

**IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF WINDOW ROCK, ARIZONA**

Former Members of the Navajo Nation)	Case No. WR-CV-70-15
Board of Election Supervisors and as)	
Navajo Voters,)	<u>Amended</u>
)	ORDER GRANTING
Petitioners,)	PETITIONERS' PETITION FOR
)	PERMANENT INJUNCTIVE
v.)	RELIEF
)	
The Navajo Nation Election Administration)	
Director Edison Wauneka,)	
)	
Respondent.)	
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The matter before the Court is brought by four individual Navajo Voters concerning their right to vote and how it should be exercised. The Petitioner Navajo Voters contend that a valid law calling for a Referendum Vote on the Presidential Navajo language fluency requirement shall occur before the Navajo People vote for a new Navajo Nation President.

On April 13, 2015, the above stated Petitioners filed a Petition For A Permanent Injunction Order And Motion For A Temporary Restraining Order To Stay the Navajo Nation General Election Scheduled For April 21, 2015. The Respondent is The Navajo Nation Election Administration Director Edison Wauneka. The Petitioner's Petition seeks to prohibit the scheduled General Navajo Nation Presidential Election from occurring on April 21, 2015. The Petitioners also seek to utilize the funds allocated for the April 21, 2015 Navajo Nation Presidential General Election to enforce a Referendum Vote to modify 11 N.N.C. § 8(A)(4) which concerns the qualification of a presidential candidate's ability to speak the Navajo language fluently.

Jurisdiction

This Court has proper subject matter and personal jurisdiction over this matter.¹ See *Window Rock Dist. Ct. Order Denying Pet. Mot. for A Temp. Restraining Order and Order*

¹ A District Court must have both subject matter jurisdiction and personal jurisdiction to properly hear a case and prior to making any substantive rulings. *Begay v. Begay*, No. SC-CV-65-05, slip op. at 3-4 (Nav. Sup. Ct. May 11, 2006); *Yazzie v. Yazzie*, 5 Nav. R. 66, 68 (Nav. Sup. Ct. 1985); *Begay v. Navajo Engineering & Construction Authority*, No. SC-CV-44-08, slip op. at 5 (Nav. Sup. Ct. July 25, 2011).

Setting Hearing on Petition For Permanent Injunctive Relief, April 14, 2015. The Court initially denied the Petitioners' Motion for a Temporary Restraining Order because the relief sought was inconsistent with the Navajo Nation Supreme Court's ruling in *Tsosie and Whitethorne v. Navajo Board of Election Supervisors and The Navajo Nation Election Administration*, SC-CV-68-14 (Nav. Sup. Ct. March 20, 2015). However, the Court granted a hearing on the Petitioners' Petition For Permanent Injunctive Relief.

Respondent's Motion to Dismiss

Respondent asserted a sovereign immunity defense and filed a Motion to Dismiss for lack of subject matter jurisdiction. The Court denies Respondent's Motion to Dismiss because the issues Respondent raises have already been considered by this Court. See, *Window Rock Dist. Ct. Order Denying Pet. Mot. for A Temp. Restraining Order and Order Setting Hearing on Petition For Permanent Injunctive Relief*, April 14, 2015. In addition to the Court's previous Order, the Court also finds the Petition currently before the Court is a "special proceeding"² because the Navajo Nation Presidential Election is scheduled to occur on April 21, 2015.

Resolution CMA-06-15 calling for a Referendum Vote prior to an election for president was signed into law by President Ben Shelly on March 16, 2015. Essentially the Respondent argues this Court does not have proper subject matter jurisdiction because the Petitioners failed to provide the Navajo Nation with a 30 day notice. The Court finds, it took time for the Petitioners to evaluate the Resolution's effect on their rights and to secure legal counsel to help them file their Petition in Court. If this Court requires the Petitioners to serve the President of the Navajo Nation, the Chief Legislative Counsel, and the Attorney General of the Navajo Nation by registered mail with a thirty (30) day notice their complaint would be moot. At the time the Petition was filed this Court found that the Petitioners' had standing and claimed an "injury in fact" if they could meet the elements of Nav. R. Civ. P. Rule 65(c)(1—4). *Perry v. Navajo Nation Labor Comm.*, SC-CV-50-05, slip op at 4, (Nav. Sup. Ct. August 7, 2005).

² The Navajo Nation Supreme Court held that an application for Temporary Restraining Order (TRO) and Preliminary Injunctive Relief shall be considered a "special proceeding" under Court rules with different notice and scheduling rules than normal actions. *Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 30 (Nav. Sup. Ct. May 28, 2010). Irreparable harm is alleged when a TRO is filed and the Court must act swiftly due to the urgent and emergency situation. *Id.* The Court may use its discretionary injunctive power to make whole again a party whose rights have been violated. *Id.*

Although this Court declined to issue an Temporary Restraining Order, a hearing on the preliminary and permanent injunctive relief was set as an “expedited proceeding.”³

11 N.N.C. § 8(A)(4)—Navajo Nation Presidential Candidate Fluency Requirement

The issue currently before the Court stems from an ongoing struggle the Navajo People face in their attempts to clarify or amend the Navajo Nation law which requires a Navajo Nation president to fluently speak and understand the Navajo language. See 11 N.N.C. §8(A)(4).

The first attempt to amend the “fluency requirement” was proposed in Legislation No. CO-47-14 which sought to amend the language to state, “Must fluently speak and understand Navajo and read and write English, which language proficiency shall be determined by the People voting in favor of the person upon the right and freedom of the *Diné* to choose their leaders.” Although Legislation No. CO-47-14 passed in the Council Chambers, it was vetoed by President Ben Shelly. President Shelly issued a statement along with his veto saying:

The decision to amend the language requirements in Title 11, the Navajo Nation Election Code, must be brought before the Navajo people through a referendum vote...because it is far too important and it is one the people need to decide on.

Thereafter, the Council enacted Resolution No. CMA-06-15 that called for a Referendum Vote on the “fluency requirement” prior to holding an election for president and it was passed in the Council Chambers on March 13, 2015 and signed into law by President Shelly on March 16, 2015. Resolution No. CMA-06-15 orders:

B. ...[S]upplemental funding should be first used to have the Navajo voters vote on the referendum question to modify 11 N.N.C. § 8(A)(4), [the fluency requirement] as follows:

§8 Qualifications for Office

~~Qualifications for President and Vice President are:~~

~~Must fluently speak and understand Navajo and write English;~~
Must be able to speak and understand the Navajo and English language; and this ability shall be determined by the Navajo voter when he/she casts a ballot.

C. After the certification of the referendum vote by Navajo Election Administration, the Speaker shall call a special session to address the election for Navajo Nation Office of the President.

³ The Navajo Nation Supreme Court held that when a TRO and preliminary injunction action is filed, the Petitioner has a due process right to expedited proceedings and the Court shall ensure irreparable harm does not occur or continue to occur. *Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 31 (Nav. Sup. Ct. May 28, 2010).

Currently, the an election for Navajo Nation President is scheduled to occur on April 21, 2015 which brings us to the Petition presently before the Court for Injunctive Relief to stop the General Election.

Permanent Injunction Hearing

On April 14, 2015 at 2:00 p.m. a hearing for permanent injunctive relief was held. The Court orders that the findings of fact herein shall be used for purposes in finding a Permanent Injunction pursuant to Nav. R. Civ. P. Rule 65(d). Petitioners Norman Begay, Harry Brown, Wallace Charley, and Ruth H. Watson were present with their legal counsel Lee R. Belone. Respondent Navajo Nation Election Administration Director Edison Wauneka was present and his legal counsel Michael Upshaw appeared telephonically. The printer hired to print the Navajo Nation Election ballots appeared as a witness and testified telephonically.

At the hearing the Petitioners' counsel opened with statements declaring that in staying the April 21, 2015 General Election, the Petitioners do not seek to add another candidate onto the ballot; they do not challenge the disqualification of any candidate; nor do they seek to include a "write in" candidate. The Petitioners have clearly stated that they only wish to enforce Resolution CMA-06-15 calling for a referendum vote on the Navajo Nation's presidency requirement to fluently speak and understand the Navajo language prior to holding a General Election for president. The Court explained that in addition to the Petitioners' legal counsel's opening statements, the Petitioners would need to testify to tell the Court "exactly" what they want and the reasons they would be harmed by holding the April 21, 2015 election as scheduled. Petitioners Mrs. Watson and Mr. Charley testified and overall their testimony suggested that the root of the problem is that the Navajo People went to the Navajo Nation Council seeking relief to the confusion surrounding 11 N.N.C. §8(A)(4) otherwise known as the "presidential fluency requirement" and despite the fact that the Council responded with the passage of Resolution No. CMA-06-15, which the President signed into law on March 16, 2015 there was no change in the Election Administration's plan to hold the election of presidential candidates before the referendum could be held.

Permanent Injunctive Relief, Nav. R. Civ. P. Rule 65

In granting a Petition for Permanent Injunctive Relief, a hearing is held where the Petitioner(s) must present sufficient evidence for the Court to find: (1) That the moving party has or is claiming a protectable right or interest and has a high likelihood of success on the merits;

(2) That irreparable injury, loss, or damage to that right or interest is likely to occur unless the permanent injunction is issued; (3) That the threatened injury, loss or damage is substantial in nature or character; and (4) That the moving party does not have an adequate remedy at law. Nav. R. Civ. P. Rule 65(c).

The Petitioners' testimony including the direct examination and cross examination was spoken in the Navajo language. The Court informed the parties that they are free to offer testimony in Navajo or English. The Court has done translations and interprets testimony made in Navajo into English for the findings of fact.

1. The Right to Vote is a Protectable Right.

The Petitioners want the language issue that is the subject of the Referendum to be addressed through a vote of the people before a general election for president is to occur. Mrs. Watson testified that she is registered to vote in Navajo Nation elections and she exercises her right to vote. She asserts her right to vote for the Navajo Nation President involves a right to first participate in determining a presidential candidate's qualification under the law. Mrs. Watson testified that if she is forced to vote on April 21, 2015, without first participating in the referendum to clarify what the voters determine should be the qualifications in the Presidential election, she would feel cheated and her vote would have no value to her.

2. Irreparable Injury and Loss of the Right to Vote is Likely to Occur Unless a Preliminary Permanent Injunction is Issued.

The Petitioners established that irreparable injury, loss, or damage to their protectable right to vote is likely to occur unless the preliminary permanent injunction is issued. Mrs. Watson asserts that the controversy surrounding the language requirement in the Election Code needs to be addressed as soon as possible. She also testified that she would continue to dispute the matter until her voice is heard because her life is being detrimentally affected by the decision to hold the presidential election before the people have had the opportunity to address the qualifications for the president.

3. The Threatened Injury is Substantial.

The Petitioners indicated that the injury is substantial in nature because it affects the Navajo People. Mr. Charley testified that people come to him asking about the Election Laws because of his former position on the Board of the Election Supervisors. As a *naat'áanii* he is responsible for helping the People when he is called. Mrs. Watson testified that there have been

discussions with many others who are people of the voting public, she stated, "The people from all over, the voting population, have had in-depth discussions [about the election] because of these issues we are suffering." Mrs. Watson in her testimony touched upon the importance of selecting a leader and testified as to emotional hardship and suffering she has experienced as a result of events related to the election.

The injuries suffered by the Petitioners and others are substantial in nature because Navajo People begin to lose trust in the government and their leaders when it appears the law is being enforced on an arbitrary basis.

4. A Permanent Injunction is the Adequate Remedy at Law.

The Petitioners believe harmony can be restored with a Permanent Injunction staying the April 21, 2015 General Election. Mrs. Watson stated that the only way to fix the problem before us is to restore harmony. Mrs. Watson testified that the outcome of the referendum vote on the fluency requirement will be used as a measure to guide her when she votes. The Petitioners state that the Referendum Vote must occur first in order for them to properly exercise their right to vote for their leaders. A Permanent Injunction is the only remedy currently available to the Petitioners.

Discussion

Navajo Voting Rights are amongst the most paramount of rights because it was in fact only through the initial exercise of the right to vote in 1868 at Fort Sumner, also known as *Hweeldi*, that the Navajo Tribe was able to subsequently obtain recognition by the United States as a government of the Navajo People. At *Hweeldi*, the Navajo People participated in the election of their leadership and voted for the formation of their government.⁴

Navajo Nation elections bring hope to our People because they present an opportunity for positive change or keeping things the same. Prior to an election the Navajo People engage in discussions because it helps inform voters as to which person will likely be the best leader. A Navajo voter will talk to their relatives, elders, friends, read the local newspapers, listen to the radio, attend public meetings or rallies or watch television coverage concerning the positions of

⁴ A United States General recommended that the Navajos at Fort Sumner select ten headmen to serve on a council. Upon consultation amongst the Navajo People they initially selected twelve leaders but within a day the People appointed 28 leaders to participate in treaty negotiations and signed the Navajo Treaty of 1868.

the candidates. These discussions are likely to include the candidate qualifications.⁵ All these interactions allow a voter to make his or her choice. Voters want to vote for the best person who should be their leader.

In this case, the Respondent has recognized the right of the Navajo People to have an election, but failed to schedule the Referendum Vote on the fluency requirement prior to holding an election for president. If the Court does not grant the Petitioners' relief, the People may be required to wait three to four years before being able to select candidates based upon the voters' decision in a referendum.

There are competing thoughts on the financial impacts of whether or not to stay the April 21, 2015 presidential election. In addition, the Court has considered the resources already spent on the November 2014 election which was postponed. To clarify the current expenditures, the Court called Tim George a spokesperson for the printing company to testify at the hearing for Permanent Injunctive Relief. Mr. George has been hired to print the Navajo Nation election ballots. Mr. George affirmed that 100 percent of the ballots have been printed for the April 21, 2015 election. Mr. George explained that the printing company would not charge the Navajo Nation any additional costs if the same ballots were to be used at a later time. If there are no physical changes to the ballots, Mr. George said a minor change to the memory pack would be necessary to scan the results. However, due to the enduring relationship between the printing company and the Navajo Nation, the printing company would waive the memory pack reprogramming cost. Despite Mr. George's testimony Respondent asserts that if the April 21, 2015 election is delayed the Navajo Nation will incur a \$260,000 cost.

The Court concludes that that the costs of staying the April 21, 2015 election is significantly less than the toll this conflict has taken on the Navajo People. When a Navajo

⁵ The current Navajo Nation Election Code was enacted in 1990. Former Council Delegate Donald Benally raised concerns with its impact on our future generation of Navajo People. He stated, "I think we're better off running for the President of the United States." Councilman Benally advocated for simplicity and felt the qualifications for Navajo Nation president should be open as much as possible, leaving decisions to the voters. Councilman Benally felt the language concerning fluency was "not be in time with our generation." He questioned his colleagues about the purpose of the fluency requirement and reminded them that "[M]any of your youngsters do not speak fluent Navajo. We didn't require this language during the 50's or 30 years ago. During that time the language spoken most was Navajo, now English is the language spoken most in homes, so I don't know what the purpose of [a fluency requirement] is. I think we don't need to have this language in here, it's sort of discriminatory language at this time to adopt in this day and age. So I would request that provision be deleted." The Council was unresponsive to Councilman Benally's request. Record of the Navajo Nation Council, transcript, p. 23, April 6, 1990.

family is faced with the need to contribute resources for the well-being of a relative or friend through ceremony or hardship they often say *beeso náho dleel*, material things can be replenished. The Court is mindful of the impact this controversy and its uncertainty has had taken on the minds, the hearts and the lives of the Navajo voters and candidates. The logic in determining the qualifications of candidates first and thereafter holding an election is not only sensible, but it is the law.

Based upon the Court's analysis above, this Court GRANTS the Petitioners' prayer for ~~preliminary~~ permanent injunctive relief and the Petitioners' request to enforce Navajo Nation Resolution No. CMA-06-15.

The April 21, 2015 General Election for Navajo Nation President is hereby STAYED.

Pursuant to Nav. R. Civ. P. Rule 65(e)(1) the Navajo Nation Election Administration is hereby enjoined from holding the April 21, 2015 General Election for Navajo Nation President.

SO ORDERED this 17th day of April 2015, 4:48 pm,



Judge, Window Rock District Court