IN THE SUPREME COURT OF THE NAVAJO NATION

DALE TSOSIE AND HANK WHITETHORNE, Petitioners, vs. **NAVAJO BOARD OF ELECTION SUPERVISORS AND NAVAJO ELECTION ADMINISTRATION,** Respondents; and **CHRISTOPHER DESCHENE,** Real Party in Interest.	**No. SC-CV-68-14** Regarding OHA Case Nos. OHA-EC-05-14 and OHA-EC-07-14 and this Court's Prior Opinion in SC-CV-57-14 and SC-CV-58-14 **BRIEF ON JURISDICTION**

This Court has jurisdiction over this writ. It has original jurisdiction to issue "any writ" that is "[n]ecessary and proper to the complete exercise of its jurisdiction." 7 N.N.C. § 303(a). This statute gives this Court direct, original jurisdiction to issue mandamus relief against the Respondents, who are, at this very moment, making efforts to defeat the jurisdiction of this Court. The Court should accept jurisdiction, and grant the requested relief.

This Court's jurisdiction was explained in *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98 (Nav. Sup. Ct. 1986): In addressing the "necessary and proper" clause in 7 N.N.C. § 303(a), the Court ruled:

> As stated earlier, we believe that the necessary and proper clause performs through the Supreme Court's appellate jurisdiction. Any restraint ordered thereunder would serve to preserve or protect the Supreme Court's appellate jurisdiction. A petition for relief under the necessary and proper clause can be initiated by an interested party or on the Supreme Court's own prerogative. An injunction granted thereunder would enjoin a party from impeding the appellate jurisdiction of the Supreme Court. Situations inciting action under the necessary and proper clause include cases where the Supreme Court has lawfully acquired jurisdiction but efforts are being pursued to defeat jurisdiction; where the status quo must be maintained pending review of an action on appeal; and where the Supreme Court has potential appellate jurisdiction but there is interference with

> that jurisdiction which prevents perfection of the appeal. The test is to show a need to preserve and protect the Supreme Court's appellate jurisdiction.

Chuska, 5 Nav. R. at 101-102.

A writ is necessary to preserve this Court's jurisdiction. This Court has already accepted jurisdiction over this dispute, in SC-CV-57-14 and SC-CV-58-14. In those consolidated cases, the Court ordered the OHA to hold a hearing to determine RPI's fluency as a prerequisite for eligibility to run for the Office of President. The OHA held a hearing on remand in that case and issued a disqualification order. In so doing, the OHA found that RPI was directly defying the order of this Court to cooperate with the OHA as it carried out the task of determining fluency.

If Respondents NBOES and NEA were following Navajo law, they would have "automatically" removed RPI as a disqualified candidate and placed the third-place finisher on the ballot. 11 N.N.C. § 44. Respondents have no discretion in following this statute. The Navajo Board of Election Supervisors has publicly declared itself an "independent" body. It is not independent of the operation of Navajo law. Respondents are refusing to remove a disqualified candidate from the ballot notwithstanding the non-discretionary command of Navajo law.

As this Court recognized in *Sandoval*, Respondents are *naat'ániis* who owe responsibilities greater than those that would be recognized in other jurisdictions. *Sandoval v. NEA*, No. SC-CV-62-12, slip op. at 13 (Nav. Sup. Ct. February 26, 2013). The RPI, as someone who would present himself to the people as a *naat'ánii*, must engage in self review to evaluate his own qualifications. *Id.* He should voluntarily step back, *nát'ą́ą́' hizhdidoogáál*, if he has a disqualifying condition. Moreover, he should encourage and foster respect for the law by publicly obeying Navajo tribunals when they disqualify him. His refusal to obey the rule of law should not be tolerated or indulged – especially since RPI is a member of the Navajo Nation Bar Association. It is axiomatic, especially in light of *Sandoval*, Respondents may not allow an

unqualified candidate to take the oath of office and may not present an unqualified candidate to the people for voting.

The appropriate remedy for Petitioners would normally be a mandamus action in District Court. 1 N.N.C. § 554(G) provides: "Any officer, employee or agent of the Navajo Nation may be sued in the courts of the Navajo Nation to compel him/her to perform his/her responsibility under the expressly applicable laws of the United States and of the Navajo Nation, which shall include the Bill of Rights of the Navajo Nation, as set forth in Chapter 1, Title 1, Navajo Nation Code." At first blush, this provides the answer for Petitioners. Respondents have a responsibility under the laws of the Navajo Nation that they are failing to follow, and the District Court should issue a mandamus order requiring them to do their duty.

Obviously, this Court has appellate jurisdiction over a District Court mandamus action. 7 N.N.C. § 302. In the normal course of proceedings, this Court would have the final say in a mandamus action filed in District Court. This is especially important in a case such as the present action, where the Court has already accepted jurisdiction and has issued orders to the parties with which it rightly assumes the parties must comply.

Unfortunately, there is nothing normal about this case. Were Petitioners to file their action in District Court, they would face an impossible problem. A mandamus action cannot be lawfully heard by the District Court without complying with 1 N.N.C. § 555. This would require Petitioners to first serve a notice of claim on the President, Attorney General and Chief Legislative Counsel. They would have to wait for the return receipts, a process that generally takes a week to ten days, and they would then have to wait thirty more days from the date of the last receipt. The earliest the mandamus action could be filed would be the end of November.

Respondents have made sure that this would be far too late. Respondents have not only flagrantly ignored their duty under 11 N.N.C. § 44, they have insisted that the election go

forward as scheduled on November 4. Thus, a mandamus action before the election would be dismissed. A mandamus action filed in compliance with the 1 N.N.C. § 555 would be too late.

Petitioners could perhaps bring an election challenge after the election is completed. The Council has mandated that candidates remain qualified throughout their term, and RPI could never satisfy that requirement. However, at that point, significant damage would be done to the Navajo electoral process. The Navajo people would have participated in a sham election involving a disqualified candidate. The third place finisher, who now has a statutory right to be on the ballot, would not participate in the election. Such a sham election would undermine the very credibility of Navajo governance. The Navajo people would likely have to endure a second election, with the date of the inauguration only weeks away. This Court should take strong action to prevent such a catastrophic result.

This Court has appellate jurisdiction two ways. First, this Court has already accepted jurisdiction in SC-CV-57-14 and SC-CV-58-14. In that case, it ordered a fluency hearing, and it ordered RPI to cooperate with the OHA in reaching a fluency determination. Second, it has appellate jurisdiction over mandamus proceedings in the District Court.

The only way to preserve that appellate jurisdiction – to make sure that the orders that this Court have already issued are followed, and to make sure that its appellate jurisdiction over mandamus actions is not rendered moot by the unlawful activities of the Respondents – is to issue a writ to protect its appellate jurisdiction under 7 N.N.C. § 303(a). This satisfies *Chuska*, because this Court has lawfully acquired jurisdiction (in SC-CV-57-14 and SC-CV-58-14) but efforts are being pursued to defeat that jurisdiction, and because this Court has potential appellate jurisdiction (over mandamus proceedings) but Respondents are interfering with that jurisdiction which prevents perfection of the appeal (by insisting that the election occur before a mandamus action could be brought under 1 N.N.C. § 555). *Chuska* makes it clear that this court

can issue a writ, including a mandamus writ, in these circumstances. See also *Bennett v. Board of Election Supervisors*, 7 Nav. R. 201 (Nav. Sup. Ct. 1990) (original jurisdiction over NBOES may lie in 7 N.N.C. § 303(a)).

The Court should recognize that, were this Court to decline jurisdiction, it would effectively be allowing Respondents to flagrantly defy the orders of this Court and the OHA with no consequences. This Court explained in SC-CV-57-14 and SC-CV-58-14 the importance of the fluency requirement. RPI refused to take a fluency test ordered by the OHA, refused to answer questions about his fluency at a deposition ordered by the OHA, refused to answer Petitioners' questions about his fluency at the final OHA hearing, and refused to answer the direct questions of the OHA about his fluency.

RPI's apparent strategy is to defy the authority of the very government that he seeks to preside over. Meanwhile, the NBOES adamantly refuses to carry out its non-discretionary duty. The question in this jurisdiction brief really should be asked thusly: "Does this Court have the power to expect that its orders will be followed?" Of course it does. RPI and the Respondents need to be reminded that one defies the orders of this Court at ones' own peril.

RESPECTFULLY SUBMITTED this 20th day of October, 2014.

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CERTIFICATE OF SERVICE

We hereby certify that COPIES were faxed this 20th day of October, 2014, to Levon Henry, Chief Legislative Counsel, at (928) 871-7576; Brian Lewis, Counsel for RPI, at (505) 722-3212, and the Office of Hearings and Appeals, at (928) 871-7843.