No. SC-CV-61-10

IN THE SUPREME COURT OF THE NAVAJO NATION

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, et al.,
Petitioners

v.

THE NAVAJO NATION COUNCIL and
NAVAJO BOARD OF ELECTION SUPERVISORS,
Respondents.

**WRIT OF MANDAMUS AND SUPERINTENDING CONTROL**

THE NAVAJO NATION SUPREME COURT TO
JUDGE ALLEN SLOAN:

Before YAZZIE, Chief Justice, SHIRLEY, Associate Justice, and YELLOWHAIR, Associate Justice by Designation.

An original action *sua sponte* for a writ of mandamus and superintending control concerning Cause No. WR-CV-304-2010, the Honorable Allen Sloan presiding.

The Navajo Nation Supreme Court *sua sponte* issues this *Writ of Mandamus and Superintending Control* to you, as a Navajo Nation District Court Judge in order to compel you to immediately hold an expedited evidentiary hearing and issue a final decision upon the above-captioned matter.

**I.**

On September 27, 2010, the Office of the President and Vice-President *et al.* (Petitioners) filed for declaratory judgment and injunctive relief in the Window Rock District Court with you as presiding judge. The filing included an application for a preliminary injunction and temporary restraining order (TRO), which was granted pending hearing on October 8, 2010. The action

concerns a referendum measure referred to the Navajo Board of Election Supervisors (Board) by the Council regarding the election of judges and justices which was never shared with the President for his review. On September 15, 2010, the Board approved the language and the ballot layout for the referendum measure, thereby permitting the measure to be placed on the November 2, 2010 general election ballot. Petitioners contest the placement of the measure on the ballot because the referral by the Council failed to follow the enactment process; the approval by the Board failed to conform to their legal duties; and the ballot language itself is insufficient as it fails to inform the voters of the full extent of the changes in store for the courts.

Following the October 8 hearing, you issued a short order on October 11, 2010 denying Petitioners' request and later issued an explanatory order on October 15, 2010 (Order). In your explanatory order you explained why you denied Petitioners' request; your Order is incorporated by reference and is attached herein.

**II.**

This matter comes before the Court on the Court's own motion as permitted under 7 N.N.C. §303 and N.R.A.C.P. Rule 2(e) and 3.

This Court has both appellate and original jurisdiction over extraordinary writs, 7 N.N.C. §302, including power to issue any writs or orders necessary and proper to the complete exercise of our jurisdiction, 7 N.N.C. §303(A), and to cause a Court to act where such Court fails or refuses to act within its jurisdiction, 7 N.N.C. §303(C). Pursuant to 7 N.N.C. §303, 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. *Chuska Energy Co. v. Navajo Tax Commission,* 5 Nav. R. 98, 101 (Nav. Sup. Ct. 1986).

In other jurisdictions, the extent of a court's superintending control power is designed to

prevent an injustice being done through a mistake of law, or a willful disregard of it, when there is no appeal from the erroneous order, or the relief obtained through the appeal would be inadequate, *see, e.g., State ex rel. Helena v. Helena Waterworks Co.,* 43 Mont. 169 (1911), and to correct erroneous rulings where there is not an appeal, or the remedy by appeal cannot afford adequate relief and gross injustice is threatened as the result of such rulings. *See, e.g., State ex rel. Carroll v. District Ct.* 147 P. 612 (1915). Essentially, we have adopted such interpretations.

We exercise our supervisory authority sparingly. We have required that there be "no adequate remedy at law," including "potential damage to a litigant that is irreversible on appeal." *Johnson v. Tuba City District Court,* No. SC-CV-12-07, slip op. at 3 (Nav. Sup. Ct. Nov. 7, 2007) *citing Hurley v. To'hajiilee Family Court,* 8 Nav. R. 705, 708 (Nav. Sup. Ct. 2005). We have also required that injunctive relief be previously petitioned to the trial court. *Navajo Nation Dept of Justice, on behalf of the Commission of the Nahata'Dziil Chapter v. Arnold Begay,* No. SC-CV-26-10, slip op. at 2 (Nav. Sup. Ct. June 17, 2010) *citing Budget and Finance Committee of the Navajo Nation Council v. Navajo Nation Office of Hearings and Appeals and concerning Johnny Livingston and Edward Carlisle, Real Parties in Interest,* No. SC-CV-63-05 (Nav. Sup. Ct. January 4, 2006).

**III.**

In your Order, you stated that "the harm to the public will be far greater than the harm to the Petitioner if the Court stopped the Election Board." You further stated that "[p]lacing a referendum before the private Navajo citizen, whether by the Navajo People's own choosing, or by the president or by the Council is always a good thing. It never harms the People." However, these are bare and unsupported conclusions, and you have yet to give the parties a full hearing on the merits. There remain many issues in this case that impact the manner in which laws are

presented to the People for approval. Meanwhile, the primary issue of placement of the referendum measure on the ballot will become moot very shortly.

There is no doubt that the referendum measure on the election of Judges and Justices will directly impact the Judicial Branch and our courts. It is a situation of immense tension for our judges that cannot be over-stated. At least two judges have already recused themselves from this case. However, our courts have a duty to protect the due process rights of all the parties, in this case the governmental parties, and render impartial decisions no matter what political implications may arise.

Our dual systems of laws require judicious balancing—on the one hand, the system of precedents and statutes, and on the other, the interpretation of these precedents and statutes using *Diné bi beenahaz'áanii*. While a judge may well believe that, under our fundamental laws it is always best for the Navajo People to be given the choice regardless of how a law comes to be approved or rejected by the People, the governmental parties in this case are invested in the proper process under our written laws. The parties, *nata'aniis* of our government, who seek the assistance of our courts must be given due diligence and meaningful, judicious consideration.

We note that our codified laws provide that no appeal can be filed prior to the entry of a final judgment in this matter. On October 14, 2010, we dismissed an appeal filed by Petitioner due to the lack of a final judgment. This day, we dismissed a petition for an original writ also filed by Petitioner because the same relief is sought in this pending matter before you. As you are aware, the clock is running on this case. These are exigent circumstances. Petitioner, the President of the Navajo Nation, is seeking a pre-election judgment in an election matter in which the mandatory standard of review must change once the election takes place. There is no time to designate another judge for this case prior to the November 2nd elections. There must be a final

decision that is timely, judicious and based on sound principles. The parties must not be denied presentation of their case on the merits due to judicial inaction. The integrity of the courts shall not be compromised in this way.

We note that 11 N.N.C. §3(E) authorizes the Board to postpone for a maximum of 60 days any Navajo election for the purpose of printing new ballots required because of changed circumstances. Additionally, 11 N.N.C. §403 permits referendum measures to be held at a special election. If you need additional time, it is solely within the discretion of your court and no other court at this time to issue findings necessitating any postponement as to only the referendum. No challenge has been issued as to the election of candidates and any postponement should not delay those elections.

**IV.**

Based on the foregoing, you SHALL immediately hold an evidentiary hearing on the above pending cause for permanent injunction and declaratory judgment, shall make such other orders including orders on interim or ancillary relief as justice may require, and shall ensure that a written detailed decision is issued no later than October 28, 2010.

While we will not intrude upon your discretion in rendering a final judgment, there are baseline considerations that you SHALL make as you go forward.

Firstly, "initiative" and "referendum measure" are not interchangeable. They have fully developed legal meanings that go to the heart of their processes and both are also described within the Navajo Nation Code. 11 N.N.C. §403(A) addresses referendum measures directly and provides variously for elections following the "passage of the resolution referring the enactment." As your final decision must address the question of whether the referendum referral process does or does not include approval or veto by the President, your decision shall, by

necessity, contain a determination of what "enactment" as used in Section 403(A) entails.

Secondly, you are to determine whether the Presidential veto authority is part of the governmental structure of checks and balances; if so, it is not to be treated as a power significant only to a squabbling governmental faction.

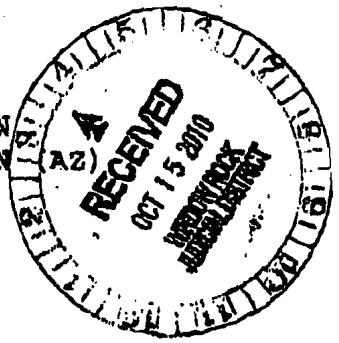
Finally, we caution that it is not within a court's discretion to determine whether or not the by-passing of Presidential review of a legislation was harmless due to the high number of delegates having voted to pass it in the first place. Legislative votes are subject to reversal and change by the legislators themselves, and our courts are in no position to guess what a vote would be following further legislative events.

Dated this 25th day of October, 2010.

Chief Justice

Associate Justice Shirley

Associate Justice Yellowhair




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,, et al.,

Petitioners,

vs.

THE NAVAJO NATION COUNCIL and NAVAJO BOARD OF ELECTION SUPERVISORS,

Respondents.

No. WR-CV-304-2010

**O R D E R**

Petitioner's Application for Preliminary Injunction was heard October 8, 2010. A summary order denying the Application was issued on October 11, 2010. The Court's reasoning for issuing a denial is set forth herein.

The Petitioners are Joe Shirley, Jr., as the President of the Navajo Nation and Joe Shirley, Jr., as an individual Navajo citizen. Both are referred to collectively in the singular as "Shirley".

Shirley asks this Court to stop the Navajo Nation Council ("Council") and the Navajo Board of Election Supervisors ("Election Board") from placing the Judicial Elections Referendum Act of 2010 (Referendum Measure CJY-32-10) on the November 2, 2010 Navajo Nation General Election Ballot. He filed his Complaint for Permanent Injunction on September 28, 2010 along with his Applications for Temporary Restraining Order and Preliminary Injunction. The Temporary Restraining Order was granted on October 4, 2010, and a hearing was held on the Preliminary Injunction request on October 8, 2010. The summary

Order Denying the Application for Preliminary Injunction was issued thereafter.

Jurisdiction over the parties and subject matter exists pursuant to 7 N.N.C. § 253 and *Shirley v. Morgan*, No. SC-CV-02-10, Slip Op. (Nav. Sup. Ct. 2010) at 7. (Navajo Nation governmental entities have full access to Navajo Courts when seeking non-monetary relief matters relating to governmental functions.) It is noted at this point that whether Shirley the private citizen is entitled to bring suit outside of those processes mandated by the Navajo Nation Sovereign Immunity Act has not been addressed. However, determination of that issue is not critical to the Court's decision at this stage of the lawsuit.

The focus of the Court's inquiry is whether Shirley is entitled to the issuance of a preliminary injunction. This is in contrast to the issue of whether he is entitled to a permanent injunction, which occurs only after a full trial on the merits. This distinction is important for the reason that the petitioning party carries a heavier burden at the preliminary injunction stage than he or she does at the trial on the merits.

Shirley must show the Court that 1) he has or claims a protectable right or interest; 2) he has a high likelihood of success on the merits of the case; 3) if an injunction is not issued, the petitioner will suffer irreparable harm to that right or interest; 4) the threatened injury, loss or damage is substantial in nature or character; and 5) there is no adequate remedy at law.

Put another way, Shirley must prove he has or claims a right or interest that must be protected by the law; if the case goes to full trial, his chances of winning are substantially greater than his chances of losing; if the Court does not stop

the Respondents from acting, his right or interest will be damaged beyond repair; that the Respondents' actions are very serious and finally, the most critical part is there is no other way he can get the Respondents to stop what they are doing.

First, Shirley has not shown to the satisfaction of the District Court that the President possesses or claims a right or interest which is protectable by law. Whether the Navajo Nation Council has the authority to place a referendum before the People is undisputed. Whether the Council must present Referendum Measure CJY-32-10 to the President for his statutory review is questionable. The law is not clear. The fact that there are two competing views by two competing factions of the Navajo Nation government as to the referendum process in this regard speaks loudly to the non-clarity of the law. To surmount the "strong likelihood of success on the merits" burden in this respect, Shirley must show that the law is clear and the Council just simply misinterpreted the law or acted in direct derogation of such.

Secondly, Shirley has not demonstrated that he will suffer irreparable harm. The question here is two-fold of whether the Office of the President and private Navajo Citizen Joe Shirley, Jr., will suffer harm that cannot be fixed. In the first, even if the President had been presented Referendum Measure CJY-32-10 as he asserts and he had exercised his veto powers, there is still a measure of uncertainty of whether the veto would have been successful in view of the fact that the number of initial delegate votes for the measure were more than the required number to override a veto challenge. The fact of whether he should have been presented the Referendum Measure CJY-32-10, while still a question, would not have changed anything. The end result would have been an unsuccessful exercise of his veto power. It is clear however, that the President veto powers have

not been disturbed except perhaps, in particular to this referendum. His powers remain intact.

The second part of this two-fold question is private citizen Shirley's irreparable sufferance. Will Shirley the private citizen suffer irreparably if the referendum measure is put before himself and other Navajo citizens like him? This Court would answer with a resounding No. Placing a referendum before the private Navajo citizen, whether by the Navajo People's own choosing, or by the President or by the Council is always a good thing. It never harms the People. Shirley takes great pains to suggest to the District Court that the Navajo Citizen will be unable to decipher the 36 page legislation which underlies the referendum. He is absolutely right. However, he gives himself, as the private citizen, too little credit. He is capable of deciphering the major points of any issue put to him, including his ability to understand that, "if I say yes, the Navajo Judge will be subject to election and if I say no, then he will not." Only good comes from the People making their own choices of governance.

Thirdly, the harm to the public will be far greater than the harm to the Petitioner, if the Court stops the Election Board. When Shirley initially received word of the referendum, he could have approached the legislature and expressed his concern under the principles of K'é. If the Council refused to address his concern, then he would have been left with little choice but to come to the Court seeking a declaratory judgment for a proper determination of his role in that referendum process. This could have occurred within days after the Speaker's certification. Yet, Shirley waits until the 11th hour to mount his challenge. By that time it is too late. The People have already been presented with the notion that the issue of

election of judges would go before them during election time. As a matter of fact, even before the Court was given time to act, the absentee ballots went out to prospective voters which included Referendum Measure CJY-32-10. Moreover, as all seemed to agree at the hearing, Shirley could have brought his complaint before the Office of Hearings and Appeals. It is an impossible task to take back a notion that you've created in the minds of the People: election of judges. You cannot unring a bell.

Finally, Shirley has remedial measures available to him at law. His veto powers are preserved generally. And specific to Referendum Measure CJY-32-10, the use of such powers in circumstances such as presented here can always be clarified legislatively in the future. It is not as if his powers have been curtailed indefinitely.

Upon the foregoing, the request for the issuance of a preliminary injunction is denied.

Finally, as noted in the concluding remarks at the close of the hearing on October 8th, it is distressing to learn that this controversy was not necessary. As the Navajo Nation Supreme Court stated in *Judy v. White*, "As Diné bi naat'áanii 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." 8 Nav. R. 510 (Nav. Sup. Ct. 2004) at 541. The Council and the President are elected by the People to serve the People. They are not elected to further their own personal irritations. The symbol of naat'áanii carries with it awesome duties and responsibilities, not the least of which is that one sacrifices his or her own personal interests for the greater interests of the People. At the heart of every decision the naat'áanii makes

is whether his or her actions will serve the interests of his People. If even a doubt crosses his or her mind that this action will not further the People's interests, then a step back and consideration of whether the intended actions further their personal interests instead must be taken.

Both sides have stressed to this Court the fundamental concepts of K'é and its proper use in a situation such as this. One of the witnesses even described that the core of the Diné Life Way is the concept of K'é. It is unfortunate that the Court must note that neither party, although casting blame on the opposite for not minding such, has practiced the essence of the concept of K'é. Both sides should examine why they disagree so vehemently. The parties can vigorously disagree but, they should do so in a nice and respectful manner. In the saying of our elders, you should disagree nicely for eventually you will meet again. This comes from the principal of háágóósh dadooh kah meaning, there is no place for us to go to avoid each other. As naat'áanii, our leaders bear the responsibilities of coming together to find solutions to the natural disputes that arise from making the laws of our People. It is unfortunate that our naat'áanii resolve to first rely on the adversarial court system, rather than automatically implementing the systems of K'é and the Diné Life Way when disagreements arise.

In summary, this is not a case about whether Judges and Justices should be subject to elections. Such questions are ultimately for the People to decide. It is about whether the President has given the Court a very important reason why the Election Board should be prohibited from placing the referendum on the November 2, 2010 general election ballot. The Court is not convinced that the President is entitled to a preliminary injunction.

Under separate cover, a final hearing to determine the merits of the underlying complaint will be set.

By the Court: October 15, 2010.

District Judge, Navajo Nation