

No. SC-CV-68-14

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SUPREME COURT

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IN THE SUPREME COURT OF THE NAVAJO NATION

NAVAJO NATION

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Dale E. Tsosie and Hank Whitethorne,  
Petitioners,

v.

Navajo Board of Election Supervisors and Navajo  
Election Administration  
Respondents; and

Christopher C. Deschene,  
Real Party in Interest

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RESPONSE TO PETITION FOR WRIT  
OF MANDAMUS  
REGRDING COURT'S JURISDICTION

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## **I. INTRODUCTION**

The underlying Petition seeks a Writ of Mandamus against the Navajo Board of Election Supervisors and the Navajo Nation Election Administration (Respondents), non-parties to the actions below. The Writ would order Respondents to comply with 11 N.N.C. § 44, and remove Christopher Deschene (RPI) from the ballot, place the third place finisher (Russell Begaye) on the ballot, and order the RPI to cease conducting further campaign activities. The Petition is grounded on the default judgment issued by the Office of Hearings and Appeals against the RPI for refusing to participate in pre-trial proceedings ordered by a tribunal. *Final Order Disqualifying the Respondent*, OHA-EC-005-14 and OHA-EC-007-14, issued by the Office of Hearings and Appeals on (October 9, 2014).

The Respondents offer the following in opposition to the Petition for Writ of Mandamus for lack of jurisdiction.

## **II. ARGUMENTS**

### **A. THIS COURT DOES NOT HAVE ORIGINAL JURISDICTION TO ISSUE THE WRIT OF MANDAMUS IN THIS CASE.**

Petitioners assert that this Court has “original jurisdiction” to issue an extraordinary Writ of Mandamus against the Respondents using 7 N.N.C. § 302, who were non-parties in the related case heard before the Office of Hearings and Appeals, and appealed to this Court. First, they incorrectly assume that this Court has original jurisdiction to issue a writ in this case under 7 N.N.C. § 302, and then suggest that this Court may issue the writ under 7 N.N.C. § 303(A) by invoking the “necessary and proper clause.”

Both the District Courts and the Supreme Court have jurisdiction to issue extraordinary writs. The District Court has authority under 7 N.N.C. § 255. The Supreme Court has authority

under 7 N.N.C. § 302:

The Supreme Court shall have jurisdiction to hear appeals from final judgments and other final orders of the District Courts of the Navajo Nation and such other final administrative orders as provided by law. The Supreme Court shall also have jurisdiction over *original* extraordinary writs. The Supreme Court shall be the Court of last resort.

7 N.N.C. § 302 (emphasis added).

Petitioners assume this Court has original jurisdiction in this matter on a literal reading of 7 N.N.C. 302 quoted above. However, as this Court clarified in *Navajo Nation Dept. of Justice v. Begay*, No. SC-CV-26-10, slip op. at 2 (Nav. Sup. Ct. June 17, 2010), “there is no magic in the phrase ‘original jurisdiction’ . . .”. *Dept. of Justice*, slip op. at 1. In *Dept. of Justice*, the Petitioner sought a Writ of Mandamus against a local government official to force the official to sign chapter checks. In summarily denying the petition, the Court held:

Original jurisdiction does not mean that this Court will accept jurisdiction of a request for an extraordinary writ where the petitioner has not petitioned the district court for a writ. This Court will comply with its grant of “jurisdiction to hear appeals from final judgments and final orders of the district courts of the Navajo Nation and such other administrative orders as provided by law.” 7 N.N.C. § 302. . . . the Supreme Court does not have jurisdiction to issue a writ where the Petitioner has not approached the lower court for a writ.

*Dept. of Justice*, slip op. at 2.

Accordingly, this Court has no original jurisdiction under 7 N.N.C. § 302, and Petitioners must seek their writ in the District Courts.

**B. A WRIT OF MANDAMUS UNDER 7 N.N.C. § 303 MAY ONLY BE BROUGHT AGAINST LOWER COURTS**

Petitioners suggest that this Court may issue the writ pursuant to 7 N.N.C. § 303(A) under a mistaken interpretation of *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R.

201 (Nav. Sup. Ct. 1990). In *Bennett*, the petitioner was a candidate for president that was disqualified by the Navajo Board of Election Supervisors, and filed a petition for injunctive relief against them. The Court considered whether it could enjoin the Board from proceeding with the primary election. The Court determined that 7 N.T.C. § 303 (1985)<sup>1</sup> gave the Court supervisory authority “over lower courts,” and that under this supervisory authority, the Court could issue original extraordinary writs. *Bennett*, 6 Nav. R. at 202 (emphasis added) (citing *Chuska Energy Co. v. Navajo Tax Comm’n*, 5 Nav. R. 98 (1986) as precedent). The Court denied the injunction under 7 N.N.C. § 303 because the petitioner did not identify the trial court to be enjoined. *Bennett* at 203.

Additionally, the Court in *Bennett* acknowledged that an injunctive remedy is available using the “necessary and proper clause,” which functions through the Supreme Court’s appellate jurisdiction (over lower courts). 7 N.N.C. § 303(A). The Court stated that the Supreme Court may issue an injunction using the necessary and proper clause whenever “a need to preserve and protect the Supreme Court’s appellate jurisdiction” arises. *Id.* The Court denied the injunction because the petitioner did not claim a need to preserve and protect the Court’s appellate jurisdiction. *Id.* The Petitioner did not identify a court to be enjoined. *Id.*

In the instant case, a Writ is being sought against the Navajo Board of Election Supervisors, which is *not* a court. *Bennett*, slip op. at 203 (“The Navajo Board of Election Supervisors is not a court for purposes of section 303.”) Additionally, the Court in *Bennett* observed that the word “original” does not appear in § 303. *Bennett*, slip op. at 2. Accordingly, the current petition cannot be brought under 7 N.N.C. 303(A), because it is not brought to

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<sup>1</sup> § 303. Writs or Orders: The Supreme Court shall have the power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction, or to prevent or remedy any act of any Court which is beyond such Court’s jurisdiction, or to cause a Court to act where such Court unlawfully fails or refuses to act within its jurisdiction. (1985).

preserve and protect the Supreme Court's appellate jurisdiction *over lower courts* under the "necessary and proper clause." 7 N.N.C. § 303(B-C) do not apply because Respondents do not seek to remedy acts by a Court.

**C. COMPLYING WITH THE SOVEREIGN IMMUNITY ACT IS A JURISDICTIONAL CONDITION PRECEDENT TO FILING ANY ACTION AGAINST AN OFFICER, EMPLOYEE OR AGENT OF THE NAVAJO NATION**

The Court in *Bennett* ruled that:

The Supreme Court's original jurisdiction comes from "its power to issue any writs or orders . . . to prevent or remedy any act of any Court or to cause a Court to act where such Court unlawfully fails or refuses to act within its jurisdiction.

*Bennett*, slip op. at 202 (citing 7 N.T.C. § 303).

Accordingly, in order for the Petitioner to obtain a writ of mandamus from this Court, it must first file a petition in District Court pursuant to 7 N.N.C. § 255. "A writ of mandamus is an extraordinary remedy granted only when necessary. This Court will refuse to issue a writ when there is a plain, speedy and adequate remedy at law." *Hurley v. To'hajiilee Family Court*, 8 Nav. R. 705, 707-708 (Nav. Sup. Ct. 2005). The remedy at law for Petitioners is to file for a Writ of Mandamus with the District Court, which will require proper notice under the Sovereignty Act.

The Navajo Nation is a sovereign nation which is immune from suit under the Sovereign Immunity Act (Act). 1 N.N.C. § 553(A). Suits may be filed to compel an officer, employee or agent of the Navajo Nation to perform his or her duty under an exception to the Act. 1 N.N.C. § 554(G). The definition of the Navajo Nation under the Act includes the Legislative Branch. 1 N.N.C. § 552(L). The Navajo Board of Election Supervisors is established in Title 2 Navajo Nation Government, Chapter 3. Legislative Branch (§§ 101-978) of the Navajo Nation Code, which defines the Legislative Branch. See 2 N.N.C. 871 (establishing the Navajo Board of Election Supervisors); 2 N.N.C. § 876 (establishing the Election Administration Office).

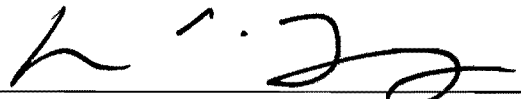
Sovereign immunity is a jurisdictional defense. *Begay v. NECA*, SC-CV-44-08 (Nav. Sup. Ct. July 22, 2011). Under the Act, proper notice is required and is a “jurisdictional condition precedent”. 1 N.N.C. § 555(A); *Chapo v. Navajo Nation*, 8 Nav. R. 447, 456 (Nav. Sup. Ct. 2004); *Begay v. NECA*, SC-CV-44-08 (Nav. Sup. Ct. July 22, 2011). Such notices must be sent via registered mail to the President of the Navajo Nation, the Attorney General of the Navajo Nation and the Legislative Counsel. 1 N.N.C. § 555. No action shall be accepted for filing against the Navajo Nation or any officer, employee or agent of the Navajo Nation unless the plaintiff has filed proof of compliance by service of the notices at least 30 days prior to the date on which the complaint or any other action is proposed to be filed with such Court. 1 N.N.C. § 555(A)(3).

In conclusion, the Respondents must provide proper 30 day notice before any action may be filed in district court in compliance with the Act in order for the District Court to have jurisdiction.

### III. CONCLUSION

This Court does not have original jurisdiction under 7 N.N.C. §§ 302-303 because the Navajo Supreme Court does not have original jurisdiction to hear writs of mandamus against entities which are not courts. Petitioners must comply with the jurisdictional condition precedent in the Act by filing proper 30 days’ notice to the parties.

RESPECTFULLY SUBMITTED this 20th day of October, 2014.

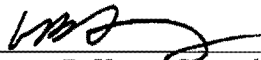


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**CERTIFICATION:**

I hereby certify that the forgoing application,  
at time of filing, was forwarded to the parties  
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