

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF WINDOW ROCK, NAVAJO NATION (AZ)

OFFICE OF THE NAVAJO NATION PRESIDENT
and VICE-PRESIDENT and JOE SHIRLEY,
JR., in his capacity as President of
the Navajo Nation, and as an
individual.

Petitioners,

vs.

THE NAVAJO NATION COUNCIL and NAVAJO
BOARD OF ELECTION SUPERVISORS,

Respondents.

No. WR-CV-304-2010

F I N A L O R D E R

Petitioners ask this Court to declare Navajo Nation Council Resolution CJY-32-10 invalid and to issue a permanent injunction preventing the Navajo Board of Election Supervisors ("Election Board") from including the Referendum Measure adopted by Resolution CJY-32-10 on the November 2, 2010 General Election Ballot.

The matter was initially heard on October 8, 2010 on Petitioners' preliminary injunction request. The request was denied on the basis that the Petitioners did not meet the high standards for the issuance of a preliminary injunction. The Complaint is now before the Court on the Petitioners' request for the issuance of a permanent injunction and declaratory judgment. The Complaint was heard on October 28, 2010. This decision is now entered.

For the reasons discussed below, Petitioners' Complaint is granted. This Court determines that the Petitioners are correct in their position that Navajo Nation Council Resolution CJY-32-10 must have been presented to the President of the Navajo

Nation for his exercise of Presidential review powers pursuant to 2 N.N.C. 165(B). When the Navajo Nation Council ("Council") did not transmit the Resolution to the President's Office in accordance therewith, the Resolution was without force and effect and never became a valid Council enactment under law. Further, if the Resolution was never valid to begin with, then the Election Board should not have adopted the Referendum Measure for inclusion on the General Election Ballot. Navajo Nation Council Resolution CJY-32-10 is declared invalid. The Election Board is hereby permanently enjoined from including the Referendum Measure on the November 2, 2010 General Election Ballot.

Resolution CJY-32-10 must have been transmitted to the Office of the President for his review pursuant to 2 N.N.C. §165(B). Resolution CJY-32-10 is a resolution which proposes new laws and proposes amendments to existing laws and therefore subject to veto by the President of the Navajo Nation. It is clear that the Resolution contains the required underscoring for new language and overstriking for deletions of proposed laws or amendments. The Council stresses that the act of referring the Referendum Measure to the People does not constitute its proposing of new laws and amendments. If anything, they suggest, it is the People, through the Referendum process, who engage in the act of proposing new laws and amendments, and it would be the People, ultimately that would adopt the new laws or changes. That argument is rejected.

Title 2 makes no distinction as to whether a resolution referring a referendum to the People in which changes to the laws are proposed as opposed to Council Resolutions which directly propose such changes. The statute simply says "all resolutions proposing new laws or amendments of laws." Whether the end result would be that of a vote of the People for

adoption or rejection, or a signing into law or veto by the President, that condition is immaterial to the question of whether the initiating resolution proposes new law or amendments. The President must be involved in the referendum referral process.

Ordinarily, the Court's determination of the initial issue would be dispositive of this case. However, in its October 25, 2010 issuance of a *Writ of Mandamus and Superintending Control* to this Court, the Navajo Nation Supreme Court has given guidance that certain issues be addressed. In accordance therewith, this Court sets forth its discussions in addressing the queries presented by the high Court.

The term enactment as used in 11 N.N.C. §403(A) refers to the Council's completed act of adopting a resolution in accordance with prescribed requirements. Section 403(A) envisions the existence of a properly adopted resolution before a referendum is referred to the People. This hinges upon the completion of certain conditions prescribed in 2 N.N.C. §165(B). Necessarily, in the course of referring referenda to the People, the Council must determine whether the President's veto powers are implicated.

Inquiry however, does not end there. Beyond that determination, this Court would opine that the Council has an affirmative obligation to inform the President of whether his veto powers will play a role. That permits the President to determine, in his own right, whether his 2 N.N.C. §1005(C)(10)-(11) powers should be exercised. This is essential under *Diné bi beenahaz'áanii*, *K'é*, and Supreme Court precedent. Simply deciding that the President's veto powers are not necessitated is insufficient as this case very well illustrates. Had the

Council taken the step of initially consulting with the President as whether his veto powers play a role in this particular referendum referral process, we would not be here.

Diné bi beenahaz'áanii rights relate to the Diné Way of Life, and are wholly protectable rights. Diné bi beenahaz'áanii has application to all facets of Navajo life. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005). Concepts of Diné bi beenahaz'áanii require coordination between the Branches of Navajo government as part of K'é, mutual respect, and the opportunity to speak. *Shirley v. Morgan*, SC-CV-02-10, Slip Op. (Nav. Sup. Ct. 2010) at 4.

The fundamental opportunity to be heard stems from principle that "every word is powerful, sacred, and never frivolous." *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated School District*, 8 Nav. R. 501 (Nav. Sup. Ct. 2004). There is an importance to baa yáti'- "talking things out." *Downey v. Bigman*, 7 Nav. R. 176, 177-178 (Nav. Sup. Ct. 1995). Under these principles, the President should have been given the opportunity to be heard through presentation of the resolution for his Executive veto review.

Discussion of the separation of powers within the Navajo Nation government in this time of political turmoil is warranted. The Supreme Court recognized:

Separation of functions is a concept that is so deeply rooted in Navajo culture that it is accepted without question. It is essential to maintaining balance and harmony, and the concept holds true with the Navajo Nation's three-branch government. If one branch oversteps its powers, and infringes on the role of another branch, the integrity of the government is ruined. In Navajo society, the integrity of the government is the key to its viability. If the governed cannot trust that their government is essentially just and accountable, then there arises

widespread belief that the government benefits only a few.

Tuba City Judicial Dist. v. Sloan, 8 Nav. R. 159, 169 (Nav. Sup. Ct. 2001).

Although the Branches are separate, they have their functions, and the Branches are expected to work together cooperatively and cohesively. *Shirley* (SC-CV-02-2010) at 21. The Supreme Court has taken great pains to stress the responsibility of the Navajo *naat'áanii* to work together and consult on government issues. This cooperation is necessary for the survival of the Navajo Nation government. The Court finds that merely giving the President a copy of the resolution does not constitute cooperation.

Furthermore, *Diné bi beenahaz'áanii* requires *K'é* to be exercised. *Id* at 4. According to the Supreme Court, "*K'é* is the high standard which the People hold our leadership in their enactments and exercise of powers during the period they hold office, in service of the Navajo People who have chosen them, and in dealings with each other." *Id*. Under this concept, as *naat'áanii*, we are in service to the People, and we need to think about what we do because the offices we hold and the work we do are not our own - they belong to the People. As *naat'áanii*, we are to be careful in our approach and be cognizant of the importance of procedure.

The question of whether the jurisdictional mandates and prohibitions of the Navajo Nation Sovereign Immunity Act are invoked as to private citizen Joe Shirley, Jr., does not play a vital role in this Court's determinations. It is therefore not necessary that the Court undertake an expansive discussion as to the need for private citizen Joe Shirley, Jr., to comply with the Sovereign Immunity Act provisions. Any claims made by

private citizen Joe Shirley, Jr., have not been argued or addressed. Thus, his claims are denied.

Finally, it must be noted that a referendum of the People is an extraordinary exercise of the will of the People. It is a vote by the People in the making of laws for the People. It is not as if though law making were synthesized through the legislative body. It is an exercise of the People's will in its purest form. Because of that, the Court must reiterate its concern with taking the Referendum Measure out of the hands of the People. The Court places faith in the People to make their choice through the voting process and hesitates to restrict that choice in any sense. However, that choice must be presented to the People in proper context. When the President was deprived of his right to exercise his veto review powers, that in effect deprived the voting public of the right to hear President's voice in the referendum referral process.

As the President asserted in his closing remarks at the final hearing, the People placed the responsibility of speaking on their behalf in him when they voted him into Office. It then follows, that the People ought to have the benefit of his voice when a referendum measure of this magnitude is entrusted to it.

The Court notes that within the 20 days between the preliminary injunction hearing and the final hearing, significant events have occurred, not the least of which is the placement of the Referendum Measure on the November 2, 2010 General Election Ballot, and the Ballots have already been distributed for use at the various voting sites. Obviously, to enjoin inclusion of the Referendum Measure on the Ballot is impossible at this late stage. By necessary operation of this decision, the Election Board must, as a part of compliance with this injunction, undertake steps necessary to inform the voting

public of the Court's decision and the resulting effect of the non-count of the Ballots as to this Measure.

By the Court: October 29, 2010.

A handwritten signature in cursive script, appearing to read "Albert S. Shaw", written over a horizontal line.

District Judge, Navajo Nation