESF's offices, Mr. Zah discovered Lloyd House and a workman inside the suite.<sup>16</sup>

According to his affidavit, Mr. Zah told Mr. House that he was going to spend the night in the Foundation's offices, and that if Mr. House wanted to remove Mr. Zah, he would have to get the police to serve him with a court order. Mr. House and the workman then left the offices, but returned a short time later in the company of Marshal Tome, former editor of the Navajo Times during a previous MacDonald administration.

Despite Mr. Zah's protests, Mr. House and the workman removed the locking mechanism on the door to NESF's suite and replaced it with a locking mechanism for which employees of NESF had no keys.

On May 25, we filed a motion for a temporary restraining order in the District Court of the Navajo Nation for the District of Window Rock. Judge Yazzie issued the order enjoining the Attorney General, "MacDonald" appointees to NESF's Board, "their officers, agents, servants, employees, counsel and all persons

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<sup>15</sup>Mr. Zah's affidavit is attached as Exhibit J.

<sup>16</sup>Mr. House later purported to be the executive director of NESF, appointed by the Advisory Committee or "MacDonald" Board of Trustees.



## Exhibit No. 4 (cont.)

who receive actual notice of th[e] order" from:

1. evicting [the "Zah" Board] and/or their employees from [NESF's offices in] the Navajo Education Center;
2. interfering in any way with [the "Zah" Board's] and/or their employees' right to peaceably occupy and beneficially use [NESF's suite of offices] in the Navajo Education Center;
3. interfering in any way with [the "Zah" Board's] and/or their employees' conduct of the affairs of [NESF];
4. purporting to act or acting as the Board of Trustees of [NESF] or otherwise attempting to control, direct, or manage the affairs of [the] Foundation; and/or
5. enforcing or implementing [Resolution ACMY-107-88].

Temporary Restraining Order at 1-2, Upshaw ex rel. Benally v. Gorman, No. WR-CV-96-87 (Window Rock D. Ct. May 25, 1988). At 5:55 p.m. on May 25, 1988, Mr. House and Major Morris of the Navajo police department delivered a letter from Donald Benally, chairman of the "MacDonald" Board of Trustees, purporting to terminate Mr. Zah's "employment and status as Executive Director of [NESF]."<sup>17</sup> The following morning, a copy of the Temporary Restraining Order issued by Judge Yazzie was posted on an interior window to the Foundation's offices, so that it would be visible to all who approached the offices from the hallway.

On the morning of May 26, 1988, Lloyd House again appeared in NESF's suite. On this occasion, Mr. House was accompanied by two officers of the Navajo police department. One of the men showed Mr. Zah a copy of a court order signed by Judge Wayne Cadman of the Navajo District Court for the District of Chinle.

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<sup>17</sup>A copy of the letter is attached as Exhibit K.

#### Exhibit No. 4 (cont.)

The Order was issued pursuant to an action filed against Mr. Zah by "The Navajo Education and Scholarship Foundation" and "Lloyd House, executive director of NESF".<sup>18</sup> The Order directed Mr. Zah to vacate NESF's suite of offices and "to deliver all foundation [sic] books, accounts, minutes, records, [sic] in his and her [sic] possession to [Mr.] House". Mr. Zah stated in his affidavit that he had no notice that any action had been filed against him until he received Judge Cadman's temporary restraining order.<sup>19</sup>

Mr. Zah read the restraining order issued by Judge Yazzie to the police officers and informed them that he had no intention of vacating NESF's offices. Meanwhile, I telephoned Judge Cadman's chambers and informed his clerk that we were filing a writ of prohibition with the Supreme Court of the Navajo Nation and would ask for sanctions against the Judge on the ground that the Chinle District Court was clearly without jurisdiction to enter a temporary restraining order, since the case was pending in the Window Rock District Court, and on the ground that the Chinle District Court did not have venue. Later that morning, I received a call from Judge Cadman's clerk informing me that the Judge had dissolved his temporary restraining order and transferred the action to Window Rock.<sup>20</sup>

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<sup>18</sup>A copy of the Chinle Order is attached as Exhibit L.

<sup>19</sup>See Affidavit of Peterson Zah, at 4, lines 18-24, attached as Exhibit J.

<sup>20</sup>See also Order, No. CH-CV-109-88, CH-CV-110-88 (Chinle D. Ct. May 26, 1988), attached as Exhibit L.

#### Exhibit No. 4 (cont.)

On the evening of May 26, 1988, Mr. Zah received unofficial notice that Bobby Charley, chief executive administrator of the Navajo Nation, had directed Col. Bill Kellogg, director of the Navajo Division of Public Safety, to "administratively close" the Navajo Education Center from 7:00 p.m. on Thursday, May 26, 1988 through 5:00 p.m. on Friday, June 3, 1988.<sup>21</sup>

On the morning of Friday, May 27, Judge Yazzie, Deputy (Navajo) Attorney General Eric Dahlstrom and I had a telephonic hearing on Mr. Dahlstrom's motion to dissolve the Judge's temporary restraining order. On the basis of that hearing (at which Colonel Kellogg testified, without notice, as an expert witness), Judge Yazzie entered an order (1) placing the Navajo Education Center under the immediate supervision of the Navajo Division of Public Safety; (2) permitting access to the Center by all employees through 5:00 p.m. on Friday, May 27; and (3) closing the Center to all persons "except as may be necessary to protect the Education Center facility or the public safety" until "the hearing scheduled before [the] Court at 2:00 p.m. on May 31, 1988 or soon [sic] thereafter as the Court may Order."<sup>22</sup>

Although Judge Yazzie verbally issued the "Additional Order" in the presence of Eric Dahlstrom and Colonel Kellogg, NESF employees were not permitted access to the Navajo Education Center until after the Judge entered his written Order at 2:30

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<sup>21</sup>A copy of Mr. Charley's Executive Order is attached as Exhibit M.

<sup>22</sup>A copy of Judge Yazzie's "Additional Order" is attached as Exhibit N.

#### Exhibit No. 4 (cont.)

p.m. on May 27. The Foundation's employees left NESF's offices shortly before 5:00 p.m., and turned their keys over to Colonel Kellogg and have not been permitted to return to the office since then.

On May 31, 1988, the Advisory Committee met in executive session and enacted Resolution ACMY-108-88.<sup>23</sup> In that Resolution, the Advisory Committee:

1. again cancelled the "lease or use agreement" for NESF's offices in the Navajo Education Center and directed NESF's employees to "immediately vacate the premises";
2. again requested the Chairman of the Navajo Tribal Council to "immediately take any and all actions necessary to enforce the termination of the lease and use agreements";
3. directed "[a]ny member of the Board of Trustees, any officer and any employee of [NESF] who is in possession of or has knowledge of the location of Foundation books of [sic] accounts, construction contracts together with all related documents and inspection logs, records, financial statements, reports required by the Articles of Incorporation or bylaws, and any other official records of the Foundation" to provide those records to the Chairman of the Navajo Tribal Council;
4. recommended to the Budget and Finance Committee that it "immediately contract for an independent audit of [NESF] and that the audit be delivered to the Advisory Committee and Budget

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<sup>23</sup>A copy of the Resolution is attached as Exhibit O.

## Exhibit No. 4 (cont.)

and Finance Committee"; and

5. requested the "United States Department of the Interior as part of its trust responsibility, [sic] to take all proper and necessary action to protect the Navajo Education Center in light of Navajo Tribal Council Resolution CF-8-88."

See Resolution ACMY-108-88 (Advisory Committee May 31, 1988). Deputy (Navajo) Attorney General Eric Dahlstrom delivered a copy of Resolution ACMY-108-88 to me at 2:16 p.m. on May 31, as we were preparing to argue our motion for a preliminary injunction before Judge Yazzie.

In response to our motion for a preliminary injunction and to the Attorney General's motion for a stay of execution of the Judge's September 18, 1987, Order, Judge Yazzie re-appointed the interim Board of Trustees "to control, direct and manage the daily affairs of the Foundation."<sup>24</sup> He also specifically enjoined "[a]ll parties, their officers, agents, servants, employees, counsels and all persons who receive actual notice of [the] order [] from evicting the current employees of the Foundation from the Foundation offices." Finally, he prohibited anyone from removing NESF's books, accounts, minutes and records from the Education Center without the approval of the interim Board. In chambers, in the presence of Eric Dahlstrom and myself, Judge Yazzie stated on at least three occasions that the May 31 Order would expire 30 days after he issued his final Order

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<sup>24</sup>A copy of Judge Yazzie's Order of May 31, 1988, is attached as Exhibit P.

Exhibit No. 4 (cont.)

on the remaining post-trial motions.

Despite Judge Yazzie's attempt to adjudicate a compromise, the Navajo Education Center remained closed to NESF and tribal employees until June 13, 1988.<sup>25</sup>

On June 2, 1988, the Judge issued an Order denying the Attorney General's post-trial motions for reconsideration and additional findings of fact and conclusions of law. The Judge also denied our post-trial motion for an award of attorneys' fees.<sup>26</sup>

On June 8, 1988, the Budget and Finance Committee passed a resolution appropriating tribal funds for an audit of NESF. Shortly thereafter, and over our protests, Peat, Marwick & Main of Albuquerque were permitted access to the Foundation's offices in order to begin the tribe's audit of NESF's books and accounts.<sup>27</sup>

On June 15, 1988, I received a letter from Deputy (Navajo) Attorney General Eric Dahlstrom stating his opinion that the Judge's Order of May 31, 1988, expired when the Judge issued his final Order of June 2, 1988.<sup>28</sup> He did not explain how he reached

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<sup>25</sup>When the Center was finally re-opened, NESF's offices remained locked and off-limits to everyone.

<sup>26</sup>Judge Yazzie's Order of June 2, 1988, is attached as Exhibit Q.

<sup>27</sup>In order to comply with the Judge's Order and diffuse the situation, we suggested that the audit be conducted by order of the interim Board rather than by Resolution of the Advisory Committee. No Tribal official ever responded to the suggestion.

<sup>28</sup>Attached as Exhibit R.

Exhibit No. 4 (cont.)

this opinion given the Judge's statements in chambers on May 31, 1988, that the Order would expire 30 days after he filed his ruling on our post-trial motions. Mr. Dahlstrom also said that NESF employees would not be permitted access to NESF's offices in the Navajo Education Center. Despite Judge Yazzie's rulings in their favor, NESF's employees have not been permitted to enter their offices since 5:00 p.m., May 27, 1988.

On July 1, 1988, the Attorney General filed a Notice of Appeal of Judge Yazzie's September 18, 1987, and June 2, 1988, Opinions and Orders. On July 5, 1988, NESF filed a Notice of Appeal of that portion of Judge Yazzie's June 2, 1988, Opinion and Order denying NESF's request for an award of attorneys' fees.

COMMENTS<sup>29</sup>

From my perspective as a non-Indian, the Tribe's response to its dispute with the Navajo Education and Scholarship Foundation demonstrates a degree of lawlessness that one would be hard pressed to find equaled anywhere else in the United States. The situation at Navajo is reminiscent of the legend wherein, in response to Chief Justice Marshall's opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), then-President Andrew Jackson purportedly said, "It's John Marshall's law: let him

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<sup>29</sup>These comments reflect my own, personal reaction towards the dispute between the Navajo Nation and NESF and in no way reflect the opinions of the officers, employees, or agents of NESF or of any law firm for which I have worked or am working.

#### Exhibit No. 4 (cont.)

enforce it."<sup>30</sup> In effect, the Tribe's response to losing in Tribal Court has been to say, "It's Robert Yazzie's law: let him enforce it."

In the Worcester-Jackson sense, the situation at Navajo can be seen as a normal growth process from which will emerge a clearer understanding of the role that the Navajo People want the Navajo Tribal Courts to play in interpreting and shaping laws on the Reservation. Viewed in that perspective, the situation at Navajo is, in my opinion, something that the federal government should let the Navajos work out themselves, free from interference from other sovereigns.

However, there are differences between the situation on which the Worcester-Jackson legend is based and the current situation at Navajo. Those differences may require intervention, given Congress' declaration that Tribes' authority is limited in that it may not intrude upon individual rights.<sup>31</sup>

First, the reaction attributed to President Jackson has been

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<sup>30</sup>In response to Justice Stewart's decision in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 909 (1980), then-Washington Attorney General Slade Gorton was reported to have said "It's federal law, let them enforce it." Justice Stewart is purported to have admonished Mr. Gorton that federal marshals were available to do just that. The story illustrates that constitutional struggles are not foreign to other sovereignties in the United States, even in this modern era.

<sup>31</sup>See 25 U.S.C. § 1302; Halona v. MacDonald, 1 Nav. R. 189, 204 (Nav. Ct. App. 1978) (opining that 25 U.S.C. § 1302 "precludes [] an exclusion of judicial review of legislative actions because that law [the Indian Civil Rights Act] is a mandate for Indian governments which necessarily assumes and requires judicial review of any allegedly illegal action by a tribal government").



#### Exhibit No. 4 (cont.)

discredited: he didn't respond "It's John Marshall's law, let him enforce it."<sup>32</sup> By contrast, the A.C. did enact Resolutions ACMY-107-88 and ACMY-108-88 which have the effect of saying, "It's Robert Yazzie's law, let him enforce it." By directing a Board which had been appointed pursuant to laws which had been declared "invalid and of no effect"<sup>33</sup> to begin operating the Foundation and by directing NESF's employees to turn over the Foundation's business records to the Tribal government, the A.C. demonstrated that it has no intention of being bound by the adverse decisions of a Tribal Court.<sup>34</sup> The message delivered by A.C. Resolutions ACMY-107-88 and ACMY-108-88 and Tribal Council Resolution CF-8-88 is that, if the administration doesn't like the Tribal Courts' decisions, it will seek a legislative reversal of those

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<sup>32</sup>When I was doing research on Professor Charles Wilkinson's book, American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy (Yale 1987), I found numerous scholarly works in which President Jackson's legendary reaction to the Worcester decision was debunked.

<sup>33</sup>See Opinion and Order, WR-CV-96-87 (Window Rock D. Ct. September 18, 1987).

<sup>34</sup>In a memorandum sent to the "MacDonald" appointees shortly after Judge Yazzie issued his September 18, 1987, Opinion and Order, the Assistant Attorney General Bill Riordan recommended that the "MacDonald" Board seek a "legislative solution" to the Judge's ruling. Nothing in the record of this case, which includes the transcript of the meeting at which the Tribal Council enacted Resolution CF-8-88, indicates that the Council members or A.C. delegates were ever cautioned by the Department of Justice that such a "solution" could be interpreted as an unlawful usurpation of judicial authority or a violation of Tribal or federal law.

#### Exhibit No. 4 (cont.)

decisions, and give those reversals retroactive effect.<sup>35</sup>

Second, unlike the federal courts, the Navajo Courts are apparently without any power to enforce their decisions: While the Tribal administration can - and did - employ the Tribal police to deprive NESF employees of access to the Foundation's business records, the Tribal Court had no reciprocal force to compel the Tribal administration to release NESF's books to their rightful owners. The testimony that Assistant Secretary of Indian Affairs Ross Swimmer delivered at the Commission's hearing in Washington, D.C., made it clear that neither the Tribal Courts nor NESF could appeal to the Bureau of Indian Affairs to withhold funding for the Tribal police until they ceased being used to interfere with NESF's adjudicated civil rights. As a result, the Courts and NESF are without a remedy to enforce NESF's adjudicated civil rights until a benevolent, civil-rights oriented administration is elected.

#### PROPOSED SOLUTIONS

As a non-Indian, I do not feel that it is my role to propose solutions to the situation at Navajo except to encourage the Commission to ask Indian people for their suggestions. I will suggest that any solution to the problem of enforcing civil

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<sup>35</sup>Albert Hale, former Deputy Assistant (Navajo) Attorney General, and Mike Nelson, formerly staff counsel to Chairman Zah, have told me that, during the Zah administration, the Attorney General's office would often present an unbiased legal analysis of a proposed law while the Chairman's attorneys would present the administration's position. In my experience, that isn't happening under the current administration. Rather, the Attorney General's office is being used to present the administration's position, and the opposition is being stifled.

#### Exhibit No. 4 (cont.)

rights in Indian country that involves a diminution of Tribal sovereignty should be accompanied by a restoration of Tribal sovereignty in areas where that sovereignty has been diminished by Congressional action or judicial decision, e.g., a restoration of criminal jurisdiction over non-Indians or non-member Indians where Tribes seek to assert such jurisdiction.

I would like to comment on two solutions that I understand are being considered. First, I have read the draft amendments to the Indian Civil Rights Act proposed by the Department of Justice. The bill proposes federal judicial review of Tribal court decisions and authorizes the Department of Justice to bring actions in federal court for civil rights violations on behalf of individuals when there is no Tribal forum available. The draft bill does not specify whether the federal courts should be limited to appellate, or whether they may exercise de novo, review.

Even as a non-Indian, I have a number of serious problems with the draft bill and categorically do not support it in its original form. Also, if the draft bill had been in effect on February 25, 1987, when NESF's trouble with the Navajo Nation began, it would not have afforded any timely relief to the civil rights deprivations that NESF continues to suffer. It would not have enabled NESF employees to gain access to their records in a timely manner. It would not have reduced the cost of NESF defending its rights against abusive conduct by Tribal officials. It would not have stopped the Tribal government from

Exhibit No. 4 (cont.)

attempting to usurp judicial authority.

The draft bill presupposes that the problem with enforcement of civil rights is in Tribal court. Nothing could be further from the truth at Navajo. Judge Robert Yazzie, who adjudicated the NESF case, was not swayed by Tribal politics when he ruled, contrary to the Tribal government's position, that NESF has been a non-Tribal entity since its inception. Although he is a probationary judge, Robert Yazzie was not motivated by personal or familial self-interest when he declared that laws enacted by the Advisory Committee were "invalid and of no effect". Throughout this litigation, it has been the Courts of the Navajo Nation, and particularly Judge Robert Yazzie, that have vigorously, and with principle, attempted to protect the rights of NESF against abuses by the Tribal government.

Nothing in the draft bill would assist the Courts of the Navajo Nation in their mission. Rather, it would simply add to the already exorbitant cost of attempting to protect a litigant's rights from abuses by the Tribal government. In that regard, if<sup>36</sup> federal courts are to be authorized to review Tribal Court decisions, some mechanism for compensating an individual for the additional cost of that review should be enacted and funded.

In contrast to the proposed Justice Department bill, the second proposed solution to enforcement of civil rights in Indian

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<sup>36</sup>And, I in no way mean to imply support for the draft Justice Department bill.

#### Exhibit No. 4 (cont.)

country could have benefitted NESF if it had been in effect at the time this action arose. If 25 U.S.C. § 450m were read (or amended) to require the Secretary of the Interior to withhold funding to a Tribal program that is being used to discriminate against or violate an individual's adjudicated rights, NESF would probably have access to its business records today. Based upon Judge Yazzie's decisions of September 18, 1987, and June 2, 1988, NESF could have asked the Navajo Area Director to withhold funding for the Tribal police when they were used to deny NESF's employees access to the Foundation's business records. Once BIA resumed administration of police services on the reservation, NESF's employees could have obtained the Foundation's business records. In that way, BIA could have assisted in enforcing NESF's adjudicated rights, rather than funding the continued abridgement of those rights.

I respect Indian Tribes and their authority, and ability, to govern. Based upon that respect, I oppose any diminution of Tribal sovereignty. However, I also respect the rights of individual Indian people. Where a Tribal government has shown itself unable or unwilling to enforce laws guaranteeing individual liberties, I believe the rights of the individual should take precedence over the authority of the government.<sup>37</sup>

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<sup>37</sup>My belief that governmental authority should be prohibited where the exercise of that authority infringes on individual liberties seems to parallel the beliefs of the Navajo People. Before Congress enacted the Indian Civil Rights Act, the Navajo Tribal Council limited the Tribe's governmental authority by guaranteeing the People most of the rights accorded by the federal Bill of Rights.

#### Exhibit No. 4 (cont.)

Because of my respect for Tribal governments and my belief that any government's authority should not be permitted to infringe on basic individual liberties, I believe that, if the federal government is going to become actively involved in enforcing civil rights on Indian reservations, amending § 450m is preferable to enacting the proposed Justice Department bill.<sup>38</sup> First, amending § 450m would "penalize" only those Tribes whose officials continue to abuse a person's civil rights, in violation of the Tribe's own court's orders. Tribes that honor their court's decisions would not be affected by the amendment.<sup>39</sup> Second, withholding funding has a reservation-wide impact that could encourage Tribal members to take a second look at their Tribal officials, and the way in which those officials treat other branches of government and other persons. In that way, the amendment may encourage Indian people to oust oppressive officials and elect officials who respect individual liberties

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<sup>38</sup>Again, I express no opinion as to whether federal intervention is necessary.

<sup>39</sup>Tribes could seemingly get around a requirement that BIA funding be withheld if it were used in the Tribe's effort to deprive an individual of his/her adjudicated rights by using non-federal sources to fund the abridgement. However, the amendment could be written so as to permit BIA to withhold federal funding regardless of the source of funds used to finance the continued abridgements. If this approach were adopted, the amendment to § 450 would be similar to the Civil Rights Reauthorization Act. Also, language would be required to hold the BIA harmless for withholding funds in the event the Tribal Court's decision were overturned by the Tribe's appellate court.

## Exhibit No. 4 (cont.)

and Tribal concepts of separation of powers.<sup>40</sup>

### CONCLUSION

As the Commission has heard in the past, one of the grievous "sins" that the federal government has historically perpetrated against Indian people and Indian Tribes is to treat them as one; to make all Tribes and Indian people suffer for the perceived wrongs of one. While it is difficult for Congress to address the problems of each Tribe individually, it should not diminish the authority of the other Tribes on the ground that the Navajo Nation has abridged the rights of NESF. If anyone is to be held accountable for the Navajo Nation's abuse of authority, it should be that Tribe alone. In that regard, I encourage the Commission to be conservative and creative in its recommendations to Congress and the President and, as others have done before me, I urge the Commission to guard against sweeping too broadly.

Thank you for the opportunity to make these comments. I wish you inspiration in your deliberations and recommendations.

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Sandy Hansen  
Attorney at Law

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<sup>40</sup>The notion of separation of powers is not foreign to the Navajo People. Writing for a unanimous Court in Halona v. MacDonald, 1 Nav. R. 189, 205 (1978), Justice Bluehouse said:

[The Tribal Council and its Chairman have never questioned the authority of the Tribal Courts to pass upon the legality or meaning of Tribal Council actions.] 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.

Exhibit No. 4 (cont.)

EXHIBIT A

ACF-52-87

Class "C" Resolution  
No BIA Action Required.

RESOLUTION OF THE  
ADVISORY COMMITTEE OF THE  
NAVAJO TRIBAL COUNCIL

Confirming the Creation and Continuing Existence of the Navajo Education and Scholarship Foundation as an Entity of the Navajo Nation; Rescinding Advisory Committee Resolution ACN-183-86; and Amending the Plan of Operation of the Navajo Education and Scholarship Foundation

WHEREAS:

1. Pursuant to Section IV (B)(1) of the Plan of Operation of the Advisory Committee of the Navajo Tribal Council, as approved and adopted by Navajo Tribal Council Resolution CJA-1-81, the Advisory Committee is empowered to create only "any enterprise, college, ONEO, or other entity of the Navajo Nation by adoption of its Plan of Operation", and is further authorized "to amend or rescind that Plan"; and

2. The Advisory Committee of the Navajo Tribal Council is not authorized or empowered under its Plan of Operation, adopted and approved by Navajo Tribal Council Resolution CJA-1-81, to create nor to charter nor otherwise establish any entity separate and apart from the Navajo Nation; and

3. No body or entity other than the Navajo Tribal Council, as the governing body of the Navajo Nation, pursuant to Title 2, Navajo Tribal Code Section 101, nor the Advisory Committee of the Navajo Tribal Council under those powers and authority delegated from the Navajo Tribal Council, is authorized to adopt, amend or rescind any or all provisions or articles of any Plan of Operation of any entity of the Navajo Nation; nor is the Advisory Committee of the Navajo Tribal Council authorized or empowered to redelegate such authority to any entity; and

4. Pursuant to the authority and powers of the Advisory Committee of the Navajo Tribal Council as hereinabove set forth in paragraphs (1) and (2), ~~the Advisory Committee created and established the Navajo Education and Scholarship Foundation on October 12, 1983 as an entity of the Navajo Nation by Advisory Committee Resolution ACO-171-83, approving and adopting a Plan of Operation for the Navajo Education and Scholarship Foundation, therein designated as "Articles of Incorporation of the Navajo Education and Scholarship Foundation, a nonprofit Corporation chartered under the authority of the Navajo Tribe of Indians"; and~~



## Exhibit No. 4 (cont.)

5. Neither the Navajo Tribal Council nor the Advisory Committee of the Navajo Tribal Council has ever rescinded the Plan of Operation of the Navajo Education and Scholarship Foundation, approved and adopted by Advisory Committee Resolution ACO-171-83 (supra); and

6. The Advisory Committee of the Navajo Tribal Council by Resolution ACN-183-86, purported to approve "amendment by substitution of ... amended Articles of Incorporation of the Navajo Education and Scholarship Foundation, Inc.", without hearing, consideration, deliberation or further discussion of any specific amendments thereto, in the transcript of the official record of that action, on November 13, 1986, attached as Exhibit "A" hereto; and

7. The Advisory Committee of the Navajo Tribal Council has determined that no such purported amendment to the Plan of Operation of any entity of the Navajo Nation should be approved or adopted without full disclosure of each specific deletion and addition of every proposed amendment thereto, with opportunity for due deliberation by the Advisory Committee to determine the substance and compliance thereof with all applicable authority and laws of the Navajo Nation.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Advisory Committee of the Navajo Tribal Council hereby affirms that the creation, establishment and continuing existence of the Navajo Education and Scholarship Foundation only as an entity of the Navajo Nation, pursuant to Advisory Committee Resolution ACO-171-83.

2. The Advisory Committee of the Navajo Tribal Council hereby rescinds in full Resolution ACN-183-86 of the Advisory Committee of the Navajo Tribal Council, hereby declaring null and void any and all purported amendments by substitution or otherwise, of the Plan of Operation of the Navajo Education and Scholarship Foundation, Inc., purported to be approved thereby.

3. The Advisory Committee of the Navajo Tribal Council hereby amends the Plan of Operation of the Navajo Education and Scholarship Foundation as approved and adopted by Advisory Committee Resolution ACO-171-83, by deletion of all provisions stricken by strike marks (////) therefrom, and by additions underlined therein, as set forth in Exhibit "B", attached hereto and incorporated herein.

4. The Advisory Committee of the Navajo Tribal Council hereby amends the Articles of Incorporation of the Navajo Education and Scholarship Foundation as a not for profit corporate entity of the Navajo Nation, certified under the authority of the Navajo Nation, by substituting therefor, the articles as amended in the Plan of Operation of the Navajo Education and Scholarship Foundation, attached as Exhibit "B" hereto and by reference incorporated therein.


## Exhibit No. 4 (cont.)

5. The Advisory Committee of the Navajo Tribal Council hereby affirms that any and all rights, title and interests of any kind or nature, including real, personal, mixed, or other property rights, whether vested, beneficial, inchoate or contingent, and whether previously, now or hereafter acquired, held or received by, for or on behalf of or on account for the Navajo Education and Scholarship Foundation (a.k.a. Navajo Education and Scholarship Foundation, Inc., NESF, etc.), a nonprofit Corporation chartered under the authority of the Navajo Tribe of Indians, a not for profit Corporation chartered under the authority of the Navajo Nation, or any other designation, alter ego, successor or assignee thereof are and shall be and remain the rights, title and property of the Navajo Nation (a.k.a. the Navajo Tribe of Indians), subject to the uses, purposes and conditions set forth in the Plan of Operation, designated as Articles of Incorporation for the Navajo Education and Scholarship Foundation (Inc.), a nonprofit Corporation, chartered under the authority of the Navajo Tribe of Indians, adopted and approved by Resolution ACO-171-83 of the Advisory Committee of the Navajo Tribal Council on October 12, 1983, as amended herein.

6. The Advisory Committee of the Navajo Tribal Council hereby affirms that no assignment, transfer, encumbrance or other alienation of any rights or property of the Navajo Education and Scholarship Foundation, an entity of the Navajo Nation created by Advisory Committee Resolution ACO-171-83, under any name or designation whatsoever, nor any incorporation or other organization or reorganization thereof under the laws of any jurisdiction other than the Navajo Nation are or shall be authorized or valid without express consent by lawful resolution of the Navajo Tribal Council or of the Advisory Committee of the Navajo Tribal Council, and then only to the extent of and subject to the limitations of such authorization.

### CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Advisory Committee of the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 11 in favor and 0 opposed, this 25th day of February, 1987.

  
Vice Chairman  
Navajo Tribal Council

**Exhibit No. 4 (cont.)**

ACF-53-87

Class "C" Resolution  
No BIA Action Required.

**RESOLUTION OF THE  
ADVISORY COMMITTEE OF THE  
NAVAJO TRIBAL COUNCIL**

**Affirming the Removal of All Prior and Existing Members  
of the Board of Trustees of the Navajo Education and Scholarship  
Foundation, and the Appointment by the Chairman of the Navajo  
Tribal Council of Ten (10) Successor Members Thereof**

**WHEREAS:**

1. The Advisory Committee of the Navajo Tribal Council is authorized and empowered by Section 4 (B)(1) of its Plan of Operation, by Navajo Tribal Council Resolution CJA-1-81, to create any entity of the Navajo Nation by adopting its Plan of Operation and to amend or rescind that Plan; and

2. By Resolution ACO-171-83, the Advisory Committee of the Navajo Tribal Council adopted the Plan of Operation of the Navajo Education and Scholarship Foundation as an entity of the Navajo Nation; and

3. By Resolution ACN-183-86, the Advisory Committee of the Navajo Tribal Council purported to amend said Plan of Operation of the Navajo Education and Scholarship Foundation, including the constitution and appointment of members of its Board of Trustees; and

4. By Resolution ACF-52-87, adopted February 25, 1987, the Advisory Committee of the Navajo Tribal Council rescinded Resolution ACN-183-86 in full, affirmed the creation of Navajo Education and Scholarship Foundation as a Tribal entity under its Plan of Operation adopted by Resolution ACO-171-83, and amended that Plan of Operation, including authorizing the Chairman of the Navajo Tribal Council to declare vacant the seat of any member of the Board of Trustees and to appoint any successor Trustees with the concurrence of the Advisory Committee of the Navajo Tribal Council; and

5. Current disputes and confusion concerning the constitution and lawful membership of the Board of Trustees of the Navajo Education and Scholarship Foundation have arisen and remain unresolved and threaten the continuing ability of the Navajo Education and Scholarship Foundation to perform and accomplish its functions and duties pursuant to its Plan of Operation as approved by the Advisory Committee of the Navajo Tribal Council.

Exhibit No. 4 (cont.)

NOW THEREFORE BE IT RESOLVED THAT:

1. The Advisory Committee of the Navajo Tribal Council hereby affirms and concurs with the removal by the Chairman of the Navajo Tribal Council of all prior and existing members of the Board of Trustees of the Navajo Education and Scholarship Foundation, attached as Exhibit "A" and incorporated herein.

2. The Advisory Committee of the Navajo Tribal Council hereby approves the appointment by the Chairman of the Navajo Tribal Council of the following named ten (10) members to the Board of Trustees of the Navajo Education and Scholarship Foundation to succeed and replace all prior and existing members thereof, pursuant to Exhibit "A" attached and incorporated herein:

Daniel Tso - *Chmn, Educ Committee*  
Donald Benally  
Loyce Phoenix - *CEO*  
Rebecca Martgan - *(BA ee. to IPA to Tribe.)*  
Bobby Charley - *Asst to Vice Chmn*  
Richard Kontz - *Director OMB (also under Zeh)*  
Paul Sage - *Ethics & Rules Committee mbr*  
Kee Ike Yazzie  
Manuel Shirley - *Chmn, Ethics & Rules Committee*  
Lewis Calamity

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Advisory Committee of the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 11 in favor and 0 opposed, this 25th day of February, 1987.

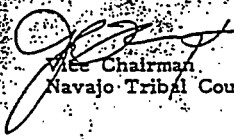
  
Vice Chairman  
Navajo Tribal Council

Exhibit No. 4 (cont.)

EXHIBIT B

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

WR-CV-96-87

FINDING OF FACTS, CONCLUSION OF LAW

OPINION AND ORDER

DONALD BENALLY, et. al.  
Relators

vs.

GUY GORMAN, et. al.  
Respondents.

Michael Upshaw, Attorney General, William A. Riordan and Arita Yazzie, Navajo Nation Department of Justice, Attorneys for Relators.

Richard Hughes, Luebben, Hughes, Tomita & Borg Law Firm; Dale T. White and Sandra Hansen, Fredricks & Pelciger Law Firm, Attorneys for Respondents.

JUDGE ROBERT YAZZIE PRESIDING

INTRODUCTION

This case involves the question whether the Navajo Education and Scholarship Foundation (hereinafter NESF or "The Foundation") is a Tribal entity or a private Non-Profit Corporation. The Foundation was organized solely for purposes of raising funds from private and public sources to support the education goals and programs for the benefit of Navajo students.

To determine the legal status of the Foundation, this Court must look at the authority of the Advisory Committee and the rights and responsibilities of a corporate entity under Navajo Law.

Exhibit No. 4 (cont.)

PARTIES

1. Petitioners Michael P. Upshaw is the Attorney General of the Navajo Nation.
2. Relators include Donald Benally, Daniel Tso, Loyce Phoenix, Rebecca Martgan, Bobby Charley, Richard Kontz, Paul Sage, Kee Ike Yazzie and Manuel Shirley.
3. Respondents include Guy Gorman, Sr., Vivian L. Arviso, Elouise DeGroat, Annie D. Wauneka, Alyce Rouwalk, Rosalind Zah, David L. Tsosie and Albert A. Yazzie.
4. All the individual relators and respondents are enrolled members of the Navajo Tribe with permanent residence with the Navajo Nation.
5. Navajo Education Scholarship Foundation, Inc., was established and created on October 12, 1983.
6. The principal place of NESF is at Window Rock, Navajo Nation.

JURISDICTION

7. Jurisdiction arises pursuant to 7 N.T.C. section 253 (2) in that the cause of action hereto have occurred within the territorial jurisdiction of the Navajo Nation.

FINDINGS OF FACT

1. On January 28, 1981 the Navajo Tribal Council adopted a revised Plan of Operation for the Advisory Committee of the Navajo Tribal Council. See Resolution CJA-1-81 at 2 N.T.C. 341-344 (1985 supp.) In that Resolution, the Tribal Council authorized the Ad-

Exhibit No. 4 (cont.)

visory Committee "[to] create any enterprises, colleges, O.N.E.O., or other entity of the Navajo Nation by adoption of its Plan of Operation and to amend or rescind that plan . . ." 2 N.T.C. 343

(b).

2. The Navajo Education and Scholarship Foundation was first established by the Advisory Committee by Resolution ACO-171-83. Under this resolution, the Advisory Committee adopted NESF Articles of Incorporation and declared NESF as a "nonprofit, non-member Corporation." The resolution further provided that:

a) The Chairman of the Navajo Tribal Council appoint NESF Board of Trustees, with Advisory Committee concurrence. See Article V (D).

b) The Advisory Committee has full authority to approved any and all amendments to the NESF Articles of Incorporation. (See Article IX.)

3. On January 30, 1986, the Navajo Tribal Council enacted the Navajo Nation Corporation Code and Navajo Nation Non-Profit Corporation Act by Resolution CJA-2-86, which became effective August 1, 1986.

4. On November 13, 1986 the Advisory Committee approved amendments to NESF Articles of Incorporation by Resolution ACN-183-86. That resolution:

a) Gave the majority of a quorum of NESF Board of Trustees authority to appoint future trustees of NESF. (See Article [D]);.

b) Eliminated the need for Advisory Committee approval of amendments to NESF Articles of Incorporation, and authorized the NESF Board of Trustees to amend the articles; and

Exhibit No. 4 (cont.)

c) The Advisory Committee further authorized NESF Board of Trustees "to comply with the Navajo Tribal law by filing (the amended) Articles of Incorporation with the Commerce Department to comply with the Navajo Tribal Law."

5. The first NESF Board of Trustees, Respondents herein, are:

Guy Gorman, Sr.	Alyce Rouwalk
Vivian L. Arviso	Rosalind Zah
Elouise DeGroat	David J. Tsosie
Annie D. Wauneka	Albert A. Yazzie

6. On December 18, 1986, the Commerce Department issued NESF a certificate of Incorporation, authorizing it to transact business within the Navajo Nation as a non-Profit Corporation.

7. On February 25, 1987, the Advisory Committee passed two resolutions which attempted to:

a) Reestablish NESF only as an entity of the Navajo Nation. The Advisory Committee fully rescinded Resolution ACN-183-86 which had created NESF as a private nonprofit corporation, separate from the Navajo Nation. The Advisory Committee further declared the NESF Articles of Incorporation as null and void. See Resolution ACF-52-87.

b) Remove all the existing members of the Board 1 (Respondents) and replace them with the Relators as successors of NESF Board of Trustees:

Donald Benally	Richard Kontz
Daniel Tso	Paul Sage
Loyce Phoenix	Kee Ike Yazzie
Rebecca Martgan	Manuel Shirley
Bobby Charley	Lewis Calamity



## Exhibit No. 4 (cont.)

8. On March 13, 1987, the Navajo Nation and on behalf of Regulators filed Quo Warrant Proceeding against Respondents to prevent Respondents from taking any further action as NESF.

9. Because of the unresolved question of which Board is the valid Board of NESF, it was necessary during the pendency of this action, the Court appoint these persons as the Interim Trustees to manage and direct the daily affairs of NESF.

### ISSUES

I. WAS THE ACTION OF THE ADVISORY COMMITTEE ON NOVEMBER 13, 1986 PROPER AND VALID?

II. WAS THE ACTION OF THE ADVISORY COMMITTEE ON FEBRUARY 25, 1987 PROPER AND VALID?

### OPINION

#### Introduction

When a court is faced with reviewing any legislative action, that review must be conducted under certain principles. The main principle of judicial review is the presumption that the legislative act is proper and legal. The word "presumption" is a legal term which means that a thing is accepted as true or proven unless that presumption is rebutted by evidence to the contrary. One of the factors in determining whether an act is proper or legal is whether the legislative action is rationally related to a legitimate governmental purpose.

A second presumption guiding the courts is that the legislators acted from proper motives. If the legislative body did a proper and legal act the court will not examine the motives

## Exhibit No. 4 (cont.)

of the legislators. Motives will be examined only to the extent needed to determine if the legislative action should be invalidated on grounds of fraud and bad faith.

A government consists of at least three functions: determination of principles and policies of the society being governed; execution of those policies through the instruments of government; and resolution of questions and disputes arising under the principles and policies of the society.

The formulation of principles and policies should be done as close to the people as possible. In the United States this usually means the legislative bodies whose delegates are representatives of the people. The reason for this is that no government can exist indefinitely without the support and voluntary obedience of a majority of the people.

2 N.T.C. section 101 says that the Navajo Tribal Council is the governing body of the Navajo Tribe. A review of the Navajo Tribal Code indicates that Tribal Council as representatives of the Navajo people retained to itself the legislative functions and established the Executive Branch and the Judicial Branch to carry out the other functions of government.

As has happened with the states and federal government, the Navajo Nation government became so complex that further authority had to be delegated. Generally, this delegation has been to administrative agencies. The Navajo Nation is experiencing a development of administrative bodies and of administrative law.

The search for ways to make large and complex government efficient has not stopped with administrative agencies. Governments

Exhibit No. 4 (cont.)

also make use of corporations to provide certain governmental services.

It appears to the Court that the underlying questions in this case are delegations of authority and the validity of those delegations.

Tribal Council has delegated certain powers to the Advisory Committee. Historically, the Advisory Committee has exercised powers in excess of those given to the other committees of the Tribal Council. The Court has not done an extensive study of the history of the Advisory Committee but finds that the Plan of Operation of the Advisory Committee which was passed by Tribal Council on January 28, 1981, is the current delegation under which the Advisory Committee operates. A review of the Navajo Tribal Code shows that many statutes under which the Navajo Nation operates were passed by the Advisory Committee but not the full Tribal Council. In effect Advisory Committee often operates as a second legislative body. The Court, however, does not have the enormous task of deciding whether this is proper. All the court need consider for purposes of this case is whether the Advisory Committee had the power to establish NESF in 1983 and the validity of subsequent acts of the Advisory Committee toward NESF.

The Plan of Operation of the Advisory Committee sets forth the purposes of the Advisory Committee. Those purposes include at 2 N.T.C. section 341 (b):

(1) Act as the Executive Committee of the Navajo Tribal Council with general authority (as specifically provided herein), to act for the Navajo Tribal Council at such times when the Navajo

Exhibit No. 4 (cont.)

Tribal Council is not in session.

(2) Monitor and coordinate the activities of all divisions, departments, and enterprises of the Navajo Nation

The Plan of Operation of the Advisory Committee contains the following enumerated power:

To create any enterprise, college, ONEO, or other entity of the Navajo Nation by adoption of its Plan of Operation, and to amend or rescind that Plan, and to amend, or rescind the Plans of Operation of any entities already created by the Tribal Council. 2 N.T.C. Section 343 (B) (1).

This is apparently one of the "specifically provided" powers referred to in 2 N.T.C. section 341 (b)(1).

By this Plan of Operation the Navajo Tribal Council delegated to the Advisory Committee the power to create and abolish entities of the Navajo Nation. The Court is not able to determine whether this was a new delegation of authority. It is clear that in the early years tribal entities and enterprises were established by the Navajo Tribal Council.

The word "entity" generally means an organization or body that has some existence independent of its individual members and staff. An entity has a recognized existence and being of its own. For example, the Advisory Committee of the Navajo Tribal Council is an entity. It has existed for many years even though the individual members have changed. An entity may also be a corporation.

Advisory Committee was delegated the power to create entities. The Court finds as a matter of first impression that this delegation by Tribal Council was proper.

## Exhibit No. 4 (cont.)

Advisory Committee was given the power to create an entity by adopting its plan of operation. The Advisory Committee was given the power to rescind plans of operation. This implies the right to abolish an entity. Advisory Committee had the authority to establish NESF as a tribal entity in 1983. The question is whether the Advisory Committee did in fact create the foundation as a tribal entity by adopting its Plan of Operation. The Advisory Committee never adopted a Plan of Operation designated as such for the foundation. The Advisory Committee instead adopted "Articles of Incorporation of the Navajo Education and Scholarship Foundation."

It is easy to assume that because the Navajo Nation did not have a Corporation Code prior to January 30, 1986, that the Navajo Nation could not authorize incorporations prior to that time. This is incorrect. The Court has briefly reviewed the history of corporations in England and the United States. In this review the Court has relied on Ballentine on Corporations, Rev. Ed. (1946).

In England, prior to corporation acts, charters were granted either by the king or by a special act of Parliament. In the 19th century England passed acts that dealt with the chartering of corporation.

In the United States corporations were created by special acts of the various state legislatures until the 19th century when the states began adopting general incorporation laws open to all applicants. Ballentine at section 8 (a) says:

State legislatures have plenary power to create corporations. Formerly, corporations were created exclusively by special acts-- that is, by acts creating a particular corporation, as distinguished from a general law allowing any persons to organize themselves into and be a corporation by complying with prescribed conditions; and corporations may still be

#### Exhibit No. 4 (cont.)

created by special act, in the absence of a constitutional prohibition. Corporations may also be created under the authority of general laws. In most of the states, in order to remove the danger of favoritism and corruption in the creation of corporations, the people have adopted constitutional provisions declaring that, with certain exceptions, the legislature shall not pass any special act creating a corporation, but that corporations shall be formed under general laws only; and where there is such a prohibition, a special act creating a corporation is absolutely void. Formerly when a corporation was to be organized a private bill had to be introduced in the legislature, referred to a committee, passed through both houses and signed by the governor of the state. Delay, expense and corruption often resulted. General incorporation laws now make it possible for almost any enterprise to be conducted in corporate form upon compliance with simple formalities.

The Court finds that prior to the enactment of the Navajo Nation Corporation Code the Navajo Tribal Council had the inherent governmental power to charter corporations. This inherent governmental power was recognized by the Navajo Tribal Council in 1979 when it chartered Toyei Industries. The first "whereas" clause of the resolution (CAP-13-79) granting the corporate charter says, "The authority to grant charters to corporations is an element of the inherent sovereignty of the Navajo Nation."

The chartering of corporation was done on an individual basis requiring a separate act of Tribal Council for each incorporation. With the adoption of the Navajo Nation Corporation Code the Navajo Nation provided a uniform procedure for the chartering of corporations and provided certain laws under which each corporation must function.

The Court is persuaded by certain exhibits submitted by petitioners that the authority to charter corporations was never delegated to Advisory Committee. The Court is particularly persuaded by the minutes of Tribal Council on January 28, 1981, at which the

Exhibit No. 4 (cont.)

Plan of Operation of the Advisory Committee was adopted that such power was deliberately withheld from Advisory Committee.

On its face the act of the Advisory Committee on October 12, 1983, purporting to grant a charter, was in excess of its authority.

As the Advisory Committee was in the habit of establishing tribal entities and calling the authorizing document a "Plan of Operation" the Court finds that Advisory Committee intended to charter NESF as a corporation.

Although Advisory Committee had no authority on October 12, 1983, to charter corporations, the Court finds that the subsequent course of dealing with the NESF by the Navajo Tribal Government ratified the act of incorporation.

Navajo students and the public, particularly donors, were allowed to believe NESF was properly chartered. The Budget and Finance Committee of the Navajo Tribal Council authorized a grant to NESF from the Pittsburgh and Midway Coal Mining Company Scholarship account to the Navajo Education and Scholarship Foundation (BFAU-118-86). The Navajo Nation permitted NESF to solicit funds for construction of an education center and to oversee the construction of the center. The Navajo Tribal Council appropriated funds (\$1,000,000) toward construction of the building (CS-72-85). Petitioners' exhibits contain documents which were drawn up to transfer the building to the Navajo Tribe with NESF having the right to lease space in the center as consideration for the efforts of NESF in raising the money to build the center. On October 12, 1983, the Advisory Committee granted a charter to NESF and

#### Exhibit No. 4 (cont.)

the Navajo Tribe Government thereafter acted toward NESF and allowed NESF to be held out to the public as a properly chartered corporation.

The Court is not prepared to say that a governmental function was delegated to NESF. The 1983 Articles authorize NESF to "solicit funds from private and public sources for the support of the educational goals and programs of the Navajo Tribe." (Article III, B.) That Article also designates some specific purposes for which the solicited funds could be used. Soliciting funds for the use of Navajo People does not appear to be an exclusive governmental activity. Petitioners cite certain Tribal Code section on solicitation of funds as support for the argument that NESF was a tribal entity. These sections were passed by Tribal Council in 1970 making it a crime to solicit funds without authority in the name of the Navajo Tribe or Navajo groups "for the purpose of defrauding the Navajo Tribe, the Navajo People, or any group, class or individuals thereof." At the same time Tribal Council set forth conditions under which the authority to solicit funds could be granted. Those sections were contained in Chapter 3 of Title 17 of the Navajo Tribal Code. Chapter 3 was repealed in 1977 with the revision of Title 17 which is known as the Navajo Tribal Criminal Code.

The act of incorporation creates an entity that for certain purposes is regarded as a legal person and is entitled to certain civil rights guarantees. May a legislative body delegate to a private "person" certain powers and authority normally exercised by that legislative body? The Court has relied to some degree on



## Exhibit No. 4 (cont.)

Sutherland Statutory Construction (4th Ed.) for guidance on the issues of delegation of power. In Sutherland the issue of valid delegation comes under the threshold question of constitutionally, particularly the U.S. Constitution. The U.S. Constitution contains broad parameters of the power which each branch of government may exercise. In addition the Tenth Amendment states:

The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

Here we have the enabling document of the U.S. government delegating power from the people to the three branches of government. In the Navajo Nation, the governing power was originally placed in Tribal Council which delegated certain powers to the Executive Branch and the Judicial Branch. Despite these differences, and perhaps in light of them, the Court finds the material in Sutherland instructive. Section 4.11 of the treatise deals with the delegation of legislative power to private persons.

Generally a delegation to a private person to decide what the law shall be or when a law shall be effective has been held invalid. On the other hand, delegation of legislative power to private persons which is more of an administrative decision making process has been upheld. The granting of eminent domain powers to privately owned utility companies with the companies having the authority to decide what properties should be taken and when has been upheld. Private agricultural and environmental groups have been given the authority to nominate candidates for appointment to a fish and game conservation and control agency. This was upheld on the grounds that a delegation of legislative authority is legal

Exhibit No. 4 (cont.)

if there are sufficient safeguards to assure that arbitrary power is not concentrated in persons or groups motivated by self-interest. In addition, private persons are frequently delegated powers in the creation of new political subdivisions, such as special drainage, water or reclamation areas, schools, park districts, etc.

The Court is not prepared to say there was a delegation to NESF. If there was, it appears to have been a valid delegation.

NESF has not been delegated any law making powers. The purposes of NESF are limited. NESF is subject to the laws of the Navajo Nation through the Navajo Nation Corporation Code. The Code sets out a procedure for involuntary dissolution and for revocation of the articles of incorporation.

The next question is one of tribal property. The Court is not convinced that NESF has ever had "tribal property" other than that appropriated from the Navajo Tribe to NESF for specific purposes. The Court is thinking in particular of the \$1,000,000 appropriated for the building and the one time appropriation from the Budget and Finance Committee in 1986. The 1983 Articles at Article III B. 2. state as one of the uses of funds collected:

To provide for the construction of a Navajo Education Center to belong to the Navajo Tribe and to house the programs of the Navajo Division of Education and related programs of the Navajo Tribe. It may do this either by providing funds to the Navajo Tribe for use in constructing said building, or else by otherwise participating in its construction pursuant to agreements entered into between the corporation and the Navajo Tribe.

As for any other property that might have belonged to the Navajo Nation, it appears that it was placed in the control of NESF

## Exhibit No. 4 (cont.)

by the Navajo Nation.

The 1983 Articles at Article IV on dissolution of NESF provides:

In the event of the liquidation or dissolution of the Corporation, whether voluntary or involuntary, no director, trustee, officer of the Corporation, or any other private person shall be entitled to any distribution or division of its assets. Any assets remaining to the corporation at dissolution or liquidation, after paying or providing for its liabilities, shall be distributed to one or more nonprofit, charitable organizations which are tax-exempt under section 501 (c) (3) of the Internal Revenue Code or its successors, or, if permissible under federal tax law then in effect, to the Navajo Tribe, to be used to carry on activities consistent with purposes for which this corporation was organized. The specific recipients will be determined by written agreement between the corporation and the Navajo Tribe. Any assets not so distributed by a Court of the Navajo Tribe to such a nonprofit, charitable organization, or to the Navajo Tribe if permissible under federal tax law then in effect, in accordance with said purposes.

Article IV of the 1986 Articles Provides:

In the event of the liquidation or dissolution of the Corporation, whether voluntary or involuntary, no Trustee, Officer of the Corporation, or any other private person shall be entitled to any distribution or division of its assets. Any assets remaining to the Corporation at dissolution or liquidation, after paying or providing for its liabilities, shall be distributed to one or more not for profit, charitable organizations for purposes of awarding scholarships to Navajo students which organizations are tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1954 or its successors.

The 1983 Articles provided for options for disposition of the assets of NESF on dissolution. One of those optional distributees is the Navajo Tribe. It seems unlikely that the Navajo Tribe would be only a possible recipient of property it already owned. The 1986 Articles provide no choices. The only distributees upon dissolution are nonprofit organizations providing scholarships to Navajo students. The assets which are acquired to benefit Navajo

Exhibit No. 4 (cont.)

students must be distributed for their benefit upon dissolution of NESF.

In addition the Nonprofit Code at section 320 prohibits shares of stock and dividends. Section 303 permits a merger or consolidation only if the corporation surviving the merger is a nonprofit corporation.

The situation is somewhat analogous to a trust with NESF being the trustee and Navajo students being the beneficiaries.

This is very different from the situation in Tome v. Navajo Nation, 4 Nav. R. 159 (Window Rock District Court, 1983) where the contemplated transaction would have given a private individual absolute ownership of tribal assets. In Tome the Court also found that there were sufficient disparities in the valuation of the assets to raise the questions of fiduciary responsibilities and good faith in the transfer of assets. Through the NESF money is taken in and distributed outside the legislative process. Through the NESF certain people are designated to oversee the funds. It does not appear that any intrinsic governmental powers have been delegated to the Foundation. The Court further finds that no tribal assets have been removed from the intended beneficiaries. NESF, both prior to November 13, 1986, and after, receives and distributes funds for the benefit of Navajos.

The Court holds that the Advisory Committee chartered the NESF and that the Navajo Nation ratified that by subsequent acts. This holding is very limited as it pertains to NESF. Advisory Committee has the power to create and abolish tribal entities. It does not have the power to grant corporate charters.

## Exhibit No. 4 (cont.)

NESF was given the power to solicit donations and to distribute those donations, The Court is not convinced, however, that this is an exclusive delegation. The Court sees no prohibition on the Navajo Nation soliciting and negotiating for scholarship and educational donations to be given to the Navajo Nation or to NESF. The Navajo Nation through its appropriate governmental bodies may channel donations to NESF or may make appropriations to NESF. The Navajo Nation may also make other dispositions of educational and scholarship donations to the Navajo Nation that are not inconsistent with the terms and conditions of the donation.

No specific property has been identified to the Court as being in question. The court can address the issue only in the limited manner above.

### ISSUE I.

#### WAS THE ACTION OF THE ADVISORY COMMITTEE ON NOVEMBER 13, 1986 PROPER AND VALID?

The 1983 Articles provided for participation by the Advisory Committee in two instances. The trustees were to be appointed by the Chairman of the Navajo Tribal Council and their appointment concurred by the Advisory Committee, Article V. D, Article IV provided:

These Articles of Incorporation may be amended by a majority vote of the Board of Trustees. Prior written notice of at least two weeks shall be given to all members of the Board of Trustees of any proposed change in the Articles. No amendment or alteration of the Articles of Incorporation shall take effect until the same is approved by a vote of the Advisory Committee of the Navajo Tribal Council.

On November 13, 1986, the Advisory Committee by resolution ACN-183-86 approved amended Articles of Incorporation for NESF.

Exhibit No. 4 (cont.)

This action of approval was authorized under the original Articles of Incorporation.

The Advisory Committee also authorized NESF to file the amended Articles with the Commerce Department to comply with Navajo Tribal law. It is not clear that Advisory Committee had the authority to direct such filing. It is clear, however, that NESF had the authority to file its Articles and receive a certificate of incorporation.

NESF was already a corporation chartered by the Navajo Nation. When NESF filed its amended Articles on November 13, 1986, it subjected itself to the laws of the Navajo Nation for the regulation and supervision of corporations as contained in the Navajo Nation Corporation Code.

The action of Advisory Committee in approving the amended Articles was proper even though by the act Advisory Committee approved a change in the way the Board is selected and removed from the Advisory Committee any authority to approve future amendments to the Articles of Incorporation.

The Court has found nothing in its review of this case and the law which could have been prohibited the Advisory Committee from retaining in the Articles of Incorporation certain powers and authority even though the corporation is registered under the Navajo Nation Corporation Code. This was not done.

ISSUE II

WAS THE ACTION OF THE ADVISORY COMMITTEE  
FEBRUARY 25, 1987 PROPER AND VALID?

Prior to passage of the Navajo Nation Corporation Code, cor-

Exhibit No. 4 (cont.)

porations chartered by the Navajo Nation were dissolved either voluntarily or involuntarily by act of Tribal Council. Just as the Corporation Code provides a uniform method for the chartering of corporations, it also provides uniform procedures for the regulation of corporations.

One of the rights of corporations is due process. The Court finds that at the very least this means that changes in the corporate structure must be according to law. The Navajo Nation Corporation Code provides procedures for the amendment of articles of incorporation and procedures for the dissolution of corporations. Once the foundation became a corporation it automatically received the legal right to have the law followed in actions regarding the foundation.

The Court understands the desire of the Advisory Committee to continue to have input into NESF. As was expressed earlier in this opinion, the Court generally will not examine the motives behind a legislative act if the act itself is proper and valid. The opposite is also true. The Court will not examine the motives behind a legislative act if the act itself is improper or invalid. The act of the Advisory Committee on February 25, 1987, was not according to the law of the Navajo Nation and the best of intentions will not make it so.

NESF was incorporated on October 12, 1983. It registered under and became subject to the Navajo Nation Corporation Code on November 13, 1986, by filing its Articles of Incorporation. The Court holds that any subsequent acts toward NESF which were not in accord with its Articles of Incorporation and with the Navajo Na-

Exhibit No. 4 (cont.)

tion Corporation Code are invalid and of no effect.

Dated this 18 day of Sept. 1987.

Carl Smith  
JUDGE, District Court of the Navajo Nation



Exhibit No. 4 (cont.)

EXHIBIT C

PROPOSED RESOLUTION OF THE  
ADVISORY COMMITTEE OF THE  
NAVAJO TRIBAL COUNCIL

- # 1 A.C  
Resolution passed  
1/19/88

Recommending Confirmation by the Navajo Tribal Council,<sup>7</sup>  
of the Continuing Status of Navajo Education and Scholarship  
Foundation, Incorporated,<sup>8</sup> as a Governmental Non-Profit Corporate  
Entity of the Navajo Nation and Directing the Navajo Nation  
Department of Justice to Pursue Action in Quo Warranto on Behalf  
of the Attorney General of the Navajo Nation, ex rel. Relators

WHEREAS:

1. By enactment of Navajo Tribal Council Resolution CJA-1-81 approving and adopting the Plan of Operation of the Advisory Committee, the Navajo Tribal Council has authorized, empowered and required the Advisory Committee of the Navajo Tribal Council to create only official entities of the Navajo Nation, and to adopt, amend or rescind Plans of Operation for all such entities of the Navajo Nation, in conformity with the organizational structure authorized by the Advisory Committee; and

2. By Resolution ACO-171-83, the Advisory Committee of the Navajo Tribal Council duly approved and enacted such a Plan of Operation for the Navajo Education and Scholarship Foundation, designating its organizational structure as Articles of Incorporation for a non-profit organization created under the laws of the Navajo Nation; and

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3. ~~The Plan of Operation or Articles of Incorporation of Navajo Education and Scholarship Foundation, Incorporated as approved by Resolution ACO-171-83 has never been rescinded; and~~

4. By Resolution CJA-2-86, the Navajo Tribal Council enacted the Navajo Nation Corporation Code on January 30, 1986, thereby providing for incorporation under the laws of the Navajo Nation of profit and non-profit entities, whether privately owned organizations or governmental entities of the Navajo Nation, including certified Chapters and other entities of the Navajo Nation as authorized by the Navajo Tribal Council and/or the Advisory Committee, effective August 1, 1986; and

5. The Navajo Education and Scholarship Foundation, Incorporated, has not been incorporated under the laws of any jurisdiction other than under the Navajo Nation Corporation Code as authorized on November 13, 1986 by Advisory Committee Resolution ACO-183-86, "Approving Amendment by Substitution to the Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc.," and

6. The Advisory Committee of the Navajo Tribal Council is not authorized to transfer, sell or otherwise consent to or authorize expropriation of ownership rights of any organization or property of the government of the Navajo Nation to any private ownership or control, such appropriation being reserved for approval only in accordance with the Plan of Operation of the Budget and Finance Committee adopted by Navajo Tribal Council Resolution CAP-17-84 and approved by the Navajo Tribal Council as the governing body of the Navajo Nation; and

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3 AC 1/19/88 - Excerpt (Education Foundation)

Exhibit No. 4 (cont.)

7. By Resolution ACN-183-86, "Approving Amendment by Substitution to the Articles of Incorporation of the Navajo Education and Scholarship Foundation, ~~incorporated~~", the Advisory Committee on November 13, 1986, amended said Articles and authorized incorporation of Navajo Education and Scholarship Foundation, ~~incorporated~~ by filing only said Amended Plan of Operation as the Articles of Non-Profit Incorporation of Navajo Education and Scholarship Foundation, ~~incorporated~~ as an entity of the government of the Navajo Nation under the Non-Profit Corporation Code of the Navajo Nation, filed as such on December 18, 1986, (Exhibit A attached hereto) and duly amended on March 13, 1987 (Exhibit B attached hereto); and

8. The deletion by Advisory Committee Resolution ACN-183-86 from the amended Plan of Operation or Articles of Incorporation of Navajo Education and Scholarship Foundation, ~~incorporated~~ of the Advisory Committee's sole authority and responsibility to approve further amendment of said Plan of Operation or Articles of Incorporation is ~~therefore, rather a legal and oversight of~~ beyond the power and authority of the Advisory Committee delegated by Navajo Tribal Council Resolution CJA-1-81; and

*deleted or proposed for J.T. Resolution*

9. Said omission or deletion from the Plan of Operation and Articles of Incorporation of Navajo Education and Scholarship Foundation, ~~incorporated~~, together with Advisory Committee Resolution ACN-183-86 were duly corrected and amended by Advisory Committee Resolutions ACF-52-87 and ACF-53-87, respectively, on February 25, 1987, and by Amendment to the Articles of Incorporation of Navajo Education and Scholarship Foundation, ~~incorporated~~ as a non-profit governmental corporation of the Navajo Nation, certified and filed by the Incorporation Office of the Navajo Nation, Department of Commerce on March 13, 1987 (Exhibit B attached hereto); and

*letly Jordan*

10. ~~By Resolution ACN-183-86 (attached as Exhibit C hereto) the Education Committee of the Navajo Tribal Council has questioned and opposed the Advisory Committee's lawful enactment of Resolutions ACF-52-87 and ACF-53-87;~~

*letly Jordan*

11. ~~By Decision and Order dated September 18, 1987 in the Quo Warranto action by Michael P. Upshaw, Attorney General, ex rel., Relators vs. Guy Coman, Sheriff et al.; Respondents, (WR-CV-96-87) the Window Rock District Court of the Navajo Nation has refused to recognize the validity of Advisory Committee Resolutions ACF-52-87 and ACF-53-87, respectively, as confirming the status of Navajo Education Scholarship Foundation, incorporated as an entity of the Navajo Nation, based upon the aforesaid omission or deletion in the substituted amendment to Navajo Education Scholarship Foundation's Articles of Incorporation, as approved and adopted by Advisory Committee Resolution ACN-183-86.~~

NOW, THEREFORE BE IT RESOLVED THAT.

*worded*

1. ~~The Advisory Committee of the Navajo Tribal Council hereby recommends that the Navajo Tribal Council confirm and adopt Advisory Committee Resolutions ACF-52-87 and ACF-53-87, respectively, superseding Resolution ACN-183-86 as the duly enacted resolutions of the Advisory Committee of the Navajo Tribal Council pursuant to Navajo Tribal Council Resolution CJA-1-81, together with the Articles of Amendment to Navajo Education and~~

*- Amended*

Exhibit No. 4 (cont.)

Scholarship Foundation, ~~Incorporated~~ Articles of Non-Profit Incorporation, as certified by Navajo Nation Commerce Department's Office of Incorporation on March 13, 1987, (Exhibit B attached hereto).

2. ~~The Advisory Committee of the Navajo Tribal Council~~ further recommends that the Navajo Tribal Council confirm and declare the initial, continuous and present status of Navajo Education and Scholarship Foundation, ~~Incorporated~~ as a non-profit corporate entity, fully owned and controlled by the Navajo Nation, for the benefits and purposes of Navajo People and Students served thereby, and in accordance with the ~~aforsaid~~ enactments of the Advisory Committee of the Navajo Tribal Council, ~~confirmed and adopted herein.~~ *changed by WOT/CS*

3. ~~The Advisory Committee of the Navajo Tribal Council~~ further recommends that the Navajo Tribal Council approve and adopt the position of the Attorney General, and direct the Navajo Nation Department of Justice to continue to pursue reconsideration in Window Rock District Court Action No. WR-CV-96-87 in Quo Warranto, on behalf of the Attorney General of the Navajo Nation ex rel. Relators, and failing such reconsideration by the Window Rock District Court of the Navajo Nation in accordance herewith, to petition the Supreme Court of the Navajo Nation for stay of execution of such contrary order or orders of the Window Rock District Court and to appeal said decision(s) and order(s) to the Supreme Court of the Navajo Nation, pending further Resolution of the Navajo Tribal Council as the governing body of the Navajo Nation.

\*\*\*\*\*

CHAIRMAN: Members of the Advisory Committee: As you'll recall this is an ongoing subject that has been directed during the Council's budget session last fall that this particular item be pursued with this Committee as the oversight entity, and in response to that this is the result and the resolution has now been read to read. The floor is now open for discussion.

DONALD BENALLY: Mr. Chairman, Members of the Committee: I move to approve the proposed resolution.

CHAIRMAN: Members of the Committee: You've heard Mr. Donald Benally making the motion to adopt the proposed resolution and recommend it on to the full Council; seconded by Mr. Manuel Shirley. So there's a motion on the floor. The floor is now open for the discussion.

REYNOLD HARRISON: Mr. Chairman, Members of the Committee: I have a question on Paragraph 10 of "whereas"; I wasn't aware of that. Also, would it be appropriate to delete that?

CHAIRMAN: The question to the Justice Department, the possibility of deleting Paragraph 10 under the "whereas" section?

WILLIAM RICHARD: Thank you, Mr. Chairman, Members of the Committee, Mr. Harrison: The resolution could be enacted in effect without that reference as you point out. My recommendation, unless you have other reasons that I don't see on this, is that it would be wiser to address it because the purpose here is to clarify misunderstanding that may have existed at the Council or among Committees of the Council.

## Exhibit No. 4 (cont.)

I think one of your responsibilities in your plan of operation as the Advisory Committee is to coordinate the activities of all other Committees, departments and divisions, and where there is an inconsistency as there really is here by addressing it, you are showing that you're conscious of that position and that you are seeking to resolve it by your interpretation.

It isn't necessary for you to propose that the Council as a whole adopt that position, but you're not trying to rescind that resolution of the Education Committee but if you don't address it, it'll continue to exist and it's possible that somebody might ask, well, how come you completely ignored the position of the Education Committee which was directed specifically to the Advisory Committee, if you read the provisions on it.

As I say, I feel base on misunderstanding of what that resolution really says, number one, it doesn't terminate the corporate status of NESF; number one, it doesn't make it impossible for any of the former members to be added to the present board provided they recognize that they are dealing with an entity of the Navajo Nation.

The short answer is, yes, it can be deleted without affecting the legality of the resolution. Perhaps I assume too much, but I thought it might be wise to address that existing resolution since it is one in opposition and it is another standing committee of the Tribal Council. So that would be a matter to your decision, not mine.

CHAIRMAN: Mr. Harrison, the Counselor recommended that we address this particular item that you raised a question on, so I yield the floor back to you.

REYNOLD HARRISON: Mr. Chairman, Members of the Advisory Committee: I'm going to leave it up to the moving party.

CHAIRMAN: There is a request to the moving party to exercise his discretion on this particular paragraph.

ALEX RIGGS: Mr. Chairman, Members of the Committee: I just have a question in regard to the directive that was made, I think it Charley Long that gave a directive whereby the Council had voted on it. And this Education Committee resolution was acted on on the 26th of February, so it's way before the Council have acted on the directive after this February 26th Education Committee resolution. So I just wonder, which has more barrier, who has more weight, the fact that the total Council have given a direction. That is my question. And is it possible to recall that directive? I think Mr. Long made it very clear.

CHAIRMAN: There is a question on the Education Committee's resolution that is attached; Mr. Riggs is concerned about the date that this was enacted upon, that was back in February of '87. As you'll recall, you, the Advisory Committee, had stated in your resolution that you didn't pick up this particular issue until after this date. So he is concerned with that, and I would like to call on Mr. Riordan if there is any possible conflict.

## Exhibit No. 4 (cont.)

WILLIAM RIORDAN: Mr. Chairman, Members of the Committee: Mr. Riggs' point I believe is accurate and if I'm not misunderstanding, what he's saying is it kind of responds to what I was saying that you would be resolving this apparent conflict and position, I think what Mr. Riggs is saying, hasn't the Council pretty well already resolved that by stating that that is the full Council's policy that it is an entity which is in support of what your position is. I have thought of that and I think it's a good point which would make it also make it more possible to delete that in view of the action already taken so that, remember, I was saying that there was some concern that somebody might ask you, how come you didn't resolve that conflict. I think Mr. Riggs has given the answer because the full Council considered it and resolved it. But I stand to be corrected on that, and I feel that's a good point.

CHAIRMAN: Thank you, Mr. Riordan. I just like to pose a question to you in order to be consistent with Mr. Riggs' concerns, how much will it distort the resolution if we add a new "whereas" mentioning the Council's directive? Would that furthermore confuse it or would it make clear as to Mr. Riggs' question?

WILLIAM RIORDAN: Mr. Chairman, Members of the Committee: I believe there already is a reference to the budget resolution of the Council, and we wouldn't be adding -- if I'm not mistaken, what the question and the discussion was is that we delete the reference to the Education Committee, that would not cause a great deal of problem, we'll just delete Number 10 that Mr. Harrison addressed as Exhibit "C" and then Exhibit "C" would be removed and that would not create any confusion in the rest of the resolution.

CHAIRMAN: Now back to the moving party, Mr. Benally.

DONALD BENALLY: Mr. Chairman, Members of the Committee: I think base upon the statement of Mr. Riggs here, base on the prior direction made by the Navajo Tribal Council that sort of supersedes the Education Committee, and I feel that the Education Committee feels differently today. I've talked with a couple of the Committee members and I think this section, we don't need to incorporate into the resolution so I will delete that section under Number 10 under the "whereas" clause.

CHAIRMAN: Mr. Manuel Shirley concurs. If there are no other questions, we'll now vote on this. So all those in favor of adopting this proposed resolution and recommending it to the full Council, please raise your right hand; opposed, the same sign. This will also include the amendments. With your vote of 13 in favor and none opposed, you have hereby adopted this resolution and recommended it to the full Council for their consideration.

Exhibit No. 4 (cont.)

EXHIBIT D

CF-8-88

Class "C" Resolution  
No BIA Action Required

RESOLUTION OF THE  
NAVAJO TRIBAL COUNCIL

Confirming and Declaring the Continuing Status of the  
Navajo Education and Scholarship Foundation, Inc., as a  
Governmental Non-Profit Corporate Entity of the Navajo Nation

WHEREAS:

1. By enactment of Navajo Tribal Council Resolution CJA-1-81, approving and adopting the Plan of Operation of the Advisory Committee, the Navajo Tribal Council, as the governing body of the Navajo Nation, has authorized, empowered and required the Advisory Committee of the Navajo Tribal Council to create only official entities of the Navajo Nation, and to adopt, amend or rescind Plans of Operation for all such entities of the Navajo Nation, in conformity with the organizational structure authorized by the Advisory Committee; and
2. By Resolution ACO-171-83, the Advisory Committee of the Navajo Tribal Council duly approved and enacted such a Plan of Operation for the Navajo Education and Scholarship Foundation, designating its organizational structure as Articles of Incorporation for a non-profit organization created under the laws of the Navajo Nation; and
3. The Advisory Committee of the Navajo Tribal Council has never rescinded the Plan of Operation or Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc., as approved by Resolution ACO-171-83; and
4. By Resolution CJA-2-86, the Navajo Tribal Council enacted the Navajo Nation Corporation Code on January 30, 1986, thereby providing for incorporation under the laws of the Navajo Nation of profit and non-profit entities, whether privately owned organizations or governmental entities of the Navajo Nation, including certified chapters and other entities of the Navajo Nation as authorized by the Navajo Tribal Council and/or the Advisory Committee, effective August 1, 1986; and
5. The Navajo Education and Scholarship Foundation, Inc., has not been incorporated under the laws of any jurisdiction other than under the Navajo Nation Corporation Code as authorized on November 13, 1986 by Advisory Committee Resolution ACN-183-86, "Approving Amendment by Substitution to the Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc."; and

Exhibit No. 4 (cont.)

6. The Advisory Committee of the Navajo Tribal Council is without authority to transfer, sell or otherwise consent to or authorize expropriation of ownership rights of any organization or property of the government of the Navajo Nation to any private ownership or control, such appropriation being reserved for approval only in accordance with the Plan of Operation of the Budget and Finance Committee adopted by the Navajo Tribal Council Resolution CAP-17-84 and further approved by the Navajo Tribal Council as the governing body of the Navajo Nation; and

7. By Resolution ACN-183-86, "Approving Amendment by Substitution to the Articles of Incorporation of the Navajo Education and Scholarship Foundation, Inc.", the Advisory Committee on November 13, 1986, amended said Articles and authorized incorporation of Navajo Education and Scholarship Foundation, Inc. by filing only said amended Plan of Operation as the Articles of Non-Profit Incorporation of Navajo Education and Scholarship Foundation, Inc., as an entity of the government of the Navajo Nation under the Non-Profit Corporation Code of the Navajo Nation, filed as such on December 18, 1986, (Exhibit "A" attached hereto) and duly amended on March 13, 1987 (Exhibit "B" attached hereto); and

8. The deletion by Advisory Committee Resolution ACN-183-86 from the amended Plan of Operation or Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc., of the Advisory Committee's sole authority and responsibility to approve further amendment of said Plan of Operation or Articles of Incorporation is beyond the power and authority of the Advisory Committee delegated by Navajo Tribal Council Resolution CJA-1-81; and

9. Said omission or deletion from the Plan of Operation and Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc., together with Advisory Committee Resolution ACN-183-86, were duly corrected and amended by Advisory Committee Resolutions ACF-52-87 and ACF-53-87, respectively, on February 25, 1987, and by Amendment to the Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc., as a non-profit governmental corporation of the Navajo Nation, certified and filed by the Incorporation Office of the Navajo Nation, Department of Commerce on March 13, 1987 (Exhibit "B" attached hereto); and

10. The Navajo Tribal Council, by enacting directive to Budget Resolution CO-50-87, directed the Navajo Tribal Education System to sponsor this proposed resolution for final adoption and enactment by the Navajo Tribal Council, to clarify and declare the legislative intent of the governing body of the Navajo Nation, that Navajo Education and Scholarship Foundation is and has continuously existed only as a non-profit government entity of the Navajo Nation; and

Exhibit No. 4 (cont.)

11. By Resolution ACJA-20-88, the Advisory Committee of the Navajo Tribal Council has recommended in consideration of the foregoing respective actions that the Navajo Tribal Council confirm the continuing status of Navajo Education and Scholarship Foundation, Inc., as a governmental non-profit corporate entity of the Navajo Nation, organized and existing for the benefit of the Navajo People and students served thereby.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby confirms and adopts Advisory Committee Resolutions ACO-171-83, ACF-52-87 and ACF-63-87, respectively, as the duly enacted resolutions of the Advisory Committee of the Navajo Tribal Council pursuant to Navajo Tribal Council Resolution CJA-1-81, together with the Articles of Amendment to Navajo Education and Scholarship Foundation, Incorporation's Articles of Non-Profit Incorporation, as certified by the Navajo Nation Commerce Department's Office of Incorporation, on March 13, 1987 (Exhibit "B" attached hereto). The Navajo Tribal Council rescinds Resolution ACN-183-86 as an ultra vires act of the Advisory Committee.

2. The Navajo Tribal Council hereby further confirms and declares the initial, continuous and present status of Navajo Education and Scholarship Foundation, Inc., as a non-profit corporate entity, fully owned and controlled by the Navajo Nation, for the benefits and purposes of Navajo People and students served thereby and in accordance with the authorized enactments of the Advisory Committee of the Navajo Tribal Council as confirmed and adopted herein.

3. The Navajo Tribal Council hereby directs the Advisory Committee to take all actions necessary to implement the mandates of this Resolution and ensure the continuing status and operation of the Navajo Education and Scholarship Foundation, Inc., as a government non-profit corporate entity of the Navajo Nation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 39 in favor, 38 opposed and 1 abstained, this 4th day of February, 1988.

  
Chairman  
Navajo Tribal Council



Exhibit No. 4 (cont.)

EXHIBIT E

(Whereupon, the following was read by Larry Foster.)

PROPOSED RESOLUTION  
OF THE NAVAJO TRIBAL COUNCIL

Confirming and Declaring the Continuing Status of the Navajo Education and Scholarship Foundation, Inc., as a Governmental Non-Profit Corporate Entity of the Navajo Nation and Directing the Navajo Nation Department of Justice to Pursue Action in Quo Warranto on Behalf of the Attorney General of the Navajo Nation, ex rel. Relators

WHEREAS:

1. By enactment of Navajo Tribal Council Resolution CJA-1-81 approving and adopting the Plan of Operation of the Advisory Committee, the Navajo Tribal Council, as the governing body of the Navajo Nation, has authorized, empowered and required the Advisory Committee of the Navajo Tribal Council to create only official entities of the Navajo Nation, and to adopt, amend or rescind Plans of Operation for all such entities of the Navajo Nation, in conformity with the organizational structure authorized by the Advisory Committee; and

2. By Resolution ACO-171-83, the Advisory Committee of the Navajo Tribal Council duly approved and enacted such a Plan of Operation for the Navajo Education and Scholarship Foundation, designating its organizational structure as Articles of Incorporation for a non-profit organization created under the laws of the Navajo Nation; and

3. The Advisory Committee of the Navajo Tribal Council has never rescinded the Plan of Operation or Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc. as approved by Resolution ACD-171-83; and

4. By Resolution CJA-2-86, the Navajo Tribal Council enacted the Navajo Nation Corporation Code on January 30, 1986, thereby providing for incorporation under the laws of the Navajo Nation of profit and non-profit entities, whether privately owned organizations or governmental entities of the Navajo Nation, including certified Chapters and other entities of the Navajo Nation as authorized by the Navajo Tribal Council and/or the Advisory Committee, effective August 1, 1986; and

5. The Navajo Education and Scholarship Foundation, Inc. has not been incorporated under the laws of any jurisdiction other than under the Navajo Nation Corporation Code as authorized on November 13, 1986 by Advisory Committee Resolution ACN-183-86, "Approving Amendment by Substitution to the Articles of Incorporation of Navajo Education and Scholarships Foundation, Inc."; and

Exhibit No. 4 (cont.)

6. The Advisory Committee of the Navajo Tribal Council is without authority to transfer, sell or otherwise consent to or authorize expropriation of ownership rights of any organization or property of the government of the Navajo Nation to any private ownership or control, such appropriation being reserved for approval only in accordance with the Plan of Operation of the Budget and Finance Committee adopted by Navajo Tribal Council Resolution CAP-17-84 and further approved by the Navajo Tribal Council as the governing body of the Navajo Nation; and

7. By Resolution ACN-183-86, "Approving Amendment by Substitution to the Articles of Incorporation of the Navajo Education and Scholarship Foundation, Inc.", the Advisory Committee on November 13, 1986, amended said Articles and authorized incorporation of Navajo Education and Scholarship Foundation, Inc. by filing only said amended Plan of Operation as the Articles of Non-Profit Incorporation of Navajo Education and Scholarship Foundation, Inc. as an entity of the government of the Navajo Nation under the Non-Profit Corporation Code of the Navajo Nation, filed as such on December 18, 1986, (Exhibit "A" attached hereto) and duly amended on March 13, 1987 (Exhibit "B" attached hereto); and

8. The deletion by Advisory Committee Resolution ACN-183-86 from the amended Plan of Operation or Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc. of the Advisory Committee's sole authority and responsibility to approve further amendment of said Plan of Operation or Articles of Incorporation is beyond the power and authority of the Advisory Committee delegated by Navajo Tribal Council Resolution CJA-1-81; and

9. Said omission or deletion from the Plan of Operation and Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc., together with Advisory Committee Resolution ACN-183-86, were duly corrected and amended by Advisory Committee Resolutions ACF-52-87 and ACF-53-87, respectively, on February 25, 1987, and by Amendment to the Articles of Incorporation of Navajo Education and Scholarship Foundation, Inc. as a non-profit governmental corporation of the Navajo Nation, certified and filed by the Incorporation Office of the Navajo Nation, Department of Commerce on March 13, 1987 (Exhibit B attached hereto); and

10. The Navajo Tribal Council, by enacting directive to Budget Resolution CO-50-87, directed the Navajo Tribal Education System to sponsor this proposed resolution for final adoption and enactment by the Navajo Tribal Council, to clarify and declare the legislative intent of the governing body of Navajo Nation, that Navajo Education and Scholarship Foundation is and has continuously existed only as a non-profit government entity of the Navajo Nation; and

Exhibit No. 4 (cont.)

11. By Resolution ACJA-20-88, the Advisory Committee of the Navajo Tribal Council has recommended in consideration of the foregoing respective actions that the Navajo Tribal Council confirm the continuing status of Navajo Education and Scholarship Foundation, Inc. as a governmental non-profit corporate entity of the Navajo Nation, organized and existing for the benefit of the Navajo People and Students served thereby.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby confirms and adopts Advisory Committee Resolutions ACO-171-83, ACF-52-87 and ACF-53-87, respectively, as the duly enacted resolutions of the Advisory Committee of the Navajo Tribal Council pursuant to Navajo Tribal Council Resolution CJA-1-81, together with the Articles of Amendment to Navajo Education and Scholarship Foundation, Inc.'s Articles of Non-Profit Incorporation, as certified by the Navajo Nation Commerce Department's Office of Incorporation, on March 13, 1987 (Exhibit B attached hereto). The Navajo Tribal Council rescinds Resolution ACN-183-86 as an ultra vires act of the Advisory Committee.

2. The Navajo Tribal Council hereby further confirms and declares the initial, continuous and present status of Navajo Education and Scholarship Foundation, Inc. as a non-profit corporate entity, fully owned and controlled by the Navajo Nation, for the benefits and purposes of Navajo People and Students served thereby and in accordance with the authorized enactments of the Advisory Committee of the Navajo Tribal Council as confirmed and adopted herein.

3. The Navajo Tribal Council hereby directs the Advisory Committee to take all actions necessary to implement the mandates of this Resolution and ensure the continuing status and operation of the Navajo Education and Scholarship Foundation, Inc. as a government non-profit corporate entity of the Navajo Nation.

\* \* \* \* \*

LARRY FOSTER: Mr. Chairman, you have attached the Exhibit "A", which is the Navajo Nation Corporation Code which is referenced herein; you also have Exhibit "B", its also a similar document of the Navajo Nation Corporation Code for the certificate of articles of incorporation which has been referenced here in the resolution.

There's language in the resolution, in the heading of the resolution, if you would look on the signature approval sheet which is the SAS form, you would have that certain language has been deleted from the resolution and that it be incorporated in the heading, that particular -- those amendments should read in the heading where the reading will be as follows:

Exhibit No. 4 (cont.)

"Confirming and Declaring the Continuing Status of Navajo Education and Scholarship Foundation, Inc., as a Governmental Non-Profit Corporate Entity of the Navajo Nation." Put a period there. From there on after, all the remaining sentence will be stricken, so that will be the appropriate heading, Mr. Chairman.

LEO R. -BEGAY: Mr. Chairman, Members of the Navajo Tribal Council, Staff, Visitors: I wish to entertain a motion to adopt the resolution as read and as explained by Mr. Foster. I believe that this body, the Navajo Tribal Council, is the governing body of the Nation and it also has the authority, the obligation and the duty to reconsider, nullify, amend or confirm the actions of any of the standing committees, whether they be legitimate or questionable actions.

I believe that the Council, the actions and the approval of this resolution will confirm that this body, the Navajo Tribal Council, is the final authority in the decisions that they made and also the decisions that are made by the standing committees can be reaffirmed or can even be done away with by this Council. Therefore, Mr. Chairman, I make this motion to adopt the resolution.

CHAIRMAN: Motion has been made by Leo R. Begay; seconded by Roselyn John. Ms. John, do you have anything you want to say?

ROSELYN D. JOHN: Mr. Chairman, Members of the Navajo Tribal Council: I would like to make the second to the motion made by Leo R. Begay.

CHAIRMAN: Members of the Tribal Council: Mike, do you wish to make any remarks at this time?

MICHAEL UPSHAW: Mr. Chairman, Members of the Navajo Tribal Council: Mr. Chairman, I wish to defer my remarks until after Ms. Martgan from the Division of Education.

CHAIRMAN: Ms. Martgan.

REBECCA MARTGAN: Mr. Chairman, Members of the Navajo Tribal Council: On October 12, 1983, the Advisory Committee established the Navajo Education and Scholarship Foundation, by approving its Plan of Operation as the "Articles of Incorporation" of an entity of the Navajo Nation. The authority delegated to the Navajo Education and Scholarship Foundation as a tribal entity was to act for and on behalf to the tribal government, as its administrative agency, in accomplishing the government's responsibility for representing the Navajo public interest in the education of Navajo students.

The Navajo Education and Scholarship Foundation was created by the Navajo Tribal Government to support and carry out the education policies of the Navajo Tribe - not to compete with

#### Exhibit No. 4 (cont.)

it philosophically, financially, politically and to cause discord and disharmony. Attempts to take away the funds raised by and donated to the Tribal Government, for operation of NESF is in actuality an attempt to take over NESF and the use and the control of its funds by private interest groups.

All of the donations which Navajo Education and Scholarship Foundation claims to have "raised" from 1983 to 1986 were either transferred from tribal scholarship accounts or acquired by the Navajo Education and Scholarship Foundation as an entity of the Navajo Tribal Government. NESF admits its status has been, ever since its creation, a tribal entity, even though when the Navajo People voted a change in their elected officials at the end of 1986, individuals associated with NESF attempted to run NESF as a private corporation.

It was only after the 1986 elections - after all of those scholarship funds have been transferred to, or acquired by, Navajo Education and Scholarship Foundation as an administrative agency which was an integral part of the Navajo Tribal Government, that the people entrusted with its operation and management attempted to use the previous administration's Advisory Committee and the Navajo Nation Incorporation laws to completely divorce the Navajo Education and Scholarship Foundation from the Navajo Tribal Government. An attempt was made to take tribal assets and rights as private properties settlement. The Department of Justice discovered that these actions were invalid and contrary to the laws of the Navajo, and sought and is still seeking the aid of the Courts of the Navajo Nation in recognizing and protecting the Navajo Nation's paramount property and governmental rights in the Navajo Education and Scholarship Foundation as a tribal entity.

The former NESF Board's proclamation that "In December 1986 the Navajo Education and Scholarship Foundation gave the Navajo Education Center to the Navajo Nation," is completely inaccurate and misleading. Navajo Education and Scholarship Foundation, which has admitted in court that it was created in 1983 by the Advisory Committee as an entity of the Navajo Nation, was commissioned by its Plan of Operation to construct a facility for the ownership of the Navajo Nation. Navajo Education and Scholarship Foundation was never given any right, title or interest, separate and apart from that of the Navajo Nation.

However, it completed the construction of the Navajo Education Center and turned it over for use of tribal education offices in the following manner: Navajo Education and Scholarship Foundation solicited donations for the construction of the Education Center and the facilities to be constructed were to be completed in all respects. However, because of contract and legal problems, delay in the commencement of the construction and some funds not arriving in time, all the planning work was not completed. Even though the building was

#### Exhibit No. 4 (cont.)

constructed completely with public funds, donated to the scholarship programs of the Navajo Tribal Government, the Tribe could not apply these funds for the Center the way it is normally done when the Tribe undertakes construction. The result is a facility which remains in need of more money and work for its proper completion.

Navajo Education Division requested an appropriation of Tribal Capital Improvement Funds (CIP) in the amount of \$968,000 for intending to complete unfinished work on the facility. Accordingly, \$960,000 was released to the Design and Engineering Department for these purposes and through the coordinated efforts of the Design and Engineering Department, the Navajo Tribal Education System and the Purchasing Services, this work continues to progress.

Though a smooth transition of facilities management and maintenance has not happened, which has made it impossible to attend to the incomplete work and repairs. Since there should be warranties of the various aspects of the construction, the contractors who undertook the work need to be contacted to remedy numerous structural problems on the buildings. Since there was not an official inspection from the Tribe of the construction and sign off on the building, tribal facilities management and maintenance offices are reluctant to touch the building.

There was never any action taken by the former Board of Trustees of the Navajo Education and Scholarship Foundation to separate Navajo Education and Scholarship Foundation from the tribal government which the former board alleges they determined to be in the best interests of the students and the Navajo Education and Scholarship Foundation, until they tried to do so by obtaining a restraining order against the present Chairman and Vice Chairman and members of the Advisory Committee of this Navajo Tribal Council on February 27, 1987.

Contrary to what has been released to the news media by the former board and their associates, Navajo Education and Scholarship Foundation's former Board of Trustees did not vote on approving the substituted amendment until after they were presented to and acted upon by the Advisory Council on November 13, 1986. Navajo Education and Scholarship Foundation's own records and minutes have revealed that the attempt to delete the Advisory Committee's authority to approve future amendments was made and presented by the Navajo Education and Scholarship Foundation's Executive Committee -- not by its Board.

In fact it was not until five days after the Foundation's Executive Committee succeeded in getting its proposed post-election amendments by substitution past the Advisory Committee on November 13, 1986, that the Navajo Education and Scholarship Foundation's Executive Director, dispatched ballots by mail on November 18 to the Navajo

#### Exhibit No. 4 (cont.)

Education and Scholarship Foundation Board members to ratify such substitutions, after they are acted upon by the Advisory Committee.

Returned correspondence from the other Board members further clarified that the ratification ballots were not even accompanied by the substituted amendments, just a half-page summary from the Executive Director which neglected to even mention that the Advisory Committee's authority to approve future documents had been deleted without any record of explanation, discussion or even reading to the Advisory Committee. This is despite the false claim that the Board of Trustees asked the Advisory Committee of the Navajo Tribal Council to relinquish its control of the Foundation.

Another incorrect and misleading fact is that when it was authorized by the previous Administration's Advisory Committee to incorporate as a non-profit entity under the laws of the Navajo Nation, NESF was in fact being "transferred" from the Navajo Tribe into private hands.

The Navajo Nation Corporation laws specifically provide that any entity of the Navajo Nation may be certified as a nonprofit corporation, as long as it is authorized by the lawful tribal authority, in this case the Advisory Committee of the Navajo Tribal Council. However, the Navajo Nation Commerce Department is given absolutely no authority to dissolve any tribal entity. Furthermore, even if it wanted to, does the Advisory Committee have any power to transfer any tribal entity over to private ownership? The former Navajo Education and Scholarship Foundation Board itself admitted that the Advisory Committee has no authority whatsoever to create any kind of private entity.

Although the previous Administration's Advisory Committee could dissolve the Navajo Education and Scholarship Foundation as a tribal entity by rescinding its Plan of Operation, they chose instead to specifically amend not rescind NESF's Plan of Operation as a tribal entity on November 13, 1986.

Moreover, if the Advisory Committee had dissolved Navajo Education and Scholarship Foundation, under both law and its own Articles of Incorporation, the Navajo Education and Scholarship Foundation's property and rights as a nonprofit, government organization, would then revert to the Navajo Tribe and the Tribal Council would then have to approve any transfer of these tribal rights and property over to private ownership and control. The Navajo Tribal Council has delegated no such authority to the Committee - it specifically deleted from the Advisory Committee's Plan of Operation authority to charter any organizations.

#### Exhibit No. 4 (cont.)

So the only way that the Navajo Education and Scholarship Foundation could lawfully be incorporated under the Navajo Nation Corporation Code is as a continuing public entity of the Navajo Nation, which the Council's Advisory Committee confirmed by its resolutions in February 1987, ACF-52-87 and ACF-53-87.

The Government of the Navajo Nation, as the elected representatives of the Navajo people, must accept and exercise its ultimate responsibility to make education available to all its constituents. There is no greater public interest of the Navajo Nation than the Education of its own students - the greatest of all assets of the Navajo Nation.

Also if you will note, if you have a question regarding where the funds came from, you will note that you have a listing of where those donations came from in your packet. Thank you.

MICHAEL UPSHAW: Mr. Chairman, Vice Chairman, Members of the Tribal Council: The resolution before you is a result of your 1988 budget directive that the Division of Education promulgate the law or policy to resolve conflicting authorities surrounding the Navajo Education and Scholarship Foundation and reaffirming the Advisory Committee's action of February 1987. The purpose of this resolution which is before you is for the Council, the Navajo Tribal Council, you, to state clearly the intentions of the Navajo Tribal Government concerning the Navajo Education and Scholarship Foundation.

What I will do at this point is give you a general overview of our position from the Department of Justice and then also a further discussion of the November of 1986 Advisory Committee resolution which seems to be at the crux of the matter here. I'd like to defer the remainder of my time to Mr. Riordan, Assistant Attorney General, to give you his comments and his analysis regarding the United States Department of Internal Revenue Service's sanction of the Foundation and some of the concerns that are associated with it.

As you would probably know already from listening to Ms. Martgan's report and also discussion among you and also reading the newspaper articles, that that issue here is whether the Navajo Education and Scholarship Foundation is a tribal or a private entity and that the concern here is a dispute over the meaning of the actions that are taken by the Advisory Committee. One view is that the Advisory Committee set up the Foundation as a private corporation, wholly separate and independent from the Navajo Tribal Government.

The position that I have and the Department of Justice is that while the Foundation is independent, as are many tribal enterprises, for example, NAPI, NTUA and so forth that the Foundation is a non-profit organization, it was not turned over



## Exhibit No. 4 (cont.)

into a private corporation. We contend that the Foundation is still owned by the Navajo Tribal Government and is still answerable to the Navajo Tribal Council. This resolution clarifies that the Navajo Tribal Council -- that the Foundation is an entity of the Navajo Nation Government. The Advisory Committee has authority to create corporations under the Navajo Corporation Law as tribal entities, ~~or also as private entities.~~

We believe that what the Advisory Committee did was incorporate the Foundation under the Navajo Corporation Code as a tribal entity. The Advisory Committee does not have the power to give away the property of the Navajo Nation to private corporations. That is what the Advisory Committee's resolution of November 13, 1986 tried to do, however, we advised here and make the legal conclusion that that Advisory Committee in that action was acting beyond their scope of authority and their action is not valid.

This resolution makes clear that the Navajo Tribal Council argues that any such Advisory Committee transfer was invalid. The Advisory Committee has the authority to set up tribal entities including tribal corporations. It can also set up how the boards of directors are to be selected in the future and also it can mandate how the charters and the plans of operation can be amended or rescinded from time to time. However, that doesn't mean that the organization is no longer owned by the Navajo Tribal Government, for example, under the Navajo Nation Corporation Code, chapters are allowed to incorporate. Just by the fact that a chapter of the Navajo Government incorporates does not mean its private and wholly separate and independent from the Navajo Government again. This resolution is an opportunity for the Navajo Tribal Government through you, the Members of the Council, to express their intention concerning the status of the Navajo Education Foundation.

I will go ahead and give you the chronology of Council and the Committee actions relating to the creation and operation of the Education Foundation. On January 28, 1981, the Navajo Tribal Council adopted a revised plan of operation for the Advisory Committee of the Navajo Tribal Council. In that resolution the Navajo Tribal Council authorized the Advisory Committee to create any enterprises, colleges, ONEO or any other entity of the Navajo Nation by adopting a plan of operation and to amend or rescind that plan.

On October 13, 1983, the Advisory Committee passed a resolution establishing the Education Foundation and adopting the articles of incorporation and declaring it a non-profit corporation to gain the tax exempt status. This resolution further provides that the Chairman of the Navajo Tribal Council appoint the Foundation's Board of Trustees. Also the Advisory Committee has full authority to approve any and all amendments. On November 13, 1986, the Advisory Committee approved amendments

## Exhibit No. 4 (cont.)

by substitution to the Foundation's Articles by Resolution AC-183-86. That resolution gave them the majority of the quorum of the Foundation's Board of Trustees authority to appoint further trustees of the Foundation.

Second, it also eliminated the need for Advisory Committee approval of amendment to the Foundation's articles of incorporation and authorized the Board of Trustees to amend the articles. It also appointed the -- it also authorized the Foundation to comply with Navajo Tribal law by filing amended articles of incorporation with the Commerce Department. The first board of trustees pursuant to that action was Mr. Guy Gorman, Sr., Vivian Arviso, Elouise DeGroat, Annie D. Wauneka and Alyce Rouwalk and Roselyn Zah and David Tsosie and Albert Yazzie.

On February 25, 1987, the Advisory Committee passed a resolution which reestablished the Foundation as an entity of the Navajo Nation. The Advisory Committee fully rescinded the November 13, 1986 Advisory Committee resolution which created the Foundation as a non-profit corporation. The Advisory Committee further declared the Foundation's articles null and void. It also removed the existing members of the Board and replaced them with the following Board members: Donald Benally, Daniel Tso, Loyce Phoenix, Rebecca Martgan, Bobby Charley, Richard Kontz, Paul Sage, Kee Ike Yazzie, Manuel Shirley and Lewis Calamity.

As I pointed out earlier that it is the Justice Department's position that the Advisory Committee or the B&F could not transfer or sell property of the Navajo Tribe to a private non-tribal corporation. That's been the Department of Justice's position at the inception of the Foundation. I will go ahead and present to you the minutes of the Budget and Finance Committee of July 1986 or August 1986 wherein the Budget and Finance Committee was presented with a resolution that would transfer P&M lease monies to the Foundation. In there there was a concern that was raised by my predecessor, Ms. Claudeen Bates Arthur, then Attorney General, the concern she had was whether or not the Navajo Nation could transfer tribal property to a private corporation.

In response to that concern, the then Assistant Attorney General, Albert Hale, advised -- gave advice to the Budget and Finance Committee that was entered on record. In that advice, which I still hold, Mr. Hale concluded that the Foundation is a tribal non-profit charitable and tax exempt entity. In concluding, Mr. Hale stated the Navajo Education and Scholarship Foundation has all the appearances of a Tribal enterprise, the board of trustee members are appointed by the Chairman and confirmed by the Advisory Committee of the Tribal Council. Annual audit reports are required to be submitted to the Budget and Finance Committee of the Navajo Tribal Council. The board of trustees may amend the articles of incorporation,

## Exhibit No. 4 (cont.)

but amendments are not effective until approval by the Advisory Committee of the Navajo Tribal Council.

So I just want to emphasize that this is not a position that I have adopted by myself alone recently, we have continued the analysis that was made in that opinion that was rendered to the Budget and Finance Committee on August 5, 1986 by Attorney General Claudeen Bates Arthur and also Mr. Albert Hale. I still -- we still hold the analysis that the Advisory Committee does not have the authority to transfer tribal property to a non-tribal private foundation. In order to do that, under the Tribal Code which I refer to Budget and Finance Committee authorization, Section 372 contained in Title 2 that the B&F would need to recommend -- review and recommend to the Tribal Council any such action. Under Section 343, the Advisory Committee does not have any authority to transfer property of the Navajo Nation to a private foundation.

The Advisory Committee does have authority to create a tribal entity and in present circumstances, what we're looking at is that the Advisory Committee's action of November 1986 was invalid because (1) all they could do was create a tribal entity and they had no authority to create other than a tribal entity and (2) they had no authority to transfer property to a private foundation and (3) that the Advisory Committee could not re-delegate to a private foundation the authority that was given to it to oversee the plan of operation of the Foundation.

Based on that, it is our conclusion that the action of the Advisory Committee of November 13, 1986 was beyond their scope of authority and that because of that, it has no effect or validity of transferring tribal property. I'd like to also point out that under the Tribal Code, Title 2, Section 57, it states that -- which deals with provisions concerning tribal property, this is Section 57 (c) the sale, gift, loan, exchange or other disposition of any tribal property, not specifically authorized by regulations or other directives by the Tribal Council, is illegal.

So based on that, we have at this point recommended earlier to the Advisory Committee that the Council action that's appropriate at this time, our advice, based on our conclusions, legal conclusions that the action of November 13 Advisory Committee was beyond the scope of authority that this matter has to come back before you and clarify the intention of the Council relating to the status of the Foundation.

Also to correct any action that was taken by the Advisory Committee that was beyond the scope of authority, therefore, we're recommending that the Council reaffirm the resolution of October 13, 1983 which created the Foundation as an tribal non-profit corporation. Also to reaffirm the resolution of February 1987, reaffirming the status of the Foundation as a tribal non-profit corporation.

Exhibit No. 4 (cont.)

I will go ahead and conclude at this point and have Mr. Riordan speak to some concerns that you should have regarding the Foundation and its relationship with the Internal Revenue Service.

WILLIAM RIORDAN: Mr. Chairman, Members of the Tribal Council Delegates, Members of the Tribal Divisions, Departments, Staff and Guests: I will not review again the outline because I believe its been very clearly presented to you, as to the Tribe's position, but in a particular area I've been asked to address because there has been some misinformation apparently that's been publicized. The Tribe has had to really struggle to assert its position in view of the initial claims that by trying to assert its position that the Foundation was created and always has been and is a tribal entity, that that was likened to be a takeover by the Tribe, when in fact to claim that there had been an authorized transfer from a tribal entity to private hands would be just the opposite, it would a takeover by private individuals of a public asset and a public entity of the Navajo Nation.

Other misinformation concerns the tax status of the Foundation and that is probably because it has been a factor in trying to view the intent of the Advisory Committee. The Advisory Committee has no authority, it does not have authority to transfer assets of the Tribe. Neither does the Advisory Committee have any authority to create a private entity of any kind. In fact, in 1981 when the Advisory Committee sought to have its plan of operation approved by the Tribal Council, there was a proposal that would include the authority of the Advisory Committee to issue a charter to a private organization and in considering that the Tribal Council specifically addressed it, it specifically said no, that they did not want that authority to be delegated to the Advisory Committee, that it would be retained by the Council itself.

This chartering had been used in the past and in the absence of the Tribal Corporation Code as a means of obtaining tax exempt status, so that the recognition of a non-profit organization by the governing body of the Navajo Tribal Council would qualify that body for tax exempt status to accept donations so that donations would be tax deductible to the donor. It is not correct to state that the tax status of the Education Foundation is as a private non-profit corporation under 501 (c) of the Internal Revenue Code. That application was made, its true but it was rejected by the Internal Revenue as not being the correct statement of the status of the Foundation. Instead the actual tax exempt status that has been issued by the Internal Revenue is for a public non-profit entity which includes a governmental corporation.

We've experienced the same thing in the past, its a very common misunderstanding, even among many lawyers that you must incorporate in order to qualify for tax exempt status and

#### Exhibit No. 4 (cont.)

that is not true, that is not the only organization that is recognized by the Internal Revenue. Before we had our corporation code, the chapters were even considering, they wanted to run non-profit programs, that they would have to incorporate under some state law which of course makes it unthinkable to place a subdivision of the Navajo Tribe Government under state jurisdiction by means of incorporation.

But it was not necessary if you simply applied on behalf of the chapter this was done, this is how I personally became aware of it, the chapter got its non-profit recognition, its tax exempt status by simply submitting its status as a governmental entity, that is non-profit. This is actually the analysis and the status that came back from Internal Revenue. Why is that important, its also important because although its been recognized that the Advisory Committee had no authority to create a private entity, there's been a position taken by the party seeking to take over NESF, that even if it didn't have that authority, there must have been some intent to do so because they refer to their articles in the plan of operation as articles of incorporation but it makes it very clear when you read the history of that that the reason for that was to qualify for tax exempt status, not as a private organization, but as a governmental organization and as a governmental corporate body which is very common in the Federal Government, as numerous federal corporations, examples are the Federal Deposit, the Insurance Corporation, various loan programs.

In effect they operate -- in law they operate as wholly owned by the Federal Government in a non-profit corporate form and they are regarded in law as agencies of the government and this is exactly what the intent of the AC resolution was because they could do no other than to say that there was such an intent is to presume an intent to do something unlawful and the legislative record does not bear that out. The Advisory Committee acted lawfully and created a tribal entity, the Navajo Education and Scholarship Foundation. Thank you.

ALEX RIGGS: Mr. Chairman, Members of the Tribal Council, Visiting Friends and Justice Department which has interpreted some of the laws and also the Education Foundation, the way it has separated from the tribal government. As we have received the report from Ms. Martgan and also Michael Upshaw and then Mr. Riordan. I think to say that it has become clear, some of us didn't really -- was not really aware of the extent of the information that was supplied to us in terms of the tribal laws that we have. Truly, the Advisory Committee has the authority to set up an organization as the charter but not to separate and make a separate entity from the tribal government. This is not their line of authority.

So what we are doing is just taking the action that the Advisory Committee had taken and bring it back within the tribal government, the way it should be and that is merely the

#### Exhibit No. 4 (cont.)

understanding that we're getting as well as the Attorney General's interpretation that he has outlined. I believe that it is only right that we bring the Navajo Education and Scholarship Foundation back in the non-profit organization within the Tribal Government. This is the way that it has been and that's the way it should be. On no grounds that the Advisory Committee can authorize, it should not set a precedent as to giving a separate entity of the organization as this.

So many information that has been made clear to us, Mr. Chairman, I believe this is the right approach that we will be making. I would like to see that the set rules and the resolution be set as this to reset up the Navajo Tribal Scholarship Foundation as it has been, a non-profit organization within the Navajo Tribal Government. Mr. Chairman, it is only proper that we vote on this resolution and set it back the way it should be and this is my comments and thoughts, Mr. Chairman.

CHORUS: Vote! Vote!

ROBERT WHITEHORSE: Mr. Chairman, Members of the Tribal Council, Justice, BIA, Ms. Martgan, Visitors: I'd like to make a comment on this issue before the Tribal Council. I'm not going to go into great detail but my interpretation of the resolution is that we try to bring the entity that was blessed as a private entity, to bring it back under the Tribal -- under the Navajo Nation, the Tribal Council, so it would be set up similar like NTUA, NECA, other business enterprises that's branched off the Navajo Tribe.

So I have looked through the Foundation, as far as the appropriation that has been made, the donation, I see that Mobil Oil Company operating in Aneth has donated and I concur with them that it is the one that donated half a million and also Texaco. Today, the people who live in Aneth, are beginning an uprising with these oil companies because of the non-preference, its not being implemented the way the law is stated under the Navajo Tribe. They in turn use this that they have donated this in good faith to the Navajo Tribe, therefore, the community should recognize the oil company since a good term of cooperation is being practiced, but if we're going to have this foundation that's going to be set aside as a private entity, I think we should make it known to the oil company that they are making donations, not to the Tribe but they are making it to the one that's branched off and spaced off, the entity that is no longer controlled by the Navajo Tribe.

I think based on this terms I think the people in Utah have a legitimate argument against these companies that they have not donated any. I think it would be only proper if we bring this entity back under the control of the Navajo Tribe. Then the corporation and the agreement and whatever terms will be settled based on the donation that has been set aside in the previous years. So I just want to cite this one.

## Exhibit No. 4 (cont.)

I know after its brought back under the entity like similar enterprises, I know that it could be controlled and run and whatever the intent of this Foundation can continue. I don't think we're talking about the Board members there, the people, the staff that's being staffed now, I think we're only authorizing that this entity will be joined back within the Nation, so we can be all as a whole. So the scholarships and whatever can be distributed accordingly, equally, based on the terms being decided, should also be oversighted by the Education Committee.

**BENJAMIN HOUSE:** Mr. Chairman, Vice Chairman: I'd just like to reiterate what we're discussing here, that the information that we received from our Attorney General and Ms. Martgan, that this entity is solely the property of the Navajo Tribe. The Navajo Tribe is responsible and has its duty to protect tribal property, exercising its duty to protect its resources. I realize we're not dealing with private corporations because the Foundation is a tribal entity and it is without question tribal property.

I can see that someone might say that we're interfering with cases pending in court and someone might say that we have no respect for tribal courts, tribal judges or the Judicial system, to wipe out this entity. That's not the case, we're not wiping it out, we're simply putting it back with the Navajo Tribe, that's all that we're asking in its right place. Thank you.

**CHORUS:** Vote! Vote!

**ANDERSON TULLY:** Mr. Chairman, Vice Chairman, Members of the Tribal Council: Just from the review of the documents and the information that we have received so far, one question that I have maybe to the Attorney General or Ms. Martgan, the purpose and intention of the Foundation itself, I presume that the operation itself is solely supported by private donations. As we look into the documents that we have before us, many of the companies that are affiliated with the Navajo Tribe have donated the most funds.

After the discussion thus far has indicated to me certainly the Foundation belongs as a tribal entity, a governmental entity, with that the Navajo Tribal Council has the ultimate authority to carry out the responsibility to protect the property of the Navajo people. With that I think what this Council is doing is trying to clear up some of the unclear authority that was made, such as the authority of the AC, that the Advisory Committee has to create or establish a private entity. With this, I think we have -- this Council has mentioned over and over again that the Council has the ultimate authority to amend or to correct anything that is unsatisfactory to the policies. I think this is what we're doing, we're trying to clear up some of the things -- correct some actions that were

Exhibit No. 4 (cont.)

done illegally. Thank you, Mr. Chairman.

CHAIRMAN: You had a question, did you say, Mr. Tully of the Attorney General?

ANDERSON TULLY: Yes, either to the Attorney General or Ms. Martgan about the funds that are donated to the Foundation. What was the intention in the first place or what funds were to be used for the operation?

CHAIRMAN: Mr. Upshaw, or if you don't have the answer, Ms. Martgan.

REBECCA MARTGAN: Mr. Chairman, Members of the Council: The intent of the donations was to build the Education Center. Thank you.

CHAIRMAN: You're asking for the vote, but here's the situation as I understand it.

Members of the Tribal Council, its very clear to me that perhaps to many of you by asking for the question by now, we'll soon have that that there is no authority on the part of the Advisory Committee to give away tribal monies and tribal assets without the Tribal Council acting on it. What we're talking about probably right now is an asset well over \$4 million. Just as if the Tribe has established an authority like the Tribal Utility Authority, the Advisory Committee does not have the authority to say, okay, we'll just make NTUA a private enterprise to be run and owned by Mickey Dalton. There's about \$20 million worth of tribal assets in that enterprise. Its just simply the case where the action of the Advisory Committee was not appropriate, was not legal, consequently, you are being asked to correct that situation and let the Foundation continue to operate and exist under the entity of the Navajo Tribal Government.

If you want to vote, let's have a vote.

(Comments were made by various Council Delegates from the floor.)

CHAIRMAN: Order. All those in favor of the motion to approve this proposed resolution indicate by voting yes; opposed.

(Comments were made by various Council Delegates from the floor.)

CHAIRMAN: Everybody voted?

(Comments were made by various Council Delegates from the floor.)



Exhibit No. 4 (cont.)

CHAIRMAN: Members of the Tribal Council: The vote is 38 in favor, 38 opposed and 1 abstaining, that's a tie vote, so I will cast my vote in favor of the yes, so the resolution passes with 39 in favor, 38 opposed and 1 abstention.

Members of the Tribal Council, with that vote of 39 in favor, 38 opposed and 1 abstention, the proposed resolution is hereby approved as read.

We'll now recess for lunch until 1:30.

(Whereupon, at 12:20 p.m., the Tribal Council recessed and reconvened on the same day at 2:10 p.m.)

Chairman Peter MacDonald, Presiding

CHAIRMAN: The Council meeting will now come to order. We'll now have roll call.

(Whereupon, there were 51 Council Delegates present at the commencement of the afternoon session.)

CHAIRMAN: Members of the Tribal Council: We do have a quorum, we'll now move on with our agenda. It's my understanding that Item 17, Adopting the Recommendations on the Prevention of Child Abuse and Molestations on School Settings on the Navajo Reservation, is ready; if that is so, then I'd like to have it handed out to the Members of the Tribal Council and read.

This particular item facing the Council really is a serious problem throughout the Reservation, it's something that we need to address in order to provide a safe and healthy environment for our children, whether it be in school or wherever they might be. After the proposed resolution is read, I'd like to have explanations made here by the parties sponsoring the resolution.

(Whereupon, the following was read by Larry Foster.)

# Chairman nails debate, casts deciding vote

By Richard Sitts

Dine Bureau

WINDOW ROCK, Ariz. — Democracy and the right of free speech took a forced vacation from the Navajo Tribal Council chambers Thursday.

Navajo Tribal Chairman Peter MacDonald refused to allow many council delegates to speak and then cast the deciding vote on the Navajo Education and Scholarship Foundation issue.

The vote strips the foundation of its private status and gives the tribal government power over the foundation. Its fundraising arm is headed by former tribal chairman Peterson Zah.

Afterward, half the council charged that the session was being run like a dictatorship.

The resolution being voted on was to confirm and declare the continuing status of the foundation as a governmental, non-profit corporate entity of the Navajo Nation.

Last February the Advisory Committee dismissed the foundation's board and appointed its own board to take over. The original board claimed it had been made a private corporation, while the tribe maintains it has been a tribal entity all along, and the issue is still pending in Navajo courts.

The vote ended in a 38-38 deadlock, with one abstention. MacDonald then quickly announced that he was casting the deciding vote, declared the resolution approved, and recessed the council for lunch.

Council members were outraged when MacDonald called for a vote on the foundation resolution, when many had not been recognized by the chair and still had questions they wanted answered.

The vote itself was almost anticlimatic, compared to the drama leading up to it and the verbal protests afterward.

Low Mountain and Jeddito Council Delegate David Tsosie was particularly upset that he was not recognized. He is a member of the tribe's Education Committee and has served on the foundation's board.

"It seems like the Education Committee should be allowed to voice their opinion," Tsosie said. "There were two or three of us with our hands up who were not recognized." Education Committee Chairman Daniel Tso was one of those.

After keeping his hand raised through three other delegate speeches, Tsosie then stood up with his hand still raised, through another speech.

It didn't help.

Rather than recognize delegates who may have questioned or spoken against the resolution, MacDonald went down the list and called on his stable of staunch supporters to speak instead.

Council delegates Tsosie, Tso, Stanley Yazzle, Marshall Plummer, and many others were left with their hands in the air, while the chairman called on delegates Robert Billy Whitehorse, Benjamin House and Anderson Tulley.

Upon calling for a vote, MacDonald had to pick up his gavel and call for order when delegates verbally expressed their outrage.

Exhibit No. 4 (cont.)

chance to speak!", and "We still have questions!" rang through the chamber.

Delegates did vote, however, and the tote board lit up like a red and green Christmas tree. Many of the red "Nay" lights were lit up for the first time since the current administration took office.

The board, which usually is predominantly green, showed an equal mix of red, leading to the tie vote, which was then broken by the chairman.

"It clearly demonstrates that we have a dictator who only calls on people who share his views and won't call on others with different views, for fear of a more objective debate," Teosie said.

Tuba City delegate Irving Billy was furious, calling MacDonald's action "Dictatorial."

"Awful," was the word Rock Point delegate Ernest Begay used.

"The way this was handled was entirely unfair," said Hard Rock delegate Percy Deal. "All the sides must be heard, including the entity directly involved — the foundation. This is an action I strongly reject."

The resolution had been presented by Navajo Education Director Rebecca Martigan, but no one representing the foundation had been allowed to speak.

The abstention was cast by Teec Nos Pos Council Delegate Frank Farley, who told the *Independent* he did so because the other side had not been allowed to express its views.

Upon dismissing the council for lunch, MacDonald left the chamber, while frustrated delegates descended down front to question Navajo Attorney General Michael Upshaw.

"You're making a mockery of the tribal justice system," Billy told Upshaw.

Council member Tom Babe asked Upshaw what his position was on how the delegates were not recognized and given the floor.

"I don't have anything to do with that," Upshaw responded. "That's the chairman's prerogative."

...I should advise that everyone be recognized," Babe said. "You should have stood up for our rights."

Upshaw told the delegates he would have been out of order if he had done anything. He suggested that the council come up with some rules that everyone be recognized, but the delegates countered that that was his job.

One of the many observers sitting in the gallery Thursday was Zah, who is in charge of fundraising for the foundation.

"It's unfortunate the Tribal Council has to employ this kind of tactic," he said afterward. "We are still in court and it's not over yet."

Zah said the approved resolution means a "disrespect for the Navajo courts and judges," because the matter still is being decided in court.

"The sad thing about this whole

thing is the students are getting hurt, and half of the council delegates are frustrated and voiceless," Zah said. "If he (MacDonald) doesn't hear them, then half the Navajo people are without a voice."

Zah said when he was chairman he recognized the opposition and let them have their say. His strategy, he added, was to recognize the opposition first, and then mount counter-arguments.

"In America, by the U.S. Constitution, we have room for opposition," Zah said. "What I saw today looked more like Russia."

"No corporation is going to relocate to the reservation if they see these kind of exhibitions carried out in the Navajo Tribal Council," Zah said.

Council member Morris Johnson also brought up the economic development concern, saying he believed Thursday's action will only hurt the tribe's economic development initiative.

"What company is going to trust us now?" Johnson asked. "This seems to tell the private sector that we are unstable."

"There were 38 of us who weren't given the floor."

## Editorials

### A Vote Against Navajos

A Navajo tribal judge ruled last fall that the Navajo Education and Scholarship Foundation is an independent corporation and not, as Navajo Chairman Peter MacDonald argued, an arm of the tribal government.

But a court decision wasn't good enough for Peter MacDonald.

While attorneys for the tribe's justice department appealed the decision, MacDonald last week went one step better. He cast the tie-breaking vote for a Navajo Tribal Council resolution making the foundation an arm of the tribal government. Or, "clarifying" the law for the courts, as MacDonald's press secretary explained.

But the real explanation for MacDonald's continued crusade against the foundation's independence is painfully transparent.

MacDonald's long-time rival, Peterson Zah, is chief fund-raiser for the foundation. Placing the foundation under the tribal government just happens to give MacDonald the power to hire — and fire — its employees.

MacDonald already has proven that he will exercise that power. Last January, the tribe's advisory committee — appointed by MacDonald — fired the foundation board that had hired Zah. Those firings prompted Zah to seek an injunction in tribal court.

MacDonald's press secretary said after last week's vote that the foundation was illegally made an independent corporation during Zah's tenure as tribal chairman. MacDonald in the past has charged that Zah is using the foundation for his own political purposes. (This, from a man who cast his tie-breaking vote after banning any debate by the opposition.)

These same arguments were made before the tribal judge last fall. The judge ruled otherwise. The proper avenue for resolving these differences is rightly through appeal, not by rewriting the law in the middle of the game.

The sad fact is that it's not just MacDonald's credibility that suffers from such misguided escapades as last week's vote.

The tribal council in 1986 passed a law to protect corporations such as the education foundation from the very kind of political interference currently being practiced in Window Rock. The Navajo Nation needs jobs desperately; actions like the one taken last week can only send a negative message to companies considering doing business in Navajo country.

And education is key to strengthening the Navajo economy. Meddling with a foundation that raises scholarships for needy students is the pettiest of politics.

Exhibit No. 4 (cont.)

EXHIBIT F

ALBUQUERQUE JOURNAL

Friday, February 5, 1988

"MacDonald Vote Decides Zah Dispute"

By Susan Landon

JOURNAL STAFF WRITER

As several Navajo Tribal Council members shouted that they had been denied the right to speak, tribal Chairman Peter MacDonald on Thursday cast the tie-breaking vote in a resolution giving the tribal government power over a foundation headed by his longtime rival.

Peterson Zah, chief fund-raiser for the Navajo Education and Scholarship Foundation, said, "The whole purpose of all this is so MacDonald can fire me as a foundation employee — he can't do that when the foundation is separate and independent."

MacDonald and Zah were bitter opponents in the 1986 campaign for chairman, with MacDonald narrowly winning the election.

But a statement issued by MacDonald's office late Thursday said the foundation was illegally made an independent entity by a tribal advisory council in the closing months of Zah's administration.

"Today, the Navajo Nation clarified the intent as to the status of the foundation as a non-profit tribal corporation," the statement said.

Tribal council members opposing the resolution during the council's winter session in Window Rock, Ariz., on Thursday said the vote will hurt the tribe's attempts to attract business to the reservation. They said a tribal judge had already ruled last September that the foundation

was an independent corporation created under the Navajo Corporation Code.

"No one will trust us if we don't follow our own law," said Morris Johnson, a tribal council member from northwestern New Mexico who opposed the resolution. "We're changing our laws in the middle of the game."

But Karen Diakun, press secretary for MacDonald, said the resolution clarifies for the courts that the foundation is a tribal corporation. She said the matter is still before the courts, where attorneys for the tribe's Justice Department have appealed the September ruling.

Zah said he will abide by whatever the tribal court finally rules in the case.

He added, "By voting against the foundation's independence, MacDonald has made a mockery of the Navajo Nation Corporation Code, tribal courts and tribal judges."

The vote was tied 38 to 38, with one abstention, when MacDonald cast the deciding vote in favor of a resolution saying the foundation is a tribal entity.

Johnson and council member David Tsosie of northern Arizona said not one opponent to the resolution was allowed by MacDonald to speak. The chairman presides over tribal council meetings.

Exhibit No. 4 (cont.)

"Usually, the opponents are allowed to say a few words, at least. This time we were never given the floor — never! We believe if we'd been given the floor, we could have persuaded some of the other 38 supporters of the resolution to vote with us," Johnson said.

MacDonald quickly adjourned the council session for lunch and left,

Johnson said. More than a dozen council members then clustered around Navajo Attorney General Michael Upshaw, criticizing the way the vote had been handled.

"The education scholarship foundation legal counsel and board members were not allowed to present their case — it was an infringement on due process and civil rights," Johnson said.

Ms. Diakun said the tribe's Advisory Committee in 1983 and in 1987 stated the foundation is a tribal corporation. Those two votes were taken when MacDonald was chairman.

She said action taken by the advisory group under Zah was un-

lawful because the committee does not have the power to transfer tribal property to an independent group without Tribal Council approval.

The Navajo Education and Scholarship Foundation has three employees. This semester, it will award about 80 college scholarships and 75 college preparatory scholarships to Navajo students, Zah said. He said the total amount of the scholarships will be more than \$100,000.

The foundation raises money from the private sector, foundations and individuals to send Navajo students to school.

INDEPENDENT

February 11, 1988

"Zah: No Force in Ed Transition"

By Betty Reid  
Dine Bureau

WINDOW ROCK, Ariz. — Tribal attorneys have assured Navajo Education and Scholarship Foundation officials that force won't be used to remove them, according to former Navajo Chairman Peterson Zah.

Zah spoke to more than 70 persons who gathered Wednesday at the foundation to find out the future of organization following last week's Navajo Tribal Council action.

The council recommended in a 38-38 deadlock with one abstention to put the foundation under tribal control. Tribal Chairman Peter MacDonald cast the tie-breaking vote.

Zah mentioned that he, along with foundation officials Guy Gorman and Annie Wauneka, visited Navajo Nation Attorney General Michael Uphaw last Friday.

The group asked if there would be a repeat of last year's attempted removal of Zah by MacDonald's

staff members. That action followed an Advisory Committee vote to dissolve the foundation.

Uphaw could not be reached for comment and Navajo Nation Press Secretary Karen Diakun was reported on leave.

Zah said the attorney general told Ms. Wauneka that he did not want the foundation dispute to become any more heated than it already is. He added that Uphaw said he would follow whatever the tribal courts decide. Courts are expected to rule on the tribe's current appeal to reverse last September's decision.

In September, the Navajo court ruled that the foundation was an independent corporation created under the Navajo Nation Corporation Code.

"I would have to say that I believe our attorney general," said Zah. "We will honor his word."

He disputed radio news accounts in the Navajo language about how

# ● Zah ...

the foundation had become indebted by not paying its taxes.

Zah told the group that it wasn't true because the foundation has a tax-exempt status. As for stories which said the foundation was constructed using tribal funds, he said the tribe contributed only \$1 million to the \$4 million project. The remaining \$3 million came from private corporations, he said.

Zah furthered questioned the action of the council saying that it makes a mockery of the tribal courts.

"From here on, will we take our traffic tickets to the Navajo Tribal Council to determine our fate?" he asked. "What use is the tribal courts if the council acts like a judge."

He charged that the mission of the current administration is to acquire the foundation, leaving room for tribal officials to "step on his neck."

"Some people may say that, 'we Please see ZAH, page 2.

Continued from page 1

won,' but it is the children who benefit from the foundation who are losers," said Zah. "I'm not hurting. The chairman is not hurting, for he is doing well. It's the children who are hurting."

Zah said the foundation has \$500,000 in a fiduciary trust fund.

Rebecca Martgan, director of the Navajo Education Division, said she did not believe that the children were suffering from recent actions. She said an estimated \$30,000 was given out in scholarship awards last year.

Ms. Martgan, however, said meetings similar to Wednesday's will only create a further division among the Navajo people.

"It is not good for the Navajo people to have our heads together in anger," she said. "If we want peace, we need to get together."

Wednesday's meeting was sponsored by the Dine Rights Association, which invited Zah to talk about the foundation.



ALBUQUERQUE JOURNAL  
Monday, February 8, 1988

EDITORIALS

"A Vote Against Navajos"

Monday, February 8, 1988

# Editorials

## A Vote Against Navajos

A Navajo tribal judge ruled last fall that the Navajo Education and Scholarship Foundation is an independent corporation and not, as Navajo Chairman Peter MacDonald argued, an arm of the tribal government.

But a court decision wasn't good enough for Peter MacDonald.

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But the real explanation for MacDonald's continued crusade against the foundation's independence is painfully transparent.

MacDonald's long-time rival, Peterson Zah, is chief fund-raiser for the foundation. Placing the foundation under the tribal government just happens to give MacDonald the power to hire and fire its employees.

MacDonald already has proven that he will do anything to get his way. In January, the tribe's advisory committee — appointed by MacDonald — fired the foundation board that had hired Zah. Those actions prompted Zah to seek an injunction in tribal court.

MacDonald's press secretary said after last week's vote that the foundation was illegally made an independent corporation during Zah's tenure as tribal chairman. MacDonald in the past has charged that Zah is using the foundation for his own political purposes. (This, from a man who cast his tie-breaking vote after banning any debate by the opposition.)


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The sad fact is that it's not just MacDonald's credibility that suffers from such misguided escapades as last week's vote.

The tribal council in 1985 passed a law to protect corporations such as the education foundation from this kind of political interference currently being practiced in Window Rock. The Navajo Nation needs jobs desperately. Actions like the one taken last week can only send a negative message to companies considering doing business in Navajo country.

And education is key to strengthening the Navajo economy. Meddling with a foundation that raises scholarships for needy students is the pettiest of politics.

THE TRUTH WELL TOLD



# Independent

February 5, 1988

## Navajo Tribe makes ed takeover official

Dine Bureau

**WINDOW ROCK, Ariz.** — The Navajo Tribal Council Thursday approved a resolution to keep the Navajo Education and Scholarship Foundation as a tribal entity.

Navajo Tribal Chairman Peter MacDonald cast the tie-breaking vote to approve the resolution.

The resolution confirms and declares the continuing status of the foundation as a governmental, non-profit corporate entity of the Navajo Nation.

Thursday night the Navajo tribal chairman's office, released a prepared statement regarding the vote.

The statement reads as follows:

"The 1988 council budget resolution passed during the fall session directed the Navajo Division of Education and the Department of Justice to 'promulgate a law or policy to resolve conflicting authorities surrounding the Navajo Education and Scholarship Foundation, and reaffirming the Advisory Council action of February, 1987.'

"The council received a report from the Department of Justice that the action of the Advisory Committee on Nov. 13, 1986, creating the foundation as a non-profit, private, non-tribal entity, was beyond the scope of the authority of the Advisory Committee.

"Subsequently, the council resolution of today rescinded the Nov. 13, 1986, resolution of the Advisory Committee and reaffirms the Advisory Committee resolutions of October, 1983, and February, 1987.

"These resolutions created and reaffirmed the foundation as a non-profit tribal corporation.

"The November, 1986, Advisory Committee action was said to be unlawful because the Advisory Committee could not transfer tribal property without approval of Council."

"Secondly, the Advisory Committee could not redelegate its authority to a private entity to approve amendments to the plan of operation or the articles of incorporation of a tribal entity.

## Exhibit No. 4 (cont.)

THE ARIZONA REPUBLIC: State & Valley

"Navajo Council Seeks To Rule Scholarship Agency"

### Stricter controls sought over board that raises funds

By MARK SHAFFER  
Northern Arizona Bureau

The Navajo Tribal Council has recommended that the independent Navajo Education and Scholarship Foundation be placed under control of the tribe.

The advisory resolution, which critics say is an attempt to sap the independence of corporations doing

business on the reservation and to undercut Chairman Peter MacDonald's political opposition, passed 39-38 on Thursday.

Council delegates had deadlocked 38-38 on the advisory resolution — a recommendation to the tribal court, which is deliberating on the foundation's status. MacDonald cast the tie-breaking vote.

Angry delegates later charged that MacDonald, who conducted the council meeting, never consulted with the council's education committee and only recognized four proponents of the resolution to

speak during floor debate.

The foundation was created in 1983, separate from tribal government, by former Chairman Peterson Zah to help raise funds to build an education center and provide more scholarships for Navajo college students.

After MacDonald defeated Zah in the 1986 election for chairman, Zah was picked by the foundation's board as head fund-raiser.

The tribe's advisory committee then changed the plan of operation for the foundation and replaced three of Zah's supporters on the

board with three sympathetic to MacDonald.

Members of the board then filed suit in tribal court, alleging that the advisory committee did not have authority to change the board.

Judge Robert Yazzie of Window Rock District Court, in a ruling in September, upheld the right of the foundation to be separate from the tribe.

The tribe appealed Yazzie's ruling to the Navajo Supreme Court but it was remanded to the district court for final disposition.

— *Navajo, B3*

# NAVAJO

Continued from B1

Diakun said she expects the Tribal Council's action to place a great deal of pressure on Yazzie to reverse his decision. District Court judges are appointed and can be removed by the chairman.

Meanwhile, education officials chastised the council for its decision.

"It's nothing but an insult to the political process," said Alice Rowwalk, a member of the foundation's board of directors. "It shows a lack of respect for the court system when the legislative branch goes in and dictates action."

Zah said the resolution "makes a mockery of the tribal corporation code" and predicted that it would stifle all business development on the nation's largest reservation. Economic development has been a linchpin of MacDonald's administration.

The corporation code was adopted in 1986, Zah said, to keep tribal politics out of questions on economic development.

"By MacDonald personally voting in favor of this measure, it's crippled his own program. No business in its right mind would invest millions at his urging," Zah said. "It's also destroyed the credibility of the foundation."

RESOLUTIONS AND VOTES OF THE ALLIANCE OF TRIBES  
TO PUT THEM UNDER THE TRIBAL GOVERNMENT

Voting Yes for the Motion and Resolution		Voting No and opposing the Resolution		Absent		Excused		Abstention
1 Leo R. Begay		1 Tom Y. Bahe		1 George Herrera		1 Raphael Martin		1 Frank Farley
2 Larry Billah		2 Larry Beak		2 Henry Hesuse		2 Ernest Hubbell		
3 Kelly Wood Harvey		3 Richard K. Begay		3 Raymond Seolero		3 Charlie C. Billy		
4 Thomas Barbone		4 Emmett Bia, Sr.		4 Benjamin Henry				
5 Ernest C. Beentli		5 Percy Deal		5 Elmer Milford				
6 Billy Chiquito		6 Nelson Dorman		6 Ceoll Sylversmythe				
7 Annie Descheny		7 Joe Shirley		7 Leo N. Begay				
-8 Benjamin House		8 Alfred L. Yazzie		8 Billy Todaohenne				
9 Roselyn D. John		9 Samuel Yazzie						
10 Buddy Mexloano		10 Henry Hudson						
11 Robert Ortiz		11 Charley Long						
12 Gilbert Roger		12 John Perry, Jr.						
13 Andrew Sampson		13 Daniel Tso						
14 Nelson V. Thompson		14 Roy Vandever						
15 Larry Anderson		15 Kenneth L. Begay						
16 George Clark		16 Sampson Begay						
17 Kenneth Howard		17 Thomas Boyd						
18 Julius Johnson		18 Benjamin Curley						
19 Albert Ross		19 Henry Nez						
20 Paul Sage		20 Marshall Plummer						
21 Manuel Shirley		21 David Gangster						
-22 Anderson Tully		22 Tom Shirley						
23 Robert Ahkeah		23 David Tsosie						
24 Richard T. Begaye		24 Wallace Tsosie						
25 Donald Benally		25 Woody B. Tsosie						
26 Reynold Harrison		26 Ernest H. Begay						
27 Thomas C. Johnson		27 Leonard Haskie-						
28 Virgil Kirk, Sr.		28 Morris Johnson						
.29 Dean Paul		29 Lee B. Roy						
-30 Robert Whitehorse		30 Duane Yazzie						
31 Thomas Joe Yazzie		31 Waller Atene						
32 Lewis Calamity		32 Irving Billy						
33 Victor C. Joe		33 Richard George						
34 Billy Reese Kee		34 Lee F. Johnson						
-35 Alex Riggs		35 Thoe Nez						
36 Elwood Saganey		36 Floyd Stevens						
37 Hoover Schultz		37 Kee R. Tsosie						
38 Seymour Tso		38 Stanley Yazzie						
39 Peter MacDonald								

EXHIBIT C

Exhibit No. 4 (cont.)

Exhibit No. 4 (cont.)

EXHIBIT H



**THE NAVAJO NATION**

**PETER MacDONALD, CHAIRMAN**  
**THE NAVAJO TRIBAL COUNCIL**  
**JOHNNY R. THOMPSON, VICE CHAIRMAN -**  
**THE NAVAJO TRIBAL COUNCIL**

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AFTG-10025-88

RECEIVED

NAVAJO NATION DEPARTMENT OF JUSTICE  
Post Office Drawer 2010  
Window Rock, Arizona 86515  
(602) 871-6343/6348

February 16, 1988

Hon. Robert Yazzie, Judge  
Window Rock District Court  
Post Office Box 447  
Window Rock, Arizona 86515

Re: Michael P. Upshaw, Petitioner, ex rel.  
Relators v. Guy Gorman, Sr., et al.  
Window Rock District Court No. WR-CV-96-87

Dear Judge Yazzie:

I am enclosing for the record herein, a copy of certified Navajo Tribal Council Resolution CF-8-88, Confirming and Declaring the Continuing Status of the Navajo Education and Scholarship Foundation, Inc., as a Governmental Non-Profit Corporate Entity of the Navajo Nation.

Since this has now been enacted into the laws of the Navajo Nation, I am further requesting you to take judicial notice of its contents, particularly for reconsideration of the basis for the District Court's decision herein dated September 18, 1987, viz: the Court's imputation of the legislative intent of the governing body of the Navajo Nation.

Accordingly, I am also requesting your immediate scheduling of hearings on the post-judgment motions of both parties, as ordered by the Supreme Court of the Navajo Nation on November 23, 1987.

I have conferred with counsel for respondents, and both parties are agreeable to any day or days within the week of March 7 through March 11, 1988 for all motion hearings.

Post Office Box 303 • Window Rock, Navajo Nation (ARIZONA) • (602) 871-4941

Exhibit No. 4 (cont.)

Hon. Robert Yazzie  
February 16, 1988  
Page 2


As you know, it is imperative that certain matters pending since March and April 1987 be resolved at your earliest opportunity, including the continuing effect of your own March 25, 1987 Order which appointed Interim Court Supervised Trustees, and which has never been rescinded, pending final determination of all the ongoing issues in this case.

The urgent necessity for immediate compliance with your March 25, 1987 order is clearly demonstrated by the position of Fiduciary Trust International, as expressed in the enclosed correspondence.

I would certainly also appreciate your written order confirming your previous denial and dismissal of respondents' motion to strike a portion of petitioner's pleadings based upon allegations of fraudulent misrepresentation to this Court. These allegations have already been to be wholly untrue and without merit or justification and I therefore respectfully submit that the vindication of this matter on the record is long overdue.

Sincerely,

NAVAJO NATION  
DEPARTMENT OF JUSTICE

  
William A. Riordan  
Assistant Attorney General  
Counsel for Petitioner

WAR/ah  
Enclosures

xc: Sandy Hansen, Esq.  
Fredericks & Pelcyger  
Suite 216  
1881 9th Street  
Boulder, Colorado 80302



## Exhibit No. 4 (cont.)

EXHIBIT I

ACNY-107-88

Class "C" Resolution  
No BIA Action Required.

### RESOLUTION OF THE ADVISORY COMMITTEE OF THE NAVAJO TRIBAL COUNCIL

#### Terminating and Rescinding the Existing Lease to the Navajo Education and Scholarship Foundation

WHEREAS:

1. The Navajo Tribal Council, by Resolution CF-8-88, has confirmed and specifically declared the intent and determination of the governing body of the Navajo Nation that the Navajo Education and Scholarship Foundation, has been created by the authority vested in the Advisory Committee of the Navajo Tribal Council, under the laws and authority of the Navajo Tribal Council, and exists only as a governmental entity of the Navajo Nation; and

2. Navajo Tribal Council Resolution CF-8-88 is consistent with and confirms the legislative intent of the Advisory Committee as expressed in Resolution ACO-171-83, ACF-52-87, ACF-53-87, and ACJA-20-88; and

3. The Navajo Tribal Council has also expressly rescinded Advisory Committee Resolution ACN-182-86 insofar as the same has been erroneously interpreted by certain parties and entities as implying an intent of the Advisory Committee to violate the unequivocal laws of the Navajo Nation by attempting to either transfer the status, control, property or other right of an entity of the Navajo Nation to private ownership; or to abrogate or re-delegate the sole duty and authority of the Advisory Committee to private parties so that they could approve further amendments to the Articles of a wholly owned entity of the Navajo Nation; and

4. By reason of the foregoing, and pursuant to CJA-1-81, the Advisory Committee of the Navajo Tribal Council has the sole authority and responsibility to take all actions necessary to implement the mandates of Resolution CF-8-88 to ensure the continuation and operation of the Navajo Education and Scholarship Foundation, as a governmental, non-profit entity of the Navajo Nation; and

5. The Advisory Committee is required by its Plan of Operation (CJA-1-81) to take such action as it deems necessary to preserve the interests of the Navajo Nation during times when the Navajo Tribal Council is not in session; and

6. Advisory Committee Resolution ACD-231-86 approving a Transfer Agreement from and "lease back" to the Navajo Education and Scholarship Foundation for the building, pursuant to the Plan of Operation of the Advisory Committee of the Navajo Tribal Council Resolution (CJA-1-81) and the Plan of Operation of the Navajo Education and Scholarship Foundation adopted by the Advisory Committee Resolution ACO-171-83, and confirmed by Navajo Tribal Council Resolution CF-8-88, can only constitute agreements for use permits from the

## Exhibit No. 4 (cont.)

Navajo Nation government as owner of the premises on Tribal trust land by entities of the Navajo Tribal government, including: The Navajo Education and Scholarship Foundation under its approved Plan of Operation "to construct a building for the ownership of the Navajo Nation"; and

7. There are no Navajo Tribal records evidencing that the Bureau of Indian Affairs ever approved the agreement described in ACD-231-86, which, in any event, is not required for use by Navajo Tribal entities; and

8. Inasmuch as former directors of the Navajo Education and Scholarship Foundation have asserted their private ownership and control of the Navajo Education and Scholarship Foundation and its public assets of the Navajo people and their government, said parties are in violation of the laws and authority of the governing body of the Navajo Nation and also the terms of the aforesaid agreements between the Navajo Nation and the Navajo Education and Scholarship Foundation, an entity created and wholly owned by the Navajo Nation; and

9. The former Board of Trustees, Officers and staff of the Navajo Education and Scholarship Foundation, continued as a tribal entity by Resolution ACN-183-86 now occupy the building pursuant to the agreement executed on or about January 12, 1987, by reason of their unlawful claim as private owners of the Navajo Education and Scholarship Foundation; and

10. The individual former Board members have clearly violated the terms and conditions of their use agreement in the following additional instances:

- a). Use the premises for purposes other than carrying on the business of an entity of the Navajo Nation without written consent of the Navajo Nation pursuant to paragraph 4; and
- b). Conducting and engaging in substantial propaganda and otherwise attempting to influence legislation contrary to the use agreement and the status of the Navajo Education and Scholarship Foundation as an entity of the Navajo Nation; and
- c). Paragraph 14 relating to termination is conditioned upon the continuing ownership and operation of the Navajo Education and Scholarship Foundation as an entity owned and controlled by the government of the Navajo Nation; and

11. On February 7, 1988, the Navajo Education and Scholarship Foundation Board of Trustees passed a resolution (attached as Exhibit "A") requesting that the Advisory Committee terminate the lease executed pursuant to Advisory Committee Resolution ACD-231-86; and

12. In view of the foregoing, it is the duty and responsibility of the Advisory Committee of the Navajo Nation to immediately rescind and terminate the agreement with the former Board members, agents and employees now occupying any part of the premises of the Navajo Education Center, under claim of private ownership of the Navajo Education and Scholarship Foundation, in clear violation of the laws, public policies and property rights and interests of the government of the Navajo Nation.

## Exhibit No. 4 (cont.)

NOW THEREFORE BE IT RESOLVED THAT:

1. The Lease or use agreement for the Navajo Education and Scholarship Foundation as a wholly owned entity of the Navajo Nation which was authorized by Advisory Committee Resolution ACD-231-86 and executed by Vice-Chairman Edward T. Begay on or about January 12, 1987 in the name of the Navajo Nation, is hereby terminated and rescinded with regard to the current tenant and occupants of the Navajo Education Center, who are unlawfully claiming private ownership and control of the Navajo Education and Scholarship Foundation, furthermore, they are hereby ordered to immediately vacate the premises.

2. The Advisory Committee of the Navajo Tribal Council requests that the Chairman of the Navajo Tribal Council immediately take any and all actions necessary to enforce the termination of the Lease and use agreements as to said private individuals and to secure possession of the premises by the Navajo Nation for the use and benefit of the Navajo Education and Scholarship Foundation as a wholly owned public entity of the government of the Navajo Nation.

3. The Navajo Education and Scholarship Foundation Board, appointed by Advisory Committee Resolution ACF-53-87 and confirmed by Navajo Tribal Council Resolution CF-8-88, should hold a formal meeting as soon as possible to begin the challenging task of implementing the goals and purposes for which the Navajo Education and Scholarship Foundation was created as a governmental entity of the Navajo Nation.

4. The Chairman, Navajo Tribal Council, and the Department of Justice, are requested to implement and enforce the purpose and intent of this Resolution, should there be a failure by any former Trustee, Officer, employees or other person unlawful claiming private ownership or control of the Navajo Education and Scholarship Foundation, and compel them to comply with delivery of all Foundation books, accounts, minutes, records, and in his/her possession, to the Trustees of the Navajo Education and Scholarship Foundation, by authority of ACF-53-87, confirmed by Navajo Tribal Council Resolution. CF-8-88.

### CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Advisory Committee of the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 10 in favor and 4 opposed, this 24th day of May, 1988.

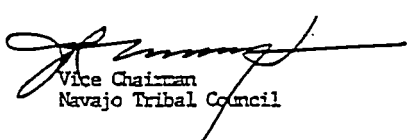
  
Vice Chairman  
Navajo Tribal Council

Exhibit No. 4 (cont.)

EXHIBIT A

NAVAJO EDUCATION AND SCHOLARSHIP FOUNDATION  
BOARD OF TRUSTEES

RESOLUTION-REQUESTING THAT ALL FORMER MEMBERS OF THE BOARD OF TRUSTEES, ALL FORMER AND CURRENT OFFICERS, EMPLOYEES AND STAFF MEMBERS OF THE FOUNDATION TO DISCLOSE AND DELIVER ALL BOOKS OF ACCOUNTS, FINANCIAL RECORDS, BOARD RESOLUTIONS MINUTES, CORRESPONDENCE, AUDIT REPORTS, AND OTHER RECORDS RELATING TO THE BUSINESS ACTIVITIES OF THE FOUNDATION AND THAT ALL SAID INDIVIDUALS IMMEDIATELY VACATE AND REMOVE THEIR PERSONS AND PERSONAL PROPERTY FROM THE PREMISES AND BUILDING CONSTRUCTED FOR AND ON BEHALF OF THE NAVAJO EDUCATION AND SCHOLARSHIP FOUNDATION

WHEREAS, by Resolution ACF-52-87 the Advisory Committee of the Navajo Tribal Council confirmed the creation and continuing existence of the Navajo Education and Scholarship Foundation as an entity of the Navajo Nation, rescinded Advisory Committee Resolution ACN-183-86, and amended the Plan of Operation of the Navajo Education and Scholarship Foundation; and

WHEREAS, the Navajo Tribal Council by Resolution CF-8-88 confirmed the previous actions of the Advisory Committee as set forth in Resolutions ACO-171-83, ACF-52-87, and ACF-53-87, rescinded Advisory Committee Resolution ACN-183-86, and confirmed the continuing status of the Navajo Education and Scholarship Foundation as a governmental non-profit corporate entity of the Navajo Nation; and

WHEREAS, it is desirable and appropriate for this Board of Trustees, which has been duly appointed and confirmed by Advisory Committee Resolution ACF-53-87, to proceed to take control and operation of the Navajo Education and Scholarship Foundation program and activities as mandated by the Navajo Tribal Council and by our own Plan of Operation; and

WHEREAS, the Navajo Tribal Council by Resolution CF-8-88 has directed the Advisory Committee to take all actions necessary to implement the mandates of said Resolutions and to insure the continuing status and operation of the Navajo Education and Scholarship Foundation as a government non-profit corporate entity of the Navajo Nation; and

WHEREAS, this Board agrees with the Navajo Tribal Council mandate to Advisory Committee of the Navajo Tribal Council expressed in Resolution CF-8-88 to continue to be involved in protecting the assets of the Foundation and insure the operation and continuation of the Foundation's educational and charitable goals and purposes; and

Exhibit No. 4 (cont.)

WHEREAS, this Board finds that the action of the Navajo Council in Resolution CF-8-88 constitutes a final resolution of the disputes and confusion surrounding the Navajo Education and Scholarship Foundation, and that it is both necessary and appropriate for this Board to meet and begin the process of obtaining possession of all property and assets of the Foundation to protect and preserve them from any possible waste and to get the scholarship program back into full operation; and

WHEREAS, this Board must immediately take possession and control of all assets of the Foundation, collect, review and audit all financial and operational records of the Foundation, identify and deal with any and all obligations of the Foundation, prepare for Spring applications and awards of scholarships, and complete independent audits of the financial records and affairs of the Foundation for 1986 and 1987 as this Board believes the only independent audit conducted of the records of the Foundation was performed in September, 1985; and

WHEREAS, this Board believes that any former member of the Board of Trustees, any former or current Officer, and any former or current employee of the Foundation should and must show proper respect for and compliance with the expression of the Navajo Tribal Council and cooperate with this Board in any and all ways possible to insure full and proper accountability for all income and all expenditures of the Foundation to date and to insure a smooth transition of full operational and administrative control to this Board to avoid any further diminishment or disruption of service to needy Navajo students; and

WHEREAS, the Board of Trustees, Officers, and staff of the Navajo Education and Scholarship Foundation as established in Resolution ACN-183-86 continue to occupy the building pursuant to the Lease which was executed on or about January 12, 1987. Said Lease is clearly in violation of law and sound public policy and should be terminated and rescinded immediately.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Board requests that all former members of the Board of Trustees, all former or current officers of the Foundation, and all former or current employees of the Foundation who have possession of or knowledge of the location of books of accounts, financial records, Board Resolutions and minutes, correspondence, audit reports, or any other records relating to the business activities of the Foundation, deliver said records to or immediately set forth in writing the names and addresses of the custodian of any such records to the

Exhibit No. 4 (cont.)

2. The Board requests that all former members of the Board of Trustees, and all former or current officers, and all former or current employees of the Foundation, or any other persons who share the goals and purposes of the Foundation put aside all disputes and work together to resolve any continuing confusion relating to the Foundation consistent with and pursuant to the mandate and intent of the Navajo Tribal Council as expressed in Resolution CF-8-88 and move forward together to accomplish the educational and charitable purposes of the Navajo Tribe of Indians as expressed in the Plan of Operation for the Navajo Education and Scholarship Foundation.

3. This Board requests that the Advisory Committee of the Navajo Tribal Council and the Navajo Tribal administration through the Office of the Chairman, Navajo Tribal Council assist this Board in obtaining all financial and other business records of the Foundation, assist this Board in contracting for and paying for necessary independent financial audits and other fiscal reports and activities to enable the Foundation to go forward with its goals and purposes, and to assist this Board in obtaining possession of and protect against waste of any and all Tribal assets and property belonging to our relating to the Foundation, and that the Navajo Tribe take any and all action necessary to obtain immediate possession of the Foundation building including, but not limited to, termination of the Lease executed pursuant to Advisory Committee Resolution ACD-231-86.

C E R T I F I C A T I O N

I hereby certify that the foregoing Resolution was duly considered by the Board of Trustees of the Navajo Education and Scholarship Foundation at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 7 in favor and 0 opposed, this 19th day of February, 1988.

  
Chairman  
Board of Trustees

Exhibit No. 4 (cont.)

EXHIBIT J

EXHIBIT A

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Sandra Hansen  
FREDERICKS & PELCYGER  
Suite 216, 1881 Ninth Street  
Boulder, Colorado 80302  
(303) 443-1683

Richard Hughes  
LUEBBEN, HUGHES, TOMITA, BORG  
SIMPSON & EBY  
Suite 200, 809 Copper, N.W.  
Albuquerque, New Mexico 87101  
(505) 842-6123

Attorneys for Respondent  
Navajo Education and  
Scholarship Foundation, Inc.

IN THE DISTRICT COURT OF THE NAVAJO NATION

DISTRICT OF WINDOW ROCK

MICHAEL P. UPSHAW, Attorney General,	)	
Navajo Nation,	)	No. WR-CV-96-87
	)	
Petitioner,	)	
	)	
ex rel.	)	
	)	AFFIDAVIT
DONALD BENALLY, et al.,	)	OF PETERSON ZAH
	)	
Relators,	)	
	)	
vs.	)	
	)	
GUY GORMAN, SR., et al.,	)	
	)	
Respondents.	)	

County of Apache )  
                                  ) ss  
State of Arizona )

Peterson Zah, first being duly sworn, deposes and says:

- I am the chairman of the National Advisory Council of the Navajo Education and Scholarship Foundation, Inc.
- In the late afternoon of May 24, 1988, I received

Exhibit No. 4 (cont.)

1 notice that the Advisory Committee of the Navajo Tribal  
2 Council had enacted a Resolution "Terminating and Rescinding  
3 the Existing Lease to NESF".

4 3. I was further advised that, by this Resolution, the  
5 Advisory Committee had directed the Navajo Nation Department  
6 of Justice to secure possession of NESF's suite of offices on  
7 the second floor of the Navajo Education Center and to seize  
8 the books, accounts, records, and minutes of the Foundation.

9 4. Acting on that information, I picked up Duane Beyale,  
10 another Foundation employee, and we went to NESF's suite of  
11 offices on the second floor of the Navajo Education Center  
12 around 7:00 p.m. on Tuesday, May 24, 1988.

13 5. When Mr. Beyale and I arrived at the offices, I  
14 observed Lloyd House, an employee of the Navajo Nation's  
15 Division of Administration and Finance, and another person  
16 whose identity is unknown to me, but whom I believe to be a  
17 locksmith.

18 6. When I entered NESF's offices, I observed Mr. House  
19 and the unknown person standing inside the Foundation's  
20 offices, with the lights turned off.

21 7. When I discovered Mr. House and his accomplice inside  
22 NESF's suite of offices, I became angry. After telling Mr.  
23 House what I thought about his participation in this latest  
24 attempt to seize control of the Foundation, I told him that  
25 the May 24 Advisory Committee Resolution was invalid. I told  
26 him that we (meaning myself and the Foundation's Board of



Exhibit No. 4 (cont.)

1 Trustees) were not given advance notice of the Resolution and  
2 that we had not been given a copy of the Resolution. I told  
3 him that the case was in Court, and should be decided there.  
4 I told him that, in order for him to oust us from our office,  
5 Lloyd House would have to get an order from the Tribal Court.  
6 I told him that I was going to spend the night in the  
7 Foundation's offices, and that if he wanted to remove me, he  
8 would have to get the police to serve me with a court order.

9 8. Mr. House appeared visibly upset by my appearance in  
10 the Foundation's office. He said something about the  
11 Advisory Committee having sent him there. He rifled through  
12 some papers he was holding, but did not produce a copy of the  
13 May 24 Advisory Committee Resolution.

14 9. I went into my office and telephoned NESF's attorney  
15 and told her what was happening. I believe that Mr. House  
16 and his accomplice left NESF's suite shortly after I entered  
17 my office.

18 10. Around 8:15 p.m. (I'm not absolutely certain about  
19 the time), Mr. House, the man whom I believe to be a  
20 locksmith, and Marshall Tome returned to NESF's offices and  
21 proceeded to remove the locking mechanism on the door to  
22 NESF's suite which leads to the hallway to the Navajo  
23 Education Center. Despite Mr. Beyale's and my protests, they  
24 replaced the door knob and locking mechanism with a locking  
25 mechanism for which employees of the Navajo Education and  
26 Scholarship Foundation, Inc., had no keys.

Exhibit No. 4 (cont.)

1 11. I believe that the persons who installed the new  
2 locking mechanism were acting in response to the Advisory  
3 Committee Resolution passed on May 24, 1988, and that they  
4 received their instructions from officials of the Navajo  
5 Nation. My belief is based upon Mr. House's initial comment  
6 that he had been sent to the Foundation's offices by the  
7 Advisory Committee.

8 12. On the morning of May 26, 1988, Lloyd House again  
9 appeared at the Foundation's offices. This time, he was  
10 accompanied by two officers of the Navajo police department.

11 13. Mr. House or one of the police officers, I forget  
12 which, showed me a copy of a court order signed by Judge  
13 Wayne Cadman, of the Chinle District Court. That order was  
14 issued pursuant to an action filed against me by the "Navajo  
15 Education and Scholarship Foundation" and "Lloyd House,  
16 executive director of NESF" and directed me to vacate the  
17 Foundation's suite of offices.

18 14. Before Mr. House and the police officers showed up in  
19 the Foundation's offices on the morning of May 26, 1988, I  
20 had absolutely no notice that an action had been filed  
21 against me in the Chinle District Court. I had not received  
22 any telephone calls about such an action. I had not received  
23 any papers concerning such an action. I had not been  
24 notified in any way about such an action.

25 15. I called my lawyer and told her about Mr. House's  
26 restraining order. On her advice, I tried to show the police

Exhibit No. 4 (cont.)

1 officers a copy of the order Judge Yazzie of the Window Rock  
2 District Court had signed on Wednesday, May 25, 1988,  
3 restraining petitioner, relators, and anyone with actual  
4 notice, from interfering with respondents' and NESF's  
5 employees' right to occupy the Foundation's suite of offices.  
6 The police officers refused to even look at Judge Yazzie's  
7 order.

8 16. While I refused to leave the Foundation's offices,  
9 Lloyd House stayed in the reception area of the offices.

10 17. Late in the morning of May 26, 1988, my attorney  
11 called and advised me that Judge Cadman's clerk had just  
12 telephoned and told her that Judge Cadman had dissolved his  
13 temporary restraining order issued against me and had  
14 transferred the "NESF v. Zah" action to Window Rock District  
15 Court. Shortly thereafter, Mr. House left the Foundation's  
16 offices. The police officers stayed to, as they said,  
17 "protect public safety".

18 18. Sometime on the evening of May 26, 1988, I received  
19 unofficial notice that Bobby <sup>Charley</sup>~~George~~, chief executive  
20 administrator of the Navajo Nation, had directed Colonel Bill  
21 Kellogg, director of the Navajo Division of Public Safety, to  
22 "secure" the Navajo Education Center, i.e., to prohibit  
23 anyone from entering the building from 7:00 p.m., May 26,  
24 1988, through 5:00 p.m., June 3, 1988. I was told that Bobby  
25 <sup>Charley</sup>~~George~~ said that the building had to be secured in order to  
26 "protect public safety".

Exhibit No. 4 (cont.)

1 19. At no time prior to my hearing, unofficially, that  
2 the Navajo Education Center was being "closed" did Mr.  
3 <sup>Charles</sup> ~~George~~, Colonel Kellogg, or anyone else advise me that such  
4 an action was being considered, nor did anyone ask me if, as  
5 a tenant of the Navajo Education Center, I believed such a  
6 drastic measure was needed.

7 20. Although I believed Mr. George's order to be in  
8 violation of this Court's temporary restraining order,  
9 neither I or any of the Foundation's employees attempted to  
10 enter the building until May 27, 1988, <sup>later</sup> ~~when~~ we learned from  
11 our lawyer that this Court had issued an Order directing <sup>Mr.</sup> ~~Mr.~~  
12 Kellogg and Mr. <sup>Charles</sup> ~~George~~ to permit us to enter the building  
13 through 5:00 p.m., Friday, May 27, 1988.

14 21. When we (myself, Faye Kinlicheenie, and Duane Beyale)  
15 returned to the Foundation's offices at about 2:30 in the  
16 afternoon on May 27, 1988, we discovered that the locking  
17 mechanism we had placed on the Foundation's door on May 26,  
18 1988, (to replace the one installed by Mr. House's workman)  
19 had been removed and that a locking mechanism for which we  
20 had no key had been installed in its place. This new locking  
21 mechanism must have been installed sometime between 5:00 p.m.  
22 on May 26 and 2:30 p.m. on May 27, 1988, as at all other  
23 times a Foundation employee was in NESF's office and would  
24 have told me that someone was again tampering with our door.

25 22. Because petitioner, relators, and persons acting in  
26 concert with them have engaged in a continuous course of

Exhibit No. 4 (cont.)

1 | conduct over a period of fifteen months, I believe that they  
2 | will continue to pursue their agenda to convert NESF to a  
3 | Tribal entity unless they are enjoined from doing so.

4 | 23. I believe that, unless they are enjoined from doing  
5 | so, employees and officials of the Navajo Nation will  
6 | continue to interfere with the rights of respondents and  
7 | employees of the Navajo Education and Scholarship Foundation,  
8 | Inc.

9 | 24. I believe that irreparable harm will occur, in that  
10 | officials and employees of NESF will be wrongfully excluded  
11 | from their leasehold without notice and an opportunity to be  
12 | heard and will be wrongfully deprived of their lawful right  
13 | to direct the affairs of the Foundation without notice and an  
14 | opportunity to be heard.

15 | 25. When the controversy over the legal status of NESF  
16 | began on February 25, 1987, the outstanding pledges to the  
17 | Foundation totaled more than \$100,000. From February 25,  
18 | 1987, until this Court issued its Opinion and Order, the  
19 | Foundation did not receive a single payment on those  
20 | outstanding pledges, and received no new contributions,  
21 | despite repeated attempts by myself to collect those funds.

22 | 26. Donors who had pledged funds to the Foundation before  
23 | February 25, 1987, told me that they would not make good on  
24 | their pledges until the controversy over the Foundation's  
25 | legal status was settled, and a lawful Board of Trustees was  
26 | recognized. Thus, as a consequence of the Advisory

Exhibit No. 4 (cont.)

1 Committee's attempts to seize control of NESF, funds which  
2 were pledged to NESF have not been deposited in NESF's  
3 interest-bearing accounts. As a consequence, NESF's  
4 scholarship accounts have not grown to the extent they would  
5 have but for the Advisory Committee's, petitioner's and  
6 relators' actions.

7 27. Also, from the period February 25, 1987, to September  
8 18, 1987, no new pledges were received by NESF. NESF will  
9 never to the extent to which its scholarship accounts would  
10 have increased but for the actions of the Advisory Committee,  
11 petitioner, relators and persons acting in concert and  
12 participation with them.

13 28. Since September 18, 1987, when this Court issued its  
14 Opinion and Order, NESF has received a payment of more than  
15 \$40,000 on a pledge that was outstanding from February 25,  
16 1987, until the date it was paid. We have received  
17 assurances from another donor that another pledge will be  
18 paid within the next few weeks. The donors who have and who  
19 have promised to make good on their pledges have told me that  
20 they are now willing to contribute to NESF because the legal  
21 status of the Foundation has been settled by Order of this  
22 Court.


23 29. Based upon my experience and discussions with persons  
24 who have pledged money to NESF in the past, I believe that  
25 donations to NESF will dry up unless petitioner, relators,  
26 and persons acting in concert and participation with them are

Exhibit No. 4 (cont.)

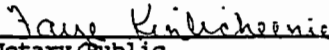
1 enjoined from purporting to act, or acting as, the Trustees,  
2 officers, and employees of NESF.

3 30. Based upon the past conduct of petitioner, relators,  
4 and persons acting in concert and participation with them, I  
5 believe that, unless they are restrained, they will continue  
6 to violate the clear import of this Court's Order of  
7 September 18, 1987, by attempting to seize control of NESF  
8 and to convert it to a Tribal entity.

9 31. The above statements are based on my own personal  
10 knowledge, experience, observation and belief.

11   
12 \_\_\_\_\_  
13 Peterson Zah  
14 Chairman, National Advisory Council  
15 Navajo Education and Scholarship  
16 Foundation, Inc.

17 Subscribed and sworn to before me this 31st day of May,  
18 1988.

19   
20 \_\_\_\_\_  
21 Notary Public

22 My Commission Expires:

23 My Commission Expires Feb. 4, 1989  
24  
25  
26  
27  
28

Exhibit No. 4 (cont.)

EXHIBIT K



THE NAVAJO NATION

PETER MACDONALD  
CHAIRMAN

JOHNNY R. THOMPSON  
VICE CHAIRMAN

Received at 5:55 PM  
From Lloyd House  
on 5/25/88 - Recd  
w/ Major Morris.

May 25, 1988

Mr. Peterson Zah, Executive Director  
Navajo Education and Scholarship Foundation, Inc.  
P.O. Box 2360  
Window Rock, Arizona 86515

Dear Mr. Zah:

You are hereby given notice that your employment and status as Executive Director of the Navajo Education and Scholarship Foundation, Inc., is terminated effective 5:00 P. M. this date.

This action is done pursuant to the Resolution of the Navajo Education and Scholarship Foundation, Inc., Board of Trustees passed this date and attached hereto.

Sincerely,

Vote: Received with no  
attachment(s).

Donald Benally, Chairman  
Board of Trustees  
Navajo Education and Scholarship  
Foundation, Inc.

RECEIVED

MAY 25 1988

Ans'd.....



Exhibit No. 4 (cont.)

*Patrick Platero*  
*Police Officer*

*Rec'd 9:57 am*  
*5/26/88*

EXHIBIT L

IN THE DISTRICT COURT OF THE NAVAJO NATION  
JUDICIAL DISTRICT OF CHINLE, ARIZONA

The Navajo Education and	)	
Scholarship Foundation	)	NO.
Board of Trustee and	)	<i>CR - CV - 109 - 88</i>
Lloyd L. House, Ph. D, in his	)	
Capacity as Executive Director of	)	
NESF Board of Trustees	)	
	)	RESTRAINING ORDER
Plaintiff	)	
	)	
vs.	)	
	)	
Peterson Zah, et. al.	)	
	)	
Defendants	)	

Upon receiving and reviewing the Complaint for Injunction and Certification of Notice of Plaintiffs and good cause shown by Certified Complaint, it is hereby ORDERED and ADJUDGED that the request of Plaintiff for RESTRAINING ORDER IS HEREBY GRANTED.

The Defendants are hereby enjoined and restrained from further interferences and occupancy of the Offices of the Navajo Education and Scholarship Foundation as directed by the Advisory Committee of the Navajo Tribal Council.

The Posting of Security Bond shall not be required of Plaintiff as the matter involves a Tribal entity

The Defendant Peterson Zah and others are hereby ORDERED to immediately vacate the premises and offices of the Navajo

**Exhibit No. 4 (cont.)**

Education and Scholarship Foundation and further ordered that defendant, Peterson Zah and others are hereby directed to deliver all foundation books, accounts, minutes, records, in his and her possession to Dr. Lloyd L. House, Ph. D., Executive Director of Navajo Education and Scholarship Foundation, by authority of Navajo Tribal Council Resolution CF-8-88 and Advisory Committee Resolution ACWY-107-88.

The Defendants may appear to Show Cause before this Court why the injunction should not be made permanent on the 9th day of June, 1988, at 10:00 a.m.

It is further ORDERED that in the interest of preserving peace and safety of all related parties the restraining ORDER shall stay in effect with force of law until further order of the Court and upon final adjudication of the matter and the Navajo Nation Division of Public Safety is hereby directed to enforce this Order immediately without delay.

So Ordered on this 25<sup>th</sup> day of May, 1988 at the hour of 9:06 p.m.

  
\_\_\_\_\_  
JUDGE, District Court of the  
Navajo Nation

**Exhibit No. 4 (cont.)**

RETURN OF SERVICE

I, hereby, certify that the Complaint and Restraining Order was personally served upon Defendant and others on this 25<sup>th</sup> day of May, 1988, at N.E.S.P. 614 W.

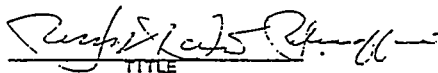
  
\_\_\_\_\_  
TITLE

Exhibit No. 4 (cont.)



EXHIBIT M

THE NAVAJO NATION

PETER MACDONALD  
CHAIRMAN

JERRY R. THOMPSON  
VICE CHAIRMAN

EXECUTIVE ORDER

May 26, 1988

MEMORANDUM

TO : Mr. Bill Kellogg, Executive Director  
Division of Public Safety

FROM : Bobby Charley, Chief Executive Administrator  
Office of the Chairman/Vice-Chairman

SUBJECT: Navajo Education Center

By and through the authority vested in me as Chief Executive Administrator, Office of the Chairman/Vice-Chairman, I find it necessary to administratively close the Navajo Education Center from 7:00 p.m. Thursday, May 26, 1988 to 5:00 p.m. on Friday, June 3, 1988.

This action is necessary because of the continuing disturbances to the public peace that has been occurring and is still occurring at the Navajo Education Center. For the sake of public safety, I am hereby directing that the Navajo Division of Public Safety assume control and secure the area and protect the people and property of the Navajo Nation.

  
Bobby Charley

DISTRIBUTION: All Navajo Divisions/Departments

POST OFFICE BOX 308 - WINDOW ROCK, NAVAJO NATION (ARIZONA) 86515 - (602) 871-4941

Exhibit No. 4 (cont.)

EXHIBIT N

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

1			
2			
3	MICHAEL P. UPSHAW, Attorney General,	)	
4	The Navajo Nation,	)	NO. WR-CV-96-87
5		)	
6		)	ADDITIONAL ORDER
7	Petitioner,	)	
8		)	
9	ex rel.	)	
10		)	
11	DONALD BENALLY, et al.,	)	
12		)	
13		)	
14	Relators,	)	
15		)	
16	vs.	)	
17		)	
18	GUY GORMAN, SR., et al.,	)	
19		)	
20		)	
21	Respondents.	)	
22		)	

Upon consideration of the Motion to Dissolve or Modify the Temporary Restraining Order which was presented to the Court on May 27, 1988, and upon hearing the arguments of counsel including counsel for respondent who presented her arguments over the telephone, and upon considering the presentation made by Colonel Kellogg, Division of Public Safety, Navajo Nation it is,

FURTHER ORDERED that the Amended Order of May 26, 1988, is further amended by adding the following additional provision:

IT IS FURTHER ORDERED that based on concerns for public safety as presented to the Court by Colonel Kellogg, Division of Public Safety, Navajo Nation, the Education Center located in Window Rock shall be placed under the immediate supervision of the Division of Public Safety until further Order of the Court. The supervision shall be exercised under the following guidelines:

Exhibit No. 4 (cont.)

1 (a) Access to the Education Center shall be  
2 granted to employees of the Navajo Nation and of the Navajo  
3 Education Scholarship Foundation who have legitimate business  
4 in the Education Center until 5:00 p.m., May 27, 1988;

5 (b) After 5:00 p.m. on May 27, 1988, and until  
6 the hearing scheduled before this Court at 2:00 p.m. on May 31,  
7 1988, or soon thereafter as the Court may Order, no access to  
8 the Education Center shall be provided to any person except as  
9 may be necessary to protect the Education Center facility or  
10 the public safety;

11 (c) No records may be removed from the Education  
12 Center by any person; and

13 (d) This Order shall be posted on the door of the  
14 Education Center by the Division of Public Safety.

15 Entered by the District Court of Window Rock on this  
16 27th day of May, 1988 at 2:26 p.m.

17  
18  
19   
District Court Judge.

20  
21  
22 I HEREBY CERTIFY THAT THIS IS A  
23 TRUE AND CORRECT COPY OF  
24 THE INSTRUMENT ON FILE IN THE  
25 COURTS OF THE NAVAJO TRIBE.

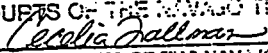
  
26  
27  
28 CLERK, COURTS OF THE NAVAJO TRIBE

Exhibit No. 4 (cont.)

EXHIBIT O

ACMY-108-88

Class "C" Resolution  
No BIA Action Required

RESOLUTION OF THE  
ADVISORY COMMITTEE OF THE  
NAVAJO TRIBAL COUNCIL

Terminating and Rescinding the Existing Lease  
to the Navajo Education and Scholarship Foundation,  
Providing for an Independent Audit of the Books  
and Accounts of the Foundation

WHEREAS:

1. The Navajo Tribal Council, by Resolution CF-8-88, has confirmed and specifically declared the intent and determination of the governing body of the Navajo Nation that the Navajo Education and Scholarship Foundation has been created by the authority vested in the Advisory Committee of the Navajo Tribal Council under the laws and authority of the Navajo Tribal Council and exists only as a governmental entity of the Navajo Nation; and

2. Navajo Tribal Council Resolution CF-8-88 is consistent with and confirms the legislative intent of the Advisory Committee of the Navajo Tribal Council as expressed in Resolutions ACO-171-83, ACF-52-87, ACF-53-87 and ACJA-20-88; and

3. By reason of the foregoing and pursuant to Resolution CJA-1-81, the Advisory Committee of the Navajo Tribal Council has the sole authority and responsibility to take all actions necessary to implement the mandates of Resolution CF-8-88 to ensure the continuation and operation of the Navajo Education and Scholarship Foundation, as a governmental, nonprofit entity of the Navajo Nation; and

4. Advisory Committee Resolution ACD-231-86, Approving a Transfer Agreement from the "lease back" to the Navajo Education and Scholarship Foundation for the building, pursuant to the Plan of Operation of the Advisory Committee of the Navajo Tribal Council Resolution (CJA-1-81) and confirmed by the Navajo Tribal Council Resolution CF-8-88, can only constitute agreements for use permits from the Navajo Nation Government as owner of the premises on Tribal trust land by entities of the Navajo Tribal Government, including: The Navajo Education and Scholarship Foundation under its approved Plan of Operation "to construct a building for the ownership of the Navajo Nation"; and

5. There are no Tribal records evidencing the Bureau of Indian Affairs ever approved the agreement described in Resolution ACD-231-86 which, in any event, is not required for use by Navajo Tribal entities; and

Exhibit No. 4 (cont.)

6. Inasmuch as former directors of the Navajo Education and Scholarship Foundation have asserted their private ownership and control of the Navajo Education and Scholarship Foundation and said parties are in violation of the laws and authority of the governing body of the Navajo Nation and also the terms of the aforesaid agreements between the Navajo Nation and the Navajo Education and Scholarship Foundation, an entity created and wholly owned by the Navajo Nation; and

7. The former Board of Trustees, officers and staff of the Navajo Education and Scholarship Foundation now occupy the building pursuant to the agreement executed on or about January 12, 1987, by reason of their unlawful claim as private owners of the Navajo Education and Scholarship Foundation; and

8. The individual former Board members have clearly violated the terms and conditions of their use agreement in the following instances:

- a) Use the premises for purposes other than carrying on the business of an entity of the Navajo Nation without written consent of the Navajo Nation pursuant to Paragraph 4; and
- b) Conducting and engaging in political action and otherwise attempting to influence legislation contrary to the use agreement and status of the Navajo Education and Scholarship Foundation as an entity of the Navajo Nation; and
- c) Paragraph 14 relating to termination is conditioned upon the continuing ownership and operation of the Navajo Education and Scholarship Foundation as an entity controlled by the government of the Navajo Nation; and

9. On February 7, 1988, the Navajo Education and Scholarship Foundation Board of Trustees passed a resolution (attached as Exhibit "A") requesting that the Advisory Committee of the Navajo Tribal Council terminate the lease executed pursuant to Advisory Committee Resolution ACD-231-86; and

10. The original Articles of Incorporation for the Navajo Education and Scholarship Foundation and all subsequent amendments to the Articles provide that the Navajo Education and Scholarship Foundation shall account for all income received and that such income shall be applied for the purposes for which said funds were contributed; and

11. The Advisory Committee of the Navajo Tribal Council is responsible for ensuring accountability of the Navajo Education and Scholarship Foundation funds; and



Exhibit No. 4 (cont.)

12. The Advisory Committee of the Navajo Tribal Council believes it imperative for the protection and preservation of tribal resources to obtain full and accurate information as to the assets and obligations of the Navajo Education and Scholarship Foundation so that the Foundation may get on with its important public goals and purposes.

NOW THEREFORE BE IT RESOLVED THAT:

1. The lease or use agreement for the Navajo Education and Scholarship Foundation as a wholly owned entity of the Navajo Nation, which was authorized by Advisory Committee Resolution ACD-231-86 and executed by former Vice Chairman Edward T. Begay on or about January 12, 1987 in the name of the Navajo Nation, is hereby terminated and rescinded with regard to the current tenant and occupants of the Navajo Education Center, who are unlawfully claiming private ownership and control of the Navajo Education and Scholarship Foundation and furthermore they are hereby ordered to immediately vacate the premises.

2. The Advisory Committee of the Navajo Tribal Council requests that the Chairman of the Navajo Tribal Council immediately take any and all actions necessary to enforce the termination of the lease and use agreements as to said private individuals and to secure possession of the premises by the Navajo Nation for the use and benefit of the Navajo Education and Scholarship Foundation as a wholly owned public entity of the government of the Navajo Nation.

3. Any member of the Board of Trustees, any officer and any employee of the Navajo Education and Scholarship Foundation who is in possession of or has knowledge of the location of Foundation books of accounts, construction contracts together with all related documents and inspection logs, records, financial statements, reports required by the Articles of Incorporation or bylaws, and any other official records of the Foundation shall immediately provide said records to the Chairman of the Navajo Tribal Council or his designated representatives.

4. The Advisory Committee of the Navajo Tribal Council recommends to the Budget and Finance Committee of the Navajo Tribal Council that it immediately contract for an independent audit of the Navajo Education and Scholarship Foundation, books of accounts and records for 1988 and any prior year for which an independent audit has not been completed and that said audit report and any audits in existence be delivered to the Advisory Committee of the Navajo Tribal Council and the Budget and Finance Committee of the Navajo Tribal Council pursuant to the Articles of Incorporation.

5. The United States Department of the Interior as part of its trust responsibility, is hereby requested to take all proper and necessary action to protect the Navajo Education Center in light of Navajo Tribal Council Resolution CF-8-88.

Exhibit No. 4 (cont.)

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Advisory Committee of the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 16 in favor and 0 opposed, this 31st day of May, 1988.

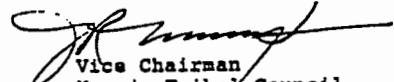
  
Vice Chairman  
Navajo Tribal Council

Exhibit No. 4 (cont.)

EXHIBIT A

NAVAJO EDUCATION AND SCHOLARSHIP FOUNDATION  
BOARD OF TRUSTEES

RESOLUTION-REQUESTING THAT ALL FORMER MEMBERS OF THE BOARD OF TRUSTEES, ALL FORMER AND CURRENT OFFICERS, EMPLOYEES AND STAFF MEMBERS OF THE FOUNDATION TO DISCLOSE AND DELIVER ALL BOOKS OF ACCOUNTS, FINANCIAL RECORDS, BOARD RESOLUTIONS MINUTES, CORRESPONDENCE, AUDIT REPORTS, AND OTHER RECORDS RELATING TO THE BUSINESS ACTIVITIES OF THE FOUNDATION AND THAT ALL SAID INDIVIDUALS IMMEDIATELY VACATE AND REMOVE THEIR PERSONS AND PERSONAL PROPERTY FROM THE PREMISES AND BUILDING CONSTRUCTED FOR AND ON BEHALF OF THE NAVAJO EDUCATION AND SCHOLARSHIP FOUNDATION

WHEREAS, by Resolution ACF-52-87 the Advisory Committee of the Navajo Tribal Council confirmed the creation and continuing existence of the Navajo Education and Scholarship Foundation as an entity of the Navajo Nation, rescinded Advisory Committee Resolution ACN-183-86, and amended the Plan of Operation of the Navajo Education and Scholarship Foundation; and

WHEREAS, the Navajo Tribal Council by Resolution CF-8-88 confirmed the previous actions of the Advisory Committee as set forth in Resolutions ACO-171-83, ACF-52-87, and ACF-53-87, rescinded Advisory Committee Resolution ACN-183-86, and confirmed the continuing status of the Navajo Education and Scholarship Foundation as a governmental non-profit corporate entity of the Navajo Nation; and

WHEREAS, it is desirable and appropriate for this Board of Trustees, which has been duly appointed and confirmed by Advisory Committee Resolution ACF-53-87, to proceed to take control and operation of the Navajo Education and Scholarship Foundation program and activities as mandated by the Navajo Tribal Council and by our own Plan of Operation; and

WHEREAS, the Navajo Tribal Council by Resolution CF-8-88 has directed the Advisory Committee to take all actions necessary to implement the mandates of said Resolutions and to insure the continuing status and operation of the Navajo Education and Scholarship Foundation as a government non-profit corporate entity of the Navajo Nation; and

WHEREAS, this Board agrees with the Navajo Tribal Council mandate to Advisory Committee of the Navajo Tribal Council expressed in Resolution CF-8-88 to continue to be involved in protecting the assets of the Foundation and insure the operation and continuation of the Foundation's educational and charitable goals and purposes; and

Exhibit No. 4 (cont.)

WHEREAS, this Board finds that the action of the Navajo Tribal Council in Resolution CF-8-88 constitutes a final resolution of the disputes and confusion surrounding the Navajo Education and Scholarship Foundation, and that it is both necessary and appropriate for this Board to meet and begin the tasks of obtaining possession of all property and assets of the Foundation to protect and preserve them from any possible waste and to get the scholarship program back into full operation; and

WHEREAS, this Board must immediately take possession and control of all assets of the Foundation, collect, review and evaluate all financial and operational records of the Foundation to date, identify and deal with any and all obligations of the Foundation, prepare for Spring applications and awards of scholarships, and complete independent audits of the financial records and affairs the Foundation for 1986 and 1987 as this Board believes the only independent audit conducted of the records of the Foundation was performed in September, 1985; and

WHEREAS, this Board believes that any former member of the Board of Trustees, any former or current Officer, and any former or current employee of the Foundation should and must show proper respect for and compliance with the expression of the Navajo Tribal Council and cooperate with this Board in any and all ways possible to insure full and proper accountability for all income and all expenditures of the Foundation to date and to insure a smooth transition of full operational and administrative control to this Board to avoid any further diminishment or disruption of service to needy Navajo students; and

WHEREAS, the Board of Trustees, Officers, and staff of the Navajo Education and Scholarship Foundation as established in Resolution ACN-183-86 continue to occupy the building pursuant to the Lease which was executed on or about January 12, 1987. Said Lease is clearly in violation of law and sound public policy and should be terminated and rescinded immediately.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Board requests that all former members of the Board of Trustees, all former or current officers of the Foundation, and all former or current employees of the Foundation who have possession of or knowledge of the location of books of accounts, financial records, Board Resolutions and minutes, correspondence, audit reports, or any other records relating to the business activities of the Foundation, immediately deliver said records to or immediately set forth in writing the location of and custodian of any such records to the Chairman, Navajo Tribal Council.

Exhibit No. 4 (cont.)

2. The Board requests that all former members of the Board of Trustees, and all former or current officers, and all former or current employees of the Foundation, or any other persons who share the goals and purposes of the Foundation put aside all disputes and work together to resolve any continuing confusion relating to the Foundation consistent with and pursuant to the mandate and intent of the Navajo Tribal Council as expressed in Resolution CF-3-88 and move forward together to accomplish the educational and charitable purposes of the Navajo Tribe of Indians as expressed in the Plan of Operation for the Navajo Education and Scholarship Foundation.

3. This Board requests that the Advisory Committee of the Navajo Tribal Council and the Navajo Tribal administration through the Office of the Chairman, Navajo Tribal Council assist this Board in obtaining all financial and other business records of the Foundation, assist this Board in contracting for and paying for necessary independent financial audits and other fiscal reports and activities to enable the Foundation to go forward with its goals and purposes, and to assist this Board in obtaining possession of and protect against waste of any and all Tribal assets and property belonging to our relating to the Foundation, and that the Navajo Tribe take any and all action necessary to obtain immediate possession of the Foundation building including, but not limited to, termination of the Lease executed pursuant to Advisory Committee Resolution ACD-231-86.

CERTIFICATION

I hereby certify that the foregoing Resolution was duly considered by the Board of Trustees of the Navajo Education and Scholarship Foundation at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 7 in favor and 0 opposed, this 19th day of February, 1988.

  
Chairman  
Board of Trustees

Exhibit No. 4 (cont.)

EXHIBIT P

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

MICHAEL P. UPSHAW, Attorney General, )  
The Navajo Nation )  
Petitioner, )  
ex rel. )  
DONALD BENALLY, et al., )  
Relators, )  
vs. )  
GUY GORMAN, SR., et al., )  
Respondents. )

NO. WR-CV-96-87

O R D E R

This matter coming before the Court after notice of hearing on the Motion for Preliminary Injunction; all parties being present in Court and represented by counsel, and after hearing testimony and argument of counsel, the court finds:

- a. That the Court has authority to issue orders in aide of its jurisdiction under 7 N.T.C. section 255 which provides:

"The trial court shall have the power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction."

Pursuant to that section, this Court has inherent authority to preserve the status quo to keep everything the same. That the court has the inherent power to prevent people from resorting to self-help remedies and causing confusion. The equitable powers of the courts are extensive and extend to permitting the court to protect its own jurisdiction.

Exhibit No. 4 (cont.)

- b. Based upon the evidence presented today and the testimony presented by Colonel Kellogg at a hearing on petitioner's Motion to Dissolve and, given the state of affairs surrounding NESF the court finds that it is in the best interest of NESF and the Navajo Nation for the Court to operate the foundation with an interim board of trustees. The interim board of trustees shall control, direct, and manage the daily affairs of the foundation.

The Court hereby Orders as follows:

1. The Temporary Restraining Orders as Amended and as supplemented with the Additional ORDER of May 27, 1988 is hereby vacated.
2. The Motion for Preliminary Injunction is taken under advisement.
3. The Petitioner's Motion to Reinstate the Interim Board is granted in the following respects:
  - a. The interim board consisting of six (6) individuals shall be reappointed and continue to operate, control, direct, and manage the affairs of the Foundation.
  - b. The Board shall consist of three members of Realtors and three members of the Respondents as follows: Alice Rouwalk; Vivian Arviso; David J. Tsosie; Kee Ike Yazzie; Rebecca Mortgan; and Richard Kountz.

Exhibit No. 4 (cont.)

- c. Rebecca Martgan and Vivian Arviso are appointed interim co-executive directors who shall be responsible for carrying out the decisions and policies of the Board. All checks and other action of the interim Board shall require the signature of both executive directors to bind NESF. The keys to the foundation shall be given to and shall remain in the possession of the co-executive directors.
- d. The interim Board shall meet at least twice weekly at times and places to be decided by the Board. Failure of a Board member to attend a meeting may be grounds for contempt. Any Board member not able to serve as a Board member shall request the Court in writing to appoint a replacement Board member. The interim board may make decisions by simple majority vote. In the event of a tie vote, the parties shall present the issue to the court for resolution.
- e. All parties, their officers, agents, servants, employees, counsels and all persons who receive actual notice of this order are hereby enjoined from evicting the current employees of the Foundation from the Foundation offices.



Exhibit No. 4 (cont.)

- f. No books, accounts, minutes and records of NESF may be removed from the Education Center except upon the direction of the Interim Board or further Order of the Court. The interim board shall have access to all books, accounts, minutes and records.

So ORDERED this 31 day of May, 1988.

Robert G. Goyne  
District Judge of the Navajo Nation

Exhibit No. 4 (cont.)

EXHIBIT Q

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

MICHAEL P. UPSHAW, Attorney General,  
The Navajo Nation,

NO. WR-CV-96-67

Petitioner,

ex rel.

DONALD BENALLY, et.al.,

Relators,

vs.

GUY GORMAN, SR., et al.,

Respondents.

RECEIVED  
JUN 6 1988  
OPINION AND  
ORDER  
~~RECEIVED & RELAYED~~

This matter was initiated by Petitioner and Relators (hereafter Petitioner) on March 13, 1987, as a Quo Warranto proceeding. Quo Warranto is an action to test the authority under which one holds public office. It may also be used to challenge corporate existence. The petition asked the court to declare that Relators and not Respondents were the proper Board of Trustees of the Navajo Education and Scholarship Foundation, Inc. (hereafter NESF).

On March 25, 1987, by stipulation of the parties the court issued an order appointing an interim Board of Trustees and interim co-executive directors of NESF.

On April 6, 1987, Respondents filed a Motion for Summary Judgment. On April 8, 1987, Respondents filed a reply brief. This filing of cross motions was by agreement of counsel. Counsel informed the Court of this agreement and requested that upon the cross motion for Summary Judgment the Court would hold oral arguments upon the motions. Oral arguments were had on April 23.

## Exhibit No. 4 (cont.)

1987. On September 18, 1987, the court issued its decision. On October 19, 1987, Petitioner filed a Notice of Appeal. On the same day, Petitioner filed a Motion for Reconsideration and a Motion for Additional Findings of Facts and Conclusions of Law in the trial court.

On October 29, 1987, the District Court issued an Order stating that an extension of appeal time is a matter for the Supreme Court.

On November 23, 1987, the Supreme Court issued an Order that the Motion for Additional Findings of Facts and the Motion to Alter or Amend the Judgment had been timely filed in the District Court and dismissed the appeal for lack of jurisdiction. The Supreme Court also ordered that the new appeal time would not begin to run until the district court judge disposed of all motions mentioned in the Supreme Court's order.

On April 22, 1988, oral arguments were had on Respondent's Motion for Attorney's Fees, Petitioner's Motion for Reconsideration, Petitioner's Motion for Additional Findings of Facts and Conclusions of Law, Petitioner's Motion for a Stay of Execution and for Extension of the Interim Board.

### I. Motion for Reconsideration

Petitioner's Motion for Reconsideration of the Opinion and Order entered September 18, 1987 was denied on October 26, 1987. Under the former Navajo Rules of Appellate Procedure, Rule 5 (d), Scope of Appeal, no appeal is allowed unless the party seeking an appeal files a Motion for Reconsideration with the District Court. The newly revised and appellant procedures, however, do not contain a provision for Motion for Reconsideration. Since the old

## Exhibit No. 4 (cont.)

Appellate rule requiring Motion for Reconsideration as a condition of appeal was abolished, there is no requirement now for entering a Motion for Reconsideration before an appeal is filed. In addition, the Navajo Rules of Civil Procedure do not provide for Motion for Reconsideration. The denial of the Motion for Reconsideration filed by the petitioner, ex rel. is hereby affirmed.

### II. Petitioners' Motion for Additional Findings of Facts and Conclusions of Law.

Rule 23 of the Navajo Rules of Civil Procedures states:

The Court shall have the power to order any relief required after the determination of the facts, and law, whether such relief be equitable or legal in nature.

At anytime after the final order or judgment, the Court may in the interest of justice reopen a case in order to correct errors or to consider newly-discovered evidence, or for any other reason consistent with justice.

This is the only civil rule relating to post-trial motions.

Rule 8 (b) of the Navajo Rules of Civil Appellate Procedure provides that the appeal time may be extended when certain motions are timely filed. One of those is a motion to amend or make additional findings of facts whether or not granting the motion could alter judgment.

Rule 28 of the Navajo Rules of Civil Procedure is the rule on summary judgments. That rule states in part:

The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

## Exhibit No. 4 (cont.)

Petitioners's Motions for Additional Findings of Facts and Conclusions of Law and the Memorandum in Support attempts to present new evidence through memorandum arguments and attached exhibits.

The Court in considering its decision on the Cross Motion for Summary Judgment considered the pleadings, briefs, and exhibits submitted by the parties as required by Rule 28 of the Navajo Rules of Civil Procedure.

Petitioner has not demonstrated to the Court that the additional findings are within the materials originally submitted to the Court or that the arguments and exhibits submitted with the Motion for a Findings of Facts and Conclusions of Law were not available to Petitioner at the time the Motion for Summary Judgment was filed.

A Motion for Additional Findings of Facts and Conclusions of Law is not a proper method of submitting additional evidence to the court if that evidence was available at the time the court was originally requested to make a decision whether by trial on the merits or by summary judgment.

Petitioner's Motion for Additional Findings of Fact and Conclusions of Law is denied.

### III. ATTORNEY'S FEES

The Respondents are seeking attorney's fees from the petitioner, ex rel. Whether a party in a lawsuit is entitled to attorney's fees depends upon whether there is a legal basis for such claim. The former Court of Appeals (now the Navajo Supreme Court) ruled that each party in litigation must bear the costs of their own attorney's fees. The Navajo Courts must exercise

Exhibit No. 4 (cont.)

Restraint in allowing recovery of such fees. Arthur v. Hall, 3 Nav. R 35(1966). However, such fees are permitted in these circumstances:

1. Where statute provides for attorney's fees or other exceptions made by Tribal Council or the Navajo Supreme Court. John v. Herrick, A-CV-23-85.

2. In contempt proceedings where the action of a party may be properly viewed as vindicating the authority and dignity of the court. Hali, id.

3. Where a contract provides for payment of attorney's fees. Hali, id.

4. In an action for dissolution of marriage, the court may order one party to pay a reasonable amount toward the attorney's fees of the other party. Morgan v. Morgan, A-CV-13-83.

5. Where a party fails to comply with the discovery rules and orders compelling discovery, which results in unnecessary costs to opposing party. Chavez v. Tome, A-CV-24-85.

Where evidence shows a special set of circumstances established by Navajo law, only then can an award of attorney's fees be appropriate. Here, the Respondents have not shown any evidence to justify that Petitioner must bear the Respondents' attorney's fees. Absent any justification, therefore, the claim for attorney's fees is hereby denied.

IV. Motion for Stay of Execution and Continuance of Order Appointing Interim Trustees.

The Petitioner's Motion for Reinstatement of the Interim Board was granted on May 31, 1966.

The Motion for Stay of Execution was mooted by the Supreme

## Exhibit No. 4 (cont.)

Court's Order of November 23, 1967, A-CV-31-87.

The above is the ruling of the Court upon all Motions. The Court believes this disposes of the matter.

The Court now wishes to briefly address some remarks to counsel for the purpose of advising that certain matters were considered.

1. Navajo Skill Center v. Benally (A-CV-08-84): Both sides argued that the decision in this case supported their position. The Court disagrees with both interpretations of Skill Center held that a government may establish a corporation to carry out a governmental purpose and in that situation the principles of administrative law apply. The Skill Center had started existence under a Plan of Operation and a few years later had been incorporated under the law of New Mexico. The issue of whether changes in the structure and in the articles of incorporation of the Skill Center had to be according to New Mexico corporate law was not before the Court.

2. The Court did not address the issue of Tribal Council Resolution CF-8-88. Petitioner did send the court a letter advising the Court of the resolution. The issue was not submitted to the Court by formal pleading nor was it addressed at oral argument. The Court, therefore, made no decision on the propriety of considering it or upon its interpretation. The Court has seen a copy of the resolutions and is under the impression that the resolution supports the Court's finding that NESF's corporate existence began on October 12, 1983, and that it has continued as a nonprofit corporation since that time. In resolved clause number 1 Advisory Committee Resolution ACO-171-83 which approved the

#### Exhibit No. 4 (cont.)

Articles of Incorporation for NESF was confirmed. Resolved clause number 2 confirms the "initial, continuous, and present status" of NESF as a nonprofit corporation.

3. Both parties have used the terms "public" and "private" when speaking of NESF and have talked about "owner". The Court believes there are many ambiguous terms which are used in connection with corporations and that it should be careful of using those terms without adequate consideration. The word "public" is sometimes used in relation to a for profit corporation in which ownership of stock is available to the general public. At the time a corporation decides to sell stock to the general public this is referred to as "going public". A closely held for profit corporation is also sometimes referred to as a "private" corporation.

The Court has continuously used only nonprofit corporation when referring to NESF. Whether a corporation is incorporated by a government or by private individuals, the act of incorporation invokes the laws of the jurisdiction in regard to corporations and must be followed.

Further, the Court is not persuaded that a nonprofit corporation has "owners". The Court is particularly not convinced that NESF has "owners". This is consistent with the Court's statement in the September 18, 1967, opinion that "The situation is somewhat analogous to a trust with NESF being the trustee and Navajo students being the beneficiaries." In fact the Board is designated as a Board of Trustees rather than a Board of Directors.

The act of chartering a corporation establishes an entity that, under the law, has some of the same rights and duties as



Exhibit No. 4 (cont.)

individuals. NESF as a corporate entity exists independent of any particular individuals on the Board and independent of any particular individual as Executive Director.

4. Finally, both parties have referred to December 13, 1986, the date the certificate of incorporation was issued, as the date NESF became subject to the Navajo Nation Corporation Code.

Sec. 325 of the Navajo Nonprofit Corporation Act states:

Upon the filing of the articles of incorporation, the corporate existence begins, and the filing is conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with, and that the nonprofit corporation has been incorporated under this chapter, except as against the Navajo Nation in a proceedings for involuntary dissolution of the corporation or revocation of the articles of incorporation.

Under the law of the Navajo Nation, NESF became subject to the Navajo Nation Corporation Code on November 13, 1986, the date the articles were filed.

So Ordered this 2 day of June, 1988.

  
District Court Judge

Exhibit No. 4 (cont.)

EXHIBIT R



THE NAVAJO NATION

PETER MacDONALD, CHAIRMAN  
THE NAVAJO TRIBAL COUNCIL  
JOHNNY R. THOMPSON, VICE CHAIRMAN  
THE NAVAJO TRIBAL COUNCIL

RECEIVED  
JUN 17 1988

June 15, 1988

PROCKS & PELCYOR

Ms. Sandra Hansen  
1881 9th Street, Suite 216  
Boulder, Colorado 80302

RE: Navajo Education Scholarship Foundation

Dear Sandra:

The Petitioner, in consultation with Realtors, is considering whether to file an appeal of Judge Yazzie's decision of June 02, 1988. In the meantime, several questions have arisen concerning the current state of affairs.

It is the position of Petitioner that the May 31, 1988 Order was in the nature of a preliminary order. As a general rule such an order becomes merged with the final judgment. Often a preliminary order would be incorporated in a permanent injunction. No permanent injunction was issued in this case.

The May 31, 1988 Order dealt with two issues - the interim board and occupancy. Neither the final Opinion and Order nor the September 87 Opinion and Order addresses either of these issues. The May 31, 1988 Opinion and Order simply states that Petitioner's Motion to Reinstate the Interim Board was granted on May 31, 1988. It does not state for how long it will be effective. Judge Yazzie could not have intended in his final order to both ratify the Gorman Board and to continue the interim board. Therefore, it is Petitioner's position that the interim board ceased to exist on June 02, 1988.

If Petitioner decides to file an appeal of the final Opinion and Order, a stay and other interim relief - including reimposition of the interim board - could be requested or stipulated to by the parties.

Petitioner's position is consistent with the position I took with Judge Yazzie in chambers. As I recall, I told the Judge that if either party was unsatisfied with the final decision, they could seek interim relief in connection with an appeal.

Exhibit No. 4 (cont.)

Ms. Sandra Hansen  
June 15, 1988  
Page 2

Petitioner's position is that the May 31, 1988 Order regarding occupancy is no longer in force. The June 02, 1988 Opinion and Order makes no reference to occupancy rights. Had the Judge intended to rule on occupancy rights, he would have said so. The Advisory Committee's termination of any occupancy rights of NESF constitutes the valid action of the Navajo Nation. NESF employees will not be permitted access to the offices in the Education Center.

The Navajo Nation is deeply concerned with the financial affairs of NESF. Whatever the legal status of NESF, the Nation has a legitimate right to be assured that funds donated to NESF were not misappropriated. The most recent NESF draft audit raises real concern that the financial affairs of NESF may not be in order. On June 08, 1988, the Budget and Finance Committee appropriated funds for an audit of NESF and directed the Chairman of the Budget and Finance Committee to arrange for the audit.

The Navajo Nation does not believe that any assets or property of the Nation were lawfully conveyed to NESF. The assets of NESF, including liquid assets, office equipment and furnishings, remain the property of the Navajo Nation to the extent they are traceable to donations made to the Navajo Nation or grants from the Navajo Nation.

I assume that NESF employees may have left personal items in the offices in the Education Center. Upon request, arrangements will be made to allow employees to remove their personal items.

Very truly yours,



Eric Dahlstrom  
Deputy Attorney General

ED/dw

**Exhibit No. 5**

July 19, 1988

Assistant Attorney General  
U.S. Civil Rights (Justice Dept)  
Washington, D.C. 20530

Dear Sir:

Navajo Attorney General Michael Upshaw said Peter MacDonald Sr. told him to take Civil Rights panel probing case to Federal Court to question whether the Commission has the right to investigate Tribal governments.

Quote, "any Civil Rights group" whether it's the U.S. Civil Rights Commission has no damn authority to investigate the Navajo Tribal government said Peter MacDonald Sr.

Chairman Peter MacDonald Sr., commanded the Advisory Committee and Budget and Finance Committee to oppose the "heavy-handed" tactics of the Commission because the tribe feels it does not have the jurisdiction to investigate the tribal government. The Chairman of the Tribal Council Peter MacDonald Sr. said the Commission's actions are contradictory to recent statements by President Reagan that he would treat the tribes as "equal partners".

Peter MacDonald said the Navajo Tribal Advisory Committee and Budget and Finance Committee are upset that the Commission continuously fails to realize that the tribe has a Bill of Rights which affords tribal members due process and equal protection.

"We are more than willing to take any suggestions regarding improvement of our judicial system but AC and B&F make the laws for the Navajo People", "not the Federal government" said MacDonald.

Sincerely,  
Dineh Rights Association, Inc.



Edward J. Little  
P.O. Box 855  
Tuba City, Arizona 86045

Exhibit No. 5 (cont.)

PETITION

We, the undersigned, as a concerned person, hereby petition against the interference of the Navajo Tribe Council in the operations of the Navajo Education and Scholarship Foundation. We petition for the Navajo Education and Scholarship Foundation to remain a private foundation and not a Tribal entity. Furthermore, we petition that the Indian Civil Rights Act be acknowledged and adhered to. All violations of the Indian Civil Rights Act must cease. We petition that the Indian Civil Rights Act no longer be violated by disobeying Tribal court orders.

<u>Signature</u>	<u>Address</u>	<u>Census #</u>
<u>Melvin Chee</u>	<u>PO Box 445, Kayenta, AZ</u>	<u>322258</u>
<u>Melvin Chee</u>	<u>PO Box #445, Kayenta, AZ</u>	<u>49346</u>
<u>Charles Gily</u>	<u>Box # 413 Kayenta, Az</u>	<u>82,278</u>
<u>MK Mielimay</u>	<u>Box 2106 Tuba City, Az</u>	<u>19747</u>
<u>Armin H. Boyay</u>	<u>Box 103 Kayenta, Az</u>	<u>2759</u>
<u>Jonathan D. Boy</u>	<u>Box 1255 Kayenta, Az</u>	<u>94813</u>
<u>Armen L. Boyay</u>	<u>Box 1661 Kayenta, Az</u>	<u>104210</u>
<u>Armina Boych</u>	<u>Box 892 Kayenta, Az</u>	<u>104214</u>
<u>Armen Boyay</u>	<u>Box 972 Kayenta, Az</u>	<u>109,096</u>
<u>Johnny M. I</u>	<u>Box 671 Kayenta, Az</u>	<u>81118</u>
<u>Harold Stucky</u>	<u>PO Box 312 Kayenta, AZ</u>	<u>101-457</u>
<u>Karl Smallcanyon</u>	<u>P.O. Box #565</u>	
	<u>Shonto AZ 86054</u>	<u>34498</u>
	<u>PO Box 708</u>	
	<u>Kayenta, AZ 86033</u>	<u>51368</u>
<u>Leatha Shuly</u>	<u>PO Box 959 Kayenta, AZ</u>	<u>113,519</u>
<u>Sacey Chee</u>		
<u>W.A. 1100</u>		

Exhibit No. 5 (cont.)

PETITION

We, the undersigned, as a concerned person, hereby petition against the interference of the Navajo Tribe Council in the operations of the Navajo Education and Scholarship Foundation. We petition for the Navajo Education and Scholarship Foundation to remain a private foundation and not a Tribal entity. Furthermore, we petition that the Indian Civil Rights Act be acknowledged and adhered to. All violations of the Indian Civil Rights Act must cease. We petition that the Indian Civil Rights Act no longer be violated by disobeying Tribal court orders.

<u>Signature</u>	<u>Address</u>	<u>Census #</u>
<u>Lawrence Simonson</u>	<u>Box 31 Oraibi, Az</u>	<u>5029</u>
<u>James Whitak</u>	<u>Box 238 Tropic, Az</u>	<u>28938</u>
<u>Stony Jackson</u>	<u>Box 85 Chinle, AZ</u>	<u>48797</u>
<u>Anna Jackson</u>	<u>P.O. Box # 85 Chinle</u>	<u>65244</u>
<u>Albert Ross</u>	<u>P.O. Box 85 Chinle</u>	<u>661, 375</u>
<u>Lynn Ross</u>	<u>P.O. Box 85 Chinle</u>	<u>662, 275</u>
<u>Leonard T. Kim</u>	<u>P.O. Box # 85 Chinle</u>	<u>67, 543</u>
<u>Emile <sup>Agnes</sup> <del>Vandier</del></u>	<u>Tsaloni T. p. Chinle</u>	<u>403.60</u>
<u>Nelson Babe</u>	<u>Box # 2063 Chinle AZ</u>	<u>32867</u>
<u>Rose M. Charly</u>	<u>Box: 182 Chinle</u>	<u>9647</u>
<u>Jabe Woody</u>	<u>Box 796 Chinle</u>	<u>96907</u>
<u>Jo Ann Yanzji</u>	<u>Box 56, Az, Az.</u>	<u>302, 861</u>
<u>Kentoni gourd</u>	<u>Box # 1713 SHIPROCK, N.M.</u>	<u>121-141</u>
<u>Jimmie Thompson</u>	<u>Box 1334 Crownpoint N.M.</u>	
<u>Helen Thompson</u>		

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<u>Signature</u>	<u>Address</u>	<u>Census #</u>
David Blackwater	Mexican Water Az	
Marie Blackwater	Mexican Water Az	
Martha S. Wauneka	Kayenta Az	
J. Smith		35
W. Smith	Ariz	16775
W. Smith		15, 29
Louis Norbert	Bloomfield	53850
Hubert Norbert	Bloomfield, N.M.	49292
Roy Smith	Empire, Az	123002
Don Bally	Forest Lake	4785
Lucile Bally	Forest Lake	5047
Marilyn Bally	Forest Lake	
Elisa Bally	Wide Ruins,	98860
Marjorie	Tree View, Az	107, 254

Exhibit No. 5 (cont.)

TITLE ONE

*General Provisions*

CHAPTER	SECTION
1. Bill of Rights . . . . .	1
3. Great Seal and Flag . . . . .	101
5. Navajo Nation . . . . .	301
7. Membership in Tribe . . . . .	501
9. Hopi Indians . . . . .	701

**General Cross References**

- Constitutional rights of Indians, see Appendix Part 2, 1968, § 1301 et seq.
- Federal laws of a permanent and general nature relating to Navajo Indians, see United States Code, Title 25, Indians.
- Federal regulations relating to Navajo Indians, see Code of Federal Regulations, Title 25, Indians.
- Text treatment of Federal statute and case law, see Federal Indian Law (1958).

*Chapter 1. Bill of Rights*

**SECTION**

1. Freedom of religion, speech, press, and right of assembly and petition
2. Right to keep and bear arms
3. Governmental use of houses
4. Searches and seizures
5. Double jeopardy; self-incrimination; deprivation of property
6. Rights of accused
7. Cruel and unusual punishments; excessive bail and fines
8. Other rights not impaired

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- Equal rights under the law, 42 U.S.C. § 1981.
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T.1 § 1

GENERAL PROVISIONS

Ch. 1

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Indian tribes have a status higher than that of states and are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. *Native American Church v. Navajo Tribal Council* (1959) 272 F.2d 131.

See, also, annotations under *Tribes and Nations* and *Courts* in *digest*.

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The Navajo Tribal Council shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Navajo Tribal Government for a redress of grievances.

HISTORY

Source. Tribal Council Res. CO-63-67, § 1, passed Oct. 9, 1967.

Preamble. CO-63-67 contained the following preamble:

"Whereas: A declaration of the basic Navajo human rights is deemed to be necessary to the preservation of, and in keeping with, the dignity of the Navajo people."

Cross References

Constitutional rights of Indians, see Appendix Part 2, 1968, § 1302.

§ 2. Right to keep and bear arms

The right of the people to keep and bear arms for peaceful purposes, shall not be infringed.

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Source. Tribal Council Res. CO-63-67, § 2, passed Oct. 9, 1967.

§ 3. Governmental use of houses

No Governmental use shall be made of any house, without the consent of the owner, except in a manner to be prescribed by resolution.

HISTORY

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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§ 5. Double jeopardy; self-incrimination; deprivation of property

No person shall be subject for the same offense to be twice put in jeopardy of liberty, or property; nor shall he be compelled in any criminal case to be a witness against himself; nor shall private property be taken for public use, without just compensation.

HISTORY

Source. Tribal Council Res. CO-63-67, § 5, passed Oct. 9, 1967.

Cross References

—United States Code. Double jeopardy, 42 U.S.C. § 2000h-1.

ANNOTATIONS

1. Eminent domain. The Navajo Tribe has the power to take or authorize the taking of property without the consent of the owners of the property or of any interest therein, provided that the owners are given due process of law and just compensation. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals (Decided Dec. 23, 1974).

Under the customary division of governmental power into three separate branches, a division which exists in the Navajo Nation, the right to exercise the power of eminent domain may be authorized only by the legislature and there

Exhibit No. 5 (cont.)

T.1 § 5

GENERAL PROVISIONS

Ch. 1

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Where Chairman of the Navajo Tribe, on behalf of the tribe, granted gas and electric company a right-of-way across land of plaintiffs, who had a grazing permit and had a home and other improvements on the land, to build and maintain a power line, and just compensation was not given plaintiffs, the taking of the land was illegal and not in accord with 16 N.T.C. §§ 551 et seq., and defense of sovereign immunity from suit was not available to the tribe in plaintiffs suit for damages, an injunction against further trespass and cancellation of their allegedly fraudulently obtained consent to the taking. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals (Decided Dec. 23, 1974).

§ 6. Rights of accused

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor.

HISTORY

Source. Tribal Council Res. CO-63-67, § 6, passed Oct. 9, 1967.

Cross References

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§ 7. Cruel and unusual punishments; excessive bail and fines

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

HISTORY

Source. Tribal Council Res. CO-63-67, § 7, passed Oct. 9, 1967.

§ 8. Other rights not impaired

The enumeration herein of certain rights, shall not be construed to deny or disparage others retained by the people.

HISTORY

Source. Tribal Council Res. CO-63-67, § 8, passed Oct. 9, 1967.

ANNOTATIONS

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TITLE ONE

*General Provisions*

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1. Bill of Rights . . . . .	1
3. Great Seal and Flag . . . . .	101
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*Chapter 1. Bill of Rights*

**SECTION**

1. Freedom of religion, speech, press, and right of assembly and petition
2. Right to keep and bear arms
3. Governmental use of houses
4. Searches and seizures
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T.1 § 1

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Exhibit No. 5 (cont.)

Ch. 1

BILL OF RIGHTS

T.1 § 5

§ 4. Searches and seizures

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*Chapter 1. Bill of Rights*

**SECTION**

1. Freedom of religion, speech, press, and right of assembly and petition
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T.1 § 5

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### § 6. Rights of accused

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor.

#### HISTORY

Source. Tribal Council Res. CO-63-67, § 6, passed Oct. 9, 1967.

#### Cross References

—United States Code. Right to speedy trial, 42 U.S.C. § 1992.

### § 7. Cruel and unusual punishments; excessive bail and fines

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### HISTORY

Source. Tribal Council Res. CO-63-67, § 7, passed Oct. 9, 1967.

### § 8. Other rights not impaired

The enumeration herein of certain rights, shall not be construed to deny or disparage others retained by the people.

#### HISTORY

Source. Tribal Council Res. CO-63-67, § 8, passed Oct. 9, 1967.

#### ANNOTATIONS

1. Due process. Where judge who issued order that District Prosecutor spend 30 days training newly appointed District Prosecutor, and who at the same time vacated order holding District Prosecutor in contempt of court for failing to appoint a District Prosecutor for over six months, made extra-judicial statements to the effect that he did not believe District Prosecutor's "witchcraft" claims and thought it was wrong for District Prosecutor to avoid bench warrant commanding his arrest for failure to comply with first order, there was no denial of due process. *Navajo In re Appointment of Tuba City District Prosecutor*, Navajo Nation Court of Appeals (July 27, 1977).

Exhibit No. 5 (cont.)

TITLE ONE

*General Provisions*

CHAPTER	SECTION
1. Bill of Rights . . . . .	1
3. Great Seal and Flag . . . . .	101
5. Navajo Nation . . . . .	301
7. Membership in Tribe . . . . .	501
9. Hopi Indians . . . . .	701

**General Cross References**

- Constitutional rights of Indians, see Appendix Part 2, 1968, § 1301 et seq.
- Federal laws of a permanent and general nature relating to Navajo Indians, see United States Code, Title 25, Indians.
- Federal regulations relating to Navajo Indians, see Code of Federal Regulations, Title 25, Indians.
- Text treatment of Federal statute and case law, see Federal Indian Law (1958).

*Chapter 1. Bill of Rights*

**SECTION**

1. Freedom of religion, speech, press, and right of assembly and petition
2. Right to keep and bear arms
3. Governmental use of houses
4. Searches and seizures
5. Double jeopardy; self-incrimination; deprivation of property
6. Rights of accused
7. Cruel and unusual punishments; excessive bail and fines
8. Other rights not impaired

**Cross References**

- United States Code. Civil action for deprivation of rights, 42 U.S.C. §§ 1983, 1984.
- Equal rights under the law, 42 U.S.C. § 1981.
- Federal civil rights law regarding public accommodations, facilities, education and programs, employment and voting, 42 U.S.C. §§ 2000a et seq.
- Offenses, prosecutions and proceedings in vindication of rights, 42 U.S.C. §§ 1985-1991.
- Organization of Indian tribes, constitution and bylaws, 25 U.S.C. § 476.

Exhibit No. 5 (cont.)

T.1 § 1

GENERAL PROVISIONS

Ch. 1

Code of Federal Regulations. Adoption of ordinances by tribal council, 25 C.F.R. 11.1(e).

—Federal Indian Law (1958). Derivation of tribal powers, p. 398.

ANNOTATIONS

1. Authority of Indian governments. While Congress retains paramount authority to legislate for and enforce its laws on all the tribes in certain respects, it has recognized the authority of Indian governments over their reservation and if this power is to be taken away from them it is for Congress to do it. *Oliver v. Udall* (1962) 306 F.2d 819.

Indian tribes have a status higher than that of states and are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. *Native American Church v. Navajo Tribal Council* (1959) 272 F.2d 131.

See, also, annotations under *Tribes and Nations* and *Courts in digest*.

§ 1. Freedom of religion, speech, press, and right of assembly and petition

The Navajo Tribal Council shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Navajo Tribal Government for a redress of grievances.

HISTORY

Source. Tribal Council Res. CO-63-67, § 1, passed Oct. 9, 1967.

Preamble. CO-63-67 contained the following preamble:

“Whereas: A declaration of the basic Navajo human rights is deemed to be necessary to the preservation of, and in keeping with, the dignity of the Navajo people.”

Cross References

Constitutional rights of Indians, see Appendix Part 2, 1968, § 1302.

§ 2. Right to keep and bear arms

The right of the people to keep and bear arms for peaceful purposes, shall not be infringed.

HISTORY

Source. Tribal Council Res. CO-63-67, § 2, passed Oct. 9, 1967.

§ 3. Governmental use of houses

No Governmental use shall be made of any house, without the consent of the owner, except in a manner to be prescribed by resolution.

HISTORY

Source. Tribal Council Res. CO-63-67, § 3, passed Oct. 9, 1967.

§ 4. Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

HISTORY

Source. Tribal Council Res. CO-63-67, § 4, passed Oct. 9, 1967.

ANNOTATIONS

"Plain view" rule, 2

Search warrant, 3

Searches without warrant. 1

1. Search warrant. In any situation in which the police have information in advance of a planned operation sufficient to establish probable cause to obtain a search warrant, the warrant must be obtained if a search is to be made. *Navajo Nation v. Swinonish*, Navajo Nation Court of Appeals (March 14, 1977).

2. "Plain view" rule. The "plain view" search and seizure doctrine only permits seizure of things actually in view, the theory being that search is not necessary when a thing is in plain view; and when in a building, drawers, doors and cabinets may not be opened and areas not in plain view of the thing seized may not be searched. *Navajo Nation v. Swinonish*, Navajo Nation Court of Appeals (March 14, 1977).

3. Searches without warrant. Court would reverse conviction of selling liquor in violation of 17 N.T.C. § 561 if it was found that police, who searched house without a warrant, could have obtained a warrant, or that liquor alleged in plain view from door was not in fact in plain view, or that evidence illegally seized was material to the conviction. *Navajo Nation v. Swinonish*, Navajo Nation Court of Appeals (March 14, 1977).

§ 5. Double jeopardy; self-incrimination; deprivation of property

No person shall be subject for the same offense to be twice put in jeopardy of liberty, or property; nor shall he be compelled in any criminal case to be a witness against himself; nor shall private property be taken for public use, without just compensation.

HISTORY

Source. Tribal Council Res. CO-63-67, § 5, passed Oct. 9, 1967.

Cross References

—United States Code. Double jeopardy, 42 U.S.C. § 2000h-1.

ANNOTATIONS

1. Eminent domain. The Navajo Tribe has the power to take or authorize the taking of property without the consent of the owners of the property or of any interest therein, provided that the owners are given due process of law and just compensation. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals (Decided Dec. 23, 1974).

Under the customary division of governmental power into three separate branches, a division which exists in the Navajo Nation, the right to exercise the power of eminent domain may be authorized only by the legislature and there

Exhibit No. 5 (cont.)

T.1 § 5

GENERAL PROVISIONS

Ch. 1

can be no taking of private property for public use against the will of the owner without direct authority from the legislature and then the taking must be only in the manner prescribed by the legislature. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals (Decided Dec. 23, 1974).

Where Chairman of the Navajo Tribe, on behalf of the tribe, granted gas and electric company a right-of-way across land of plaintiffs, who had a grazing permit and had a home and other improvements on the land, to build and maintain a power line, and just compensation was not given plaintiffs, the taking of the land was illegal and not in accord with 16 N.T.C. §§ 551 et seq., and defense of sovereign immunity from suit was not available to the tribe in plaintiffs suit for damages, an injunction against further trespass and cancellation of their allegedly fraudulently obtained consent to the taking. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals (Decided Dec. 23, 1974).

§ 6. Rights of accused

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor.

HISTORY

Source. Tribal Council Res. CO-63-67, § 6, passed Oct. 9, 1967.

Cross References

--United States Code. Right to speedy trial, 42 U.S.C. § 1992.

§ 7. Cruel and unusual punishments; excessive bail and fines

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

HISTORY

Source. Tribal Council Res. CO-63-67, § 7, passed Oct. 9, 1967.

§ 8. Other rights not impaired

The enumeration herein of certain rights, shall not be construed to deny or disparage others retained by the people.

HISTORY

Source. Tribal Council Res. CO-63-67, § 8, passed Oct. 9, 1967.

ANNOTATIONS

1. Due process. Where judge who issued order that District Prosecutor spend 30 days training newly appointed District Prosecutor, and who at the same time vacated order holding District Prosecutor in contempt of court for failing to appoint a District Prosecutor for over six months, made extra-judicial statements to the effect that he did not believe District Prosecutor's "witchcraft" claims and thought it was wrong for District Prosecutor to avoid bench warrant commanding his arrest for failure to comply with first order, there was no denial of due process. *Navajo In re Appointment of Tuba City District Prosecutor*, Navajo Nation Court of Appeals (July 27, 1977).

TITLE ONE

*General Provisions*

*Chapter 1. Bill of Rights*

NEW SECTION

9. Denial or abridgement of rights on the basis of sex

Cross References

Federal Indian Law (1982). Derivation of tribal powers, pp. 232-235.

§ 6. Rights of accused

1. Sufficiency of complaint. This section requires that prosecutors prepare criminal complaints which allege the basic parts of the statute creating the crime and sufficient facts fitting within the statute to enable the defendant and his defense attorney to prepare their case. *Navajo Nation v. Benson Lee* (C.A. 1983) 4 Nav. R. 185.

§ 9. Denial or abridgement of rights on basis of sex

Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex.

Source. Tribal Council Res. CF-9-80, passed Feb. 7, 1980.

Preamble. CF-9-80 contained the following preamble:

"WHEREAS:

"1. The tradition and culture of the Navajo Nation has always emphasized the importance of the woman in Navajo society; and

"2. Navajo culture and society is both matrilineal and matrilocal; and

"3. The Navajo Tribal Council by Resolution CO-63-67 of October 9, 1967, passed the Navajo Bill of Rights; and

"4. No provision was made in the Navajo Bill of Rights for equal protection of the laws for both men and women; and

"5. Such a declaration would be in keeping with the tradition of the Navajo people."

1. Interpretation. The proper interpretation of the Navajo Equal Rights guarantee is that there can be no legal result on account of a person's sex, no presumption in giving benefits or disabilities gauged by a person's sex and no legal policy which has the effect of favoring one sex or the other. *Help v. Silvers a.k.a. Silver Fox* (C.A. 1983) 4 Nav. R. 46.

2. Presumptions. Under Navajo Equal Rights Amendment, there can be no presumption, in a child custody dispute, that a young child should be in the care of the mother. *Help v. Silvers a.k.a. Silver Fox* (C.A. 1983) 4 Nav. R. 46.

*Chapter 5. Navajo Nation*

SUBCHAPTER 1. DESIGNATION

SECTION

301. Use of term "Navajo Nation"; certification of resolutions; address

302. Spelling of "Navajo"



Exhibit No. 6

JULY 18, 1988

MR. EDWIN MEESE III  
ATTORNEY GENERAL  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D.C.

DEAR ATTORNEY GENERAL MEESE:

I AM GREATLY INTERESTED IN AND SUPPORT THE U.S. DEPARTMENT OF JUSTICE'S INQUIRY INTO THE AMENDMENT OF THE INDIAN CIVIL RIGHTS ACT OF 1968.

SPECIFICALLY, I BELIEVE AMENDMENT OF THE INDIAN CIVIL RIGHTS ACT TO ENSURE FEDERAL COURT REVIEW OF ACTIONS OF INDIAN TRIBAL GOVERNMENTS IN CIVIL RIGHTS MATTERS, IS NEEDED TO ENSURE ADEQUATE PROTECTION OF THE INDIVIDUAL LIBERTIES AND CONSTITUTIONAL GUARANTEES OF INDIANS AND NON-INDIANS.

MY CONCERN INVOLVES A PERSONAL EXPERIENCE WHICH I HAVE NOT HERETOFORE BROUGHT TO YOUR ATTENTION, BUT WHICH I FEEL NEEDS TO BE ADDRESSED IN ASSESSING THE NEED FOR AMENDMENT OF THE ICRA. I HAVE PREVIOUSLY COMMUNICATED THIS CONCERN, ORALLY AND IN WRITING TO MR. BRIAN MILLER, ATTORNEY FOR THE U.S. CIVIL RIGHTS COMMISSION, WHO HAS WORKED CLOSELY WITH THE COMMISSION TO ASSESS ABUSES IN INDIAN TRIBAL JUDICIAL SYSTEMS. I HAVE ALSO COMMUNICATED MY CONCERNS ORALLY TO THE NAVAJO AREA BUREAU OF INDIAN AFFAIRS ASSISTANT AREA DIRECTOR, MR. GEORGE GOVER, GALLUP, NEW MEXICO.

I AM A NON-NAVAJO. I WORKED FOR THE NAVAJO NATION DEPARTMENT OF JUSTICE AS A LAW CLERK AND HELD AN EXEMPLARY EMPLOYMENT RECORD FROM AUGUST 1982 UNTIL I WAS TERMINATED ON FEB. 20, 1987 BY MICHAEL UPSHAW, ATTORNEY GENERAL FOR THE NAVAJO TRIBE. THE BASIS FOR MY TERMINATION STATED BY UPSHAW WAS THAT I WAS NOT A NAVAJO AND THAT NAVAJO PREFERENCE DICTATED I SHOULD BE DISPLACED. I ADVISED UPSHAW THAT THIS WAS IN CLEAR VIOLATION OF THE LONG-STANDING NAVAJO PERSONNEL POLICIES AND PROCEDURES MANUAL WHICH RECOGNIZES THE USE OF NAVAJO PREFERENCE IN HIRING PRACTICES BUT DOES NOT ALLOW TERMINATIONS ON THE BASIS OF RACE. I REQUESTED THAT UPSHAW RECONSIDER HIS DECISION, INDICATING THAT THE U.S. CONSTITUTION AND THE TREATY OF 1868 BETWEEN THE NAVAJO NATION AND THE UNITED STATES, AND THE INDIAN CIVIL RIGHTS ACT AND THE NAVAJO NATION BILL OF RIGHTS AND THE TRIBAL PERSONNEL POLICIES AND PROCEDURES PROHIBITED UPSHAW FROM TAKING THESE DISCRIMINATORY ACTIONS BASED SOLELY UPON MY RACE. UPSHAW REFUSED TO RECONSIDER AND I WAS TERMINATED.

IN CONFORMANCE WITH THE TRIBAL PERSONNEL POLICIES AND PROCEDURES, I REQUESTED A GRIEVANCE HEARING BY THE TRIBAL PERSONNEL GRIEVANCE COMMITTEE. THIS REQUEST WAS UNILATERALLY DENIED BY MR. KIM WILLIAMS, PERSONNEL DIRECTOR.

I THEN RETAINED AN ATTORNEY AND FILED THE REQUIRED NOTICES OF INTENT TO SUE. THE NECESSARY TIMELINES WERE MET AND MY COMPLAINT

## Exhibit No. 6 (cont.)

FOR NEGLIGENCE AND DEPRIVATION/VIOLATION OF MY CIVIL RIGHTS AND REQUESTING TRIAL BY A JURY COMPRISED OF NAVAJO AND NON-NAVAJOS WAS FILED IN THE WINDOW ROCK TRIBAL DISTRICT COURT. UPON THE INSISTENCE OF THE NAVAJO DEPARTMENT OF JUSTICE, MY ATTORNEY SUBSEQUENTLY REMOVED HERSELF FROM THE CASE AND BECAUSE I WAS, AND CONTINUE TO BE, UNEMPLOYED, I PROCEEDED PRO SE.

APPROXIMATELY SIX MONTHS AFTER I WAS TERMINATED, AND HAD REQUESTED A GRIEVANCE HEARING, AND AFTER SUIT HAD BEEN FILED, WILLIAMS, THE PERSONNEL DIRECTOR MAGICALLY HAD A "CHANGE OF HEART" AND OFFERED ME A GRIEVANCE HEARING. I REFUSED THE HEARING BECAUSE I HAD ALREADY EXHAUSTED THE FULL ADMINISTRATIVE PROCESS AND BECAUSE THE GRIEVANCE COMMITTEE DID NOT HAVE THE POWER TO REMEDY MY SPECIFIC INJURIES, AND BECAUSE THE ALLOWANCE OF THE GRIEVANCE REQUEST WAS NOT MEANINGFUL DUE PROCESS AND NOT IN ACCORDANCE WITH THE PROVISIONS OF THE NAVAJO TRIBAL CODE. THE MATTER THEN CONTINUED WITHIN THE NAVAJO TRIBAL COURTS WHERE IT IS STILL PENDING LITIGATION.

IN APRIL 1988, WELL OVER A YEAR AFTER MY TERMINATION BASED UPON MY RACE, UPSHAW SERVED ME WITH WRITTEN "SUPPLEMENTARY REASONS" FOR MY TERMINATION. INCLUDED IN THESE "SUPPLEMENTARY REASONS" ARE LETTERS AND COPIES OF MINUTES OF MEETINGS WHICH IN ADDITION TO BEING IRRELEVANT, OCCURRED TWO TO THREE YEARS PRIOR TO UPSHAW'S EMPLOYMENT WITH THE NAVAJO NATION. FURTHER, UPSHAW'S PREDECESSOR, CLAUDEEN BATES ARTHUR, HAD NEVER TAKEN ANY ADVERSE ACTIONS AGAINST ME AND I ENJOYED EXEMPLARY EMPLOYEE EVALUATIONS FROM HER AND MY IMMEDIATE SUPERVISOR, THE LATEST OF WHICH WAS ONLY 6 MONTHS BEFORE MY TERMINATION.

I HAVE BEEN ADVISED BY CURRENT AND/OR FORMER EMPLOYEES THAT THEY WERE BEING "ASKED TO TESTIFY" AGAINST ME BY TRIBAL OFFICIALS, AND THE UNDERLYING MESSAGE WAS THAT IF THEY DID NOT COOPERATE, THAT THEY MIGHT CEASE TO BE EMPLOYED BY THE NAVAJO NATION OR NEVER BE EMPLOYED AGAIN. IN A COMMUNITY WHERE UNEMPLOYMENT EXCEEDS SIXTY PERCENT, THE THREAT BECOMES VERY REAL.

I THEN MOVED TO AMEND MY COMPLAINT TO SUE UPSHAW, WILLIAMS, AND OTHER DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES BECAUSE I CONSIDERED THEIR INDIVIDUAL AND COLLECTIVE ACTIONS TO BE IN BAD FAITH AND MALICIOUSLY MOTIVATED.

THE DEFENDANTS' NAVAJO NATION, UPSHAW, WILLIAMS ET. AL. HAVE RAISED THE AFFIRMATIVE DEFENSES OF SOVEREIGN IMMUNITY AND THAT THE ATTORNEY GENERAL CAN ONLY BE SUED FOR MALPRACTICE, AND ONLY WHEN AUTHORIZED BY THE TRIBAL COUNCIL'S ADVISORY COMMITTEE, WHICH IS APPOINTED BY THE CHAIRMAN OF THE TRIBE, AND I MIGHT ADD, WHICH HAS TO MY KNOWLEDGE NEVER RENDERED A DECISION CONTRARY TO THE CHAIRMAN'S POSITION.

IN ORDER TO PROTECT MY RIGHTS, I HAVE HAD TO EXPEND AN ENORMOUS AMOUNT OF EMOTIONAL AND FINANCIAL EXPENSE, AND BECAUSE THE PROCESS HAS ALREADY ENTAILED OVER A YEAR AND SIX MONTHS, I ANTICIPATE AN EQUAL AMOUNT OF TIME BEFORE THIS MATTER IS RESOLVED. ONE OF THE CRITICAL PROBLEMS I FACE, IS THAT IF I AM NOT ALLOWED TO AMEND MY COMPLAINT OR IF THE JUDGE RULES AGAINST ME ON ANY OF THE PENDING

## Exhibit No. 6 (cont.)

MOTIONS, I AM PRECLUDED FROM REVIEW OF THE DISTRICT COURT'S DECISION BY THE NAVAJO SUPREME COURT BECAUSE THERE IS NO PROVISION FOR INTERLOCUTORY APPEALS. THIS WILL HAVE A TREMENDOUSLY HARSH AND INEQUITABLE FINANCIAL AND EMOTIONAL BURDEN ON ME, ESPECIALLY SINCE I WILL HAVE TO PAY THE FULL COSTS OF A TRIAL AND THEN A RETRIAL IF THE CASE IS REMANDED ON A TECHNICAL POINT.

I AM ALSO AWARE OF AND AM HEREBY NOTIFYING YOU THAT THERE ARE AT LEAST FOUR (4) OTHER PLAINTIFFS (NAVAJO AND NON-NAVAJO) WHO ARE ALSO IN LITIGATION AGAINST THE NAVAJO NATION FOR ALLEGED VIOLATIONS OF CIVIL RIGHTS WHICH ALSO ARISE OUT OF DISCRIMINATORY TERMINATION OF EMPLOYMENT. THESE INDIVIDUALS ARE BEING REPRESENTED BY MR. JAY MASON, GALLUP, N.M. ATTORNEY. ANOTHER CLASS-ACTION LAW SUIT INVOLVING NAVAJOS AND NON-NAVAJOS WAS SETTLED OUT-OF-COURT WITHIN THE PAST YEAR.

BECAUSE OF THE CLAIMED SOVEREIGNTY OF THE NAVAJO NATION, I, AND OTHER NON-NAVAJOS SIMILARLY SITUATED HAVE NO RECOURSE TO THE STATE OR FEDERAL COURTS, EVEN THOUGH WE ARE STATE CITIZENS, PAY STATE TAXES, COMPLY WITH AND ARE SUBJECT TO ALL STATE LAWS, VOTE IN STATE AND MUNICIPAL (BUT NOT TRIBAL) ELECTIONS AND QUALIFY TO RECEIVE ALL OTHER STATE SERVICES, UNLESS THE NAVAJO NATION HAS AN EXCLUSIVE COVERAGE, SUCH AS WORKMEN'S COMPENSATION PROGRAM, WHICH IS ALSO SUBJECT TO APPOINTMENT OF BOARD MEMBERS BY THE CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL, AND SUBJECT TO FURTHER POLITICAL DIRECTION AND/OR CORRUPTION.

I OPPOSE THE VIEW THAT TRIBAL COURTS SHOULD BE ABLE TO ESCAPE FEDERAL REVIEW IN CIVIL RIGHTS CASES USING THE GUISE OF TRIBAL SOVEREIGNTY, AS INDIANS AND NON-INDIANS ALIKE ARE STILL CITIZENS OF THE UNITED STATES ENTITLED BY LAW TO HAVE THOSE BASIC PROTECTIONS THAT ALL OTHER U.S. CITIZENS ENJOY. A TECHNICAL RESERVATION BOUNDARY WITHIN THE UNITED STATES SHOULD NOT SERVE TO CIRCUMVENT THE PROVISIONS OF THE U.S. CONSTITUTION AND PRECLUDE AMERICAN CITIZENS FROM THESE PROTECTIONS EVEN IF THEY LIVE AND WORK ON INDIAN RESERVATIONS. I CANNOT BELIEVE CONGRESS INTENDED ANYTHING LESS.

FURTHER, THE UNITED STATES GOVERNMENT CONTRACTS WITH AND/OR SUBSIDIZES NAVAJO TRIBAL PROGRAMS. I AM SURE THAT THE NAVAJO TRIBE IN APPLYING FOR AND RECEIVING THESE FUNDS, HAS CERTIFIED THAT THERE ARE NO VIOLATIONS OF ANY INDIVIDUALS CIVIL RIGHTS, WHEN IN REALITY THERE ARE NUMEROUS ABUSES PRACTICED BY THE NAVAJO NATION GOVERNMENT AGAINST INDIVIDUALS, AND HAS FURTHER AGREED AS A CONDITION PRECEDENT TO RECEIVING THESE FUNDS, THAT IT WILL COMPLY WITH AND ADHERE TO THE CIVIL RIGHTS LAWS OF THE UNITED STATES. IN EFFECT, THE NAVAJO TRIBE HAS THEREFORE WAIVED ANY CLAIMS TO ANY ABORIGINAL AND/OR TRIBAL SOVEREIGNTY.

BECAUSE THE NAVAJO GOVERNMENT IS NOT SUBJECT TO A CONSITUTION, THERE IS NO SEPARATION OF POWERS. THOUGH IT MAY APPEAR THAT A DISTINCTION EXISTS BECAUSE THERE IS AN EXECUTIVE, A JUDICIAL AND A LEGISLATIVE BRANCH, THE REALITY IS THAT THE CHAIRMAN OF THE THE NAVAJO TRIBE IS THE CHIEF EXECUTIVE OFFICER AND ALSO SERVES AS THE CHAIRMAN OF THE LEGISLATIVE BODY (TRIBAL COUNCIL) AND WHO FURTHER HAS PRIMARY RECOMMENDING AUTHORITY FOR APPOINTMENT AND RETENTION.

Exhibit No. 6 (cont.)

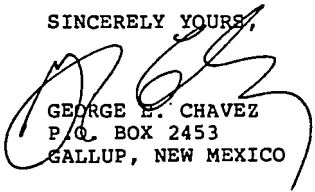
OF ALL JUDGES. FURTHER, THE EXECUTIVE BRANCH PROVIDES RECOMMENDATIONS ON THE JUDICIAL BRANCH'S BUDGET. TAKING THESE TWO ITEMS TOGETHER, THE APPOINTMENT OF JUDGES AND FUNDING OF THEIR BRANCH, IT IS NOT DIFFICULT TO ENVISION THE PROBLEMS FACING A JUDGE WHO IS BOUND TO EXERCISE HIS JUDICIAL DUTIES INDEPENDENT OF ALL INFLUENCES. THE RESULT, SADLY, IS THAT THE JUDICIARY ARE IN MY VIEW AND THE VIEW OF MANY OTHERS, UNABLE TO ESCAPE THE CLOUD OF THE EXECUTIVE IN THEIR EXERCISE OF LAWFUL AND IMPARTIAL JUDGMENT.

I AM SURE THAT YOU ARE AWARE OF THE NAVAJO TRIBAL GOVERNMENT'S REFUSAL TO ATTEND U.S. CIVIL RIGHTS COMMISSION HEARINGS, AND MORE DISAPPOINTINGLY, THE GOVERNMENT'S PROHIBITION OF TRIBAL EMPLOYEES SPEAKING AT THESE HEARINGS WHICH I BELIEVE IS A VIOLATION OF THEIR RIGHT TO EXERCISE FREEDOM OF SPEECH. ALSO, RECENTLY, THERE WAS A DISTURBING NEWSPAPER ARTICLE IN THE GALLUP INDEPENDENT COVERING THE LOCKING DOWN OF THE NAVAJO EDUCATION SCHOLARSHIP FOUNDATION (NESF) OFFICE BY THE CHAIRMAN'S STAFF USING THE POLICE POWERS OF THE EXECUTIVE BRANCH. A NAVAJO DISTRICT COURT OF COMPETENT JURISDICTION HAD PREVIOUSLY HELD THE N.E.S.F. TO BE A PRIVATE FOUNDATION AND NOT AN ENTITY OF THE TRIBAL GOVERNMENT, AND ISSUED AN INJUNCTION. THE MATTER WAS THEN APPEALED TO THE NAVAJO SUPREME COURT. HOWEVER, THE TRIBAL GOVERNMENT IGNORED AND IN CLEAR VIOLATION OF THE INJUNCTION ISSUED BY THE DISTRICT COURT AND USING ITS POLICE POWER, OUSTED AND LOCKED OUT THE EMPLOYEES AND OFFICERS OF THE FOUNDATION. THE COMMENT OF THE DEPUTY ATTORNEY GENERAL OF THE NAVAJO TRIBE REPORTED IN THE LOCAL NEWSPAPER WAS THAT THE NAVAJO POLICE WHO LOCKED OUT THE FOUNDATION EMPLOYEES WORKED FOR THE CHAIRMAN'S OFFICE AND NOT FOR THE JUDICIAL BRANCH OR THE JUDGE AND THEREFORE DID NOT HAVE TO (AND IN FACT DID NOT) OBEY THE COURT'S INJUNCTION TO DESIST FROM REMOVING THE N.E.S.F. OFFICIALS FROM THEIR OFFICES. CLEARLY, YOU CAN SEE FROM THAT STATEMENT, THAT THE TRIBAL COURT ORDER HAD NO FORCE AND/OR EFFECT AND RESULTED IN A BLATANT DISREGARD FOR THE JUDICIAL BRANCH BY THE EXECUTIVE. WITHIN THE NAVAJO RESERVATION, THERE IS NO OTHER AVAILABLE TRIBAL, STATE, OR FEDERAL SYSTEM WHERE RELIEF CAN BE OBTAINED.

THUS, EVEN IF I PREVAIL IN MY CASE BEFORE THE TRIBAL COURT, I HAVE EVERY REASON TO BELIEVE THAT MY JUDGMENT WOULD NOT BE HONORED BY THE NAVAJO GOVERNMENT, AND I WOULD BE WITHOUT ANY FORUM TO ENFORCE THE JUDGEMENT, THEREFORE, FOR ALL OF THE ABOVE REASONS I AM IN COMPLETE SUPPORT OF FEDERAL REVIEW OF TRIBAL COURT DECISIONS.

I TRUST THAT THIS LETTER WILL BE OF ASSISTANCE TO YOU IN YOUR EFFORTS TO ENSURE A FULL AND FAIR APPLICATION OF THE LAWS OF THE UNITED STATES OF AMERICA. I STAND READY TO PROVIDE WRITTEN AND ORAL TESTIMONY CONSISTENT WITH THE INFORMATION SET FORTH IN THIS LETTER UPON YOUR REQUEST AND DIRECTION.

SINCERELY YOURS,



GEORGE E. CHAVEZ  
P.O. BOX 2453  
GALLUP, NEW MEXICO

(505) 863-6615 (home)  
(505) 863-5244 (work)

Exhibit No. 7

T. J. ...  
Box 209 P  
Lakeside, Arizona 85929  
August 9, 1988

U.S. Commission on Civil Rights  
Washington, D.C.

Dear Commission Members:

Please excuse the informality of this letter. I am currently travelling, but wanted to write to you prior to August 20<sup>th</sup>.

Thank you a very much for the opportunity to testify before you at the hearing in Flagstaff, Arizona on July 20, 1988. The main point of this letter is to clarify the following: that my testimony regarding the Baier case, & that regarding the functioning of the White Mountain Apache Tribal & Juvenile Courts, are clearly distinct & separate from each other.

It was obvious that Mr. Unger (who was, as of the 20<sup>th</sup>, the attorney representing Ms. Olivia Baier) was attempting to interweave aspects of my testimony regarding his client with that regarding instances of blatant malfunctioning of the Juvenile Court. Olivia Baier was not in any way mistreated by the Tribal Court system. The circumstances surrounding the separation of her & her daughter beginning on April 1, 1986, were purely caused by Olivia's actions, or lack of action.

Ms. Baier herself requested that the Tribe intervene in "getting her daughter back"; but as is her habit, she has alienated herself from that system & the individuals within it, who all supported her & her

Exhibit No. 7 (cont.)

efforts at reunification with the child. For Mr. Unger, to assert that his client is justified in leaving the Tribal Court system, based on any testimony regarding the Tribal Court system, is merely another desperate attempt to bolster his weak case.

The Tribe clearly has, & has had, legitimate jurisdiction in this matter; but Olivia, with her parents' enticements, is now engaged in forum-shopping. Since private adoptions are not legal in Colorado (the home of the adoptive parents of the child), & since she is running from the Tribal Court, the next target is the Montana courts, despite the fact that the child has never lived permanently or long-term in that state.

It is interesting to note that Ms. Baier's adoptive parents, Harold & Betty Baier of Bozeman & West Yellowstone, Montana, have consistently offered Olivia gifts & for trips if she would only do as they wished; that they persisted in their goal of placing the child with their personal friends, Judy & Jim Collins of Fort Collins, Colorado; & that Olivia was seen driving a brand new pick-up truck immediately after she gave up physical custody of her child (against Tribal Court order) to her adoptive parents in October 1987.

I hope that the above can be helpful in this case. The tragedy, of course, is that the child has been removed from a wonderful Native American family & her heritage, until she is returned to the White Mountain Apache reservation.

Please do not hesitate to contact me if I can



**Exhibit No. 7 (cont.)**

be of any further assistance. I can be reached at my Arizona address & phone number from August 23<sup>rd</sup> - 25<sup>th</sup>. After September 1<sup>st</sup>, I can be reached at:

826 Ohio Street, #1  
Bangor, Maine 04401  
207.942.3142

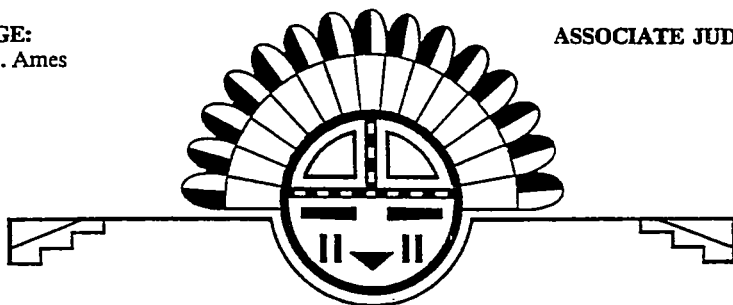
I look forward to hearing the progress of this case & of your hearings. Thank you again for your time & the opportunity to testify.

Sincerely yours,  
Debbie Leon, MSW

Exhibit No. 8

CHIEF JUDGE:  
Robert H. Ames

ASSOCIATE JUDGE:



HOPI TRIBAL COURT  
P.O. BOX 156  
KEAMS CANYON, ARIZONA 86034

July 18, 1988

U. S. Commission on Civil Rights  
c/o Monte Vista Hotel  
100 North San Francisco  
Flagstaff, AZ 86001

In re: Hopi Tribal Court  
Complaint by Attorney for  
Katney, Tso and Scott  
(Navajos)

Members of U. S. Commission on Civil Rights:

It has come to my attention that some complaint has been made by an attorney who represented Katney, Tso and Scott, Navajo Indians, before the Hopi Tribal Court. I am aware of, and familiar with the circumstances which occurred in the Tribal Court and the Decision and final resolution in that matter, as well as other cases involving Navajos and other Indians in the Hopi Tribal Court.

By way of background, please be advised that I am an attorney in private practice with my own law firm in Salinas, California. I completed my undergraduate studies at Stanford University, Palo Alto, California, and received my JD from the Stanford Law School in 1954. I have been practicing continuously since 1955 when I was admitted in the California and Federal Courts. My law firm is involved heavily in a litigation practice, primarily family law, personal injury, condemnation, criminal and probate. I have personally tried cases in numerous Superior and lower Courts in California, and have taken or responded to appeals before the Appellate Courts of California, including the California Supreme Court.

Most recently I represented a client in a condemnation action which resulted in recovery for the property owners in a condemnation action in the sum of approximately Eight Million Dollars which was appealed by the State of California through the Appellate Court System in the State of California.



## Exhibit No. 8 (cont.)

U. S. Commission on Civil Rights  
Page 2  
July 18, 1988

It has been my pleasure to serve the Hopi People on its Courts and as Chief Judge for approximately the last fifteen years. I am familiar with, I advise concerning and monitor the procedural and substantive training of the Associate Judges who serve in that Court. It is my belief that the Hopi Tribal Court is one of, if not the best Indian Court in the United States. I sincerely believe this opinion is shared by the Advocates and Attorneys practicing in that Court and the Civil and Appellate Courts in the State of Arizona. In the not too distant past a decision rendered in the Hopi Tribal Court was appealed to the Federal and the Arizona State Courts and that decision was ultimately affirmed by the Arizona Supreme Court.

With respect to the subject matter involving the Defendants Katney, Tso and Scott in a criminal action brought against them by the Hopi Tribal it must be brought to your attention that a full and complete written Opinion was rendered by Associate Judge Leslie in that matter which was not appealed by the attorney representing those defendants or the attorney who now apparently is making some complaint to your Commission.

It must also be brought to your attention that the subject case (Hopi Tribe vs. Katney, Tso and Scott) was finally resolved by a Stipulated Judgment, which must have been fully and completely explained to the Defendants by their attorneys, one of which (I believe) is the attorney who is now making some complaint to your Commission.

It is certainly most unusual, in my experience, for an attorney to advise his clients to accept a Stipulated Judgment and then complain that his clients have been treated unfairly.

It also appears that a complaint is made that the subject Defendants in that criminal action would not have received a fair jury trial because only Hopis sit on the jury. This also is a most unique argument in view of the number of Navajo and other Indians I have personally observed appear in the Hopi Tribal Court and receive full and complete preservation of their civil rights in numerous and various matters, including criminal actions.

On a prior occasion I personally sat as Judge in a jury trial involving a Navajo as Defendant in a criminal action. I am not sure whether or not the attorney who is now making the complaint was the attorney representing the Defendant in that matter or not. At the beginning of the trial the attorney representing the Navajo moved to have the matter dismissed on the grounds that his Navajo client (an employee of the Navajo Tribe who was distributing anti-Hopi material concerning the land dispute) could not receive a fair jury trial. I suggested that we proceed with the jury selection and trial, suggesting that I take his motion under submission and reserve decision until a later time. He agreed. Trial of the matter proceeded, evidence and testimony was received and considered by the jury to make a determination of whether or not the Navajo was driving the Navajo Tribal vehicle while under the influence of an intoxicating beverage. The jury returned a verdict of not guilty.

**Exhibit No. 8 (cont.)**

U. S. Commission on Civil Rights

Page 3

July 18, 1988

I then suggested to this attorney that if he wished to do so I would allow him to renew his motion to dismiss the matter or he could accept the verdict of not guilty. He withdrew his motion and accepted the verdict rendered by the jury composed entirely of Hopis.

The Hopi People and the Hopi Courts take very seriously their responsibilities as citizens and as jurors in trials brought to them for decision.

On more than one occasion attorneys practicing in states from Washington to Arizona, New Mexico and the East Coast have complimented our Court and the Hopi People for the organization and responsibility they observe in the Court.

I respectfully submit that the complaint, as I understand it to have been made, is not well taken.

Respectfully Submitted,



ROBERT H. AMES  
Chief Judge, Hopi Tribal Court

lfg

P. S. Over the years the Hopi Appellate Court has included Judge James Ogg, a sitting Justice of the Arizona Appellate Court, Arizona Superior Court Judges and Judge Paul Rosenblatt, now a Federal Court Judge in Phoenix, Arizona.

RHA

Via Express Mail

Exhibit No. 9



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

1121 Vermont Avenue, N.W.  
Washington, D.C. 20425

July 13, 1988

FEDERAL EXPRESS

Claudeen Bates Arthur, Esq.  
General Counsel  
White Mountain Apache Tribe  
Post Office Box 700  
Whiteriver, Arizona 85941

Dear Ms. Arthur:

This will confirm our invitation to you to testify at the Commission's public hearing on enforcement of the Indian Civil Rights Act, which will be held on July 20, 1988, in the 100 North Banquet Room of the Monte Vista Hotel, 100 North San Francisco Street, Flagstaff, Arizona 86001.

Ms. Maria Sims of our office will call you to arrange travel and hotel accommodations. Should you wish to discuss any of these matters further, please feel free call me at (202) 376-8351.

We appreciate your willingness to testify and look forward to seeing you in Flagstaff.

Sincerely, ..

A handwritten signature in cursive script, appearing to read "Brian D. Miller".

BRIAN D. MILLER  
Deputy General Counsel

Exhibit No. 10

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

JUL 21 1988 //  
H. P. CLERK  
LOU ALEKSICH, JR. CLERK  
~~XXXXXXXXXXXXXXXXXXXX~~

LITTLE HORN STATE BANK,  
A Montana Banking Corporation,  
  
Plaintiff,  
  
vs.  
  
CROW TRIBAL COURT and DAN  
OLD ELK, SR.,  
  
Defendants.

CV 88-155-BLG-JFB

MEMORANDUM AND ORDER

On July 18, 1988, a hearing was held before the undersigned to show cause why a preliminary injunction should not be entered in this matter. Appearing for the plaintiff was Christine A. Cooke. Neither defendant appeared before the Court to contest plaintiff's motion. Having reviewed the evidence presented by the plaintiff during such hearing, the Court concludes that plaintiff's due process rights were violated and that plaintiff will suffer irreparable harm if an injunction is not granted. The Court further finds that the facts surrounding this case have been fully developed and that there exists a cognizable danger that plaintiff's rights will be violated again. Therefore, the Court issues a permanent injunction restraining, enjoining and prohibiting the defendants from enforcing the Crow Tribal Court Order dated June 30, 1988.

## Exhibit No. 10 (cont.)

### PROCEDURAL FACTS

The facts of this case strongly support a gross violation of plaintiff's due process rights. On November 21, 1985, plaintiff Little Horn State Bank filed a complaint in the Thirteenth Judicial District Court of the State of Montana, in and for the County of Big Horn. The complaint alleged that Daniel C. Old Elk, Sr. and Old Elk Building Supply had defaulted on a promissory note executed to plaintiff and secured by a purchase money security interest in a forklift.

After the foreclosure proceedings were initiated by plaintiff, defendants were duly served with a summons and complaint. No appearance was ever made by the defendants and a default was entered. On July 20, 1986, District Court Judge Charles Luedke issued Findings of Fact, Conclusions of Law and Decree of Foreclosure, together with an Order of Sale.

Subsequent to obtaining this judgment, plaintiff filed a complaint for Enforcement of Foreign Judgment in the Crow Tribal Court on April 11, 1987. Again, defendants Daniel Old Elk, Sr. and Old Elk Building Supply were duly served with copies of the complaint and summons which was issued by the Crow Tribal Court. The defendants failed to make any appearance in this proceeding and a default was entered by the Crow Tribal Court on May 12, 1986. On May 20, 1986, the Clerk of the Crow Tribal Court set a hearing on default judgment May 27, 1986. At said hearing plaintiff Little Horn State Bank appeared and presented evidence to the Crow Tribal Court. Once

## Exhibit No. 10 (cont.)

again, defendants failed to appear before the Crow Tribal Court.

At the conclusion of the hearing, Tribal Judge Rowena Gets Down advised counsel for the plaintiff that the Court would issue its ruling in five working days. Plaintiff Little Horn State Bank also submitted to the Court proposed Findings of Fact, Conclusions of Law and Decree of Foreclosure. Although this hearing transpired more than two years ago, no decision has been issued by the Crow Tribal Court.

Since the default hearing concluded, plaintiff's counsel has made numerous inquiries about the status of said case. Throughout all her communication with the Crow Tribal Court, plaintiff has only been advised that Tribal Judge Rowena Gets Down is no longer sitting on the bench and that a decision as to the underlying default is still pending.

On June 20, 1988, plaintiff acquired possession of the forklift and removed it from the exterior boundaries of the Crow Indian Reservation.

On June 30, 1988, the Crow Tribal Court issued an Ex Parte Order in the original lawsuit filed by Little Horn State Bank nearly two years ago. This order mandated that the forklift in the possession of Little Horn State Bank was to be returned to the Crow Tribal Court impoundment yard for disposition by the Court. Prior to the issuance of this order, plaintiff's counsel of record was not notified of any motion or hearing on this matter.

## Exhibit No. 10 (cont.)

On July 5, 1988, defendant Daniel C. Old Elk, Sr., delivered a certified copy of the June 30, 1988 Tribal Court Order to State District Court Judge G. Todd Baugh. Again, without notification to plaintiff, defendant Daniel C. Old Elk requested the Thirteenth Judicial District Court of Montana to honor said Crow Tribal Court order.

Having been advised of this ex parte communication with Judge Baugh, plaintiff's counsel travelled to Crow Agency, Montana, where she spoke with Chief Judge Dennis Big Hair of the Crow Tribal Court. Counsel for Little Horn State Bank attempted to file with the Tribal Court a motion to set a hearing on the order dated June 30, 1988 and to hold the enforcement of said order in abeyance until a hearing could be held. Judge Big Hair advised plaintiff's counsel that no hearing would be scheduled and that no motion would be accepted by the Crow Tribal Court from Little Horn State Bank. Judge Big Hair further advised counsel that the Crow Tribal Appellate Court was a nonfunctioning body, but that the Appellate Court might begin hearing cases at Judge Big Hair's request.

On July 6, 1988, plaintiff Little Horn State Bank filed this action alleging a violation of its due process rights under the Indian Civil Rights Act of Title 25 U.S.C. §1302(8). Plaintiff also filed a Motion for Temporary Restraining Order seeking to enjoin defendants from enforcing the Crow Tribal Court Order dated June 30, 1988. Defendants were duly served with notice of plaintiff's motion for a

## Exhibit No. 10 (cont.)

temporary restraining order. Defendant Dan Old Elk, Sr., did appear in Chambers and in Court with respect to the Temporary Restraining Order issued on July 7, 1988. However, he did not appear at the hearing of July 18, 1988 on plaintiff's Motion for a Preliminary Injunction although given notice of the hearing. Defendant Crow Tribe did not appear to contest either Motion.

### DISCUSSION

Plaintiff invokes the jurisdiction of this Court pursuant to Title 28 U.S.C. §1331, 28 U.S.C. §1343, and 25 U.S.C. §1302(8).

The most compelling basis for jurisdiction in this matter is found at 25 U.S.C. §1302(8) since plaintiff alleges a violation of the Indian Civil Rights Act (ICRA). The Court is quite mindful that the Supreme Court has long held that federal courts have no jurisdiction to entertain actions to redress violations of the ICRA other than by habeas corpus petition pursuant to Title 25 U.S.C. §1303. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

Nevertheless, the United States Court of Appeals for the Tenth Circuit has fashioned a narrow exception to Martinez which appears to be applicable in this case. Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847, reh. denied, 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d 385 (1981). In Dry Creek, the Court of Appeals distinguished



Exhibit No. 10 (cont.)

Martinez, noting that the Supreme Court had focused on three factors in determining that federal courts do not have jurisdiction of §1302 claims. The Court identified those factors as: 1) the availability of Tribal remedies; 2) a dispute which is peculiarly intra-tribal in nature; and 3) an action in which all the parties are Indians. 623 F.2d at 685. Those factors were found not to be present in the Dry Creek Case.

After considering those same factors, the Court concludes that they are similarly absent in this case and that the Martinez holding should not preclude this Court from exercising jurisdiction. First, all parties to this action are not Indians. Plaintiff is a financial institution located outside the exterior boundaries of the reservation. One of the significant factors distinguishing Dry Creek Lodge from Martinez, was the presence of non-Indian parties in the former case. 623 F.2d at 684.

Secondly, the underlying dispute in this case is not of intra-tribal nature contemplated by the Supreme Court in Martinez. The underlying cause of action arises out of an executed promissory note and purchase money security interest in a forklift. This transaction occurred outside the exterior boundaries of the reservation and is not of tribal importance.

Third, the record clearly reflects that there are no further adequate tribal remedies available to plaintiff. Plaintiff has recognized the establishment of the Tribal Court

## Exhibit No. 10 (cont.)

and carefully followed its procedures. Notwithstanding its diligence in providing notice to the defendants and complying with the Tribal Court system, plaintiff has been unable to obtain a simple default judgment. Plaintiff has no other tribal remedies available. The Tribal Court of Appeals has not functioned in some time and will only operate at the whim of the current Judge Dennis Big Hair. Plaintiff's counsel has inquired on numerous occasions as to the status of their underlying action to no avail. Counsel's last contact with the Tribal Court resulted in the Court refusing to file any pleadings which plaintiff's counsel wished to file with the Court. Certainly plaintiff has exhausted all known tribal remedies and should not be required to expend any futile efforts with tribal authorities. With this in mind, the Court concludes that jurisdiction does exist to determine this Motion for Preliminary Injunction.

The factors to be considered in deciding whether an injunction is appropriate in a given case are as follows:

- (1) a strong likelihood of success on the merit;
- (2) the possibility of irreparable injury if relief is not granted;
- (3) the balance of hardships; and
- (4) advancement of the public interest.

Los Angeles Memorial Colosseum Commission v. National Football League, 634 F.2d 1197. 1200 (9th Cir. 1980).

In the Ninth Circuit, defendants, as moving parties, have the burden of demonstrating either (1) a combination of probable success on the merits and the possibility of

## Exhibit No. 10 (cont.)

irreparable injury or (2) that serious questions are raised and the balance of hardship tips sharply in its favor. Id., at 1201. These tests are not separate, but represent the "outer reaches of a single continuum". Id. This Court must balance the equities in the case to determine at which point along the continuum a stay is justified. With those points in mind, the Court will proceed to consider the present case in light of those factors.

### I. Probability of success on the merits and the possibility of irreparable injury.

In this case, plaintiff alleges that enforcement of the Tribal Court's order will result in a deprivation of its property without due process. Specifically, plaintiff claims that the order was entered without notice or hearing, in violation of its rights under the ICRA. The ICRA, at 25 U.S.C. §1302(8), requires at least a minimal amount of process before the property of any person may be taken. The Court need not inquire into the precise amount of due process required in this matter, since it is clear that this plaintiff was afforded absolutely none. By requiring the plaintiff to relinquish control of the forklift in question, the Tribal Court will deprive the bank of its property interest in the equipment, without the courtesy of any notice, hearing or other pretense of due process. Plaintiff has a strong probability of success in its claims regarding a denial of due process, in violation of the ICRA.

## Exhibit No. 10 (cont.)

Further, with respect to the second factor, plaintiff's only remedy lies with its possession of the forklift, and its right to resell the equipment to recover the outstanding indebtedness owed by defendants. Enforcement of the Tribal Court order would deprive plaintiff of this remedy. It is abundantly clear to this Court that the Tribal Court would be of no assistance in plaintiff's quest to recover any amount due. The Tribal Court's refusal to enforce the validly obtained state court judgment against defendant Dan Old Elk deprives plaintiff of any adequate remedy at law. Therefore, this Court must enjoin the Tribal Court from compelling plaintiff to return the forklift to the impoundment yard of the Tribal Court, since failure to do so would subject plaintiff to the possibility of irreparable injury.

At this juncture, the Court finds that the first test for a preliminary injunction has been met, and thus the remaining factors need not be evaluated. However, the Court feels compelled to comment more about the situation at hand.

Over the past decades, Indian tribes have cried out for and received judicial recognition of their status as sovereign, or quasi-sovereign nations. The Supreme Court has repeatedly fostered the federal government's policy of encouraging tribal self-government. Iowa Mutual Ins. Co. v. La Plante, \_\_\_ U.S. \_\_\_, 107 S.Ct. 971, 975 (1987); Three Affiliated Tribes v. Wold Engineering, 476 U.S.877, 106 S.Ct. 2305, 90 E.Ed.2d 881 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S.

Exhibit No. 10 (cont.)

130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). As a vital role in tribal self-government, the federal government has consistently urged the development of tribal courts. U.S. v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

This Court is well aware of the continued promotion of tribal self-government and self-determination. In National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), the Supreme Court directed the federal district court to give tribal legal institutions the "proper respect" by staying its hand in order to allow the Tribal Court a "full opportunity to consider the issues before them." 471 U.S. at 857, 105 S.Ct. at 2454. This Court, in keeping with its obligation to uphold the law, will honor that directive.

However, it has become extremely difficult to do so in the face of such decidedly egregious facts as are presented herein. Plaintiff has recognized the sovereignty of the Tribe and has valiantly tried to operate within the Tribal Court system, seeking its approval of a valid judgment entered in the courts of the State of Montana, and assistance in enforcing the same. The Crow Tribal Court, acting as a sort of "kangaroo court", has made no pretense of due process or judicial integrity. Plaintiff was met not only with bias and

## Exhibit No. 10 (cont.)

uncooperativeness, but with a blatantly arbitrary denial of any semblance of due process. The tribal judge's conduct makes a mockery of any orderly system of justice, and renders any attempt to deal with the Tribe in a professional and competent manner a farce. The Court seriously questions whether the conduct of the Tribal Court is befitting the title of a sovereign, and the respect and deference customarily accorded along with that status.

It would appear that the Crow Tribal government changes judges at a whim, to the detriment of non-Indian litigants, and of the Tribe. As a result, the Tribal Court lacks any continuity and uniform precedent which is the foundation of our judicial system. While the tribal members enjoy the protection of their rights under both the United States Constitution and the ICRA, depending on the forum, it appears that non-Indians are not granted the same privilege of dual citizenship in Tribal Court. If the Crow Tribe wishes to earn the respect and cooperation of its non-Indian neighbors, it must do more to engender that respect and cooperation, not abuse those neighbors who attempt to work within its system.

Ordinarily, the Court would proceed to enter a preliminary injunction at this time, setting a schedule for later determination of the propriety of a permanent injunction. See, Shanks v. City of Dallas, TX, 752 F.2d 1092, 1097 (10th Cir. 1985). However, the factual context of the case is sufficiently established, and need not be further developed to permit a ruling on the issues raised by a request

Exhibit No. 10 (cont.)

for permanent injunction. Moreover, the plaintiff has shown that "there exists some cognizable danger of recurrent violation." United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 898, 97 L.Ed. 1303 (1953). The Court deems it appropriate at this time to enter a permanent injunction, barring enforcement of the Tribal Court Order obtained ex parte, without notice or hearing. Therefore,

IT IS ORDERED that defendants Crow Tribal Court and Dan Old Elk, Sr., are hereby permanently restrained, enjoined, and prohibited from pursuing enforcement of the Crow Tribal Order dated June 30, 1988, commanding plaintiff, Little Horn States Bank, to relinquish the forklift which is the subject of the underlying action.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 21<sup>st</sup> day of July, 1988.

  
\_\_\_\_\_  
Chief Judge

Exhibit No. 11



**THE NAVAJO NATION**  
*PETER MacDONALD, CHAIRMAN*  
*THE NAVAJO TRIBAL COUNCIL*  
*JOHNNY R. THOMPSON, VICE CHAIRMAN*  
*THE NAVAJO TRIBAL COUNCIL*

August 18, 1988

BY EXPRESS MAIL, RETURNED RECEIPT REQUESTED

William B. Allen, Chairman  
Subcommittee on Enforcement of  
the Indian Civil Rights Act  
U. S. Commission on Civil Rights  
1121 Vermont Avenue, N.W.  
Washington, D.C. 20425

Dear Mr. Allen:

Enclosed is a Supplemental Statement of the Navajo Nation for  
inclusion in the record of your July 20, 1988 hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Upshaw".

Michael P. Upshaw, Attorney General  
Navajo Nation Department of Justice  
Post Office Drawer 2010  
Window Rock, Arizona 86515  
(602) 871-6344

MPU/DLN/rj  
Enclosure



Exhibit No. 11 (cont.)

SUPPLEMENTARY STATEMENT OF THE NAVAJO NATION

U.S. COMMISSION ON CIVIL RIGHTS HEARING  
OF JULY 20, 1988

Submitted August 18, 1988

This statement is submitted for the record in the purported investigation by the United States Commission on Civil Rights ("Commission") into the enforcement of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq., by Navajo and other Indian Tribal Courts. The Navajo Nation and its Judicial Branch have previously stated our concerns that the Commission is exceeding its statutory authority by conducting this investigation and by issuing subpoenas to Navajo judges and attorneys. See Statement of the Navajo Nation submitted September 11, 1987; Letter of July 19, 1988 from Attorney General Michael Upshaw to Commissioner Allen; Letter of August 3, 1988 from Chief Justice Tom Tso to Commissioner Allen (letters attached as Exhibits A and B).

The Commission Subcommittee and its staff have assured Indian Nations that they have not reached any conclusions about legislative recommendations which might diminish tribal sovereignty.<sup>1</sup> Even if that assurance is trustworthy,

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<sup>1</sup> The Navajo Nation justifiably distrusts the "assurances" made by the Commission and its staff. The Commission assured those at the hearing that it was not investigating the Indian Child Welfare Act, yet it asked extensive questions about Navajo law regarding the domicile of an Indian child. Such an inquiry into Navajo substantive law regarding child welfare cases cannot possibly relate to civil rights and leads to the reasonable suspicion that evidence is being gathered for some other purpose.

(continued...)

## Exhibit No. 11 (cont.)

the Commission's investigation has already been used by federal officials to propose a drastic interference with the independence of tribal courts. The U.S. Justice Department has proposed amendments to the Indian Self-Determination Act which would allow de novo review of tribal court decisions by the federal courts. Senator Orrin Hatch has introduced legislation which would amend the Indian Civil Rights Act to allow such federal review, thus overruling longstanding Supreme Court precedent. S.2747, Cong. Rec. August 11, 1988.

Moreover, Commissioner Allen, in correspondence with at least one Indian representative, has disclosed a predisposition to recommend drastic changes in Indian governmental status, including the termination of many tribal governments. See Exhibit C. Commissioner Allen's suggestions are disturbing to Indian people, who remember former federal policies of allotment and termination which decimated many tribes.

The focus of the Commission's investigation casts doubt upon its intentions. The investigation has focused on the structure of tribal government, not on any significant,

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<sup>1</sup> (...continued)

The Commission gave "assurances" that it would not seek advisory opinions from tribal court judges, nor ask them questions which would violate judicial ethics, yet it asked Hopi tribal judges how principles of sovereign immunity would be applied in Hopi Tribal Court.

A Commission staff member "assured" the attorney for Navajo judges that he would provide a list of written questions for their review by July 15. When that attorney called on July 15, no list had been prepared.

## Exhibit No. 11 (cont.)

unredressed deprivations of civil rights. The Commission is seeking to learn if native people have adopted Anglo-American governmental structures. It is addressing questions about "separation of powers," "judicial review," and "adversary proceedings," which are honorable traditions in the Anglo-American governmental system but may or may not be appropriate for tribal governments. The Hatch Bill, as well, focuses on alleged structural defects in tribal government.

In fact, the Navajo Council and Courts have adopted most, if not all, of these Anglo-American concepts. They should not, however, be forced wholesale on all Native Americans simply because they are familiar to non-Indian lawyers. Such a course would not be consistent with the status of Indian Nations or Congress' policy of promoting Indian self-determination.

Indian Nations are unique governmental entities. For over 150 years the United States has recognized them as "distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial . . . ." Worcester v. Georgia, 6 Pet. 515, 519, 8 L.Ed. 483 (U.S. 1832). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1976). Tribal authority is subject to express restriction by Congress, but for many years the policy of Congress, and of the Reagan Administration, has been to support Indian self-

## Exhibit No. 11 (cont.)

determination. E.g., 25 U.S.C. §§ 450, 450a; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-64 (1978).

Self-determination is critical to Native American people. We have centuries-old traditions by which we have governed our internal affairs. We have a rich heritage which we deserve to maintain, allow to grow, or change as we see fit. All too often, unfortunately, past policies of Congress and federal administrative agencies have resulted in senseless destruction of Native American lives and culture. Thankfully, those are not Congress' current policies.

To Indian people, self-determination means the right to live under traditional rules and, when appropriate, to adopt other rules and interpret them in ways that are consistent with our traditions. The Navajo Nation has a long history of protecting individual civil liberties. Basic concepts of fairness in decisionmaking are deeply imbedded in Navajo tradition. For example, local disputes are often resolved at a meeting where decisions are reached by thorough discussion, compromise, and consensus.

The Navajo Courts consist of judges who have a solid grounding in Navajo culture and tradition and can use that knowledge to decide the disputes that come before them. Increasingly, they are also educated in principles of Anglo-American law, which are being adopted by the Navajo Nation as its legislative and judicial branches deem appropriate. The Nation has enacted a Bill of Rights, 1 N.T.C. §§ 1 et seq, which is very similar to the Bill of Rights found in

## Exhibit No. 11 (cont.)

the United States Constitution. That law was enacted before, and is more extensive than, the Indian Civil Rights Act. The Navajo Bill of Rights is a law that the Navajo Courts are bound to apply and the Navajo Nation is bound to obey.<sup>1</sup>

Self-determination is a fundamental right of every Native American person which is essential to the survival of our cultures. It can indeed be classified as a civil right, at least as important as the rights listed in the Indian Civil Rights Act. Self-determination must not be sacrificed simply because some tribal governmental structures and traditions may be unfamiliar to non-Indian lawyers.

For these reasons, the Navajo Nation opposes federal court review of Navajo court decisions. Federal judges, though generally highly intelligent individuals, are not Native Americans. They could not be expected to know or understand Indian traditions, even if they were authorized to apply those traditions in cases brought before them. Self-determination, if it is to continue as a viable policy, demands that traditional and non-traditional legal principles be applied and interpreted in the Navajo Nation

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<sup>1</sup> Some of the questions posed by the Commission in its hearings focused on whether the Navajo Courts and Government believe that the federal Indian Civil Rights Act applies or can be enforced in the Navajo Nation. Why should the label make a difference? Navajo traditional and statutory law protect civil liberties to a greater extent than does the Civil Rights Act. The questions posed suggest that the Navajo people should submit to superior federal power even when our laws are more extensive than federal law. That suggestion is not consistent with a policy of self-determination.

## Exhibit No. 11 (cont.)

by Navajo judges, and in other Indian Nations by native members of those Nations.<sup>3</sup>

The Navajo Nation, for the same reasons, opposes any more drastic change in tribal governmental status, such as the termination proposal suggested by Commissioner Allen in the letter attached as Exhibit C.

Proposals designed to strengthen tribal court systems are a different matter. Most, if not all, tribal court systems are relatively young and underfunded. Additional funding and training would be positive steps forward. Establishing informal or formal contacts between tribal and federal judges for the exchange of knowledge about tribal and federal law could also prove beneficial.

Finally, if there are problems perceived by the public or the United States with the functioning of any particular tribal court system,<sup>4</sup> then those problems should be formally

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<sup>3</sup> An intertribal court of appeals, while somewhat less intrusive than federal court review, would suffer from the same defect. Indian people have many varied traditions. A Navajo appeals court judge could no more readily apply Acoma or Hopi tradition, or visa versa, than could a federal court judge.

<sup>4</sup> The testimony presented at the July 20 hearing reveals no such problems with the Navajo courts. Their independence and fairness were demonstrated even by those, like the Pitts family, who would criticize the Navajo Nation. Certainly attorneys for the Navajo Nation, in accordance with their professional responsibilities, may vigorously represent the interests of their client. Opposing counsel in the Navajo Education Scholarship Foundation case clearly does so as well, as indicated by Ms. Hansen's admission of ex parte contact with the Chinle District Court Clerk in which she stated she would seek sanctions against the Judge. Written Statement of Sandy Hansen dated July 15, 1988 at 14.

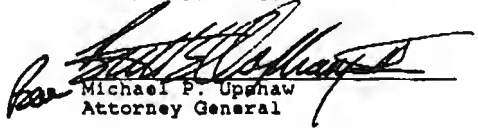
The fairness of the Navajo judicial system cannot be judged by the litigation strategies of the parties in hotly  
(continued...)

Exhibit No. 11 (cont.)

communicated to that tribe, along with any constructive suggestions for change. If those problems are real, then tribal legislatures or courts can correct them in a suitable manner. If the suggestions are necessary and good ones, and are consistent with culture and tradition, they will almost certainly be adopted. Those are decisions, however, that we, as Native Americans, must make for ourselves. That is self-determination.

Respectfully submitted,

THE NAVAJO NATION



Michael P. Uppshaw  
Attorney General

August 18, 1988

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(...continued)  
disputed matters, but only by the ultimate manner in which  
the courts resolve the cases before them.