

# FUNDAMENTAL LAW EXCERPTS OUTLINE

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## **1. GENERAL PRINCIPLES**

### PEOPLE OF THE COVENANT

### DUTY TO FOLLOW FUNDAMENTAL LAW

We, the Dine', the people of the Great Covenant, are the image of our ancestors and we are created in connection with all creation.

Dine' Bi Beehaz'aanii Bitsi Silei

Water and the sacred mountains embody planning,

Air and variegated vegetation embody life,

Fire, light, and offering sites of variegated sacred stones embody wisdom.

These are the fundamental tenets established.

Thinking is the foundation of planning.

Life is the foundation of wisdom.

Upon our creation, these were instituted within us and we embody them.

Accordingly, we are identified by:

Our Dine' name,

Our clan,

Our language,

Our life way,

Our shadow,

Our footprints.

Therefore, we were called the Holy Earth-Surface-People.

From here growth began and the journey proceeds.

Different thinking, planning, life ways, languages, beliefs, and laws appear among us,

But the fundamental laws placed by the Holy People remain unchanged.

Hence, as we were created with living soul, we remain Dine' forever.

The Holy People ordained,

Through songs and prayers,

That

Earth and universe embody thinking,

Water and the sacred mountains embody planning,

Air and variegated vegetation embody life,

Fire, light, and offering sites of variegated sacred stones embody wisdom.

These are the fundamental tenets established.

Thinking is the foundation of planning.

Life is the foundation of wisdom.

Upon our creation, these were instituted within us and we embody them.

Accordingly, we are identified by:

Our Dine' name,

Our clan,

Our language,

Our life way,

Our shadow,

Our footprints.

Therefore, we were called the Holy Earth-Surface-People.

From here growth began and the journey proceeds.

Different thinking, planning, life ways, languages, beliefs, and laws appear among us,

But the fundamental laws placed by the Holy People remain unchanged.

Hence, as we were created with living soul, we remain Dine' forever. 1 N.N.C. § 201.

## CHOICE OF LAW

Our choice of law statute at 7 N.N.C. §204 requires us to "utilize *Dine bi beenahaz 'etanii* (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations."

*Office of the NN President vs. NN Council*, 9 Nav. R. 325 (2010).

## LAW OF PREFERENCE

The soul of this Court is to apply Navajo Tribal law, especially where our customs and traditions are appropriate.

*Sells v. Sells*, 5 Nav. R. 104, 108 (1986).

Customs and traditions of the Navajo people have the force of law. They provide a unique body of law known as Navajo common law.

*Estate of Bedonie*, 5 Nav. R. 161 (1987); *Estate of Apachee*, 4 Nav. R. 178-179-81)

Since time immemorial the Navajo people have applied their customs and traditions in dispute resolutions. Even the Navajo Court of Indian Offenses, the Navajo judges of that court, under often adverse circumstances, continued to apply Navajo customs and traditions in cases brought before them. Navajo Courts of today are no exception, they apply customs and traditions as the law of preference.

*Navajo Nation v. Platero*, 6 Nav. R. 422, 424 (1991).

Dine' Bi Beenahaz' aanii has application to all facets of Navajo life.

*Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

Navajo traditional laws and values are what make Navajos distinct from Americans. Maintaining a distinct culture is important for the purposes of maintaining Navajo identity, Navajo land, and Navajo resources.

*Benally v. Benally*, 8 Nav. R. 796 (Kay. Fam. Ct. 2003).

## K'EH IS THE PREVAILING LAW

Navajo common law is the first law of our courts and we will abide by it whenever possible. Therefore, we agree with Appellee that the Navajo way of *k'e* is the prevailing law to be applied. *K'e* recognizes "your relations to everything in the universe," in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply felt emotion which is learned from childhood. To maintain good relations and respect one another, Navajos must abide by this principle of *k'e*.

*Office of the NN President vs. NN Council*, 9 Nav. R. 325 (2010).

## K'EH

*K'e* includes equality and respect and leads to consensual solution.

*Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 313 (1998).

*K'e* contemplates one's unique, reciprocal relationships to the community and the universe. It promotes respect, solidarity, compassion, and cooperation so that people may live in hozho, or harmony.

*K'e* stresses duties and obligations of individual relatives to their community.

*Atcitty v. Dist. Ct. for the Judicial Dist. Of Window Rock*, 7 Nav. R. 227 (1996).

## FUNDAMENTAL LAW IS CREATION STORY TEACHINGS

Amicus Mr. Arthur states in his brief, "The Fundamental law represents the cumulative knowledge which has accrued to the Dine from the time of creation until the present. It represents the lessons which were learned as the People traveled through the underworlds and emerged into the glittering world as the *bila 'ashdla 'ii*. It includes the conflicts that took place before the emergence, and how they were resolved, and conflicts that took place after the emergence, and how they were resolved. It includes what has transpired since the creation and the lessons taught to the People by the *Diyin Dine*. No single person knows all of the Fundamental Law but every single one of the *Táá Dine* knows some of it. *Amicus Curiae Brief of Eddie J. Arthur*, p. 18.

*Office of the NN President vs. NN Council*, 9 Nav. R. 325 (June 2, 2010)

## WITCHCRAFT

What is presently termed in the Navajo tribal courts as Navajo Common Law is a system of law based upon customs and traditions. These customs and traditions are grounded in the Navajo creation stories, which until recently have been passed on orally. Recountings and publications of the creation story have been a recent undertaking, primarily by non-Navajo social scientists. The creation stories slightly vary from region to region and from storyteller to storyteller. Some of these stories are recounted herein, specifically those dealing with the origin of witchcraft, which is a part of the creation story. Thus, witchcraft has been firmly embedded in the minds and the lives of the Navajos. Problems with witchcraft have unfolded since, permeating distrust, rivalry and hostility throughout Navajo society. In general, the treatment of witchcraft crimes and accusations were often by clandestine arrangements.

Before the Long Walk to Fort Sumner in 1864, the crime of witchcraft in Navajo law was considered serious and its commission was considered deserving of "Capital Punishment" by individuals, immediate family groups and the extended countryside, and at times even by the tribe. Navajo Common Law III, Museum Notes, Museum of Northern Arizona, Flagstaff, Arizona, vol. 10, no. 12, June 1938. Since the return of the Navajos from Fort Sumner and the development of Navajo Common Law and justice prior to the establishment of Indian courts, the punishment for witchcraft was basically the same- - capital punishment by individual, immediate family group, etc. However, in some cases, when reported to Indian Department Officials there might have been a short imprisonment and injunction against further witchcraft. Finally, when Indian courts were developed, the Courts became indifferent to the crimes of witchcraft. Id.

Witchcraft was historically considered heinous: Witchcraft is the most heinous of all Navajo crimes, for it affects the health and wealth of not only the individual or individuals, but it terrorizes the whole countryside as well. The practice, although now rare, is not as uncommon as most people believe. In recent years, employees of the Indian Services have been forced to publicly burn medicine bags of suspected witches in order to quell the wrath of the Navajos. Within the past five years, a witch was killed by a semi-educated boy, who, probably because of his education, had lost some of the superstition and terror that most Navajos have of these "poisoners."

*Hosteen v. Tapaha*, 7 Nav. R. 532 (SR Dist. Ct. 1997).

## WORDS ARE SACRED

People speak with caution and respect because speech is sacred.

*Hosteen v. Tapaha*, 7 Nav. R. 532 (SR Dist. Ct. 1997).

## T'AAHWO AJIT'EEGO

Furthermore, in this jurisdiction, we recognize the Dine way of *T'aahwo ajit'eeego* is the law to be applied. The traditional teaching of "it is up to you" stresses personal responsibility and personal accountability. See *Office of the NN President vs. NN Council*, 9 Nav. R. 325 (2010); *Watson v. Watson*, 9 Nav. R. 299 (Nay. Sup. Ct. 2010). Each person is responsible for our actions/inactions and effect (positive/negative) in *all* aspects of life.

*T'aahwo ajit'eeego* assists in our interpretation. The Council has authorized employees or applicants for employment who allege violations of the NPEA to file actions to grieve and appeal final decisions in keeping with certain procedures. Litigants are told to gather certain materials and bring them to the court within certain timeframes, see 15 N.N.C. § 614, as requirements to move their actions forward. Similarly, "[i]f one goes to a medicine man and is told to gather materials to allow judicial review, one's failure to do so will make it difficult or impossible for the medicine man to perform." *Begay v. Board of Election Supervisors*, 2 Nav. R. 120, 125 (Nay. Ct. App. 1979). Thus, *T'aahwo ajit'eeego* requires the appellant to move along his or her own case, or face consequences.

*Jerrilene Begay v. Navajo Nation Department of Self Reliance*, SC-CV-03-19 (May 23, 2019).

## HAZHO'OGO

*Hazho'ago* is not man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals.

*Green Tree Servicing v. Duncan*, 9 Nav. R. 205 (Nay. Sup. Ct. 2008)



## **2. FUNDAMENTAL LAW STATUTE (1 N.NC. §§ 201-206)**

### **A. GOVERNMENT**

#### **RIGHT TO SELECT A LEADER**

#### **DUTY OF LEADER TO COMMUNICATE WITH THE PEOPLE**

#### **DUTY OF LEADER TO ACT IN THE BEST INTEREST OF THE PEOPLE**

#### **DUTY OF LEADER TO PROTECT, UPHOLD, AND MAINTAIN DINE RIGHTS AND FREEDOMS**

It is the right and freedom of the Dine' to choose leaders of their choice; leaders who will communicate with the people for guidance; leaders who will use their experience and wisdom to always act in the best interest of the people; and leaders who will also ensure the rights and freedoms of generations yet to come; 1 N.NC. § 3(A).

#### **DUTY OF LEADERS TO BE HONEST, ETHICAL, AND MORAL**

#### **DUTY OF LEADERS TO PROTECT, UPHOLD, AND MAINTAIN FUNDAMENTAL LAW**

All leaders chosen by the Dine' are to carry out their duties and responsibilities in a moral and legal manner in representing the people and the government; the people's trust and confidence in the leaders and the continued status as a leader are dependent upon adherence to the values and principles of Dine bi beenahaz'aanii; 1 N.NC. § 3(B).

#### **DUTY TO PROTECT ELDERS & MEDICINE PEOPLE**

#### **RIGHT OF ELDERS & MEDICINE PEOPLE TO PARTICIPATE IN GOVERNMENT**

#### **DUTY OF LEADERS TO PERIODICALLY CONDUCT CERTAIN CEREMONIES FOR GOVERNMENT FUNCTION**

Our elders and our medicine people, the teachers of traditional laws, values and principles must always be respected and honored if the people and the government are to persevere and thrive; the teachings of the elders and medicine people, their participation in government and their contributions of the traditional values and principles of Dine' life way will ensure growth of the Navajo Nation; and from time to time, the elders and medicine people must be requested to provide the cleansing, protection prayers, and blessing ceremonies necessary

for securing healthy leadership and the operation of the government in harmony with traditional law; 1 N.N.C. § 3(G).

#### RIGHT TO INDIVIDUAL RIGHTS

The individual rights and freedoms of each Dine' (from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age) as they are declared in these laws; 1 N.N.C. § 2(A).

#### RIGHT TO COLLECTIVE RIGHTS

#### RIGHT TO BE DISTINCT PEOPLE

The collective rights and freedoms of the Diyin Nihookaa Dine' as a distinct people as they are declared in these laws; 1 N.N.C. § 2(B).

#### RIGHT TO FUNDAMENTAL LAW

The fundamental values and principles of Dine' Life Way as declared in these laws; 1 N.N.C. § 2(C).

#### DUTY OF LEADERS TO CREATE AND INTERPRET LAWS CONSISTENT WITH FUNDAMENTAL LAW

The knowledge, wisdom, and practices of the people must be developed and exercised in harmony with the values and principles of the Dine' Bi Beenahaz'aanii; and in turn, the written laws of the Navajo Nation must be developed and interpreted in harmony with Dine' Common Law; 1 N.N.C. § 6(A).

#### DUTY TO PROTECT FUNDAMENTAL LAW

The values and principles of Dine' Common Law must be recognized, respected, honored and trusted as the motivational guidance for the people and their leaders in order to cope with the complexities of the changing world, the need to compete in business to make a living and the establishment and maintenance of decent standards of living; 1 N.N.C. § 6(B).

#### RIGHT TO SELF-GOVERNMENT

Self-governance; 1 N.N.C. § 2(D).

#### RIGHT TO A 4-BRANCH GOVERNMENT

A government structure consisting of Hozhooji Nahat'a (Executive Branch), Naat'aji Nahat'a (Legislative Branch), Hashkeeji Nahata (Judicial Branch), and the Naayee'ji Nahat'a (National Security Branch); 1 N.N.C. § 2(E).

## RIGHT TO A GOVERNMENT THAT UPHOLDS FUNDAMENTAL LAW

That the practice of Dine' bi nahat'a through the values and life way embodied in the Dine' bi beenahaz'aanii provides the foundation for all laws proclaimed by the Navajo Nation government and the faithful adherence to Dine' Bi Nahat'a will ensure the survival of the Navajo Nation; [lettering in the original; should be "F"] 1 N.N.C. § 2(F).

## RIGHT TO EXTERNAL SOVEREIGNTY

That Dine' Bi Beenahaz'aanii provides for the establishment of governmental relationships and agreements with other nations; that the Dine' shall respect and honor such relationships and agreements and that the Dine' can expect reciprocal respect and honor from such other nations; 1 N.N.C. § 2(I).

## ESTABLISHMENT OF 4-BRANCH NAHAT'A STRUCTURE

### ROLE OF EACH BRANCH

The leader(s) of the executive branch (Alaaji Hozhooji Naat'aah) shall represent the Navajo Nation to other peoples and nations and implement the policies and laws enacted by the legislative branch; 1 N.N.C. § 3(C).

The leader(s) of the legislative branch (Alaaji' Naat'aji Naat'aah and Alaaji' Naat'aji Ndaanit'aii or Naat'aanii) shall enact policies and laws to address the immediate and future needs; 1 N.N.C. § 3(D).

The leader(s) of the judicial branch (Alaaji' Haskeeji Naat'aah) shall uphold the values and principles of Dine' bi beenahaz'aanii in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments; 1 N.N.C. § 3(E).

The leader(s) of the security branch (Alaaji' Naayee'ji Naat'aah) are entrusted with the safety of the people and the government. To this end, the leader(s) shall maintain and enforce security systems and operations for the Navajo Nation at all time and shall provide services and guidance in the event of severe national crisis or military-type disasters; 1 N.N.C. § 3(F).

## RIGHT TO BE INDEPENDENT AND SELF-RELIANT

The values and principles of Dine' Common Law must be used to harness and utilize the unlimited interwoven Dine' knowledge, with our absorbed knowledge from other peoples. This knowledge is our tool in exercising and exhibiting self-assurance and self-reliance in enjoying the beauty of happiness and harmony; 1 N.N.C. § 6(C).

## B. WAY OF LIFE

### RIGHT TO FUNDAMENTAL LAW EDUCATION

The right and freedom of the Dine' to be educated as to Dine' Bi Beenahaz'aanii; 1 N.N.C. § 2(H).

### RIGHT TO HOLISTIC EDUCATION

It is the right and freedom of the people that there always be holistic education of the values and principles underlying the purpose of living in balance with all creation, walking in beauty and making a living; 1 N.N.C. § 4(A).

### DUTY TO PROTECT, AND MAINTAIN NAVAJO LANGUAGE

### RIGHT TO NAVAJO LANGUAGE

It is the right and freedom of the people that the sacred Dine' language (nihiinei') be taught and preserved; 1 N.N.C. § 4(C).

### RIGHT TO EDUCATION

### RIGHT TO MAKE A LIVING

It is the right and freedom of the people that our children are provided with education to absorb wisdom, self-knowledge, and knowledge to empower them to make a living and participate in the growth of the Navajo Nation. 1 N.N.C. § 4(F).

### DUTY TO PROTECT CEREMONY SYSTEM

The various spiritual healings through worship, song and prayer (Nahagha) must be preserved, taught, maintained and performed in their original forms; 1 N.N.C. § 3(H).

### RIGHT TO SPIRITUALITY AND PRACTICE

The Dine' and the government must always respect the spiritual beliefs and practices of any person and allow for the input and contribution of any religion to the maintenance of a moral society and government; 1 N.N.C. § 3(I).

### RIGHT TO INCORPORATE OTHER PRACTICES CONSISTENT WITH FUNDAMENTAL LAW

The Dine' and the government can incorporate those practices, principles and values of other societies that are not contrary to the values and principles of

Dine' Bi Beenahaz'aanii and that they deem is in their best interest and is necessary to provide for the physical and mental well-being for every individual. 1 N.NC. § 3(J).

## DUTY OF LEADERS TO PERIODICALLY CONDUCT CERTAIN CEREMONIES FOR GOVERNMENT FUNCTION

### DUTY TO PROTECT CEREMONY SYSTEM

The rights and freedoms of the people to the use of the sacred elements of life as mentioned above and to the use of the land, natural resources, sacred sites and other living beings must be accomplished through the proper protocol of respect and offering and these practices must be protected and preserved for they are the foundation of our spiritual ceremonies and the Dine' life way; 1 N.NC. § 5(F).

### DUTY TO PROTECT MARRIAGE AND FAMILY

#### RIGHT TO MARRIAGE AND FAMILY

It is the right and freedom of the people that the sacred bonding in marriage and the unity of each family be protected; 1 N.NC. § 4(D).

## C. KEIYA

### DUTY TO PROTECT THE FOUR SACRED ELEMENTS

The four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored and protected for they sustain life; 1 N.NC. § 5(A).

### DUTY TO PROTECT THE SIX SACRED MOUNTAINS

The six sacred mountains, Sisnajini, Tsoodzil, Dook'o'oosliid, Dibe Nitsaa, Dzil Na'oodilii, Dzil Ch'ool'i'i, and all the attendant mountains must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation; 1 N.NC. § 5(B).

### DUTY TO PROTECT PLANTS AND ANIMALS

All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws, and have rights and freedom to exist; 1 N.NC. § 5(C).

### DUTY TO BE A STEWARD OF THE EARTH

The Dine' have a sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward of these relatives through our use of the sacred gifts of language and thinking; 1 N.NC. § 5(D).

#### DUTY TO PROTECT MOTHER EARTH AND FATHER SKY

Mother Earth and Father Sky is part of us as the Dine' and the Dine' is part of Mother Earth and Father Sky; The Dine' must treat this sacred bond with love and respect without exerting dominance for we do not own our mother or father. 1 N.NC. § 5(E).

#### DUTY TO PROTECT MOTHER EARTH AND FATHER SKY

It is the duty and responsibility of the Dine' to protect and preserve the beauty of the natural world for future generations. 1 N.NC. § 5(G).

### D. PEOPLE

#### RIGHT TO DIVERSITY

That Dine' bi beenahaz'aanii provides for the future development and growth of a thriving Navajo Nation regardless of the many different thinking, planning, life ways, languages, beliefs, and laws that may appear in the Navajo Nation; 1 N.N.C. § 2(G)

#### DUTY TO PROTECT, UPHOLD, AND MAINTAIN CLAN SYSTEM

#### RIGHT TO CLAN SYSTEM

It is the right and freedom of the people that the sacred system of k'e, based on the four clans of Kiiyaa'aanii, Todich'iinii, Honaghaahnii and Hashtl'isihnii and all the descendent clans be taught and preserved; 1 N.NC. § 4(B).

#### DUTY TO PROTECT CHILDREN AND ELDERS

#### DUTY TO MAINTAIN A HEALTHY ENVIRONMENT FREE OF ABUSE

#### RIGHT TO A HEALTHY ENVIRONMENT FREE OF ABUSE

It is the right and freedom of the people that every child and every elder be respected, honored and protected with a healthy physical and mental environment, free from all abuse. 1 N.NC. § 4(E).

### 3. NAHAT'A

#### NAAT'AANIIS

The Navajo traditional concept of fiduciary trust of a leader (*naat'aanii*) is just as relevant here. After the epic battles were fought by the Hero Twins, the Navajo people set on the path of becoming a strong nation. It became necessary to select *naat'aaniis* by a consensus of the people. A *naat'aanii* was not a powerful politician nor was he a military chief. A *naat'aanii* was chosen based upon his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If a *naat'aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words. The *naat'aanii* indeed was expected to be honest, faithful and truthful in dealing with his people.

*In Re: Certified Question II*, 6 Nav. R. 105, 117 (Nav. Sup. Ct. 1989).

As *Dine bi naat'aanii* we are gifted with the treasures of community influence and recognition, while at the same time we carry the burden of leadership and safeguarding the interests of our people. The Council understood its obligations under (Title 2, Section) 106(A) and attempted to comply by giving way to the Chapter ratification process. When that failed, it attempted a bypass. Had the Council properly approached the chapters, they would not have failed, perhaps. But, at the very least, the members of the Council would have taken their concern for delegate welfare to the very people who voted them into office. That is the Navajo way. We refer to it in Navajo as "*Baa ni'jookaah* or "you beg leave" of your people. That has been the Navajo way for centuries. There is a custom to be followed, and the 1989 Council recognized the necessity of its observance. The ritual goes like this: you approach and ask. The act of approach suggests humility and equality. In the course of asking you speak of your status, your need for recompense and you beg leave. While your request may not be honored, the act of approach and request strengthens ties and relations. The cornerstone of this custom is *K'e*. Whether your request is honored depends on the following of the custom and your people's acceptance of the merits of your request.

*Judy v. White*, No. SC-CV-35-02, slip op. at 26-27 (Nav. Sup. Ct. August 2, 2004).

A *naat'aanii* is an individual with a persuasive role within a community. In this context, a community may be any identifiable group: a clan, town, chapter, institution or other group.

*Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 8 (Nav. Sup. Ct. July 18, 2005).

Words are sacred and never frivolous in Navajo thinking, see *Smith*, No. SC-CV-50-04, slip op. at 4 ( Nav. Sup Ct. Sept. 21, 2005), and are not to be used to offend or intimidate, particularly in Kesoli's position of supervisor, which, in the context of Navajo thinking makes him a *naat'aanii*. See *Goldsmith v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 8 (Nav. Sup. Ct. July 18, 2005) (identifying executive director of school as *naat'aanii*). As a *naat'aanii* he had responsibility to conduct himself thoughtfully and carefully with respect for his employees under the principle of *hazho'ogo*, see *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, slip op. at 10 (Nav. Sup. Ct. December 16, 2004) (discussing principle of *hazho'ogo* in context of right against self-discrimination), including utilizing the *k'e* mechanisms Anderson (**Note:** this was the employer) provides to deal with disputes among employees. By shouting at employees he supervised, Kesoli did not conduct himself thoughtfully and carefully.

*Kesoli v. Anderson Security Agency*, No SC-CV-01-05, slip op. at 5-6 (Nav. Sup Ct. October 12, 2005).

## MEDICINE PEOPLE AS NAT'AANII

When a person becomes an apprentice or becomes a medicine man or takes up the practice of becoming a ceremonial practitioner, he/she runs the risk of being suspected of using knowledge for bad ends, or witchcraft. Shepardson, *Navajo Ways in Government*, p. 52. Thus, such accusations can be used as a means of control. This risk comes with the trade, so to speak. Medicines Practitioners or apprentices heed care lest they be accused of witchcraft, the ceremonial practitioner or apprentice who was obligated to perform or learn his ritual ran the risk of being suspected of using his knowledge for bad ends. *Id.*

The ceremonial practitioners are public figures of general fame and notoriety in the community and have pervasive involvement in the affairs of society. Such pervasive fame or notoriety makes them public figures for all purposes and all contexts. The United States has drawn a distinction between the public figure of general fame or notoriety in the community, who has pervasive involvement in the affairs of the society, and the person who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In the latter description, the issues are public and engage the public's attention in regard to the, as well as assume special prominence in their resolution.

Shepardson made the following observation:

Some sings attracted participants from other communities, and as many as a thousand people might gather for one of the more important ceremonies. A singer's influence would extend beyond the ceremonial occasion only if he was endowed with the personal qualities that inspire respect, the qualities associated with a *nataani*.



*Id.* at 50.

*Hosteen v. Tapaha*, 7 Nav. R. 532, 540-541 (Ship. Dist. Ct. 1997).

## DUTY OF LEADERS TO CREATE OPPORTUNITIES TO PROSPER

### DUTY OF LEADERS TO UPHOLD T'AANIHI AK'INEILDZIL (SELF-SUFFICIENCY)

### T'AAHWOH'AJIT'EEGO IS THE BASIS OF T'AANIHI AK'INEILDZIL (SELF-SUFFICIENCY)

## DUTY OF LEADERS TO FIND THE SOLUTION

The government's obligation to enforce the economic opportunity civil right goes to the core of tribal sovereignty itself in safeguarding the continuation of our communities and heritage. Hózhooogo iiná literally means doing the harmonious plan, that the Diné shall live together as a viable community on our sacred lands in order to continue our way of life, iina doo ninit'í, which is an immutable principle of Diné bi beenahaz'áanii.

For Diné, the principle of nahat'á, embodying economic opportunity, means more than alleviating the effects of poverty or economic injustice. It means providing opportunities to prosper on our own lands, and thereby the means of survival of our people as a community and sovereign nation. While there have been long periods in which the Diné, through a lack of education and poverty have been denied access as individuals to become self-sufficient, it is not so much the case in the modern era. Today, the learning of modern skills to be self-sufficient is achieved through education. Education has resulted in Navajos owning and operating engineering, architecture, law, medicine, accounting and other professional businesses. The fundamental teaching of t'áá hwó ájít'éego t'éiyá is the basis of self-sufficiency. Diné self-sufficiency teaches that the obligation of Diné individuals to take care of themselves impacts the community, which relies on the survival of individuals in order to continue to exist as a cohesive people. The Navajo translation of "economic self-sufficiency" is t'áá nihí ák'ineildzil dóó adiká' adiilwol-to learn all the skills that you can to fulfill your responsibility to survive, that you will not go hungry, that you will not be thirsty, that you will have a roof over your head and that you will have clothing to cover you, and to ensure that you provide these essentials of life for your families. The relevance of this teaching is that it is going to have to take one's individual hard work and sacrifices (t'áá hwó ájít'éego t'éiyá) to learn the skills necessary to sustain a prosperous life for an entire community. It is up to our leaders to make this possible, and it is within this teaching of Diné self-sufficiency that our leaders created the NBOA and the NNPA.

We have stated that exceptions to Navajo preference in business contracting which preceded the amended Bill of Rights are presumed valid. We would note, in closing, that Diné bi beenahaz'áanii does not call for the rigid application of rules of statutory construction, but does require the absolute application of fundamental principles. Rules of statutory interpretation give way to specific and actual cultural values. See, e.g., *In re Harvey*, 6 Nav. R. 413, 414-415 (Nav. Sup. Ct. 1991) (rejecting statutory interpretation regarding the disposition of property under general principles of Anglo American law in favor of an interpretation based upon both the Navajo common law and judicial economy). Naata'aniis are required to be conscious of their authority to find sacred solutions. People have expectations that the public treasury will be used by their government in a manner that benefits the Navajo people and Navajo-owned businesses. It is presumed that "the Navajo Nation Council would not intend to violate the Navajo Nation Bill of Rights by enacting conflicting law." *In re Certified Question from the United States District Court for the District of Arizona*, 8 Nav. R. 132, 138-139 (Nav. Sup. Ct. 2001).

DUTY OF LEADERS TO NEVER LAY DOWN PEOPLE'S TRUST

DUTY OF LEADERS TO FIND SOLUTION USING BI'A'IIDZA

BI'A'IIDZA REQUIRES UPHOLDING FUNDAMENTAL LAW

Leaders do not ever lay down the people's trust and the laws because a leader is taught that they must find the solution, for it is always available. "[A]s demonstrated in the design of the sacred wedding basket, a leader through adherence to the laws, the analysis of the stories of the Diné journey, and a positive approach will find a solution (bi'a'íidzá) around, through, or over that which confronts the people." See *Thinn v. Navajo Generating Plant*, No. SC-CV-25-06, slip op. at 9 (Nav. Sup. Ct. October 19, 2007).

*lina Ba, Inc. v. Navajo Business Regulatory*, No. SC-CV-60-10 (May 15, 2014)

#### **4. AGHA'DIIT'AAHII (ATTORNEYS)**

##### COMPETENCY IN THE FUNDAMENTAL LAW

The NNBA is the organization charged with the pre-admission of the legal practitioners. However, the specific process through which out of state attorneys who apply for pro hac vice status has been lax and unclear. The current pro hac vice admission process circumvents the most crucial feature of the regular admissions process which requires an understanding of Dine bii Beenahaz'aanii. Competency in the foundation of Dine Law and our problem-solving approach in the four sacred directions separates our legal system from other jurisdictions. By allowing attorneys to appear under a pro hac vice status, then later openly profess that they lack knowledge of our fundamental law—we do the Nation and the People a disservice. See, *In re Practice of Law by Avalos*, 6 Nav. R. 191, 193 (Nav. Sup. Ct. 1990) (finding that an understanding of Navajo lifestyle and culture is indispensable to the practice of law within the Navajo Nation.

*Biscup v. Kayenta District Court*, No. SC-CV-19-19 (2019)  
(Concurrence/Dissent)

##### DUTY TO LEARN FUNDAMENTAL LAW

We have heard that many of our non-Navajo practitioners rely solely on Navajo Nation Supreme Court opinions for an understanding of our Fundamental Laws and continue to be unfamiliar with our civilization in spite of sometimes decades of living in border towns near us and practicing in our courts. There is a saying that we have, that it is up to you to learn, T'aaho Aji't'eigo. Our culture is best known through interactions and experience, not through interpretations and secondary sources. We exhort those advising our government and those practicing in our courts to seek out knowledge by going among our Dine People and experiencing the Dine way of life first-hand.

*Office of the NN President vs. NN Council*, 9 Nav. R. 325 (June 2, 2010)

##### DUTY OF GOVERNMENT LAWYER TO LEARN, USE, AND TEACH FUNDAMENTAL LAW

A lawyer working for the People is a leader who should be further guided as follows:

Diné bá nijigháao, bá naat'áanii jíliigo éi bá dóó bil nidajilnishígíí Diné bibeenaahaz'áanii bee bich'i' yájílti' dóó bee nazhntin dooleel; azhashii doo yídíneelnáada ndi, áko Diné binant'a'í dóó bá bee agha'diit'aahii jíliigo ei Diné t'áá náhwiist'áánt'éé bibeenaahaz'áanii hol niliigo baan tsíj'kees dooleel.

As a representative of the People, a leader for the People, and also for those you work with, you must advise and teach them of the laws of the Diné, even though they might not agree with the law; therefore, to be a leader and lawyer for the People, one must use and respect the laws of all the People.

*In Matter of Frank Seanez*, 9 Nav. R. 433, 438 (Nav. Sup. Ct. November 24, 2010)

## 5. HOZHOOJI NAHAT'A (PEACEMAKING)

### APPOINTMENT OF HOZHOOJI NAHAT'A

The court takes judicial notice of the fact there is a longstanding custom and tradition among the Navajo People for a judge of the Navajo Tribal Courts to appoint a member of the community to mediate and conciliate problems among members of the community. That tradition permits the appointment of an elder, chapter official or other person of respect in the mediation or conciliation acts as an officer of the court and has the authority to compel individuals to take part in the process.

*In the Matter of Conciliation of the Marriage of Allison*, 3 Nav. R. 199 (Window Rock District Court 1982).

PURPOSE OF PEACEMAKING IS TO UPHOLD K'EH AND DINE  
BIBEEHAZ'AANII

PEACEMAKERS ARE EXPERTS OF K'EH PRINCIPLE

PEACEMAKING AGREEMENTS ARE ENFORCEABLE

The role of Peacemaking is to preserve and promote the traditional Navajo laws and values of k'eh among Navajo people as mandated by the Fundamental Laws of the Dine. Does this court recognize Peacemaking agreements even without a court order? To answer the pressing question, this court recognizes Peacemaking agreements even without a court order. Peacemaking agreements do not have to be incorporated into court orders to be enforceable. In this case, "enforceable" means being recognized by the District Court for purposes of not revisiting the same issues again in a court trial and therefore rendering judgment summarily.

Peacemakers are experts of the fundamental law of k'eh, which is central to Navajo philosophy and law. Peacemakers emphasize k'eh as the top value in their proceedings: proceedings center around k'eh. The law of k'eh plays throughout Navajo society, even in the Judicial Branch of the Navajo Government. The Judge's code of Conduct indicates, "A judge should behave to everybody as if they were his relatives." See Canon 1, Section 3, Navajo Nation Judicial Code (1991).

*Benally v. Benally*, 8 Nav. R. 796 (Kay. Fam. Ct. 2003).

PEACEMAKING AND WESTERN COURT SYSTEM PREMISED ON  
DIFFERENT FOUNDATIONS

PEACEMAKING FOCUSES ON PROBLEM SOLVING

## K'EH INCLUDES DUE PROCESS

### ALL PERSONS TREATED EQUALLY UNDER K'EH PRINCIPLE

Unlike the adversarial American legal system, where parties win and lose and the court forces its judgment, Peacemaking is not premised upon adversity nor coercion. Peacemaking is premised upon *k'eh*, which is opposite to adversity and coercion. Peacemaking is premised upon cooperation, sharing, and helping each other. Peacemaking emphasizes maintaining positive relations by acknowledging and tending to responsibilities toward one another. Peacemaking does not focus on taking away a party's life, property or liberty. . . .Rather, Peacemakers focus on *solving the problems* brought by parties using the *k'eh* principle. When abused lawyers tactfully use individual rights against each other to win the case and address the problem by retribution (1.e., revenge). As legal devices engineered for an adversarial coercive system, individual rights do not belong in Peacemaking because Peacemaking encourages making peace and not adversity. Peacemakers want to focus on solving the substance of the problem, rather than focusing on procedural issues for due process as in the American system. Because Peacemaking and the legal system are premised on different foundations, and to encourage *k'eh*, individual rights do not belong in Peacemaking sessions. . . What replaces due process and individual rights if rights are prohibited in Peacemaking? The concept of *k'eh* fills that void. Due process is fairness in the adversarial system. *K'eh* incorporates fairness, but in the context of cooperation, sharing and caring for each other. In caring for each other, a person treats each other fairly by giving equal treatment. Rather than favoring one person over another, all persons are treated equally under the *k'eh* principle.

*Benally v. Benally*, 8 Nav. R. 796 (Kay. Fam. Ct. 2003).

## **6. AK'EI (DOMESTIC RELATIONS)**

### MARRIAGE AND FAMILY ORGANIZATION

The Navajo economy has traditionally been based upon grazing sheep for food, clothing and marketing. This ties the Navajo to the land. It must also be understood that the Navajo clan system is very important, with a child being of the mother's clan and "born for" the father's clan. The clan is important, and the family as an economic unit is vital. The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters, and all the members of the family group have important duties to each other. These duties are based on the need to survive and upon very important religious values which command each to support each other and the group. Some call these family and clan members living together a "residence group," and some call them a "camp." Shepardson and Hammond, "Navajo Inheritance Patterns: Random or regular?," V *Ethnology* 87, 90 (No. 1 Jan. 1966); Barsh, Navajo Property Law and Probate, 1940-1972, p. 13. (Unpublished manuscript. This document was prepared as an experimental outline of Navajo probate law in cooperation with the Navajo courts of appeals and former Chief Justice Virgil L. Kirk.) The meaning of these terms is actually that groups of Navajo who are related by blood or clan will live together for mutual protection and the common good, and the important point is that there is a difference in the distribution of property, depending upon whether it is an essential piece of property for the maintenance of the camp.

*In the Matter of the Estate of Boyd Apachee*, 4 Nav. R. 178, 182-183 (WR Dist. Ct. 1983).

Not only is marriage important in Navajo common law, but relatives and relationships are as well. "Navajos think of such relationships (kinship) in a much broader and different sense than does the general American population." B. Johnson, Ed., *Navajo Stories of the Long Walk Period*, xix (1973) (Preface explaining relationships used in the stories). There is the biological family, with husband, wife and unmarried children; the extended family, which adds married daughters and their husbands as well as unmarried children, the outfit, with mixes of extended or biological families; the clan, with relationships which are not restricted to biological connections; and linked clans, with relationships among clans. *Id.* xix-xxi.

. . . . The reciprocal obligation required of Navajos is summed up in the saying used to describe someone who has misbehaved: "He acts as if he had no relatives."

*Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 264 (Nav. Sup Ct. 1990)

Traditionally, the responsibility for a family whose male spouse either has deserted or is deceased falls upon the family of the female spouse.

*Johnson v. Johnson*, 3 Nav. R. 9, 11 (Nav. Ct. App 1980).

By Navajo tradition, at the time of marriage the husband will normally move in with the wife's clan. Traditionally the father and the children are said to "belong" to the mother's clan. Kluckhohn and Leighton, *The Navaho*, 100 (Rev. Ed. 1974).

*Apache v. Republic National Life Ins. Co.*, 3 Nav. R. 250, 251 (W.R. District 1982).

The Navajo People's segmentary lineage system (clanship system) is the foundation of Navajo Nation domestic relations law. Traditional Navajo society is matrilineal and matrilocal, which obligates a man upon marriage to move to his wife's residence. The property the couple bring to the marriage mingle and through their joint labors create a stable and permanent home for themselves and their children. The wife's immediate and extended family benefit directly and indirectly, in numerous ways, from the marriage.

*Naize v. Naize*, 7 Nav. R. 269, 271-272 (Nav. Sup. Ct. 1997).

Family cohesion under Navajo common law means there is a father, a mother and children. They comprise the complete initial family unit and are protected as such inside and outside the blessed home (*hooghan*) by the Holy People. The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity.

Navajo commonlaw on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and the clan relationships. This is inherent in the Navajo doctrine of *ak'ei* (kinship). Two noted writers have said this of Navajo kinship:

The importance of his relative to the Navajo can scarcely be exaggerated.

The worst that one can say of another person is, "He acts as if he didn't have any relatives." Conversely, the ideal of behavior often enunciated by headmen is, "Act as if nobody were related to you." Clyde Kluckhohn and Dorothea Leighton, *the Navaho*, 100 (Rev. ed. 1974).

When the family is complete, there is peace and harmony, which produces beautiful and intelligent children and happiness and prosperity throughout all the relationships. The family is blessed.

*Davis v. Means*, 7 Nav. R. 100, 102-104 (Nav. Sup Ct. 1994).



## BEST INTEREST OF THE CHILD

### PARENS PATRIAE

The family is the core of Navajo society. Thus, family cohesion is a fundamental tenet of the Navajo people.. It is Navajo customary law – *DineBi Beehaz'aanii* – or Navajo common law. . . The Navajo Nation courts must apply that tenet to disputes involving children under the doctrine of *parens patriae*. See, *Barber v. Barber*, 5 Nav. R. 9 (1984) (a Navajo court must act as the parent of the child and do what is best in the best interest of the child). . . .

*Davis v. Means*, 7 Nav. R. 100, 102-104 (Nav. Sup Ct. 1994).

### CHILDREN OF MOTHER'S CLAN

This court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular, children are considered members of the mother' clan. While that fact could be used as an element of preference in a child custody case, the court wants to point out that the primary consideration is the child's strong relationship to members of an extended family. Because of those strong ties, children frequently live with various members of the family without injury, this is the condition throughout Indian Country ( as Indian reservations as a whole are called). Therefore the court looks to that tradition and holds that it must consider the children's place as the entire extended family in order to make a judgment based upon Navajo traditional law.

*Goldtooth v. Goldtooth*, 3 Nav. R. 223,226 (W.R. Dist. Ct 1982)

Thus the Navajo child fits into an atmosphere of family and relatives.

...Traditionally, the father and child lived with the mother's family, and the child was said to "belong" to the mother's clan. *Id.*, 90. While the child belonged to the mother's clan, it was said to be "born for" the father, and a child might say "I am Bitter Water, born for Salt." *Id.*, 112.

*Lente v. Notah*, 3 Nav. R. 72, 80-81 (Nav. Ct. App. 1982)

### CHILD MAY LIVE WITH EXTENDED FAMILY

This court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular, children are considered members of the mother' clan. While that fact could be used as an element of preference in a child custody case, the court wants to point out that the primary consideration is the child's strong relationship to members of an extended family. Because of those strong

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*Goldtooth v. Goldtooth*, 3 Nav. R. 223,226 (W.R. Dist. Ct 1982)

(Also look at the role of children in family organization).

## FATHER'S DUTY OF SUPPORT

It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least its mother, the duty of support. It is said that if a man has a child by a woman and fails to pay the woman money to support it, "He has stolen the child." In other words, the man who receives the benefit and joy of having a child is a thief if he does not share in the worldly burdens of taking care of it. This Navajo custom lays the groundrule of support, and the conclusion to be drawn from the principle given is that a man must pay as much as is necessary for the child, given his abilities and resources at any given time.

*Tom v. Tom*, 4 Nav. R 12,13 (Nav. Ct. App.1983)

This Court has long recognized a father's absolute obligation under Navajo tradition to provide support for his children. *Notah v. Francis*, 5 Nav. R. 147, 148 (1987). . . . That principle was also applied in *Descheenie v. Mariano*, 6 Nav. R. 26, 27 (1988). Children are central to the Navajo family and clan, and in the event of family breakup, it is a Navajo court's duty to fully provide for the needs of the children, utilizing all available resources of their parents. See Barber. Barber, 5 Nav. R, 9,12 (1984) (court must always act in the child's best interest). Navajo children are the Navajo people's future, and they must have support to take their equal places in the overall Navajo society. *Burbank v. Clarke*, 7 Nav. R. 369, 371-372 (Nav. Sup. Ct. 1999)

The law that obligates every parent to support his or her offspring is integral to Navajo culture. This customary law underlies our modern child support jurisprudence. *Tom v. Tom*, 4 Nav. R 12,13 (1983). The rationale for the law is straightforward - - a parent who brings a child into the world has a duty imposed by natural and spiritual law to provide for the child's needs until the child is capable of self-support. The law also helps to turn the Navajo concept of *'iina* ("life - - past, present, and future ") into practical experience. Children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity. **(Footnote here:** This lesson comes to us from a chapter in Navajo history called *'alnaashii jidezdaal* (separation of the sexes"). Due to certain misdeeds of those in authority, the males and females of the tribe separated and took up residence on opposite sides of a wide flowing river. After four years of

separation, the wise men of the tribe reunited the genders after explaining that without propagation, the tribe would surely become extinct.)

*Davis v. Means*, 7 Nav. R. 100, 102-104 (Nav. Sup Ct. 1994).

## KNOWING ONE'S CLANS IS A PART OF HOZHO

### RIGHT TO KNOW FATHER'S CLAN

Paternity must be established for children, because children must know their father's clan to avoid incestuous relationships when they come of age. Navajo children are "born for" their father's clan. Children are owed obligations by their father's clan, and have obligations to it. Children are the fabric of a clan. Thus, the clan members want to know their children and have a right to know under Navajo common law.

In this case, the mother's insistence that Davis is not the father, in spite of the family court's ruling, causes dissension in the family unit. This is manifested by threats, animosity, confrontations, and disruptions in the lives of the parties and the child. Under Navajo common law, this family cannot achieve stability, and thus harmony, until the court determines with reasonable certainty which of the two men is the father of the child.

Under the Navajo doctrine of *a'kei*, the grandparents, other extended family members, and the clan relations have a right to know the biological heritage of a child. The Navajo maxim is this: "It must be known precisely from where one has originated." This means all of the child's relations must know who the parents are, so the child will eventually know who is related and not related to him or her. The maxim focuses on the identity of a person (here the child) and his or her place in the world, and is a crucial component of the tent of cohesion.

Knowing one's point of origination (meaning the parents) is extremely important to the Navajo People, because only then will a person know which *adoon'e* and *dine'e* (people) the person is. Those precepts are essential to a Navajo's identity and must be known for Navajo religious ceremonies. One must know them to seek *hozho* (harmony and peace). When applied to a child, they are necessary for the child's emotional, physical, and spiritual well-being. Thus, under Navajo common law, the child's best interests require that the father be determined with reasonable certainty.

*Davis v. Means*, 7 Nav. R. 100, 102-104 (Nav. Sup Ct. 1994).

### EMANCIPATION AT T'AABI AK'INAALDZIL (SELF-SUPPORTING)

When a young Navajo person no longer needs the support, care, and custody of the parents, he or she is said to be a young adult. At this time, the

person becomes self-supporting, independent, and free of parental control. The Navajo term for this is t'aabii ak'inaaldzil and basically means a person is self-supporting. That law applied to the subject of child support determines when a minor becomes emancipated. Navajos became self-supporting earlier in their teens during the first half of this century, because of the Navajo people's minimal reliance on wage income. In contrast, highly developed skills or a post high school education is a must today, if one is to become financially capable of earning a living. For that reason, it takes a minor longer to become independent and self-supporting today. This point may serve as a backdrop for our courts when handling emancipation questions. *Burbank v. Clarke*, 7 Nav. R. 369, 371-372 (Nav. Sup. Ct. 1999).

*Davis v. Means*, 7 Nav. R. 100, 102-104 (Nav. Sup Ct. 1994).

#### YOODEIYA (DIVORCE)

Navajo law is clear that even a prior custom marriage can only be terminated by a divorce. *In the Matter of Slowman*, 1 Nav. R. 142, 143 (1977).

Conceding there must be a divorce prior to remarriage, the question was raised as to the validity of a Navajo traditional divorce. That is, in Navajo tradition there is a means of customary divorce, as there is for customary marriage. Indian custom divorce is recognized under United States law if it is permitted by the law of the Indian Nation involved. *See, "Powers of Indian Tribes,"* 55 Decisions of the Department of the Interior 14, 40-42 (Solicitor's Opinion, 1934).

9 NTC 407 provides:

"No person, married by a Tribal custom, who claims to have been divorced shall be free to remarry until a certificate of divorce has been issued by the Courts of the Navajo Tribe."

This statute was enacted in 1940, and it is a clear prohibition of the of (sic) traditional divorce.

*In Re Documenting the Marriage of Slim*, 3 Nav. R. 218 (Crwn. Dist. Ct. 1982).

When there is a divorce and the couple is living with the wife's family, the husband simply returns to his own mother's unit. Witherspoon, *Navaho Kinship and Marriage*, 75 (1975). If the divorce takes place at the residence area of the husband, then the wife and children go to her mother's unit and the husband remains. *Id.*, at 76. As to dividing property, the couple keeps what is theirs before marriage and the wife keeps the remainder. One researcher summed up the procedure this way:

“Among the people who follow the old laws, the procedure is very simple: the man merely states as he walks out of the Hogan: “Tse-hah-maz (Stone Rolls Out).” He takes with him all the goods that were his before marriage. Any property accumulated during the union remains with his wife.” Van Valkenburgh, “*Navaho Common Law 1*”, 9 Museum Notes 17, 22 (1936).

Another method of divorce was counseling by the wife’s father and, when it appeared there could be no reconciliation, the couple would “split the blanket,” dividing equally the goods they acquired during the marriage. Therefore it would appear that in the absence of an agreement, the wife would take all.

*Apache v. Republic National Life Ins. Co.*, 3 Nav. R. 250, 251 (W.R. District 1982).

. . . we can find that there is a custom of finally terminating a marriage by someone moving, the woman keeping the property when the move is made or the couple making an equal division of marital property before going their ways. The principle of finality requires that the court say there is an event which cuts the ties of the parties, and the event here is the divorce.

Under Navajo custom the woman can simply keep the property of the marriage and send the man to his own family, taking only his own property acquired before the marriage. She also has the option of working out an arrangement with the man. In modern times, the woman has the further choice of coming into a court using Anglo-European ways, and that is what happened here.

*Apache v. Republic National Life Ins. Co.*, 3 Nav. R. 250, 252-253 (W.R. District 1982).

There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common sense. To permit a former spouse to keep such ties that she or he may be said to be lurking behind the Hogan waiting to take a portion of the corn harvest is unthinkable, since each spouse returns to his or her own family after the divorce. Each former spouse should return home after the divorce. Each former spouse should return home after making the break and disturb one another no more.

*Apache v. Republic National Life Ins. Co.*, 3 Nav. R. 250, 253 (W.R. District 1982).

If the marriage does not survive, customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes and religious items) and the rest of the marital property stays with the wife and

children at their residence for their support and maintenance. Whatever gains the marital property generates goes to support the wife and children and to a lesser extent the wife's close relatives. This longstanding customary law is akin to modern spousal maintenance. Therefore, we conclude that Navajo common law gives the Navajo Nation courts authority to award spousal maintenance in appropriate cases even in the absence of statutory law on the subject. Our laws require our courts to apply Navajo common law equally to both spouses when addressing spousal maintenance issues.

*Naize v. Naize*, 7 Nav. R. 269, 271-272 (Nav. Sup. Ct. 1997).

Another observer of the Navajo specifically discussed the effect of divorce. Gary Witherspoon, *Navajo Kinship and Marriage* (1975). He says:

"When divorce occurs between a couple living matrilocally the husband returns to his mother's unit, and the wife and children remain. The same is true in the leadership generation, although divorce is uncommon at the leadership level. \* \* \*

"When the divorce occurs in patrilocal residence, the wife and the children return to the mother's unit. The husband of course remains." *Id.*, 75-76.

Translating Witherspoon, he says that when there is a divorce and the couple is living with the wife's family, the husband goes back to his mother's family and the wife and children remain with her family. When there is a divorce and the couple is living with the husband's family, the husband stays where he lives and the wife and children go back to the wife's family. There are exceptions to this general rule, of course, but they are said to be rare and that they must be approved by everyone concerned, especially the head mothers. *Id.*, 76-77. There are very logical reasons for this Navajo tradition. When families live with the wife's overall family, death and divorce do not affect the living arrangements of the family in the same way as families living with the overall family of the father. *Id.*, 77.

*Lente v. Notah*, 3 Nav. R. 72, 80-81 (Nav. Ct. App. 1982)

## 7. NALYEEH

### NALYEEH – GENERALLY

This Court does not agree with the defendant's contention that a wrongful death action is foreign to the custom and tradition of the Navajo people. Compensation for wrongful death of a human being is and always has been recognized at Navajo common law. The Navajo experts in testimony before this Court, on the issue of whether human loss from a wrongful act is compensable, agreed with the following:

When a Navajo dies from the careless conduct of another, the person responsible for the death pays the immediate family livestock and silver jewelry.

If a person dies in a wrongful death situation, the closer relative would be given sheep to relieve that person from loneliness. How many sheep will be given varies depending upon what will fix the victim's mind. One at fault will say, "I will give this for payment."

In other situations, where there is wrongful death, survivors get together and discuss what compensation should be given to make up for the wrongdoing. When a settlement is reached among the survivors and the one at fault, payment may be made by giving sheep, a belt, or even one strand of beads. Sometimes, survivors may object and demand that more should be given.

Whatever property of value is given for the wrong doing, the paying back, "Nalyeeh " would make the person in sorrow get better, feel better, regain strength, and be able to go forth again in this life.

Finally, the "Nalyeeh" (a paying back of restitution), seems to be used today mostly in connection with what would be considered civil matters, but in the past this symbolic restitution was usually all that would be required of the person who committed a criminal act, as well. Nalyeeh, traditionally, has the power to correct wrongs of any kind . . . The law of the People-Dine 'Bibee Haz'a' nii; Volumes I-IV, Ramah High School, Ramah, New Mexico, 1972, Dan Vicenti, et al.

*Benally v. Navajo Nation*, 5 Nav. R. 209 (W.R. Dist. Ct. 1986)

If, after consideration of the threshold issues described above, the district court reaches the merits of Nez's claim, it must determine whether, as a factual matter, the remedy Nez received from the Arizona workers' compensation regime is substantially different than the remedy compelled by Navajo common law. Under Navajo Common law, damages in personal injury actions are measured by nalyeeh. See *Benally v. Navajo Nation*, 5 Nav. R. 206 (1986). Nalyeeh has been interpreted to include a broad range of damages, including claims such as mental

anguish and pain and suffering. However, nalyeeh is a flexible concept of distributive justice, and it is possible that Navajo common law prevents plaintiffs from seeking to recover twice for the same injury. How nalyeeh should apply in Nez's situation is a matter to be determined by the district court.

*Nez v. Peabody Western Coal Co.*, 7 Nav. R. 416 (1999);

Did Mr. Silversmith's single affidavit sufficiently establish the Navajo common law applicable to this case to support a summary judgment? If someone is injured by the act of another, then the victim has the right to demand nalyeeh or compensation for the injury. *In re Claim of Joe*, 7 Nav. R. 66, 69 (1993). We are not convinced by the analogy that although there may be bootleggers and drunks at Navajo ceremonies, there is no liability by the family that puts up the ceremony or the medicine person who conducts it if someone is injured by a drunk who buys alcohol from a bootlegger. When we said that if someone is injured "by the act of another," we meant a highly factual analysis of relationships, actions, and their effects. It is not sufficient to make a broad analogy, and a Navajo common law analysis must be grounded in fact. *Belone*, supra, at 166. Navajo common law liability has its own special rules, and we will not venture an extensive examination of that liability at this stage of the case, but our judgment statute, 7 NNC § 701 (1995), requires the court to determine whether an injury was the result of carelessness, deliberate infliction, or accident, with varying degrees of damages, depending upon the nature of the injury.

*Jensen v. Giant Industries*, 8 Nav. R. 203 (2002)

While nothing in our Navajo statutory law relieves the NHA from its responsibility to Mr. Tso, there are central principles of Dine' bi o ool' iil (the Navajo Life Way) that affirmatively require the NHA to satisfy the judgment. The NHA has been found responsible for injuring or causing damage to Mr. Tso, and the amount of damages has been determined. Whether that amount is considered "damages," "restitution," or "nalyeeh" is unimportant here; the important thing is that the NHA have respect for others and for decisions made by the Labor Commission, the lower court, and this Court. Dine' bi o ool' iil recognizes our relationships to each other and the responsibilities that those relationships create. There was an employer-employee relationship between the NHA and Mr. Tso. That relationship created duties and responsibilities between the NHA and Mr. Tso. It has been determined that the NHA wrongfully damaged that relationship. There are many ways to address a damaged relationship, and in this case the issue was addressed formally by the Labor Commission and the courts. The NHA now has the responsibility to compensate Mr. Tso as directed by the courts. To disregard the responsibilities of a relationship, or to refuse to make amends as required, is shameful and without rationale. See *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246 (Nav. Sup. Ct. 1990) (recognizing the saying to describe someone who has misbehaved as "He acts as if he had no relatives.").



NALYEEH – CRIMINAL LAW

Our modern criminal law, as it is found in the Navajo Nation Criminal Code, is foreign to traditional Navajo society. Navajos, traditionally, did not charge offenders with crimes in the name of the state or on behalf of the people. What are charged as offenses today were treated as personal injury or property damage matters, and of practical concern only to the parties, their relatives, and, if necessary, the clan matriarchs and patriarchs. These "offenses" were resolved using the traditional Navajo civil process of "talking things out." Nalyeeh (restitution) was often the preferred method to foster healing and conciliation among the parties and their relatives. The ultimate goal being to restore the parties and their families to hozho (harmony).

These concepts supported a request for restitution in a juvenile proceeding in a prior district court case. In *In the Matter of D. P.*, 3 Nav. R. 255, 257 (Crownpt. Dist. Ct. 1982), the court discussed the Navajo traditions of putting the victim in the position he or she enjoyed prior to the offense, punishing in a visible way to show a wrong was punished, and giving an offender a means to return to the community by making good for a wrong. *Id.* The court concluded that "not only is restitution permitted under Navajo custom law, but indeed it was so central to Navajo tradition in offenses that it should be presumed to be required in any juvenile disposition." *Id.* While we agree that restitution is central to Navajo tradition, we do not, at this point, address whether restitution should have presumptive value in criminal cases.

Restitution, a time honored American Indian practice, entered the tribal criminal codes through the early Bureau of Indian Affairs (BIA) Code of Federal Regulations (CFR) (often referred to as "Law and Order Regulations"). For example, a provision in the 1938 BIA regulations states as follows:

In addition to any other sentence the Court [CFR Court] may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured, through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party. Federal Register, at page 956 (May 18, 1938).

In 1958, the Navajo Nation Council adopted, wholesale, the BIA Law and Order Regulations and made it the Navajo Nation Criminal Code. See Navajo Tribal Council Res. No. CJ-45-58 (passed July 18, 1958). Upon adoption, the restitution provision found in the BIA regulations became a part of Navajo statutory criminal law. Restitution, therefore, is firmly embedded in Navajo common law and in modern Navajo criminal law. With this background, we now turn to the issue raised by Blake.

*NN v. Blake*, 7 Nav. R. 233 (1996) (restitution only after evidentiary hearing) (must be evidence raised about amount);

## NALYEEH – INSURANCE

This construction of the statute is also in harmony with principles of Navajo common law. At oral argument, the Court raised the question of whether there are Navajo common law principles to construe the Act. There is a Navajo common law of insurance, which is a method of sharing risks. In the past, when a Navajo was injured, he or she could rely upon family and clan members to provide for the necessities of life. If a Navajo was injured by the act of another, the victim could demand nalyeeh, which is a form of compensation or reparation. In either situation, the amount of support owing by the family, clan, or another (including that person's family and clan) depended upon what they had. Nalyeeh is a form of distributive justice, where the concern is to address need in accordance with resources. Navajos shared the risks of life by giving what they had to those who suffered an injury. What was given depended upon what others actually had.

*In re Claim of Joe*, 7 Nav. R. 66 (1993) (type of insurance);

First National holds the bag. The Board trusted First National to hold its money, and it paid extra for five vehicles. The Board placed its trust in First National and expected that if the Board's relative was hurt, she would receive benefits in accordance with her injury. Benalli also argues that First National owes her nalyeeh as the uninsured motorist's "relative." In a sense that is true. When there is an injury, Navajo common law requires the negotiation of the amount of nalyeeh[3] based upon the effects of the injury and the ability of the tortfeasor and his or her relatives to make things right. The Navajo maxim is that it should be enough "so there will be no hard feelings."...

In this case, First National was prepared to pay based on stacking. Benalli's expert stated that the premiums paid by the Board were similar to those paid by an individual who owned more than one vehicle. Benalli's need exceeded the amount set aside for one vehicle, but in fact First National, as the uninsured motorist's "relative," had the ability to pay more, based upon the sums the Board put into the money bag.

We observe that while the counsels for the parties made excellent arguments about nalyeeh, the best argument was that made in Navajo by Benalli herself. She introduced herself by clan, and clan relation is the basis of nalyeeh. If a person is hurt, he or she looks to clan relations for help. The tortfeasor and his or her relatives are expected to set things right in accordance with the hurt. That is done on the basis of the ability to help, and in this case, that ability is measured by the amount of money put into the bag and the understanding that there are certain persons who should benefit from the money in the bag.

[Note 3 - While the term nalyeeh is often used in the sense of an amount of payment, it actually expresses the mode of payment, i.e., the respectful negotiation of the amount an offender should pay based upon the injured person's needs and the offender's ability to pay, including the ability of relatives and clan members.]

*Benalli v. First National Insurance Co.*, 7 Nav. R. 329 (1998) (effect on insurance);

The trial court's discretion is limited by "custom." *Little v. Begay*, 7 Nav. R. at 354. The Navajo common law doctrine of nalyeeh is applicable to this case. We have said that nalyeeh is based upon the effects of the injury, and it should be enough so that there are no hard feelings. *Benalli v. First Nat'l Ins. Co. of America*, 7 Nav. R. 329, 338 (1998). We compared insurance to a bag with monies available to see to the plaintiff's needs in that case. *Id.* at 337-338. There are procedures for arriving at nalyeeh that involve the respectful talking out of a dispute. The person requesting nalyeeh should be willing to lay out all the facts of the problem and the injury, and the listener should acknowledge the request to talk out the problem and then participate in good faith.

These principles were obviously violated when State Farm refused to negotiate in good faith. Singer told the district court of his difficulties attempting to negotiate a settlement and to get a fair offer. He then pointed out that any delay was not his fault. We have before us the history of Singer's claims and offers and State Farm and Nez's attorney's refusal to negotiate in good faith and disrespectful response which led to a trial. It is appropriate to award prejudgment interest in this case so there are no hard feelings.

*Singer v. Nez*, 8 Nav. R. 122 (2001);

## NALYEEH – WORKERS COMP

We now take this opportunity to explain the principle of nalyeeh. It does not carry the same meaning as "the adequate award" in contemporary personal injury practice. See, M. BELLI, MODERN TRIALS § 67 .1 (:1982) . Generally, nalyeeh means compensation for an injury. However, it has a deeper meaning of a demand to "make right" for an -injury and an invitation to negotiate what it will take so that an injured party will have "no hard feelings." *Benalli v. First Nat'l Ins. Co. of Am.*, No. SC-CV-45-96, slip op. at 15-17 (Nav. Nat. Sup. Ct. June 23, 1998). It is possible that in some k'e relationships, symbolic compensation will be enough so that there are "no hard feelings," because the parties discussed the injured person's needs, the needs and resources of the tortfeasor, and the relationship of the parties. In most instances where an employee receives a workers' compensation award, the nalyeeh principle should be satisfied, because there is a method of determining the nature of the injury and the monetary needs of the worker.

*Benally v. Big A Well Service*, 8 Nav. R. 60 (2000);

The stated public policy is in accord with Navajo common law principles. In the case of *In Re Claim of Ray Joe Jr.*, we identified a Navajo common law principle that applies here: "If a Navajo was injured by the act of another, the victim could demand nalyeeh, which is a form of compensation or reparation." 7 Nav. R. 66, 69 (1993). This means the injured person has a personal right to seek nalyeeh for physical injuries contracted. It is only logical that the injured person would know how the injuries have affected his or her life, family and finances. The Navajo Nation government, in comparison, cannot be said to have experienced the injured person's pain. The tortfeasor has a reciprocal obligation under Navajo common law: "The tortfeasor and his or her relatives are expected to set things right in accordance with the hurt." *Benally v. First Nat'l Ins. Co. of America*, 7 Nav. R. 329, 338 (1998). Thus, a person injured by a tortfeasor is entitled under Navajo common law principles to compensation for his or her injuries and should not be stripped of that right prematurely...

We realize that section 1032(B) does not expressly state what happens to the worker's interest in recovery beyond the amount of benefits paid, such as claims for pain and suffering and emotional distress. We again tap the Navajo common law principle of nalyeeh to conclude that the injured worker keeps an interest in such claims for the duration of the statute of limitations. Nalyeeh is "a paying ... of restitution." *In re: Estate of Benally v. Navajo Nation*, 5 Nav. R. 209, 212 (Window Rock Dist. Ct. 1986). It is a form of just compensation paid to an injured party and is determined by the nature of the injury and the ability of the wrongdoer to restore the injured party. As this case illustrates, a worker would need to file a formal action against a corporate defendant to realize nalyeeh.

The nalyeeh principle gives the injured worker a right to retain an interest in recovery against a tortfeasor. Largo's right to nalyeeh is his right to recover for the additional injuries that were not covered by the workers' compensation benefits. The tortfeasor who is liable for the injured worker's injuries and who is in a position to pay for the injuries remains liable to the injured worker even after the worker's claim passes to the Navajo Nation. A worker could not be justly compensated for injuries if his or her interest in recovery disappeared once the Navajo Nation took control of the claim; this would contradict the nalyeeh principle.

*Largo v. Eaton Corp*, 8 Nav. R. 96 (2001);

We have previously utilized the Navajo common law doctrine of nalyeeh as the basis for permitting an independent action aside from workers' compensation benefits in *Nez*, 7 Nav. R. at 421, and we will discuss that doctrine as an equitable principle. The appellants have also touched on that doctrine in their arguments. The Navajo Nation courts, as it is with other courts, apply

ancient principles of equity, and they also apply traditional Navajo equitable principles.

Nalyeeh is a unique Navajo principle that is used to redress civil wrongs. It is akin to, but not quite the same, as the Anglo-European concepts of restitution and reparation. The similarity is that nalyeeh requires payment or compensation to people who are injured, but it is quite different in its procedures. That is, when courts require the payment of restitution or reparation for an injury, they assess the injured person's actual damages and attempt to make that person whole. Nalyeeh has an additional procedural aspect which addresses relationships. Nalyeeh does not simply require restitution or reparation, but calls upon the person who has caused an injury or is responsible for an injury to talk out both compensation and relationships. It is relevant to the case before us that we have compared nalyeeh to insurance, because of the insurance aspects of workers' compensation. See, In re Claim of Joe, 7 Nav. R. 66, 69 (1993).

While we prefer to apply Navajo common law because law is based on values, and the Navajo common law incorporates the basic values of the Navajo People, there are problems when Navajo common law is taken out of its original context. That is particularly true of the doctrine of nalyeeh. It is not simply a legal equitable doctrine to be applied by a court as an impartial decision-maker, but a relationship value. We touched on the relationship aspect in a prior decision when we said that the amount of nalyeeh to be paid should be "enough so that there are no hard feelings." Benalli v. First Nat'l Ins. Co. of America, 7 Nav. R. 329, 338 (1998). The Navajo Nation courts can use the doctrine to assess the adequacy of damages and to assure that the parties to the dispute are restored to a harmonious relationship. In this case, nothing has been advanced to suggest that the amount of workers' compensation benefits awarded does not comport with the doctrine of nalyeeh. In the case before us, the district court chose to ignore the parties' contentions on the cause of the death and the amount of damages which resulted using a commonsense doctrine that it would be unfair for the appellants to choose one remedy, receive its benefits, and then seek another. Is there a basis for that decision in Navajo common law?

Law is about expectations. It deals with the agreements of parties. It regulates the relationships of people in a just society. We have said that Navajo common law requires people to keep their word and honor their promises. See, Ben v. Burbank, 7 Nav. R. 222, 224-226 (1996). In this particular situation, the appellants' decedent went to work at a coal mine understanding that if he was injured, the mining company would pay for the injury under a workers' compensation program. The appellants sought and received death benefits under that program, and the company kept its word by paying them, as agreed. The wrongful death suit attempted to reject the agreement the parties reached and thus broke it. Accordingly, the district court was correct in dismissing the wrongful death suit on equitable principles as a matter of Navajo common law. This is not a situation where the appellants can point to some unfair

arrangement, an unconscionable law, an unjust enrichment on the mine's part, or some other injury which justifies refusing to give comity recognition to a decision made under state law. The district court had the parties' contentions before it on both the cause of the decedent's death and the adequacy of the New Mexico workers' compensation remedy, and chose instead to reject the claim under principles of equity. The district court's decision was correct as a matter of law.

*Benally v. Broken Hill*, 8 Nav. R. 171 (2001);

In *Largo* we recognized the right of a tribal employee to seek nalyeeh from a third-party under certain procedural requirements set out in 15 N.N.C. § 1032. *Largo*, No. SC-CV-09-99, slip op. at 9-10. We stated that the injured party's "right to nalyeeh is his [or her] right to recover for additional injuries that were not covered by the workers' compensation benefits." *Id.* at 9 (emphasis added). We recognized that the third-party has a reciprocal obligation "to set things right in accordance with the hurt," and therefore "a person injured by a tortfeasor is entitled to compensation for his or her injuries and should not be stripped of that right[.]" *Id.* at 6. Therefore, an injured party could seek nalyeeh from a third-party, and receipt of workers' compensation would not be a bar.

We believe the same right to seek damages from a third-party tortfeasor, notwithstanding receipt of workers' compensation, applies to employees of private corporations operating within the Nation. Assuming liability, the third-party has obligations "to set things right" that have not been fulfilled by the receipt of workers' compensation by the employer. Therefore we hold that an injured employee is not barred from seeking nalyeeh from a third-party tortfeasor merely because he or she has received workers' compensation from his or her employer. Nalyeeh is not satisfied merely by receipt of workers' compensation from the employer when a third party has some responsibility for the accident.

We leave the measure of nalyeeh in this case, if liability is found, to the sound discretion of the district court. We defer the issue of nalyeeh to the district court because it is contingent on a number of factors, such as how much the responsible party can pay, the needs of the injured party, the extent to which the worker was negligent, and other factors.

*Benally v. Mobil Oil Corporation* (Sup. Ct. of the Navajo Nation 2003)

*Benally v. Mobil Oil*, 8 Nav. R. 387 (2003);

## TALKING THINGS OUT

Furthermore, speech should be delivered with respect and honesty. This requirement arises from the concept of k'e', which is the "glue" that creates and binds relationships between people. To avoid disruptions of relationships, Navajo common law mandates that controversies and arguments be resolved by "talking

things out." This process of "talking things out," called hoozhoojigo, allows each member of the group to cooperate and talk about how to resolve a problem. This requirement places another limitation on speech, which is that a disgruntled person must speak directly with the person's relative about his or her concerns before seeking other avenues of redress with strangers.

*Navajo Nation v. Crockett*, 7 Nav. R. 237 (1996)

## NALYEEH – EMPLOYMENT

In the employment context, relationships are established according to the personnel policies, and other instruments. When an employee has a complaint about a supervisor, according to Navajo custom and tradition, he or she should first approach the supervisor and discuss the problem in a respectful manner. Moreover, under the Navajo common law concept of nalyeeh, the employee should not seek to correct the person by summoning the coercive powers of a powerful person or entity, but should seek to correct the wrongful action by "talking things out." The employee should not seek a remedy from a stranger, but should rather explain the problem to the person or one of his or her relatives and ask that "things be put right." If this method proves unsuccessful, then the employee also has access to an internal employment grievance process. Even in this formal, modern process for addressing grievances, the traditional rules of respect, honesty, and kinship apply.

*Navajo Nation v. Crockett*, 7 Nav. R. 237 (1996)

Based on Navajo statutory law and the Navajo Common Law doctrine of nályééh, we do not apply the parties' "bad faith" approach to this case, but hold that pre judgment interest is an element of damages regardless of the conduct of the party responsible for compensation or the liquidated or unliquidated nature of the claim. The Navajo Nation Code guides the award of damages in tort cases by mandating that the "judgment shall fairly compensate the injured party for the loss he [or she] has suffered." 7 N.N.C. § 701(B) (1995).[2] The Code does not define "fairly compensate" however, and it is unclear from the plain language, and therefore we look to Diyin Nohookáá Dine'é Bi Beehaz'áanii (Navajo Common Law) to assist in our interpretation. See Tso, No. SC-CV-10-02, slip op. at 9.

The Navajo Common Law doctrine relevant to our analysis is nályééh. See *id.* (interpreting Navajo Preference in Employment Act provision on back pay compensation in light of nályééh). Nályééh is the Navajo Common Law method by which parties come to an agreement on compensation for an injury. See *Nez y. Peabody Western Coal Co., Inc.*, 7 Nav. R. 416, 421 (1999). Nályééh is a unique Navajo doctrine based on the effects of the injury. *Singer*, No. SC-CV-04-99, slip op. at 8. As the means by which Navajos customarily compensate injuries, Navajo Nation courts use nályééh to assess the adequacy of damages

in tort claims. See *Benally v. Broken Hill Propriety, Ltd.*, No. SCCV-79-98, slip op. at 4 (Nay. Sup. Ct. September 21, 2001). As previously discussed, nályééh includes the responsibility to respectfully talk out disputes. See *supra*, at 4. While a "flexible concept of distributive justice" depending on the circumstances of the injury and the positions of the parties, Nez, 7 Nay. R. at 421, a central purpose of nályééh is to restore harmony between the parties by adequately compensating the injured person or persons. *Benally*, No. SC-CV-79-98, slip op. at 4. Therefore, the amount of compensation arising out of that process "should be enough so that there are no hard feelings." *Singer*, No. SC-CV-04-99, slip op. at 8. Based on these principles, nályééh incorporates what might be expressed in Anglo terms as a procedural requirement and a substantive result.

While *Singer* emphasized the procedural aspect of nályééh to recognize pre-judgment interest, the award of interest is consistent with the substantive result as well, as it is "an element of complete compensation" designed to "make whole" an injured person. *Singer*, No. SC-CV-04-99, slip op. at 6. In an era when Navajos increasingly use bank accounts, take out loans on vehicles and homes, and deal with interest on money in a variety of other circumstances, accounting for the time value of money in calculating damages enters into the process of restoring harmony by fully compensating the injured. Cf. *Benally v. Navajo Nation*, 5 Nay. R. 209, 212-213 (W.R. Dist. Ct. 1986) (noting change in value and expectation of Navajo people to money in context of wrongful death compensation under nályééh). The retention of money during settlement negotiations and later litigation means that the amount of compensation is less than what the injured party would have received had the payment been made when requested, contributing to hard feelings and disharmony when resolution is delayed. We therefore conclude that pre-judgment interest is not dependent on the conduct of the parties (except to the extent that the responsible party continues to delay payment) or whether the amount of damages may be known with certainty, but is a central element of full compensation that makes sure that an injured party has no hard feelings. The Kayenta District Court therefore abused its discretion when it declined to award pre-judgment interest under nályééh, as pre-judgment interest is a mandatory substantive element of full compensation. The only outstanding issues are then (1) the interest rate, and (2) the time period the interest accrued.

While pre-judgment interest is required and therefore not in the discretion of the district court to deny, the interest rate depends on the circumstances of the case, and is within the discretion of the district court to calculate and apply. The rate of pre-judgment interest as an element of nályééh is affected by the ability of the party responsible for compensating the injured to pay. See *In re Claim of Joe*, 7 Nay. R. 66, 69 (1993). The rate is also affected by outside economic factors concerning the interest rate available at the time that the interest accrues, as it is that rate of return which is lost when compensation is delayed. This Court announced a process in *Singer* that first allows the plaintiff to propose an interest rate, and puts the burden on the defendant to show the rate is unreasonable. *Id.*



at 9. In the context of insurance, we suggested that the interest rate earned by the insurance company during the claim process was a good method to establish a reasonable interest rate if the defendant objects to the rate proposed by the plaintiff. *Id.* We reiterate that this method is appropriate and in the sound discretion of the district court to apply.

The time period within which to apply interest also depends on the circumstances of the case. We follow *Singer* to hold that in tort cases the date the interest begins accruing is the date the request for compensation is received by the party responsible for payment. See *id.* Here, in the context of interpleader, we hold that the period for calculating interest ends when the insurance company actually deposits the money in the court, and therefore ends its control over the funds. In non-interpleader cases, the date is the date judgment on damages is rendered by the court. As discussed, the amount of interest within this period, based on the *Singer* procedure, is within the district court's discretion, which we will not reverse absent a showing of an abuse of that discretion.

*Allstate Indemnity v. Blackgoat*, 8 Nav. R. 627 (2005);

## 8. KEIYA (LAND)

### CUSTOMARY TRUST – GRAZING RIGHTS

#### COMMUNAL OWNERSHIP

To understand the Navajo customary trust, we must examine Navajo land use. Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajos have always occupied land in family units, using the land for subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership. Grazing rights are a land use right, but they are not individual rights as such. Navajo families and relatives occupy an area and graze animals for the benefit of the group. A grazing permit is not a form of land title, but the right of a named permittee to graze a certain number of animals in a large common grazing area. The right is measured by "animal units" or "sheep units."...

The judges of the former Navajo Court of Indian Offenses understood the concepts of communal land use and grazing permit tenure well. They also understood that the Navajo Indian agent, and later the Bureau of Indian Affairs agency superintendent, operated using a different set of rules. American law generally establishes the rights of individuals, and does not recognize the rights of groups. Therefore, the Navajo judges knew that a grazing permit would have to be in the name of one individual. However, because Navajos share grazing rights with others, there had to be a method to protect the group. That method is the Navajo "customary trust" for grazing permits, which was developed by the Navajo judges.

*Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991)

#### TRANSFER (PROBATE) OF GRAZING PERMIT

The usual pattern of the trust is for an elderly Navajo permittee to give the permit to a child, to be held "in trust" for other children or grandchildren. Usually the most responsible child, and one who makes actual use of the permit, will hold the permit in his or her own name, but to be shared and used by the other children. The Navajo courts follow the same process in probates, awarding it to the "most logical heir," who is personally involved in using the permit. In re Estate of Benally, 5 Nav. R. 174, 179 (1987). The "trustee" is therefore a person who holds a grazing permit for the benefit of those who actually graze sheep or cattle on the land. That has nothing to do with the American common law trust.

*Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991)

#### LAW OF PREFERENCE

Navajo Nation grazing law is based upon traditional expectations, so the Navajo common law takes precedence over American common law. The former Navajo Court of Indian Offenses applied the Navajo common law trust, and American trust language was incorporated to implement it. That is because Navajo judges knew they would have to supply a justification to get Bureau of Indian Affairs officials to honor their decrees. Unfortunately, that causes confusion in the minds of some officials, and prompts us to further clarify the Navajo trust.

*Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991)

## NO FRAGMENTATION

While the 1979 probate decree is valid, because the court had both personal and subject matter jurisdiction, that does not mean that it was correct. The presiding judge could not have anticipated that we, in 1987, would rule that "once a customary trust is established, those involved in the trust cannot normally devise their interests in the land or grazing permits to their heirs, as that would cause the rights to be split up among more and more owners. Rather, the permits remain intact, and the last surviving member of the original trust will end up owning the entire permit." *In re Estate of Benally*, 5 Nav. R. at 180.

*Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991)

## KEEDAW FACTORS

### MOST LOGICAL HEIR RECEIVES GRAZING PERMIT

### USE IT OR LOSE IT (LAND MUST BE PUT TO BENEFICIAL USE)

Another aspect of traditional Navajo land tenure is the principle that one must use it or lose it. In *In re Estate of Benally*, we summarized the land policies of the Navajo Nation as follows: (1) animal units in grazing permits must be sufficiently large to be economically viable; (2) land must be put to its most beneficial use; (3) the most logical heir should receive land use rights; (4) use rights must not be fragmented; and (5) only those who are personally involved in the beneficial use of land may inherit it. 5 Nav. R. at 179. All these land policies are designed to assure that Navajo Nation lands are used wisely and well, and that those who actually live on them and nurture them should have rights to their use.

*Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991)

## KEIYA BEE IINA (LIFE WITH LAND)

## LAND BELONGS TO THE CLANS

## LAND BELONGS TO THOSE WHO LIVE ON IT

There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would [not] exist and without which the Navajo People would be caused to disperse like the Jewish People following the fall of Jerusalem. Land is basic to the survival of the Navajo People. While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival - the Navajo People. *Tome v. Navajo Nation*, 4 Nav. R. 159, 161 (Window Rock D. Ct., 1983).

## CUSTOMARY USE INTEREST

The ownership of the land always remains vested in the Navajo Nation as a whole, and cannot be wrested away through adverse possession or prescription by individual occupiers. *Yazzie v. Jumbo*, 5 Nav. R. 75, 77 (1986). However, we have recognized the custom that individual Navajos who use or improve the land with buildings, corrals, fences, etc., create for themselves a customary use ownership interest:

Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use area concept. *Estate of Wauneka Sr.*, 5 Nav. R. 79, 81 (1986). Moreover, the customary use ownership concept encompasses the right to sell or otherwise dispose of the improvements made on the land:

The native type of dwelling follows the same rules; ownership is vested in the builder. The free use of buildings by any family member is always implied.

The owner or owners, however, have the right of disposal, the right of sale and removal, of forbidding others the use of the premises (corrals, shelters, etc.), and of exacting damages for willful destruction...

*Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991)

## DISTRIBUTION OF PROPERTY BASED ON "PRODUCTIVE" OR "NON-PRODUCTIVE"

The meaning of these terms is actually that groups of Navajo who are related by blood or clan will live together for mutual protection and the common

good, and the important point is that there is a difference in the distribution of property, depending upon whether it is an essential piece of property for the maintenance of the camp.

There is a division of property into productive goods and nonproductive goods. Productive goods, such as sheep and land (including land permits), are held for the benefit of the individual and the camp, and upon death such property is held for the benefit of those living in the camp. Nonproductive goods (jewelry, tools and equipment, nonsubsistence livestock such as horses) belong to the individual. Cash can present a special problem because it can be treated either as productive property or nonproductive property. Treated as productive property, cash would be held in the camp for its economic security as a unit. Seen as nonproductive, cash would be distributed among family members.

Nonproductive goods are distributed by the camp where the decedent resided at the time of his death. A gathering is held, supervised by an agreed representative, and there is a discussion of how the property should be divided. This process may be assisted by a naat'aanii or some other community leader. (The peacemaker of the Navajo Peacemaker Court could also be used). The property is then distributed with a preference to the immediate family members of the decedent, and the comparative need of claimants is also considered. The principle things considered in the distribution are residence in the camp and things considered in the distribution are residence in the camp and need, although other relatives not living in the camp may participate.

Under the old ways children did not necessarily have any preference in inheritance because of the fact they usually had a share in the family herd and because of the fact that Navajo children are always cared for by their family. The father's family would recognize that his children were "born for" their clan and would help if it was needed.

\* \* \* \*

[T]he object of Navajo common law probate is to benefit the camp or residence group as a unit in the case of productive property and to benefit those living together and those in need in the case of nonproductive property.

*In the Matter of the Estate of Boyd Apachee*, 4 Nav. R. 178, 182-183 (WR Dist. Ct. 1983).

## 9. HOOCHXO' (PROBATE)

### ORAL WILL

It is a well-established custom that a Navajo may orally state who shall have his property after his death when all of his immediate family are present and agree that such a division will be honored after his death. We hold, therefore, that unless all the members of his immediate family are present and agree a Navajo cannot make an oral will.

*In the Matter of the Estate of Ray Lee*, 1 Nav. R. 27, 31-32 (Nav. Ct. App. 1971).

“(I)mmediate family” means those related to decedent by blood ties, adoption or marriage, and they must be living in the same household with decedent at the time he makes an oral will. Blood relation alone does not make one a member of the immediate family. Therefore, “immediate family” is clearly defined in *Benally* ( *In Re Estate of Chisney Benally*, 1 Nav. R. 219 (1978 ).) to include members of the same household who are bound by ties of relationship to decedent.

*In the Matter of the Estate of Joe Thomas*, 5Nav. R. 232, 233 (Nav. Ct. App. 1986).

We are limiting this rule on the immediate family to cases involving oral will because the Court is mindful of the Navajo concept of extended family. This rule is adopted because it would work too great a hardship on the Navajo People to require the presence of all who might be considered immediate family by the Navajo extended family concept. Since many Navajo cannot write, cannot afford to have an attorney write a will, and do not understand the concept of a written will, it is important that there be some alternate method by which a person may devise his property.

*In Re Estate of Chisney Benally*, 1 Nav. R. 219, 223 (Nav. Ct. App, 1978)

An oral will is a lifetime statement of a decedent’s wishes on the disposition of his or her property after death. English-American common law addressed problems of frauds, contention and the reliability of hearsay statements of a decedent’s oral wishes by requiring that wills be in writing and witnessed (with the exception of holographic will). Our courts rejected the English-American rule, as they have the authority to do, in favor of honoring the wishes of Navajos in accordance with ancient custom. The oral will is a time-honored Navajo practice and the People expect their courts to acknowledge and enforce it in modern probate proceedings.

*In Re Estate of Howard*, 7 Nav. R. 262, 263-264 (Nav. Sup. Ct. 1997).

## DIYIN DINE'E BI (UNBORN CHILD BELONGS TO HOLY PEOPLE; DECEASED BODY BELONGS TO THE HOLY PEOPLE)

Although the present case is not a burial case, the rule expressed in *Chee* and *Laughter* applies (footnote omitted). In the present case the parties are asserting rights and claims that arise from the death of an unborn child. Under Navajo fundamental laws of Dine, however, the Dine People can have no right nor claim that arises from the death of an unborn child because from a Navajo perspective, an unborn child, like the body of a deceased person, belongs to the Holy People. During the existence of a person, there are two times when the person is considered to belong to the Holy People: before birth and after death. No human person can claim ownership of an unborn child, nor a deceased person, for doing so equates to requesting for more death to occur. It is for this reason that Navajos have strict rules regarding the unborn and the deceased. For example, a pregnant parent cannot buy possessions for an unborn baby or give it a name because the unborn baby still belongs to the Holy People. When an unborn baby dies prenatally, then the rules of death also apply and great care must be taken. These rules are in place for the protection of the surviving members of the family, and the Holy People. Therefore, there can be no rights arising from the death of an unborn child.

Because great care and respect must be taken with regard to an unborn child's death, because an unborn child belongs to the Holy People, to avoid harm to the surviving family members of the decedent, to protect the Navajo People and the court, the petitioners' claims with respect to the unborn child must be denied. Plainly, the petitioners don't have any rights with respect to the deceased unborn child under the fundamental laws of Dine.

*Jensen v. EXC, Inc.*, No. KY-CV-171-06, slip op at 4 (Kay. Dist. Ct. January 21, 2009).

## BAHASTI' (RESPECT FOR KWA'ASINI (DECEASED RELATIVES))

### NO DELAY IN DISTRIBUTION OF PROPERTY

The Court further reminds the Family Court and the children of the deceased parties that under Dine fundamental law, custom and practice, affairs of the deceased need to be taken care of immediately and with the utmost care. There is a strong principle not to prolong these matters out of respect for the deceased. Burial and property distribution should occur without dispute to protect surviving family members. Furthermore, death is not a proper and lively thing to discuss. *In re Estate of Tsosie*, 4 Nav. R. 198, 200 (W.R. Fam. Ct. 1983). It is therefore troubling that the parties submit pleadings referring to the deceased as if they were alive.

*Hall v. Watson*, 9 Nav. R. 235 (2009).

## DEATH CUSTOM

It is the Navajo custom to discuss the deceased's property matters among the family (at a family meeting after the funeral of the deceased).

*Lee v. Begay*, 1 Nav. R. 27,30 (Nav. Ct. App. 1971).

Under our rules Navajo custom, if proven, controls the distribution of intestate property. Custom takes priority even if it conflicts with our rules of probate.

*In the Matter of the Estate of Wauneka*, 5 Nav. R. 79, 82 (Nav. Sup Ct. 1986).

## SOME OF DECEASED'S PROPERTY IS BURIED WITH HIM OR HER

## SOME OF DECEASED'S PROPERTY IS BURNED

. . .the burning of the decedent's clothing and placing some property with him at the time of burial are in accord with the Navajo common law. Some things are always left with the deceased because "the things were his or hers. More was added out of love for (the) dead one." Barsh, supra, p. 13.

*In the Matter of the Estate of Boyd Apachee*, 4 Nav. R. 178, 183 (WR Dist. Ct.

## DISTRIBUTION OF PROPERTY BASED ON "PRODUCTIVE" OR "NON-PRODUCTIVE"

The meaning of these terms is actually that groups of Navajo who are related by blood or clan will live together for mutual protection and the common good, and the important point is that there is a difference in the distribution of property, depending upon whether it is an essential piece of property for the maintenance of the camp.

There is a division of property into productive goods and nonproductive goods. Productive goods, such as sheep and land (including land permits), are held for the benefit of the individual and the camp, and upon death such property is held for the benefit of those living in the camp. Nonproductive goods (jewelry, tools and equipment, nonsubsistence livestock such as horses) belong to the individual. Cash can present a special problem because it can be treated either as productive property or nonproductive property. Treated as productive property, cash would be held in the camp for its economic security as a unit. Seen as nonproductive, cash would be distributed among family members.



Nonproductive goods are distributed by the camp where the decedent resided at the time of his death. A gathering is held, supervised by an agreed representative, and there is a discussion of how the property should be divided. This process may be assisted by a naat'aanii or some other community leader. (The peacemaker of the Navajo Peacemaker Court could also be used). The property is then distributed with a preference to the immediate family members of the decedent, and the comparative need of claimants is also considered. The principle things considered in the distribution are residence in the camp and things considered in the distribution are residence in the camp and need, although other relatives not living in the camp may participate.

Under the old ways children did not necessarily have any preference in inheritance because of the fact they usually had a share in the family herd and because of the fact that Navajo children are always cared for by their family. The father's family would recognize that his children were "born for" their clan and would help if it was needed.

\* \* \* \*

[T]he object of Navajo common law probate is to benefit the camp or residence group as a unit in the case of productive property and to benefit those living together and those in need in the case of nonproductive property.

*In the Matter of the Estate of Boyd Apachee*, 4 Nav. R. 178, 182-183 (WR Dist. Ct. 1983).

## **10. ALHA'DEET'A (CONTRACTS)**

### FORCE OF LAW

Navajo customs cannot be applied in a vacuum, and they must be applied with logic in accordance with present circumstances. It is not correct to say that Navajo custom cannot be applied to situations such as this, where there are contracts binding commercial entities from the outside that don't understand local situations. That is nonsense, because Navajo law and tradition is as much the law of the Navajo Nation as a tribal council resolution or a statute in the Navajo Tribal Code. Contracts of insurance are made subject to the local law of contract and insurance, and that local law determines the validity and construction of contract. 43 Am.Jur.2d, Insurance Section 29.

*Apache v. Republic National Life Ins. Co.*, 3 Nav. R. 250, 252 (W.R. Dist. Ct. 1982).

### ROLE OF K'EH

### WORDS ARE SACRED

Appellant admits there was an oral agreement and Navajo policy dictates that she had a duty to fulfill her promise to Appellee. "Certainly the Navajo Nation's policy is not to encourage people to breach oral contracts or written contracts. It is against Navajo policy for people to literally breach their contracts." *Anderson Petroleum Serv. Inc. v. Chuska Energy and Petroleum Co.*, 4 Nav. R. 187,191 (W.R. Dist. Ct. 1983). This sets forth the Navajo traditional concept that when people make promises between one another, oral or written, they should honor those promises.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

### ROLE OF K'EH

### LAW OF PREFERENCE

The fact that the parties were related supports the position that Navajo common law should take precedence in this case. The parties may not be close relatives under Anglo standards, but they are closely related under Navajo principles governing clan relationships. "The Navajos have very strong family ties and clan ties." *In the Matter of the Interest of J.J.S.*, 4 Nav. R. 192, 194 (W.R. Dist. Ct. 1983). These parties are related by clan and Appellee trusted Appellant to pay for the work because of this relationship. Appellee also gave Appellant numerous opportunities to pay the debt owed to him, by sending her collection letters, which she did nothing about. Thus, Appellee saw the courts as his only means of relief.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

## ROLE OF K'EH

### WORDS ARE SACRED

“The Navajo law builds on relationships. It works because of them. [The] people’s conduct is guided by family and clan relationships. Therefore, a clan is a legal ‘institution’ . . . “ Lecture by the Honorable Robert Yazzie, *Traditional Navajo Dispute Resolution In The Navajo Peacemaker Court* (August 6, 1994). Appellant is legally obligated to Appellee, not only because of their oral agreement, but also because of their clan relationship. It would be unjust and immoral to go against such a relationship and, by breaching their agreement, Appellee has gone against it.

“The importance of his relatives to the Navaho (sic) can scarcely be exaggerated. The worst that one can say of another person is, ‘he acts as if he has no relatives.’ Conversely, the ideal behavior often enunciated by headmen is ‘Act as if nobody was related to you.” *Lente v. Notah*, 3 Nav R. 72, 80 (1982) (citing Clyde Kluckhohn and Dorothea Leighton, *The Navajo*, 100 (Rev. ed. 1974). This brings forth the norm that one must respect his or her relatives in order to maintain social order. Appellant goes against this norm by not following through on the agreement she made with her relative, Appellee.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

## NALYEEH

### ROLE OF K'EH

To maintain social order, the oral agreement made must be honored and the injured party must be compensated. The parties had a binding oral agreement which obligated Appellee to provide construction work on Appellant’s house, and she, to pay for his services. She breached the oral agreement by not paying for the work. The Navajo way is to compensate the injured party, Appellee, and restore and maintain the relationship between the parties.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

## ALHA'DEET'A (AGREEMENT)

### ROLE OF K'EH

Even though the agreement between the parties was not reduced to writing, it does not release Appellant from her obligation to pay for the work. Most transactions within the traditional Navajo culture are based on oral

agreements. To maintain this tradition, certain barter transactions are exempted from the Code. 5A Navajo Nation Code § 2-201 (1995). Appellee did not see a need to put anything in writing because of the relationship they had as relatives. Often, this is the way oral contracts are made and enforced between traditional Navajos. A handshake usually consummates the agreement.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

## WORDS ARE SACRED

Appellant's brief repeatedly discussed trying to calculate the specific date the contract went into effect in order to support her argument that the district court applied the wrong statute of limitations. However, there was very little discussion as to why she was refusing to pay for the work done. It appeared that Appellant was hiding behind her statute of limitations claim in order to avoid paying for the work. This is not the Navajo way.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

## NALYEEH

## ROLE OF K'EH

"[T]he end goal of Navajo justice is helping them live together well. Our justice maxim is this: *hazho' sokee'* – stay together nicely." Lecture by the Honorable Robert Yazzie, *Traditional Navajo Dispute Resolution In The Navajo Peacemaker Court* (August 6, 1994). Considering the parties were related and the goal of Navajo justice is helping people live together, the only logical outcome would be for Appellant to compensate Appellee for the work he did to maintain a relationship between them.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

## FORCE OF LAW

## ROLE OF K'EH

## NALYEEH

## LAW OF PREFERENCE

"The soul of this Court is to apply Navajo Tribal law, especially where our custom and tradition are appropriate." *Sells v. Sells*, 5 Nav. R. 104, 108 (1986). By coming to this decision, uniformity and consistency will develop in Navajo law. Uniformity will develop when Navajo traditions are applied to agreements made between persons, whether it be oral or written. They will be obligated to each

other to fulfill their portion of the agreement. To do otherwise is against the basic principle of *k'e* and the one breaching the agreement will have to compensate the injured party. This will also encourage consistency in the fact that Navajo common law will be the first law applied in our courts.

*Ben v. Burbank*, 7 Nav. R. 222, 224-226 (Nav. Sup. Ct. 1996).

WORDS ARE SACRED

[E]ach provision of a contract must be given force and effect:

It is the fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions, including the signatures, must be given meaning, and force and effect, if that can consistently and reasonably be done. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless, meaningless, or inexplicable.

17A Am.Jur.2d *Contracts* Section 386 (1991); see also Farnsworth on *Contracts* § 7.11 (1990). This is consistent with the Navajo Common Law principle that every word is powerful, sacred, and never frivolous. Under this principle, a contracting party cannot give their word in one section and take it back in the next.

*Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, 8 Nav. R. 501, 505-06 (Nav. Sup. Ct. 2004).

WORDS ARE SACRED

Navajos take contracts very seriously, and this Court will enforce them. Words are sacred and never frivolous in Navajo thinking. *Office of Navajo Labor Relations ex rel. Bailon v. Central Consolidated School District No. 22*, 8 Nav. R. 501, 506 (Nav. Sup. Ct. 2004), and promises made must be fulfilled absent some compelling reason otherwise, see *Allstate v. Blackgoat*, 8 Nav. R. 660, 668 (Nav. Sup. Ct. 2005)(pre-judgment interest cap in insurance contract unenforceable as violative of Navajo public policy expressed in Common Law concept of *nalyeeh*).

*Smith v. Navajo Nation Dept. of Head Start*, 8 Nav. R. 709, 715 (Nav. Sup. Ct. 2005).

(**Note:** in this case the Supreme Court ruled that an employment personnel manual served as a contract between employer and employee.)

WORDS ARE SACRED

Words are sacred and never frivolous in Navajo thinking, see *Smith*, 8 Nav. R. at 715, and are not to be used to offend or intimidate, particularly in Kesoli's position of supervisor, which, in the context of Navajo thinking makes him a *naat'aanii*. See *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, 8 Nav. R. 680, 692 (Nav. Sup. Ct. 2005) (identifying executive director of school as *naat'aanii*). As a *naat'aanii* he had responsibility to conduct himself thoughtfully and carefully with respect for his employees under the principle of *hozho'ogo*, see *Navajo Nation v. Rodriguez*, 8 Nav. R. 604, 615 (Nav. Sup. Ct. 2004) (discussing principle of *hozho'ogo* in context of right against self-incrimination), including utilizing the *k'e* mechanisms Anderson (Security Agency) provides to deal with disputes among employees. By shouting at employees he supervised, Kesoli did not conduct himself thoughtfully and carefully. There was therefore "just cause" to terminate him, and no requirement to engage in progressive discipline.

*Kesoli v. Anderson Security Agency*, 8 Nav. R. 724, 732 (Nav. Sup. Ct. 2005) (**Note:**

#### WORDS ARE SACRED

Navajo law recognizes the importance of contracts, and this Court applies the principle that words are sacred and never frivolous. See *Smith v. Navajo Nation Dept. of Headstart*, 8 Nav. R. 709, 715 (Nav. Sup. Ct. 2005); *Bailon*, 8 Nav. R. 501, 506 (Nav. Sup. Ct. 2004). However, certain types of promises in contracts are unenforceable, because they are specifically prohibited by law or are in violation of Navajo public policy. *Allstate v. Blackgoat*, 8 Nav. R. 660, 668 (Nav. Sup. Ct. 2005).

*Cedar Unified School District v. Navajo Nation Labor Commission*, No SC-CV-53-06; SC-CV-54-06, slip op. at 9-10 (Nav. Sup. Ct. November 21, 2007).

#### ALHA'DEET'A (AGREEMENT)

NABINAAZLAAGO BEE T'AALAHJI ALGHA'DEET'A (EVERYTHING MUST BE TALKED OVER)

HAZHO'O (NOT RECKLESSLY/RUSHING,  
PROPERLY/CAREFULLY/RESPECTFULLY)

IISHJANI ADOOL'NIIL (TO MAKE THINGS CLEAR)

There are also Fundamental law principles that inform Navajo public policy on arbitration agreements in mobile home contracts. The Navajo maxim of *hozho'ogo* mandates more than the mere provision of an English form stating certain rights . . . and requires a patient, respectful discussion . . . before a waiver is effective." *Eriacho v. Ramah District Court*, No. SC-CV-61-04, slip op.

at 7 (Nav. Sup. Ct. January 5, 2005). *Hozho'ogo* requires a meaningful notice and explanation of a right before a waiver of that right is effective. *Id.* *H hozho'ogo* is not man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, slip op. at 10 (Nav. Sup. Ct. December 16, 2004). It is “an underlying principle in everyday dealings with relatives and other individuals.” *Id.* Though primarily discussed previously in the criminal context, *hozho'ogo* equally applies in civil situations. See *Kesoli v. Anderson Security Agency*, No Sc-CV-01-05, slip op. at 6 (Nav. Sup. Ct. October 12, 2005).

Several other principles are relevant. In a recent case, the Court discussed the Navajo concept of *nabinaheezlago be t'aa lahji algha' deet'a*, which is, finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement. *Casaus v. Dine College*, No. SC-CV-48-05, slip op. at 7 (Nav. Sup. Ct. March 8, 2007). It is also said that in the process of “talking things out,” or meeting the Navajo common law procedural requirement that everything must be talked over, see *Navajo Nation v. Crockett*, 7 Nav. R. 237, 241 (Nav. Sup. Ct. 1996), there is a requirement of *iishjani adooniil*, that is making something clear or obvious. See *Phillips v. Navajo Housing Authority*, No. SC-CV-13-05, slip op. at 7 (Nav. Sup. Ct. December 8, 2005) (applying Navajo concept of *iishjani adooniil* to require clear intent to retroactively grant sovereign immunity to Navajo Housing Authority); *Yazzie v. Thompson*, No. SC-CV-69-04, slip op. at 4 (Nav. Sup. Ct. July 21, 2005) (same for Court rules on fees in domestic violence cases); *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 168,174 (Nav. Sup. Ct. 1995) (same for qualifications of school board candidates). Navajo decision making is practical and pragmatic, and the result of “talking things out” is a clear plan. *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 168,174 (Nav. Sup. Ct. 1995). When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Aadoo na'nile'dii ei dooda*, that is, delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences. *Rodriguez*, No SC-CR-03-04, slip op. at 10. This is *hozho'ogo*. *Id.* If things are not done *hozho'ogo*, it is said to be done *t'aa bizaka*.

An arbitration clause must be set in the manner of *hozho'ogo* (standard of care), so as to make a clause *iishjani adooniil* (clear and obvious), therefore it will not be made *t'aa na'nile'dii* (not recklessly, carelessly or with indifference to consequences) resulting in making the arbitration clause *nabinaheezlago be t'aa lahji algha' deet'a* (comprehensive agreement). This was shown in *Eriacho*, wherein the Navajo Nation argued that the explanation of right to a jury trial was not necessary due to Ms. Eriacho's apparent education level. See No. SC-CV-61-04, slip op. at 7 n. 2. In response, this Court rejected “any rule that conditions the respectful explanation of rights under Navajo due process on subjective assumption concerning the defendant. This right exists for all defendants in our system.” *Id.*

Finally, these principles must be applied in the context of the importance of a home in Navajo thought. This Court has noted that a home is not just a dwelling, but a place at the center of Navajo life. *Fort Defiance Housing Corp. v. Lowe*, No SC-CV-32-03, slip op. at 4 (Nav. Sup. Ct. April 12, 2004). Based on this principle, the Court scrutinizes procedures to make sure they protect a home owner's ability to maintain a healthy home and family. *See id; Phillips*, No. SC-CV-13-05, slip op. at 7.

*Green Tree Servicing, LLC v. Duncan*, No. SC-CV-46-05, slip op. at 10-12, (Nav. Sup. Ct. August 18, 2008).



## **11. EVIDENCE**

PROVING FUNDAMENTAL LAW

MUST SCRUTENIZE CUSTOM

DANGER OF USING CUSTOM WITHOUT UNDERSTANDING

CUSTOM VARIES FROM PLACE TO PLACE

[T]hrough recorded opinions and decisions of the Navajo courts or through learned treatises on the Navajo way; it may be judicially noticed, or it may be established by testimony of expert witnesses who have substantial knowledge of Navajo common law in an area relevant to the issue before the court. *Id.* citing *Estate of Boyd Apachee*, 4 Nav. R. 178, 179-81 (Window Rock D. Ct., 1983).

Although, here, appellants have provided no documentary or testimonial support for their reliance on Navajo common law, that void is not necessarily fatal to their claim.

Where no question arises regarding custom or usage, the court need not avail itself of experts in Navajo culture. Rule 5, Navajo Rules of Evidence. 7 N.T.C. § 204(a) requires the court to take judicial notice of Navajo traditional law. Even if custom and tradition are arguably matters of factual evidence, and not simply reading the law as it is printed, it is clear that a court can take judicial notice of customs as adjudicative facts. Thus, if a custom is generally known within the community, or if it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, it is proven. *Id.*

However, where a claim is made under the traditions or customs of the Navajo Nation, particular scrutiny must be made of those traditions.

The danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place throughout the Navajo Nation; Old customs and practices may be followed by the individuals in a case or not; There may be a dispute as to what the custom is and how it is applied; or, A tradition of the Navajo may have so fallen out of use that it cannot any longer be considered a `custom.' The courts should see whether a particular custom or tradition is generally accepted and applicable to the parties before the Court. *Lente v. Notah*, 3 Nav. R. 72, 79-80 (1982).

*Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991)