NAVAJO COURTS AND NAVAJO COMMON LAW

by

Raymond Darrel Austin

Copyright © Raymond Darrel Austin

A Dissertation Submitted to the Faculty of the

AMERICAN INDIAN STUDIES PROGRAM

In Partial Fulfillment of the Requirements
For the Degree of

DOCTOR OF PHILOSOPHY

In the Graduate College

THE UNIVERSITY OF ARIZONA

2007
As members of the Dissertation Committee, we certify that we have read the dissertation prepared by Raymond D. Austin, entitled Navajo Courts and Navajo Common Law and recommend that it be accepted as fulfilling the dissertation requirement for the Degree of Doctor of Philosophy.

______________________________ Date: April 6, 2007
Robert A. Williams Jr., Professor of Law, Chair

______________________________ Date: April 6, 2007
Manley Begay, Professor of American Indian Studies

______________________________ Date: April 6, 2007
Robert A. Hershey, Professor of Law

______________________________ Date: April 6, 2007
James A. Hopkins, Professor of Law

______________________________ Date: April 6, 2007
Joseph H. Stauss, Professor of American Indian Studies

Final approval and acceptance of this dissertation is contingent upon the candidate’s submission of the final copies of the dissertation to the Graduate College. I hereby certify that I have read this dissertation prepared under my direction and recommend that it be accepted as fulfilling the dissertation requirement.

______________________________ Date: April 6, 2007
Dissertation Director: Professor Robert A. Williams Jr.
STATEMENT BY AUTHOR

This dissertation has been submitted in partial fulfillment of requirements for an advanced degree at The University of Arizona and is deposited in the University Library to be made available to borrowers under rules of the library.

Brief quotations from this dissertation are allowable without special permission, provided that accurate acknowledgment of source is made. Requests for permission for extended quotation from or reproduction of this manuscript in whole or in part may be granted by the copyright holder.

SIGNED: Raymond D. Austin
# TABLE OF CONTENTS

ABSTRACT ................................................................................................................................. 8

INTRODUCTION ...................................................................................................................... 10

CHAPTER I. THE NAVAJO NATION .................................................................................. 15
   A. Brief Navajo History ...................................................................................................... 15
      1. Demographics and Contact ..................................................................................... 15
      2. Fort Sumner (Hweeldi) .......................................................................................... 16
      3. Traditional Navajo Government ........................................................................... 26
      4. Modern Navajo Nation Government ..................................................................... 31

CHAPTER II. THE NAVAJO NATION COURT SYSTEM .................................................. 37
   A. History ......................................................................................................................... 37
      1. Introduction ............................................................................................................. 37
      2. Navajo Court of Indian Offenses .......................................................................... 38
      3. Navajo Nation Creates its Court System .............................................................. 48
   B. Modern Navajo Nation Courts .................................................................................. 55
      1. Structure .................................................................................................................... 55
      2. Jurisdiction .............................................................................................................. 59

CHAPTER III. FOUNDATIONAL DINÉ LAW PRINCIPLES .......................................... 62
   A. Modern Navajo Law .................................................................................................... 62
   B. Navajo Common Law Underpinnings ....................................................................... 66
   C. Finding and Using Navajo Common Law in Court ..................................................... 71
TABLE OF CONTENTS — Continued

CHAPTER IV. HOZHO (PEACE, HARMONY AND BALANCE).................................80

A. Overview of *Hozho* in Navajo Culture ..........................................................80
   1. Descriptions and perspectives of *hozho* .....................................................80
   2. Levels of knowledge .....................................................................................86
   3. *Hozho* and *Hochxo* represent right and wrong ..........................................89
   4. *Nayee’* disrupt *hozho*............................................................................90
   5. Traditional Navajo problem-solving model ..................................................92

B. *Hozho* as Used in the Navajo Nation Courts..................................................93
   1. Theoretical constructs ..................................................................................93
   2. Navajo common law informs legal interpretations .........................................95
   3. Goal is to restore *hozho* ............................................................................98
   4. Restoring *hozho* in individual rights cases ................................................103
   5. Restoring *hozho* in domestic cases ............................................................107
   6. Restoring *hozho* through *nalyeeh* (restitution) .........................................112

CHAPTER V. K’E (SOLIDARITY THROUGH POSITIVE VALUES)......................115

A. Overview of *K’e* in Navajo Culture ...............................................................115
   1. Harmonious relationships .........................................................................115
   2. Kin giving, sharing and support ..................................................................121
   3. Political affairs .............................................................................................125
   4. Traditional notions of equality .....................................................................127
   5. Traditional leadership ................................................................................128
TABLE OF CONTENTS — Continued

B. K’e as Used in the Navajo Nation Courts .................................................................132
   1. The court’s duty to use Navajo common law .....................................................132
   2. The rule on adopting Bilagaana law .................................................................138
   3. Principle of Nataah Nibikiyati (Participatory Democracy) .............................143
      a. Ashjoni adoolnil (“make things clear” rule) .................................................149
      b. Application of “talking things out” rule ....................................................150
   4. Principle of Házhó’ógo (Freedom with Responsibility) ...............................152
      a. Navajo due process ...................................................................................155
      b. Leadership standards .................................................................................164
      c. Free speech ................................................................................................166
      d. Rights of criminal defendants ...................................................................170
      e. Jury trial ....................................................................................................175
      f. Miranda rights ...........................................................................................177
   5. Principle of Ch’ihónit’i’ (Equity) ...................................................................181

CHAPTER VI. K’EI (DESCENT, CLANSHIP AND KINSHIP) ...................................186

A. Overview of K’ei in Navajo Culture .................................................................186
   1. Introduction to k’ei .........................................................................................186
   2. K’ei determines relatives ...............................................................................188
   3. The four basic clans ......................................................................................190
   4. Source of Navajo clan system .......................................................................196
   5. Traditional marriage ......................................................................................198
TABLE OF CONTENTS — Continued

6. Traditional divorce ................................................................. 206
7. Traditional property concepts .............................................. 207
8. Traditional probate ............................................................... 209
9. K’ei fosters duties and responsibilities .................................. 210

B. K’ei as Used in the Navajo Nation Courts ................................. 215
1. Marriage ............................................................................. 219
2. Divorce ............................................................................... 233
   a. Alimony ........................................................................... 238
   b. Child custody and support .............................................. 240
   c. Marital property ............................................................... 251
3. Probate ................................................................................ 255
   a. Wills ................................................................................ 257
   b. Estate property .................................................................. 261
   c. Grazing and land use permits .......................................... 265
4. Land Use .............................................................................. 271

CHAPTER VII. CONCLUSION ................................................................. 278
REFERENCES ............................................................................. 282
ABSTRACT

The Navajo Nation courts use ancient Diné (Navajo) customs and traditions or Navajo common law to decide cases. While the concepts called Navajo common law are free-flowing, communal, and egalitarian, the forum where they are used, the Navajo Nation court, is adversarial and uses adopted American court rules to strain traditional concepts to relevancy. Incorporating Navajo common law into American-styled court litigation is a difficult process. Navajo common law is rooted in Navajo philosophy, while the forum of its application is of Anglo-American design. The Navajo judges, nonetheless, have developed methods using adopted American rules of evidence, particularly the expert witness rules and the judicial notice doctrine, to bring Navajo common law into Navajo court litigation.

This work focuses on three foundational Navajo doctrines, hozho (harmony, balance and peace), ke (kinship solidarity), and k’ei (clanship system), to analyze how the Navajo judges use Navajo common law to resolve legal problems. The three doctrines are first examined within the Navajo cultural context and then the case method of analysis is employed to explain how the Navajo judges engage the incorporation process. The three doctrines are not laws that can be applied to legal issues, but their derivative norms and values are applied as laws in the Navajo Nation courts.

When the Navajo Nation courts use Navajo common law in their written decisions, they are at once preserving Navajo culture, language, spirituality, and identity for future Navajo generations. When the Navajo people use Navajo common law in their courts and in the overall operations of their government, they are not only exercising
sovereignty the Navajo way, but also nation-building the Navajo way. The methods used to incorporate Navajo common law into modern Navajo government can serve as a model for American Indian tribal governments and indigenous peoples around the globe who desire to resurrect their ancient ways of governance. So long as American Indians and indigenous peoples retain their cultures, languages, spiritual traditions, and identities, they have in place traditional frameworks that can be used to solve modern problems.
INTRODUCTION

American Indian tribes in the Western Hemisphere and native peoples around the
globe share the calamitous consequences of European colonization manifested as reduced
populations, removals, disastrous government policies, property loss, and destroyed
cultures, languages, and religious practices. The Navajos did not escape these
catastrophes. Since the first Europeans arrived in the American southwest, Navajo
culture, language, spirituality, and identity (all known as the Diné Life Way – Diné
bi’ó’ool’iiil) have been under constant attack from the outside. The philosophy
underlying the Diné Life Way has also steadily eroded over the last century as
knowledgeable elders die off and each new generation of Navajos increasingly embrace
Anglo-American culture.

American Indian nations face a bleak future if they are not actively using and
preserving the characteristics (i.e., culture, language, and religion) that distinguish them
from other Americans. The nation-to-nation relationship between Indian tribes and the
United States fully recognizes that the American Indian people have distinct cultures,
languages, identities, and spiritual beliefs and practices that predate the American Nation.
From a legal standpoint, American Indian treaties, federal statutes, self-determination
policy, and court decisions all recognize the tribes’ inherent right to maintain their
cultures, languages, religions, and identities as the original inhabitants of North America.

American Indians must not fall into a false sense of security simply because the
legal authority is on the shelf. As American history all too clearly indicates, federal
Indian policies shift with the political mood; the United States Supreme Court and lower
federal courts relentlessly attack tribal sovereignty; and states continue to push for greater authority over American Indian lands. American Indian leaders must remain vigilant for the day America moves to end its special relationship with Indian nations on the pretense that the Indian people have abandoned their cultures, languages, religions, and identities and fully adopted Euro-American culture. The American Indian people must never underestimate the power of their cultures, languages, and spirituality, and actively incorporate them into their governing institutions, court decisions, and codes as a means of enhancing tribal sovereignty, nation-building, and cultural perpetuation.

The anthropologist, E. Adamson Hoebel, instructs that societies have social postulates on which law systems rest, therefore, to properly understand a law system, the society’s postulates must be abstracted and examined.\(^1\) Postulates, also called general propositions, determine what is “qualitatively desirable and undesirable” in a society.\(^2\) Moreover, members of a society may not express its social postulates explicitly and disagreement on which ones are postulates should be expected.\(^3\) Hoebel’s methodology works well for reconstructing dormant native legal systems and that can include

---


\(^2\) HOEBEL, THE LAW OF PRIMITIVE MAN, supra note 1, at 13.

\(^3\) Id. at 17. This statement certainly applies to the Navajo people. The Navajo Creation Scripture and Journey Narratives vary, but the main points are similar. Navajos, however, do not agree on which are their original four clans. Disagreement is expected because, throughout their history, Navajos have adopted members of other Indian tribes who have joined their customs and traditions with Navajo culture.
uncovering, as yet, unidentified traditional Navajo and other tribes’ common law principles.⁴

While it would be a significant and worthy project to compile and analyze the customary laws of several American Indian tribes, this work is limited to the Navajos’ experience with their common law. For well over a century, Navajo judges have used Navajo postulates in dispute resolution, and since 1969, some of the traditional principles have been applied as Navajo common law in the published decisions of the Navajo Nation courts. The Navajo Nation Council also codified some basic postulates as the Diné Fundamental Laws in 2002.⁵ Thus, the case method of analysis employed here achieves the goal of explaining how the modern Navajo judges incorporate Navajo common law into a Navajo Nation Court System that uses adversarial decision-making. The Navajo common law incorporation process is also essential to building a sovereign Navajo Nation that places the interests of the Navajo people at the forefront.

The foundational doctrines examined in this work are *Hozho* (harmony, balance, and peace), *K’e* (kinship solidarity), and *K’ei* (clan system). While each doctrine is treated separately, in actuality the three are related concepts. The common theme linking the three doctrines is the Navajo emphasis on harmony and order. As Witherspoon said, “The Navajo emphasis on harmony and order as expressed by the term *hozho* is an emphasis on relatedness. It is impossible to have order and harmony among unrelated

---

⁴ This methodology was employed in the following works: HOEBEL, THE LAW OF PRIMITIVE MAN, supra note 1; KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY (1941); and STRICKLAND, FIRE AND THE SPIRITS, supra note 1.

⁵ Navajo Nation Council Resolution No. CN-69-2002 (Nov. 1, 2002)(codified as 1 N.N.C. §§ 201-206 (2005). The term Diné is used interchangeably with the term Navajo in this work because they are both names for the Navajo people.
entities. *K’e* terms refer to forms of social harmony and order that are based on affective action. The *k’ei* doctrine controls an extensive network of Navajo clan relationships which must facilitate and maintain kinship solidarity (*k’e*) for Navajo society to function in *hozho*.

The written decisions of the Navajo Nation courts contain a wealth of information on how American Indian customs and traditions achieve the status of law and then used to decide court cases. Because use of American Indian common law in tribal government functions, and particularly in dispute resolution, enhances tribal sovereignty, nation-building, and cultural perpetuation, American Indian tribes and indigenous peoples should look to the Navajo Nation for workable methods and models. The Navajo approaches include identifying basic common law doctrines, locating sources of relevant common law, introducing common law into the dispute resolution process, shaping common law to apply to issues, developing a native-based body of common law, and codifying common law principles. In addition, the Navajo Nation revived peacemaking, a traditional Navajo dispute resolution institution, and placed it within its modern court system to promote holistic use of Navajo common law in resolving disputes.

Tribes are pursuing gaming and other economic ventures and these activities always bring tribal sovereignty issues to the forefront. Tribes are overwhelmed with social ills and health and education issues, but they provide opportunities for use of customs and traditions as problem-solving tools and to rekindle pride in Indian identity.

---

6 GARY WITHERSPOON, LANGUAGE AND ART IN THE NAVAJO UNIVERSE 94 (1977) [hereinafter WITHERSPOON, LANGUAGE AND ART].
Longstanding Indian customs and traditions are always available for solving tribal problems, strengthening tribal sovereignty, and ensuring cultural longevity.

Developing respect for Indian common law entails educating Indian leaders, the Indian people, and eventually mainstream America. This work is organized around three core Navajo doctrines to show that American Indians and other indigenous peoples can move into the future by drawing on their own cultural norms and values.

The Navajo experience is one of going back to fundamental values. Given the disruptions of non-Indian schools, the wage economy, destruction of tribal land bases, alcohol, and an overbearing federal bureaucracy exerting daily dominance, Indians have many barriers to overcome. All those influences have eroded traditional values. However, so long as Navajos preserve their language, religion, traditions, and culture, they retain the framework for successful modern approaches. Navajo common law is not something quaint or curious — it is alive and vibrant. It adapts to the present, and it will adapt to the future. As Navajos use their values and discuss their relevance to the present, they will be able to step into the future. ...

This is a process of going back, but Indians are going back to their own law — back to the future.7

Finally, my own traditional Diné education, taught by my maternal grandparents and knowledgeable elders, serves as the basis for many of the traditional analysis in this work, including those concerning the three doctrines and their emanating values and the traditional stories.

---

CHAPTER I. THE NAVAJO NATION

A. Brief Navajo History

1. Demographics and Contact

An understanding of Navajo jurisprudence comes easier when one knows something about the history, language, culture, and spiritual beliefs of the Navajo people. The Navajo people speak the Athabascan language, a tongue also spoken by the Hupa and Tolowa tribes in northern California, the Apache tribes of the southwest, and several Indian tribes in northwestern Canada and interior Alaska. The Navajos and Apaches form the Southern Athabascans. The territory of the Navajo Nation (Diné Bikeyah) extends over northeastern Arizona, southeastern Utah, and northwestern New Mexico. The Navajo Nation also owns fee and trust lands that are separate from the main Navajo Indian Reservation, including the reservations located at Ramah, Alamo and Tójajiileeh in New Mexico, and the Big Boquillas Ranch near Seligman, Arizona. Navajo Nation lands total nearly 27,000 square miles. The 2000 United States Census shows that 298,197 individuals identified themselves as Navajo.

---

8 The Navajo people call themselves Diné (The People) in their own language. According to the Navajo Creation Scripture, the Holy People created the Diné and gave them the name, “Nihookaa’ Diné’e Diyinii (Holy Earth Surface People).” The term “Navajo Nation” is not a Navajo conceit. The Treaty of 1868, 15 Stat. 667, refers to the Navajo people as the “Navajo Nation.”


10 JACK D. FORBES, APACHE, NAVAJO, AND SPANIARD vii (1960).


The first Europeans the Navajos encountered were Spaniards (Naakailbahí), somewhere near present day Albuquerque, New Mexico in 1541. From the latter part of the sixteenth century to the time Anglo-Americans (Bilagaanaa) entered Navajo Country in about 1846, the Navajos engaged first, Spaniards, and then Mexicans (Naakii), in war, slavery, and treaty-making. The Navajo people, as a whole, suffered severely in its war with the United States from 1863 to 1868, a period commensurate with Anglo-American expansion into Arizona and New Mexico.

2. Fort Sumner (Hweeldi)

Beginning in 1863, the United States Calvary and Indian allies under the command of Colonel Kit Carson waged a brutal and destructive military campaign against the Navajo people. Oral accounts by Navajo elders describe Carson’s campaign against the Navajos as “t’aa altso anaa’ silii’” (when everything — humans, plants, animals, etc. — turned enemy). Historians Garrick and Roberta Bailey draw the same conclusion about America’s war against the Navajos: “Though short, the Navajo war of 1863-1864 proved to be one of the most violent and decisive military campaigns ever waged against a major North American Indian tribe.”

---

13 J. Lee Correll, Through White Men’s Eyes: A Contribution to Navajo History 2-3 (1976); James W. Zion, Law as Revolution in the Courts of the Navajo Nation, Federal Bar Association Indian Law Conference Materials (Albuquerque, N. M., April 7, 1995) [hereinafter Zion, Law as Revolution]. Spanish records from this period refer to Athabascan speakers as “Querechos” and “Apaches” which likely included Navajos.
14 Frank D. Reeve, Navajo Foreign Affairs 1795-1846 (1983).
Carson marched his troops through Navajo Country in the fall and winter attacking and killing Navajos at their camps, slaughtering livestock, burning hogans and crops, and virtually destroying any property and food supply the Navajos would need to survive and prolong the war. The scorched-earth campaign worked. Approximately 8,500 starving, freezing, and ragged Navajos surrendered over several months and were death-marched on foot in four separate large groups and a number of smaller ones for over 400 miles to a barren reservation established for them at Fort Sumner (called Hweeldi by Navajos) in eastern New Mexico. There, the Navajos were imprisoned under military guard from winter 1863 to June 1868.

During the second year of confinement, General James H. Carleton, Commanding Officer of the Department of New Mexico, bemoaned the tremendous burden of feeding and caring for the imprisoned Navajos and Mescalero Apaches with scant funding from Washington. On April 26, 1865, the military officers devised a plan intended to

16 Id. at 10. The reservation at Fort Sumner was called the Bosque Redondo Reservation. The march to Fort Sumner is called “The Long Walk.” The Long Walk was not a single march, but involved at a minimum four forced marches over different routes from Fort Wingate, New Mexico to Fort Sumner. My ancestors were held at Fort Sumner for over 4 years. My maternal great, great grandmother and her relatives left the Canyon de Chelly area near present-day Chinle, Arizona and arrived at Fort Sumner with the initial group in the winter of 1863.

17 General Carleton had to plead with his superiors in Washington for funds: I beg to impress upon your mind, General that the government should at once take some action for the immediate support and the prospective advance of the Navajos …. [T]he government is so greatly the gainer by their giving it [Navajo lands] up, that an annuity of at least one hundred and fifty thousand dollars should be given them in clothing, farming implements, stock, seeds, stockhouses, mills, etc., for ten years, when they will not only have become self-sustaining, but will be the happiest and most
transform the Navajos from a scattered, pastoral people into village dwelling, self-sustaining farmers.\textsuperscript{18} Realizing that the traditional Navajo political system consisted of several independent bands, the officers decided to divide the Navajos into twelve villages, located perhaps a half-mile apart, and each headed by a principal chief.\textsuperscript{19} The twelve-village concept came from the officers’ belief that twelve principal Navajo leaders were imprisoned at Bosque Redondo, each with his band.\textsuperscript{20} Each village would be structured in a manner that prominently displayed its farm in front.\textsuperscript{21}

With only 400 soldiers to guard the Navajos and Mescalero Apaches, the officers apparently believed that it would be in their best interests to let the traditional band leaders exercise limited authority over their people. Moreover, a set of Anglo-American styled criminal laws was drafted to instruct the Navajo prisoners on respect for law. The Fort Sumner plan called for each designated principal chief to “carry out and enforce laws given him [by the military] for the government of his village [...]. He will be held responsible for the order and police of his village.”\textsuperscript{22} Each village would also have a sub-chief for every one hundred persons; the sub-chief’s job would be to assist the principal chief on governing the village.\textsuperscript{23} While the principal chiefs would exercise some

\begin{footnotes}
\item[18] Id. at 22.
\item[19] Id.
\item[20] Id.
\item[21] Id.
\item[22] Id.
\item[23] Id. at 23.
\end{footnotes}
authority, the commanding officer would retain ultimate authority over all their decisions.\textsuperscript{24}

The principal chief and his sub-chiefs would establish an American form of military trial court to try criminal charges, and the twelve principal chiefs, along with a military officer as presiding judge, would compose a military-styled appellate court.\textsuperscript{25} In the case of jury trials, the Fort’s commanding officer (or a specially appointed military officer) would serve as the presiding judge and the chiefs would serve as the jurors.\textsuperscript{26} The appellate court would have jurisdiction over serious offenses, including murder, theft, property damage, and AWOL.\textsuperscript{27} The following seven criminal offenses with punishment that included hanging, whipping, imprisonment, hard labor, and fine were recommended for the Navajo prisoners of the Bosque Redondo Reservation: murder, theft, absence from or refusal to work, destroying or losing tools, destroying the reservation’s trees or farm produce, missing curfew, and being AWOL from the reservation.\textsuperscript{28}

While the military officers expressed reservations about applying Anglo-American laws of punishment to the Navajo prisoners, they nonetheless believed it was necessary to the overall civilizing process.

It may appear unjust to punish people for a violation of laws which they do not only not understand, but have heretofore been taught to regard as the highest virtue to break. But it must be recollected that these Indians

\textsuperscript{24} Id. at 24.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
have got to be made to respect the bonds which unite civilized society, and
the only practical way of doing this is by inflicting a punishment, however
light, for the first offence, and increasing the punishment in proportion to
the increase of knowledge, until its severity would prevent further
repetition. This is the only possible mode of instructing them on the
subject of the law.  

The government structure the military recommended was not fully implemented,
because the Navajos stubbornly refused to depart from their kinship structure way of life
and their customs. The federal government’s reports on the Bosque Redondo
Reservation after April 26, 1865 do not mention the proposed court system or criminal
provisions so it is not clear whether they were implemented or not. Modern Navajos
call the Navajo Nation Court System “Diné Bi Gooldi.” Some Navajos claim that this
term is a Navajo pronunciation of the words “court day” and may have originated from
the officers’ announcement of “court day” at the Bosque Redondo Reservation.

---

29 Id. at 23-24.
30 DAVID E. WILKINS, THE NAVAJO POLITICAL EXPERIENCE 79 (1999)(the
planned government did not take effect because the Navajos preferred to live in extended
family groups); But see BAILEY & BAILEY, A HISTORY OF THE NAVAJOS, supra note
15, at 29 (“At Bosque Redondo the military organized the tribe into twelve bands and
appointed a chief for each one,” citing LAWRENCE C. KELLY, THE NAVAJO INDIANS
AND FEDERAL INDIAN POLICY 1900-1935, at 14 (1968) [hereinafter KELLY, THE
NAVAJO INDIANS]). The plan failed because the Navajos refused to live in a house where
a person died.
31 One author suggests that the proposed court system and criminal laws were
implemented: “An elaborate court system was established which was always subject to
final government authority. An important element was to provide a ‘legal’ framework so
as to force Navajos to work in the fields.” ROESSEL, PICTORIAL HISTORY OF THE
NAVAJO, supra note 17, at 22.
32 I have heard this theory during casual conversation with different Navajos in
the past. But see Vicenti, Jimson, Conn & Kellogg: “The court (gooldi) can be seen as
possibly being derived from the Navajo word for Bosque Redondo or Fort Sumner
Although the military constantly watched the Diné, they continued to practice their spiritual ceremonies in secrecy; particularly, those that implored the Holy Beings to return them to their homelands.\textsuperscript{33} The several thousand Navajos who did not surrender and remained in Navajo Country likewise performed ceremonies to ensure the freedom and return of their kinsmen from Fort Sumner.\textsuperscript{34} A well-known story from this period states that the Coyote Way Ceremony was performed after the first day of treaty negotiations to block General William T. Sherman’s recommendation that the Navajos move to Indian Territory in Oklahoma.\textsuperscript{35}

A group stood away from the [treaty] negotiations, and while the Coyote way chants were sung, a coyote entered the circle. He ran around inside it, and at one point during the chant, he broke the circle and ran to the west. That was an indication that Navajos would return west, back to Diné Bikeyah (Navajo Country), rather than to the east and Indian Territory.\textsuperscript{36}

The United States Government’s Fort Sumner experiment ended in total failure. Fort Sumner is synonymous with misery, starvation, disease, and death to the Navajo
people. Over 2,000 Navajos died at Fort Sumner.\textsuperscript{37} The attempt to turn Navajos into agriculturists in the American mold was a total failure; the desert waste-land was unsuitable for farming and the water had high alkali content.\textsuperscript{38} The federal government’s proposal to exile the Navajos to Indian Territory in Oklahoma was defeated by Navajo Headman Barboncito’s oration during the first day of treaty negotiations.

[General William T. Sherman, American negotiator]: For many years we have been collecting Indians on the Indian Territory south of the Arkansas and they are now doing well and have been doing so for many years. We have heard you were not satisfied with this reservation [Bosque Redondo] and we have come here to invite some of your leading men to go and see the Cherokee country and if they liked it we would give you a reservation there.

[Barboncito, Navajo negotiator]: I hope to God you will not ask me to go to any other country except my own. It might turn out another Bosque Redondo. They told us this was a good place when we came here but it is not.\textsuperscript{39}

The Navajo Treaty of 1868 (\textit{Naaltsoos Sani}) between the Navajo Nation and the United States of America, and which emancipated the Navajo people, was signed on June 1, 1868. The Navajos see the 1868 Treaty as a sacred document to be honored, much like their covenant with the Holy People. The 1868 Treaty guarantees that the Diné will

\textsuperscript{38} For a description of the conditions at Fort Sumner, see IVERSON, \textit{DINÉ}, \textit{supra} note 36, at 57-59.
\textsuperscript{39} LINK, \textit{THE NAVAJO TREATY}, \textit{supra} note 37, at 4-6.
remain a distinct people and a sovereign nation with all sovereign powers appertaining thereto.

The war leading to exile and imprisonment at Fort Sumner inflicted on Navajos the greatest trauma and tragedy in their modern history. Navajo Nation President Joe Shirley summarized well the modern Navajo emotions on their ancestors’ tribulations during the dedication of the Bosque Redondo Memorial on June 4, 2005:

Etched into the collective memory of every Navajo alive today is the terrible trauma of the tragedy that began at Bosque Redondo — *Hweeldi* — 141 years ago. It doesn’t matter that we who are alive today were not there at that time. The stories continue to come down to us, and those stories keep what happened alive.

....

The period known as the Long Walk, and our brutal imprisonment at Fort Sumner, marked us. It scarred us. It hurt us terribly and deeply, like nothing before and nothing since. Like a blood stain over an entire people, it indelibly changed us from who we were in the 1800s to set the stage for who we are today.

....

This is our history. And this is why we call the Long Walk the Navajo holocaust. Yet the determination and resilience that made us strong, proud and feared before 1863 is what got us through this fearful time.

....

Ever since, many have asked how Navajos endured that incredible hardship. It was our prayers, our ceremonies, our ancient way of life that brought us back from the precipice of genocide. That way of life is still a
part of us today although we lost many of our songs, ceremonies and medicinemen during that terrible time.\textsuperscript{40}

The Navajos kept their ceremonies, sacred narratives, and values close to their hearts at Fort Sumner and relied on them to beat death and win an eventual return to their homelands. As educator Robert Roessel explains:

\begin{quote}
Few nations in the world have endured such hardships as have the Navajo. Yet, instead of being broken, crushed and bitter by this concentration camp experience the Navajos grew stronger and their roots went deeper. This increased strength of the Navajo in the face of such tribulation can be attributed mostly, perhaps entirely, to Navajo religion and to the faith the Navajo people had in their Holy People.\textsuperscript{41}
\end{quote}

While some ceremonies, sacred narratives, and values died with the people at Fort Sumner, many also survived and have become the cornerstone for law and procedure used by the modern Navajo Nation Court System.

At least three significant factors that helped shape the Navajo political system came from the Navajos’ Fort Sumner experience. First, while the structure of government proposed by the military officers did not materialize, the beginning of the end of the traditional Navajo governing system, including band type government and traditional leadership, was set in motion when the military treated the Diné as a single entity, and not as separate bands. Furthermore, the authority exercised by the military officers over the Navajo people eroded the good will and respect the people had for their

\begin{footnotes}
\item[40] Navajo Nation President Joe Shirley, Address at the Bosque Redondo Memorial Dedication, Bosque Redondo, New Mexico (June 4, 2005)(unpublished document on file with author).
\item[41] ROESSELL, PICTORIAL HISTORY OF THE NAVAJO, supra note 17, at 20.
\end{footnotes}
traditional band leaders. Death, illness, stress, famine, vulnerability to enemy attack, and all the hardships of incarceration further weakened the traditional band leader’s authority.

Second, the Navajos were introduced to the Anglo-American model of hierarchical and coercive power. The proposed court system at Fort Sumner, if implemented, would have used force and punishment; practices that are foreign to traditional Navajo society. The Anglo-American power structure made a single individual an all powerful decision maker, which contradicted Navajo consensual decision-making through group discussion of policy. During the treaty negotiations, for example, Barboncito said to General Sherman: “It appears to me that the General [meaning Sherman] commands the whole thing [has complete power] as a god.”42 The Navajos quickly deciphered the inner workings of the Fort Sumner power structure after they realized that selected Navajo leaders were granted special benefits and privileges for furthering the government’s goal of “civilization.”43

Third, the United States limited the sovereignty of the Navajo Nation. The military at Fort Sumner prohibited the Navajo Nation from exercising its power over external relations, which gave neighboring tribes and Mexicans free rein to prey on Navajo prisoners at will.44 While the Navajo people still maintained self-government after their release from Fort Sumner, the federal government ensured a strong presence among them through the Indian agent and eventually the Bureau of Indian Affairs.

42 LINK, THE NAVAJO TREATY, supra note 37, at 4-6.
43 ROESSEL, PICTORIAL HISTORY OF THE NAVAJO, supra note 17, at 22.
44 IVERSON, DINÊ, supra note 36, at 59.
Nonetheless, the 1868 Treaty reaffirmed the Navajo Nation’s political status as a sovereign nation.

The Fort Sumner experience started the Navajo people on the road to co-mingling traditional concepts with Anglo-American concepts. The Navajos were no longer isolated and beyond the reach of American power, which required periodic adjustments to culture, spiritual beliefs, and relationships with non-Navajos to accommodate the new pervasive non-Indian presence in their country and just beyond their territorial borders. Nonetheless, in spite of their harsh experience with the power structure at Fort Sumner, the Navajo people retained much of their traditional ways of governance upon their return to Navajo Country in the late summer of 1868.

3. Traditional Navajo Government

Much of the rebuilding of Navajo society and the initial task of nation-building fell to the traditional Navajo leaders after the Navajos returned to their homelands from Fort Sumner. A Navajo leader is called *naat’aanii*, a term that describes a leader’s ability to persuade through speech and histrionics. The parts of the Navajo Journey Narratives covering warfare, particularly those recounting the battlefield exploits of Monster Slayer (*Naayee’ Neezghani*) and his twin brother, Born-for-Water (*To Bajish Chini*), underlie separation of war functions from peace functions in traditional Navajo society. The war leaders (*hashkeeji naat’aah*) oversaw all war related matters, including defense, by relying on their war experiences and extensive knowledge of war ceremonies and warfare passages from the Journey Narratives. The peace leaders (*hozhoji naat’aah*), on the other hand, possessed extensive knowledge of the Navajo Creation Scripture and the
Blessing Way Ceremony and relied on their everyday interactions with people to lead. The peace leaders exercised broad authority over Navajo civil society by guiding the day-to-day activities of the people. While the functions of war and peace were based on two distinct “ways” of knowledge, each was necessary to maintain a harmonious, traditional Navajo society (hozho).

Scholars generally agree that the Navajos did not utilize a centralized political organization before creation of the Navajo Tribal Council in 1923. This proposition holds that the entire Navajo Nation never united under a single leader or a body of leaders (e.g., a tribal council) before 1923. Instead, Navajo political power was dispersed among several independent bands, each headed by a respected and influential leader (naat’aanii). The band type of government functioned primarily as an economic and subsistence unit, although it exercised powers of war when necessary. The band’s headman, who was advised by respected elders (hastoi [elder men] and saanii [elder women], handled issues concerning the general safety and welfare of band members.

While the band type of Navajo government is what Europeans saw in the late 1500’s and early 1600’s, the concept of centralized leadership is part of traditional

---

47 WILKINS, THE NAVAJO POLITICAL EXPERIENCE, supra note 30, at 69.
Navajo knowledge. The Navajo Creation Scripture and Journey Narratives, which is the foundation of traditional Navajo education, contains ample references to a centralized form of political organization. The Creation Scripture and Journey Narratives holds that First Man was the head naat’aanii, and First Woman his subordinate, as they led the primeval beings (First Beings) through the first three worlds (Black World, Blue World, and Yellow World) and during the stabilization of the Fourth World (White World). In the Third World (the Yellow World), which was destroyed by a Great Flood, four sub-chiefs advised First Man. The four sub-chiefs directed the day-to-day activities of the First Beings (male and female) when they resided in a camp at a place called The Two Rivers that Flow Past Each Other (Tóalnaosdlii). The Navajo oral traditions, which are inherent in Navajo culture, language, politics, and religion, suggest that the entire tribe was united under central leadership in ancient times when the population was smaller. The Naachid, a tribe-wide assembly that is no longer practiced today, may be the link to the period when the tribe lived under central leadership.

According to scholars, aged Navajo informants claimed that the last Naachid was held in the 1850’s at Tsin Sikaad (Lone Tree), between twelve to fourteen miles northeast

48 A remark attributed to scholars Klara Kelly and Harris Francis is applicable here: “[A]bsence of evidence is not necessarily evidence of absence.” IVERSON, DINÉ, supra note 36, at 14.
49 This discussion, as are several others in this work, come from my own education on the Navajo Creation Scripture and Journey Narratives.
51 Van Valkenburgh states that the Naachid assembled “all the people” in the days when “the tribe was not so widely diffused as it is today.” Richard Van Valkenburgh, Navajo Common Law I: Notes on Political Organization, Property and Inheritance, 9 MUSEUM NOTES: MUSEUM OF N. ARIZ. 17, 18 (1936) [hereinafter Valkenburgh, Navajo Common Law I].
of present-day Chinle, Navajo Nation (Arizona). One scholar describes the Naachid as a “regional gathering of Peace and War leaders,” because it brought together the tribe’s twelve peace leaders and twelve war leaders. The word Naachid means “to gesture with the hand” and complements the word naat’aah (means leader, but describes head movements and eye contact to make a point while speaking). To understand the latter better, visualize the speaker standing in the center of a circle formed by his audience. While speaking, the speaker shifts to face different sections of his audience so that when he finishes speaking he has made contact with the entire audience.

The naat’aah “way” of speaking conforms to the physical setup of the Naachid. The central feature of the arrangement was a large ceremonial hogan, perhaps “forty feet in diameter and six feet deep, surrounded by a fence of spruce boughs.” The peace leaders sat on the south side of the hogan and the war leaders on the north side. Outside the enclosure, the hogans of the war leaders and their families were situated on the south.

---

52 YOUNG, POLITICAL HISTORY, supra note 45, at 19; Valkenburgh, Navajo Common Law I, supra note 51, at 18. According to my maternal grandfather, the last Naachid was held at Tsin Sikaad before the Navajos were moved to Bosque Redondo.

53 WILKINS, THE NAVAJO POLITICAL EXPERIENCE, supra note 30, at 70-71; See also YOUNG, POLITICAL HISTORY, supra note 45, at 17. In contrast, Kluckhohn & Leighton suggest that the accounts of twelve war chiefs and twelve peace chiefs are likely “ideal patterns with a strong element of retrospective falsification.” KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 122. Washington Matthews mentions that the “natcid” was held for Navajo Chief Big Knee sometime after Spanish contact. Washington Matthews, “The Gentile System of the Navajo Indians,” 3 J. OF AM. FOLKLORE 89, 94-95 (Apr. – June 1890).

54 YOUNG, POLITICAL HISTORY, supra note 45, at 17.

55 Id.
side, while those of the peace leaders and their families were located on the north side. These arrangements would be consistent with Navajo spiritual law because the south side of a ceremonial hogan is associated with peace and the north side with war. The outside arrangement, the inverse of the arrangement inside the hogan, is consistent with spiritual law because peace and war balance each other in Navajo philosophy and each provides spiritual protection to the other. The area beyond the fence would be a public area. The central area in the outside arrangement would be reserved for speakers.

Like the *Nidaa*, an extant Navajo ceremony used to purify the mind, body and soul, the *Naachid* would have served religious, social, economic, and political purposes and probably was open to participation by any Navajo. The war leaders dominated the function if the *Naachid* had been called during war time and the peace leaders dominated during peace time. While data on the actual functioning of the *Naachid* is scanty, the ceremony apparently gave Navajos an opportunity to discuss social, political, economic, and religious issues. In comparison, the *Nidaa* Ceremony provides modern Navajos with a similar forum to raise and discuss contemporary issues in public.

The Navajo people continued to rely on their traditional ways of governance into the early 1900’s. However, the introduction of the Navajo Court of Indian Offenses in

---

56 Valkenburgh, *Navajo Common Law I, supra* note 51, at 18. Notice the reverse arrangements of peace and war. Inside the ceremonial hogan, peace is on the south side, but outside the ceremonial hogan, peace is on the north side.


58 The public area between the large ramada used for cooking and feasting and the ceremonial hogan is reserved for speeches (called *yadati*). The topics I heard discussed at *Nidaa* ceremonies include the Navajo and Hopi land dispute; alcohol abuse; the need to teach young Navajos the Navajo language, culture, and religion; and holding elected leaders accountable to the Navajo public.
1892, the Indian boarding school system in the 1880’s, and the tribal council system in 1923 eventually diminished the traditional Navajo leadership and political system. Western governing methods came to dominate after 1923, particularly during the second half of the twentieth century. Towards the end of the twentieth century, Navajo political institutions came to resemble the Anglo-American institutions that were their models.

4. Modern Navajo Nation Government

While the Navajo Nation now operates the most complex government among Indian tribes, the irony is the Navajo people did not provide any meaningful input into the initial establishment of their government. The events that led to creation of the Navajo Tribal Council began as local Navajo responses to requests by oil companies for exploration leases in the four corners area of Navajo Country. In May of 1921, the Navajo agent for the San Juan Agency called the first “council” of local adult male Navajos to consider requests for oil leases, and this same process was followed for subsequent requests for leases because a council that represented the entire Navajo Nation did not exist. In January of 1922, after a council of San Juan Navajos had approved one lease in fall 1921 and rejected other applications for the Hogback area, three prominent Navajo leaders – Chee Dodge, Charlie Mitchell, and Dugal Chee Bekiss

---

59 Wilkins, Governance Within the Navajo Nation: Have Democratic Traditions Taken Hold?, 17 WICAZO SA REV. 91, 93 (2002) [hereinafter Wilkins, Governance Within the Navajo Nation].

60 IVERSON, DINE, supra note 36, at133; KELLY, THE NAVAJO INDIANS, supra note 30, at 49-50.
– were selected to form “a business council to consider future applications,” but again the ad hoc business council did not represent the entire Navajo Nation.61

Meanwhile in September of 1922, oil was discovered at Hogback, but the exploration lease approved by the San Juan Navajos was found to violate a provision in the 1868 Navajo Treaty that required three-fourths of the adult Navajo males to consent to any “cession” involving Navajo trust lands.62 To eliminate problems with representation, Secretary of the Interior Albert Bacon Fall and Herbert J. Hagerman, who Secretary Fall had appointed as Special Commissioner to the Navajo Tribe to negotiate leases for Navajo lands, created a twelve-member Navajo Tribal Council in spring 1923 specifically to approve oil leases.63 Thus, Secretary Fall, who had friends in the oil industry and wanted to open Navajo lands to oil, gas, and mineral exploration, created the original Navajo Tribal Council primarily to serve the interests of white profiteers.64

The new Navajo Tribal Council held its first session on July 7, 1923 under Hagerman’s supervision and as its first order of business approved a Bureau of Indian Affairs proposal to give Hagerman power of attorney to sign oil and gas leases on the

62 Wilkins, Governance Within the Navajo Nation, supra note 59, at 102. The provision is Article X of the 1868 Treaty.
63 IVERSON, DINÉ, supra note 36, at 133-34; Wilkins, Governance Within the Navajo Nation, supra note 59, at 101; KELLY, THE NAVAJO INDIANS, supra note 30, at 61-64.
64 IVERSON, DINÉ, supra note 36, at 133-34; See infra note 158 for discussion on how Secretary Fall’s creation of the Navajo government conforms to Professor Derrick Bell’s interest convergence dilemma theory.
Navajos’ behalf for the treaty part of Navajo lands. The Navajo Tribal Council rescinded the authority it gave to the special commissioner on October 3, 1933.

Nothing in the record suggests that Secretary Fall created the Navajo Tribal Council to encourage or promote Navajo Nation sovereignty. Secretary Fall’s primary goal was to open Navajo lands to non-Indian companies for oil, gas, and mineral exploration.

By rescinding the special commissioner’s authority in 1933, the Navajo leaders took the first step to controlling the assets of the Navajo Nation, an important aspect of nation-building. The influential men who composed the original and successive Navajo Tribal Council took to heart broad issues that affected the Navajo people, including natural resources development, financial stability, education, health care, and government development. Although the Navajo Tribal Council was under the supervision of the Bureau of Indian Affairs for several decades after its creation, “the Council represented a vital step toward a more cohesive approach to Navajo issues, a central authority that could examine the larger picture and consider how developments in one area might affect all Diné.” Of course, the Navajo Nation Government had to overcome several crucibles, from within and without, to arrive at its present democratic state.

The Navajo Nation now operates a democratic form of government comprised of three branches: legislative (Navajo Nation Council); executive (president and vice-president); and judicial (Navajo Nation Court System). The statutes compiled in Title Two (executive and legislative) and Title Seven (judicial) of the Navajo Nation Code

---

65 IVERSON, DINÊ, supra note 36, at 134-35. The Bureau promised expansion of the Navajo Reservation if the Council approved Hagerman’s authority. Id. at 135.

66 Wilkins, Governance Within the Navajo Nation, supra note 59, at 103-04.

67 IVERSON, DINÊ, supra note 36, at 135.
establish the form of Navajo Nation Government. The Navajo Nation does not have a written constitution. The current three-branch form of government, with checks and balances, was implemented through amendments to Title Two of the Navajo Nation Code in 1989 to reallocate powers between the legislative and executive branches. There were no corresponding amendments to Title Seven in 1989 because the Navajo Nation courts were already in a separate branch of government.

The Navajo people restructured their government to stem abuses of power by Navajo officials. The restructuring occurred in response to Chairman of the Navajo Tribal Council Peter MacDonald Sr.’s corruption in office. MacDonald was charged, tried, and convicted, in both the Navajo Nation courts and the federal district court, of accepting bribes and kickbacks from contractors, violating Navajo Nation ethics laws, instigating a riot, fraud, racketeering, extortion, and conspiracy. He was sentenced to fourteen years in federal prison.

The pre-1989 Navajo government used two branches; the Navajo Tribal Council and the chairman composed one branch (the chairman presided over council sessions), and the court system the other. The Navajo experience shows that the two-branch system, which is also the government structure of most tribes organized under the 1934

---

68 The Navajo Nation Council enacts legislation by resolution. The council resolution that reorganized the structure of the Navajo Nation Government is Navajo Tribal Council Resolution No. CD-68-89 (Dec. 15, 1989). In addition, the Navajo Nation Code seemly gives more power to the Navajo Nation Council than the other two branches: “The Navajo Nation Council is the governing body of the Navajo Nation.” 2 N.N.C. § 101 (1995).

69 Wilkins, Governance Within the Navajo Nation, supra note 59, at 109-11.
Indian Reorganization Act,\textsuperscript{70} can embolden a chairperson to amass tremendous power. In the Navajo two-branch government, the chairman presided over all Navajo Tribal Council sessions; appointed council delegates to tribal council committees; and presided over the Advisory Committee, a mini-council, which acted for the tribal council when it was not in session, and that included approving contracts for the Navajo Nation.\textsuperscript{71} Furthermore, the Advisory Committee had authority to recommend legislation and an agenda for the Navajo Tribal Council.\textsuperscript{72} Under the two-branch system, a chairman could easily manipulate the Council, and even control the entire Navajo government, by appointing partisan delegates to powerful committee positions and Navajo enterprise boards. Fortunately, the Navajos repealed their two-branch government during the 1989 government reforms.

The Navajo Nation Council now has eighty-eight delegates who represent 110 chapters on the Navajo Nation. The council delegates are not subjected to term limits, but the president is limited to two terms. The voters tried to reduce the council to twenty-four members but failed in a Navajo Nation-wide referendum in September, 2000.\textsuperscript{73} Elections for the offices of council delegate and president are held every four years. The Speaker of the Navajo Nation Council heads the legislative branch and presides over council sessions. The Navajo Nation Council elects one of its members every two years to the speaker’s position.

\textsuperscript{70} 25 U.S.C. § 461 et. seq. (Wheeler-Howard Act). The two-branch system of tribal government resembles a corporate board where a chairperson presides over a board. \textsuperscript{71} Wilkins, \textit{Governance Within the Navajo Nation}, supra note 59, at 109, 111. \textsuperscript{72} \textit{Id.} at 111. \textsuperscript{73} \textit{Id.} at 93.
The chief duties of the Navajo Nation Council are approving a budget for the Navajo Nation Government and enacting legislation. The president can veto legislation passed by the Navajo Nation Council; however, the council can overturn a veto with 59 votes. The president, as the head of the executive branch, has authority to appoint directors for several divisions that provide services to the Navajo public, including the Department of Public Safety, Department of Justice, Health and Social Services, Natural Resources, and Education.

The Navajo Nation judges are appointed by the Navajo Nation President and confirmed by the Navajo Nation Council. After serving a successful two-year probationary term, a judge can receive a lifetime permanent appointment. The Navajo Nation judges must speak the Navajo language and know Navajo culture and traditions because those are used during Navajo court litigation. There are nineteen Navajo Nation judges; three are justices of the Navajo Nation Supreme Court. The Navajo Nation Council can remove a judge for cause by a two-thirds vote (59 votes) of the entire council (88). The Navajo Nation judges are at the forefront of all American Indian tribal court judges on use of Indian common law in tribal court decision-making.

74 7 N.N.C. § 355(A) (Oct. 24, 2003 amendments); See also In re Certified Questions I, Navajo Nation v. MacDonald, 6 Nav. Rptr. 97 (1989).
75 7 N.N.C. § 355(B) (Oct. 24, 2003 amendments).
CHAPTER II. THE NAVAJO NATION COURT SYSTEM

A. History

1. Introduction

The Navajo Nation judges enjoy a solid reputation for utilizing extant Navajo customs and traditions as law (Navajo common law) and blending the old with the new, a process that meshes Navajo customs and traditions with relevant and beneficial parts of not only Anglo-American legal traditions, but also legal traditions from different parts of the world.76 The process of blending the old with the new uses a framework that gives primacy to Navajo philosophy and Navajo ways of doing things. The use of Navajo common law by the Navajo judges and Navajo Nation government, which has been described as a Navajo legal revolution,77 is really the Navajo people defining Navajo Nation sovereignty the Navajo way — by relying on their own customs, traditions, language, spirituality, and sense of place.

The skill of the Navajo Nation judges at using Navajo common law and at blending the old with the new has generated intense study and scholarship by those interested in American Indian methods of dispute resolution and the related topic of use of customs and traditions as law by the World’s indigenous peoples. Known as the

76 This statement does not mean, nor does it imply, that the Navajo Nation courts always blend Navajo common law with Anglo-American or other law. In some cases, the Navajo Nation courts have applied only Navajo custom to decide issues; in others, the Navajo Nation judges have applied only Anglo-American law. Moreover, the Navajo Nation courts have leeway to utilize the law or reasoning of other “nations,” including Indian nations, to decide cases. See Pelt v. Shiprock District Court, No. SC-CV-37-99, slip op. at 4 n.3 (Nav. Nat. Sup. Ct., May 4, 2001)(“[B]ecause the Navajo Nation is a ‘nation,’ we will look to other nations’ courts, as well as those of the states and federal government, for guidance on human rights issues”).

77 Zion, Law as Revolution, supra note 13, at 1-3.
flagship of American Indian tribal courts, the Navajo Nation Court System has earned preeminent status among American Indian tribal courts in North America. Even the Federal Ninth Circuit Court of Appeals has acknowledged the competence and sophistication of the Navajo Nation Court System: “The Navajo Nation has a sophisticated body of published laws, and an experienced court system in which trained trial and appellate judges adjudicate thousands of cases per year.”

The Navajo people’s responses to external political, economic, and social pressures have to a large extent shaped Navajo legal traditions and the structure of the modern Navajo Nation adjudicatory system. It is unequivocal that since the 1980’s, Navajo Nation judges have injected a healthy dose of Navajo culture, language, and spiritual traditions into the entire Navajo Nation Court System. The contemporary Navajo Nation Court System, which has roots in the 1892 Navajo Court of Indian Offenses, is constantly developing new ways of using Navajo common law in court decision-making. Opportunities for rapid development of the Navajo Nation courts always follow challenges to the functioning of the Navajo Nation Government by external forces or the Navajo people themselves.

2. Navajo Court of Indian Offenses

Established by the Navajo Tribal Council in 1959, the Navajo Nation Court System, like other American Indian tribal court systems in the United States, is relatively

The Navajo people, however, have been involved with the Anglo-American form of law and courts since at least 1892, when the Bureau of Indian Affairs established the Navajo Court of Indian Offenses for the Navajo Nation. The Navajo Court of Indian Offenses came to Navajo Country as part of a package of criminal and civil laws and courts created for American Indian tribes by the Bureau of Indian Affairs in 1883. Although adversarial in design and called the “Courts of Indian Offenses,” the purposes for which these courts were created belie any suggestion that they were courts of justice.

In 1888, the Federal District Court of Oregon described the Courts of Indian Offenses as “mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.” Furthermore, the federal court said, “the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.”

Lacking any constitutional basis, the Courts of Indian Offenses, also known as “CFR

---

80 The Navajo Tribal Council passed the laws that established the Navajo Nation Court System in 1958 and thereby eliminated the Navajo Court of Indian Offenses. Navajo Tribal Council Resolution No. CO-69-58 (Oct. 16, 1958). The resolution set April 1, 1959 as the official beginning date of the Navajo Nation Court System; the terms of office of the judges of the Navajo Court of Indian Offenses expired on that day.


83 Id.
Courts,” apparently sprang “from the reform impulse” of Interior Secretary Henry M. Teller, who was appointed to lead the Interior Department in 1882.84

Shortly after assuming office, Secretary Teller directed Hiram Price, the Commissioner of Indian Affairs, to draft a set of rules that would abolish “the savage and barbarous practices” of the Indians which have been “a great hindrance to [their] civilization.”85 The rules that Commissioner Price compiled were approved by Secretary Teller on April 10, 1883 and immediately circulated to the Indian agents on the reservations for implementation.86 The new rules established the organization and procedure of the Courts of Indian Offenses and included a short criminal and civil code that was designed to extirpate what Commissioner Price had called the “evil practices” of the Indians.87

In 1890, the agent to the Navajos, C.E. Vandever, reported to the Indian Commissioner that the Courts of Indian Offenses would not work on the Navajo Nation. According to Vandever, the Navajos were inextricably bound to their clan relatives by a complex kinship system that would not allow a Navajo judge of the Court of Indian Offenses to be impartial. Agent Vandever stated his belief as follows:

85 AMERICANIZING THE AMERICAN INDIANS 296-97 (Francís Paul Prucha ed., 1973). The savage and barbarous practices that Secretary Teller wanted to abolish included traditional feasts and dances (e.g., Sun Dance, Scalp Dance), customary marriage and divorce, religious practices of medicine-men, customary probate, and traditional burials. Id.
86 WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 108-09 (1980). Indian agents were white men working for the federal government who had complete authority over their assigned reservations and Indian tribes.
87 Id. at 109.
There has never been, to my knowledge, a court of Indian offenses here. The tribe is divided into clans, which are widely scattered over a vast territory. If such a court existed the different clans should be represented, and if they were it would be next to an impossibility to get the members together at any one time, or even a small portion of them. On the other hand, in a court composed of a few representatives from a few clans the member of an unrepresented clan would certainly suffer if brought to trial before them, so great is the jealousy existing between them. For these reasons I do not think it desirable to have a court; in short, in my experience the offenses committed have been so few and trifling that I do not think a court necessary. If a crime is committed the Territorial courts are amply able to deal with it.88

David L. Shipley, a man determined to civilize the Navajos, replaced Vandeever as agent to the Navajos in 1891.89 In his first Annual Report dated August 31, 1891, Agent Shipley reported that the Navajos under his charge were on a steady march to civilization: “The Indians are gradually abandoning their old customs; dancing is diminishing, and the heathenish yearly ceremony called the ‘hish kohu’ [sic] dance is waning and will soon be a thing of the past. There is a marked increase in the number of Indians who are adopting


89 Agent Shipley, accompanied by Navajo police, nearly started another Navajo war in 1892 when he tried to round up 30 Navajo children from the Round Rock, Arizona area to enroll in school at Fort Defiance. Black Horse, the area’s headman, and his followers held Agent Shipley hostage for a day and a half before releasing him to American soldiers. A few days later, Agent Shipley asked the soldiers to arrest Black Horse, but the commanding officer denied the request stating that the situation would be better left to Navajo headmen. IVERSON, DINÉ, supra note 36, at 89-91.
civilized dress.”

Modern scholars of Navajo history, however, conclude that the federal government’s “attempts to ‘civilize’ the Navajos failed almost completely.” This conclusion would suggest that the Navajo way of life remained strong through the end of the nineteenth century.

In 1892, Agent Shipley established the Navajo Court of Indian Offenses on the Navajo Nation. In his Annual Report for that year, dated August 25, 1892, Agent Shipley had nothing but praise for the founding judges of the Navajo Court of Indian Offenses:

The court of Indian offenses is composed of 3 judges and meets once a month or more frequently if necessary. The court has done good work and relieved me of considerable business, which, in the majority of cases, can be as well if not better performed by them than by the agent. I can not call to mind a single case of theirs that I have had to reverse.

During the late 1800’s and the early 1900’s, the Navajo CFR Court enforced the Bureau of Indian Affairs’ 1892 regulations for the Courts of Indian Offenses. The

90 Sixtieth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, printed in REPORT OF THE SECRETARY OF THE INTERIOR, 52d Cong., 1st Sess. (1892), at 310. Agent Shipley was probably voicing a novice’s optimism. Navajo customs and ceremonial practices were still prevalent in the 1890’s. The Navajos were severely traumatized by Kit Carson’s scorch-earth campaign and subsequent imprisonment at Fort Sumner; both of these caused Post Traumatic Stress Syndrome among the Navajo survivors. The Navajos knew about PTSS long before contact with Europeans because they had curing ceremonies to treat it. The ceremonies, together with customary and traditional practices, used to treat PTSS were as dynamic as ever at the time Agent Shipley submitted his annual report.


original regulations were approved in 1883 and then reissued on August 27, 1892; the following were listed as crimes in 1892: Dances; Plural or polygamous marriages; Practices of medicine men; Destroying property of other Indians; Immorality; Intoxication; any misdemeanor; and any Indian who does not “adopt habits of industry” or engages in “civilized pursuits or employment, but habitually spends his time in idleness and loafing” shall be deemed guilty of a misdemeanor and punished by fine or imprisonment.\footnote{DOCUMENTS OF UNITED STATES INDIAN POLICY 186-89 (Francis Paul Prucha ed., 2d ed., 1990)(the August 1892 regulations are entitled, “Punishment of Crimes and Misdemeanors Committed by Indians”).} On June 2, 1937, the Commissioner of Indian Affairs approved new regulations for the Courts of Indian Offenses of the Navajo and Hopi Tribes.\footnote{THE PHELPS-STOKES FUND, THE NAVAJO INDIAN PROBLEM 72 (1932) [hereinafter PHELPS-STOKES FUND].}

Entitled the “Special Regulations Governing Law and Order on the Navajo and Hopi Jurisdictions in Arizona and New Mexico,” the 1937 regulations gave the Navajo Tribal Council some authority over the selection and removal of Navajo CFR Court judges. According to the regulations, the judges were “appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the Tribal Council and holding office for four years.”\footnote{Id. at 73; See also Law and Order Regulations, 3 Fed. Reg. 1134 (May 18, 1938).} The Commissioner of Indian Affairs retained authority to suspend, remove, or dismiss any judge upon recommendation of the Navajo Tribal Council.\footnote{PHelps-STOKES FUND, supra note 94, at 73; See also Law and Order Regulations, supra note 95, at 1134.} By 1937, the Bureau of Indian Affairs had eliminated the harsh “civilizing” regulations of 1883 (and reissued in 1892) and replaced them with regulations that

\footnote{PHelps-STOKES FUND, supra note 94, at 73; See also Law and Order Regulations, supra note 95, at 1134.}
mimicked state criminal laws and which allowed tribes a small voice (probably due to the 1934 Indian Reorganization Act) in the administration of reservation justice.

The Navajo Court of Indian Offenses started to keep better track of its operations in about 1937.97 The record from that period shows that the Navajo CFR Court handled largely criminal matters, because the Navajo people continued to settle their civil disputes outside the court system using headmen and the old ways.98 Criminal law and civil law are not separated under traditional Navajo justice. Apology, forgiveness, and restitution were preferred remedies for injury and wrongs, including crimes, under traditional Navajo justice.

The Bureau of Indian Affairs disrupted the efficacy of Navajo justice concepts when it imposed criminal laws and incarceration as punishment, a sanction unknown under traditional Navajo justice, and police and courts to enforce them. The Navajos initially ignored the Navajo CFR Court for civil matters because they associated it with incarceration. Any system that uses coercive authority is antithesis to traditional Navajo consensual decision-making. In contrast, resolution of disputes outside the Navajo Court of Indian Offenses reinforced Navajo common law by restoring disputants and their community to right relations (hozho). For example, Navajos of one community continued to use traditional Navajo methods of dispute resolution well into the 1960’s,

97 Phelps-Stokes Fund, supra note 94, at 77.
and not the Western-styled Navajo courts, because “harmony [hozho] has such a high value in Navajo society.”

The caseload for 1937 totaled 557 cases (516 criminal and 41 civil) with the majority of the criminal cases involving alcohol abuse. During the sentencing phase, the Navajo CFR Court frequently used nalyeeh, which allows for apology, forgiveness, and restitution, to require the defendant to compensate any party harmed by his wrongful conduct. The court also summoned headmen to lecture wrongdoers on the proper way to maintain proper relations within a Navajo community. The Bureau of Indian Affairs Law and Order Code allowed the tribal custom of restitution by the late 1930’s:

In addition to any sentence, the Court may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured, through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party.

The Navajo Tribal Council eventually adopted the restitution provision and several other provisions from the 1937 Bureau of Indian Affairs Law and Order Code as Navajo Nation statutory law.

---

100 Phelps-Stokes Fund, supra note 94, at 79.
102 Law and Order Regulations, supra note 95, at 1137.
103 See 7 N.N.C. § 701(A) (2005): The judgment in all civil cases shall be an order of the Court awarding money damages to the injured party, directing the surrender of certain property to the injured party, directing the performance of an act for the benefit of the injured party, directing that a party refrain from taking
The Navajo judges of the Navajo Court of Indian Offenses of the 1930’s were described as “men of high standing and intelligence” who conducted their court proceedings like the traditional community gatherings, which led non-Indian observers to describe the court proceedings as informal. The judges were well acquainted with the Bureau’s Law and Order Code, and when in doubt, most of them applied “the Indian [Navajo] customary law.” In one case, the judge asked the interpreter to read Section 18 (manufacturing and transporting liquor) of the Criminal Code to the defendant in Navajo, and when the interpreter erred, the judge corrected the misreading although he did not have a copy of the code before him.

The Navajo Court of Indian Offenses judges exercised an exceptional degree of impartiality during court proceedings and decision-making in spite of traditional Diné kinship rules that demanded fidelity to clan relatives. The judges did not permit politics, kinship or other external pressures to influence their work and they were less manipulated by outside influences than the local white judges. Overall, the Navajo people who

---

104 Phelps-Stokes Fund, supra note 94, at 73; Boyden & Miller, Report of Survey of Law and Order, supra note 98, at 16. The Navajo men who were observed while presiding as judges of the Navajo Court of Indian Offenses during the period of these two studies were Judges Tom Claw, John Curley, Sammy Jim, Sidney Phillips, Slowtalker, and Jim Shirley.


conducted business before the Navajo Court of Indian Offenses voiced satisfaction with the way their cases were handled and believed they had received justice.\textsuperscript{108}

While the 1937 Bureau of Indian Affairs Criminal Regulations that the Navajo CFR Court used resembled state criminal laws, the Navajo judges frequently drew from Navajo customs and traditional dispute resolution methods to decide cases brought under the Bureau’s criminal code. While presiding over criminal cases, the Navajo Court of Indian Offenses judges followed Navajo custom by allowing defendants ample time to tell their version of events that constituted the criminal charges against them.\textsuperscript{109} Respected leaders and headmen frequently spoke on behalf of criminal defendants in court, which is the traditional Navajo form of legal representation.\textsuperscript{110}

The punishment included restitution (\textit{nalyeeh}) as a matter of course in criminal cases in the Navajo CFR Court. In a 1942 case, four defendants pleaded guilty to cattle rustling, and each defendant was ordered to give the owner of the two cows they had stolen ten head of sheep to satisfy the restitution part of his sentence.\textsuperscript{111} Another prevailing custom the judges used was to allow relatives who were present in the courtroom to speak on behalf of a defendant or a victim in an attempt to arrive at a just and practical decision.\textsuperscript{112} Although the Navajo Court of Indian Offenses was an Anglo-American institution forced on the Navajo people as an instrument of oppression and

\textsuperscript{108} See interviews in Boyden & Miller, \textit{Report of Survey of Law and Order, supra} note 98, at 28-52A.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 35.
\textsuperscript{111} Navajo Tribe v. Jim Warito, Art Sandoval, Richard Antoni, and John Largo, Case No. 18 (Navajo Ct. of Ind. Offenses, Crownpoint, N.M., Mar. 6, 1942) (reported in Boyden & Miller, \textit{Report of Survey of Law and Order, supra} note 98, at 70-71).
\textsuperscript{112} Boyden & Miller, \textit{Report of Survey of Law and Order, supra} note 98, at 41.
assimilation, over time they adjusted to it, and eventually used it to establish a highly regarded and efficient modern Navajo Nation Court System.

3. Navajo Nation Creates its Court System

Federal Indian policy shifted from tribal self-government to termination in 1945, after the resignation of Commissioner John Collier, the architect of the 1934 Indian Reorganization Act and the chief proponent of self-government for Indian tribes. Advocates of the termination policy desired a complete integration of American Indians into the American mainstream as full taxpaying citizens.\(^ {113}\) In 1953, the termination policy received a major boost when Congress passed Public Law 280, a general statute that granted states unprecedented authority to extend their civil and criminal jurisdictions into Indian Country.\(^ {114}\) Public Law 280 authorized states to amend their laws to exercise power on Indian reservations, but many declined the invitation because of the huge financial burden associated with police, court, probation, and other services to reservation residents.\(^ {115}\)

The Navajo leadership understood well the congressional termination policy and the potential consequences of Public Law 280 on the sovereign powers of the Navajo Nation. The Navajos had successfully blocked federal efforts to impose state jurisdiction


\(^ {115}\) Stephen Cohn, Mid-Passage – The Navajo Tribe and its First Legal Revolution, 6 AM. INDIAN L. REV. 329, 334 (1978) [hereinafter Cohn, Mid-Passage]; Williams v. Lee, 358 U.S. at 222-23.
on them in 1949 when Congress conditioned passage of the Navajo-Hopi Rehabilitation Act, a law designed to spur economic development on the Navajo Nation, on the Navajos’ acceptance of state civil and criminal jurisdictions on their lands.116 The condition, known as the Fernandez Amendment to the Navajo-Hopi Rehabilitation Act, would have allowed concurrent state court jurisdiction over reservation-based disputes between Navajos. Caught in a dilemma, the Navajo Tribal Council opted for the federal aid package when it voted 37 to 20 to support the Fernandez Amendment, but the grassroots Navajos refused to accept state jurisdiction which led the tribal council to change course and ask President Harry Truman to veto the entire Act.117 On October 17, 1949, President Truman cited the Fernandez Amendment’s potential to eliminate Navajo customary law to the detriment of the Navajo people and vetoed the Act.118 The Navajo-Hopi Rehabilitation Act was reintroduced without the Fernandez Amendment during the next congressional session and passed and signed into law in 1950.119

In 1957, the State of Arizona moved to implement Public Law 280 on the Arizona portion of the Navajo Nation. Then Navajo Tribal Chairman Paul Jones summarized Arizona’s scheme this way:

---

116 25 U.S.C.A. § 636 (1954); Cohn, Mid-Passage, supra note 115, at 334.
117 Cohn, Mid-Passage, supra note 115, at 344-45.
118 Congress passed the Navajo-Hopi Rehabilitation Act with the Fernandez Amendment in 1949, but President Truman vetoed the Act stating that the Amendment might be construed to eliminate Navajo customary practices and impose upon the Navajos, the majority of whom are non-English speaking, non-Indian laws “which they neither want nor understand.” Id. at 345.
119 The Navajo-Hopi Rehabilitation Act channeled millions of dollars to the Navajo Nation for road construction, schools, range conservation, irrigation projects, healthcare facilities, loans, and domestic and institutional water projects. IVERSON, DINÉ, supra note 36, at 4, 189-90.
[Chairman Paul Jones]: First of all, some time ago last year [in 1957], the State Congress [sic] of Arizona almost passed a law where our judges would be supplanted by the state judges, and also the Law and Order police, without our knowledge. Mr. Davis [Laurence Davis, Tribal Attorney] informed us just a few days before a decision would be reached by a committee, and we hustled down to Phoenix to make some opposition to the bill that was introduced in the State Congress [sic]. Thereafter, when they found we were there to object, they didn’t even give us a chance to be heard; they finally decided, since there was objection, that they better not do it. It seemed to me that it was sort of done on the sly, but we found out and went over there to oppose, and they wouldn’t even permit us to make a protest. They knew what it was we were there for, but they wouldn’t let us make a comment. After telling us that the committee would meet and we would be heard, they decided to throw it out, knowing it would be discussed.

But, anyway, the State is on the verge of assuming that responsibility as far as law and order, and in order to keep them from us, we think that our law and order setup should be made stronger, for them to enforce the courts’ decisions and the like in the manner that the State does; therefore, they could say: ‘They have got a better law and order setup than we have; leave them alone.’ That is what we are after.120

While Chairman Jones cannot be faulted for seeing Arizona’s move as underhanded, it also demonstrates that in the 1950’s a state could act unilaterally under Public Law 280 to extend its power over an Indian reservation. The threat of state unilateral authority under Public Law 280 forced the Navajo Tribal Council and Norman

---

120 Navajo Tribal Council Minutes, Oct. 14, 1958, at 246. Chairman Jones’ remarks preface the legislation that established the Navajo Nation Court System.
Littell, the tribe’s general counsel, to strategize to ward off any further state attempts to usurp Navajo sovereignty. The plan formed around two core nuclei, both of which involved the exercise of Navajo Nation sovereignty. First, the Navajos had to prove to non-Indian officials that the Navajo Nation had the capacity to govern, and second, the Navajo Tribal Council had to prove to the Navajo people that it could be trusted to govern. The strategy was pursued along two complimentary paths. First, the Navajo Nation tapped the federal courts to define its sovereign rights, and second, the Navajo Nation took control of police and court functions — services typically provided by sovereigns — that were then under the administration of the Bureau of Indian Affairs.

On January 7, 1958, the Arizona Supreme Court provided the Navajo Nation with the perfect opportunity to test its plan when it ruled that Hugh Lee, a non-Indian doing business as Ganado Trading Post, could sue Paul and Lorena Williams, a Navajo couple living on the Navajo Indian Reservation, in Arizona state court to collect a reservation-

---

121 Norman Littell had worked with two Seattle law firms and had served as assistant solicitor in the Department of the Interior and as assistant attorney general in the U.S. Justice Department before he became the Navajo Nation’s general counsel on July 10, 1947. Littell resigned as general counsel in late February, 1967 following an acrimonious relationship with Chairman Raymond Nakai, which resulted in a federal court decision against Littell in Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966). IVERSON, DINÉ, supra note 36, at 207, 231-32; Peter Iverson, Legal Counsel and the Navajo Nation Since 1945, 3 AM. INDIAN Q. 1, 2, 6-7 (1977). In 1968, as part of the Indian Civil Rights Act, Congress removed unilateral state authority and replaced it with tribe consent to state jurisdiction. See 25 U.S.C. §§ 1321(a), 1322(a), 1326 (2006).

122 Cohn says the “Navajos were aware that they could lose the inherent powers of self-government by default. The right to self-government inherent in Indian semi-sovereign states was subject to reinterpretation by Congress. Tribal action was essential to prove their capacity to govern and therefore retain the inherent power.” Cohn, Mid-Passage, supra note 115, at 335, 340.
based debt. Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (Ariz. 1958). Littell petitioned the United States Supreme Court for review and certiorari was granted. On January 12, 1959, the United States Supreme Court reversed the decision of the Arizona Supreme Court by holding that Indian tribal courts have exclusive jurisdiction over non-Indian lawsuits against Indians for claims arising on Indian reservations. A few months later, on November 17, 1959, the Tenth Circuit Court of Appeals held that the First Amendment to the United States Constitution did not apply to the Navajo Nation’s prohibition on religious use of peyote on the Navajo Nation. These two landmark federal Indian law decisions, Williams v. Lee and Native American Church of North America v. Navajo Tribal Council, upheld the Navajo Nation’s adjudicatory and regulatory powers, respectively, and significantly clarified and solidified the sovereign powers of Indian nations.

Law and order (police services) on the Navajo Nation had been a federal responsibility since the Navajos returned from exile in the summer of 1868. However, federal funding for police functions on the Navajo Nation had never been adequate from the very beginning. By 1958, the Navajo Tribal Government was providing 93% of the funds for police services on the Navajo Nation although those services were under the

126 Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). The Navajo Tribal Council legalized religious use of peyote on the Navajo Nation in 1967.
direct control of the Bureau of Indian Affairs.\textsuperscript{127} When the Navajo people requested more police protection in the outlying areas, particularly to quell alcohol-induced violence at ceremonies (i.e., \textit{Nidaa}), the Bureau of Indian Affairs responded indifferently. The Navajo Tribal Council then proposed to take over police functions on the Navajo Nation.\textsuperscript{128} The Bureau accepted the proposal and the Navajo Nation assumed control of law enforcement over its territorial jurisdiction in the summer of 1958.

The Bureau of Indian Affairs also administered the Navajo Court of Indian Offenses simultaneously with police functions. While traditional dispute resolution methods and customs were still the primary means used to resolve conflicts in local Navajo communities during the 1950’s, the court system that the Navajo Tribal Council adopted in 1958 was completely at variance with traditional justice methods. The Council’s decision, however, was not a case of deliberately favoring a Western-styled court system over a Navajo traditional one, but a result forced on it by state threats of extending their jurisdictions into Navajo Country.

The Council and its attorney-advisers concluded that only a legal system which resembled the state legal system, replete with legal specialties and institutional arrangements, could block implantation of a system in state hands.

\textsuperscript{127} The estimated budget for law enforcement on the Navajo Nation for the 1958 fiscal year was $1,398,766. Out of that total, the Navajo Nation’s share was $1,313,766 (93.5%), while the federal government’s share was $85,000 (6.5%). Navajo Tribal Council Resolution No. CJ-45-58 (July 18, 1958).

\textsuperscript{128} “The Navajo Tribe hereby requests the Secretary of the Interior to divest himself of and to transfer to the Navajo Tribe his authority over all aspects of the law enforcement program on the Navajo Reservation and other land subject to the jurisdiction of the Navajo Tribe....” \textit{Id}.
Knowledgeable observers expressed concern about the conflicts inherent in forcing Anglo-American law on non-Anglos. Their protests were helpful in fending off state takeovers. However, the Council and its attorneys appear to have been convinced that the only legal system which would be recognized as valid was a system modeled after state and federal design.\(^{129}\)

In essence, the decision rested on an assumption that a Navajo court system that looked like an Anglo-American court system would be more palatable to non-Indian policymakers. The states would then leave the Navajo Nation alone to develop its jurisdiction, law, and justice institutions.\(^{130}\)

Beyond the political ramifications of the states exercising jurisdiction in Navajo Country, the Navajo leaders also had to consider the potential impacts of Public Law 280 and the termination policy on Navajo cultural well-being. While World War II had brought the wage economy and other trappings of the non-Indian world to Navajo lands, the Navajo Nation was still a predominately Navajo-speaking, traditional Navajo society. Thus, the realities of life on the Navajo Nation in the late 1950’s also influenced the Navajo leadership to adopt a Western-styled court system as a way of keeping Anglos out of Navajo Country and thereby shielding Navajo culture from American mainstream culture that would follow state extension of jurisdiction.

On October 16, 1958, the Navajo Tribal Council established the “Judicial Branch of the Navajo Nation Government”; a branch separate and independent of the Tribal

\(^{129}\) See Cohn, Mid-Passage, supra note 115, at 338.

\(^{130}\) Navajo Tribal Council Minutes, Oct. 14, 1958, at 246.
Council and chairman’s office to house the Navajo trial and appellate courts. The Tribal Council defined the jurisdiction of the newly formed courts; provided for jury trials; established procedures for appointment, retirement, and removal of judges; set the salaries of judges; authorized judges to adopt court rules and schedules for fines and fees; and delineated the chief justice’s duties. The enabling resolution took effect on April 1, 1959; the date on which the terms of the judges of the Navajo Court of Indian Offenses expired. On April 1, 1959, the caseload of the former Navajo Court of Indian Offenses was transferred to the Navajo Nation courts and the former judges of the Navajo CFR Court assumed their new positions as Navajo Nation judges.

B. Modern Navajo Nation Courts

1. Structure

Except for the creation of the Supreme Judicial Council of the Navajo Tribal Council in 1978, the Navajo Nation Court System remained unchanged until the Navajo Tribal Council undertook court reforms in 1985. The Tribal Council created the Supreme Judicial Council on May 4, 1978 on the recommendation of Antioch Law School Deans Edgar S. Cahn and Jean Camper Cahn, who had been retained by the Council’s Judiciary Committee to find ways to prevent Navajo court review of Council actions. The Navajo Nation courts had earlier used the Indian Civil Rights Act to

\[\text{Navajo Tribal Council Resolution No. CO-69-58 (Oct. 16, 1958)(this resolution created the Navajo Nation Court System).}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Navajo Tribal Council Resolution No. CMY-39-78 (May 4, 1978).}\]
\[\text{Navajo Tribal Council Minutes, May 4, 1978, at 478-95. Chairman Peter MacDonald Sr. and his supporters on the Council created the Supreme Judicial Council to}\]
review and invalidate Council resolutions on reapportionment and funding for Chairman Peter MacDonald Sr.’s legal defense. The Chairman and his supporters on the Council cast the court decisions as a power grab by the courts and used it as a pretext for enacting legislation that denied Navajo courts the power of judicial review.

The Supreme Judicial Council, a quasi-legislative appellate body and arm of the Navajo Tribal Council, was granted power to review Navajo Court of Appeals decisions that determined the validity of Council resolutions. Of the eight members on the Supreme Judicial Council, the chairman had authority to appoint seven members (two retired judges and five tribal council delegates). The chief justice, as the eighth member of the panel, could preside over the proceedings of the Supreme Judicial Council, but could not vote on the final decision except in the event of a tie, which in all probability was very slim. At any point in the proceedings of the Supreme Judicial Council, the chairman could intervene “to represent the interests of the Navajo
The Supreme Judicial Council heard only three cases before it was abolished by the 1985 court reforms.

The Navajo Tribal Council reformed and set the current structure of the Navajo Nation Court System in 1985. The Supreme Judicial Council was eliminated and the Navajo Court of Appeals was renamed the Navajo Nation Supreme Court and made the court of final resort within the Navajo Nation Government. The Navajo Nation Supreme Court reviews Navajo trial court decisions and final decisions of administrative agencies and has original jurisdiction to issue extraordinary writs. The Supreme Court has ultimate authority over law practice, including bar membership, on the Navajo Nation and reviews decisions of the Navajo Nation Bar Association, an organization of lawyers and lay advocates authorized to practice law on the Navajo Nation.

The Navajo trial courts, called district courts, are divided into seven district courts and five family courts. The trial courts are located at Tuba City, Kayenta, Chinle and Window Rock on the Arizona side of the Navajo Nation and at Crownpoint, Shiprock, and...

---

140 Id.
142 7 N.N.C. § 302 (2005).
Ramah, Tóhajiilleeh and Alamo on the New Mexico side. The district courts are courts of general jurisdiction and the family courts have jurisdiction over domestic matters.  

Annexed to each trial court (district court and family court) is a peacemaking division and each district court has a small claims division that businesses use to bring claims worth $2,000 or less without the services of a lawyer. Peacemaking, called Hozhooji Naat’aanii, utilizes traditional Navajo methods of dispute resolution. The Special Division of the Window Rock District Court, whose three judges are appointed by the chief justice, has exclusive jurisdiction to appoint a special prosecutor to investigate and prosecute ethics and corruption cases involving Navajo Nation Government officials.

The Navajo Nation judges are appointed by the Navajo Nation President and confirmed by the Navajo Nation Council after a preliminary process of background checks, analytical skills testing, and interviewing by the Council’s Judiciary Committee. The Judiciary Committee scores each applicant and sends the names of three applicants with the highest scores to the Navajo Nation President for appointment. The president’s appointee goes before the Navajo Nation Council for confirmation. Each newly appointed judge serves a two-year probationary period during which the judge completes judicial education at either the National Judicial College at Reno, Nevada or

---

145 “The Family Courts of the Navajo Nation shall have original exclusive jurisdiction over all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship, mental health commitments, mental and/or physical incompetence, name changes, and all matters arising under the Navajo Nation Children’s code.” 7 N.N.C. § 253(B) (2005).
146 7 N.N.C. §§ 292(A), (C) (2005).
147 7 N.N.C. § 355(A) (2005).
the National Indian Justice Center at Petaluma, California.\textsuperscript{148} After successful completion of probation, the Navajo Nation Council may grant a judge a lifetime appointment. Each permanent judge serves “during good behavior”; thus, a judge can be removed for “malfeasance or misfeasance in office, serious neglect of duty, or has become mentally or physically unable to perform [judicial] duties,” or if a judge “has been convicted of a felony in a state or federal court since entering upon duty,” or if the judge substantially misrepresented his qualifications for a judgeship.\textsuperscript{149} Removal of a permanent judge requires a two-thirds vote (59 votes) of the full membership of the Navajo Nation Council and only after a full hearing before the Council at which the judge has a right to be represented by an attorney.\textsuperscript{150}

2. Jurisdiction

Navajo Nation law gives the Navajo district courts original jurisdiction over 1) all crimes listed in the Navajo Nation Criminal Code when committed within Navajo Nation territorial jurisdiction or when committed off the Navajo Nation as a Navajo-on-Navajo crime; 2) all civil actions in which the defendant resides in Navajo Indian Country or has caused an action to occur within Navajo territorial jurisdiction; and 3) all matters under Navajo statutory law, Navajo common law, and Navajo treaties, and all causes of action recognized in American law generally.\textsuperscript{151} The Navajo Nation also has status jurisdiction over its members, which means the Navajo courts can exercise jurisdiction over enrolled Navajos regardless of their place of residence and over Navajo children who are eligible

\textsuperscript{148} 7 N.N.C. § 355(B), (C) (2005).
\textsuperscript{149} 7 N.N.C. §§ 352(A), (B), (D) (2005).
\textsuperscript{150} 7 N.N.C. § 352(C) (2005).
\textsuperscript{151} 7 N.N.C. § 253(A)(1)-(3) (2005).
for enrollment regardless of where they are found. For example, a provision on Navajo
criminal jurisdiction states as follows: “The Navajo Nation Courts shall also have
jurisdiction over any member of the Navajo Nation who commits an offense against any
other member of the Navajo Nation wherever the conduct which constitutes the offense
occurs.” Moreover, the Navajo Nation courts have criminal jurisdiction over all
individuals who marry Navajos and thereby assume tribal relations and live in Navajo
Indian Country. When non-Navajos marry Navajos, they voluntarily place themselves
within the clanship structure and thereby consent to maintaining proper relations with
their spouse’s clan relatives, other Navajos, and the Navajo Nation as place. The Navajo
Nation asserts civil jurisdiction over non-Indians who commit offenses in Navajo Indian
Country, but the sanctions are limited to civil fine, civil forfeiture, restitution, and
exclusion.

The Navajo territorial jurisdiction statute gives the Navajo Nation courts
jurisdiction over all of Navajo Indian Country. The statute is based generally on the
federal Indian country statute. The Navajo territorial jurisdiction statute defines
Navajo Indian Country as follows:

The territorial jurisdiction of the Navajo Nation shall extend to Navajo
Indian Country, defined as all land within the exterior boundaries of the
Navajo Indian Reservation or of the Eastern Navajo Agency, all land

152 7 N.N.C. § 253(A)(1).
153 17 N.N.C. § 204(C) (2005). This is a codification of the hadane rule in
Means v. District Court of the Chinle Judicial District, 7 Nav. Rptr. 383, 391-93 (1999),
which holds that the Navajo Nation has criminal jurisdiction over non-Navajos who
marry enrolled Navajos and commit crimes on the Navajo Nation.
154 17 N.N.C. § 204(D)(1)-(4) (2005).
within the limits of dependent Navajo Indian Communities, all Navajo Indian allotments, all land owned in fee by the Navajo Nation, and all land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.\textsuperscript{156}

The term “Navajo Indian Reservation” includes lands set aside by the 1868 Navajo Treaty and all subsequent additions to the Treaty Reservation by federal executive orders and statutes. Territorial jurisdiction in the Eastern Navajo Agency in New Mexico is difficult to pinpoint because the area is “checker-boarded” with Navajo allotments, fee lands, and state owned lands. For sure, the Navajo Nation has jurisdiction over Navajo Indian allotments, Navajo Nation owned fee lands, and dependant Navajo Indian communities. The term “dependent Navajo Indian Communities” in the Navajo territorial jurisdiction statute comes from the federal Indian country statute. The extent to which the Navajo term has been affected by the United States Supreme Court decision in \textit{Alaska v. Native Village of Venetie Tribal Government}\textsuperscript{157} is not clear. The territorial jurisdiction statute gives the Navajo Nation jurisdiction over lands held in trust for or owned by the Navajo Nation or leased by the United States to the Navajo Nation. This part of the law covers fee lands that the Navajo Nation has purchased like the Big Boquillas Ranch near Seligman, Arizona, and lands leased from the federal government, including the Espil Ranch which is on the north side of the San Francisco Peaks near Flagstaff, Arizona.

\textsuperscript{156} 7 N.N.C. § 254(A) (2005).
\textsuperscript{157} 522 U.S. 520 (1998).
CHAPTER III. FOUNDATIONAL DINÉ LAW PRINCIPLES

A. Modern Navajo Law

There is a glaring imbalance in Navajo Nation law between Navajo common law and adopted American law. The great bulk of Navajo Nation law is adopted American law; particularly, the laws that comprise the 26 titles of the Navajo Nation Code. While the Navajo Nation Code matches any state code in terms of subjects covered and complexity, the traditional Navajos and a significant percentage of the Navajo population would find their Nation’s laws perplexing, because the Code contains little that is Navajo in custom, tradition, or language. The dearth of Navajo common law in the Code confirms, first, that the Navajo people did not participate in the initial creation of the Navajo Nation Government, and, second, non-Indian lawyers with little or no knowledge of Navajo common law drafted the statutory laws. This chapter traces the methods the Navajo judges have used to counter the imbalance in Navajo Nation law; the result of an over-reliance on American law. As a necessary exercise of self-government

158 As discussed in Chapter 2, Secretary of the Interior Albert Bacon Fall established the original Navajo Tribal Government primarily to serve the economic interests of exploitive non-Indian mineral companies. The purpose for which Secretary Fall created the Navajo Tribal Council in 1923 conforms to Professor Derrick Bell’s interest convergence dilemma theory. Professor Bell’s theory holds that “minority rights are only recognized by the dominant society when that society perceives that it is in its own best interests to do so.” ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON, xxxiii (2005). The challenge for Indian nation leaders is to convince American policy makers and judges that it is in America’s interests that tribes “govern their reservation homelands and those who enter them by their own laws, customs, and traditions, even when these are incommensurable with the dominant society’s values and ways of doing things.” Id. at xxxv.

159 The law and order regulations promulgated by the Bureau of Indian Affairs for the Courts of Indian Offenses are the sources of Navajo statutory laws on crimes, domestic relations, and Navajo courts.
and nation-building, the Navajo Nation must provide sufficient space for traditional Diné ways within a Navajo Nation Government that is overly saturated with Western models and laws.  

For much of the twentieth century, the federal government implemented Indian assimilation and termination policies through the Bureau of Indian Affairs. These policies were in all respects incompatible with incorporating traditional Navajo values into the Navajo Nation Government. The federal government abandoned in practice its termination policy in 1961, but two more decades passed before the Navajo judges found the political environment suitable for officially sanctioning use of traditional Navajo justice concepts and methods in the Navajo Nation courts. While the Navajo judges had used traditional law and justice methods since the days of the Courts of Indian

---

160 Cultural match, which means that the tribe’s culture, including customs and traditions, should match its institutions, is one of the components of the Nation-Building Model. The other components are “stable institutions and policies, fair and effective dispute resolution, separation of politics from business management, [and] a competent bureaucracy.” Stephen Cornell and Joseph P. Kalt, Sovereignty and Nation-Building: The Development Challenge in Indian Country Today, 22 AM. IND. CULTURE & RESEARCH J. 187, 196, 201-05 (1998). According to the Nation-Building Model, Indian nations that use their customs and traditions exercise effective sovereignty.

161 The goals of the termination policy were to abolish Indian reservations and make the lands taxable and severable, end the tribal-federal relationship, and end the special services that the federal government provides to Indian tribes. Although termination in practice was abandoned in 1961, it was not until President Richard M. Nixon called for a new federal policy of self-determination for Indian tribes in 1970 that the termination policy was officially ended. Stephen Cornell, The Return of the Native 123-25 (1988).

Offenses, it was not until 1982 that traditional Navajo justice ways became official court policy.\textsuperscript{163}

By 1980, the Navajo judges firmly believed that an alternative to the Western form of adjudication in the Navajo courts was imperative for the Navajo Nation. While reviewing public complaints, Navajo court officials had identified several problems produced by the inherent incompatibility between traditional Navajo justice ways and Western-styled litigation in the Navajo courts. The problems were summarized as follows: 1) The litigious system could not resolve certain kinds of disputes in the Navajo communities; 2) Navajos complained that the Western form of adjudication was expensive and time consuming; 3) Western methods of adjudication confused and frustrated Navajo litigants; and 4) The confrontational style of Western adjudication contravened traditional Navajo justice procedures, which used “talking things out” and consensus to resolve disputes.\textsuperscript{164} To address the problems, the Navajo judges searched Navajo culture for a dispute resolution method that “would be inexpensive, rapid, simple,

\textsuperscript{163} Navajo common law has played an important part in the decision-making of the Navajo Nation courts since 1959. The Navajo Nation courts began publishing their decisions in 1969. The first reported decision concerns Navajo custom: Whether a Navajo custom marriage between two Navajos that lacks a marriage license is a valid marriage? \textit{In re Marriage of Daw}, 1 Nav. Rptr. 1 (1969).

The Navajo judges of the Navajo Court of Indian Offenses also applied customs and used traditional Navajo dispute resolution methods in their courts. In 1959, the Navajo Tribal Council converted the old Courts of Indian Offenses’ choice of law regulation, which had allowed use of tribal customs in decision-making, into Navajo law. Navajo Tribal Council Resolution No. CJA-1-59 (Jan. 6, 1959)(codified at 7 N.N.C. § 204 (2005)). See \textit{infra} note 178 for the regulation that applied in the Navajo Court of Indian Offenses.

\textsuperscript{164} ZION & MCCABE, NAHO PEACEMAKER COURT MANUAL, \textit{supra} note 162, at 2-3.
and meet the standards of Navajo tradition.\textsuperscript{165} The answer was traditional Diné peacemaking, which the judges revived in the form of the Navajo Peacemaker Court in 1982. The Navajo Peacemaker Court (now called Navajo Peacemaking Division), a traditionally derived dispute resolution system, has surpassed all expectations and is now an essential Navajo justice institution.

Navajo Nation officials have a duty to incorporate traditional Navajo norms and values into the Navajo Nation Government for use in the governing process. The Navajo Nation Council recognized its duty in 2002 when it codified the foundational, traditional Diné laws as “the fundamental laws of the Diné.”\textsuperscript{166} Moreover, because traditional Navajo knowledge is fading among the Navajo people, particularly the young people, the Diné fundamental laws (or philosophy) were codified as a means to educate the Navajo populace and perpetuate Navajo culture.\textsuperscript{167} A panel of traditional Navajos who were fluent in Navajo philosophy and language identified the Diné Fundamental Laws. The Laws form four codified sections: 1) Traditional Law (\textit{Diyin Bits’aadee Beehaz’aanii} — laws of the Great Spirit); 2) Customary Law (\textit{Diyin Diné’e Bits’aadee Beehaz’aanii} — laws of the Holy Beings); 3) Natural Law (\textit{Nahasdzaa doo Yadihilil Bits’aadee Beehaz’aanii} — laws of Mother Earth and Father Heaven); and 4) Common Law (\textit{Diyin Nohookaa Diné Bi Beehaz’aanii} — laws of the Diné).\textsuperscript{168} Now that the Navajo Nation

\textsuperscript{165} \textit{Id.} at 3.
\textsuperscript{166} Navajo Nation Council Resolution No. CN-69-2002, \textit{supra} note 5.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} Those who call American Indian philosophy primitive have never done the hard task of explaining Diné epistemology by going to its substratum to abstract subtle features. The concepts that comprise Navajo epistemology (I call it the Diné Way of Knowledge) are highly developed, complex, and abstract, and difficult to translate into
Code contains the foundational Navajo laws, the officials in each branch of the Navajo Nation Government must decide how the traditional principles should be interpreted and utilized so that they enhance Navajo Nation sovereignty while effectively maintaining a strong Diné cultural presence in a Western model Navajo Nation government.

B. Navajo Common Law Underpinnings

The Navajo Nation Council is a legislative body that enacts laws. In pre-Council days, the traditional Navajo leaders (naa’taanii) mediated disputes, sometimes using precedent and stern lectures on the norms, but they did not make laws for the entire tribe. The traditional Navajos understood the interconnectedness of all things so they did not see law as a set of rules detached from daily life. Each day the people lived their laws, as they did their spirituality; although, to traditional Navajos, any distinction between law and spirituality is an amorphous concept. The norms that produced desired effects, probity, peace, order, and positive relationships, were common knowledge and in the traditional Navajo world, positive values sustained a state called hozho. As the next

---

169 My view is that the Navajo language does not have a word for “religion.” All spiritual concepts and practices are intertwined with the secular into the “Diné Life Way,” which, according to the Diné Fundamental Laws, is holistic. Navajo Nation Council Resolution No. CN-69-2002, Whereas Cl. 6, supra note 5. For another view on the word religion, see Vicenti: “The white man did not understand Navajo law because Navajo people did not call it law, but, rather, religion. It was not written down. It was closer to daily lives than law because everyone was trained in it, not just lawyers.” VICENTI ET AL., DINÉ BIBEE HAZ’AANII, supra note 32, at 104.
chapter states, *hozho* describes a state where everything is properly situated and existing and functioning in harmonious relationship with everything else.

The traditional Navajos understood *Diné bi beehaz’aanii* as comprising the values, norms, customs, and traditions that were transmitted orally from generation to generation and produced positive outcomes.¹⁷⁰ Today, this term covers statutory law, administrative regulations, court-made law, and Navajo common law (values, norms, customs, and traditions). In 1990, the Navajo Nation Supreme Court said this about the word *beehaz’aanii*:

The Navajo word for ‘law’ is *beehaz’aanii*. While we hear that word popularly used in the sense of laws enacted by the Navajo Nation Council ... it actually refers to higher law. It means something which is ‘way at the top’; something written in stone so to speak; something which is absolutely there; and, something like the Anglo concept of natural law. In other words, Navajos believe in a higher law, and as it is expressed in Navajo, there is a concept similar to the idea of unwritten constitutional law.¹⁷¹

The Supreme Court explained that Navajo higher law includes “fundamental customs and traditions, as well as substantive rights found in the Treaty of 1868, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989.”¹⁷² Although the Supreme Court did not identify the fundamental customs and traditions that Navajos consider higher law, the doctrines of *hozho, k’e, and*

---

¹⁷⁰ The standard translation of *beehaz’aanii* is law and that is how it is used here. Bennett v. Navajo Board of Election Supervisors, 6 Nav. Rptr. 319, 324 (1990).
¹⁷¹ *Id.*
¹⁷² *Id.*
k’ei fit that category. These traditional Navajo doctrines have roots in the Navajo
Creation Scripture and Journey Narratives and compose the foundation of Navajo culture,
language, spirituality, and identity. On an abstract level, bee haz’aanii has a meaning like
“By it which things and beings remain in a state of hozho.” The three doctrines fit into
the “it” in the preceding description.

The modern Navajos endorse a perspective of law that has roots in the traditional
conception of Diné bi bee haz’aanii. The Diné Fundamental Laws bear this out.

The Diné have always been guided and protected by the immutable laws
provided by the Diyin [Great Spirit], the Diyin Diné’e [Holy Beings],
Nahasdzaan [Mother Earth] and Yadilhil [Father Heaven]; these laws have
not only provided sanctuary for the Diné Life Way but have guided,
sustained and protected the Diné as they journeyed upon and off the sacred
lands upon which they were placed since time immemorial.173

According to traditional Navajo philosophy, the Holy Beings established the fundamental
doctrines that drive the Diné Life Way. Thus, the Diné Fundamental Laws are a modern
enunciation of the traditional view that Diné bi bee haz’aanii have spiritual roots. Any
study of Navajo common law should respect the traditional Navajo understanding that
spiritual sources underlie Diné foundational law.174

The view that Navajo fundamental doctrines have spiritual origins does not cause
uneasiness among modern Navajo lawmakers when they enact laws for the Navajo

---

No. 2, supra note 5. The closest translations of these terms are as follows: Diyin means
the Creator; Diyin Diné’e means the Holy Beings; and Nahasdzaan and Yadilhil mean the
Earth and the Heavens, respectively.

174 The spiritual origins of Navajo law are briefly discussed in Robert Yazzie,
people and Navajo homelands. The Navajo Nation Council has tremendous leeway and flexibility to make laws, but those laws should not contravene the primordial principles. The following example illustrates this limitation: Suppose the Navajo Nation Council enacted a law making English the official language of the Navajo Nation. How would a Navajo Nation court deal with this issue on a challenge? The Navajo Creation Scripture and Journey Narratives teaches that the Diné language formed from the Creator’s thought process which turned into sound (called the Single Word) and then language and the Holy Beings made the Navajo language a component of Diné identity.175 A Council enacted law that makes English the official language of the Navajo Nation would profane the Diné language and Diné identity, both of which connect Navajos to the Holy Beings.

Navajo judges frequently use the general propositions underlying Navajo culture to resolve legal issues that arise during litigation. These same principles also apply during peacemaking to heal participants and restore them to harmonious relationships with each other, and their kin and community. E. Adamson Hoebel, an early twentieth century American anthropologist, calls similar general propositions social postulates.176 The Navajo Nation courts prefer to call the extant Navajo social postulates, and the norms, values, customs, and traditions of the Navajo people, Navajo common law. In 1987, the Navajo Nation Supreme Court proclaimed that Navajo customs and traditions that have the force of law are collectively Navajo common law:

175 See the Declaration of the Foundation of Diné Law, codified at 1 N.N.C. § 201 (the Diné language is one aspect of Diné identity), Navajo Nation Council Resolution No. CN-69-2002, supra note 5. One postulate is that the Navajo language is sacred and powerful.

176 HOEBEL, THE LAW OF PRIMITIVE MAN, supra note 1, at 12-17.
Because established Navajo customs and traditions have the force of law, this Court agrees with the Window Rock District Court in announcing its preference for the term “Navajo common law” rather than “custom,” as that term properly emphasizes the fact that Navajo custom and tradition is law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law. (emphasis in original).177

Although the Navajo Nation courts do not need statutory authority to use Navajo common law, the Navajo Nation Code has provided such authority since 1959. The provision that authorizes use of Navajo common law in the courts has undergone minor modifications since its predecessor, a regulation of the Court of Indian Offenses, was adopted as Navajo statutory law in 1959.178 The current provision requires the Navajo

---

177 In re Estate of Belone, 5 Nav. Rptr. 161, 165 (1987); See also Navajo Nation v. Platero, 6 Nav. Rptr. 422, 424. The Window Rock District Court cases that support the Court’s declaration are In re Estate of Apachee, 4 Nav. Rptr. 178, 179-81 (Window Rock Dist. Ct. 1983), and Tome v. Navajo Nation, 4 Nav. Rptr. 159, 160-61 (Window Rock Dist. Ct. 1983) (Navajo common law consists of Navajo customs, traditions, and usages and is binding on the Navajo Nation courts). Notice that the Navajo Nation Council and the Navajo Nation courts do not use the same terminology to identify Dine fundamental customs and traditions. See 1 N.N.C. §§ 202–206, Navajo Nation Council Resolution No. CN-69-2002, supra note 5.

178 The law and order regulation for the Navajo Court of Indian Offenses that became Navajo statutory law stated as follows: “In all civil cases the Court of Indian Offenses shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe, not prohibited by such Federal laws.” Section 2. Law Applicable in Civil Actions, 3 Fed. Reg. 1135 (May 18, 1938). The term “Courts of the Navajo Tribe” replaced “Court of Indian Offenses” when the Navajo Tribal Council adopted the BIA regulation as Navajo law in 1959. The 1985 amendment reads as follows: “In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws and customs of the Navajo Nation not prohibited by applicable federal laws.” 7 N.N.C. § 204 (1985). The 1985 amendment dropped the word “civil” from the term “civil cases.”
courts to apply Navajo statutory laws and regulations to legal matters first; requires use of Navajo common law to interpret Navajo statutes and regulations; and requires application of Navajo common law to legal matters that are not addressed by Navajo statutes and regulations. 179 A Navajo Nation Supreme Court ruling holds that the Navajo Nation courts must follow the requirements of the Diné Fundamental Laws.180

C. Finding and Using Navajo Common Law in Court

Navajo customs and traditions that do not appear in the written decisions of the Navajo Nation courts or codified in the Navajo Nation Code remain largely within the domain of Navajo oral tradition. The largely unwritten nature of Navajo common law gives legal advocates who are unfamiliar with Navajo culture the additional work of finding and introducing relevant Navajo common law during litigation. Moreover, the Navajo Nation Supreme Court underscored the preeminence of customs and traditions in Navajo jurisprudence when it declared Navajo common law as the law of preference in

179 The current statutory authorization, 7 N.N.C. § 204(A) (2005), states as follows:
In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The courts shall utilize Diné bi beenahaz’aanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz’aanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.

the Navajo Nation courts. The stakes are indeed high because Navajo common law can trump predisposed expectations that rely on Western legal outcomes.

Navajo elders, ceremonial practitioners, peacemakers, retired Navajo Nation judges, and people who live a traditional Navajo lifestyle are normally well-versed in Navajo customs and traditions. In addition to written materials, the values that comprise Navajo common law are present in traditional lore, maxims, stories, ceremonies, prayers, songs, and the Navajo language. While collecting Navajo common law, it is important to heed the Navajo Nation Supreme Court’s caveats on how Navajos relate to their common law: 1) first, understand the customs and traditions; then how they would apply to an issue; 2) customs and traditions may vary from place-to-place on the Navajo Nation; 3) some customs and traditions may have fallen into desuetude; and 4) parties to a case may not follow customs and traditions.

Although a party may not follow customs or traditions, when it is pleaded in the initial pleadings or anytime thereafter, it becomes relevant for the court’s consideration. Moreover, not all Navajo customs are law, and the individual

---

181 Navajo Nation v. Platero, 6 Nav. Rptr. at 424. The United States Supreme Court recognizes the right of the Navajo Nation courts to use Navajo common law. See United States v. Wheeler, 435 U.S. 313 (1978).
182 See Ben v. Burbank, 7 Nav. Rptr. 222 (1996) (the ke doctrine disposed of the argument that the statute of limitations had run on a contract case). The Ben v. Burbank case concludes Chapter 5 (Ke), infra.
183 Lente v. Notah, 3 Nav. Rptr. 72, 80 (1982).
184 In re Estate of Belone, 5 Nav. Rptr. at 163-64; Judy v. White, No. SC-CV-35-02, slip op. at 17-18.
185 Custom “is a practice and not an opinion. ... Custom is what men do, not what they think.” (emphasis in original). Lente v. Notah, 3 Nav. Rptr. at 80. According to E. Adamson Hoebel, customs that are law meet the following criteria: “A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of
contributing common law knowledge may refuse to testify on custom in open court due to its sacred nature or object to its use in adversarial litigation. An in camera disclosure of the sacred custom is a possible solution. These problems arise when litigants attempt to introduce Indian common law into tribal, state, and federal courts.

Legal practitioners who are not familiar with Navajo culture, including language, etiquette, and spiritual beliefs and practices, would do well to associate with a court advocate or attorney who is Navajo and a member of the Navajo Nation Bar Association. The Navajo legal practitioner can help locate sources of Navajo common law, including knowledgeable persons, and advise on introducing customs into court proceedings. While being Navajo does not guarantee a person will know Navajo common law, Navajo legal counselors are culturally embedded; that is knowledge of Navajo spiritual and social practices, Navajo language speaker, and an insider’s view of Navajo court practice. Navajo judges, several of whom are former court advocates, know of the indispensability of court advocates to law practice on the Navajo Nation:

physical force by an individual or group possessing the socially recognized privilege of so acting.” HOEBEL, THE LAW OF PRIMITIVE MAN, supra note 1, at 28. Thus, a handshake, although a Navajo custom, is not law.

For example, a common etiquette is to wait at least five minutes before knocking on the door when visiting a Navajo family. This gives the family time to prepare for the visitor’s arrival. When Navajos still lived in hogans, the delay was used to prepare a place for the visitor on the west side of the hogan.

The Navajo Nation Bar Association, with headquarters in Window Rock, Navajo Nation (Arizona), has over 450 Navajo and non-Navajo members who practice law on the Navajo Nation. Bar members who are not state-licensed attorneys (both Navajos and non-Navajos) are called court advocates. Tafoya v. Navajo Nation Bar Association, 6 Nav. Rptr. 141; In re Practice of law in the Courts of the Navajo Nation by Avalos, 6 Nav. Rptr. 191 (1990); see also Alderman v. Navajo Nation Bar Association, 6 Nav. Rptr. 188 (1990)(the Navajo Nation Supreme Court has ultimate authority over law practice on the Navajo Nation).
Navajo advocates are familiar with the customs and traditions of their people. They can speak the tribal language, thereby communicating with those seeking legal help who rely upon their native tongue. An understanding of the Navajo life-style and culture is indispensable to the practice of law within the Navajo Nation, and Navajo advocates advance the development of a modern judicial system which retains traditional legal norms.”

The Navajo Nation Supreme Court set the parameters for locating, pleading, and proving Navajo common law in the Navajo Nation courts in In re Estate of Belone. First, the Supreme Court stated that when “a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim.” This rule gives the opposing party notice and an opportunity to respond to the Navajo common law claim. In Judy v. White, the Navajo Nation Supreme Court ruled that the Diné Fundamental Laws “expand[ed] the Belone rule beyond the initial pleading requirement. ... Thus, the failure to raise [Navajo common law] in the initial pleading will not lead to exclusion of the claim.”

Second, in addition to oral sources, Navajo common law can be found in written Navajo court opinions, Judicial Branch Solicitor opinions, and literature and studies on Navajo culture, including those by social scientists, legal scholars, attorneys, and Navajo

---

188 Tafoya v. Navajo Nation Bar Association, 6 Nav. Rptr. at 143.
189 5 Nav. Rptr. 161.
190 Id. at 164. A party who pleads custom gives notice to all parties and the court that custom will be argued.
191 No. SC-CV-35-02, slip op. at 17-18.
judges.\textsuperscript{192} Navajo judges have acknowledged that writings on Navajo culture by Navajo authors are more accurate than similar writings by non-Indian authors, especially those previous to the 1980’s. Navajo court opinions are published in the Navajo Reporter\textsuperscript{193} and the Indian Law Reporter and are available through VersusLaw, a commercial online legal research source. Third, Navajo common law can be introduced and proved in court through an expert witness.\textsuperscript{194} Finally, judges frequently take judicial notice of applicable Navajo common law during litigation and decision-making.\textsuperscript{195}

The \textit{In re Estate of Belone} decision provides general guidelines on qualifying expert witnesses on Navajo common law and admitting expert testimony. The trial court exercises “sound discretion” over expert witness qualification and over the admission of expert testimony on Navajo common law.\textsuperscript{196} If the claimed custom or tradition is not disputed, “the [trial] court need not avail itself of experts in Navajo culture” and admit it as evidence if relevant.\textsuperscript{197} The trial court also has discretion to accept an undisputed custom or tradition under the doctrine of judicial notice. The party desiring to use an expert witness must satisfy the trial court that expert testimony on Navajo common law is

\footnotesize
\begin{itemize}
  \item \textsuperscript{192} \textit{Id.} at 165. The judge in \textit{In re Estate of Apachee}, 4 Nav. Rptr. at 180, stated that based upon his experience, literature written by Navajos on Navajo culture are more accurate than those by non-Navajos.
  \item \textsuperscript{193} There are presently seven published volumes of the Navajo Reporter and they contain opinions from 1969 to 1999. Opinions issued after 1999 are in loose-leaf form. The books and slip opinions can be purchased from the Navajo Nation Supreme Court, P.O. Box 520, Window Rock, Navajo Nation (Arizona) 86515.
  \item \textsuperscript{194} \textit{In re Estate of Belone}, 5 Nav. Rptr. at 165.
  \item \textsuperscript{195} \textit{Id.}
  \item \textsuperscript{196} \textit{Id.} at 166-67.
  \item \textsuperscript{197} \textit{Id.} at 165.
\end{itemize}
“relevant to the issue before the court” and will help the judge or jury understand the
custom or tradition.198

A witness must be qualified as an expert on Navajo customs and traditions before
offering evidence in that area. Evidence of qualification as an expert witness on Navajo
common law may come from: 1) readings on custom; 2) practicing custom; or 3)
understandings of custom derived from oral education, living a traditional life-style, long-
term association with traditional knowledge, or reputation as a person imbued with
traditional knowledge.199 If litigants dispute the offered Navajo custom or tradition, the
court may “hold an informal pre-trial conference with two or three expert witnesses”
whom it has appointed and, using the traditional Navajo civil procedure of “talking things
out,” agree on the custom to be applied.200 The litigants can attend the pre-trial
conference but their participation will be “limited to asking questions to clarify the expert
witnesses’ conclusions.”201 The Navajo Nation Code authorizes Navajo judges to seek
out knowledgeable individuals to clear-up questions on Navajo common law: “To

198 Id. The Supreme Court stated that the trial court must be satisfied that “use of
an expert witness is proper,” Belone at 166, which, when interpreted in light of the
“sound discretion” standard, would mean that the expert’s testimony would help the
judge or jury 1) understand the custom, or 2) identify the custom that is applicable, or 3)
determine how the custom should be applied. In addition, the second full paragraph on
page 166 in Belone is general background information on expert witnesses. The
guidelines for use of experts in the Navajo Nation courts are set forth on page 167 in
Belone, beginning with the first full paragraph.

199 Id. at 167.

200 Id. In the interest of fairness, a trial judge can allow each side to select its
own expert witness and the court can appoint the third witness.

201 Id. This limitation arises from the Court’s concern that parties may attempt to
manipulate experts to benefit their own interests, which is not in keeping with the
traditional Navajo civil procedure of “talking things out” and arrival at a solution through
consensus.
determine the appropriate utilization and interpretation of Diné bi beenaház’aanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenaház’aanii.”202

The Supreme Court’s guidelines set forth in the *In re Estate of Belone* opinion supplements the trial courts’ broad discretion over the qualification of experts and the admission of expert testimony on Navajo common law.203 On appeal, the Supreme Court will review for abuse of discretion; that is, to determine if the proper procedure (the guidelines) was followed to qualify the expert on relevant Navajo common law.204 Thus, a record must be made of the evidence used to qualify the witness as an expert on Navajo common law.205 The de novo standard of review should apply to issues brought before the Supreme Court that challenge the trial court’s application of Navajo common law.

The abuse of discretion standard the Supreme Court announced in *In re Estate of Belone* allows for flexibility on use of Navajo common law, but the overall process on qualifying experts and admitting expert testimony is more a practice of exclusion, rather than of inclusion, when considered in light of traditional Navajo justice ways. The notion that one person can be elevated above others and called “expert” on Navajo ways is inconceivable to traditional Navajos. True, there are Navajos, particularly ceremonial

---

202 7 N.N.C. § 204(B) (2005). The predecessor to this provision comes from the 1938 regulations for the Navajo Court of Indian Offenses. See *supra* text accompanying note 178.

203 5 Nav. Rptr. at 166, 167.

204 The Court said, on appeal, it will “review, as a matter of law, whether the district court followed the proper procedure in determining the expert witness’s qualifications as regards the custom or tradition applicable to the specific circumstances and locale involved.” *Id.* at 167.

205 *Id.*
practitioners, who possess vast amounts of traditional knowledge, but they hardly consider themselves “experts,” because ordinary Navajos know the same concepts. The Navajo Nation Supreme Court should revisit the *In re Estate of Belone* case and reexamine its guidelines on raising and admitting Navajo common law. Any modifications should be in tune with traditional Navajo ways of doing things.

Use of American evidentiary rules to filter witnesses and proffered evidence may be germane to adversarial litigation in Anglo-American courts, but is wholly incompatible with traditional Diné justice, which values equality, talking things out, and free-flowing oral discourse. The American court practice of trimming evidence down to relevancy through evidentiary rules strains Navajo customs and traditions of significance. The result is a value or norm stripped bare of meaning and, thus, devoid of credibility with court judges, especially non-Indian state and federal judges. Furthermore, traditional Navajo values, norms, and doctrines are broad concepts which do not play well in American courts which constrain evidence to narrow concepts.

Most of the Navajo customs and traditions that make up the modern body of Navajo common law have been identified and developed through the doctrine of judicial notice. Navajo judges using judicial notice is not a recent phenomenon. The Navajo judges have been engaging the doctrine since the early days of the Navajo Court of Indian Offenses. When the Navajo Nation took control of its court system in 1959, judicial notice of Navajo common law became standard practice.

In 1983, after the Navajo judges had been using the doctrine of judicial notice for nearly a century, a Navajo trial court established written guidelines for use of the doctrine
in Navajo court litigation. The trial court proclaimed that judicial notice can be taken of customs that are generally known within the community or can be found in accurate sources. The Navajo Nation Supreme Court adopted the trial court’s standard on taking judicial notice of customs in In re Estate of Belone. In addition, the Supreme Court declared that if a trial court takes judicial notice of Navajo common law, “it must clearly set forth in its order the custom on which it is relying, so that the basis for its decision is clear” in case of appellate review. The guidelines the Supreme Court established by case-law and the doctrine of judicial notice discussed above are ingenious ways of incorporating Navajo common law into rules-constrained adversarial litigation in the Western-styled Navajo Nation courts. Nonetheless, as the following chapters illustrate, the Navajo Nation courts see restoration of disputants to the desired state of hozho (peace, harmony, and balance) as their ultimate goal.

207 Id. at 252.
208 5 Nav. Rptr. at 165 (the Supreme Court also ruled that a Navajo trial court can take judicial notice of customs as adjudicative facts).
209 Id. at 165-66.
CHAPTER IV. HOZHO
(PEACE, HARMONY AND BALANCE)

A. Overview of Hozho in Navajo Culture

1. Descriptions and perspectives of hozho

Probably the preeminent doctrine in Navajo philosophy and one of the least amenable to English translation is the doctrine of hozho.\(^{210}\) This concept is the foundational backbone of Navajo philosophy and can be denominated “the main stalk,” because everything else branches from it.\(^{211}\) The concept pervades everything in the traditional and contemporary Navajo universe, from everyday domestic life, which includes the spiritual and secular aspects, to the most advanced philosophical abstraction. Because Navajos believe that everything in the universe is interrelated, interconnected, and interdependent (called T’aa ‘alsoni alk’ei dah ndlii),\(^{212}\) the doctrine of hozho is related to the doctrines of k’e (glossed as kinship solidarity) and k’ei (glossed as clan system). The all encompassing and pervasive nature of the hozho doctrine makes it

\(^{210}\) Kluckhohn explains that Navajo philosophy has “abstract words that are extremely difficult to render adequately in English [because] the difficulty with translation primarily reflects the poverty of English in terms that simultaneously have moral and esthetic meaning.” Clyde Kluckhohn, The Philosophy of the Navajo Indians, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER, STUDIES IN THE PHILOSOPHY AND SCIENCE OF THE WORLD’S CULTURES 356, 368-69 (F.S.C. Northrop, ed. 1949) [hereinafter Kluckhohn, The Philosophy of the Navajo Indians].

\(^{211}\) The phrase “the main stalk” is borrowed from Farella: The Navajo ceremony called hozhooji “is the main Navajo rite; the mainstem from which all other ceremonies branch out. It is the ‘main stalk.’” See JOHN R. FARELLA, THE MAIN STALK, A SYNTHESIS OF NAVAJO PHILOSOPHY 32 (1984) [hereinafter FARELLA, THE MAIN STALK]. Navajo philosophers and story tellers also use the corn stalk (as “the main stalk”) to symbolize hozho when narrating the Navajo Creation Scripture and Journey Narratives. Of course hozho has roots in the creation and journey stories.

\(^{212}\) The Navajo term, T’aa ‘alsoni alk’ei dah ndlii, is called the Navajo universal relations doctrine in this work and is discussed in the next chapter.
difficult to define in English. Even the Navajo Nation courts have not attempted to
define the doctrine in their written decisions.

Anthropologists have glossed the *hozho* doctrine as harmony, balance, beauty,
goodness, blessed, pleasant, perfection, ideal, and numerous other positive attributes.213
These single word descriptions fall within the realm of the *hozho* concept, although they
do not tell the whole story, and the Navajo Nation courts have used them occasionally.
The denotations listed above are best characterized as descriptions of convenience
because they aid in comprehension of the *hozho* concept within a realistic context
involving everyday Navajo life, behavior, and interaction.214

Reichard, who spent a lifetime studying Navajo culture, provides a more in-depth
translation of the concept: *Hozho* “means ‘perfection so far as it is attainable by man,’
the end toward which not only man but also supernaturals and time and motion,
institutions, and behavior strive. Perhaps it is the utmost achievement in order.”215
Reichard’s translation is a marked improvement over the descriptions of convenience,
although it expresses *hozho* as a constituent element of *Sa’ah naaghaii bik’eh hozho*
(SNBH), “a key concept in Navajo worldview (or the unifying theme).”216 The concept

---

213 LELAND C. WYMAN, BLESSINGWAY 7 (1970); Kluckhohn, The Philosophy of
the Navajo Indians, supra note 210, at 368-70.
214 For example, when it rains Navajos will say we have been blessed because our
prayers have been answered. Thus, rain is *hozho*, a blessing.
215 GLADYS A. REICHARD, NAVAJO RELIGION, A STUDY OF SYMBOLISM 45
(1950; renewed 1977) [hereinafter REICHARD, NAVAJO RELIGION].
216 FARELLA, THE MAIN STALK, supra note 211, at 14-17. Farella states: “The
key concept in Navajo world view ... is sa’a naghai bik’e hozho. ... So, as Reichard
points out, an understanding of [SNBH] is an understanding of the whole. In fact, in a
very literal sense, [SNBH] is the whole.” Id. at 16-17.
of SNBH does not have a conspicuous role in Navajo dispute resolution so it warrants only passing mention in this work.

Witherspoon’s translation of hozho provides the better conceptual framework for understanding and studying Navajo common law: “The Navajo concept of ‘hozho’ refers to that state of affairs where everything is in its proper place and functioning in harmonious relationship to everything else.”\(^\text{217}\) Witherspoon explains that the “closest English gloss of ho [in hozho] might be ‘environment,’ considered in its total sense.”\(^\text{218}\) Furthermore, “[a]s a verbal prefix, ho refers to (1) the general as opposed to the specific; (2) the whole as opposed to the part; (3) the abstract as opposed to the concrete; (4) the indefinite as opposed to the definite; and (5) the infinite as opposed to the finite.”\(^\text{219}\) The stem –zho “refers to things like beauty, excellence, and quality. It refers to the essence, or to the essential feature, of that which we regard as aesthetically

---

SNBH is another Navajo foundational concept that is difficult to translate. SNBH is also all encompassing and pervasive in the Navajo universe. A sure way to know that Navajo thinking on SNBH is at a level of sacredness, and not available for public discourse, is when the keeper of the knowledge refuses to discuss its intricacies with Navajo or non-Navajo. The sacred knowledge is used only during ceremony. The social scientists who write on SNBH usually relate the non-sacred knowledge of the concept, whether they realize it or not. Witherspoon separates the concept (SNBH) into two parts and explains it this way: “Sa’ah Naaghaii and Bik’eh Hozho are the central animating powers of the universe, and, as such, they produce a world described as hozho, the ideal environment of beauty, harmony, and happiness.”\(^\text{217}\) GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE 8 (1975); see also Austin, ADR and the Navajo Peacemaker Court, supra note 7, at 10: “The Navajo culture stresses hozho, which when generally translated means ‘harmony.’ It is, however, broader than that, with a meaning something like ‘a reality with a place for everything, and everything in its place, functioning well with everything else.’ In other words, the ‘Perfect State.’”\(^\text{218}\) WITHERSPOON, LANGUAGE AND ART, supra note 6, at 25.

\(^\text{217}\) GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE 8 (1975); see also Austin, ADR and the Navajo Peacemaker Court, supra note 7, at 10: “The Navajo culture stresses hozho, which when generally translated means ‘harmony.’ It is, however, broader than that, with a meaning something like ‘a reality with a place for everything, and everything in its place, functioning well with everything else.’ In other words, the ‘Perfect State.’”\(^\text{218}\) WITHERSPOON, LANGUAGE AND ART, supra note 6, at 24.

\(^\text{219}\) Id.
positive.”

In general, the term hozho “refers to the positive or ideal environment. It is beauty, harmony, good, happiness, and everything that is positive, and it refers to an environment which is all inclusive.”

These translations come from non-Indian social scientists and that brings up this question: how do Navajos conceptualize hozho? At a higher level, or more appropriately the universal level, hozho describes a state (in the sense of condition) where every tangible and intangible thing is in its proper place and functioning well with everything else, such that the condition produced can be described as peace, harmony, and balance (for lack of better English terms). Moreover, at the highest level of Diné philosophical abstraction, hozho describes the abstract “perfect state,” although this ideal condition is, quite frankly, imponderable, or, according to Navajo philosophy, a reality that is beyond human experience.

The phrase “everything in the universe” refers to the interconnected, interrelated, and interdependent elements (i.e., air, water, animals, birds, heavenly bodies, etc.) that form a unified whole, such that the resulting structure might resemble a web.

Human beings compose one facet within the unified whole. In the

---

220 Farella, The Main Stalk, supra note 211, at 30.
221 Witherspoon, Language and Art, supra note 6, at 24.
222 Obviously, some people will claim they know what “the perfect state” is, but Navajo philosophy teaches that one does not know what absolute perfection is until he dies and enters the realm of Sa’ah naaghaii bik’eh hozho (See Farella, The Main Stalk, supra note 211, and Witherspoon, Language and Art, supra note 6, for an in-depth discussion of SNBH). Reichard sheds additional light on the Navajo concept of perfection: “[W]hat is wholly good is merely an abstraction, a goal that man as an individual never attains. Reichard, Navajo Religion, supra note 215, at 5.
223 This paradigmatic web is called the web of universal relations in this work. All components that compose the universe make up the web. Again, the interrelated, interconnected, and interdependent nature of all elements in the universe is called the universal relations doctrine in this work. See supra text accompanying note 212.
grand scheme of things, hozho described at the universal level relates chiefly to Navajo spiritual thinking and ceremonial practice rather than jurisprudence.

Navajo common law is concerned chiefly with how hozho influences the choices Navajos make in everyday life and particularly those that raise legal questions. In other words, how do ordinary Navajos utilize hozho in their daily lives? Perhaps, with few exceptions, the ordinary Navajo gives the doctrine of hozho very little thought because it is so prevalent in Navajo culture and its social system that it is taken for granted. Hozho definitely operates unconsciously in the Navajo world. Another way of putting it is Navajos think, speak, and act according to hozho without giving the concept much thought. This does not mean that Navajo philosophers, including ceremonial practitioners, do not discuss important foundational doctrines like hozho, because they do under condign conditions.

Navajos generally view the world with a communal orientation, although within the Navajo culture, there is ample room for individualism. Individual pursuits are encouraged, but individual freedom must be exercised responsibly. Navajos strive to live life according to hozho, so the doctrine (normally in concert with other doctrines like k’e) organizes and guides how one thinks, speaks, acts, and relates to people and the natural world on a daily basis. For example, depending on the context in which it is spoken, a Navajo will say “Shil hozho” to mean “I am happy,” or “I am physically and

---

224 See Austin, ADR and the Navajo Peacemaker Court, supra note 7, at 10: “The high respect for individual freedom is balanced by concepts of responsibility and duty.” The individualism spoken of here does not equate to the one stressed as an American value. Navajos value an individualism that is tempered by reciprocal duties and obligations to relatives and kinfolks.
mentally well,” or “I am comfortable.” Another phrase, “Hozho shil haas’ah,” means “My domestic affairs are in order” (or other meanings), again depending on the context within which the expression is used. *Hozho* is a goal throughout life because it is goodness and other positive attributes.225

The doctrine glossed as disharmony is *hochxo*, which might be seen as conterminous with *hozho*. According to Witherspoon, *hochxo* “could be glossed as ‘the ugly, unhappy, and disharmonious environment.’”226 Navajo philosophy normally describes *hochxo* as the evil (or bad) side of things and beings, which includes disharmony caused by malevolent acts through witchcraft. Again, to borrow from Witherspoon, “evil (*hochxo*) is not negative in a moral or ethical sense but negative in a pragmatic or realistic sense. Evil is misfortune, illness, premature death, drought, famine, or some other such tragedy, all of which may be caused by things and beings out of control.”227 Ritual, which uses sacred knowledge integrated into prayers, songs, sacred words, sacred practice, and sacred materials, brings things and beings under control.228 The process is one of identification, isolation, and treatment or exorcism of the bad, and restoration to the good.229 When things return to the conceptual state of *hozho*, it is called

---

225 Witherspoon sums this up nicely: “The goal of Navajo life in this world is to live to maturity in the condition described as *hozho*, and to die of old age, the end result of which incorporates one into the universal beauty, harmony, and happiness described as *sa’ah naaghaii bik’eh hozho*.” WITHERSPOON, LANGUAGE AND ART, supra note 6, at 25.

226 *Id.* at 24-25.

227 *Id.* at 186.

228 The concept of beings in Navajo philosophy is discussed at the beginning of Chapter 5 (K’e).

229 “In so far as Navajo philosophy is goal-oriented, it is directed toward the elimination of friction in human relations and toward the restoration of harmony in that
hozho nahasdlii (hozho restored); a phrase also repeated four times to close a traditional Diné prayer.

The Navajo emphasis on maintaining and perpetuating the state of hozho normally requires the services of ceremonial practitioners, but not always, who possess enormous traditional knowledge, including the Navajo Creation Scripture and Journey Narratives, sacred words, songs, prayers, sacred materials, and values. Navajos believe knowledge is power. One becomes a ceremonial practitioners (and hence a person of knowledge) by studying under a veteran practitioner (called medicine-man by non-Indians and hataalii by Navajos), who is usually an elder, for ten years or more. Upon successful completion of study, the apprentice is initiated and then can perform the ceremony learned. A person can also become a person of knowledge through traditional education. Ceremonial practitioners and elders with traditional education are the “Keepers of the Diné Way of Knowledge.”

From the ceremonial perspective, the term “knowledge is power” is understood as possessing the know-how to invoke powerful forces. Not every apprentice achieves the status of ceremonial practitioner. Navajos say that “If the knowledge does not want you, it will avoid you.” This maxim connotes that traditional knowledge, which is property under Navajo common law, is a “gift” granted by the Holy Beings.

2. Levels of knowledge

---

total economy of things in which human affairs constitute only one facet.” Kluckhohn, *The Philosophy of the Navajo Indians*, supra note 210, at 362.
Some anthropologists rely on degree of abstraction to categorize Navajo philosophy into three levels of knowledge: taboo, ritual, and synthetic.\textsuperscript{230} Plotted on a continuum, taboo knowledge and synthetic knowledge are on opposite ends and ritual knowledge assumes the middle. Concreteness, which is the least abstract, identifies taboo knowledge and, for Navajos, this kind of knowledge “is limited to an awareness of things that are safe and things that are dangerous — that is, things to approach and things to avoid.”\textsuperscript{231} Unfortunately, the description of taboo knowledge (awareness of safe and dangerous things) leads “to mistakes in describing the culture under study, [and] ethnocentrism in reciting the taboos and mocking them, explicitly or implicitly.” (citation omitted).\textsuperscript{232}

The second level of knowledge, ritual, refers to ceremonial practice. Ritual knowledge allows the world to be seen not as given, “but subject to alteration or manipulation. More specifically, ritual can ‘correct’ mistakes, or anticipate and immunize against them.”\textsuperscript{233} In a society that has ritual knowledge as its highest level of abstraction “things very quickly become rigid, behavior becomes compulsive, and thought becomes stagnant. People cease creating and dealing with questions and instead become obsessed with correctness — or more accurately, with not making a mistake.”\textsuperscript{234}

\begin{itemize}
  \item \textsuperscript{230} Farella, The Main Stalk, supra note 211, at 9-14 (“Levels of Knowledge”).
  \item \textsuperscript{231} Id. at 10.
  \item \textsuperscript{232} James W. Zion, Navajo Therapeutic Jurisprudence, 18 Touro L. Rev. 563, 597 (2002). Non-Indians mocking and ridiculing Navajo beliefs and calling them superstitions have made many knowledgeable Navajos reluctant to discuss traditional concepts.
  \item \textsuperscript{233} Farella, The Main Stalk, supra note 211, at 11.
  \item \textsuperscript{234} Id. at 13.
\end{itemize}
For example, people may believe that a ceremony did not work because it was not done correctly. This would lead the ritual practitioner to assume that the mistake can be corrected by paying “more attention to detail, try to do it better and better, in the ultimate sense of making finer and finer distinctions.”\textsuperscript{235}

The third kind of knowledge is synthetic and also called theoretical, meta-theoretical, or paradigmatic knowledge.\textsuperscript{236} Of the three levels of knowledge identified, synthetic knowledge is the most abstract. Synthetic knowledge “allows more choices and, more importantly, provides a basis for selecting among choices. ... Without this knowledge, nothing else in the culture, especially the ritual, can make sense.”\textsuperscript{237}

Recently, some Navajo philosophers have disclosed twelve levels of knowledge (actually four main levels that are each subdivided into three levels to form twelve levels) that a Navajo “person of knowledge” uses to conceptualize and explain accounts of the Navajo Creation Scripture and Journey Narratives.\textsuperscript{238} Knowledgeable Navajos rely on the Creation Scripture and Journey Narratives to explain things in the universe, tangible and intangible, past, present and future, including matters that affect humans and the environment. According to Professor Schwarz, “The usefulness of the narratives [Creation Scripture and Journey Narratives] stems from their being compressed

\textsuperscript{235} Id. at 12.
\textsuperscript{236} Id. at 13.
\textsuperscript{237} Id. at 14.
\textsuperscript{238} See MAUREEN TRUDELLE SCHWARZ, MOLDED IN THE IMAGE OF CHANGING WOMAN 25 (1997) [hereinafter SCHWARZ, MOLDED IN THE IMAGE].
metaphoric accounts that encode numerous messages at twelve levels of knowledge differentiated by degree of abstraction.”  

The four main levels of knowledge, from the simplest to the most abstract, are *hozhooji hane’*, *dyin k’ehji hane’*, *hataa k’ehji hane’* and *naayeeji hane’*. Whether the four main levels identified for Schwarz are hierarchical like the three levels (taboo, ritual, and synthetic) that anthropologists use is not clear, although the four levels, like its counterpart three-levels, are differentiated by degree of abstraction. It may be that *hozhooji hane’*, the most elementary level, serves as the foundation for the other three categories such that each contains within it the three levels identified by social scientists. It is doubtful that a Navajo who claims knowledge at the highest level of abstraction, *naayeeji hane’*, possesses all of the knowledge, including their abstractions, that compose the other three levels. The Navajos’ twelve levels of knowledge merits further study.

3. *Hozho* and *Hochxo* represent right and wrong

Witherspoon divides the Navajo universe into two parts, *hozho* and *hochxo*. According to this view, the forces representing each concept are involved in a continual struggle, but eventually, with the aid of ceremony, the good (*hozho*) overcomes the bad. Farella does not agree “that the good/evil axis is the primary division of the [Navajo] universe” or that there “is a constant struggle between good and evil” where

---

239 *Id.* at 17.
240 *Id.* at 25.
241 WITHERSPOON, LANGUAGE AND ART, *supra* note 6, at 39. Witherspoon states: “In the battle between the forces of disorder and evil and those of order and good, the ‘good’ side has the advantage. ... There are no evil forces or deities that cannot be transformed or exorcised.” *Id.*
good always triumphs. Farella argues that there is no such duality (*hozho/hochxo*) in Navajo philosophy because *hozho* and *hochxo* are “a part of the same whole. They exist together, or neither one exists. ... One cannot define beauty unless there is ugliness to contrast it with. ... You do away with one side of a contrasting set, and you of necessity eliminate its opposite.”

Navajo philosophy can become highly abstruse when critical analysis enters the realm of fundamental principles at their highest levels of abstraction. Critical examination, however, is necessary because *hozho* and *hochxo* are foundational doctrines that pervade Navajo culture, language, spirituality, and identity. Critical analysis should elicit different interpretations of Navajo fundamental doctrines to provide students of Navajo culture and institutions opportunities to ponder diverse viewpoints, which can only lead to better understandings of the Diné Life Way. Furthermore, critical examination produces fresh insights into the overall objective of developing and intellectualizing Navajo epistemology (the Diné Way of Knowledge). While the two doctrines, *hozho* and *hochxo*, are not black letter law in the sense that they bear on legal questions, they are still the wellspring of precepts that determine right and wrong, morally and legally, in Navajo society. The two doctrines give Navajos the framework for thinking, planning, and decision-making conducive to “living life to the fullest” and for maintaining, reinforcing, and perpetuating the Diné Life Way.

4. *Nayee’ disrupt hozho*

---

242 Farella, The Main Stalk, supra note 211, at 33.
243 Id. at 35.
While the ultimate goal in Navajo life is *hozho*, a logical assumption suggests that due to the nature of human existence, including stresses, pressures, and errors inherent in human affairs and the trappings of modern life, the harmonious state (*hozho*) would experience disruption periodically. The maleficent forces collectively called *nayee’* in the Navajo language cause disharmony, friction, and discord in daily life. Forces that are *nayee’* disrupt *hozho* and must be neutralized or eliminated to return things to *hozho*.

The term *nayee’* translates literally as “monsters”; a concept integral to the legendary exploits of the Twin Warriors (called “Monster Slayer” and “Born-for Water” in English) in the Fourth World as narrated in the Navajo Creation Scripture and Journey Narratives. The Twin Warriors were born of Changing Woman specifically to extirpate the monsters and their mutations in the Fourth World. The autochthonous, anthropomorphic beings that journeyed in the Third World produced the monsters through their irresponsibility, sexual indiscretion, and self-interests.

In modern parlance, the term *nayee’* metaphorically describes anything that disrupts harmony and goodness in life: “Navajos use *nayee’* to refer to and describe anything that gets in the way of a person living his life.” The *nayee’* include “depression, poverty, physical illness, worry, a bad marital relationship, and old age. The ‘monsters’ are ... merely the objectification of these relatively intangible entities so as to

---

244 The Navajos call the Twin Warriors *Nayee’ Neezghani* and *Tobajishchini*; these names translate literally into English as “Monster Slayer” and “Born-for-Water,” respectively. The Fourth World is the present world and is usually subdivided into the White World and the Glittering World. Navajos call Changing Woman their mother because she created the Navajos who represent the four clans and, thus, are responsible for the Navajo kinship structure.

make them manageable or exorcisable. [T]he ‘metaphorical’ interpretation of the term ... is the most common usage.”  

Anything that causes disharmony, friction, or discord in life, including criminal activity, civil disputes, and the multitude of social and health ills facing the Navajo Nation (i.e., alcoholism, domestic violence, gangs, child abuse, school dropout, suicide, and diabetes) would fit the modern understanding of *nayee*.  

5. Traditional Navajo problem-solving model  

The foregoing discussion on *hozho* leads to the conclusion that traditional Navajo problem-solving is generally a pragmatic three-stage process:  *hozho* (harmony) → *hochxo* (disharmony) → *hozho* (harmony restored). This general model becomes a Navajo ceremony model when this pattern is followed: Things begin in a state of *hozho*; negative forces called *nayee* (“monsters”) disrupt the *hozho* condition resulting in *hochxo* (disharmony); and ceremony is used to restore things and beings (including people) to *Hozho*. The ceremonial practitioner uses esoteric knowledge — prayers, songs, sacred words, sacred practice, and sacred materials — during the ceremony to neutralize or extirpate negative forces (*nayee*) and restore things and beings to *hozho*.

In the overall scheme of things, ceremonies restore one to harmony with life, community, tribe, and all relatives in creation. Navajo philosophy provides the crucial knowledge to identify and eliminate or neutralize the cause of disharmony and to restore things and beings to a state of harmony, a condition a Navajo needs to refocus on the Diné Life Way. The general Navajo problem-solving model also becomes a prototype

---

246 *Id.* at 8; See also Robert Yazzie and James W. Zion, ‘*Slay the Monsters*’: *Peacemaker Court and Violence Control Plans for the Navajo Nation*, in *POPULAR JUST.* & COMMUNITY REGENERATION 67, 69 (Kayleen M. Hazelhurst ed., 1995) [hereinafter Yazzie & Zion, ‘*Slay the Monsters*’].
for a court decision-making model in Navajo jurisprudence that is called the Navajo jurisprudence model in this work. The Navajo jurisprudence model is used to incorporate traditional dispute resolution processes and consuetudinary law into the decision-making of the Western-styled Navajo Nation Court System.

B. *Hozo* as Used in the Navajo Nation Courts

1. Theoretical constructs

   Again, traditional Navajo problem-solving involves three main stages which are recast here as the traditional Navajo problem-solving model: *Hozo* (harmony) $\rightarrow$ *Hochxo* (disharmony) $\rightarrow$ *Hozo* (harmony restored). When applied in a spiritual context, the traditional Navajo problem-solving model takes the following form:

   **The Navajo Ceremony Model**

   *Hozo* (harmony/balance/peace) $\rightarrow$ *Hochxo* (disrupter [nayee’] causes disharmony; ceremony used to neutralize/eliminate disrupter) $\rightarrow$ *Hozo* (harmony restored)

   The traditional Navajo problem-solving model takes the following form in Navajo jurisprudence:

   **The Navajo Jurisprudence Model**

   *Hozo* (harmony/balance/peace $\rightarrow$ *Anahoti’* (problem/issue caused by disrupter [nayee’]; Navajo common law applied to solve problem/issue) $\rightarrow$ *Hozo* (human relationships restored; community healed; harmony/balance/peace)

   The Navajo jurisprudence model is used to solve disputes in adversarial litigation in the Navajo Nation courts and in non-adversarial, traditionally-based Navajo peacemaking (*Hozhooji Naat’aanii*). Navajo jurisprudence uses the term *anahoti’*, in lieu of *hochxo*, to identify disharmony. The term *anahoti’* is glossed as “the existence of a problem,” and is generally described this way: “In the Navajo worldview, disharmony
exists when things are not as they should be. This condition [disharmony] is called
*anahoti’*, the opposite of harmony.\(^{247}\)

In the Navajo cultural context, the term *anahoti’* describes a breach in a person’s
personal protective shield, which encloses an individual’s personal state of *hozho.*
*Nayee’* enters through the breach to gain direct access to the individual causing personal,
and through kinship links, familial, disharmony. When viewed in the legal context, the
disharmony produces disputes and legal issues (*anahoti’*). Thus, as shown above, the
problem-solving model the Navajo Nation courts use is *hozho* (harmony), *anahoti’*
(breach resulting in disharmony), and *hozho* (harmony restored).\(^{248}\) When judges and
peacemakers use the Navajo jurisprudence model, the dispute resolution process becomes
a Navajo justice ceremony.\(^{249}\)

The traditional Navajo framework for resolving disputes is summarized in *Navajo
Nation v. Kelly,\(^ {250}\) a criminal case that uses Navajo common law to decide a double
jeopardy issue under the Navajo Nation Bill of Rights.\(^ {251}\) The Court uses Navajo
peacemaking as an example to explain traditional dispute resolution concepts, because
peacemaking best exemplifies the traditional Navajo process of dispute resolution.
Moreover, peacemaking’s core concepts can be extrapolated to dispute resolution in the

\(^{247}\) Philmer Bluehouse & James W. Zion, *Hozhooji Naat’aanii: The Navajo
Justice and Harmony Ceremony*, 10 MEDIATION Q. 327, 331 (1993) [hereinafter
Bluehouse & Zion, *Hozhooji Naat’aanii*].

\(^{248}\) More specifically, the restoration phase might be called *hozho nahodleel*.


\(^{251}\) 1 N.N.C. § 8 (2005).
adversarial context. The *Kelly* summary also produces the norms and values the Navajo Nation courts and traditional peacemakers use to resolve disputes and issues.

The traditional system of resolving disputes lives on today as illustrated by the [Navajo] Peacemaking Program. ... Peacemaking is premised upon participation by all those affected, including victims. Furthermore, consensus of all of the participants is critical to resolution of the dispute, concern or issue. With full participation (*t’aa ultso ultil ka’iijë’go*) and consensus, a resolution is reached with all participants giving their sacred word (*hazaad jidisingo*) that they will abide by the decision. The resolution (guided by *Diné be beenahaz’aanii*), in turn, is the basis for restoring harmony (*bee hozho nahodoodleel*). *Hozho* is established if all who participated are committed to the agreement and consider it as the final agreement from which the parties can proceed to live in harmony again. Finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement (*na binaheezlaago bee t’aa lahji algha’ deet’a*).\(^\text{252}\)

2. Navajo common law informs legal interpretations

As part of dispute resolution in the adversarial context, the Navajo Nation Supreme Court consistently emphasizes application of *Diyin Nohookaa Diné’e Bi Beehaz’aanii* (Navajo common law) to interpret Navajo statutes and to decide legal issues. In *Fort Defiance Housing Corp. v. Lowe*, where a Navajo forcible entry and

\(\text{252}\) Navajo Nation v. Kelly, No. SC-CR-04-05, slip op. at 6-7. On the double jeopardy issue, the Court stated that the traditional Navajo concept of finality assures that “multiple charges arising out of a defendant’s single action may not allow multiple convictions, as the offenses charged must clearly resolve separate conduct to not violate a defendant’s double jeopardy right.” *Id.*, slip. op. at 8. The doctrine of finality also plays an important role in restoring parties to *hozho* following a divorce. See *Apache v. Republic National Life Insurance Co.*, 3 Nav. Rptr. 250.
detainer statute needed interpretation, the Supreme Court stated that whether the notice of appeal should be dismissed or not depends upon an interpretation of the statute “in light of the Navajo Bill of Rights, as informed by *Diyin Nohookaa Diné’e Bi Beehaz’aanii* (Navajo common law)….“253 The Court applied Lowe’s rule of statutory interpretation in *Thompson v. Greyeyes* to issue a writ of habeas corpus because the statute, 17 N.N.C. § 477 (2005), under which the petitioner was sentenced to imprisonment required only payment of *nalyeeh* (restitution) as a sanction and not imprisonment.254

The Navajo Nation Supreme Court declared that Navajo statutes derived from state or federal statutes will be interpreted in a manner that will do justice to Navajo needs and values. A statute “adopted from an outside source does not, by itself, make it illegitimate, as the Navajo Nation Council has made it the law of the Navajo Nation. However, it does require that this Court carefully interpret such adopted provisions consistent with the needs and values of the Navajo people.”255

The Supreme Court’s rule on interpretation of adopted law also applies to construction of American common law doctrines that come from the decisions of the federal and state courts and are presented as authority in the Navajo Nation courts. In *Judy v. White*,256 private citizens challenged a Navajo Nation Council resolution that gave council delegates a $10,000 pay raise without approval of the Navajo electorate through the referendum process as required by law. The defendants (Navajo Nation officials)

---

253 No. SC-CV-32-03, slip op. at 3.
254 No. SC-CV-29-04 (Nav. Nat. Sup. Ct., May 24, 2004)(“we must interpret the DAPA [Domestic Abuse Protection Act] consistent with *Diyin Nohookaa Diné’e Bi Beehaz’aanii* (Navajo common law).” Id., slip op. at 7.
255 Fort Defiance Housing Corp. v. Lowe, No. SC-CV-32-03, slip op. at 6.
256 No. SC-CV-35-02.
relied on federal court interpretations of the standing doctrine to argue that the plaintiffs lacked standing to bring the action.

After reviewing the history of the standing doctrine under federal law, the Supreme Court decided to answer the issues before it using Navajo concepts of justice (as required by *Diyin Nohookaa Diné’e Bi Beehaz’aanii*) and not federal case-law.

The history of the U.S. Constitution and federal courts’ justiciability considerations is vast and remarkable, and in its review we are once again sharply reminded that it is not our Diné history, nor that of our own tripartite government.

....

Our judicial system mimics the American adversarial system in some ways, but we will not interpret unintended limitations on the [Navajo] district courts based on federal court case law or inapplicable U.S. legislation. That is not to say that we do not recognize the doctrine of standing, but that we do so pursuant to our own common values of substantial justice rather than as the term is understood in federal courts. Navajo courts will take their own path in judicial review, as required by the ‘Navajo higher law in fundamental customs and traditions, as well as substantive rights found in the Treaty of 1868, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989.’ *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 324 (Nav. Sup. Ct. 1990).257

The Court held that the Navajo doctrine of participatory democracy, which is integral to the Diné Life Way, assures plaintiffs standing to challenge the Navajo Nation Council resolution:

257 *Id.*, slip op. at 6, 7.
It is abhorrent to the Diné Life Way (Diné bi’ó’ool’iiil) to violate the right of a community member to speak or to express his or her views or to challenge an injury, whether tangible or intangible. This right is protected to such an extent that the right to speak to an issue is not limited to the ‘real party in interest.’ Rather, the right belongs to the community as a whole, and any member of that community may speak.258

Navajo Nation Supreme Court case-law thus assures that Navajo common law will be used to interpret or construe non-Navajo statutes and common law doctrines that are adopted as Navajo law or used as authority in Navajo court litigation.

3. Goal is to restore hozho

The Navajo Nation courts use the terms “hozho” and “harmony” interchangeably, even though they have not attempted to define hozho.259 While utilizing the Navajo jurisprudence model, the Navajo Nation courts have stated that the goal of Navajo dispute resolution, which would be both in the adversarial (litigation) and non-adversarial (peacemaking) contexts, is to restore disputants to harmony with their communities.260 Disharmony (anahoti’) is a prerequisite for restoration as shown by the case of In re

---

258 Id., slip op. at 9. The Navajo concept of community free speech is addressed in the next chapter under the subheading, “Principle of Házgó’ógo (Freedom with Responsibility).”


260 In re Mental Health Services of Bizardi, No. SC-CV-55-02; Navajo Nation v. Blake, 7 Nav. Rptr. 233, 235 (the goal of traditional dispute resolution is to “restore the parties and their families to hozho (harmony)” using the civil process of “talking things out” and the remedy of nalyeeh); Atcitty v. District Court for the Judicial District of Window Rock, 7 Nav. Rptr. 227, 230 (1996).
Mental Health Services of Bizardi.\textsuperscript{261} The Bizardi case concerned procedures used to involuntarily commit a person to a medical facility for mental health diagnosis. The parties had settled the issue, but nonetheless submitted a stipulation to the Court asking it to decide the issue for future reference. The Court declined the invitation stating that it does not issue advisory opinions and requires an actual case or controversy.

We reiterate that mootness is a concept we recognize in our courts. We do so not because of any need to mimic federal courts, but because mootness is consistent with our Navajo values. Our courts serve the purpose of bringing people in dispute back into harmony. Through ‘talking things out’ with respect under the principle of $k’e$, our courts assist in bringing litigants into hozho. The necessary prerequisite is disharmony.\textsuperscript{262}

The case was dismissed because the parties were no longer in disharmony.

In Morgan v. Navajo Nation, the Navajo Nation Supreme Court dismissed a case that had been argued and was awaiting a decision when the parties consummated a settlement agreement in harmony.\textsuperscript{263} Again, the prerequisite disharmony was lacking so dismissal was the only remedy. On the other hand, the Supreme Court allowed a late appeal to proceed in the interest of fundamental fairness and community harmony in a forcible entry and detainer case.\textsuperscript{264} While the Court cited fairness and harmony as

\textsuperscript{261} No. SC-CV-55-02.
\textsuperscript{262} Id., slip op. at 3-4.
\textsuperscript{263} 4 Nav. Rptr. 3, 4 (1983).
\textsuperscript{264} Fort Defiance Housing Corp. v. Allen, No. SC-CV-01-03 (Nav. Nat. Sup. Ct., corrected opinion, June 7, 2004)(the tardy filing of the notice of appeal was caused by a conflict between a court rule that allowed thirty days for appeal and a forcible entry and detainer statute that allowed five days for appeal).
reasons for accepting the case, the Court appears to have prolonged disharmony, superficially at least, by accepting the late appeal.

In another forcible entry and detainer case, the Supreme Court, again on fundamental fairness and community harmony grounds, refused to affirm the trial court’s decision evicting a tenant, because a strict interpretation of a statute that required the tenant to post an appeal bond before filing a notice of appeal would effectively cause disharmony. The Court said, “[c]ourt procedures which result in homelessness have the potential for creating disharmony, not only for the individual and the family, but also for the entire community. Harmony among all concerned cannot be restored if appellate procedures are so onerous that tenants cannot effectively seek review with this Court.”

In *Budget and Finance Committee of the Navajo Nation Council v. Navajo Nation Office of Hearings and Appeals*, the Budget and Finance Committee sought a writ of prohibition against the Office of Hearings and Appeals (OHA) to limit the administrative tribunal’s (OHA) scope of review, even though the Navajo Nation Council had explicitly prohibited court review of OHA decisions that concerned audits of Navajo Nation chapters. The Supreme Court denied the Committee’s petition while lamenting that its lack of appellate jurisdiction over the case prevents it from bringing the parties back into harmony with each other.

---

265 Fort Defiance Housing Corp. v. Lowe, No. SC-CV-32-03, slip op. at 6.
267 Chapters are local governmental units located throughout the Navajo Nation. There are presently 110 chapters governed by locally elected officials.
Though based on this decision, the Committee lacks a remedy from OHA’s allegedly overly broad review in this case, it is the direct result of the [Navajo Nation] Council’s denial of appeals. Without the ability of this Court to bring the parties back into harmony, the Committee and OHA must work out their dispute, or the Council should review the statute and reconsider its prohibition on appeals.\textsuperscript{268}

Sometimes parties raise broad questions in tribal court so they can exhaust their tribal court remedies pursuant to \textit{National Farmers Union Insurance Companies v. Crow Tribe of Indians},\textsuperscript{269} and bring claims against the tribe in federal district court. The Navajo Nation Supreme Court addressed this strategy, and its requirement for a case or controversy, in \textit{Arizona Public Service Co. v. Office of Navajo Labor Relations},\textsuperscript{270} a case that applied Navajo Nation labor laws to a coal-fired power plant operating on the Navajo Nation in northeastern Arizona.

All too often people come before this Court seeking to raise broad questions so that they may exhaust their tribal court remedies and commence some sort of suit against the Navajo Nation [in federal court]. We reserve the usual judicial function of deciding only that which is placed before us unless there is a compelling need to broaden the scope of an opinion. As it is with most appellate courts, we do not give advisory opinions and we require an actual case or controversy before adjudication.\textsuperscript{271}

\textsuperscript{268} \textit{Id.}, slip op. at 6.
\textsuperscript{269} 471 U.S. 845 (1985).
\textsuperscript{271} \textit{Arizona Public Service Co. v. Office of Navajo Labor Relations}, 6 Nav. Rptr. at 279.
Another case that tested the application of Navajo Nation labor laws, this time involving the Judicial Branch of the Navajo Nation, is *Tuba City District Court of the Navajo Nation v. Sloan.*\(^{272}\) In *Sloan*, judicial branch officials argued that the doctrines of separation of powers and judicial independence prevented the Navajo Nation Labor Commission, an administrative body under the executive branch, from exercising jurisdiction over employment complaints of judicial branch employees.\(^{273}\) The Supreme Court allowed the Commission to exercise jurisdiction over judicial branch employment practices, but in doing so discussed the traditional Navajo analogy of separation of functions, which it said should inform the inner workings of the Navajo Nation three-branch government.

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. For instance, a Navajo medicine man or woman will perform his or her ceremony in a certain way. The manner in which a ceremony is conducted is left to the medicine man or woman performing the ceremony, guided by the holy people. It is not acceptable for one medicine person to tell another how to conduct a ceremony. Any infringement destroys the healing powers of the ceremony. Thus, the prohibition on such intrusions is absolute. Also, when a medicine man or woman oversteps his or her authority and does not perform a ceremony

---


\(^{273}\) *Id.*, slip op. at 1. The Navajo Nation Labor Commission is an administrative hearing body, 15 N.N.C. § 302 (2005), with jurisdiction over employment complaints under the Navajo Preference in Employment Act (NPEA), 15 N.N.C. §§ 601-619 (2005). The Act’s primary purpose is Navajo employment preference on the Navajo Nation and with businesses that contract with the Navajo Nation. The reasons for enactment of the NPEA are set forth at 15 N.N.C. § 602 (2005).
properly, that ceremony is ruined irreparably. The same holds true with our 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.  

4. Restoring *hozho* in individual rights cases

The Navajo Nation Bill of Rights, which was enacted in 1967, protects individual rights on the Navajo Nation. The Navajo Nation Bill of Rights grants greater rights in certain areas than the 1968 Indian Civil Rights Act. The federal Indian Civil Rights Act tracks many of the constitutional restraints imposed on the federal and state governments by the United States Bill of Rights. The following cases highlight some of the protections accorded to individuals under the Navajo Nation Bill of Rights. In addition, under Navajo common law, community rights or group rights can take precedence over individual rights.

In *Atcitty v. District Court for the Judicial District of Window Rock*, the applicants claimed that the procedures used to determine their eligibility for public housing benefits denied them due process of law under the Navajo Nation Bill of Rights.

---

274 Tuba City District Court v. Sloan, No. SC-CV-57-97, slip op. at 5-6.
275 Navajo Tribal Council Resolution No. C0-63-67 (Oct. 9, 1967) (codified at 1 N.N.C. §§ 1-9 (2005)).
277 7 Nav. Rptr. 227.
Rights.\textsuperscript{278} In its due process analysis, the Navajo Nation Supreme Court declared that Navajo common law due process, when applied to public benefits cases, “encompasses a wider range of interest than general American due process.”\textsuperscript{279} Traditional Navajo due process grants greater protection in public benefits cases because the traditional Navajo doctrine of distributive justice demands sharing of community resources.\textsuperscript{280} The Court also said in \textit{Atcitty} that the principle of \textit{k’e} provides foundational support to traditional Navajo due process because \textit{k’e} “promotes respect, solidarity, compassion and cooperation so that people may live in \textit{hozho}, or harmony.”\textsuperscript{281}

The Indian Civil Rights Act does not require Indian nation governments to provide free counsel to indigent defendants in criminal cases, but under Navajo Nation law “criminal defendants in the Navajo Nation court system are entitled to appointment of counsel if they are indigent, and they are entitled to a jury composed of a fair cross-section of Navajo Nation population, including non-Indians and nonmember Indians.”\textsuperscript{282} The Navajo Nation Bill of Rights grants greater rights than the Indian Civil Rights Act when it comes to right to jury trial. The federal law permits jury trial, upon request, in criminal cases if the punishment calls for imprisonment, but it does not allow for jury

\textsuperscript{278} 1 N.N.C. § 3 (1995).
\textsuperscript{279} 7 Nav. Rptr. at 231.
\textsuperscript{280} Id.
\textsuperscript{281} Id. at 230.
\textsuperscript{282} Means v. District Court of the Chinle Judicial District, 7 Nav. Rptr. 382, 388 n.11. On the right to counsel, the Navajo Nation Bill of Rights, 1 N.N.C. § 7 (2005), states as follows:

[No] person shall be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.
In comparison, Navajo Nation law provides for jury trial in both criminal and civil cases: “No person accused of an offense punishable by imprisonment and no party to a civil action at law, as provided under 7 N.N.C. § 651, shall be denied the right, upon request, to a trial by jury of not less than six persons.”

The right to jury trial is such an important right in the Navajo Nation that the Navajo Nation Supreme Court readily found an analogous traditional basis for it.

A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Juries are a part of the fundamental Navajo principle of participatory democracy where people come together to resolve issues by ‘talking things out.’ The participation of the community in resolving disputes between parties is a deeply-seeded part of our collective identity and central to our ways of government. As such, we must apply restrictions on the right to a jury trial narrowly, as they turn us away from our traditional ways of dealing with disharmony. (citations omitted).

The declaration that the doctrine of participatory democracy includes the fundamental right to trial by jury in the Navajo Nation was first articulated in Downey v. Bigman, where a non-Indian sued a Navajo horseback tour business for injuries allegedly caused by the defendant’s employees. The Navajo Nation Supreme Court used the case to establish a procedure for jurors to question witnesses, through the judge,

---

284 1 N.N.C. § 7. In civil cases, a jury trial is not permitted “in any domestic relations, decedent’s estate, equitable proceeding, or miscellaneous case.” 7 N.N.C. § 651 (2005).
285 Duncan v. Shiprock District Court, No. SC-CV-51-04, slip op. at 11.
during trial to clarify testimony. After discussing the doctrine of participatory democracy from the Navajo egalitarian perspective, and having established that the doctrine applies to jury process, the Court set forth a procedure for jury participation during trial.

A modern Navajo jury continues the fundamental tradition of community participation in the resolution of disputes through deliberation and consensus. A jury consists of members of the parties’ community who bring their ‘experience, culture and community standards into the jury box.’ The jury engages in deliberations, relying upon persuasion to reach consensus, to reach its verdict. These essential characteristics of a Navajo jury make it a modern expression of our longstanding legacy of participatory democracy.

A reformulation of the jury’s duties to permit it to ask questions of the witnesses during trial is more reflective of Navajo participatory democracy. To maintain impartiality, all the questions will be channeled through the judge, whose authority to permit or forbid the question is discretionary. This modification of jury trials in the Navajo Nation courts is a natural step back to traditional ways and a means to secure the future.287

As the *Duncan* and *Downey* cases instruct, a jury, which is normally composed of citizens from the parties’ community, can return disputants to *hozho*. During deliberations, the traditional Navajo civil procedures of “talking things out,” persuasion, and consensus are used to settle matters (*anahoti*) in the case. In conjunction with Navajo common law, the civil procedures of “talking things out,” persuasion, consensus,

287 Id. at 178.
and community participation are, as the Supreme Court said in Navajo Nation v. Kelly, “the basis for restoring harmony” or bee hozho nahoodoodlee.288

5. Restoring hozho in domestic cases

The field of law where restoring hozho plays a crucial role is Navajo domestic relations, particularly in situations involving disruptions of family stability. The hooghan (hogan) in Navajo culture symbolizes family, and on a broader metaphorical dimension, the entire field of Navajo domestic relations. The Navajo Nation Supreme Court discussed the sanctity of home (also called hooghan) and its centrality in Navajo culture and spirituality in Fort Defiance Housing Corp. v. Lowe.

The Navajo home is not only a roof over one’s head, but the place where families are established and children grow and learn; it is the center of all Navajo relationships. Children are conceived in the home. Certainly in the recent past children were born at home and some may still be, even in this modern era of hospitals. In the home, children are given their education and knowledge of who they are and their place in the world. In the home, children learn their responsibilities to themselves and to their family members, and where children learn the concept of k’e that will guide their relationships throughout their life.

The home in Navajo thinking is not a mere piece of property in which one holds an equity interest, but hoohgan rises to a level of spiritual centrality. Navajo families perform sacred ceremonies and say prayers in the home. After successive prayers and ceremonies by the introduction and reintroduction of corn pollen on the retaining beams, the sprinkling of white and yellow corn and the spreading out of soil to the west, the blessedness of the home is compounded, building in power and

288 No. SC-CR-04-05, slip op. at 7.
spirituality. This concept of home is not a mere concept of property ownership. It is much more.\textsuperscript{289}

The concept of \emph{hooghan} is inextricably intertwined with family in Navajo society and forms the core of Navajo internal and social relations and thus is fundamental to Navajo identity as Diné and as individuals. Moreover, Navajo internal and social relations compose the bedrock structure for Navajo Nation sovereignty. One way of understanding the Navajo view of sovereignty is to conceptualize it as endogenous; a process where sovereignty emanates from inside the \emph{hooghan} (hogan) outwards.

The Navajo clan system, which individuals use to trace their lineage through their mothers, underlies a Navajo view of family that transcends the nuclear family to extended families and even further to clan relationships. The clan system, which Navajos use to identify familial ties, is called \emph{k’ei}. The term \emph{k’ei} is usually glossed as kinship in English.

The importance that Navajos place on family and clan relatives (\emph{k’ei}) is addressed in \textit{Davis v. Means},\textsuperscript{290} a case that pitted a non-Indian former spouse against a non-member Indian spouse to determine the paternity (both men claimed to be the father) of a child born to a Navajo mother.

The family is the core of Navajo society. Thus, family cohesion is a fundamental tenet of the Navajo People. It is Navajo customary law — \textit{Diné Bi Beehaz’aanii} — or Navajo common law. ...

Family cohesion under Navajo common law means there is a father, a mother and children. They comprise the initial family unit and are protected as such inside and outside the blessed home (\emph{hooghan}) by

\begin{footnotes}
\item[289] No. SC-CV-32-03, slip op. at 4.
\item[290] 7 Nav. Rptr. 100 (1994).
\end{footnotes}
the Holy People. The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity.

Navajo common law on the family extends beyond the nuclear family to the child’s grandparents, uncles, aunts, cousins and the clan relationships. This is inherent in the Navajo doctrine of ak’eti (kinship). ... When the family is complete, there is peace and harmony, which produces beautiful and intelligent children and happiness and prosperity throughout all the relationships. The family is blessed.

Paternity must be established for children, because children must know their father’s clan to avoid incestuous relationships when they come of age. Navajo children are ‘born for’ their father’s clan. Children are owed obligations by their father’s clan, and have obligations to it. Children are the fabric of a clan. Thus, the clan members want to know their children and have a right to know under Navajo common law. (citations omitted).291

As the Davis case instructs, family stability and cohesion promote hozho in domestic affairs. Furthermore, knowledge of one’s clan is a necessary precondition to seeking and maintaining hozho, because, as the Court said, the kinship system is “essential to a Navajo’s identity and must be known for Navajo religious ceremonies. One must know them to seek hozho (harmony and peace).”292

Divorce cases offer a good opportunity to showcase the Navajo jurisprudence model because the court’s ultimate goal is restoring the divorced parties and their families and community to hozho. The traditional Navajo principle of finality in Navajo

---

291 Id. at 102-03.
292 Id. at 103.
The court took judicial notice of Navajo marriage and divorce customs to hold that the decedent’s mother was entitled to the proceeds because the ex-wife did not claim an interest in the insurance policy and thereby “left the decedent with his remaining property.”

By Navajo tradition, at the time of marriage the husband will normally move in with the wife’s clan. Traditionally, the father and any children live with the mother’s family, and children are said to ‘belong’ to the mother’s clan. When there is a divorce and the couple is living with the wife’s family, the husband simply returns to his own mother’s unit. ... As to dividing property, the couple keeps what was theirs before marriage and the wife keeps the remainder. ... Another method of divorce was

---

293 3 Nav. Rptr. 250.
294 Id.
295 Id. at 253. The court said it was obligated to take judicial notice of Navajo custom that “every damn fool knows.” Id. at 252.
counseling by the wife’s father and, when it appeared there could be no reconciliation, the couple would ‘split the blanket,’ dividing equally the goods they acquired during the marriage. Therefore, it would appear that in the absence of an agreement, the wife would take all.

Applying these principles of Navajo custom, we can find that there is a custom of finally terminating a marriage by someone moving, the woman keeping the property when the move is made or the couple making an equal division of marital property before going their own ways. The principle of finality requires that the court say there is an event which cuts the ties of the parties, and the event here is the divorce.

Under Navajo custom the woman can simply keep the property of the marriage and send the man to his family, taking only his own property acquired before the marriage. She also has the option of working out an arrangement with the man. In modern times, the woman [can come into court and argue for a division of the property]. The woman left the man and filed a divorce against him. Importantly, she had the option of demanding a property settlement but the decree only provides for child support. She therefore left the decedent with his remaining property.

There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common-sense. To permit a former spouse to keep such ties that she or he may be said to be lurking behind the hogan waiting to take a portion of the corn harvest is unthinkable. Each former spouse should return home after making the break and disturb others no more. (citations omitted).296

296 Id. at 252-54.
The Supreme Court cited with approval Apache’s principle of finality and the goal of quickly restoring hozho following a divorce in Naize v. Naize, where the family court, as part of its spousal maintenance award to the ex-wife, had ordered the former husband “to deliver a truck-load of firewood and coal to the [ex-wife] during the months of November, December, January and February of each year, beginning the fourth year, for an indefinite time period.” The Court did not look kindly on the order’s open-endedness and ruled that it contravened the traditional Navajo principle of finality in divorce. In reversing the open-ended order, the Court said the order violated the “Navajo common law rule which requires finality in Navajo divorces. Harmony in the community and in the lives of the divorced spouses should be restored quickly following a divorce.” (citation omitted).

6. Restoring hozho through nalyeeh (restitution)

The traditional Navajo principle of nalyeeh is another mechanism that is used to restore disputants to hozho. Nalyeeh is essentially a process that uses apology, forgiveness, and “talking things out” to agree on an amount of restitution that will restore an injured party to a state of hozho. Under traditional Navajo law, the restitution was normally paid to the victim and the victim’s family and clan, because the injury not only affects the victim, but also the victim’s family and clan through the doctrine of k’ei. The nalyeeh principle works exceptionally well with the Navajo jurisprudence model in the context of adversarial litigation. Nalyeeh is glossed in English as restitution, reparation, or compensation for an injury or wrong. The nalyeeh doctrine applies in civil and

---

297 7 Nav. Rptr. 269, 270 (1997).
298 Id. at 273.
criminal cases and in traditional Navajo peacemaking and litigation in the Navajo Nation courts.

In *Allstate Indemnity Co. v. Blackgoat*, the Navajo Nation Supreme Court was asked to decide whether the trial court erred when it did not award prejudgment interest as part of its judgment in a case arising from an automobile accident on the Navajo Nation. The trial court found that the defendant’s insurance company had fulfilled its obligations to the injured parties under the principle of *nalyeeh* and refused to award prejudgment interest. The Supreme Court reversed the trial court and in the process explained the concept of *nalyeeh* and its role in restoring disputants to *hozho*.

The Navajo common law doctrine relevant to our analysis is *nalyeeh*. ... *Nalyeeh* is a unique Navajo doctrine based on the effects of the injury. As the means by which Navajos customarily compensate injuries, Navajo Nation courts use *nalyeeh* to assess the adequacy of damages in tort claims. As previously discussed, *nalyeeh* includes the responsibility to respectfully talk out disputes. While a ‘flexible concept of distributive justice’ depending on the circumstances of the injury and the positions of the parties, a central purpose of *nalyeeh* is to restore harmony between the parties by adequately compensating the injured person or persons. Therefore, the amount of compensation arising out of that process ‘should be enough so that there are no hard feelings.’ Based on these principles, *nalyeeh* incorporates what might be expressed in Anglo terms as a procedural requirement and a substantive result. (citations omitted).

---

300 *Id.*, slip op. at 6.
In summary, the traditional Navajo jurisprudence model (hozho-anahoti'-hozho) provides the framework for dispute resolution in the Navajo Nation courts. Out of the 48,227 cases (criminal, civil, and traffic) decided by the Navajo Nation trial courts in fiscal year 2005 (October 1, 2004 – September 30, 2005), only a minute fraction (123) ended up before the Navajo Nation Supreme Court for review.301 These figures say much about the ability of the Navajo Nation judges to successfully incorporate traditional Navajo justice methods and concepts into the Navajo Nation Court System and restore disputants to the desired state of hozho.

---

301 Fiscal Year 2005 Annual Report, Judicial Branch of the Navajo Nation (Released in March 2006). These figures are about average for fiscal years 2001 to 2005. The total caseload of the Navajo Nation courts for fiscal year 2005 was 79,628 cases.
CHAPTER V. K’E
(SOLIDARITY THROUGH POSITIVE VALUES)

A. Overview of K’e in Navajo Culture

1. Harmonious relationships

The hozho doctrine describes a condition where everything is in its proper place and functioning in harmonious relationship with everything else. The “harmonious relationship” concept is a continual thread throughout human existence, from the time of creation to the present and into the future, and therefore constitutes a central theme of the Diné Life Way. The Navajos refer to the actors, or the dynamics, that facilitate and engage in “harmonious relationship” as “beings.”

Navajo philosophers group the universe’s multifarious elements that constitute creation into several categories of beings that are collectively called Diné’e.302 Humans are “earth surface beings,” supernatural and spiritual forces are “Holy Beings,” feathered creatures are “winged beings,” stars, planets, moons and other heavenly bodies are “star beings,” and so on. The universal relations doctrine (T’aa ‘altsoni alk’ei dah ndlìi), a foundational principle in the Navajo belief system, holds that all beings in the universe are interrelated, interconnected, and interdependent; thus, all beings are relatives.303 The following examples show how kinship is observed under the universal relations doctrine:

1) To traditional Navajos, the earth, water, and fire are mother; the sun and heavenly

---

302 The belief that there are different categories of beings relies on the Navajo version of animism which attributes “inner forms” to all things. See SCHWARZ, MOLDED IN THE IMAGE, supra note 238, at 29-33. The concept of “Inner Forms” implicates the sacred that is essential to ceremonial practice so it will not be discussed further in this work. In other words, the subject of “Inner Forms” fits into the category of “guarded knowledge.” However, this concept may become relevant in sacred sites cases.

303 The universal relations doctrine might also be called universal kinship.
bodies are father; Changing Woman is mother; and the male Holy Beings are grandfather; 2) The sun and earth complement each other in a continual relationship to produce life on earth; and 3) Traditional Navajos pray before hunting, and after a kill, thank the Holy Beings and the “four-legged beings”; the latter for sacrificing themselves as food for “earth surface beings.”

In the main, the universal relations doctrine is about community and order; all the multifarious elements in the universe constitute a community of relatives that exist in time and space in a harmonious balance. The interlinked nature of all beings is also called the web of universal relations. Professor Schwarz explains the Navajo concept of beings and the web of universal relations this way:

Several distinct types of beings coexist in the Navajo universe [and] [h]umans are not separate from other beings or aspects of nature in terms of power and dominance. All beings and aspects of nature are alk’ei, ‘those who should be treated with compassion, cooperation, and unselfishness by the Navajo’ — in other words, as kin. ... The rules governing the web of relations between and among all beings and aspects of nature constituted the charter given to the Navajo by the Holy People. This web of relations forms the core of Navajo social life. (citation omitted).304

Navajos understand that beings engage continuously in harmonious relationships at different levels of metaphysics. The following are examples of harmonious relationship at three different levels that Navajos observe in daily life and in ceremony:

304 *Id., supra* note 238, at 17. The phrase, “All beings and aspects of nature are alk’ei,” means everything is related (i.e., they are relatives) which defines the universal relations doctrine (*T’aa ‘altsoni alk’ei dah ndlii*).
1) the human level (e.g., relationships among family members, clan members, and tribe members through kinship system); 2) the universal level (e.g., relationships among elements in the universe through universal laws such as the sun and earth in unison produce life on earth); and 3) spiritual level (e.g., relationships between Navajos and Holy Beings through prayer and ceremony). The mechanisms, or perhaps more appropriately, the demiurges that motivate harmonious relationships that usher in *hozho* are *k′e*, *k′ei*, and *nalyeeh*305 and their emanating values.

The term *k′e* has been glossed by social scientists as solidarity,306 but Navajo philosophy accords it greater breadth. The *k′e* doctrine is an irreversible universal principle that facilitates relationships among beings in the universe such that the universal relations doctrine would stagnate if not for *k′e*.

*K′e* in fact incorporates many values that bind the individual to family, clan, Navajos in general, and all people. There are even relations and obligations to mountains, plants, animals, Mother Earth, and all of creation. The value, expressed in a short word, gives each Navajo an instinctive urge to work in harmony with others in society. It also has procedural values to support it.307

At the human level, the *k′e* doctrine describes the ideal relationship among everyone in the Navajo world where values maintain relationships that produce concord. In the Navajo cultural context, *k′e* preserves kinship solidarity through values that

---

305  *Nalyeeh* is restitution for injury or wrong at the human level.
306  WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE, supra note 217, at 37.
include respect, kindness, cooperation, friendliness, reciprocal relations, and love. Although *k’e* is a polysemous term, the definition commonly cited in Navajo common law scholarship comes from Witherspoon: “The ideal relationship with all people in the universe is symbolized by the verbal prefix ‘k’e.’ ‘K’e’ means ‘love,’ ‘kindness,’ ‘peacefulness,’ ‘friendliness,’ ‘cooperation,’ and all the positive aspects of an intense, diffuse, and enduring solidarity.” The Navajo language, traditional stories, ceremonies, and maxims contain and reinforce values that Navajos express through *k’e*.

The universal relations doctrine, in conjunction with the *hozho, k’e* and *k’ei* doctrines, frames the Navajo view of the universe as a web of universal relations. The values that come from the *k’e* and *k’ei* doctrines prescribe proper etiquettes that Navajos follow when interacting with relatives in the universe. These ancient constructs are fundamental to the Navajo conception of an orderly universe functioning according to irreversible principles. The deep reverence Navajos feel for Mother Earth and its compliment, Father Heaven, and the utmost respect they accord animals and plants exemplify adherence to *k’e* norms that prescribe proper conduct towards universal kin or relatives.

Only real and immediate need justifies the killing of an animal or the cutting down of a tree. On such occasions a prayer is said to the plant or animal, explaining one’s needs and asking the pardon or indulgence of the plant or the animal. Reichard observed this respectful attitude toward plant life:

> The Navajo have a sentimental attitude towards plants, which they treat with incredible respect. ... To pick them without taking them

---

308 Witherspoon, Navajo Kinship and Marriage, *supra* note 217, at 120.
into ritual, to let them wither as cut flowers is quite out of order, even dangerous, there being no aesthetic compensation for the fear such sacrilege may engender. (citation omitted).\(^{309}\)

The approach described encompasses a humble plea for forgiveness, assistance, and thanks spoken to the “inner form” of the animal or plant. Plants and animals provide Navajos with food, ceremonial paraphernalia, and medicine. In exchange for plea and offering that conform to \(k’e\) norms, plants and animals serve human needs.

Navajo kinship solidarity defines and secures Navajo notions of identity, rights, privileges, duties, obligations, reciprocity, and other values among members of a group. Positive values and solidarity connect through feelings of belonging to a tribe, band, clan or local family unit. \(K’e\) is “‘affective’ or emotional. In that, it is not simply a state of mind, but a habit. It is an almost instinctual way of reacting in relationships which are developed through conditioning and acculturation.”\(^{310}\) Navajos learn at an early age the proprieties that perpetuate kinship solidarity and use them to speak, act, and associate with fellow Navajos, clan relatives, and family members. Navajo children learn their clan identity, clan history, and etiquettes (\(k’e\) norms) that prescribe the acceptable bounds of behavior towards relatives and other Navajos. Children are taught to use kinship terms when addressing parents, grandparents, siblings, aunts, uncles, cousins, and relatives of related clans. As a matter of respect and honor, a Navajo will also use kinship terms, “my grandmother” or “my grandfather,” to address an elderly person, even though they are not related.

\(^{309}\) WITHERSPOON, LANGUAGE AND ART, \textit{supra} note 6, at 82-83.

\(^{310}\) Zion, \textit{Navajo Therapeutic Jurisprudence}, \textit{supra} note 232, at 607.
For the most part, k’e norms work as intended and fulfill expectations in Navajo society. There are occasions, however, when issues concerning a person’s paternity or biological heritage will prevent application of k’e norms. For example, a Navajo who was adopted as a baby and whose parentage or clans are unknown would have no means of identifying relatives using the Navajo kinship system. The same would also be true of a baby conceived through artificial insemination. In fact, without clan identification, the adopted child or one conceived artificially would be without traditional Navajo identity.

In Davis v. Means, a paternity case involving a child born to a Navajo mother and a non-Navajo father, the Navajo Nation Supreme Court discussed identity issues that accompany unresolved questions about an individual’s biological heritage.

Under the Navajo doctrine of ak’ei, the grandparents, other extended family members, and the clan relations have a right to know the biological heritage of a child. The Navajo maxim is this: ‘It must be known precisely from where one has originated.’ This means all of the child’s relations must know who the parents are, so the child will eventually know who is related and not related to him or her. The maxim focuses on the identity of a person ... and his or her place in the world....

Knowing one’s point of origination (meaning the parents) is extremely important to the Navajo people, because only then will a person know which adoone’e (clan) and Diné’e (people) the person is. Those precepts are essential to a Navajo’s identity and must be known for Navajo religious ceremonies. One must know them to seek hozho (harmony and peace).  

---

311 7 Nav. Rptr. 100.
312 Id. at 103.
The k’e norms prescribe acceptable behavior conducive to harmonious relationships among kin, which in turn maintains kinship solidarity. When two Navajos meet, shake hands, and address each other, not by name, but by kinship terms, they are applying k’e norms. Before Anglo names became common, it was very impolite, even a transgression of the rules of k’e, to use a person’s traditional name in his or her presence. Anglo names apparently do not evoke similar emotions as traditional names. A person whose behavior contravenes the rules of k’e assumes the risk of being marked with the maxim, “He (or she) acts as if he (or she) had no relatives.” This maxim insinuates that a person without relatives is a “witch.” In the normal course of interaction, however, the maxim describes a wrongdoer and reflects the traditional method of shaming that maintains community order and kinship solidarity.

2. Kin giving, sharing and support

The k’e doctrine “is a general concept of solidarity, and includes the giving and sharing of kinship solidarity and the reciprocity of nonkinship or affinal solidarity.” Navajo solidarity, both kinship and affine, is reinforced through a sophisticated clan system (glossed as k’ei) that on the whole identifies relations and descent. According to Witherspoon, “The term ‘k’ei’ means ‘a special or particular kind of k’e. It is this term (k’ei) which is used to signify the system of descent relationships and categories found in

\[313\] Traditionally, a kinsman who overheard the transgression would rip off the perpetrator’s necklace or earrings as an act of exoneration. The act, however, was more facetious than serious, but the offender was nonetheless embarrassed and got a lesson on proper behavior. The same act was also reserved for a joker who uses another person’s clan kin as the butt of jokes. But again, these were simply facetious acts intended to keep behavior within acceptable bounds.

\[314\] KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 100.

\[315\] WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE, supra note 217, at 120.
Navajo culture.” In the matrilineal Navajo world, a child takes the clan of its mother so the mother’s clan is the primary identifier. The maternal clan is integral to Navajo kinship solidarity because “it is in the mother-child bond that the most intense, the most diffuse, and the most enduring form of k’e is found.” The father’s clan is called the “born for clan” and assumes a secondary role to the mother’s clan when identity is considered. Two other clans complete the basic identity paradigm, the paternal grandfather’s clan and the maternal grandfather’s clan. The grandfathers’ clans establish grandparent-grandchild ties and become significant salutary sources when grandchild pursues traditional Diné knowledge.

The people who share one or more of a Navajo’s four basic clans compose a group he or she calls *shik’ei* (my relatives). The people identified as my relatives “are the specific ones with whom a Navajo relates according to the concepts and forms of kinship solidarity.” Because kinship solidarity is the strongest, when compared to other forms of solidarity (e.g., affine and non-Navajos), Navajos related by clan normally address each other by kinship terms (e.g., my mother, my uncle, my aunt, etc.), and not personal names, in conformance with k’e rules. The Navajo clan system identifies relatives by transcending immediate family and blood ties. With a Navajo population on the brink of 300,000, the chances are tremendous that a Navajo has several thousand relatives, the majority of whom he or she has never met.

---

316 *Id.* at 37. The *k’ei* doctrine is the subject of Chapter 6.
317 *Id.* at 125.
318 *Id.* at 121.
319 The 2000 American Indian census reports that 298,197 people identified themselves as Navajo or part Navajo. “The American Indian and Alaska Native
Kinship solidarity is indispensable to the Navajo people because clan relatives provide the essentials a Navajo needs for physical, mental, emotional, and spiritual well-being. The option of relying on relatives for sustenance and affective and spiritual support is always available to a Navajo. Navajo k’e values, including the cherished values of sharing and giving, no doubt induced a noted anthropologist to proclaim that “[t]he importance of his relatives to the Navajo can scarcely be exaggerated.”\textsuperscript{320} As relations descend, from clan to family, duties and obligations and sharing and giving increase in intensity and imperativeness: “Although k’e is the ideal relationship with everyone in the social universe of the Navajo, this idea is more imperative and felt more strongly as one goes down the taxonomy to one’s own people, one’s own clan, one’s own family, and, eventually one’s own mother.”\textsuperscript{321}

By custom, a Navajo is expected to contribute to the well-being and support of relatives, particularly those of the matrilineal clan. A Navajo fulfills obligations to matrilineal clan relatives by sharing and giving and providing physical, emotional, and spiritual support. Before vehicles became the primary mode of travel in Navajo Country, a Navajo was expected to provide shelter and food to a traveling clan relative. Clan relatives, especially those with a common maternal grandmother from preceding generations, would visit and the host family would give the best of its property —

\footnotesize{Population: 2000,“ United States Census 2000, United States Census Bureau, Department of Commerce (Issued Feb. 2002), at 8.}
\footnotesize{320 KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 100.}
\footnotesize{321 WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE, supra note 217, at 120.}
jewelry, animals, produce or intangible property — as gifts.\textsuperscript{322} These two examples demonstrate how Navajos comply with \textit{k’e} rules on contributing to relatives’ welfare in the interest of maintaining kinship solidarity.

A Navajo ceremony, particularly a major ceremony, like the \textit{Ndaa}, that requires extensive labor, food, materials, and spiritual support, would definitely not succeed if the clan relatives did not give, share, support, or cooperate with the sponsoring family. The \textit{Ndaa}, a major ceremony used to cleanse and restore military veterans to \textit{hozho}, is described superficially here to aid comprehension only. The preparation phase of the ceremony requires extensive labor to build temporary structures, such as a ceremonial hogan with shade attached and a large ramada for cooking and feasting. The ceremonial grounds must be cleared and prepared to accommodate the social and religious events. Enough firewood and water must be available for the week-long ceremony. Thousands of people attend which calls for a tremendous amount of food and labor, including cooking, cutting firewood, hauling water, and washing utensils. The medicine-man and his assistants normally receive fees for services that exceed $2,000. This example shows that \textit{k’e} plays a significant role in the performance of a major ceremony while simultaneously reinforcing Navajo kinship solidarity.

\textsuperscript{322} For a contrary view, see Reichard: “The Navajo does not expect anyone to give up his best if he can help it, because he would not do so himself.” REICHARD, \textit{NAVAJO RELIGION}, \textit{supra} note 215, at 130. Reichard draws her opinion from a story involving Navajo “gods” who demand the best jewels from Hopi “elders” who are reluctant to give; the theme being that the two tribes do not trust each other. For example, Reichard states: “Just as the Navaho tale discloses the opinion of their Hopi neighbors, whom they never trusted, it shows that they understand the enemy’s motives [evasion] and implies that theirs may be the same.” \textit{Id.} The story does not concern Navajo kinship solidarity.
3. Political affairs

The k’e doctrine plays a prominent role in Navajo political affairs, although more intensely in traditional governance than the modern Western model three-branch government. This discussion focuses on traditional governance to demonstrate the significance of the k’e doctrine to Navajo political affairs. The modern Navajo Nation three-branch government retains some traditional norms, but most of the norms have been eviscerated to save time and costs in an attempt to meet the demands of a growing Navajo population and expanding government bureaucracy. The Navajo Nation Council delegates still rely on oratory skill and kinship terms to win concessions in legislative debate, but an imposed time limit severely restricts “talking things out,” and the council members rarely achieve consensus on legislation and policy.

Of the three branches, the Navajo Nation Council wields the most power which suggests that traditional Navajo notions of equality have not taken root in the Western model Navajo Nation Government, although the laws call for a co-equal three-branch government with checks and balances. The Navajo Nation Council’s refusal to balance legislative power with the other two branches of Navajo government, which would be consistent with traditional Navajo values (including k’e), might be typical of modern Western model tribal governments, where the politically powerful hoard power at the expense of traditional values. When tribal officials ignore traditional values, the governing process quickly becomes ripe for corruption and scandal.
The traditional Navajo political process used persuasion, “talking things out,” and consensus on decision-making, which were integral to a system composed of leaders (naat’aanii) highly knowledgeable and skilled on k’e norms.

Both k’e and hozho are reflected in Navajo leadership. The traditional Navajo civil leader is a naat’aanii. That term has been translated as ‘peace chief,’ but it also means something greater. The Navajo language uses action words to describe things. This word refers to someone who can speak well in public. If the community hears someone who speaks well, with the content of the speech showing wisdom, organization, and spirituality, that person is naat’aanii. He or she could become a leader by the consensus of the community, and leaders guide the people to make decisions about their future. The power and authority of a naat’aanii is based on the respect of the people for a person who has demonstrated qualities of leadership, uprightness, and spirituality. A naat’aanii will lead discussions to talk about others or talk out problems, and his or her word has a great bearing on the group’s decision.

Navajos who were adept with the “talking things out process” became successful leaders and enjoyed long service, a notable achievement in a system where leaders served for only as long as they produced and held the people’s confidence. Leaders also served as

---

323 The phrases “talking things out” and “talking things out process” are not used interchangeably in this work. The second phrase describes the entire process used to solve problems (e.g., traditional peacemaking) while the first refers to unrestricted discussion on points during the “talking things out process.” For example, the traditional Navajo dispute resolution process called peacemaking is a “talking things out process” (includes opening prayer, introductions, instructions, problem identification, discussion of problem, persuasion, consensus, lectures, apologies, and closing prayer), while discussion of a specific problem during peacemaking is “talking things out.”

324 Tso, Moral principles, supra note 307, at 17.
peacemakers to help people resolve their disputes using the “talking things out process” or peacemaking.

The traditional dispute resolution process (peacemaking) used the traditional procedures of persuasion, “talking things out,” and consensus to find solutions. These values are now denominated traditional Navajo civil procedures. *K’e* values such as respect, kindness, cooperation, and friendliness and use of kinship terms flowed freely among the participants while they discussed issues during the traditional peacemaking session.

4. Traditional notions of equality

The traditional “talking things out process” (used as peacemaking and community policy-making), including its components of “talking things out,” persuasion, and consensus, are framed by traditional notions of equality (egalitarianism) and the concept that the people as a whole can make law (participatory democracy). Navajo egalitarianism comes from harmony and balance inherent in the condition known as *hozho*. While non-Indian scholars have glossed *hozho* as harmony, Navajos interpret *hozho* as containing the elements harmony, balance, peace, completeness, and others.

Harmony and balance are integral to the view that all multifarious elements in the universe are situated on the web of universal relations. Navajo notions of equality, in the context of harmony and balance (*hozho*), can be partially explained as follows:

In the Navaho conception of the relationship between their divinities there is the mechanical notion of a balance of opposing forces. No one divine being has unfettered control over the others. ...
This dominant conception of balance is reflected in the scrupulous symmetry of ceremonials, formal narratives, and art. Poetry is constructed in the fugue and coda style. In dry paintings, rugs, and silverwork an element rarely appears singly. There is a pair, or more often a group of four. In songs and prayers there are numberless balanced repetitions, four again being the favorite pattern[.]

Traditional notions of equality (egalitarianism) are reflected in the traditional Navajo system of dispute resolution called peacemaking. Navajo peacemaking is a horizontal system of justice whereas Western model court systems are vertical systems of justice. Navajo common law scholars have pointed out differences between the two systems: “Vertical systems use hierarchies of power and authority, backed by force and coercion, to operate their legal systems. Horizontal systems are essentially egalitarian and function using relationships. Many reject force or coercion.”

5. Traditional leadership

The traditional Navajo peace leaders, unlike Western leaders, shunned authoritarianism; hence, a leadership hierarchy was not essential to the functioning of the traditional Navajo political system.

---

325 Kluckhohn, *The Philosophy of the Navajo Indians*, supra note 210, at 362-63.
The *natani*, or peace leader, was not allowed areas of uncontrolled personal whim and dominance; his role was traditionally defined as nonauthoritarian and noncoercive, his power was to be exercised in the interests of the group. It was based on the respect in which he was held as a person. Any attempt on his part to overstep his authority would destroy the basis of its legitimacy — that is, the respect and confidence without which he could not command obedience.327

Because traditional Navajos consider words powerful, oratory skill was the principal means by which a leader persuaded people on a particular point. Unanimity or consensus on policy or solutions was the desired end of the decision-making process. These traditional civil procedures were still practiced in the early 1940’s in spite of the Bureau of Indian Affairs’ attempts to supplant traditional rules with Anglo-American styled democratic methods.

Headmen have no powers of coercion ... but they do have responsibilities. ... Decisions as to ‘community’ policy can be reached only by the consensus of a local meeting. The People themselves are the real authority. No program put forward by a headman is practicable unless it wins public endorsement or has the tacit backing of a high proportion of the influential men and women of the area. Rich men often exert great power through economic pressure, but they work mostly behind the scenes and are seldom invested with the authority of formal leadership.

... The present practice of actually voting for candidates or on policy decisions is a white innovation and still makes most older and middle-

aged Navahos uncomfortable, since the Navaho pattern was for discussion to be continued until unanimity was reached, or at least until those in opposition felt it was useless or impolitic to express further disagreement.328

The traditional Navajos recognized two kinds of leaders: the peace leaders (or peace planners) who were known as hozhooji naat’aah; and the war leaders (or war planners) who were known as hashkeeji naat’aah.329 The traditional peace leaders were great orators, wise, and fair and had to earn the trust of the people to maintain leadership positions. The peace leaders were “known for their ability to guide others and plan for community solidarity and survival. Their authority [came] from the force of k’e in k’ei relationships. Beyond relationships in the family and clan, Navajos acknowledge[d] their naat’aanii as community leaders because of demonstrated leadership abilities.”330

Leaders were selected by community consensus and expected to lead by example, help the people surmount obstacles, and plan for community survival and solidarity. The Navajo Nation Supreme Court emphasized the high standards under which traditional Navajo leaders served in a case involving a power struggle among modern Navajo leaders:

328 KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 118, 120.
329 “The leader(s) of the Judicial Branch” of the Navajo Nation Government, which contains the Navajo Nation Court System, are now called Alaaji Hashkeeji Naat’aah. The leaders, or the judges, are advised to “uphold the values and principles of Diné bi beenahaz’aanii in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments.” 1 N.N.C. § 203E (2005). In the Navajo Nation Code of Judicial Conduct (Nov. 1, 1991), the modern Navajo Nation judges, as successors to the traditional peacemakers, are called hozhoji naat’aah (peace chief). See Canon One, Consideration Nos. 3 and 5.
After the epic battles were fought by the Hero Twins, the Navajo people set on the path of becoming a strong nation. It became necessary to select *naat’aaniis* by a consensus of the people. A *naat’aanii* was not a powerful politician nor was he a mighty chief. A *naat’aanii* was chosen based upon his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If a *naat’aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words. The *naat’aanii* indeed was expected to be honest, faithful and truthful in dealing with his people.331

The traditional Navajo leaders fit the modern description of the American Indian “elder.” The American Indian elder status is earned through a life-time of good deeds, personal achievements, and unwavering spirituality. A person does not achieve elder status by simply growing old and gray. American Indian elders are normally older and wiser than fellow citizens through a life-time of learning and experiences. Navajos recognize their elders as keepers of traditional knowledge, including the Navajo Creation Scripture and Journey Narratives and the foundational doctrines that comprise the framework for traditional Navajo philosophy. A Navajo “elder is a distinguished person who earns that status. As is common to most Indian groups, Navajos identify their elders by recognizing their spirituality, good works, and personal achievements. For Navajos, that person is the *naat’aanii*.”332

The *k’e* doctrine sets the rules for a Navajo’s relationship with family, clan, related clans, Navajos in general, non-Navajos, and eventually with everything in the

---

331 In re Certified Questions II, Navajo Nation v. MacDonald Sr., 6 Nav. Rptr. 105, 117 (1989).
universe. *K’e* maintains Navajo kinship solidarity, which is *hozho* at the human level, through positive values that include respect, kindness, cooperation, friendliness, mutual obligations, and love. The three foundational doctrines, *hozho, k’e* and *k’ei*, underlie Navajo understandings of kinship and relationships in the universe. The doctrine of universal relations, which describes the universe as composed of interrelated, interconnected, and interdependent elements, and the *hozho, k’e*, and *k’ei* doctrines are closely associated.

Similar to the *hozho* doctrine, the *k’e* doctrine is not black letter law capable of application to legal issues. The doctrines of *k’e* and *k’ei* are the dynamic dyads that facilitate group cooperation, planning, discussion, persuasion, and consensus which are essential to dispute resolution in the traditional Navajo context and to a limited extent in the modern Navajo Nation courts. Several principles derived from the *k’e* doctrine apply during the courts’ problem-solving stage; the stage denominated *anahoti’* in the Navajo jurisprudence model (*hozho-anahoti’-hozho*). These *k’e* principles can synthesize with Western legal principles during analysis, but in the overall understanding of Navajo jurisprudence, synthesis or not, adopted Western laws are still Navajo law. The following section demonstrates how the Navajo Nation courts, which are structured after the Anglo-American court model, use the *k’e* doctrine, including *k’e* derived principles, to address legal issues brought by Navajos and non-Navajos during litigation.

**B. K’e as Used in the Navajo Nation Courts**

1. The court’s duty to use Navajo common law
When the Navajo Nation judiciary adopted the Navajo Nation Code of Judicial Conduct on November 1, 1991, the judges made sure that Navajo common law, including the doctrines of *hozho*, *k’e*, and *k’ei*, would be used not only in the decision-making of the Navajo Nation courts, but also in the daily administration of judicial business.

A longstanding objective of the Navajo Nation courts is to preserve the customs and traditions of the Navajo people. They are embodied in the Navajo common law, and it is a source for many of the provisions of the [Navajo judicial] code. The Navajo Nation courts, as a branch of the Navajo Nation Government, must respond to the needs and expectations of the Navajo people, so they will accept and respect their courts and judges. While the Navajo Nation courts generally follow the state model of justice ... that system is alien to the Navajo common law. Traditional Navajo justice methods rely upon adjusting the differences of equals, in mediation and the free discussion of problems, to resolve them by consent. It does not rely upon a superior decision-maker, who imposes decisions upon others. It does not use coercion or force, and is instead based upon an agreed need for harmony in the community.\(^{333}\)

\[\ldots\]

Under certain circumstances the [Navajo judicial] code may apply to other members of the court staff, and particularly those who advise or counsel a judge or justice. In particular, the Canons apply to law clerks, attorneys to the courts, paralegals, court administrators, and others who are in close and constant working relationship with a judge or justice. The principles apply, because these officials are identified with judges and justices in the eye of the Navajo public.\(^{334}\)

\(^{333}\) Preamble, Navajo Nation Code of Judicial Conduct.

\(^{334}\) Application of the Code, Navajo Nation Code of Judicial Conduct.
One month after the judges approved the Navajo judicial code, the Navajo Nation Supreme Court followed suit and declared Navajo common law as the law of preference in the Navajo Nation courts.\footnote{Navajo Nation v. Platero, 6 Nav. Rptr. 422, 424.} At the time of these declarations, the Navajo Nation courts were handling several cases generated by what Navajos have come to call “the turmoil,” a 1989 political power struggle between supporters of suspended Chairman Peter MacDonald Sr. and those in opposition. The 1989 events generated heated and ample public debate, but the judges were most impressed by traditional Navajos who decried the extent to which Navajo leaders had strayed from the teachings of the hozho, k’e, and k’ei doctrines. The turmoil caused Navajos to fight Navajos on the same ground where their ancestors had sought the Holy Beings’ blessings after their release from imprisonment at Fort Sumner over a hundred years earlier.

The discussions of the early drafts of the Navajo judicial code united the judges in a spirit of collegiality that essentially focused the judiciary on revitalizing dormant traditional Navajo values. The Navajo judges began encouraging each other during their quarterly meetings to use the hozho, k’e, and k’ei doctrines and other traditional principles in decision-making and court administration.\footnote{The Navajo judges hold quarterly judicial conferences every three months where they discuss court policy and planning, fiscal matters, court administration, changes to court rules, judges and staff training, and other topics.} During the court system’s annual conferences in the 1990’s, the Navajo Nation Chief Justice encouraged judicial branch employees, including judges, attorneys, peacemakers, and court staff, to incorporate k’e values (friendliness, cooperation, kindness, kinship terms, etc.) into their work and interactions with each other and the public. The Navajo Nation Court System
is now solidly situated at a point where traditional principles are not only mainstays in the courts’ decision-making, but serve as the foundation from which the Judicial Branch of the Navajo Nation Government operates.

The Navajo Nation judges have the special duty to utilize the *hozho*, *k’e*, and *k’ei* doctrines when deciding cases. Canon One of the Judicial Code advises the Navajo judges to decide cases between the Four Sacred Mountains, the four mountains located at cardinal directions and which mark the boundaries of ancient Navajoland; land the Holy Beings promised to the Navajo people. The Navajo judges are instructed to “apply Navajo concepts and procedures of justice, including the principles of maintaining harmony, establishing order, respecting freedom, and talking things out in free discussion.” The Judicial Code advises the Navajo judges, as successors to the traditional peacemakers, to follow *k’e* rules by treating litigants as if they were relatives. Navajo society, of course, revolves around kinship.

This value [treat people like relatives] requires judges, as *Hozhoji’ Naat’aah* (leaders), to treat everyone equally and fairly. Navajos believe in equality and horizontal, person-to-person relationships as part of their concept of justice. Obligations toward relatives extend to everyone, because that is a means of not only stressing personal equality, but creating solidarity.

---

337 Canon One, Principle, Navajo Nation Code of Judicial Conduct. Navajos believe that the Holy Beings placed everything the Navajos would need to prosper and grow between the Four Sacred Mountains. The mountains themselves are beings blessed with spiritual power and contain all knowledge essential to the Diné Life Way.

338 *Id.*
The procedure of Navajo justice is people talking out their problems for a consensual resolution of them. A judge should encourage free discussion of the problem before the court, within the limits of reasonable rules of procedure and evidence. A judge should not encourage or permit aggressive behavior, including the badgering of witnesses, rudeness, the infliction of intentional humiliation or embarrassment, or any other conduct which obstructs the right to a full and fair hearing.\textsuperscript{339}

Borrowing from traditional dispute resolution practice, a Navajo judge can assume a peacemaker’s role at opportune stages of litigation and employ \textit{k’e} to encourage parties to reach consensus on disputed points. A judge can “use the pretrial conference, sentencing hearing, or post-judgment proceeding to encourage the parties to reach consensus regarding their dispute.”\textsuperscript{340} Because coercion has no place in peacemaking, the judge as peacemaker cannot force parties to settle issues. Even the Navajo Nation Supreme Court has on occasion used \textit{k’e} to encourage parties with cases pending before it to settle their disputes amicably in the interests of community harmony and kinship solidarity.

The Navajo Nation Supreme Court consistently proclaims that the Navajo Nation courts “serve the purpose of bringing people in dispute back into harmony” with their

\textsuperscript{339} Canon One, Considerations No. 3 (Judicial Attitudes), No. 4 (Coercion), and No. 6 (Fair Play), Navajo Nation Code of Judicial Conduct.

\textsuperscript{340} Canon Three, Consideration No. 1 (The Judge as Mediator), Navajo Nation Code of Judicial Conduct.
The harmony theme is diffused throughout the Judicial Code, but is explicitly set forth under Canon One:

Injustice, in the sense of evil or wrongdoing, is the result of disharmony. One of the goals of justice is to return people and their community to harmony in the resolution of a dispute. The judge must promote harmony between litigants, achieve harmony through assuring reasonable restitution to victims, and foster harmony by providing the means for offenders or wrongdoers to return to their communities. That is achieved through free discussion, conciliation, consensus, and guidance from the judge.342

The judges know that although the Navajo Judicial Code contains a set of ethics principles based on traditional Navajo values, it has other intentions that are not readily apparent or expressly stated. These purposes are 1) to encourage the judges to use traditional Navajo thinking when deciding cases; 2) to set forth foundational Navajo principles, including hozho, k’e, and k’ei, “talking things out,” nalyeeh (restitution), naat’aaah (leadership), and consensus, for active and future judges to know, apply, and develop; 3) to instill in court employees important traditional values pertinent to their work; and 4) to declare that Navajo common law, culture, spirituality, language, and identity compose the foundation from which the entire Navajo Nation Court System operates.343

---

341 In re Mental Health Services of Bizardi, No. SC-CV-55-02, slip op. at 3.
342 Canon One, Consideration No. 1 (Harmony), Navajo Nation Code of Judicial Conduct.
343 The Navajo people are masters at cultural integration — taking foreign concepts, tweaking them with Navajo ingenuity, and making them their own. For example, the Navajo Nation Court System, while modeled on the Anglo-American form of adjudication, uses Navajo common law in decision-making. Another example is the
2. The rule on adopting Bilagaana law

The solid emphasis on use of Navajo common law in the Navajo Nation courts does not mean that non-Navajo law is excluded from Navajo jurisprudence. Just as the structure of the Navajo Nation Court System replicates the Anglo-American court model, state and federal laws have guided many Navajo Nation court decisions. The Navajo Nation Supreme Court, however, has advised caution and careful deliberation before the Navajo Nation courts adopt foreign legal concepts. After the Navajo Nation Council passed the Diné Fundamental Laws in November 2002, the Navajo Nation Supreme Court established a rule on adoption of non-Navajo law, the rule on adoption of Bilagaana law, which requires compatibility of the foreign law with fundamental Navajo values before its application to an issue.

integration of members of other Indian tribes into the Navajo population and giving them clan names.

344 In an appeal that raised the issue of whether a New Mexico statute that exempted certain property from execution should be applied by the Navajo Nation courts, the Navajo appellate court stated as follows:

The Navajo judicial system, as is the federal judicial system, is an independent system for administering justice to those who come within its jurisdiction. That being the case, the Navajo Courts, as do the federal court[s], follow Navajo policies as to how the Navajo Courts should be run. We do not, as do the federal courts, consider the policy of providing substantially the same outcome as the state courts. Our policy is often to not provide the same outcome in order to protect Navajo interests and cultural values.


345 In re Validation of Marriage of Francisco, 6 Nav. Rptr. 134, 139-40 (1989)(“As a sovereign Indian nation that is constantly developing, the Navajo Nation must be forever cautious about state or foreign law infringing on Navajo Nation sovereignty”).

346 The Navajo word for American white people is Bilagaana, but the adoption rule would apply to all non-Navajo laws (state, federal, other Indian nations, and international laws), not just American federal and state laws.
In the absence of [Navajo] statutory law, we first and foremost consider \textit{Diné Bi Beenaaz'\textquoteright aanii} (Navajo Fundamental Law). We also consider other ways of dealing with a problem, including approaches in \textit{bilagaana} legal thought such as the Restatements when consistent with fundamental Navajo legal principles, particularly in situations involving adopted concepts.... (citations and parenthetical information omitted).\(^{347}\)

The Court in \textit{Goldtooth} found the non-Navajo concept of apparent authority consistent with Navajo values and joined it with the Navajo principle of \textit{naat'aanii} (traditional leader) to rule that the school’s executive director, as \textit{naat'aanii}, had apparent authority to bind the principal (the school board) to an employment contract.\(^{348}\) The Court said the executive director’s (as \textit{naat’aanii}) “words carry great weight”; thus, when the director told the employee that his contract was renewed, his words bound the school board, “absent clear guidance from the [school board that the director’s] authority was limited.”\(^{349}\) The Court’s use of \textit{naat’aanii} to find a binding contract comes from traditional norms that associate a traditional leader with strong persuasive ability through skilled use of \textit{k’e} values, and whose words the people highly respect and follow. The


\(^{348}\) \textit{Id.}, slip op. at 9; \textit{See also} \textit{Kesoli v. Anderson Security Agency,} No. SC-CV-01-05, (Nav. Nat. Sup. Ct., Oct. 12, 2005)(a private security company supervisor is a \textit{naat’aanii} who must be careful with his words; thus, when he “shouted” at subordinates, he committed “harassment” (unprofessional conduct according to company policy) which justified his firing).

Court’s finding of a binding employment contract also furthers the Navajo goal of returning disputants to harmony (*hozhо*).\(^{350}\)

The Navajo Nation Supreme Court confirmed that it will consider and “adopt *bilagaana* legal principles, if consistent with fundamental Navajo principles” in *Etsitty v. Diné Bii Association for Disabled Citizens, Inc.*\(^{351}\) The Court adopted the “control test” in employment law, which the New Mexico courts use to distinguish between employees and independent contractors.\(^{352}\) The Court added new factors to the “control test” to “foster harmony by honoring the expectations of the parties under the Navajo principle of *k’е*, a consideration absent from *bilagaana* legal thought.”\(^{353}\) The *Goldtooth* and *Etsitty* cases showcase methods that the Navajo Nation Supreme Court uses to conjoin traditional Navajo and non-Navajo concepts to form new Navajo law that it applies to issues, without losing focus on the ultimate goal of returning parties to harmony.

In a criminal case involving Miranda Rights, the Navajo Nation Supreme Court spoke at length about the similarity of language in Navajo and non-Navajo statutes that address similar topics and whether non-Navajo sources should inform interpretation of those Navajo statutes, particularly similar provisions in the Navajo Nation Bill of Rights and the Indian Civil Rights Act.\(^{354}\)

\(^{350}\) *Id.*, slip op. at 7.


\(^{352}\) *Id.*, slip. op. at 5-6.

\(^{353}\) *Id.*, slip op. at 7.

\(^{354}\) Navajo Nation v. Rodriquez, No. SC-CR-03-04 (Nav. Nat. Sup. Ct., Dec. 16, 2004). Despite the similarity of language on the right against self incrimination in the Navajo Nation Bill of Rights and the Indian Civil Rights Act, the Navajo Nation Bill of Rights does not track its federal counterpart. The Navajo Nation Bill of Rights was
In interpreting the Navajo Bill of Rights and the Indian Civil Rights Act, as with other statutes that contain ambiguous language, we first and foremost make sure that such interpretation is consistent with the Fundamental Laws of the Diné. That the Navajo Nation Council explicitly adopts language from outside sources, or that a statute contains similar language, does not, without more, mean the Council intended us to ignore fundamental Diné principles in giving meaning to such provisions. Indeed, Navajo understanding of the English words adopted in statutes may differ from the accepted Anglo understanding. Further, the Indian Civil Rights Act does not require our application of federal interpretations, but only mandates the application of similar language. (citations and parenthetical information omitted).

While we are not required to apply federal interpretations, we nonetheless consider them in our analysis. We consider all ways of thinking and possible approaches to a problem, including federal law approaches, and we weigh their underlying values and effects to decide what is best for our people. We have applied federal interpretations, but have augmented them with Navajo values, often providing broader rights than that provided in the equivalent federal provision. Our consideration of outside interpretations is especially important for issues involving our modern Navajo government, which includes institutions such as police, jails, and courts that track state and federal government structures not present in traditional Navajo society. (citations and parenthetical information omitted).355

passed in 1967 while the Indian Civil Rights Act was passed in 1968. If anything, the Navajo Nation Bill of Rights borrows language from the United States Bill of Rights. 355 Id., slip op. at 7-8.
After setting forth instructions, the Court adopted “the minimum requirements from Miranda as consistent with our Navajo values.”\textsuperscript{356} One of the Navajo values that the Court identified is individual freedom which prohibits coerced confessions: “Our Navajo Bill of Rights [specifically, the right against self-incrimination], as informed by the Navajo value of individual freedom, prohibits coerced confessions.”\textsuperscript{357} The other value is respect in Navajo relationships which requires clear and concise communication “so that we may understand the meaning of our words and the effect of our actions based on those words.”\textsuperscript{358} These two values come from the \textit{k’e} doctrine; thus, they require respect and truthfulness in relationships, not only among individuals, but also between Navajo leaders (officials) and the people. For example, the Court stated that the method the police officer used to coerce a confession, threatening the defendant with a prison term of sixty years and a fine of over a million dollars, “does not conform with the ways people should interact [in relationships].”\textsuperscript{359}

The Navajo Nation Supreme Court does not require the Navajo trial courts to adopt non-Navajo law wholly even after satisfactory compliance with the rule on

\textsuperscript{356} \textit{Id.}, slip op. at 8.
\textsuperscript{357} \textit{Id.}, slip op. at 5.
\textsuperscript{358} \textit{Id.}, slip op. at 8 (the Court added to formal Miranda Rights the requirement that a standardized “advice of rights” form given to a suspect to sign, as a waiver of rights, must be explained in detail so that the suspect understands the rights he is waiving). The requirement of clear and concise communication falls within the principle of \textit{ashjoni adoolnil} which is discussed in the next section and in \textit{Rough Rock Community School v. Navajo Nation}, 7 Nav. Rptr. 168, 174-75 (1995).
\textsuperscript{359} Navajo Nation v. Rodriguez, No. SC-CR-03-04, slip op. at 1, 4, and 10. To buttress its position, the Court also said that “a police badge cannot eliminate an officer’s duty to act towards others in compliance with the principles of \textit{házhó’ógo}.” The word \textit{házhó’ógo}, when used in the context given, suggests a respectful relationship between a government official and a member of the community.
adoption of *bilagaana* law. Foreign law can be modified to meet the Navajo cultural context, it can be joined with Navajo common law, or it can guide the process for crafting new law, including setting the extent of its reach. In some cases, non-Navajo law and Navajo common law may form a hybrid that becomes new law. The following sections show the Navajo Nation courts at work using Navajo common law and Anglo-American law to create a unique corpus of Navajo law.

3. Principle of *Nataah Nibikiyati* (Participatory Democracy)

The Navajo belief that the people as a whole can make law is consistent with the universal relations doctrine; a doctrine that proposes that the entire universe is composed of a community of relatives. The Navajos consider all the multifarious elements that compose the universe as basically equal because they compose the web of universal relations which must be in harmony and balance for the universe to be in a state of *hozho*. Thus, Navajo concepts of equality and egalitarianism come from the harmony and balance that are believed to sustain the web of universal relations.

The Navajo Nation Supreme Court explained the egalitarian concept, a principle crucial to participatory democracy, within the context of dispute resolution in *Downey v. Bigman*: “One of the major differences between Western principles of adjudication and Navajo legal procedure as participatory democracy is that it is essentially egalitarian. Egalitarianism is the fundamental principle of participatory democracy. The egalitarian principle is the ability of the people as a whole to make law.”\(^{360}\) Thus participatory democracy, from the traditional Navajo view, means that the people have a right to

\(^{360}\) 7 Nav. Rptr. 176, 177.
participate equally with their leaders in all processes of government, including
discussions leading to consensual decision-making and policy-making.

The Ndaa Ceremony, which was mentioned earlier in this chapter, provided the
perfect forum for participatory democracy at the Navajo grass-roots level in more
traditional times. The public portion of the ceremony provided an open forum where
anyone could raise and discuss issues affecting tribe, community, and families.\textsuperscript{361} Tribal
leaders were summoned to listen to local concerns so that they could act on them during
Navajo Nation Council sessions. The forum also provided a perfect opportunity to
evaluate the effectiveness of locally elected officials and delegates to the Navajo Nation
Council. Unfortunately, as Navajos have adopted more Western ways, the grass-roots
forums provided by major ceremonies have fallen into desuetude.

The doctrine of participatory democracy informed Navajo views of political
liberty in \textit{Bennett v. Navajo Board of Election Supervisors},\textsuperscript{362} where a candidate for the
Office of Navajo Nation President was disqualified for failure to meet the statutory
requirement of previous service as an elected Navajo government official or as an
employee of a “Navajo tribal organization.” While holding the statute void for
vagueness, the Navajo Nation Supreme Court identified and discussed values that foster
Navajo political liberty, which is part of the doctrine of participatory democracy:

\textsuperscript{361} Some of the greatest orations I have heard in the Navajo language were made
at these events by traditional men and women who did not speak English. It was a sight
to behold with eloquent speakers dressed in traditional garb and turquoise jewelry
displaying histrionics and speaking words no longer used today.

\textsuperscript{362} 6 Nav. Rptr. 319.
Navajo *beehaz’aanii* speaks to political liberty, and we apply Navajo common law rather than the Anglo concept of political liberty. In Navajo tradition, government and governing was a matter of the consensus of the people, and Navajos had a participatory democracy. It was, in fact, one of the purest democracies in human history. Long before the United States of America extended the privilege and right to vote to those who did not own property and to women, all Navajos participated in public decisions. Therefore, there is a strong and fundamental tradition that any Navajo can participate in the processes of government, and no person who is not otherwise disqualified by a reasonable law can be prohibited from holding office.363

Because participatory democracy underlies the traditional Navajo political system, modern Navajo leaders must continue to uphold its standards to guarantee the Navajo people their fundamental right to participate in decisions affecting their Nation, communities, and families. Navajo participatory democracy works because the “talking things out” rule requires free-flowing discussion of values and concepts that lead to consensus in an atmosphere of *k’e*. The case of *Rough Rock Community School v. Navajo Nation* demonstrates how participatory democracy works.364

In *Rough Rock*, the Navajo Nation Supreme Court was asked to decide whether the Education Committee of the Navajo Nation Council had complied with a statutory requirement of “consultation” with local school boards before drafting an apportionment plan for school board elections. The Court found that the Education Committee had not

363 *Id.* at 325.
followed the dictates of k’e, which motivates participatory democracy, and thereby had violated the statutory consultation requirement.

The statutory requirement of ‘consultation’ should have been strictly adhered to since the apportionment plan was being developed for the local schools and the communities they serve. Navajo common law speaks to consultation as giving participants ample freedom to speak, be heard, and opportunity to present written comments. The Navajo doctrine of k’e underlies all transactions between and among Navajos, and it likewise frames our view of consultation under the Election Code. Consultation is far more than giving unilateral testimony under oath for a limited number of minutes. It must encompass complete discussion of Navajo values, concepts, and diversity of opinion in an atmosphere of k’e (including equality and respect), ultimately leading to a consensual solution. This is the heart of Navajo due process embedded in Navajo participatory democracy[.] (citation omitted).365

Along the same line, the Navajo Nation Supreme Court reminded the Navajo Nation Council of its duty to uphold the standards of participatory democracy in Judy v. White,366 a case concerning a pay increase that the Navajo Nation Council gave itself without first seeking the approval of the Navajo electorate.

Through time, our traditional form of participatory democracy has given way to non-Navajo formality; this flexibility is necessary to accommodate the ever-changing face of Navajo governance and its attendant complexities. But the acceptance of formality does not circumscribe the absolute right of the Navajo citizen to complain about the manner in which he or she is governed. We have said before that

---

365 Id. at 317-18.
366 No. SC-CV-35-02.
participatory democracy does not come from the non-Navajo, and today we aver that it also does not come from the [Navajo Nation] Council. It comes from a deeper, more profound system of governance: the Navajo People’s traditional communal governance. Whether governance occurred at a public meeting place, a windmill, someone’s homestead, the final day of a traditional ceremony or at a chapter meeting, the root of that process comes from the Diné Life Way. Our narratives on the Diné Life Way are replete with allusions to communal or participatory governance. Nowhere in our life journey narratives is there any indication that one was denied the privilege to speak, nor shunned for asking.\footnote{Id., slip op. at 9-10; Duncan v. Shiprock District Court, No. SC-CV-51-04, slip op. at 11 (community participation in resolving disputes is central to Navajo ways of governance and part of Navajo collective identity).}

These cases illustrate that Navajo participatory democracy relies on rules that permit free-flowing discourse leading to consensus in a milieu of $k’e$ among participants. The values that create an environment of $k’e$ are, of course, respect, kindness, friendliness, cooperation, use of kinship terms, and other values conducive to free-flowing discussion and consensual decision-making. The Navajo Nation Supreme Court summed up well the constituent values of Navajo participatory democracy in Downey v. Bigman:

Navajo participatory democracy guarantees participants their fundamental right to speak on an issue, and discussion continues until the participants reach consensus. In this sense, decisions are a product of agreement among the community rather than a select few. Status, wealth and age are not determinants of whether a person may participate in the decision-making process. Furthermore, no one is pressured to agree to a certain solution, and persuasion, not coercion, is the vehicle for prompting
decisions. Participatory democracy is evident throughout many sectors of Navajo society, including government operations, the chapter meeting, and peacemaking.368

The rules that facilitate Navajo participatory democracy are “talking things out,” persuasion, and consensus. A rule that merits further elaboration is “talking things out” (nibikiyati). The “talking things out” rule protects a person’s fundamental right to speak on an issue and encourages discussion until unanimity on solution results. While participants talk things out “it is easy to identify duties, responsibilities, and relationships, as well as examining approaches to resolve disputes. The procedural goals are to reach consensus and harmony, with plans to maintain [them].”369

The “talking things out” rule and its related values of persuasion and consensus may appear infelicitous to the adversarial process, particularly during the course of trial, but they can be employed during settlement negotiations, pre-trial conference, sentencing hearing, or post-judgment proceeding to encourage parties to settle cases, narrow issues, or stipulate to undisputed facts. The procedural and evidentiary rules that control litigation naturally limit “talking things out” because Western model court rules are designed to restrict, rather than promote, free-flowing dialogue. The Navajo Nation courts provide an alternative to rigid court proceedings by allowing parties to transfer disputes to the Navajo Peacemaking Division where problems and solutions can be “talked out” in free-flowing discussion in an environment of k’e.

368 7 Nav. Rptr. at 177.
369 Austin, ADR and the Navajo Peacemaker Court, supra note 7, at 10; In re Mental Health Services of Bizardi, No. SC-CV-55-02, slip op. at 3-4 (“talking things out” with respect under the doctrine of k’e restores parties to hozho).
a. *Ashjoni adoolnil* ("make things clear" rule)

The “talking things out” rule and the *ashjoni adoolnil* rule (glossed here as “make things clear”) work in concert during the Navajo dispute resolution process. The “make things clear” rule requires parties or participants to state their points clearly while “talking things out” to prevent perturbation and confusion. If disputants are to engage in respectful, meaningful, and relevant discussions and move toward a consensual solution, they can not guess at each other’s positions.

The Navajo Nation Supreme Court announced the “make things clear” rule in *Rough Rock Community School v. Navajo Nation*, where it was asked to void a statute that required school board candidates to prove “demonstrated interest, experience, and ability in educational management” as a precondition to running for public office. While the Supreme Court used the “make things clear” rule in *Rough Rock* to test statutory vagueness, it can be applied in other contexts to clarify abstruse facts, issues, arguments, or laws. The Supreme Court applied the “talking things out” and “make things clear” rules to hold the candidate qualification statute void because it “delegated unregulated discretion [to the Board of Election Supervisors] which could lead to manipulation and abuses of authority.”

In the process of ‘talking things out,’ or meeting the Navajo common law procedural requirement that ‘everything must be talked over,’ there is a requirement of *ashjoni adoolnil* (making something clear or obvious). Navajo decision-making is practical and pragmatic, and the result of ‘talking things out’ is a clear plan. The Navajo Nation Council

---

370 7 Nav. Rptr. 168.
371 *Id.* at 175.
did not make an important precondition to school board candidacy clear, obvious, certain or definite. In other words, it did not follow the Navajo traditional requirement of *ashjoni adoolnil*, and for that reason, the ‘Educational Management’ requirement is void for vagueness. The standard was not objective but instead delegated unregulated discretion which could lead to manipulation and abuses of authority. Navajo thought deplores abuses of authority because of the consensual and egalitarian principles of governance.372

b. Application of “talking things out” rule

The Navajo Nation Supreme Court has applied the “talking things out” rule in several different contexts which confirm its potential for diverse, but narrow, application in litigation before the Navajo Nation courts. In a criminal case, the “talking things out” rule was used to reject the defendant’s argument that the entire contents of the prosecutor’s opening statement should have been confined to admissible evidence.373 The Supreme Court, after rejecting the defendant’s position, explained that the “talking things out” rule “permits discussion of inferences [in the opening statement] which may arise from admissible evidence and a fair presentation of the parties’ theory of the case.”374 In another criminal case, the Supreme Court explained that in traditional Navajo society, criminal offenses were resolved “using the traditional Navajo civil process of ‘talking things out’” because traditional Navajos did not distinguish between criminal and civil cases.375 All cases, including those that the Navajo Nation Code now

372 *Id.* at 174-75.
374 *Id.* at 7.
375 *Navajo Nation v. Blake*, 7 Nav. Rptr. at 234-35.
classifies as criminal, were treated as civil in traditional Navajo society and *nalyeeh* (restitution), rather than punishment, was used to redress injuries and wrongs.

In an insurance case, the Navajo Nation Supreme Court ruled that the insurance company’s refusal to negotiate damages (*nalyeeh*) in good faith violated the “talking things out” rule.\(^{376}\) In a case raising free speech issues, the Supreme Court announced that the “talking things out” rule can limit speech when priority is given to a traditional rule that requires a disgruntled person to “speak directly with the person’s relative” about concerns before resorting to strangers (in this case an administrative tribunal) for redress.\(^{377}\) The Supreme Court ruled in an employment case that the Navajo Nation Labor Commission, an administrative hearing body, violated the “talking things out” rule when it dismissed the employee’s complaint for her failure to attend and exhaust her remedies in an employer provided hearing; the dismissal denied the employee her statutory right to a hearing before the Commission.\(^{378}\) Finally, the Navajo Nation Supreme Court held that it did not violate the “talking things out” rule when the two remaining justices decided a case after the third justice had been removed from office.\(^{379}\) The Court said two statutory provisions authorize it to decide a case with two justices

---


and, furthermore, the efficient flow of cases would suffer if the Court were to rehear the case with a new third justice.380

4. Principle of Házhó’ógo (Freedom with Responsibility)

Navajo kinship solidarity (k’e) is community by another name. The universal relations doctrine informs the traditional Navajo idea of community or, more specifically, the idea of a clan group as a community comprised of relatives that a Navajo calls shik’ei (my relatives). Also, the web of universal relations is community on a higher level of abstraction and the multifarious elements that comprise the web are relatives in the Navajo way of thinking. Identity, privileges, rights, duties, obligations, and reciprocity are defined and carried out within the context of community; thus, Navajos are conditioned to approach problems with a community orientation.

Approaching issues with a communal orientation hardly means that individual rights and freedoms are trampled in the interests of community solidarity. Navajo culture accords individual rights and freedoms great respect, but rights and freedoms must be exercised responsibly within the context of community.381 The Navajo perception of individual rights differs dramatically from the Anglo-American view which deems rights individualistic and community does not factor into the analysis. The maxim, “it’s up to him,” states the Navajo view of individual rights and freedoms. Navajos have freedom to do what they want, but they must act like they have relatives.

---

380 Id., slip op. at 2-4; Allstate Indemnity Co. v. Blackgoat, No. SC-CV-15-01, slip op. at 6 (the Supreme Court decided this case with two justices after the third justice was unable to continue due to serious illness).

381 For a discussion of individual rights within the context of community (as opposed to individual rights in American law), see Zion, Monster Slayer and Born for Water, supra note 326, at 363-69.
One fundamental value of Navajo society is complete equality among people. Navajos have what some call ‘permissive’ child-rearing techniques, but Navajo children are treated as equals who have their own identities. This reflects the value that equals are free to do what they please, without others telling them what they can or cannot do. When asked if another Navajo will do something or if that person’s property may be used, a tribe member will reply ‘it’s up to him.’

The exercise of rights and freedoms within the context of community is denominated here as the házhó’ógo principle. Házhó’ógo is a polysemous term and, like the terms hozho and k’e, the meaning frequently depends on the context within which it is used. The following is one context that the Navajo Nation Supreme Court used to introduce the principle.

Házhó’ógo is not man-made law, but rather a fundamental tenet informing us [of] how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it’s not uncommon for an elderly person to stand and say ‘házhó’ógo, házhó’ógo sha’ alchini’ (“my children, show each other respect”). The intent is to remind those involved that they are Nohookaa Diné’e (“Earth-surface people (human beings)”), dealing with another Nohookaa Diné’e, and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. Aadoo na’nilé dii ei dooda (“delicate matters and things of importance must not be approached recklessly, carelessly or with indifference to consequences”). This is házhó’ógo, and we see that this is an underlying principle in everyday dealings with relatives and other

---

382 Austin, *ADR and the Navajo Peacemaker Court*, supra note 7, at 8.
individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our adopted ways are all intended to be conducted with házhóʼógo in mind. (footnotes omitted).383

The házhóʼógo principle is used here to describe the exercise of rights and freedoms responsibly within the context of community, relationships, and an environment of k’e, which can all be called freedom with responsibility.

The high respect for individual freedom is balanced by concepts of responsibility and duty. Navajos have an ingrained respect for ke’e, or kinship. Ke’e encompasses extensive responsibilities to others and respect for them. The others include spouses, children, immediate blood relations, clan relations, Navajos in general, and people at large. Even Father Heaven, Mother Earth, and the plants and animals are included.384

Rights and freedoms are enumerated in the Navajo Nation Bill of Rights and its federal counterpart, the Indian Civil Rights Act.385 Between the two laws, the Navajo Nation courts “give primacy to the Navajo Nation Bill of Rights, interpreted from a Navajo perspective.”386

Although the Navajo Nation courts have leeway to apply federal court interpretations of the United States Bill of Rights, the Navajo Nation Supreme Court recently declared that federal court interpretations must not detract from the Diné Fundamental Laws: “In interpreting the Navajo Bill of Rights and the Indian Civil Rights

---

384 Austin, ADR and the Navajo Peacemaker Court, supra note 7, at 10. K’ee and k’e are different spellings of the same word.
385 1 N.N.C. §§ 1-9 (NNBR) and 25 U.S.C. § 1302 (ICRA).
386 In re Estate of Plummer Sr., 6 Nav. Rptr. 271, 274 (1990).
Act, as with other statutes that contain ambiguous language, we first and foremost make sure that such [federal court] interpretation is consistent with the Fundamental Laws of the Diné.”

The Court’s Fundamental Laws test, which determines adoption of federal case law on individual rights, ensures that Navajo Nation courts give primacy to interpretation of rights within the context of Navajo culture, language, spirituality, identity, and the Navajo perspective of things.

a. Navajo due process

The Navajo Nation Supreme Court established rules on interpreting the due process provisions of the Navajo Nation Bill of Rights and the Indian Civil Rights Act in *Billie v. Abbott*, a case involving a Utah official who had intercepted the federal tax returns of Navajo fathers living on the Navajo Nation to recoup funds the state expended to support their children.

Due process under the ICRA and the NBR must be interpreted in a way that will enhance Navajo culture and tradition. Navajo domestic relations, such as divorce or child support, is an area where Navajo traditions are the strongest. To enhance the Navajo culture, the Navajo courts must synthesize the principles of Navajo government and custom law. From this synthesis Navajo due process is formed.

When Navajo sovereignty and cultural autonomy are at stake, the Navajo courts must have broad-based discretion in interpreting the due process clauses of the ICRA and the NBR, and the courts may apply

---

Navajo due process in a way that protects civil liberties while preserving Navajo culture and self-government.389

The rules established in Billie v. Abbott can be used to interpret other provisions of the Navajo Nation Bill of Rights to guarantee consistent considerations of Navajo culture, spirituality, language, identity, and sovereignty while protecting individual liberties.

The Navajo Nation court decisions that interpret the Navajo Nation Bill of Rights, particularly those involving the right to due process, demonstrate that inherent in the házhó’ógo principle are notions of freedom, duty, responsibility, community, relationships, respect, and k’e. In Atcitty v. District Court for the Judicial District of Window Rock, the Supreme Court reiterated that due process must be “interpreted in light of the customs and traditions, or common law, of the Navajo people, and in a manner that will enhance Navajo culture, tradition and sovereignty,”390 before explaining Navajo due process in light of the k’e principle (and by implication the házhó’ógo principle).

The Navajo principle of k’e is important to understanding Navajo due process. K’e frames the Navajo perception of moral right, and therefore this Court’s interpretation of due process rights. K’e contemplates one’s unique, reciprocal relationships to the community and the universe. [fn 2]. It promotes respect, solidarity, compassion and cooperation so that people may live in hozho, or harmony. K’e stresses the duties and obligations of individuals relative to their community. The importance of k’e to maintaining social order cannot be overstated. In light of k’e, due process can be understood as a means to ensure that individuals who are living in a

389 6 Nav. Rptr. at 74.
390 7 Nav. Rptr. at 229.
state of disorder or disharmony are brought back into the community so that order for the entire community can be reestablished.\textsuperscript{391}

The Court has consistently declared that the foundation for Navajo due process lies in traditional Navajo principles, practices, and values that define fairness, and not in Anglo-American concepts of fairness and fundamental rights.

The concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act or the Navajo Nation Bill of Rights. The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present and defend their positions. This custom is still followed today by the Navajo people in the resolution of disputes.

When conflicts arise, involved parties will go to an elder statesman, a medicineman, or a well-respected member of the community for advice on the problem and to ask that person to speak with the one they see as the cause of the conflict. The advisor will warn the accused of the action being contemplated and give notice of the upcoming group gathering. At the gathering, all parties directly or indirectly involved will be allowed to speak, after which a collective decision will be made. This is Navajo customary due process and it is carried out with fairness and respect. The heart of Navajo due process, thus, is notice and an opportunity to present and defend a position.\textsuperscript{392}

\textsuperscript{391} Id. at 230 (The Court stated at footnote 2: “This is a part of the broader Navajo traditional principle of freedom with responsibility. An individual has much freedom in Navajo society, but that freedom must be exercised with respect for self, family, clan relatives, and the community at large.”); See also Rough Rock Community School v. Navajo Nation, 7 Nav. Rptr. at 317-18 (\textit{k’e} informs Navajo due process in the context of Navajo participatory democracy).

\textsuperscript{392} Begay v. Navajo Nation, 6 Nav. Rptr. 20, 24-25 (1988).
In *Atcitty*, Navajo due process defined within the context of community allowed the applicants for governmental benefits more rights than they would have received under federal court applications of due process. The Court acknowledged that the Navajo Nation courts have applied American notions of due process which are “concerned with equality in process and not of outcome. That is, everyone is ‘equal’ before the law, and so long as everyone has an opportunity to be heard, the outcome is irrelevant.”

However, when due process is informed by traditional Navajo values underlying community, such as distributive justice, outcome becomes a relevant factor.

The Petitioners urge this Court to follow federal law, particularly *Roth*, 408 U.S. 564, and hold that the Respondents, as mere applicants for governmental benefits, do not have a protectable property interest. However, we do not believe that the inquiry stops there. Traditional Navajo due process encompasses a wider zone of interest than general American due process. In cases concerning entitlement to governmental benefits, Navajo due process protections would extend to outcome, making it very relevant. The Navajo doctrine of distributive justice underlies this reasoning.

When Navajo Nation courts interpret individual rights and freedoms within the context of community and values inherent in the Navajo culture, the standard they apply to government infringement on fundamental rights may differ from the standard used by American courts under similar circumstances, although this subject needs further study.

---

393 *Atcitty* v. District Court for the Judicial District of Window Rock, 7 Nav. Rptr. at 231.
394 *Id.*
and development. In *Rough Rock Community School v. Navajo Nation*, the Supreme Court ruled that, because the Navajo Nation allows grass-roots participation on local school boards and on setting education policy for Navajo children, any statute that “unreasonably restricts that grass-roots participation” will be struck for violation of due process. This standard, the Court said, is a “mere reasonableness standard. The American standard is a more stringent standard. It requires a showing that not only is the statutory restriction reasonable, but also that it forwards some governmental interest.”

The Court’s use of the words reasonableness and unreasonableness create confusion. While the Court says the Navajo standard is a “mere reasonableness standard,” the actual test focuses on whether the alleged government infringement is “unreasonable”; not whether it is ‘reasonable.” In *Bennett v. Navajo Board of Election Supervisors*, the Court said “no person who is not otherwise disqualified by a reasonable law can be prohibited from holding public office,” and then struck the statute for vagueness because it did not contain “ascertainable standards.” The statutes in both *Rough Rock* and *Bennett* were voided because they imposed “unreasonable” restrictions in light of Navajo customs and traditions.

The *házhó’ógo* principle, when applied in the context of government conduct, requires the Navajo Nation and its officials, agencies, and departments to stay within the bounds of law so that individuals are not deprived of rights guaranteed by the Navajo

---

395 7 Nav. Rptr. 168, 173.
396 Id. at 173.
397 6 Nav. Rptr. at 325-27. The Court also said that the Navajo Nation Council can limit a fundamental right “only for good and weighty reasons for the protection of the public interest.” Id. at 328.
Nation Bill of Rights. In *Mustach v. Navajo Board of Election Supervisors,* the Navajo Nation Supreme Court faulted the election board, an executive branch agency, for departing from statutory procedures on providing a hearing, which the Court said denied the candidate for public office due process of law. In another case on the due process right to a hearing, the Supreme Court held that under the facts of the case (where the temporary restraining order had essentially decided the merits of the case) and pursuant to *k’e* rules (“e.g., “talking things out,” respect, notice, etc.), the trial court should have held a hearing on the motion to dissolve the temporary restraining order, which would have given the non-moving party an opportunity to protect its contractual interests. In a case excluding a non-Indian juvenile from the Navajo Nation for delinquency, the Navajo Nation Supreme Court ruled that children, like adults, have a right to Navajo due process that is informed by *k’e*, so that the trial court must hold an exclusion hearing to comply with Navajo due process requirements.

The Navajo Nation Supreme Court used the *k’e* principle to protect the due process right of access to the courts in *Fort Defiance Housing Corp. v. Lowe,* a case involving a housing management company’s attempt to evict tenants for delinquent rent.

---

398 5 Nav. Rptr. 115, 118-19 (1987); See also Staff Relief v. Polacca, No. SC-CV-86-98 (Nav. Nat. Sup. Ct., Aug. 18, 2000)(the Navajo Nation Labor Commission must follow its own rules on providing hearings to be in compliance with due process of law); Taylor v. Dilcon Community School, No. SC-CV-73-04 (the *k’e* principle requires that the Navajo Nation Labor Commission provide the terminated employee with a hearing although she did not attend an employer provided hearing).

399 Navajo Housing Authority v. Bluffview Resident Management Corp., No. SC-CV-35-00.


401 No. SC-CV-32-03.
The tenants tried but could not post an appeal bond within five days of the trial court’s judgment, a condition imposed by a forcible entry and detainer statute, before they could prosecute their appeal. After underscoring the domestic, cultural, and spiritual significance of the home to Navajos, the Court ruled that the due process right of access to the courts should not be denied to persons on the brink of foreclosure on technical grounds (i.e., posting of bond within five days of the trial court’s judgment).

The primary Navajo value that informs our due process analysis is k’e. In the context of Navajo due process, k’e ensures that individuals living in disharmony are brought back into right relationships and into the community to reestablish order.[402]

Under Navajo due process this Court cannot take the separation of a Navajo person from his or her home lightly, nor can we simply adopt a strict non-Navajo statutory interpretation of the law. Navajo due process includes the concept of fundamental fairness. It is fundamentally unfair to impose harsh and difficult timelines and to penalize a person by taking away their home without some strict requirements to assure due process. After all, Navajo due process requires that Navajo courts be just and do justice. We take judicial notice of the fact that distances within the Navajo Nation are great, and transportation sometimes difficult. We do not do justice by expecting tenants to understand the unique eviction appellate requirement, to come into the court to see the judge, get the judge to set bond conditions, and then to comply with such conditions, all within five days of the order. (citations omitted).[402]

[402] Id., slip op. at 6-7; See also Navajo Townsite Community Development Corp. v. Sorrell, No. SC-CV-19-00 (Nav. Nat. Sup. Ct., Jan. 28, 2002).
As the Court noted, the rural nature of the Navajo Nation and the dearth of basic infrastructure in Navajo Country can interfere with the government’s obligation to provide individuals with due process.

The Navajo Nation Supreme Court uses the k’e values of “talking things out” and consensus within the context of community to guarantee that litigants will have an opportunity to be heard at a meaningful time and in a meaningful way.

The rights protected in the Navajo Due Process Clause are fundamental, but they are not absolute, limitless, or unrestricted. They are considered in light of the enjoyment and protection of rights by all Navajos. We require that everyone coming before our courts have an opportunity to be heard at a meaningful time and in a meaningful way. That is the right to one’s day in court. Navajo common law fully recognized this right, and it was exercised in family, neighborhood, and council gatherings where everyone had the opportunity to speak, and decisions were reached through consensus.403

A party who has received adequate notice of hearing and its subject matter and allowed ample time to obtain counsel and prepare for hearing cannot claim denial of opportunity to be heard at a “meaningful time.”404 Also, a party who has been “allowed an opportunity to raise any claim [and] an opportunity and procedure for doing so” cannot claim denial of opportunity to be heard in a “meaningful way.”405

In a case involving comity recognition of Colorado’s workers’ compensation scheme, the Navajo Nation Supreme Court declared that “while the Navajo Nation

403 In re Estate of Plummer Sr., 6 Nav. Rptr. at 275.
404 Id.
405 Id.
Council has the authority to change the law (in situations not involving vested civil rights), it cannot retroactively deprive a litigant of the property right to sue for injuries,” which would be a violation of due process. The Court subsequently reinforced its ruling in a case involving a question certified by the Arizona Federal District Court. The federal district court asked whether a Navajo Nation Council resolution that recognized “workers’ compensation to be the exclusive remedy for covered injuries to employees occurring in the workplace, applies retroactively to cases pending prior to its enactment.” The Court held that the resolution did not have the force of law because the Council disobeyed laws and procedures for enacting valid legislation (i.e., the Council must follow the limitations it places on itself) when it passed the resolution.

It is our duty to enforce what the Council has enacted, but there are certain presumptions that apply. The first is that the Navajo Nation Council would not intend to violate the Navajo Nation Bill of Rights by enacting an ex post facto law, adopting a bill of attainder or denying an individual due process or equal protection of the law. There is an additional presumption that the Navajo Nation Council would not intend to retroactively overrule a court decision or prospectively dictate the

---


conclusion of any case pending before the Navajo Nation courts. (footnotes omitted).\textsuperscript{408}

The Supreme Court again addressed the retrospective/prospective application of its opinions in \textit{Fort Defiance Housing Corp. v. Allen}.\textsuperscript{409} The Court declared that its opinions apply to all cases pending in the Navajo Nation courts and administrative agencies at the time they are filed, with the exception that an opinion can be made prospective, only if it does not violate Navajo due process as informed by \textit{k’e}.\textsuperscript{410}

\textbf{b. Leadership standards}

In 1989, in response to the near collapse of the Navajo Nation Government during “the turmoil,” the Council passed comprehensive amendments to Title Two of the Navajo Nation Code and thereby established the legislative and executive branches of Navajo government, including their powers. A law in Title Two authorizes Navajo voters to approve pay raises for council delegates through local chapter referendums.\textsuperscript{411} The Council, working with its chief attorney, passed a resolution which first impaired the law.

\textsuperscript{408} \textit{Id.}, slip op. at 4-5; See also Ramah Navajo Community School v. Navajo Nation, No. SC-CV-17-99 (Nav. Nat. Sup. Ct., July 25, 2001)(the Navajo Nation may not conduct school board elections using an apportionment plan that the Court has ruled invalid by passing a subsequent resolution that declares the plan valid; the council resolution violated the due process rights of the plaintiff schools and the candidates for office).

\textsuperscript{409} No. SC-CV-01-03 (corrected opinion June 7, 2004).

\textsuperscript{410} \textit{Id.}, n.4; Allstate Indemnity v. Blackgoat, No. SC-CV-15-01, slip op. at 6-7 (a Navajo Nation Supreme Court opinion applies to all cases pending in the Navajo Nation courts or administrative agencies at the time it is filed; the Court can make an opinion apply prospectively when consistent with due process as informed by \textit{k’e}).

\textsuperscript{411} “A salary increase may be approved by the Navajo Nation Council but shall not become effective unless ratified by two-thirds (2/3) of all Navajo Nation Chapters within 30 days of approval by the Navajo Nation Council.” 2 N.N.C. § 106(A).
that required voter approval and then gave each delegate a $10,000 pay raise.\textsuperscript{412}

Concerned voters immediately challenged the resolution as illegal in \textit{Judy v. White}.\textsuperscript{413}

The Navajo Nation Supreme Court invalidated the resolution and admonished the Council for slipping below traditional Navajo standards of leadership.

Our Navajo way dictates that we [comment on] the misapplication of Resolved Clause 7. To do this, we must give thought to the propriety of the Council’s actions in attempting to bypass Section 106(A) through Resolved Clause 7. [The trial court called the Council’s action unjust enrichment]. While we do not pronounce such condemnation, we must nonetheless remind public officials [of] the duties and responsibilities incumbent on them as the People’s leaders.

\textit{As Diné bi naat’aanii} ... we carry the burden of leadership and safeguarding the interests of our people. The Council understood its obligations under [Section] 106(A) and attempted to comply by giving way to the chapter ratification process. When that failed, it attempted a bypass. Had the Council properly approached the chapters, they would not have failed, perhaps. But, at the very least, the members of the Council would have taken their concern for delegate welfare to the very people who voted them into office. That is the Navajo way. We refer to it in Navajo as ‘\textit{Baa ni jokaah}’ or ‘you beg leave’ of your people. That has been the Navajo way for centuries. ... The ritual goes like this: you approach and ask. The act of approach suggests humility and equality. In the course of asking you speak of your status, your need for recompense, 

\textsuperscript{412} There are eighty-eight members of the Council. The Council stated in its resolution, whereas clause 7, that “Sections 101(b), 102(a), 1008 and 106(A) of the Title Two (2) amendments shall not apply to amendments duly proposed by the Navajo Nation Commission on Navajo Government Development.” \textit{Navajo Nation Council Resolution No. CJY-52-00} (July 20, 2000). The Council circumvented the four sections that posed obstacles by bestowing authority on the Commission to propose pay raises for delegates.\textsuperscript{413} \textit{No. SC-CV-35-02}. 

\textsuperscript{413} No. SC-CV-35-02.
and you beg leave. While your request may not be honored, the act of approach and request strengthens ties and relations. The cornerstone of this custom is k’e.\textsuperscript{414}

c. Free speech

In \textit{Judy}, the Supreme Court introduced the traditional Navajo concept of “community free speech” (different from individual free speech), a right inherent in the Diné Life Way (\textit{Diné bi’ó’ool’iil}) and the stem of the “community voice” concept.

It is without question that in recognizing and giving formality to the Navajo People’s fundamental principles and tenets of the \textit{Diné bi’ó’ool’iil}, or the Diné Life Way, the Council conceded that despite its statutory pronouncements, there exists a deeper, more profound system of governance. It is abhorrent to the Diné Life Way to violate the right of a community member to speak or to express his or her view or to challenge an injury, whether tangible or intangible. This right is protected to such an extent that the right to speak to an issue ... belongs to the community as a whole, and any member of that community may speak.\textsuperscript{415}

The principle of community free speech justified legal standing for the Navajo citizens challenging a resolution passed by the Navajo Nation Council. The extent to which the Navajo Nation courts should recognize fundamental “community” rights is indefinite at this juncture, but \textit{Judy} shows that the Court acknowledges such rights exist in Navajo common law. Whether the Navajo Nation courts should recognize “community” due process and similar fundamental rights are issues ripe for discussion.

\textsuperscript{414} \textit{Id.}, slip op. at 26-27.
\textsuperscript{415} \textit{Id.}, slip op. at 8-9.
The Navajo Nation Supreme Court addressed the individual right to free speech in *Navajo Nation v. Crockett*, a case that pitted three fired employees against their former employer, a Navajo Nation owned business enterprise. The enterprise fired the employees after they copied confidential business records without authorization and disclosed them at a meeting of Navajo officials where they also charged enterprise officials with mismanagement and misconduct. The terminated employees sued alleging, among other theories, that their rights to free speech were violated. The Court held that under the facts of the case, where the employees voiced concerns about job safety, undue Bureau of Indian Affairs interference in contracts, and misconduct and malfeasance by company officials, the employees’ rights to free speech were indeed violated. In its discussion, the Court declared that free speech rights are embedded in Navajo customs and traditions, particularly the *k’e* principle.

[A]n individual has a fundamental right to express his or her mind by way of the spoken word and/or actions. As a matter of Navajo tradition and custom, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle.

....

Furthermore, speech should be delivered with respect and honesty. This requirement arises from the concept of *ke*, which is the ‘glue’ that creates and binds relationships between people. To avoid disruptions of relationships, Navajo common law mandates that controversies and

---

416 7 Nav. Rptr. 237.
417 *Id.*
418 *Id.* at 237-38.
419 *Id.* at 242.
arguments be resolved by ‘talking things out.’ This process of ‘talking things out,’ called hoozhoojigo, allows each member of the group to cooperate and talk about how to resolve a problem.\(^{420}\)

The házhó’ógo principle (freedom with responsibility) substantiates the Court’s assertion in the preceding quotation that, as a matter of Navajo common law, “people speak with caution and respect, choosing their words carefully to avoid harm to others.” In the Navajo world, knowledge is power and that means knowledge expressed through thought through language through words can be used, among other goals, to coerce, control, destroy, manipulate, or persuade. The avenue through which the ends are achieved follows this pattern: knowledge precedes thought; thought precedes language; and language precedes words; thus, words as the ultimate manifestation of knowledge is sacred and powerful.\(^{421}\)

The Navajo Nation Supreme Court applied the principle of “words are sacred and powerful” in Kesoli v. Anderson Security Agency,\(^{422}\) an employment termination case involving a supervisor for a private security company who was fired for unprofessional conduct — shouting at his subordinates. The Court held that the supervisor’s unprofessional conduct constituted “harassment” and thus satisfied the “just cause”

\(^{420}\) Id. at 240-41.

\(^{421}\) For a discussion of inner and outer forms in Navajo philosophy, see Witherspoon, Language and Art, supra note 6, at 30-35. The belief that words are sacred applies especially in the ceremonial context.

\(^{422}\) No. SC-CV-01-05.
standard of the Navajo Preference in Employment Act for terminations.\textsuperscript{423} The supervisor’s shouting equated to harassment under Navajo common law because “[w]ords are sacred and never frivolous in Navajo thinking, and are not to be used to offend or intimidate,” particularly where the person is a supervisor, or a naat’aanii (leader). (citation omitted).\textsuperscript{424} The Court said a naat’aanii has a “responsibility to conduct himself thoughtfully and carefully with respect for his employees under the principle of házhó’ógo, including utilizing k’e” to deal with subordinates. (citation omitted).\textsuperscript{425} The Kesoli case applied the házhó’ógo principle in a non-governmental context by casting the company official as a naat’aanii and then applying the “words are sacred and powerful” principle to the supervisor’s conduct. Like the police officer in Navajo Nation v. Rodriguez,\textsuperscript{426} the supervisor was held to k’e standards when dealing with subordinates.

The Court in Navajo Nation v. Crockett acknowledged that Navajos recognize some traditional limitations on the content of speech when it said certain statements.

\textsuperscript{423} Id., slip op. at 1; NPEA, 15 N.N.C. § 604(B)(8) (2005)(“All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause”).

\textsuperscript{424} Kesoli v. Anderson Security Agency, No. SC-CV-01-05, slip op. at 6; Goldtooth v. Naa Tsis’ Aan Community School, Inc., No. SC-CV-14-04 (identifying the school’s executive director as naat’aanii); Smith v. Navajo Nation Department of Head Start, No. SC-CV-50-04, slip op. at 4 (Nav. Nat. Sup. Ct., Sept. 21, 2005)(words in a contract (personnel manual) are sacred and never frivolous and promises made must be fulfilled); Office of Navajo Labor Relations v. Central Consolidated School District No. 22, No. SC-CV-37-00, slip op. at 5 (Nav. Nat. Sup. Ct., June 23, 2004)(the words in a contract between the Navajo Nation and a New Mexico state school district are “powerful, sacred and never frivolous. ... [A] contracting party cannot give their word in one section and take it back in the next”).


\textsuperscript{426} No. SC-CR-03-04.
“reciting oral traditions are prohibited during specific times of the year.”\textsuperscript{427} The most well-known prohibition on speech confines the narratives about the Navajo Hero Twins’ journey to visit the Father and their subsequent battlefield exploits to the winter season (from the first frost to about the spring equinox). A prohibition on discussing the property of a deceased during the four-day mourning period is also a limitation on the content of speech. In the past, a deceased person could only be spoken of in the past-tense. Offensive and sacrilegious words are prohibited within the immediate vicinity or inside the ceremonial hogan during a ceremony.\textsuperscript{428} A traditional control on speech requires “a disgruntled person [to] speak directly with the person’s [the person causing the discomfort] relative about his or her concerns before seeking other avenues of redress with strangers.”\textsuperscript{429} The area of traditional limitations on speech is still in its nascent stage. The Navajo Nation Supreme Court has not had much opportunity to address this subject in its opinions.

d. Rights of criminal defendants

The Navajo Nation Supreme Court has been quite active utilizing the házhó’ógo principle to protect the rights of defendants in criminal cases in the new millennium. Criminal laws, police officers, jails, charging crimes in the name of the state, probation, and other constituent elements of the modern Navajo criminal justice system are federally imposed and therefore foreign to traditional Navajo society. The Court briefly compared the modern Navajo criminal justice system with traditional Navajo ways of social control

\textsuperscript{427} 7 Nav. Rptr. at 240-41.
\textsuperscript{428} These four (Hero Twins, deceased’s property and identity, and ceremony) traditional limitations on speech come from my personal knowledge of Navajo culture.
\textsuperscript{429}  Navajo Nation v. Crockett, 7 Nav. Rptr. at 241.
and dealing with offenses in Navajo Nation v. Blake, where the defendant challenged the trial court’s *sua sponte* order that he pay $76,000 in restitution even though evidence was not admitted to substantiate the alleged damages.\(^{430}\)

Our modern criminal law, as it is found in the Navajo Nation Criminal Code, is foreign to traditional Navajo society. Navajos, traditionally, did not charge offenders with crimes in the name of the state or on behalf of the people. What are charged as offenses today were treated as personal injury or property damage matters, and of practical concern only to the parties, their relatives, and, if necessary, the clan matriarchs and patriarchs. These ‘offenses’ were resolved using the traditional Navajo civil process of ‘talking things out.’ *Nalyeeh* (restitution) was often the preferred method to foster healing and conciliation among the participants and their relatives. The ultimate goal being to restore the parties and their families to *hozho* (harmony).\(^{431}\)

Restitution (*nalyeeh*) was the preferred method of redressing offenses, including homicide, in traditional Navajo society. For example, although murder was infrequent among traditional Navajos, when it occurred, the victim’s family and clan relatives pursued restitution in the form of payment of tangible goods.\(^{432}\) The families and clan relatives of victim and offender, with leaders or elders present, agreed upon the amount of payment during peacemaking through “talking things out.” According to Van Valkenburgh’s Navajo informants, “Should the demanded penalty not be paid, the immediate family of the murderer would be held responsible; should they continue to

\(^{430}\) 7 Nav. Rptr. 233, 234.

\(^{431}\) *Id.* at 234-35.

refuse to pay, the death penalty would be exacted if possible; or should the murderer die, his children would be held responsible.”433 This example illustrates that in traditional Navajo society, a “crime” was committed against the victim, the victim’s family, and the victim’s clan relatives. On the opposite side, the offender’s misconduct not only implicated the offender, but also the offender’s family and clan relatives, making them equally liable for the offender’s misconduct. The concepts of kinship solidarity and community stand-out in the example. Moreover, the institution that exercised legal authority in the traditional Navajo world was the clan.

The Western form of criminal justice system that was imposed on the Navajo people removed the clan, families, and relatives from participation in the settlement process and replaced them with invisible entities, the state and its institutions. Furthermore, the offender assumed individual liability for his misconduct and the victim, as the injured party, became irrelevant in the criminal process. The traditional roles that clan, family, and relatives played as enforcers of norms that dictated proper behavior were severely weakened under the imposed criminal justice system. The Navajo Nation courts now struggle with a high criminal caseload.434 Most of the criminal defendants are indigent, which means the judiciary has to be meticulous with their rights.

Although the Navajo Nation courts do not keep statistics on pleas, it is common knowledge that during arraignment in the Navajo Nation courts, guilty pleas come at a high rate. Many of these guilty pleas are motivated by cultural norms that require honesty

433 Id. at 53.
and accountability for misconduct. On the whole, the Navajo Nation courts do an exemplary job keeping defendants apprised of their rights in the English and Navajo languages before entering pleas.

Throughout the United States, from 90 to 95% of all criminal convictions are by pleas of guilty. *Brady v. United States*, 397 U.S. 742, 751 n.10 (1970). The same is true within the Navajo Nation, and there are also cultural reasons which motivate pleas of guilty. Given these facts, it is highly important that the district courts take great care when receiving pleas of guilty to make certain that criminal defendants know their rights, and what they may do, to be certain the plea is knowing and intelligent. Equally important is making certain pleas are voluntary and made without any threat or undue pressure. Finally, the district courts must be satisfied that there is a factual basis for a plea of guilty.435

In *Navajo Nation v. Morgan*,436 the defendant pled guilty to the charge of aggravated battery and was sentenced to a jail term. A month later, the defendant filed a motion to withdraw his guilty plea which the trial court denied.437 The defendant appealed raising the issue of whether his guilty plea was knowingly and intelligently made.438 In its analysis, the Navajo Nation Supreme Court emphasized that pursuant to the *házhó’ógo* principle all “[w]aivers of rights by criminal defendants must by knowingly and intelligently made to be valid. ... Under this analysis, courts and other governmental officials must proceed carefully and patiently, clearly explaining a

---

437 *Id.*, slip op. at 2.
438 *Id.*
defendant’s rights before a waiver is considered valid.\footnote{Id., slip op. at 3; Stanley v. Navajo Nation, 6 Nav. Rptr. at 284-85 (the tape recording of the arraignment proves defendant was informed of her rights as well as the contents of the complaint in Navajo and English; therefore, her guilty plea to the crime of accomplice to delivery of liquor was knowingly and voluntarily made).} The Supreme Court held that the trial judge did not 1) explain to the defendant the different pleas available, 2) advise the defendant of the possible sentencing options, and 3) explain to the defendant the elements of the criminal charge and the factual basis for it; therefore, the defendant’s guilty plea was not knowingly and intelligently made.\footnote{Navajo Nation v. Morgan, No. SC-CR-02-05, slip op. at 3-4; Thompson v. Greyeyes, No. SC-CV-29-04, slip op. at 8 (the defendant must have notice of the available sentencing options. The trial court erred when it imposed a jail term using a statute that allows only payment of restitution for a plea of guilty).} Because the Navajo language is still widely spoken on the Navajo Nation, trial courts must explain rights, charges and the factual basis for charges in the Navajo and English languages. Translation of English legal terms into the Navajo language poses a tremendous challenge.

The difference between a guilty plea and a no contest plea became an issue in \textit{Curley v. Navajo Nation},\footnote{No. SC-CV-55-01, slip op. at 1, 2 (Nav. Nat. Sup. Ct., Dec. 9, 2002)(the Court also said a prisoner’s note from jail to the trial court must be treated as a petition for writ of habeas corpus under Navajo law).} where the defendant pleaded no contest to a criminal charge, but later sent a note from jail to the judge claiming that he “did not know what no contest meant” and he “was nervous and couldn’t think straight” when he entered the plea. The Supreme Court examined the defendant’s note to find “meritorious second thoughts” and “sufficient doubt about whether [defendant’s] plea was genuinely knowing or intelligent.”\footnote{Id., slip op. at 3, 4.} In \textit{Curley}, the trial court violated the \textit{házhó́ʼógo} principle because it did not explain to the defendant the difference between a guilty plea and a no contest plea,
and the defendant was not advised that a plea of no contest and a plea of guilty carried the same sentence.\textsuperscript{443} The Court reinforced its holding by stating that “ordinary people are not likely to know the difference between a plea of ‘guilty’ and a plea of ‘no contest’” and defendants “have a right to know what their pleas mean, [so] Judges should go through the complaint with the defendant and discuss the elements of the crime and the facts that support it.”\textsuperscript{444}

In \textit{Eriacho v. Ramah District Court},\textsuperscript{445} the defendant went to the prosecutor’s office and signed a form waiving arraignment which she filed with the trial court. Several months later she requested a jury trial, but the trial court denied it because she had waived it through inaction. The inaction being that she had not requested a jury trial within fifteen days of the date she filed the waiver of arraignment form with the trial court.\textsuperscript{446} The arraignment waiver form she had signed also advised her that she had to demand a jury trial within that time period and she did not pursue her right.\textsuperscript{447}

\textbf{e. Jury trial}

The Navajo concept of community is the foundation for the modern right to a jury trial and because community and kinship solidarity are integral to Navajo culture, as the \textit{Eriacho} decision teaches, any limitation on the right to jury trial undergoes heightened

\textsuperscript{443} \textit{Id.}, slip op. at 4.
\textsuperscript{444} \textit{Id.}
\textsuperscript{446} \textit{Id.}, slip op. at 2. The Navajo Nation Bill of Rights, 1 N.N.C. § 7, states as follows: “No person accused of an offense punishable by imprisonment ... shall be denied the right, upon request, to a trial by jury of not less than six persons.”
\textsuperscript{447} \textit{Eriacho v. Ramah District Court}, No. SC-CV-61-04, slip op. at 2 (the Navajo Rules of Criminal Procedure, Rule 13(a), requires a defendant to “demand a jury trial at the time of arraignment or within 15 days thereafter or it will be waived”).
scrutiny. The *Eriacho* Court described the jury as “a modern manifestation of the Navajo principle of participatory democracy in which the community talks out disputes and makes a collective decision. ... As a deeply-seeded part of Navajo collective identity, we construe restrictions on the right to a jury trial narrowly.” The *Eriacho, Duncan*, and *Downey* decisions suggest that the traditional concept of community, as expressed through collective participation and decision-making, significantly influences the Court’s thinking on right to jury trial, both criminal and civil, and possibly other rights listed in the Navajo Nation Bill of Rights.

The *Eriacho* Court announced that the házhó’ógo principle requires meaningful notice and an explanation of rights so a defendant has enough understanding to make a knowing and intelligent decision to waive a right or not. The prosecutor’s failure to orally explain the consequences of the defendant’s waiver violated the házhó’ógo principle, leaving the Court no alternative but to order the trial court to grant the defendant a jury trial.

As házhó’ógo requires meaningful notice and explanation of a right before a waiver of that right is effective, it requires, at a bare minimum, that the Nation give notice that the right to a jury trial may be waived by inaction. For notice to be meaningful, and therefore a waiver to

---

448 *Id.*, slip op. at 3.
449 No. SC-CV-51-04, slip op. at 11 (participatory democracy, expressed through community decision-making, is reflected in the modern Navajo jury trial).
450 7 Nav. Rptr. 176, 178 (the Court said participatory democracy, as expressed through community participation, allows jurors to question witnesses during trial).
451 No. SC-CV-61-04, slip op. at 6.
452 *Id.*, slip op. at 7; Navajos and non-Navajos serve on Navajo court juries. Any person over 18 years of age and residing within Navajo territorial jurisdiction can be called for jury duty. 7 N.N.C. § 654 (2005).
be effective, the Navajo government must explain to the defendant that the jury trial right is not absolute, as it may be waived by doing nothing within a certain time. Absent this explanation, the information received by a defendant is incomplete, as it appears the right is automatic and perpetual, like the federal constitutional right. Without this information, the waiver by inaction is not truly knowing and intelligent, and would violate the defendant’s right to due process. As the description of the right to jury trial in the waiver of arraignment form does not include a statement that the right must be exercised within fifteen days, Eriacho’s failure to request it within that time was not a knowing and intelligent waiver. (footnotes omitted).\footnote{Eriacho v. Ramah District Court, No. SC-CV-61-04, slip op. at 7.}

f. Miranda rights

In \textit{Navajo Nation v. Rodriquez},\footnote{No. SC-CR-03-04, slip op. at 1 (this case is also discussed above under adoption of \textit{bilagaana} law).} a police officer gave the defendant an “advice of rights form” which listed rights similar to Miranda Rights for him to read. The rights were written in English and the police officer did not explain each right to the defendant in either English or Navajo.\footnote{\textit{Id.}, slip op. at 2.} The police officer also told the defendant that he could spend sixty years in federal prison and pay a fine of a million and half dollars for allegedly shooting in a residential area.\footnote{\textit{Id.}, slip op. at 1.} The defendant signed a waiver on the bottom of the advice of rights form and then wrote a lengthy confession implicating him in the shooting.\footnote{\textit{Id.}, slip op. at 2.} The advice of rights form with the signed waiver and the confession were admitted into evidence and used to convict the defendant. On appeal, the defendant
alleged that his written confession was coerced so it should have been suppressed, and the advice of rights form, without further verbal explanation, was insufficient to waive his right against self-incrimination.458

Traditional Navajos abhor coercion in dispute resolution and in everyday life. The Court in Rodriguez applied the principle rejecting coercion to establish a rule that a person in police custody cannot be coerced into waiving his right against self-incrimination.

Others may ‘talk’ about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt. ... Our Navajo Bill of Rights, as informed by the Navajo value of individual freedom, prohibits coerced confessions. We [apply] these principles to a person in police custody. ... The parties agree that Rodriguez was coerced, and we find that any degree of coercion is in violation of the Navajo Bill of Rights.”459

The Navajo value of individual freedom that the Court mentioned above pertains to traditional Navajo concepts of free speech. Because a person’s freedom to speak encounters few limitations, a person cannot be coerced or forced into speaking, including admitting wrongdoing. In this sense, using coercion to force a person to speak contravenes the traditional Navajo principle of freedom of speech.

The Court in Rodriguez applied the házhó’ógo principle to the question of whether the defendant had waived his right against self-incrimination by signing the waiver on the advice of rights form. The Court first accepted the minimum requirements

---

458 Id., slip op. at 4.
459 Id., slip op. at 5, 6.
of Miranda Rights as consistent with Navajo values.\textsuperscript{460} The Court then described \textit{házhó´ógo} as “a fundamental tenet informing us how we must approach each other as individuals,” and while dealing with one another “patience and respect are due.”\textsuperscript{461}

The \textit{házhó´ógo} principle normally guides human interaction on a daily basis, and that same reasoning applies to a Navajo government official’s interaction with a Navajo Nation citizen. For example, in \textit{Rodriquez}, the Court pronounced that “[m]odern court procedures and our other adopted ways are all intended to be conducted with \textit{házhó´ógo} in mind.”\textsuperscript{462} In other words, people should interact with one another using \textit{k’e} values (kindness, friendliness, cooperation, etc.).

The relationship between the Navajo Nation government and its individual citizens requires the same level of respect as the relationship between one person to another. In our Navajo way of thinking we must communicate clearly and concisely to each other so that we may understand the meaning of our words and the effect of our actions based on those words. The responsibility of the government is even stronger when a fundamental right, such as the right against self-incrimination, is involved.\textsuperscript{463}

The police officer did not heed the \textit{házhó´ógo} principle when he obtained a confession from the defendant. First, the officer did not verbally explain the rights listed on the advice of rights form so the defendant could understand them; and second, the officer coerced a confession from the defendant through threats. According to the Court,

\textsuperscript{460} \textit{Id.}, slip op. at 8-9; In re A.W., a minor, 6 Nav. Rptr. 38, 41 (1988)(a child taken into custody for juvenile delinquency must be informed of Miranda Rights).

\textsuperscript{461} Navajo Nation v. Rodriquez, No. SC-CR-03-04, slip op. at 10.

\textsuperscript{462} \textit{Id.}

\textsuperscript{463} \textit{Id.}, slip op. at 9.
the police officer’s conduct did not conform to “the ways that people should interact” and “a police badge cannot eliminate an officer’s duty to act towards others in compliance with the principles of házhó’ógo.”\textsuperscript{464} The Court set forth guidelines that should keep police officers within the range of házhó’ógo for obtaining valid waivers from defendants.

We therefore hold that the police, and other law enforcement entities and agencies, must provide a form for the person in custody to show their voluntary waiver. They must also explain the rights on the form sufficiently for the person in custody to understand them. Merely providing a written English language form is not enough. The sufficiency of the explanation in a Navajo setting means, at a minimum, that the rights be explained in Navajo if the police officer or other interviewer has reason to know the person speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so that the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence. (footnote omitted).\textsuperscript{465}

The cases discussed in this part show the extent to which the Navajo Nation courts have gone to protect the rights of criminal defendants who face the Navajo Nation criminal justice system. In its effort to protect the rights of criminal defendants, the Navajo Nation courts have frequently granted defendants more rights under the Navajo Nation Bill of Rights than they would receive under comparable provisions of the United States Bill of Rights. Because many criminal defendants are indigent, the Navajo Nation

\textsuperscript{464} \textit{Id.}, slip op. at 10-11.
\textsuperscript{465} \textit{Id.}, slip op. at 11.
courts provide free counsel through the Navajo Nation Public Defender’s Office or by appointing members of the Navajo Nation Bar Association to serve as court-appointed counsel.\footnote{On appointment of pro bono counsel, see *Boos v. Honorable Robert Yazzie*, 6 Nav. Rptr. 211 (1990), and *In re A.W.*, 6 Nav. Rptr. 38, 42, 43 (child in custody for juvenile delinquency must be provided counsel and given the same rights as adults).} The federal Indian Civil Rights Act does not require tribes to provide criminal defendants with free counsel; it only requires criminal defendants, including indigent defendants, to have counsel at their own expense.\footnote{The Indian Civil Rights Act states as follows: “No Indian tribe in exercising powers of self-government shall — deny to any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel for his defense.” 25 U.S.C. § 1302(6).}

5. Principle of *Ch’ihónit’i’* (Equity)

The Navajo Nation Supreme Court illuminated a traditional equity principle in *Navajo Nation v. Arviso*,\footnote{No. SC-CV-14-05 (Nav. Nat. Sup. Ct., Aug. 11, 2005).} although the Court does not call it such in its opinion. In *Arviso*, the son (Arviso) of lessees of Navajo Nation land for business purposes took over his parents’ expired lease after their deaths.\footnote{*Id.*, slip op. at 1.} Arviso attempted a lease renewal with the Bureau of Indian Affairs to no avail, and shortly thereafter, the Navajo Nation brought an action for unpaid rent plus interest and eviction against him and his brother.\footnote{*Id.*, slip op. at 2 (the Navajo Nation settled the brother’s part in the lawsuit).} Using a provision in the lease bolstered by the traditional principle of *ch ‘ihónit’i’*, the trial court dismissed the Navajo Nation’s suit after ruling that Arviso had rights to the land as a “successor” holding an “equitable lease.”\footnote{*Id.*, slip op. at 2, 7, 8.} On appeal, the Navajo Nation Supreme Court held that Arviso was not a successor under the lease, but an entrant on the premises.
without the Navajo Nation’s consent; therefore, the Nation had a right to evict him, but subject to consideration of any of his defenses.\textsuperscript{472}

The trial court recognized Arviso’s interest in the property using the traditional Navajo principle of \textit{ch’ihónit’i’}. This term, as the Supreme Court stated, literally means “The Way Out”;\textsuperscript{473} it could also be glossed as “a way out.” According to Navajo traditionalists, “the need for a ‘way out’ is universal in the Navajo world,” because a person’s thoughts, creative powers, personality, words, songs, and prayers may stagnate inside anything the person creates if “a way out” is not provided.\textsuperscript{474} The underlying rationale suggests that “a way out” guarantees a person unrestrained freedom of thought and movement in pursuit of new undertakings and goals. The “way out” principle ensures continuity, discovery, creativeness, and progress in the Navajo world.

The trial court refused to evict Arviso by suggesting that the Navajo Nation, guided by \textit{k’e} values, “should have been flexible enough to seek a solution (‘The Way Out,’ or \textit{ch’ihónit’i’}), including negotiating a new lease.”\textsuperscript{475} The Navajo Nation had not demanded rent or pursued other remedies, including evicting the original lessees from the premises, for over twenty-seven years, and these facts, the trial court said, supported negotiation of a new lease pursuant to the \textit{ch’ihónit’i’} principle.\textsuperscript{476} The Supreme Court, however, dismissed the argument that either the \textit{k’e} principle or “the way out” principle supported granting Arviso an equitable lease. The Court said the Navajo people had

\begin{flushright}
\textsuperscript{472} \textit{Id.}, slip op. at 5. \\
\textsuperscript{473} \textit{Id.} \\
\textsuperscript{474} SCHWARZ, MOLDED IN THE IMAGE, \textit{supra} note 238, at 108. \\
\textsuperscript{475} Navajo Nation v. Arviso, No. SC-CV-14-05, slip op. at 5. \\
\textsuperscript{476} \textit{Id.}
\end{flushright}
given their government representatives authority to enact laws that regulate leasing of
lands for business purposes on the Navajo Nation and those statutes control.477

Over the years Navajo laws have been enacted to regulate the use
of Navajo lands for business purposes. The Chapters are now adopting
land use plans. The decision of the people through their local and national
governments on how to use particular tracts of land is premised upon the
‘importance of k’e to maintaining social order.’ [Atcitty, 7 Nav. Rptr. at
230]. A land use decision by the people through their governments is the
balance struck between the individual land user and the needs and desires
of the community. As this Court said in Atcitty, ‘this is a part of the
broader Navajo traditional principle of freedom with responsibility. An
individual has much freedom in Navajo society, but that freedom must be
exercised with respect for family, clan relatives, and the community at
large.’ 7 Nav. Rptr. at 230 n.2. The cooperation expected between
individuals and the community is also expressed in the Nation’s legislative
recognition of the place and application of the fundamental laws of the
people, where the Navajo Nation Council recognized that Diné bi
beenahaz’áanii teaches that the rights and freedoms of the individual are
not the only considerations. The rights and freedoms of the people as a
whole must also be recognized. (citations omitted).478

Statutory laws and the entire regulatory scheme that regulate land use on the
Navajo Nation prevailed over Navajo common law (principles of k’e and ch’ihónit’i’) in
Arviso. The controlling factor, apparently, is that the tract was leased for business
purposes. Leases of land for business use must satisfy numerous Navajo and federal
rules and regulations and the Bureau of Indian Affairs must give final approval.

477 Id., slip op. at 6.
478 Id.
Another factor used to defeat Navajo common law is the Court’s distinction between land used for a home and land used for business purposes. Navajo common law affords greater protection for land with a home on it than land used for business purposes, especially if the lease has expired. According to the Court, Arviso has no right to occupy ... Navajo property for business purposes without being a party to a lease. ... Unlike a residential land situation, in which a home ‘in the context of Navajo custom and tradition is more than just a dwelling place,’ there is no comparable interest held by individuals using land owned by the collective Navajo people for commercial purposes. The lower court’s decision that [Arviso] possessed an ‘equitable lease’ is essentially a determination that [Arviso] has gained a right of possession comparable to ‘title’ to a tract of land. (citation omitted).479

While the “way out” principle may not save an expired lease for business purposes, it should allow at least an equitable lease for residential purposes. The probability exists that the “way out” principle can be applied to contracts between individuals and between individuals and business (i.e., repossession of consumer goods bought on credit). The Arviso case demonstrates that Navajo culture contains equitable principles that can be extracted and applied in modern litigation in the courts.

One of the Navajo Nation Supreme Court’s best discussions of the k’e doctrine is found in Ben v. Burbank,480 a case involving breach of an oral contract between two clan relatives. The parties, both traditional Navajos, made their oral contract using customary ways. Burbank satisfied his part of the bargain and waited (as tradition usually allows)

---

479 Id., slip op. at 7.
480 7 Nav. Rptr. 222.
for his relative to fulfill the contract (pay him). When payment was not received within a reasonable time, he sent her invoices. Finally, positive that a breach had occurred, Burbank obtained a small claims judgment which Ben appealed arguing that the statute of limitations should have barred the action. Burbank asked the Supreme Court to use the k’e doctrine to resolve the matter and not the statute of limitations defense. The Court agreed to use the k’e doctrine in the interest of restoring the parties’ clan relationship so they can return to hozho.

Navajo common law is the first law of our courts and we will abide by it whenever possible. Therefore, we agree with Appellee [non-breaching party] that the Navajo way of k’e is the prevailing law to be applied. K’e recognizes ‘your relations to everything in the universe,’ in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply-felt emotion which is learned from childhood. To maintain good relations and respect one another, Navajos must abide by this principle of k’e.481

The Burbank case proposes that the k’e, universal relations, hozho, and k’ei doctrines are all parts of the same whole. In the Navajo world, privileges, rights, duties, and mutual obligations must be identified, relationships and kinship solidarity must be maintained, and the universe’s multifarious elements must remain in harmony. The k’ei doctrine, discussed next, helps achieve these goals for the Navajo people.

481 Id. at 224.
CHAPTER VI. K’EI
(DESCENT, CLANSHIP AND KINSHIP)

A. Overview of K’ei in Navajo Culture

1. Introduction to k’ei

The k’e doctrine, a general concept of solidarity, and the k’ei doctrine are closely related and frequently work in unison to promote and maintain order and hozho in Navajo domestic affairs. While the k’ei doctrine, like the k’e doctrine, can assume universal proportions, it is confined here to the Navajo clan system which is the structure that regulates Navajo domestic life. The k’ei doctrine and its emanating rules regulate domestic matters by defining Navajo identity, illuminating responsibilities, duties, and mutual obligations among clan relatives, and establishing the bounds of proper behavior among unrelated Navajos and with non-Navajos in general.

Witherspoon describes k’e and k’ei as concomitant concepts: “The term ‘k’ei’ means ‘a special or particular kind of k’e.’ It is this term (k’ei) which is used to signify the system of descent relationships and categories found in Navajo culture. ‘Shikei’ (‘my relatives by descent’) distinguishes a group of relatives with whom one relates according to a special kind of k’e.” Witherspoon’s description of k’ei conforms to traditional Navajo understandings of the concept.

---

482 Witherspoon, Navajo Kinship and Marriage, supra note 217, at 120.
483 For example, Navajos refer to Changing Woman, a female Holy Being, as their mother. Changing Woman is credited with creating four pairs of Diné who eventually became the originators of the modern Navajo clan system. However, modern Navajos cannot agree on which clans are the original four clans.
484 Witherspoon, Navajo Kinship and Marriage, supra note 217, at 37.
Navajos understand \( k'e \) and \( k'ei \) as closely related, but both have distinguishing features which establish the framework for all transactions that a Navajo engages with clan relatives and non-clan relatives. \( K'e \) “refers to both kinship and non-kinship forms of solidarity. ‘K’ei’ refers only to kinship solidarity based on descent relationships.”\(^{485}\) This transactional framework relies on \( k'e \) values (positive attributes) to regulate the giving and sharing, usually of sustenance and emotional and spiritual support, among clan relatives (kinship solidarity) and the exchange and reciprocity, usually of goods, a Navajo engages with non-clan relatives or with affinal relatives (non-kinship solidarity).

According to Witherspoon, “[g]iving is unilateral, while exchange is reciprocal”\(^{486}\) thus, transactions among clan relatives and among unrelated Navajos proceed along these lines. When Navajos give unilaterally, they give or share with their clan relatives (\( shik'ei \)) as a means of sustenance and spiritual and emotional support without expecting reciprocity because the giving or sharing is done as an expression of love or to help a relative in need (\( k'e \) values). On the other hand, a transaction involving unrelated Navajos (non-kinship solidarity) is based on the “equity of exchange [and] need is ignored. This form of reciprocity is voluntary and contractual, based on mutual agreements and obligations.”\(^{487}\) In other words, a Navajo will give something to another Navajo who is outside his kinship network in exchange for something of equal value; however, according to tradition, the reciprocity need not be performed immediately.

\(^{485}\) Id. at 120.  
\(^{486}\) Id. at 56.  
\(^{487}\) Id. at 57.
The giving and sharing among clan kin and the exchange and reciprocity between unrelated Navajos comprise the norms that drive transactions involving kinship and non-kinship solidarity but, like the k’ei rules that use clans to define Navajo identity, the norms are not impervious to outside pressures. For example, some practitioners of ceremonies now have set rates for services (similar to medical doctors) and give out receipts. The practitioners from the past did not use fee schedules and left the amount of payment for services to the patient, because they believed they were simply conduits through which the Holy Beings did their spiritual and healing work.

2. K’ei determines relatives

The Navajos use a sophisticated, matrilineal-based clan system (k’ei system) to trace lineage through their mothers and to identify clan relatives. Specific kinship terms are used to distinguish between older and younger brothers and sisters; between maternal and paternal grandparents; between maternal and paternal aunts and uncles; and between male and female cousins on the mother’s side and those on the father’s side. In addition, clan A can be related to clan B so that Navajos can identify non-biological relatives through linked clans.488

488 Most Navajo linked clans are traceable to a single clan which suggests branches of an earlier clan. It is usually stated that originally the linked clans were but a single unit. They doubtless represent in most cases a splitting up under the stimulus of geographical dispersion or intra-clan quarrels, although in some instances the association is probably imaginary or accidental or the result of the affiliation of new clans derived from other tribes, rather than the product of actual historical splitting. KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 113. Furthermore, some clans are related through adoption by the same clan. For example, two girls, one representing the Water-Flows-Together Clan and the other representing the Mexican
The Navajo language differentiates many categories of relatives, making distinctions which are unfamiliar to white people: relatives on the mother’s side are normally called by different terms from the corresponding relatives on the father’s side; younger and older brothers and sisters are always distinguished; some relationships are foreshortened, so that the children of the mother’s sisters, for example, are addressed with the same word as actual biological brothers and sisters, just as the mother’s sisters are also called ‘mother.’

The Navajo clan system generates over thirty kinship terms and produces thousands of relatives, many of whom a Navajo will never meet during his lifetime. The following discussion uses only the matrilineal clan to show the complexity of the Navajo clan system and the role kinship terminology plays to distinguish, identify, and address relatives within the born-of clan (matrilineal clan). This illustration does not (and is not intended to) cover every kinship term used within the matrilineal clan. A Navajo ego will address members of his or her matrilineal clan as follows: 1) members that are of ego’s generation are “brother” and “sister”; 2) the females of ego’s parents’ and grandparents’ generations are “mother”; 3) a male ego will call the males of his parents’ and grandparents’ generations either “uncle” or “older brother”; 4) a female ego will call the males of her parents’ and grandparents’ generations “son”; 5) a male ego will call the Clan, were adopted by the Tséikeehé Clan (“Two Rocks Sit People”). The adoption made members of the Water-Flows-Together Clan and Mexican Clan siblings and the women of the adopting clan their mothers. Navajos related through linked clans use the same kinship terms that biological clan relatives use to address each other.

Id. at 104. Navajo kinship terminology elicited during testimony often baffle non-Indian state and federal judges. For example, a Navajo will refer to his or her mother’s sister’s children as “my brothers and sisters (cousins in the non-Indian world),” which are the same terms used to identify biological siblings.
female members of his children’s generation “aunt” and the male members “nephew”; and 6) a female ego will call the male members of her children’s generation “son” and the female members “daughter.” This system of kinship terminology and identification of relatives increases in complexity when ego’s father’s clan, maternal grandfather’s clan, and paternal grandfather’s clan are added to the kinship matrix.

3. The four basic clans

To simplify things, only the four basic clans that compose the Diné identity paradigm, the four clans that Navajos use to identify themselves and their relatives, will be covered. A Navajo will call individuals who claim one or more of his four basic clans, shikei (my relatives). Moreover, the four basic clans are generally the only ones needed to address legal issues in the area of Navajo domestic relations in the Navajo Nation courts. Assuming that a Navajo is “full-blood,”490 his or her four clans are the mother’s clan (matrilineal clan or born-of clan), the father’s clan (born-for clan), the maternal grandfather’s clan, and the paternal grandfather’s clan. Although these four clans are important for purposes of individual identity and identification of relatives, the matrilineal clan and the born-for clan take precedence because of their close proximity to a Navajo (his parents) under the k’ei system: “Each Navaho belongs to the clan of his

---

490 The political term “full-blood” is used here for illustrative purposes only. A Navajo can be less than “full-blood” and still claim all four clans. For example, if ego’s one-half Navajo blood mother (who has a Navajo mother) marries a full-blood Navajo, ego will be three-fourths Navajo blood, but still claim the clans of his mother, father, maternal grandfather, and paternal grandfather.
mother, but it must not be forgotten that he is equally spoken of as ‘born for’ the clan of his father. The father’s clansmen are all considered to be his relatives.”

Under the Navajo matrilineal clan system, the mother’s clan is the closest kin category to a Navajo because mother and child are the same clan; next is the father’s clan, which Navajos call the “born-for clan.” Lineage is not traced through the father’s clan because the matrilineal system traces descent through the female line. The father’s clan is important to individual identity, particularly when used in conjunction with the matrilineal clan and the maternal grandfather and paternal grandfather clans. The father’s clan is also used to identify kin from the father’s clan category. The males of the born-for clan are usually called “father (shizhé’é (a general reference) or shizhé’é yázhi (a reference to father’s brother)),” and the females are usually called “mother (shimá (a general reference))” or “aunt (shimá yázhi (a reference to father’s sister)),” and on some occasions both father’s brother and sister are called shibizhi (a general reference to father’s siblings). A Navajo may occasionally receive gifts and contributions to the costs of major ceremonies or functions from his born-for clan relatives. A father who is a medicine-man may select one (or more) of his children as his apprentice.

All individuals, young and old, who claim the paternal grandfather and maternal grandfather clans are relatives and addressed as grandmother or grandfather without reference to age or generation, although kinship terminology distinguishes among each maternal and paternal grandparent. A Navajo uses kinship terms to distinguish among biological grandparents and applies the same terms to non-biological relatives in the

491 KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 112.
paternal and maternal grandfather clan categories: maternal grandfather is *shichei*; maternal grandmother is *shimá sání*; paternal grandfather is *shináli* (*hastiin*); and paternal grandmother is *shináli* (*asdzáán*).\(^{492}\) The following shows application of kinship terms to non-biological relatives: A person who is not a biological grandfather but is in the maternal grandfather clan category will be addressed as *shichei*, the same term used for a biological maternal grandfather. The same format holds true for the other grandparent categories and other relative categories (mother, father, aunt, uncle, brother, sister, etc.).

The paternal grandfather and maternal grandfather clans establish grandparent/grandchild relationships, but the relationships are considered further in proximity than those of the matrilineal and born-for clans.

A Navajo’s biological grandparents, particularly the maternal grandmother and maternal grandfather, due to traditional matrilocality,\(^ {493}\) were the teachers of Navajo etiquette, history, stories, creation and journey narratives, and spirituality. Traditionally, biological grandmothers and grandfathers were responsible for transmitting culture to their grandchildren’s generation. Transmission of culture from the grandparent generation to the grandchild generation has weakened, because over half of today’s Navajo youth cannot carry on a conversation in Navajo. The generational communication gap has contributed to loss of traditional knowledge, particularly in the

\(^{492}\) Both paternal grandparents are called *shináli*; the addition of the terms *hastiin* and *asdzáán* distinguishes grandfather from grandmother, respectively.

\(^{493}\) Traditionally, a man upon marriage moved to the residence area of his wife and her family, although economic circumstances created exceptions. Today, marital residence depends upon job location, schools, and economic circumstances.
areas of ceremonialism and herbalism. In the past, a grandfather who was a medicine-
man usually made a grandson his apprentice.

Mother and child have the same clan under the Navajo k’ei system. Obviously, if
the mother is non-Navajo, the child would not have a matrilineal clan, although he would
have a “born-for clan” through the Navajo father. In other words, the father’s matrilineal
clan becomes his child’s “born-for clan.” Under a traditional analysis, a person who has
a matrilineal clan has a Navajo identity even though that person possesses a negligible
amount of Navajo blood. This scenario illustrates the inherent contradiction between the
traditional k’ei method of determining Navajo identity and the blood-quantum
requirement that is now the Navajo Nation standard for determining Navajo identity and
eligibility for enrollment.494

494 The Navajo Nation enrollment law, 1 N.N.C. § 701 (2005), provides as follows:
The membership of the Navajo Nation shall consist of the following persons:

A. All persons of Navajo blood whose names appear on the
   official roll of the Navajo Nation maintained by the Bureau of Indian
   Affairs.

B. Any person who is at least one-fourth degree Navajo blood, but
   who has not previously been enrolled as a member of the Navajo Nation,
   is eligible for membership and enrollment.

C. Children born to any enrolled member of the Navajo Nation
   shall automatically become members of the Navajo Nation and shall be
   enrolled, provided they are at least one-fourth degree Navajo blood.

The Navajo Tribal Council passed the original version of section 701 on January 18,
1938. See legislative history, Title I, Navajo Nation Code, at 42.

It should also be noted that Navajo law, 1 N.N.C. § 702 (2005), provides that a
person cannot become a member of the Navajo Nation by adoption:

A. No Navajo law or custom has ever existed or exists now, by
   which anyone can ever become a Navajo, either by adoption, or otherwise,
   except by birth.
If ego has a non-Navajo mother and a full-blood Navajo father, then ego’s “born-for clan” (father’s clan) is ego’s link to Navajo identity, but under the clan system, the Navajo clan and identity will disappear with ego’s grandchildren’s generation if ego’s children marry non-Navajos. Furthermore, ego’s grandchildren will have one-eighth degree of Navajo blood which would make them ineligible for enrollment in the Navajo Nation under the current standard requiring one-fourth degree of Navajo-blood. A person with less than one-fourth degree of Navajo blood and the rest non-Navajo blood, but who has a matrilineal clan, will still be Diné under k’ei rules. The person, however, would not be eligible for enrollment in the Navajo Nation under current Navajo Nation law and that raises an important question: Does a Navajo Nation court have criminal jurisdiction over this kind of person in light of the Ninth Circuit’s decision that a tribal court has criminal jurisdiction only over a non-member Indian who is “enrolled” or a “de facto” member of another Indian nation, but not over an Indian who is not enrolled in a tribe?495

The preceding discussion presents two methods of defining Navajo identity — the traditional Diné k’ei system and the official blood quantum standard that the Navajo Nation Government adopted from the federal Bureau of Indian Affairs. Since the Bureau of Indian Affairs initiated the blood quantum test to determine individual American

B. All those individuals who claim to be a member of the Navajo Nation by adoption are declared to be in no possible way an adopted or honorary member of the Navajo People. This law obviously ignores the heterogeneity of the Navajo people. Several Navajo clans trace their roots to members of surrounding Indian tribes (e.g., Pueblos, Zuni, Jemez, Hopi, Ute, and Apache and even Mexican) who were adopted by Navajos. The statement that no Navajo custom has ever existed that permitted non-Navajos to be adopted into the Navajo Nation is patently false.495 Means v. Navajo Nation, 432 F.3d 924, 933. Who falls into the group the Ninth Circuit designates as “de facto members of tribes”? See id. at 933.
Indians’ eligibility for federal services, Navajo Nation officials have practically ignored the \textit{k’ei} rules on determining Diné identity. In lieu of the traditional rules, the Navajo Nation Council enacted a law that requires a person to possess at least one-fourth degree of Navajo blood to be eligible for membership in the Navajo Nation. While a person with less than one-fourth degree of Navajo blood can still self-identify as Diné, that person is neither eligible for enrollment in the Navajo Nation nor eligible for services provided to enrolled Navajos, including health care, land assignments, scholarships, and other services provided by the federal government and the Navajo Nation.

A more abstract definition of Diné identity is found in the Navajo Creation Scripture and Journey Narratives. According to the part called \textit{Diné Anályaah} (“The Recreation of the Diné”), Changing Woman rubbed dirt and skin wastes off the area between her breasts, back, and from under each arm to the waist to create four pairs of male and female Diné (each pair is designated brother and sister) who would eventually become the bearers of the modern four original clans.

Changing Woman re-created the four clans by rubbing her flesh from various parts of her body and [mixing them with] these things:

A. Four Minerals
B. Four Corns
C. Four Elements
D. Four Airs.

After she re-created the four clans, she put them at her special place to mature. Later she switched them around, going through the spirit
of Holy Matrimony and matched them, where they were not related. She fixed them so they would become husband and wife for re-birth of life.\footnote{Wilson Aronilth Jr., Foundation of Navajo Culture 107 (2nd Draft 1992) (unpublished manuscript on file at Diné College Library, Tsaile, Arizona). The “Recreation of the Diné” is so called because the Navajo Creation Scripture and Journey Narratives describes an earlier creation of human beings, including the first Diné, at a place called Hayoolkaal Bee Hooghan (House made of Dawn). The first Diné were created by the Holy People and given four clan names. \textit{Id.} at 91-92.}

Changing Woman’s re-creation of the Diné by mixing dirt and skin wastes from her body with four elements underlies an abstract concept of identity which holds that the Diné is the land and the land is the Diné. In other words, Navajos will say, “We are the earth and the earth is us!”

What do the preceding discussions of Navajo identity have to do with the Diné clan system? First, the customs (or rules) that determine Navajo identity emanate from \textit{k’ei}. Second, it is clear that longstanding Navajo customs have been pushed to the periphery in favor of an alien standard that exaggerates the significance of Navajo blood quantum to a people who have a history of biological heterogeneity. Third, by using a non-Navajo standard for determining Navajo identity, individuals who would be eligible for membership in the Navajo Nation under the \textit{k’ei} rules are permanently excluded for failure to meet the Navajo-blood quantum standard. Finally, the federal degree of Indian blood standard exemplifies use of a non-Indian standard to regulate internal and core Navajo affairs, which does not bode well for strengthening Navajo Nation sovereignty.

4. Source of Navajo clan system

According to Navajo traditionalists, the episode called the “Recreation of the Diné” is the basis for the modern Navajo \textit{k’ei} (clan) system. Changing Woman did not
allocate clan names to the four pairs of Diné upon their creation, but instead bestowed on each pair a distinctive scepter — a White Shell Scepter, a Turquoise Scepter, an Abalone Shell Scepter, and a Black Jet Scepter — before sending the Diné on a homeward journey to their lands between the four sacred mountains.\(^{497}\) When the people reached the San Francisco Peaks (the sacred West Mountain), each scepter-bearer attempted to locate potable water; the very act would earn them clan names. The first carrier struck the spring bed with the Abalone Shell Scepter and bitter tasting water formed, so this pair became the Bitter Water Clan; the second carrier struck a different place with the White Shell Scepter and salty water formed, so this pair became the Salt Water Clan; the third carrier struck a third site with the Black Jet Scepter and muddy water formed, so this pair became the Mud Clan; and finally, the last poked another place with the Turquoise Scepter and out gushed clear spring water, so this pair became the Near Water Clan.\(^{498}\)

The “Recreation of the Diné” episode is the source of the Navajo clan system, and the \(k\)'ei doctrine is the foundation of traditional Navajo domestic relations. In the overall scheme of things, the \(k\)'ei doctrine imposes order in the Navajo social world. Changing

\(^{497}\) *Id.* at 109.

\(^{498}\) *Id.* at 111. My version of the “Recreation of the Diné” coincides with Aronilth’s version, except the following: The four original clans are Bitter Water, Near Water, Mud, and *Biitaanii* (not the same as the current *Bit’ahnii* — “Under his Cover Clan”). When directed to search for water, the first bearer struck the spring bed with his scepter and drew nothing but dust, so this pair became known as the *Biitaanii* Clan. The *Biitaanii* Clan did not enter the land between the four sacred mountains, but instead returned to Changing Woman’s residence in the west. Changing Woman used the *Biitaanii* Clan to people Diné groups in the west. Navajos do not agree on which are the four original clans: “There is no consensus in the various accounts of this episode (Recreation of the Diné) about exactly which clans originated from Changing Woman’s flesh, or which clans originated from which parts of her body....” SCHWARZ, MOLDED IN THE IMAGE, *supra* note 238, at 66-67.
Woman, as the creator of the four pairs of Diné, established matrilineage, the foundational core of the Navajo clan system. Changing Woman is the principal, primordial “mother” of the Navajo people.

5. Traditional marriage

The *k’ei* doctrine, and its clan system, not only determines who is a relative, but also regulates duties, responsibilities, and reciprocity among relatives and non-relatives, and controls domestic matters such as marriage, inheritance, and property ownership. Witherspoon provides a good understanding of the importance of the *k’ei* doctrine to the Navajo social world.

The discrete and invariable categories of *k’ei* primarily function to order and classify the strange and the unknown, and to establish ties and bonds between ego and people of the wider social universe of which ego is a part, but with which he has only sporadic and distant contact. Accordingly, those related according to *k’ei* are expected to provide a place to sleep and eat for each other when one is traveling in a strange area. The *k’ei* categories also provide a person with an extensive network of relatives upon whom he may call for assistance when he needs to amass a large amount of food and wealth in order to put on a major ceremony. Furthermore, these categories divide up the wider social universe into two important categories: marriageable and unmarriageable. One is not supposed to marry anyone who is related to him or her according to any of these categories. The behavioral code associated with relationships of *k’ei* can be summarized as follows: (1) hospitality; (2) ceremonial cooperation; and (3) exogamy.\(^{499}\)

\(^{499}\) Witherspoon, Language and Art, *supra* note 6, at 115-16.
An important rule of the *k’ei* doctrine, and one that contributes to *k’e*, *hozho*, and social order in the Navajo world, is the prohibition on marriage between clan-related individuals according to the basic clan paradigm (the four basic clans) and through linked clans. The marriage prohibition extends to ego’s mother’s clan (matrilineal clan), father’s clan (born-for clan), paternal grandfather’s clan, maternal grandfather’s clan, and linked clans. Here is an example of the marriage prohibition: Ego is Water-Flows-Together Clan and born-for Bitter Water Clan. Ego’s paternal grandfather’s clan is Salt and maternal grandfather’s clan is Towering House. Ego is prohibited from marrying someone who is of the Water-Flows-Together, Bitter Water, Salt, and Towering House clans or anyone who claims any of the four clans through their father or grandparents. In addition, the Water-Flows-Together and Mexican clans are related as linked clans; therefore, ego cannot marry someone of the Mexican Clan. Ego will call individuals claiming the clans listed above *shik’ei* (my relatives).

The traditional prohibition on marriage between clan relatives weakened to some extent as the Navajo people adopted more and more of Western culture. Contemporary young Navajos especially are prone to be less observant of the traditional rules, but the fault lies with Navajo leaders and the older generations for neglecting to teach them traditional values. However, even in more traditional times, some marriage choices deviated from the traditional rules. For example, the following appears in a 1946 text on the Navajo people:

In the contemporary life of The People the principal importance of clan is that of limiting marriage choices: one may never marry within one’s own clan or one’s father’s. There are still exceedingly few violations of these
prohibitions. The Navahos treat incest of this sort and witchcraft as the most repulsive of crimes. Incestuous persons are inevitably suspected of witchcraft and are thought to be, or to be doomed to become insane. On the other hand, at certain periods and in certain sections there have also been positive marriage preferences connected with clan. For example, to marry into the clan of the paternal or maternal grandfather is still highly approved in some areas.\textsuperscript{500}

Marriage, specifically into the maternal and paternal grandfather’s clans, especially in 1946, was probably an aberration from the traditional prohibition against marriage of clan kin. The overwhelming majority of Navajos would not, even today, approve of marriage between individuals related through the four basic clans, because to do so is incest which is associated with witchcraft, a component of \textit{hochxo}.

Under Navajo custom, marriage between clan relatives is incest. Incest has always been associated with witchcraft and both cause disruption of the Navajo social order by confounding the \textit{k’e} and \textit{k’ei} doctrines. Incest and witchcraft also contravene the \textit{hozho} concept. Navajo traditionalists have always disallowed marriage between clan relatives because of its potential negative effects on \textit{hozho}, \textit{k’e}, and \textit{k’ei} and the Navajo social order in general.

Our grandparents’ belief was that we must not marry within [our] own clan or with [our] blood relatives. You cannot marry your mother’s or father’s clan. If you marry into your clan, it will affect your mind, breathing, behavior, attitude, your spiritual being and your mental being.

\textsuperscript{500} KLUCKHOHN \& LEIGHTON, THE NAVAJO, supra note 9, at 112. On the subject of marriage between clan relatives, see also WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE, supra note 217, at 31-32.
All of this will begin to destroy and change you slowly. It will affect the whole part of your body from your feet to the top of your head. From some of these mistakes, the results would be like the action of a moth. You would run or jump into the fire.

....

Many young couples today do not think about their clans when they meet each other. They don’t ask each other about their clan relationships. Lots of them don’t know their clans because they were never told by their parents or grandparents. Many young people do not believe in clans. For this reason, there are people that are married to their own blood relatives. This is how lots of problems are created. ...

Our ancestors said that only a person who knows evil or bad medicine would marry his or her own blood relatives or clan. This person does not have love in their heart or any respect for the clan system. It has been mentioned before that every person has four close blood relatives. You are the same clan as your mother and grandmother’s clan which is called the maternal clan. Your father’s clan is the one you are born for and this is your paternal clan. You have maternal grandparents and paternal grandparents. 501

The Navajo Nation Council recently codified part of the traditional Navajo prohibition against marriage between clan relatives. These prohibitions were enacted in 1993 (section 5D and E) and 2005 (section 2B) and are found in Title 9 (Navajo Nation Domestic Relations Code) of the Navajo Nation Code.

§ 2. Plural marriages void

B. Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of one-

---

501 Aronilth, Foundation of Navajo Culture, supra note 496, at 128, 132.
half degree, as well as whole blood, and between uncles and nieces, aunts and nephews and between first cousins, is prohibited and void.\textsuperscript{502}

§ 5. Requirements generally

In order to contract a Navajo Nation marriage, the following requirements must be fulfilled:

D. Parties who are Navajo Nation members, or who are eligible for enrollment, may not be of the same maternal clan or biological paternal clan. The provisions of this Subsection shall not affect the validity of any marriages legally contracted and validated under prior law.

E. Parties may not be related within the third degree of affinity. The provisions of this Subsection shall not affect the validity of any marriage legally contracted and validated under prior law.\textsuperscript{503}

Traditionally, the mother’s brother or the maternal uncle was responsible for disciplining and instructing his nephews (and nieces) on life-skills, trades, and activities related to sustenance and survival. One of the uncle’s chief duties was to arrange and approve of the marriage of his nephews and nieces:

Traditionally, the relationship of maternal uncles to their nephews and nieces was of great importance. These uncles assumed many of the disciplinary and instructional functions which fall to the lot of the father in white society. They had great influence in arranging, encouraging, or vetoing the marriages of their sisters’ sons and daughters (particularly the

\textsuperscript{502} 9 N.N.C. § 2(B) (2005). This statute also prohibits plural and same sex marriages: “A. All plural marriages contracted, whether or not in accordance with Navajo custom, shall be void and prohibited. ... C. Marriage between persons of the same sex is void and prohibited.” 9 N.N.C. §§ 2(A) and (C) (2005). Subsections B and C were enacted in 2005, Navajo Nation Council Resolution No. CJN-34-05 (June 3, 2005), and subsection A was passed on July 12, 1945 (1922-1951 Resolutions, p. 86).

\textsuperscript{503} 9 N.N.C. §§ 5(D) and (E) (2005)(these subsections were enacted in 1993 by Navajo Nation Council Resolution No. CAP-36-93, April 23, 1993).
latter). Moreover, there were various economic reciprocities and inheritance rights involved. A niece, in particular, could expect to inherit at least a small amount of property from each of her maternal uncles.\textsuperscript{504}

While the following traditional practice is rarely followed today, if at all, it was the maternal uncle’s duty to find a spouse for his nephew. When the uncle located a girl from an acceptable family, he discussed the marriage proposal with her family and after they agreed to the marriage, the amount of bride price was set. Marriage discussions took place without the presence of the potential couple because marriage in traditional Navajo society was “an arrangement between two families much more than it [was] between two individuals.”\textsuperscript{505}

The traditional marriage ceremony is an elaborate, spiritual and social event attended by the couple’s families, clan relatives, and friends. Unfortunately, the traditional marriage ceremony rarely occurs today as modern Navajos opt for Christian church weddings. A medicine-man, the bride’s maternal uncle, or a person who can perform the traditional ceremony, may marry the couple inside a hogan (or house today) at the residence of the bride’s family. The medicine-man sits on the west side of the hogan, the bride sits to his left, and the groom sits to the bride’s left. A traditional basket containing blue corn meal mush (the mush can also be white or yellow cornmeal), a pitcher of water with ladle, and a bag of corn pollen are placed before the couple.

\textsuperscript{504} KLUCKHOHN & LEIGHTON, THE NAVAJO, \textit{supra} note 9, at 105.
\textsuperscript{505} \textit{Id.} at 318.
Although procedures vary according to the knowledge of the person marrying the couple, the traditional wedding ceremony generally proceeds as follows:\textsuperscript{506}

The bride takes the ladle and pours water over the groom’s hands as he washes them; the groom then pours water over the bride’s hands as she washes them. This washes away the past and symbolizes the fact that from this point forward the couple will share life together. (citation omitted).

The [medicine-man] then adjusts the ceremonial basket so that the opening in the design is oriented toward the east. ... He takes a pinch of pollen from his \textit{tådidiin bijish}, or pollen pouch, and draws a line with it from east to west across the mush. With another pinch he draws a line across the mush from south to north. Finally he draws a complete line with pollen around the circumference of the mush, from the opening in the basket’s design sunwise — east, south, west, north. The groom takes a fingerful of mush from the place where the pollen lines intersect at the eastern edge of the mush. He eats this, and then the bride dips from the same place. Subsequent fingerfuls of mush are taken from the south, the west, the north, and the center by both groom and bride. ...

After the bride and groom have eaten mush from each appointed place, the basket is passed to the relatives and friends in attendance, who eat the remaining mush. Consumption of this mush notifies the Holy People of the union of the bride and groom and their respective clans in marriage.\textsuperscript{507}

\textsuperscript{506} The general elements comprising the traditional marriage ceremony have been codified at 9 N.N.C. § 4(D)(1)-(6) (2005); See \textit{infra} text accompanying note 563. Readers should not assume that there is a single version of the traditional wedding ceremony and that the general elements must all be present for a traditional marriage to be valid.

\textsuperscript{507} SCHWARZ, MOLDED IN THE IMAGE, \textit{supra} note 238, at 71-72.
The eating of the blessed mush from each cardinal direction symbolizes accumulation of knowledge, and eating the mush from the center ensures fertility. The performance of the traditional marriage ceremony notifies and seeks the Holy People’s blessings so that the married couple will follow the rules of k’ei, k’e, hozho and the Diné Life-Way (Diné bi’ó’ool’ii). The traditional marriage ceremony links the past generation with the present generation, which in turn links with the future generation.

Most significantly, the marriage perpetuates the Diné k’ei rules. After the ceremony is completed, elders, relatives, and friends offer advice (elders lecture) to the couple for a long and fulfilling marriage.

Under Navajo common law, the validity of a marriage consummated by a traditional wedding ceremony was never questioned because it was believed that the ceremony itself validated the marriage. In addition, because procedures comprising the traditional wedding ceremony vary according to the knowledge of the person performing the marriage, there is no custom or rule that requires satisfaction of certain elements of a traditional wedding ceremony before the marriage is considered valid. For example, medicine-man A may include washing of the hands as part of his procedure, while medicine-man B may exclude that element but use exchange of vows instead. Today, the ceremony may be conducted in a modern house, a modern-styled hogan, or even outside under a tent. Unfortunately, Navajo elders rarely lecture newly weds anymore.

In more traditional times, the marriage ceremony occurred at the residence of the bride’s family because Navajos are matrilineal, the uncle came to the bride’s family to “offer” his nephew to the family, and the man (bridegroom) “comes to” the bride’s
residence to take a wife and not the other way around. Following the traditional marriage ceremony, the husband remained at the residence area of his wife’s family while his own family returned to his mother’s residence area. The couple thereafter established their residence in the same area as the wife’s family. Matrilocal residence is not strictly followed today due to job, school, and economic and other considerations. After marriage, the husband becomes a contributing member of his wife’s family and clan and is known by the affinal term *nihaadaani* (male in-law to wife’s family and clan); the term applied to the wife by her in-laws is *nihizha’aad* (female in-law to the husband’s family and clan).

### 6. Traditional divorce

Traditionally, when the marriage foundered, the man left with only his personal belongings and moved back to his mother’s residence. The marital property, including livestock, farming equipment, and household items, remained with the wife for her and her children’s support. While there were exceptions, the children remained with their mother, because of the matrilineal rule of the *k’ei* doctrine. Under Navajo custom, a couple’s children were also considered children of the matrilineal clan. The Navajo clan system influenced custody of children in traditional Navajo society: if the mother or both parents died, a maternal aunt usually adopted her sister’s children; and if a traditional divorce occurred, the mother retained custody of the children. These customs on child

---

508 Traditionally, there have been exceptions to matrilocal residence, but in the majority of cases, the couple established their residence in the same area as the wife’s family’s residence.

509 To see how the male in-law relationship has been used in the Navajo Nation courts to support jurisdiction over non-member Indians, see *Means v. District Court of the Chinle Judicial District*, 7 Nav. Rptr. 383.
custody are not the prevailing laws in the Navajo Nation courts today. It was not unusual, even today, for children to live with their aunts or uncles or grandparents at different times of the year.

Witherspoon offers the following observation of traditional Navajo divorce:

“When divorce occurs between a couple living matrilocally, the husband returns to his mother’s unit, and the wife and children remain. ... When divorce occurs in patrilocal residence, the wife and the children return to her mother’s unit. The husband of course remains with his mother.”510 The traditional divorce practices outlined above have changed since the Navajo Nation adopted Western laws and the Anglo-American form of court system. Today, only the Navajo Nation courts are authorized to grant divorces, whether the marriage was consummated by a traditional marriage ceremony or not.511 Divorce, child custody, child support, alimony, and marital property distribution are now handled by the Navajo Nation courts.

7. Traditional property concepts

Traditionally, Navajo property ownership falls into three general categories: community property; family property; and individual property. No individual or family had vested or exclusive rights to community property.512 Community property includes common water resources for domestic and livestock use; timber areas where wood is cut for heating, posts, corrals, and construction of hogans and ramadas; salt licks and salt

510 WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE, supra note 217, at 75-76.
511 9 N.N.C. § 401 (2005)(“The Family Courts of the Navajo Nation are authorized to dissolve all marriages, whether consummated by Tribal custom, church or state ceremony ...”).
512 KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 105.
bush patches for livestock; and areas where herbs, plants, and different colored sand are gathered for healing and ceremony. Certain conventions that accord with k’e, k’ei and hozho are followed when community property is used. For example, one should not “cut wood within a mile or so of someone else’s dwelling. One uses no other than his accustomed water hole except when that source fails or he goes on a journey,”513 and when traveling onto another person’s land to collect herbs or materials for a ceremony, one should notify the land user first, as a matter of courtesy and respect.

A Navajo family does not fit the mold of the American nuclear family. Navajo families are extended families; thus, family property means property owned and used in common by all members of an extended family, which may include matrilineal grandparents, aunts, uncles, cousins, siblings, and parents. Property owned and used by a Navajo family includes farm and range lands, fruit trees, farm produce, livestock, corrals, ceremonial hogan, farm equipment, and family constructed resources such as wells and water tanks. Again, family ownership of property under Navajo customs, while still followed in many areas of the Navajo Nation, have been modified by modern Navajo laws, such as grazing regulations, range management regulations, land leasing laws, and American concepts of property ownership.

Farm and range land ‘belongs’ to a family. The dominant Navaho idea of ownership of such land has been well called ‘inherited use-ownership’; that is, the man who ‘owns’ farm or range land can only control it for a limited period, and no ‘owner’ can give away or otherwise alienate land from his family. Furthermore, in this matrilineal society, the

513 Id. at 105-06.
real ‘owners’ are the wife and children, and the husband is hardly more than a trustee for them.

....

The concept of inherited use-ownership applies to some degree to livestock. Every animal in a flock is assigned to some member of the family, but he is not altogether free to sell his animals in quantity in order to buy a car or satisfy some other personal whim. Persons who do so are severely criticized.

Even young children have their own animals with private earmarks. ... Yet there is subtly implanted in him the notion that the family — not the giver, but the family as a whole — retains the right of ‘eminent domain.’ ... Always it is emphasized that the produce of animals (wool, lambs or kids, milk) is in part for the general use; when necessary it is entirely for the general use.514

Traditionally, individual property encompasses personal property which “consists of clothing, ornaments, saddles, ceremonial equipment, and intangibles such as songs and prayers.”515 The individual property category also includes religious and ceremonial paraphernalia; sacred words; knowledge of Navajo Creation Scripture and Journey Narratives; knowledge of traditional stories (trickster stories); knowledge of herbs and plants; “hard goods” (jewelry, precious stones, etc.); “soft goods” (buckskins, blankets, cloth, baskets, etc.); and personally owned livestock. There are more tangibles that would fall into the category of individual property today.

8. Traditional probate

514 Id. at 106.
515 Id. at 107.
Aged Navajos traditionally distributed their personal property to their children and grandchildren before their deaths. Alternatively, the elderly usually designated through an oral will who should receive what items of their property. The following is a general synopsis of traditional Navajo probate procedure involving individual property.

Much property is buried with the dead. This property is usually selected by the owner before his death, and he often specifies which survivor shall receive this or that saddle or piece of jewelry which is not to be buried with him.

Items that have not been thus disposed of before the burial are parceled out at a meeting of relatives, where the older and closer family connections take the lead in the discussion. When a prosperous man or woman dies the gathering is ordinarily quite large, and includes many who, according to white standards, are very distant kin but who will expect to receive at least some token gift, however, small. ...

There is usually an informal understanding that ceremonial equipment goes to sons or sororal nephews who know how to carry out the appropriate rite. Failing this, the property will be claimed by the nearest relative (including clan members) who can qualify. Some ceremonial equipment, however, especially that connected with Blessing Way, is retained by the immediate family, even in default of practitioners, because it is believed to afford protection to the dwelling and its occupants.  

Individual property, if not accounted for in either a written or oral will, or given away prior to death, is now subject to probate in the Navajo Nation courts.

9. *K’ei* fosters duties and responsibilities

---

516 *Id.* at 108-09.
The Navajo clan system creates extensive responsibilities, duties, and mutual obligations among kin, the Navajo people, and people at large.

Navajos have an ingrained respect for *ke’e*, or kinship. *Ke’e* encompasses extensive responsibilities to others and respect for them. The others include spouses, children, immediate blood relations, clan relations, Navajos in general, and people at large. Even Father Heaven, Mother Earth, and the plants and animals are included.

Navajo families live in groups, with each person having a role for family survival. Men have duties to women, women to men, and parents have responsibilities to their children. The family, which includes extended family members, works as an economic unit. The Navajo clan system, where people trace their lineage through their mothers, is a legal system. Navajo relations and responsibilities to clan members are part of a sophisticated system that defines rights, duties, and mutual obligations in relationships. Navajos are taught their responsibilities to clan members, which they carry out, and there is a saying that ‘One should act towards others as if they were your relatives.’ Shaming is an important part of discipline, and Navajos say to a wrongdoer, ‘You act as if you had no relatives.’\(^{517}\)

In traditional Navajo society, children are taught duties, responsibilities, and mutual obligations that arise from the extensive *k’ei* network at a young age by their clan mentors using what will be called here the traditional Diné knowledge paradigm. As it is with most Navajo frameworks, the traditional Diné knowledge paradigm relies on the cardinal directions (cardinal directions phenomenon). The cardinal directions phenomenon is significant in Navajo culture because it perpetuates order, stability, and

\(^{517}\) Austin, *ADR and the Navajo Peacemaker Court*, supra note 7, at 10.
predictability and figures prominently in the Navajo version of the creation of the universe. The cardinal directions phenomenon starts with the east.

The following illustrates how Navajos use the cardinal directions phenomenon. The east is associated with the basic element light, the color white, and the sacred mountain Mt. Blanca. The south is associated with the basic element water, the color turquoise, and the sacred mountain Mt. Taylor. The west is associated with the basic element air, the color yellow, and the sacred mountain the San Francisco Peaks. The north is associated with the basic element dust/dirt, the color black, and the sacred mountain Mt. Hesperus.518

The traditional Diné knowledge paradigm defines the duties and responsibilities of clan mentors within the Navajo clan system. In other words, ego’s kin from ego’s four basic clans have duties and responsibilities to instruct ego on the four foundational elements — nitsahakees, nahat’a, ‘iiná, and sihasin — of the Diné Life Way; the intention is to ensure that ego lives life consistent with the Diné Life Way. Again, using the cardinal directions phenomenon, the four basic elements are ordered in this manner: the east is associated with nitsahakees (thought or “the development of awareness, up to the level of planning”519); the south is associated with nahat’a (planning or “action based

518 According to traditional Navajos, the Creator used four basic elements, and the cardinal directions phenomenon, to create everything in the universe. The traditionalists teach that everything in the universe contains four basic elements: light, water, air, and dirt. In this respect, the traditional Navajo and Aristotle share a common theory because Aristotle believed that “all the matter in the universe was made up of four basic elements, earth, air, fire and water.” STEPHEN HAWKING, A BRIEF HISTORY OF TIME 63.

519 SCHWARZ, MOLDED IN THE IMAGE, supra note 238, at 74.
on thought, or the carrying out of plans\(^{520}\); the west is associated with \(’iiná \) (life or “the act of living according to a pattern established by the \(Diyin Diné’e\) (Holy Beings)\(^ {521}\)); and the north is associated with \(sihasin\) (assurance/security or “the confidence, assurance, and security gained from spirituality”\(^ {522}\)).

The traditional Diné knowledge paradigm assigns duties and responsibilities for ego’s learning to each of the four basic clans using the cardinal directions phenomenon to identify clans and their distinct responsibilities: the east is associated with the mother’s clan, which has the duty and responsibility of training the child in \(nitsahakees\); the south is associated with the father’s clan (born-for clan), which has the duty and responsibility of teaching the child on \(nahat’a\) or “to instruct children in the proper order of the world”\(^ {523}\); the west is associated with the maternal grandfather’s clan, which has the duty and responsibility of instructing the child on \(’iina\) or “in the proper pattern of life according to the Navajo way”\(^ {524}\); and the north is associated with the paternal grandfather’s clan, which has the duty and responsibility of instructing the child on \(sihasin\) or on “spirituality” and “ceremonial matters.”\(^ {525}\) The traditional Diné knowledge paradigm applies to several other areas of Navajo philosophy and teachings, but is used here to demonstrate the allocation of duties and responsibilities among clan kin, where each foundational element of the Diné Life Way is identified with a clan and a cardinal direction.

\(^{520}\) Id.
\(^{521}\) Id.
\(^{522}\) Id.
\(^{523}\) Id. at 76.
\(^{524}\) Id. at 77.
\(^{525}\) Id. at 77, 78.
The clan duties and responsibilities outlined here have been neglected to some extent in modern times because the Navajo extended family has lost some cohesiveness, especially in families where members have relocated to urban areas or have moved from extended family homesteads to distant Navajo Nation towns. Western culture is also changing Navajo thought and culture, such that some of the old ways are no longer followed or have been undermined by Western ways. A study of Navajos published over seventy years ago suggests that white society should take time to understand Navajo culture and allow the Navajo people to solve their problems using their own standards and principles.

Human groups that have different cultures and social structures have moral systems that differ [from Western culture] in important respects. The linkage is so great that when a social organization goes to pieces morality also disintegrates.

For every way of life is a structure — not a haphazard collection of all the different physically possible and functionally effective patterns of belief and action but an interdependent system with all its patterns segregated and arranged in a manner which is felt, not thought, to be appropriate. If we wish to understand The People in the world today, we must remember that, like ourselves, they meet their problems not only with the techniques and the reason at their disposal but also in terms of their sentiments, of their standards, of their own hierarchy of values, of their implicit premises about their world. 526 (emphasis in original).

In the traditional Navajo world, the k’ei doctrine regulated descent relationships through the clan system, determined Navajo identity, and established duties, responsibilities, and mutual obligations among kin and among non-kin. The k’ei and k’e doctrines are closely related, but they can be distinguished this way: k’e is chiefly concerned with both kinship and non-kinship solidarity, while k’ei is concerned only with solidarity among clan relatives. The k’ei doctrine provides the traditional values that regulate the whole of domestic relations in Navajo society which includes marriage, divorce, property classifications, and probate. The modern Navajo Nation courts use these same traditional values to decide domestic relations, although they have at times modified the values to fit modern conditions.

B. K’ei as Used in the Navajo Nation Courts

The Navajo Nation courts have assumed a tremendous responsibility by being more than a dispute resolution institution. Ample credit goes to the Navajo judges, past and present, for preserving Navajo customs and traditions in court opinions and by instructing the public on Navajo common law and their utility. The use of Navajo common law in a Western-styled Navajo court system took root in the early days of the Navajo Court of Indian Offenses. When the Navajo judges of the Navajo CFR Court applied Navajo common law, they masked them with Anglo-American legal terminology to subvert the Indian agent who reviewed their decisions.527

527 Different offenses simply became “disorderly conduct” and offenders were “punished” with stern lectures by headmen according to the Navajo way. VICENTI ET AL., DINÉ BIBEE HAZ’AANII, supra note 32, at 124, 126-27, 213, 214.
Publication of Navajo Nation court decisions, starting with the 1969 decisions, made Navajo common law widely available to the public, legal practitioners, and scholars. By the middle 1980’s, a body of scholarship on the Navajo Nation courts and Navajo common law, and on American Indian tribal courts and American Indian common law in general, had emerged and has since burgeoned. The Navajo Nation Judicial System leads the movement on using native values, customs, and traditions to build Indian nations and to strengthen Indian nation sovereignty and self-determination, while revitalizing and preserving the Diné Life Way for future Navajo generations.

The Navajo Nation courts frequently rely on domestic relations cases to showcase Navajo common law and thinking from Navajo perspectives. The heart of Navajo domestic relations law is the clan system, which in turn is a legal system, because it “defines rights, duties, and mutual obligations in relationships.” The Navajo Nation Supreme Court declared in Naize v. Naize that “[t]he Navajo People’s segmentary lineage system (clanship system) is the foundation of Navajo Nation domestic relations law. The system itself is law.”

A fundamental rule in Navajo society, and a lesson learned early in life, is that every Navajo must know his or her clans and linked clans, because they “are essential to

---

528 See as examples, James W. Zion, The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New, 11 AM. INDIAN L. REV 89 (1983) [hereinafter Zion, The Navajo Peacemaker Court]; Taylor, Modern Practice in the Indian Courts, supra note 78.

529 Austin, ADR and the Navajo Peacemaker Court, supra note 7, at 10 (“The Navajo clan system, where people trace their lineage through their mothers, is a legal system”); Tso, Moral principles, supra note 307, at 17 (“The clan system is in fact a legal system where rights and responsibilities are enforced by clan members”).

530 7 Nav. Rptr. 269, 271.
a Navajo’s identity and must be known for Navajo religious ceremonies. One must know them to seek *hozho* (harmony and peace).”\(^{531}\) The traditional Navajo belief that the clan system is central and indispensable to Navajo culture has been incorporated into Navajo Nation court decisions.

It must also be understood that the Navajo clan system is very important, with a child being of the mother’s clan and ‘born for’ the father’s clan. The clan is important, and the family as an economic unit is vital. The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters, and all the members of the family group have important duties to each other. These duties are based on the need to survive and upon very important religious values which command each to support each other and the group.\(^{532}\)

The home (*hooghan*) and family, including extended family members, and everything that a Navajo family needs to live life according to the Diné Life Way fall into the domestic relations category. In *Davis v. Means*, the Navajo Nation Supreme Court restated the traditional Navajo view that “[t]he family is the core of Navajo society. Thus, family cohesion is a fundamental tenet of the Navajo People. It is Navajo customary law — *Diné Bi Beehaz’aanii* — or Navajo common law.”\(^{533}\)

When the Navajo clan system operates within the context of *hozho*, the home and family become synonymous (called *hooghan haz’aangii*), a perspective common in traditional Navajo thought.

---

\(^{531}\) *Davis v. Means*, 7 Nav. Rptr. at 103.

\(^{532}\) *In re Estate of Apachee*, 4 Nav. Rptr. 178, 182.

\(^{533}\) 7 Nav. Rptr. at 102.
Family cohesion under Navajo common law means there is a father, a mother and children. They comprise the complete initial family unit and are protected as such inside and outside the blessed home (*hooghan*) by the Holy People. The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity.

Navajo common law on the family extends beyond the nuclear family to the child’s grandparents, uncles, aunts and the clan relationships. This is inherent in the Navajo doctrine of *ak’ei* (kinship). ... When the family is complete, there is peace and harmony, which produces beautiful and intelligent children and happiness and prosperity throughout all the relationships. The family is blessed.\(^{534}\)

The Navajo concept of home (*hooghan*) encompasses values important to family, clan relationships, property, descent, education, spirituality, and all things that are essential to and are components of the Diné Life Way. To Navajos, the home “is the center of all Navajo relationships;” it is a place where children are conceived, born, nourished, and educated on *k’e, hozho*, and the *k’ei* system; it is a place “of spiritual centrality.”\(^{535}\) The home is also the source of Navajo Nation sovereignty, because Navajo culture, knowledge, language, spirituality, identity, and all things that compose the Navajo Nation stem out from inside the hogan. The premises stated in this introduction on the *k’ei* doctrine motivate the thinking of the Navajo Nation judges when

---

\(^{534}\) *Id.* at 102-03.

\(^{535}\) Fort Defiance Housing Corp. v. Lowe, No. SC-CV-32-03, slip op. at 3-4; Allen v. Fort Defiance Housing Corp., No. SC-CV-05-05, slip op. at 5 (Nav. Nat. Sup. Ct., Dec. 14, 2005) (a home is “a place of central importance in Navajo thinking” and “a loss of a home deeply affects Navajo concepts of family and spirituality”).
they handle domestic relations cases, particularly those concerning marriage, divorce, children, and property.

1. Marriage

Traditionally, one major function of the Navajo clan system is the regulation of marriage in Navajo society, or as Witherspoon calls it “exogamy.” In the main, marriage between clan relatives and relatives through linked clans are prohibited. Some of the traditional marriage prohibitions, particularly marriage between clan relatives, have been codified in the Navajo Nation Domestic Relations Code.

Another traditional Navajo practice, although not the norm, was where a man was said “to have more than one wife”; the women were usually sisters. Under a traditional analysis, the conclusion that a Navajo man has “two wives” is inaccurate because by custom a man (or woman) could marry in a traditional wedding ceremony only once in a lifetime. Moreover, by custom a man could not marry another woman while he was still married to his present wife. The man who is said to have “two wives” usually carried on an extra-marital relationship with the second woman, and since he cannot marry her, she was not really his wife under Navajo common law. The old custom that a man (or woman) could only marry in a traditional Navajo marriage ceremony once in a lifetime is not necessarily followed today as people marry in a traditional marriage ceremony, get divorced, and then marry again in another traditional marriage ceremony.

536 Witherspoon, Navajo Kinship and Marriage, supra note 217, at 41, 43.
537 9 N.N.C. §§ 2(B), 5(D), 5(E).
538 According to Kluckhohn and Leighton, in one geographic area they studied, “seven out of about 100 married men have more than one wife. In general, plural marriages are associated with higher economic status.” Kluckhohn & Leighton, The Navajo, supra note 9, at 100-01.
On two separate occasions, in 1944 and 1945, the Navajo Tribal Council passed resolutions prohibiting plural marriage.\textsuperscript{539} The resolution must have pleased officials of the Bureau of Indian Affairs and the Christian missionaries because they had been combating “plural marriage” among the Navajo people at least since the Bureau outlawed the practice among Indian tribes in 1883.\textsuperscript{540} Nonetheless, the Tribal Council seems to have passed the resolutions because Navajo elders were concerned about young people ignoring longstanding marriage customs.\textsuperscript{541}

In 1940, the Navajo Tribal Council started to regulate marriage on the Navajo Nation by establishing marriage guidelines and requiring marriage licenses of Navajos who married the old way.

\textsuperscript{539} 9 N.N.C. § 2 (2005): “All plural marriages contracted, whether or not in accordance with Navajo custom, shall be void and prohibited.” The 1945 law states as follows: “[A]ll plural marriages contracted after the approval of this resolution, whether or not in accordance with tribal custom, shall be void.” 1922-1951 Resolutions, p. 86, July 12, 1945.

\textsuperscript{540} KLUCKHOHN & LEIGHTON, THE NAVAJO, supra note 9, at 100. The August 27, 1892 Rules for Indian Courts, which is a repeat of the 1883 CFR Court Rules, promulgated by the Bureau of Indian Affairs contained a provision, Section 4(b), that outlawed plural marriage among all Indian tribes:

(b) Plural or polygamous marriages. — Any Indian under the supervision of a United States Indian agent who shall hereinafter contract or enter into any plural or polygamous marriage shall be deemed guilty of an offense, and upon conviction thereof shall pay a fine of not less than twenty nor more than fifty dollars, or work at hard labor for not less than twenty nor more than sixty days, or both, at the discretion of the court; and so long as the person shall continue in such unlawful relation he shall forfeit all right to receive rations from the Government.

DOCUMENTS OF UNITED STATES INDIAN POLICY, supra note 93, at 187. Section 4(b) applied to the Navajo people with enforcement authority reserved in the Navajo Court of Indian Offenses, which started operation in Navajo Country in 1892.

\textsuperscript{541} “[T]he Tribal Council expresses its displeasure of plural marriages among our younger people and any plural marriage consummated after this date shall be void and the parties thereto shall be subject to fine ... not to exceed $30.00 and ... imprisonment ... not to exceed 30 days or both.” 1922-1951 Resolutions, p. 84, July 18, 1944.
Three kinds of marriage ceremonies are recognized by the tribe, namely, State, Church, and ‘Tribal Custom.’ While the majority of Navajos who have the advantage of an education prefer church or state marriages, the overwhelming majority of those who have not been to school are married by tribal custom. ... The definition of the tribal custom marriage is vague; these marriages are seldom recorded, and many common law marriages are frequently termed tribal custom marriages[.]

The Tribal Council then set forth procedures for a traditional Navajo wedding ceremony stating “that in tribal custom marriages the following rites shall be observed.” After setting forth procedures for the traditional Navajo marriage, the Tribal Council enacted a

---

542 Navajo Tribal Council Resolution No. CJ-2-40 (June 3, 1940).
543 Id., Resolved Clause No. 1. These are the rites that had to be observed:
(1) The parties to the proposed marriage shall have met and agreed to marry.
(2) The parents of the man [shall] ask the parents of the woman for her hand in marriage.
(3) The parents agree, the date is set, and the marriage ceremony is performed as follows:
   (1) The ceremony is held in the hogan of the bride’s parents.
   (2) The bridegroom pours water into the outstretched hands of the bride; she does likewise for him.
   (3) The bride and bridegroom then eat cornmeal mush out of the sacred basket.
   (4) Those assembled in the hogan then give advice for a happy marriage to the bride and groom.
   (5) Gifts may or may not be exchanged.

The 1940 law is the source for the modern description of the traditional marriage set forth at 9 N.N.C. § 4(D). Again, when a couple marries in a traditional wedding ceremony, the validity of their marriage is never questioned, because the ceremony itself validates the marriage.
marriage license requirement and mandated that traditional marriages shall “be recorded in the tribal census rolls” in Window Rock, Arizona.\textsuperscript{544}

In 1954, the Tribal Council passed another law requiring the Navajo Nation courts to validate all traditional marriages that took place on or before January 31, 1954 as legal.\textsuperscript{545} An additional purpose of the 1954 law obviously was to encourage Navajos who married the old way to obtain marriage licenses from then on. Nonetheless, while Navajos who married according to Western ways obtained marriage licenses, the majority of Navajos who were married by the traditional wedding ceremony did not obtain marriage licenses, in spite of the 1940 and 1954 laws, because under the traditional view “the performance of the ceremony completely validates the union.”\textsuperscript{546} However, as the following case illustrates, the failure to obtain a marriage license in an increasingly Western influenced Navajo world posed problems for Navajos who sought federal government benefits (e.g., social security and veteran’s benefits) for their dependents.

The facts in the case of \textit{In re Marriage of Daw}\textsuperscript{547} are as follows: Helen and Jerry Daw were married in a traditional Navajo wedding ceremony on September 24, 1964. While they registered their marriage with the Agency Census Office, they did not obtain a marriage license. Their community recognized them as married. The couple had two children. On June 8, 1967, Jerry Daw was killed in action in Vietnam. Without a marriage license, the Veterans Administration could not substantiate the couple’s

\begin{itemize}
\item \textsuperscript{544} \textit{Id.}, Resolved Clause No. 2.
\item \textsuperscript{545} Navajo Tribal Council Resolution No. CF-2-54 (Feb. 11, 1954).
\item \textsuperscript{546} In re Validation of Marriage of Francisco, 6 Nav. Rptr. 134, 136.
\item \textsuperscript{547} 1 Nav. Rptr. 1.
\end{itemize}
marriage and refused to pay benefits to the surviving dependents.\textsuperscript{548} The Navajo court was asked to decide whether the Daws’ custom marriage could be validated in spite of the 1954 law which required all Navajos who marry by custom after its effective date to obtain a marriage license. The court validated the union because after January 31, 1954 all traditional marriages not accompanied by a marriage license were “common law marriages,” and the Tribal Council in 1954 did not expressly outlaw “common law marriages after that date.”\textsuperscript{549} To arrive at its holding, the Court read the statute requiring a marriage license as directory, rather than mandatory.\textsuperscript{550}

When the Court in \textit{Daw} said “common law marriage,” it was obviously referring to the Anglo form of common law marriage. The Court could have still validated the Daws’ marriage by recognizing the custom marriage as lawful (instead of treating it as a common law marriage) and then construing the license requirement of the statute as directory and not mandatory as it did, because the Tribal Council had not explicitly outlawed custom marriage in the 1954 law. Nonetheless, whether the Tribal Council intended it or not, the Anglo form of common law marriage entered Navajo Nation marriage law through judicial fiat in \textit{Daw}.

The holding in \textit{Daw} was reaffirmed in a 1979 decision when the Court held that “any marriage contracted by tribal custom after January 31, 1954 may not be validated by the tribal court but is recognized as a common law marriage.”\textsuperscript{551} The Court revisited the

\textsuperscript{548} \textit{Id.} at 1-2.  
\textsuperscript{549} \textit{Id.} at 3.  
\textsuperscript{550} \textit{Id.}  
\textsuperscript{551} In re Validation of Marriage of Ketchum, 2 Nav. Rptr. 102, 105 (1979). In \textit{Ketchum}, the parties had a traditional Navajo wedding ceremony in 1974, but did not
common law marriage issue in 1988, this time in the context of the husband-wife testimonial privilege in a criminal case. The Court relied on the *Ketchum* decision to announce that “[r]elationships commonly referred to as common-law marriages have been recognized as marriages within the Navajo Nation.”

Anglo-styled common law marriage appeared to be alive and well in the Navajo Nation until the Navajo Nation Supreme Court decided *In re Validation of Marriage of Francisco* in 1989. The facts of the case are these: Loretta Francisco, a Navajo, and Oliver Chaca, a Hopi, lived together and held themselves out to the community as married up to the time of Chaca’s death. The couple talked of marriage but did not participate in any kind of marriage ceremony (Navajo or state) and they did not have a marriage license. Francisco attempted to claim life insurance proceeds as Chaca’s surviving spouse but was denied. At the time of Chaca’s death, Navajo Nation law required that marriages of Navajos and non-Navajos had to comply with state or foreign law to be recognized as valid in the Navajo Nation. The trial court ruled that Arizona, the couple’s state of residence, did not recognize common law marriage so it refused to validate Francisco’s common law marriage.

---

552 Navajo Nation v. Murphy, 6 Nav. Rptr. 10, 13 (1988).
553 6 Nav. Rptr. 134.
554 *Id.* at 134-35. The “mixed marriages” statute stated as follows: “Marriages between Navajos and non-Navajos may be validly contracted only by the parties complying with applicable state or foreign law.” 9 N.N.C. § 2 (1977)(rescinded by
The Navajo Nation Supreme Court in *Francisco* relied on Navajo marriage customs, instead of statutory law, to affirm the trial court. In the course of holding that Navajo common law did not recognize common law marriage, the Supreme Court explained as follows:

Navajo custom does not recognize common-law marriage, regardless of whether one or both spouses are Navajos. Navajo tradition and custom do not recognize common-law marriage; therefore, this Court overrules all prior rulings that Navajo courts can validate unlicensed marriages in which no Navajo traditional ceremony occurred. For the same reason, this Court will not construe any section of Title 9 of the Navajo Tribal Code as authorizing judicial validation of common-law marriages. To enhance Navajo sovereignty, preserve Navajo marriage tradition, and protect those who adhere to it, Navajo courts will validate unlicensed Navajo traditional marriages between Navajos. For these reasons, the district court’s refusal to validate the alleged common-law marriage between Chaca and Francisco is affirmed. (citation omitted).\(^{555}\)

The revered status that marriage holds in traditional Navajo society precludes common law marriage. The Navajo wedding ceremony comes from Changing Woman who taught it to the Navajo people during the episode called the Recreation of the Diné.\(^{556}\) Traditional Navajos believe that the Navajo wedding ceremony and the resultant

\[^{555}\text{6 Nav. Rptr. at 139. The prior rulings that the Court refers to are found in }\text{Daw, 1 Nav. Rptr. 1; Ketchum, 2 Nav. Rptr. 102; and Murphy, 6 Nav. Rptr. 10.}\]

\[^{556}\text{Aronilth, Foundation of Navajo Culture, supra note 496, at 107; See also RUTH ROESSEL, WOMEN IN NAVAJO SOCIETY 57 (1981)(the Holy People taught the}\]
marriage are sacred. A marriage consummated through a traditional wedding ceremony complies with the laws of the Holy People. The Navajo Nation Supreme Court discussed the sanctity of the traditional Navajo marriage in *Francisco*:

‘Traditional Navajo society places great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the ‘Holy People.’ This blessing ensures that the marriage will be stable, in harmony, and perpetual.’ Under traditional Navajo thought, unmarried couples who live together act immorally because they are said to steal each other. Thus, in traditional Navajo society the Navajo people did not approve of or recognize common-law marriages. (citation omitted).557

The Supreme Court also used the *Francisco* case to fulfill its customary duties as *naat’aanii* (leader) in Navajo society. The Court invoked its customary leadership role and recommended “that the Navajo Tribal Council amend Title 9 of the Navajo Tribal Code so it reflects Navajo regulation and control of domestic relations within Navajo territorial jurisdiction.”558 The Court said the statutory requirement that mixed marriages of Navajos and non-Navajos had to comply with state or foreign law perilously “allows outside law to govern domestic relations within Navajo jurisdiction,” especially when “Navajo domestic relations is the core” of the Navajo Nation’s internal and social

---

557 6 Nav. Rptr. at 135 citing Navajo Nation v. Murphy, 6 Nav. R. at 13.
558 6 Nav. Rptr. at 140. The Navajo people see their judges as *naat’aanii*. Customary leadership protocol requires leaders to plan, communicate, and identify policy that benefit the Navajo people. The Court was fulfilling a customary leadership responsibility when it recommended a Code amendment to the Tribal Council.
relations.\textsuperscript{559} Because Navajo Nation sovereignty is precious, the Navajo Nation must be vigilant of state and foreign laws infringing on Navajo internal affairs.

Such needless relinquishment of sovereignty [by injecting state law into Navajo domestic relations] hurts the Navajo Nation. The Navajo people have always governed their marriage practices, whether the marriage is mixed or not, and must continue to do so to preserve sovereignty. Regulation of marriages, an integral part of the Navajo Nation’s right to govern its territory and protect its citizens, should be free from the reach of state and foreign law. The Navajo Nation must regulate all domestic relations within its jurisdiction if sovereignty has any meaning.\textsuperscript{560}

The Navajo Nation Council heeded the Court’s recommendation and completed a comprehensive revision of the Navajo Nation Marriage Code in 1993.\textsuperscript{561} Most importantly, the Council eliminated the mixed marriages statute, established clear guidelines for contracting marriage, clarified licensing requirements and procedures for validating marriages, and codified some of the traditional prohibitions related to marriage

\textsuperscript{559} Id.
\textsuperscript{560} Id.
\textsuperscript{561} Navajo Nation Council Resolution No. CAP-36-93 (April 23, 1993). The Council, at Whereas Clauses Nos. 3 and 4, stated as follows:

3. The provisions of Title Nine, Chapter One, Navajo Tribal Code, incorporate provisions allowing state and foreign law to govern domestic relations within the Navajo Nation and incorporate principles of law which are alien to Navajo custom and are inconsistent with the practices of the Navajo people; and

4. The Navajo Nation Supreme Court stated, in the decision of In re: Validation of Marriage of Loretta Francisco (A-CV-15-88, August 2, 1989), that provisions of Title Nine have outlived their usefulness and recommended that ‘... the Navajo Nation Council amend Title Nine of the Navajo Tribal Code so that it reflects Navajo regulation and control of domestic relations within Navajo territorial jurisdiction.’ (citation omitted).
of clan relatives. Ironically, while heeding the Court’s suggestion to overhaul the marriage code, the Council overruled the Court’s holding in *Francisco* by explicitly establishing that a common law marriage can be contracted within Navajo Nation jurisdiction.\(^{562}\)

The Navajo Nation Marriage Code allows a marriage to be contracted on the Navajo Nation in any of four ways: 1) parties may marry by signing a Navajo Nation marriage license before two witnesses who have to sign also; 2) parties may marry in any church ceremony; 3) a Navajo Nation judge may marry parties; 4) parties may marry in a traditional Navajo wedding ceremony; and 5) parties may establish a common-law marriage (which is not the same as a traditional Navajo marriage).\(^{563}\) Moreover, a

---

\(^{562}\) The Council recognized common law marriage in the Navajo Nation to ensure that surviving spouses of deceased Navajo uranium miners receive judgments validating their marriages without having to prove a marriage ceremony from half a century or more ago. The resolution states as follows: “Many members of the Navajo Nation who are applicants for benefits under the Radiation Exposure Compensation Act, 42 U.S.C. Section 2210, have encountered serious difficulties in proving their eligibility for benefits as surviving spouses because Title Nine creates unnecessary complexities for proof of a valid marriage under Navajo Law.” Navajo Nation Council Resolution No. CAP-36-93, Whereas Clause No. 5, *supra* note 561.

\(^{563}\) The entire statute, at 9 N.N.C. § 4 (2005), states as follows:

A marriage may be contracted within the Navajo Nation by any of the following procedures:

A. The parties may contract marriage by signing a Navajo Nation marriage license in the presence of two witnesses. The witness shall also sign the license to acknowledge that the license was signed by the parties. In such cases the marriage shall be valid regardless of whether or not a ceremony is held; or

B. The contracting parties may marry according to the rites of any church, in which case they, the officiating clergyman, and two witnesses shall sign in the places provided on the face of the marriage license. The authority to officiate at marriages of any person signing a Navajo Nation marriage license as a clergyman shall not be questioned; or
marriage contracted outside Navajo Nation jurisdiction is valid in the Navajo Nation if valid by the laws of the jurisdiction where contracted. While statutory law now regulates marriage within Navajo Nation jurisdiction, including traditional Navajo marriage, the Navajo Nation Supreme Court, in the future, may have to address the impact of the Diné Fundamental Laws on the statutory recognition of common law marriage.

Some Navajo court decisions hinge on marriage-related issues. In *Navajo Nation v. Murphy*, the criminal defendant claimed a common law marital relationship and

---

C. The contracting parties may be married by any judge of the Navajo Nation Courts where the parties have first signed and completed a marriage license; or

D. The contracting parties engage in a traditional Navajo wedding ceremony which shall have substantially the following features:
1. The parties to the proposed marriage shall have met and agreed to marry;
2. The parents of the man shall ask the parents of the woman for her hand in marriage;
3. The bride and bridegroom eat cornmeal mush out of a sacred basket;
4. Those assembled at the ceremony give advice for a happy marriage to the bride and groom;
5. Gifts may or may not be exchanged;
6. The person officiating or conducting the traditional wedding ceremony shall be authorized to sign the marriage license, or

E. The contracting parties establish a common-law marriage having the following features:
1. Present intention of the parties to be husband and wife;
2. Present consent between the parties to be husband and wife;
3. Actual cohabitation;
4. Actual holding out of the parties within their community to be married.

---

564 9 N.N.C. § 1(A) (2005).
565 1 N.N.C. §§ 201-206.
566 6 Nav. Rptr. 10.
invoked the husband-wife privilege to block his alleged wife’s testimony against him.\textsuperscript{567}

The Supreme Court found that the Anglo medieval basis for the privilege, that the husband and wife are one and the husband was the one, was antithesis to Navajo matrilineal, matrilocal culture which revered the role of women.\textsuperscript{568} Instead, the Court said, a rule designed to “prevent the breakup of a marriage” conforms to traditional Navajo culture.\textsuperscript{569} Thus, the Navajo husband-wife privilege is “justified by Navajo society’s interests in preserving the harmony and sanctity of the marriage relationship.”\textsuperscript{570}

The defendant, however, could not benefit from the privilege because he could not produce sufficient evidence of a common law marriage.\textsuperscript{571}

In the case of \textit{Means v. District Court of Chinle Judicial District}, the Supreme Court stated the traditional view that a male in-law, Navajo or non-Navajo, assumes the status of \textit{hadane} (also spelled \textit{haadaani}).\textsuperscript{572} The Petitioner, Russell Means, a well-known Lakota actor and activists, was charged with criminal offenses arising from domestic violence when he was residing on the Navajo Nation with his Navajo wife. Means was accused of threatening and battery on his father-in-law (an Omaha Indian) and another


\textsuperscript{568} \textit{Id.} at 12-13.

\textsuperscript{569} \textit{Id.} at 13.

\textsuperscript{570} \textit{Id.}

\textsuperscript{571} The parties did not live together and they did not hold themselves out to the community as married. Moreover, the alleged wife identified the defendant as her boyfriend three times. \textit{Id.} at 12-14.

\textsuperscript{572} 7 Nav. Rptr. 383, 392. To clarify (and as stated previously), \textit{haadaani} is a male in-law and \textit{hazha’aad} is a female in-law.
person, a Navajo relative of his wife.\textsuperscript{573} Means argued that the Navajo Nation did not have criminal jurisdiction over him because he was not a member of the Navajo Nation.\textsuperscript{574} At the part of its decision relevant to this discussion, the Court stated as follows:

An individual who marries or has an intimate relationship with a Navajo is a \textit{hadane} (in-law). The Navajo People have \textit{adoone’e} or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the ‘foreign nation’ clans include the ‘Flat Foot-Pima clan,’ the ‘Ute people clan,’ the ‘Zuni clan,’ the ‘Mexican clan,’ and the ‘Mescalero Apache clan.’ See, Saad Ahaah Sinil: Dual Language Navajo-English Dictionary, 3-4 (1986). The list of clans based upon other peoples is not exhaustive. A \textit{hadane} or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. Among those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person).

We find that the petitioner, by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a \textit{hadane}, consented to Navajo Nation criminal jurisdiction. This

\textsuperscript{573} \textit{Id.} at 387.
\textsuperscript{574} \textit{Id.} at 383. The United States Supreme Court held in \textit{Duro v. Reina}, 495 U.S. 676 (1990), that an Indian tribe has criminal jurisdiction only over its members. In response to \textit{Duro}, Congress amended the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, to state that Indian tribes have inherent powers, “hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Means argued that the “Duro fix” legislation discriminated against him, because “while the Navajo Nation ‘cannot’ prosecute non-Indians, the Nation is trying to prosecute [him] as a nonmember Indian.” \textit{Means v. District Court of Chinle Judicial District}, 7 Nav. Rptr. at 384.
is not done by ‘adoption’ in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.\textsuperscript{575}

In \textit{Means}, the Navajo Nation Supreme Court relied on Navajo marriage customs and clan relationships to find criminal jurisdiction over a nonmember Indian. The Court also found that the 1868 Navajo Treaty, Article II (which set aside the Navajo Reservation for the exclusive use of Navajos and other Indians as the Navajo Nation and federal government may admit) reserved to the Navajo Nation criminal jurisdiction over nonmember Indians.\textsuperscript{576} Furthermore, the issue of jurisdiction over non-Navajo Indians was specifically discussed during the treaty negotiations.\textsuperscript{577} The Navajos expressed their concerns about other Indians coming into Navajo Country to offend, to which General William T. Sherman, the federal negotiator, replied: “If ... the Utes or Apaches come into your country with bows and arrows and guns you of course can drive them out but must not follow beyond the boundary line.”\textsuperscript{578} Using the “as the Indians understood it” canon of treaty construction, the Navajos understood Sherman to mean that they have the right to punish non-Navajo Indians for committing offenses in their country.\textsuperscript{579} Moreover, the Supreme Court stated: “We understand this canon to mean that we have the authority to interpret the treaty as Navajos understand it today. That includes the knowledge passed

\begin{itemize}
\item \textsuperscript{575} \textit{Id.} at 392-93.
\item \textsuperscript{576} \textit{Id.} at 389-91.
\item \textsuperscript{577} \textit{Id.} at 390-91.
\item \textsuperscript{578} \textit{Id.} at 391.
\item \textsuperscript{579} \textit{Id.}
\end{itemize}
on to us by our ancestors through oral traditions.”580 The Navajo Nation Supreme Court is aware that nearly all interpretations and constructions of Indian treaty provisions have come, not from Indian perspectives, but from Anglo-American perspectives and legal reasoning.

2. Divorce

It is quite unbelievable that a people who overly emphasize the sanctity of marriage and whose traditional marriages are elaborate spiritual ceremonies would have divorce customs as simple as a wife placing her husband’s saddle outside the hogan or a husband announcing “Stone Rolls Out” and walking away.

Descriptions of divorce practices in studies of Navajo customs emphasize the ease with which the marital relation can be terminated. Traditionally there was no formal court action, and a woman had merely to ‘put her husband’s saddle outside the hogan’ to indicate that she had had enough. A man would walk away ‘to look for his horses and never come back,’” or so a recent divorce was described to us.581

The above description fits the customary concept known as yo de yah, which expresses a spouse’s act of separating from the other spouse.582 Here is another description of the so-called traditional Navajo divorce: “Among the people who follow the old laws, the

...
divorce procedure is very simple; the man merely states as he walks out of the hogan: ‘Tse-hah-maz (Stone Rolls Out).”

Under a traditional analysis, the relative ease of the “traditional Navajo divorce” described above does not comport with the *hozho* doctrine, which requires use of formal ceremony to restore parties to *hozho* following significant disruptions in life, such as a marriage breakup. The mere act of walking away from a marriage, which is essential to the *yo de yah* and *tse hah maz* concepts, would not restore the husband, wife or their relatives to *hozho*. The fact that Navajos have a ceremony for every major disharmony in life suggests that in the distant past a traditional, formal divorce ceremony, forgotten now, was available to undo the traditional wedding ceremony. In traditional Navajo ceremonial practice, a ceremony is always available to neutralize the “powers” of a previous ceremony (e.g., a Navajo always has a Blessing Way Ceremony done after undergoing a Protection Way Ceremony).

Whether a traditional divorce ceremony was practiced at one time or not, the Navajo Tribal Council banned customary Navajo divorce in 1940 and, ironically, a day after statutorily legitimizing customary marriage.

Whereas, there has been no action by the Tribal Council to establish a legal way for securing a divorce of marriage by Tribal Custom;

Therefore, Be It Resolved that the Court of Tribal Offenses [meaning Navajo Court of Indian Offenses] is hereby authorized to grant divorces, for cause, for all marriages consummated by Tribal Custom

---

Ceremony; that all such divorces must be recorded in the agency office, and that a certificate of divorce shall be issued by the Tribal Courts; 

....

Be It Further Resolved that no person, married by Tribal Custom, who claims to have been divorced, shall be free to remarry until a Certificate of Divorce has been issued by the Tribal Courts.584

The fact that customary Navajo divorce has been illegal in the Navajo Nation since 1940 has not prevented arguments that the Navajo Nation courts should recognize the termination of customary marriage by customary divorce. In Begay v. Chief,585 a 2005 case, the petitioner sought to have her common law relationship validated as a marriage claiming that her common law husband had divorced his first wife by custom. The following are the facts of the case: In 1978, Jessie Chief and Dorothy Farland were married in a traditional Navajo wedding ceremony. Sometime thereafter, Chief took his saddle and blanket and left Farland. Neither party obtained a divorce decree from a Navajo Nation court. Chief married a second woman and then divorced her by a court divorce decree in 1985. Beginning in 1985, Chief and Julia Begay lived together in a common law relationship; they had one child and operated several businesses together. After Chief and Begay separated, Begay filed a petition to validate their relationship as a common law marriage using the 1993 law that recognizes common law marriage on the Navajo Nation. Chief moved to dismiss the petition arguing that his customary marriage to Farland remained legally valid because it was not ended by a court divorce decree as

584 Navajo Tribal Council Resolution No. CJ-3-40 (June 4, 1940). The last resolved clause is now codified at 9 N.N.C. § 407 (2005) (the words “Tribal Courts” have been replaced with “Courts of the Navajo Nation”).

585 No. SC-CV-08-03.
required by Navajo Nation statutory law. In response, Begay claimed that the Navajo customs of *yo de yah* and *tse ha maz* terminated Chief’s marriage to Farland when he left with his saddle and blanket.\(^{586}\)

The gist of the case depends on whether the Navajo Tribal Council intended to abolish divorce by custom in 1940. Begay argued that the Tribal Council did not fully eliminate customary divorce because the Council’s first enactment in 1940 (section 407) explicitly required a divorce decree issued by a Navajo Nation court to terminate a marriage but a latter statute (section 4(A)) only says “decree” but does not require that it be issued by a Navajo Nation court.\(^{587}\) Would the Council’s failure to explicitly require a court issued decree in the later enactment (1956) mean that it still allows customary divorce? No, said the Court, because in 1977, in the case of *In re Validation of Marriage of Slowman*,\(^{588}\) the Supreme Court held that the Council clearly abolished all customary divorces by statute and that holding controls all subsequent cases arguing for recognition of customary divorce.\(^{589}\)

The Court did not discuss the impact of the 2002 Diné Fundamental Laws on the facts of the *Begay v. Chief* case or on the Court’s prior holding in *Slowman*, especially because the *Slowman* case, which the Court relies on heavily, was decided in 1977.

\(^{586}\) *Id.*  
\(^{587}\) *Id.*, slip op. at 3-4. Begay’s argument implies that a divorce by custom should be treated as a divorce by “decree.”  
\(^{588}\) 1 Nav. Rptr. 141 (1977). In *Slowman*, the surviving petitioner claimed that she had a common law marriage with Slowman, the deceased. The Court held that Slowman did not terminate his prior customary marriage with a court issued divorce decree, as required by statute, so he was not free to remarry the petitioner; thus, the alleged common law marriage could not be validated.  
\(^{589}\) *Begay v. Chief*, No. SC-CV-08-03, slip op. at 5-6.
twenty-eight years earlier. Moreover, the establishment of the Diné Policy Institute at Diné College in 2005, for the specific purpose of implementing and advancing the Diné Fundamental Laws, proves that the Navajo Nation Council wants priority given to traditional values in Navajo governance and decision-making.\textsuperscript{590} The Court also did not ask whether the traditional equity doctrine of \textit{ch’ihónit’i’} (“a way out”) applied to the unique facts of the case, considering that Chief voluntarily left his first marriage with his “saddle and blanket” and then married a second woman whom he divorced by court decree in 1985. Chief’s actions obviously indicate that he believed he had divorced his first wife by Navajo custom or he would not have married the second woman. Moreover, if Chief’s first wife relied on the “customary divorce” and has since remarried, the Court’s holding has cast legal doubt over her remarriage.

Although divorce by custom is now prohibited in the Navajo Nation, the application of two traditional principles, the principle of finality of divorce and the equity principle of \textit{ch’ihónit’i’}, should have resulted in recognition of Chief’s customary divorce. The finality principle, which cuts the ties of the spouses upon divorce, has been stated as follows: “[T]here is a custom of finally terminating a marriage by someone moving, the woman keeping the property when the move is made or the couple making an equal division of marital property before going their own ways.”\textsuperscript{591} The rationale behind the customary principle of finality applies just as much to modern divorces as those from traditional times: “There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally

\textsuperscript{590} See Diné College website: https://www.Dinécollege.edu/ics/
\textsuperscript{591} Apache v. Republic National Life Insurance Co., 3 Nav. Rptr. at 252-53.
breaking ties so the community can soon return to normal is one which is common sense.”\textsuperscript{592}

a. Alimony

While these customs are not strictly followed today and there are exceptions in actual practice, Navajo common law requires the husband to move to the residence area of his wife upon their marriage where they build up marital property and the necessaries of life. The wife’s relatives also benefit from the marriage. If the marriage founders, “customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the marital property stays with the wife and children at their residence for their support and maintenance.”\textsuperscript{593} Although there is no Navajo custom that specifically grants alimony to a spouse, the traditional practice of the husband leaving marital property behind for the support of the wife and children “is akin to modern spousal maintenance.”\textsuperscript{594} The Navajo Nation courts also have equitable authority to award alimony; the rationale for such authority comes from the traditional maxim that one should not “throw one’s family away.”\textsuperscript{595} Because alimony can be justified by Navajo custom and a maxim, the Navajo Nation Supreme

\textsuperscript{592} Id. at 254.
\textsuperscript{593} Naize v. Naize, 7 Nav. Rptr. 269, 271-72. The husband’s act of leaving his wife is the yo de yah concept.
\textsuperscript{594} Id. at 272. In Johnson v. Johnson, 3 Nav. Rptr. 9, 11 (1980), the Court upheld an award of alimony to the ex-wife using New Mexico statutory law stating that there is not a Navajo custom that prevented it from applying state alimony law. Regarding the support of a wife after divorce or desertion of her husband, the Court stated that traditionally the responsibility of support fell on her family. But the facts of the case showed that the wife’s family was not capable of supporting her and that also justified the award of alimony using state law.
\textsuperscript{595} Naize v. Naize, 7 Nav. Rptr. at 271.
Court held that the Navajo Nation courts do not need statutory authorization to award alimony to either spouse.\textsuperscript{596}

In \textit{Sells v. Sells},\textsuperscript{597} a 1986 decision on alimony, the Supreme Court reversed a prior holding that the Navajo Nation courts can use state standards to fix alimony awards in the Navajo Nation. The Court warned that application of state law to issues of Navajo domestic relations would turn the Navajo courts into “mirror images of Anglo courts.”\textsuperscript{598} The Court stressed use of Navajo common law as a way of developing uniform, consistent and predictable Navajo domestic relations law.\textsuperscript{599} The Court also set forth guidelines for the Navajo trial courts to use in “a fair and reasonable manner when awarding alimony.”\textsuperscript{600} The guidelines cover the circumstances of the parties including need, age, means of support, earning capacity, length of marriage, property ownership, health, employment skills, children and their needs, and customary factors.\textsuperscript{601}

In 2005, the Navajo Nation Supreme Court established the rule that monthly interest can be applied to unpaid alimony payments.\textsuperscript{602} The Court’s reasons for allowing interest on alimony arrearages are similar to awarding interest on unpaid child support

\textsuperscript{596} \textit{Id.} at 272. The Court also said, Navajo laws “require our courts to apply Navajo common law equally to both spouses when addressing spousal maintenance issues.” \textit{Id.} In \textit{Yazzie v. Yazzie}, 7 Nav. Rptr. 33, 34 (1992), the Court held that a trial court cannot modify an alimony award on its own. A party seeking to modify alimony must show changed circumstances that are substantial and continuing. Also, despite the passage of time (ten years), all unpaid alimony must be brought current. \textit{Id.} at 36.

\textsuperscript{597} 5 Nav. Rptr. 105 (1986).

\textsuperscript{598} \textit{Id.} at 107.

\textsuperscript{599} \textit{Id.} at 108.

\textsuperscript{600} \textit{Id.} at 106.

\textsuperscript{601} \textit{Id.}

payments. The Court did not see a “reason to treat spousal support differently from child support. Both provide necessary support, and the award of interest creates the same incentive to make the important payments.” The Court held that the interest rate on spousal support arrearages will be the same as for child support, which is presently 10% calculated monthly. To date the Navajo Nation Council has not enacted a statute on alimony in the Navajo Nation.

b. Child custody and support

In Navajo society, children are not viewed as property or possessions, but are viewed as “individuals in a community.” There is “a fundamental belief that children are wanted and must not be mistreated in any way.” Navajo children “are central to the Navajo family and clan, and in the event of family breakup, it is a Navajo court’s duty to fully provide for the needs of the children, utilizing all available resources of the parents.”

In Lente v. Notah, a case involving a change of custody request after a divorce, the mother argued that “Navajo custom requires that she be given custody of the child, since Navajo children belong to their mother’s clan.” The Court agreed that the

---

604 Watson v. Watson, No. SC-CV-45-03, slip op. at 3.
605 Id., slip op. at 3.
607 Id. at 396.
608 Id.
609 3 Nav. Rptr. 72, 73. Before a child custody order is modified, the requesting party must “show a substantial change of circumstances.” Barber v. Barber, 5 Nav. R. 9, 12 (1984)(quoting Lente). The substantial change of circumstances standard was revised to allow a lesser standard in the 1994 Navajo Nation Child Support Enforcement Act,
mother correctly stated the general customary law on child custody, but qualified its statement as follows:

The danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place; Old customs and practices may be followed by the individuals involved in a case or not; There may be a dispute as to what the custom is and how it is applied; or, A tradition of the Navajo may have so fallen out of use that it cannot any longer be considered a ‘custom.’

The Court also stated that the general custom on child custody has traditional exceptions, but they are “rare and ... must be approved by everyone concerned, especially the head mothers.” But when it comes to modern child custody litigation, “custom is only one of many factors” to be considered and a “trial judge may be justified in disregarding old ways,” which will be upheld on review unless there is a clear abuse of discretion. The Court announced that when the Navajo Nation courts consider child custody factors, the child’s best interests should be the guiding standard.

---

which requires only “a showing of a change of circumstances.” 9 N.N.C. § 1708(F) (2005); See also Yazzie v. Yazzie, 7 Nav. Rptr. at 206.

Lente v. Notah, 3 Nav. Rptr. at 79-80.

Id. at 81. The “head mothers” are the clan matriarchs.

Id.

Id. at 77; Barber v. Barber, 5 Nav. Rptr. 9 (the party requesting a change of child custody has the burden to prove that change of custody is in the best interests of the children; the court must act as the child’s parent and act in the best interests of the child); Sombrero v. Honorable Keahnie-Sanford, No. SC-CV-41-02 (Nav. Nat. Sup. Ct., Sept. 15, 2003)(child’s best interests may require appointment of a guardian ad litem; child’s best interests require continuation of temporary child support). Other cases discussing the child’s best interests standard include Nez v. Nez, 7 Nav. Rptr. 25 (1992); Alonzo v.
In *Goldtooth v. Goldtooth*, the trial court found that granting the parents joint custody of their children was in the best interests of the children. The court looked to Navajo customs and traditions to find that children maintain strong relationships with extended family members so that joint custody of children is a common, traditional practice in Navajo society.

This court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular, children are considered members of the mother’s clan. While that fact could be used as an element of preference in a child custody case, the court wants to point out that the primary consideration is the child’s strong relationship to members of an extended family. Because of those strong ties, children frequently live with various members of the family without injury. ... Therefore, the court looks to that tradition and holds that it must consider the children’s place in the entire extended family in order to make a judgment based upon Navajo traditional law.

Using Navajo common law, “reinforced by modern principles of child psychology,” the trial court held that the best interests of the children “require an award of joint custody to their parents.” While the traditional child custody rule that favors the mother is still

---


*Id.* at 223, 227 (Window Rock Dist. Ct. 1982).

*Id.* at 226.

*Id.* at 227; *Pavenyouma v. Goldtooth*, 5 Nav. Rptr. 17 (1984)(in this case, the court found the reasoning in *Goldtooth v. Goldtooth* persuasive and awarded the parents joint custody of their children).
available to litigants, Goldtooth’s joint custody rule now dominates child custody decisions.

In the area of paternity, the Navajo Nation Supreme Court recognizes that Navajo common law is consistent with the universal presumption that a child born to a married woman “is considered the issue of that marriage.” 617 The Court also recognizes the customary rule that “Navajo women have equal status with Navajo men to participate in decisions affecting family and tribe.” 618 Thus, Navajo common law recognizes a wife’s standing to deny that her husband is her child’s father. 619

Where questions surround the child’s paternity, a putative father cannot be granted parental rights such as custody; nor can he be required to fulfill parental obligations.

Mere claim of biological parenthood is not enough to entitle a parent to child custody. The best interests of a child are paramount in custody decisions and a determination of paternity. We decide today that a Navajo court lacks jurisdiction to grant a putative father custody of minors in a temporary protection order without a legal determination establishing paternity and a parent-child relationship. In this regard, not even a putative father has standing to request custody. A paternity determination is a legal precondition in granting custody to a putative parent. 620

In custody dispute cases where parents are not adequately protecting the rights of their child, Navajo common law grants the child a right to be heard if he is of sufficient

618 Id. at 171.
619 Id.
age and maturity.\footnote{621}{In re Custody of T.M., No. SC-CV-58-98 (Nav. Nat. Sup. Ct., March 5, 2001).} The rule derives from two customs and a maxim: “[E]veryone has a right to be heard at a meaningful time and in a meaningful way”; “Navajos have a right to speak for themselves”; and the maxim, “It’s up to him.”\footnote{622}{Id., slip op. at 7-8. The maxim, “It’s up to him,” means the person should be consulted before actions affecting his interests are undertaken. \textit{Id.}} On the child’s right, the Navajo Nation Supreme Court proclaimed that “under proper circumstances a child may intervene in an action between his or her parents where that child’s rights or interests are affected.”\footnote{623}{Id., slip op. at 7.} Before making the discretionary decision of whether to grant the child his right to be heard, the trial court must examine “the child’s best interests and whether the child’s interests are adequately represented by the existing parties.”\footnote{624}{Id.} Moreover, the Court found that “the provisions of Article 12 of the Convention on the Rights of the Child mirror Navajo common law.”\footnote{625}{Id.}

The fundamental Navajo custom that obligates a father to support his children is the basis of all Navajo Nation court decisions on child support, including child support

\footnote{621}{In re Custody of T.M., No. SC-CV-58-98 (Nav. Nat. Sup. Ct., March 5, 2001).} \footnote{622}{Id., slip op. at 7-8. The maxim, “It’s up to him,” means the person should be consulted before actions affecting his interests are undertaken. \textit{Id.}} \footnote{623}{Id., slip op. at 7.} \footnote{624}{Id.} \footnote{625}{\textit{Id.} Article 12 states as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules or national law.

The Convention on the Rights of the Child, United Nations General Assembly Resolution No. 44/25 (Nov. 20, 1989).}
decisions concerning paternity actions. The custom on the support of children was aptly stated in a 1983 Navajo appellate court decision:

It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least its mother, the duty of support. It is said that if a man has a child by a woman and fails to pay the woman money to support it, ‘He has stolen the child.’ In other words, the man who receives the benefit and joy of having a child is a thief if he does not share in the worldly burdens of taking care of it. This Navajo custom lays the ground rule of support, and the conclusion to be drawn from the principle given is that a man must pay as much as is necessary for the child, given his abilities and resources at any given time.626

In a 2001 decision, the Navajo Nation Supreme Court decided a case that illustrates what Navajos mean when they say the father “has stolen the child.”627 In that case, the father did not marry his child’s mother, support his daughter, or participate in her life, but when she died he filed a claim for part of the insurance proceeds awarded for her death.628 In the course of finding that the father had no connection to his daughter, the Court stated as follows:

[The father] had no claim because he provided little or no care or support for his own daughter. As the Navajo common law maxim states, ‘he just stole the child.’ Tom v. Tom, 4 Nav. R. 12, 13 (Ct. App. 1983). Viewed as either a Navajo common law case or one arising in equity, this father simply sought to benefit from his child’s death. He did not even attend

626 Tom v. Tom, 4 Nav. Rptr. 12, 13 (1983).
628 Id., slip op. at 3, 8.
her birth, nor give material or emotional support to her, nor seek to be a part of her life.

Although the father had every opportunity to be with his child, and reasonable demands were made upon him for child support, he simply was not around. As Judge Tom Tso so aptly stated in *Apache v. Republic National Life Insurance Company*, this man hid behind the hogan waiting for the corn crop to be harvested, when he did nothing to help grow that crop. 3 Nav. R. 250, 254 (Window Rock Dist. Ct. 1982). The conclusion that someone cannot benefit from the work of others without contributing to the end product is a matter of common sense, and our rules of Navajo common law are, at end, ‘Navajo common sense.’

The Navajo Nation Supreme Court reaffirmed *Tom’s* Navajo common law rule on the father’s absolute obligation to support his children in *Notah v. Francis*. *Tom’s* absolute duty rule was also used to deny the father’s argument that the statute of limitations barred the mother’s petition to collect unpaid child support: “[C]hild support is not a right of the mother to payments, which may be waived if the mother does not assert it within a given time, but an obligation of the father to the child, continuing for as long as the child needs that support.” On the in-kind contributions that the father made in lieu of money payments, the Court held that “in-kind contributions may be credited to child support payments when allowed by the court, or when both parties consent to the substitution,” but the original court order must be modified to allow those

---

629 *Id.*, slip op. at 8.
630 5 Nav. Rptr. 147, 148.
631 *Id.* at 148.
In addition, it has been held that the Navajo Nation courts can assess monthly interest on unpaid child support “as an incentive for” timely payments.\textsuperscript{633}

In the 1988 case of \textit{Descheenie v. Mariano}, the Supreme Court again affirmed Tom’s Navajo common law rule on child support, but also extended the rule to both parents: “Navajo custom obligates each Navajo parent to provide for the support of his or her child.”\textsuperscript{634} The Court then described what is expected of each parent to fulfill their child support obligations.

Navajo custom also requires each parent to contribute his or her reasonable share toward the child’s support, according to each parent’s income and resources. The support award can be consistent with the lifestyle the child is accustomed to. However, the awarding court must not order a parent to pay so much child support that the parent has insufficient money to live on. A court must make child support awards such that each parent bears an appropriate amount of responsibility for the child, while keeping in mind that for the child to prosper, the parents also must prosper. (citations omitted).\textsuperscript{635}

Because statutory guidelines were not available, the Supreme Court used the \textit{Descheenie} decision to establish a general formula for the trial courts to use to fix the amount of each parent’s child support responsibility. The formula accounts for each parent’s net earnings, adjustment of mandatory expenses, and the reasonable needs of the child.\textsuperscript{636}

\begin{itemize}
  \item \textsuperscript{632} \textit{Id.} at 150.
  \item \textsuperscript{633} \textit{Yazzie v. Yazzie}, 7 Nav. Rptr. at 205-06 (the Court also set forth a formula for calculating interest on unpaid child support amounts).
  \item \textsuperscript{634} 6 Nav. Rptr. 26, 27.
  \item \textsuperscript{635} \textit{Id.} at 27-28.
  \item \textsuperscript{636} \textit{Id.} at 28-29.
\end{itemize}
The 1994 Navajo Nation Child Support Enforcement Act now contains the statutory guidelines for determining child support obligations on the Navajo Nation.

The Court in Descheenie also addressed the issue of back child support in paternity cases. Although the Court recognized the parents’ obligations to support their children, it found that unique circumstances existing on the Navajo Nation made an award of back child support in paternity actions “inappropriate and unenforceable.”

Three factors influenced the Court’s decision. First, no statute that authorized back child support in paternity cases existed; thus, to order a father to pay back child support, which he has “no legal duty to do originally,” would violate his right to due notice. Second, few parents keep receipts of purchases made or money spent on children, so any attempt to determine past child support “would plunge the district court into a quagmire of speculation,” particularly where back child support spans several years. Finally, negative economic conditions on the Navajo Nation, including lack of employment opportunities and low per capita income, were not conducive to granting back child support in paternity cases. The Court, however, advised that a paternity action should be filed immediately after the child’s birth so the other parent can be held responsible for the child’s support from an early age.

---

637 9 N.N.C. §§ 1701-1722 (2005). The child support guidelines are set forth at section 1706 and give the Navajo Nation Supreme Court authority to “establish a scale of minimum child support contributions.”

638 Descheenie v. Mariano, 6 Nav. Rptr. at 29.

639 Id.

640 Id. at 29-30.

641 Id. at 30.
No parent will be expected to pay 100% of a child’s expenses. However, if a parent wants the child’s other parent to take responsibility for a portion of the child’s support, that parent must file an action for paternity and support as soon as possible after the child’s birth. In this manner the child will be assured support from an early age. Petitions for paternity and child support cases, like all other lawsuits, take many months and sometimes years to be fully resolved.642

The Navajo Nation Supreme Court upheld Descheenie’s rule that retroactive child support is not permitted in the 2003 case of Leuppe v. Wallace, where the Court was asked to establish the time “when child support payments commence in a paternity action.”643 The Court reasoned that it refused to allow back child support in Descheenie “because of lack of fair notice,” but that was not the case in Leuppe where the father had received “fair notice of the potential to pay child support at the time the paternity action [was] filed against him.”644 Thus, the Court held that a Navajo trial court “may order that child support payments commence anytime after a paternity action is properly filed.”645

The Court in Alonzo v. Martine did not see problems with allowing back child support “where parents have children in marriage,” because under Navajo common law, “children born during a marriage are considered the issue of that marriage.”646

642 Id.
644 Id. at 3.
645 Id.
646 6 Nav. Rptr. at 397.
obligations, so that the due notice problem identified in Descheenie does not arise.\textsuperscript{647} The Supreme Court held that “where parents have children in marriage, back child support may be ordered at the entry of a divorce decree covering the time the noncustodial parent was absent and provided no support.”\textsuperscript{648}

The Window Rock District Court addressed the method by which delinquent child support payments can be collected in \textit{Navajo Tribal Utility Authority v. Foster}, which involved an employer’s refusal to garnish the wages of an employee to pay delinquent child support.\textsuperscript{649} The employer argued that the Navajo Nation did not have a specific statute authorizing garnishment of wages to satisfy unpaid child support.\textsuperscript{650} The trial court rejected the employer’s argument by holding that several Navajo Nation statutes authorize the Navajo Nation courts to order garnishment of wages, and even though the statutes do not contain the “magic word ‘garnishment,’” they allow the courts to order the surrender of property to satisfy a judgment.\textsuperscript{651}

In 1983, the Navajo Nation Supreme Court upheld the power of the Navajo Nation courts to order garnishment of wages specifically for child support.\textsuperscript{652} The Supreme Court limited the trial courts’ garnishment power to child support cases only: “The Courts of the Navajo Nation are not going to allow such equitable remedy as wage

\textsuperscript{647} Id.
\textsuperscript{648} Id. at 398.
\textsuperscript{649} 4 Nav. Rptr. 86 (Window Rock Dist. Ct. 1983).
\textsuperscript{650} Id.
\textsuperscript{651} Id. at 89. The court identified the statutes as 7 N.T.C. § 701(a); 7 N.T.C. § 704; 7 N.T.C. § 706; 7 N.T.C. § 255; and 9 N.T.C. § 1303; In re Interest of Tsosie, 3 Nav. Rptr. 182 (Chinle Dist. Ct. 1981)(Navajo Nation statutes used to satisfy judgments authorize wage garnishment to pay delinquent child support).
\textsuperscript{652} Heredia v. Heredia, 4 Nav. Rptr. 124, 126 (1983).
garnishment for other than child support enforcement.” Thus, the Navajo Nation courts cannot garnish wages to pay judgments that have nothing to do with child support. In 1994, as part of the Navajo Nation Child Support Enforcement Act, the Navajo Nation Council enacted several statutes that authorize the Navajo Nation Office of Hearings and Appeals, an administrative forum, to order wage garnishment for child support purposes. The Child Support Enforcement Act also gives the Navajo Nation Supreme Court review authority to decide alleged errors of law by the Office of Hearings and Appeals.

c. Marital property

The seminal case on Navajo common law property division in a divorce is Apache v. Republic National Life Insurance Co., a 1992 Navajo trial court opinion. The facts in Apache are these: While married, Boyd Apache designated his wife, Rebecca, as the beneficiary on his life insurance policy. Boyd died one month after his wife divorced him, but he did not change the beneficiary designation he had made. The case pitted Rebecca against Boyd’s mother and sister who also claimed the life insurance proceeds. Rebecca claimed the proceeds alleging that an insurance policy is a contract whose terms must be enforced. The mother argued that Rebecca was not entitled to the proceeds because under Navajo common law a divorce terminates all rights of the former spouses to each other’s property.

653 Id. at 127.
654 9 N.N.C. §§ 1712, 1705(F) and 1708(E)(3) (2005).
656 3 Nav. Rptr. at 250.
657 Id. at 250-51.
The trial court set forth the general Navajo customs on property division after a divorce: The spouses keep their premarital property and the wife takes all of the property acquired during the marriage.\(^{658}\) The second method of property division, said the court, allows the couple to “split the blanket” by equally dividing the property acquired during the marriage; however, if the parties cannot agree on an equal division, the wife keeps all the marital property.\(^{659}\) The court summarized the Navajo customs on property division after a divorce as follows:

Under Navajo custom the woman can simply keep the property of the marriage and send the man to his own family, taking only his own property acquired before the marriage. She also has the option of working out an arrangement with the man. In modern times, the woman has the further choice of coming into a court using Anglo-European ways.\(^{660}\)

Navajo common law presumes that the wife owns all the marital property which allows her to either take all the property or agree with the husband to an equal division of the property. Once the wife has made her choice, the Navajo common law doctrine of finality of divorce takes effect. That doctrine, which holds that the divorce cuts all ties of the former spouses, foreclosed the former wife’s claim to the insurance proceeds in the Apache case: “Because Navajo customs show us that there was finality to custom divorces and since the former wife left the husband, leaving property behind her [the

\(^{658}\) Id. at 252.  
\(^{659}\) Id.  
\(^{660}\) Id. at 253.
insurance policy], this court must hold that as a matter of Navajo customary law she
surrendered any further right in the [insurance] policy.” (citation omitted).661

How would the Supreme Court rule when a single Navajo man designates his
non-Navajo girlfriend as the beneficiary on his life insurance policy instead of his
children? In *Gene v. Halifax*, the insured, a divorced Navajo police officer with custody
of his children, designated his non-Navajo Hispanic girlfriend as the beneficiary on his
life insurance policy.662 The insured died in the line of duty.663 When the insurance
company tried to pay the designated beneficiary, the insured’s mother sued claiming that
the insurance proceeds should be paid to her for the benefit of her son’s children.664 The
trial court invalidated the beneficiary designation (because the named beneficiary did not
prove she was the intended beneficiary and she had no meaningful relationship with the
insured) and then applied Navajo common law to award the proceeds to the mother.665
On appeal, the Supreme Court construed the insurance policy as a contract and ruled that
the insured clearly intended his girlfriend to be his beneficiary.

Gene was not an unsophisticated insurance applicant. ... There is no
indication in the record that he had any problems reading or speaking
standard English. The term ‘beneficiary’ is not a mysterious one, and the
insurance application form makes a clear distinction between the
‘dependents to be covered (the children)’ and the ‘beneficiary.’ It is clear

661 *Id.*
663 *Id.* at 3.
664 *Id.* at 3, 5.
665 *Id.* at 5-6. The Navajo common law principles the trial court used state that
“children are central to Navajo life, that there is preference for their support, and that the
children of a decedent ‘should not be forgotten.’” *Id.* at 5.
that Gene intended for Hallifax to be the beneficiary of his life insurance policy. He wrote Hallifax’s name in the ‘beneficiary’ box of the policy application, and he described their relationship [friends] in the adjacent box.666

The Court said, the issue “in insurance cases is the intent of the insured” and, upon finding that Gene intended his beneficiary to be his girlfriend, reversed the trial court’s decision.667

Although the presumption under Navajo common law that favors the wife on marital property was used to defeat the former wife’s claim to the insurance proceeds in Apache, it has not been used in modern divorce decisions to favor the wife over the husband. The present statute that controls division of property in a divorce states as follows: “Each divorce decree shall provide for a fair and just settlement of property rights between the parties[.]”668 This section “does not mandate equal division of community property. It grants the trial court discretion to make unequal divisions of community property.”669 The statute prefers equal division of marital property in divorce cases, but if the trial court allows an unequal division, it must state its reasons for doing so in the divorce decree.670

The Supreme Court established the following guidelines or factors for the trial courts to use if they see a need to divide property unequally between the divorcing spouses: 1) The economic circumstances of each party, including age, health, station in

---

666 Id. at 8.
667 Id. at 10-11.
670 Id. at 162.
life, employment skills, employability, and opportunity to acquire assets; 2) Contribution of the spouses to the marriage; and 3) Duration of the marriage.\textsuperscript{671} Navajo customs on property distribution in a divorce have not been applied in any of the modern divorce decisions of the Navajo Nation courts. The traditional rule cited in \textit{Apache} that favors the wife on property division in a divorce case probably has been nullified by the equal protection clause of the Navajo Nation Bill of Rights.\textsuperscript{672}

3. Probate

Use of Navajo common law predominates in the disposal of estates on the Navajo Nation and the reasons have to do with adherence to cultural norms. Much of Navajo probate practice, including wills, determination of heirs, property definitions, and estate distribution, implicates clan and kin relationships, ancient rules of practice (traditional practice), and religious observance. Even the Navajo Nation Council has abstained from enacting probate laws, thereby, leaving the probation of estates primarily to Navajo common law in the Navajo Nation courts.\textsuperscript{673} The entire Navajo Nation Probate Code

\textsuperscript{671} \textit{Id.}; See also Shorty v. Shorty, 3 Nav. Rptr. 151 (1982)(the guidelines were first established in this case).

\textsuperscript{672} 1 N.N.C. § 3 (2005) states as follows:

Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law. Nor shall such rights be deprived by any bill of attainder or ex post facto law.

In Help v. Silvers, 4 Nav. Rptr. 46 (1983), the Supreme Court held that the equal rights clause prohibits gender-based favoritism. The Court refused to apply the Navajo common law rule that favors a mother over a father in a child custody dispute.

\textsuperscript{673} The Navajo Nation Family Courts have original jurisdiction over probate matters on the Navajo Nation. 8 N.N.C. § 1 (2005).
(Title 8) contains three statutes (jurisdiction; determination of heirs; and approval of wills) whose provisions expressly defer to Navajo customs and traditions for disposal of estates. In fact, when it comes to disposal of estates, many Navajo families still use the old ways instead of the courts.

Some of the general customs on inheritance and the distribution of property of a deceased family member are worth repeating here. Elderly Navajos generally divide all their property among their children, grandchildren, and relatives while they are alive. The intent is to prevent conflicts over property and strife in family relationships after the owner’s death. Tangible items that may be divided by the property owner include jewelry, saddles, rugs, blankets, animals, and land use and grazing permits, and intangible property including songs, prayers, sacred words, and ceremonial practices. The property owner may designate which items of property should be buried with him or her. The property owner may also designate which relative should receive which property after his or her death (the traditional oral will). Family and relatives will gather four days after the funeral to parcel out property that the owner did not distribute while living and to implement the owner’s intent if an oral will has been made.

674 A relevant section, in its entirety, states as follows: “In the determination of heirs the court shall apply the custom of the Navajo Nation as to inheritance if such custom is proved. Otherwise the court shall apply state law in deciding what relatives of the decedent are entitled to be heirs.” 8 N.N.C. § 2(B) (2005). In re Estate of Wauneka, 5 Nav. Rptr. 79, 82 (1986)(“Under our rules Navajo custom, if proven, controls the distribution of intestate property. Custom takes priority even if it conflicts with our rules of probate”).

Wills can be made in accordance with Navajo custom. Navajo custom, if proven, can supersede a provision in a will: A validly executed will shall be given effect, “but no distribution of property shall be made in violation of a proved Navajo custom which restricts the privilege of Navajo Nation members to distribute property by will.” 8 N.N.C. § 3 (2005).
a. Wills

The first recorded Navajo Nation Supreme Court decision on oral wills is the 1971 case of *In re Estate of Lee*, in which the petitioner challenged a probate judgment by claiming that the deceased (his brother) made an oral will that granted him a land use permit and that he witnessed the making of the oral will with his mother and two other brothers. It is a well established custom that a Navajo may orally state who shall have his property after his death when all of his immediate family are present and agree and that such a division will be honored after his death. We know of no other custom in this respect. We hold, therefore, that unless all of the members of his immediate family are present and agree [a] Navajo cannot make an oral will. Since the wife and children were not present when the deceased made the alleged oral will to the petitioner, we hold it was invalid.

Thus, according to Navajo custom, a Navajo oral will is valid if 1) the testator’s immediate family members witness the making of the oral will; and 2) the immediate family members agree to honor the terms of the oral will. The “agreement” requirement

---

675 1 Nav. Rptr. 27, 30 (1971).
676 *Id.* at 28.
677 *Id.* at 31-32. It is common knowledge that Navajos have a custom that has the same effect as an oral will. Thus, the following statement in *In re Estate of Thomas*, 6 Nav. Rptr. 51, 53 (1988), is a misstatement: “We can find no record of testamentary succession, either written or oral, in Navajo custom before the introduction during the middle of this century of the Anglo-American legal concept of succession through designation in a will.”
was clarified in 1988 to mean that “all members of the immediate family agree that the testator orally made known his or her last will before them.”

The clarification dispensed with what earlier appeared to be the need of the immediate family members to unanimously agree to the terms of the oral will, which can become complicated if the family does not cooperate or if the decedent had married more than once and has children from each marriage.

For several years after its decision in In re Estate of Lee, the Navajo Nation Supreme Court struggled to formulate a definition of “immediate family” that would work with different fact patterns. In the case of In re Estate of Benally, the testator made his oral will in the presence of his second wife and their four children, but his children from his first marriage were not present. The trial court ruled that the second wife and the four children constituted the testator’s immediate family and upheld the oral will. The trial court refused to recognize the children from the first marriage as members of the testator’s immediate family. On appeal, the Supreme Court affirmed the trial court’s ruling and offered the following explanation:

We adopt the rule that the children of the decedent’s first marriage, who were not living with the decedent when he died, are not members of the immediate family for the purpose of an oral will.

We are limiting this rule on the immediate family to cases involving oral wills because the Court is mindful of the Navajo concept of

---

678 6 Nav. Rptr. at 53.
680 1 Nav. Rptr. 219, 220 (1978).
681 Id. at 221.
the extended family. This rule is adopted because it would work too great a hardship on the Navajo People to require the presence of all who might be considered immediate family by the Navajo extended family concept. Since many Navajo[s] cannot write, cannot afford to have an attorney write a will, and do not understand the concept of a written will, [it] is important that there be some alternative method by which a person may devise his property.682

The Supreme Court also declined to adopt the Dead Man’s Act: “The effect of the application of the Dead Man’s Act would be to invalidate all oral wills as the immediate family could not testify. ... We decline to impose a rule of law that would make it impossible to make an oral will.”683 Because there is no Dead Man’s Act prohibiting testimony, the party disputing the oral will has ample opportunity to cross-examine the immediate family members on the making of an oral will.684

In the case of In re Estate of Thomas, the testator had eight children but made his oral will in the presence of only two sons who resided with him.685 The other six children did not reside with the testator and did not witness the execution. The trial court found that the two sons residing with the testator were his immediate family and validated the oral will. The Supreme Court reversed holding that “the immediate family includes all of the children of the testator and the spouse if alive.”686 The Court overruled the part of

---

682 Id. at 222-23.
683 Id. at 224. A Dead Man’s Act prohibits admission of a decedent’s statement as evidence to support a claim against the decedent’s estate. See BLACK'S LAW DICTIONARY 404 (7th ed. 1999).
684 In re Estate of Benally, 1 Nav. Rptr. at 224.
685 6 Nav. Rptr. at 51.
686 Id. at 53.
Estate of Benally’s decision which had held that children from a testator’s first marriage did not constitute his immediate family.687 Under a Navajo common law analysis, any decision that does not recognize some of the testator’s children as part of his immediate family “is inconsistent with the Navajo custom which teaches that parents should view each of their children equally.”688

What procedure should a testator follow to make a valid oral will if she has only one surviving heir? In the case of In re Estate of Howard, the testator’s niece argued that the sole surviving heir, a daughter, had told her (the niece) that the testator made an oral will wherein she wanted her niece, who lived with her, to have her house.689 The daughter denied making the statement, so the niece introduced a secretly taped telephone conversation between her and the daughter that appeared to show the daughter acknowledging the testator’s wish that the niece should have the house.690 The trial court used the tape recording to support its holding that the testator had made a valid oral will.691

The Navajo Nation Supreme Court reversed the trial court’s holding on two grounds: 1) the alleged declaration of intent made to the daughter was unreliable considering that the alleged beneficiary, the niece, had lived with the testator; and 2) the trial court erred by admitting the secretly taped conversation into evidence and using it to

687 Id.
688 Id. at 54.
689 7 Nav. Rptr. 262, 263 (1997).
690 Id. at 263 (the daughter appears to evade the oral will on tape saying “it’s not legal,” and while “grandma wanted you to have the house,” she “changed her mind”). Id.
691 Id.
rule in favor of an oral will. The Supreme Court stated the relevant Navajo common law that addressed the secretly taped conversation as follows:

Generally, under Navajo common law, information is property. A person’s words are property. Taping them in a clandestine manner and without the knowledge and consent of the speaker is a form of theft. It is deceit. Despite any other rule governing telephonic or other electronic communications where a sender does not know a recipient or third person is recording the communication, we hold that as a matter of policy, framed by Navajo common law, the Navajo Nation courts will not receive recordings of electronic communications if they are made without the knowledge and consent of a speaker or sender or other legal authorization.

The Supreme Court then established the rule that when the testator’s sole surviving heir is also the immediate family, then another person should “witness the discussion that form the basis of the decedent’s final declarations.” The Court’s “another witness” rule should compel a sole surviving heir to implement the decedent’s wishes. The Estate of Howard opinion is probably not the final word on Navajo oral wills or the immediate family rule. The potential for abuse in the making of an oral will is always present, but the Court’s statement that the “oral will is too entrenched in the values of the Navajo People to abandon now” also rings true.

b. Estate property

---

692 Id. at 266, 267.
693 Id. at 267 (an investigator for the niece’s attorney secretly taped the conversation).
694 Id. at 268.
695 Id. at 266.
The definitive opinion on traditional Navajo property concepts and property classification is the Window Rock District Court’s 1983 decision in *In re Estate of Apachee.* The court’s analysis in *In re Estate of Apachee* shows exemplary use of Navajo common law to solve modern issues, such that the final solution reflects the needs of the Navajo people and the Navajo way of doing things. The core issue involves classifying money (from the life insurance payment), a non-traditional asset, into one of the customary property categories that actuate distribution of intestate property in accordance with Navajo common law.

Navajos traditionally designated estate property as either productive goods or non-productive goods, the two overall categories that define group property and individual property. The productive goods category contains property which benefits the residence group and may include livestock, livestock trailers, farm equipment, grazing land, agricultural land, water resources, land use permit, and grazing permit. The deceased’s spouse, children, grandchildren, parents, brothers, sisters, nephews, and nieces may compose the residence group. Property that normally passes to an individual during the estate distribution comes from the non-productive goods category. Non-productive goods may include jewelry, personal tools, equipment, rugs, fabrics, personal vehicles, and individually owned livestock (e.g., a horse).

---

696 4 Nav. Rptr. 178.
697 *Id.* at 181.
698 *Id.* at 182.
699 *Id.*
700 The decedent may be buried with some of his personal property and his clothes may be burned according to customary practices. *Id.* at 178.
The test for dividing property into one of the two categories is whether an item of property is essential to the maintenance of the residence group.\textsuperscript{701} Using this test, the court in \textit{In re Estate of Apachee} classified the insurance money as non-productive property which may be distributed to the heirs based on need.\textsuperscript{702} The court established a presumption that money falls into the non-productive property category unless a party proves that it should be productive property.

Productive property is held, usually by a mature individual, in a customary trust status for all members of the residence group. A tractor used for farming was held to be productive property because the extended family relied on subsistence farming.\textsuperscript{703} The Supreme Court describes this form of trust this way: “The customary trust is a unique Navajo innovation which requires the appointment of a trustee to hold the productive property for the benefit of the family unit.”\textsuperscript{704} Grazing and land use permits are frequently held in customary trust, which is a traditional concept of property ownership that benefits a residence group.

A gathering supervised by an elder or mature person takes place at the residence of the deceased, usually four days or so after the funeral, for discussions on the

\footnotesize{\textsuperscript{701} \textit{Id.} at 182.  
\textsuperscript{702} \textit{Id.} at 183, 184. Neither party claimed that the money should go to the residential unit. The court said money can be either productive property or non-productive property: “Cash can present a special problem because it can be treated either as productive property or nonproductive property. Treated as productive property, cash would be held in the camp for its economic security as a unit. Seen as nonproductive, cash would be distributed among family members.” \textit{Id.} at 182.  
\textsuperscript{703} \textit{In re Estate of Chee}, 6 Nav. Rptr. 460 (Window Rock Dist. Ct. 1989).  
\textsuperscript{704} \textit{In re Estate of Wauneka}, 5 Nav. Rptr. at 82. The customary trust is discussed under “Grazing and land use permits” in the next subsection, \textit{infra}.}
distribution of estate property.\textsuperscript{705} Items of property classified as non-productive goods are distributed with first preference to immediate family members, but factors such as being a residence group member and personal need are taken into account.\textsuperscript{706} The immediate family, for the purpose of intestate distribution of property, is defined by “close ties of blood [and] the mutual assistance and support they gave to each other,”\textsuperscript{707} meaning that the group members resided in close proximity in the same area. Thus, only family members who lived with the decedent, plus his son, were found to be his immediate family in \textit{In re Estate of Apachee}.\textsuperscript{708} Navajo common law did not allow inheritance by children because they were already supported by extended family members.\textsuperscript{709}

The \textit{In re Estate of Apachee} opinion also states the traditional Navajo definitions of property and property classification. Traditional Navajos generally classify property into six separate categories: 1) \textit{Nitl’iz} (hard goods) includes coins, silver ornaments, white and yellow shell, coral, cannel coal, jewelry, and all precious stones; 2) \textit{Yódi} (soft and flexible goods) includes cloth, fabrics, rugs, baskets, hides, skins, blankets, clothing, yarn, and wool; 3) \textit{Jish} (ceremonial values) includes songs, prayers, herbs, good luck formulae, sacred names and words, medicine bags, and ceremonial paraphernalia; 4) \textit{Kéyah} (land) includes farm lands, range lands, water sources, and livestock pens and

\textsuperscript{705} In re Estate of Apachee, 4 Nav. Rptr. at 182.
\textsuperscript{706} \textit{Id.} The definition of “immediate family” for the purpose of distributing intestate property is not the same as that term is used to make a valid oral will as defined in \textit{In re Estate of Thomas}, 6 Nav. Rptr. at 53.
\textsuperscript{707} In re Estate of Apachee, 4 Nav. Rptr. at 183.
\textsuperscript{708} \textit{Id.} The decedent’s brothers and sisters did not live with him so they were not members of his immediate family for purposes of determining heirs in probate.
\textsuperscript{709} \textit{Id.} at 182.
shelters; 5) *Dini’chil ‘altaas’ëi* (game goods) includes livestock, other domesticated animals, and wild animals; and 6) *Hooghan* (buildings) includes hogans, houses, sheds, ramadas, and other buildings and structures. The property definitions and classifications also apply to property outside the context of probate.

c. Grazing and land use permits

Navajo Indian Country is made up predominately of trust lands. The United States Government holds title to Indian trust lands for the benefit of Indian tribes. Trust lands are not individually owned in fee simple and are under restriction which means that they cannot be sold without the approval of the federal government. The status of Navajo Nation lands has been described this way: “Restricted property ... includes reservation land for which the Navajo Nation holds title for the common use and equal benefit of all tribal members. Unrestricted property includes property owned by individuals, and for which the Navajo Nation does not hold title for all tribal members.” Land use on the Navajo Nation is controlled by a complex system composed of federal and Navajo Nation statutes, rules, and regulations, Navajo common law, and court rulings on civil and criminal jurisdiction in Navajo Indian Country.

Because restricted lands (trust lands) cannot be owned in fee simple, Navajos who need land for agricultural, grazing or other non-business purposes must obtain land use and grazing permits from local officials who are charged with enforcing land use laws.

The Navajo Nation Supreme Court ruled that land use and grazing permits represent

---

710 Id. at 181. The *hooghan* category is not listed in *In re Estate of Apachee*.
711 In re Estate of Wauneka, 5 Nav. Rptr. at 81.
712 Federal and Navajo Nation statutes, rules, and regulations also regulate business use of Navajo Nation lands.
interests “in land that may pass by will or inheritance or be sold or assigned” according to Navajo laws. While these two kinds of permits represent interests in land, they do not grant land ownership interests. The Court described the legalities and policies that underlie land use and grazing privileges and the overall land tenure system this way:

Land use and grazing permits within the Navajo Nation are not ‘owned’ in the same sense that property can be owned in fee simple under the Anglo American legal system. Although land use and grazing permits are sold or passed through inheritance, all transfers are subject to regulation by district land boards and grazing committees. In allotting permits, these committees must consider, among other things, the policies of insuring (1) that tracts assigned by land use and grazing permits are large enough to be economically viable, and (2) that land is put to its most beneficial use. Further, under Navajo common law, a person can only maintain a ‘right’ to productive land if he is personally involved in its beneficial use. (citations omitted).

The land policy of the Navajo Nation requires keeping tracts of land intact and awarding land use permits only to individuals who will make the most beneficial use of land. The “most beneficial use of land” requirement equates to the “use it or lose it” rule:

---

713 In re Estate of Lee, 1 Nav. Rptr. at 32; Yazzie v. Catron, 7 Nav. Rptr. 19, 21 (1992) (“A grazing permit can be sold, inherited or otherwise transferred and can be subleased to anyone eligible to receive it through inheritance”).
714 See In re Estate of Kindle, No. SC-CV-38-99, slip op. at 7 (Nav. Nat. Sup. Ct., Aug. 2, 2001) (“a grazing permit is only a license to graze animals in a given area, and it gives no land ownership interests”). This statement in Estate of Kindle probably narrowed a 1977 statement by the Court that a grazing permit transfers real property: “In the Navajo Nation, we hold that a grazing permit is the functional equivalent of a deed and is therefore an instrument which transfers real property.” In re Estate of Nelson, 1 Nav. Rptr. 162, 165 (1977).
715 In re Estate of Benally, 5 Nav. Rptr. 174, 179 (1987).
“Another aspect of traditional Navajo land tenure is the principle that one must use it or lose it.”\textsuperscript{716} For example, in \textit{In re Estate of Wauneka}, the heir best able to make beneficial use of the estate land was unemployed, had no rights to other land, had tools to work the land, lived near the land, had farmed the land in the past, and needed the land to make a living.\textsuperscript{717} A Navajo Nation court that probates “land use and grazing permits must avoid splitting up the permits whenever possible,” but the court must also ensure that “the rights of all the heirs are protected.”\textsuperscript{718} Heirs who do not receive an interest in a land use or grazing permit may be compensated with other estate property.\textsuperscript{719}

When a land use permit must descend and then be reassigned to benefit a residence group, the Navajo Nation court probating the estate must transfer the permit to the decedent’s “most logical heir” to comply with Navajo Nation land policy.\textsuperscript{720} The “most logical heir” requirement conjures up an image of a personal inheritance of a permit for sole use to the exclusion of other family members, but that is not the case in Navajo land tenure. Navajo Nation court decisions show that modern Navajo land tenure evolved from traditional land use practices and concepts.

\textsuperscript{717} In re Estate of Wauneka, 5 Nav. Rptr. at 83. The rest of the heirs said they would sell their interests in the land if awarded and none wanted to farm the land or use it for subsistence.
\textsuperscript{718} In re Estate of Benally, 5 Nav. Rptr. at 179. Peacemaking is also available for probating estates, including land use and grazing permits. \textit{In re Estate of Kindle}, No. SC-CV-38-99.
\textsuperscript{719} In re Estate of Wauneka, 5 Nav. Rptr. at 83; In re Estate of Benally, 5 Nav. Rptr. at 180, 181 (“Other heirs must be compensated from the estate in the approximate value of their share in the trust property,” but may not receive a separate permit).
\textsuperscript{720} In re Estate of Benally, 5 Nav. Rptr. at 179 (citing 3 N.T.C. § 785(1) (1977); See also 3 N.N.C. § 271(a) (2005)(a court must transfer a land use permit to the decedent’s most logical heir and the land assignments should not be subdivided).
The word ‘land’ in Navajo is *shi keyah*, or ‘That which is beneath my feet.’ As a general principle, Navajo land tenure is based on communal or family land use, and ‘that which is beneath [the] feet’ of most Navajos is held for general family use. There is individual use rights to land under Navajo common law, particularly agricultural land, but for the most part Navajo grazing permits and leases are held in individual names for the benefit of the family or group.\(^{721}\)

In *Johnson v. Johnson*, the Court rejected the appellant’s argument that his father gave him the land use permits as gifts and therefore were his separate property.

It is Navajo tradition that when a person gives property to a younger family member (such as a father giving a land use permit to his son), the gift is intended to benefit the entire family, *and most of all the children of the family*. When a land use permit is given from a father to a son and that son is the head of a household, it is traditionally the intention that the son keep the land use permit in his name, but the gift is really being made to the children. It is, therefore, against tradition and custom to characterize the land use permits given as gifts to [the appellant] as his separate property. (emphasis in original).\(^{722}\)

The holding of grazing and land use permits in individual names for the benefit of the family or residence group is called the Navajo customary trust. The following synopsis describes the customary trust:

The customary trust is so called because, in Navajo custom, land is held and managed for the benefit of the clan and the family. The aim of a customary trust is to keep tracts of land and grazing permits intact and in

\(^{721}\) In re Estate of Harvey and Begay #2, 6 Nav. Rptr. 413, 415 (1991).

\(^{722}\) 3 Nav. Rptr. at 12.
the family. Therefore, land and grazing permits held in customary trust should descend in somewhat the same way as property held in joint tenancy with right of survivorship. That is, once a customary trust is established, those involved in the trust cannot normally devise their interests in the land or grazing permits to their heirs, as that would cause the rights to be split up among more and more owners. Rather, the permits remain intact, and the last surviving member of the original trust will end up owning the entire permit. However, common-law requirements governing the creation and destruction of joint tenancies do not apply to the customary trust, which is a product of Navajo common law.723

The Navajo judges developed the customary trust to protect group property rights under Navajo common law because American law generally “does not recognize the rights of groups.”724 The foundational elements of the Navajo customary trust are group residence (the extended family), group use of subsistence resources equally, and need to protect group rights to property. Navajo land tenure, as framed by traditional Navajo group rights, is explained below:

To understand the Navajo customary trust, we must examine Navajo land use. Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajos have always occupied land in family units, using the land for subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership. Grazing rights are a land use right, but they are not individual rights as such. Navajo families and relatives occupy an area and graze animals for the benefit of the group. A grazing permit is not a form of land title, but the right of a named

723 In re Estate of Benally, 5 Nav. Rptr. at 180.
724 Begay v. Keedah, 6 Nav. Rptr. at 420.
permittee to graze a certain number of animals in a large common grazing area. The right is measured by ‘animal units’ or ‘sheep units.’

The usual pattern of the trust is for an elderly Navajo permittee to give the permit to a child, to be held ‘in trust’ for other children or grandchildren. Usually the most responsible child, and one who makes actual use of the permit, will hold the permit in his or her own name, but to be shared and used by the other children. The Navajo courts follow the same process in probates, awarding it to the ‘most logical heir,’ who is personally involved in using the permit. The ‘trustee’ is therefore a person who holds a grazing permit for the benefit of those who actually graze sheep or cattle on the land. That has nothing to do with the American common law trust. (citation omitted).725

Not every case involving transfer of a land use permit or grazing permit results in creation of a customary trust. A customary trust is appropriate only if the trust beneficiaries cooperate in its establishment and thereafter effectively manage it.726 Because the customary trust is for the benefit of the group, the person appointed as trustee must be “in the best position to encourage beneficial use of the land.”727 The other members of the trust have the right to use the land “as long as their use is not contrary to the interests of another member of the trust. However, those who make their living from the land should have day-to-day responsibility for its management.”728

725 Id. at 420.
726 In re Estate of Wauneka, 5 Nav. Rptr. at 82; In re Estate of Benally, 5 Nav. Rptr. at 180.
727 In re Estate of Benally, 5 Nav. Rptr. at 180.
728 Id.
The Navajo Nation Supreme Court has not had an opportunity to discuss the remedies that might be available in the case of mismanagement of a customary trust. It also has not hinted on the kind of facts that might constitute mismanagement. The proper remedies for mismanagement would be removal of the trustee and nalyeeh (restitution). The Court has acknowledged that members of a customary trust have standing to sue to determine the extent of their own and others’ land use rights to the same land.\(^{729}\) Finally, the following is the Court’s synopsis of modern Navajo land tenure:

[We summarize] the land policies of the Navajo Nation as follows: (1) animal units in grazing permits must be sufficiently large to be economically viable; (2) land must be put to its most beneficial use; (3) the most logical heir should receive land use rights; (4) use rights must not be fragmented; and (5) only those who are personally involved in the beneficial use of land may inherit it. All these land policies are designed to assure that Navajo Nation lands are used wisely and well, and that those who actually live on them and nurture them should have rights to their use.\(^{730}\)

4. Land Use

The lands that make up the majority of the Navajo Nation are located in three states — northeastern Arizona, southeastern Utah, and northwestern New Mexico. Two smaller Navajo reservations are located at Alamo and Tóhajiilee in New Mexico. The total land base of the Navajo Nation is nearly 15.5 million acres. Traditional Navajo Country, called Diné Bikéya (the territory the Holy People promised to the Navajo


\(^{730}\) Begay v. Keedah, 6 Nav. Rptr. at 421.
ancestors), extends beyond the reservation boundaries to the four cardinal sacred mountains. Most of the Navajo Nation lands are trust land and the rest are individually owned Navajo allotments, Navajo Nation Government owned fee lands, and a small amount of individually owned fee lands, including non-Indian fee lands. The Navajo Nation also owns fee land and leases land outside its territory, such as the well-known 75,000 acres Big Boquillas Ranch situated north of Seligman, Arizona.

Traditional Navajos did not believe land could be privately owned, bought or sold (like the Anglo-concept of fee simple). Land was owned by the entire Navajo Nation, but clans and extended families had use rights to the land. The Navajo Nation courts have stated the traditional Navajo perspective regarding their lands this way:

There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would [not] exist and without it which the Navajo People would be caused to disperse.... Land is basic to the survival of the Navajo People.

While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its

---

731 “Private ownership of land, as by fee simple in the Anglo legal system, is unknown in the Navajo Nation.” Hood v. Bordy, 7 Nav. Rptr. 349, 354 (1991). The quoted statement means that land was not owned by individuals in traditional Navajo society. Moreover, from the traditional Navajo perspective, the selling of Diné Bikéyah would be equivalent to selling one’s mother.
lands and assets belong to those who use it and who depend upon it for survival — the Navajo People.\footnote{732}

The use rights that families have over Navajo Nation lands are called customary usage and the area over which use rights are exercise is called the customary use area. The customary use area and customary usage concepts have been discussed in several Navajo Nation court opinions including the following 1986 decision.

Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use area concept.\footnote{733}

Six years later, the Navajo Nation Supreme reaffirmed its \textit{In re Estate of Wauneka} decision and explained that permits issued by the Navajo Nation are required to use Navajo Nation lands, including the customary use area, for agriculture, grazing, homes, and other purposes.

\textit{In Estate of Wauneka Sr.}, this Court discussed the difference between private ownership of land, usually off the reservation, and use and occupancy of reservation land traditionally inhabited by a person’s family, known as a customary use area. The great majority of the Navajo reservation is trust land, including the area in dispute. Trust land cannot be owned by individuals outright (‘in fee’) the way land is owned off the reservation. Rather, the actual title is held by the United States

\footnote{732}{Tome v. Navajo Nation, 4 Nav. Rptr. 159, 161. The Navajo Nation Supreme Court approved the Tome court’s statement in \textit{Hood v. Bordy}, 7 Nav. Rptr. at 354. \footnote{733}{In re Estate of Wauneka, 5 Nav. Rptr. at 81.}}
government in trust for the Navajo people. The Navajo people use trust land for livestock grazing, agriculture, homesites, herb gathering, and sacred purposes. The Navajo Nation government grants permits for agricultural use within irrigation project areas and for livestock grazing across the reservation. It also grants homesite leases throughout the Navajo Nation. Navajos use their customary use areas for small agricultural plots, homesites, and grazing. (citation omitted).734

As the Court stated above, a valid grazing permit and customary use rights are required to graze livestock on Navajo Nation lands. The Supreme Court explained that a grazing permit “allows its holder to own livestock and to graze that livestock on Navajo trust lands to which he or she has use rights. No one can hold a grazing permit unless he also holds use rights to land sufficient to support the livestock authorized.”735 A livestock grazing permit is valuable property in modern Navajo society: “In Navajo common law, a grazing permit is one of the most important items of property which a Navajo may own.”736 A grazing permit allows its holder to own livestock which can be used for food, clothing, barter, gift, and income.737

Livestock is an important part of the economy on the Navajo Nation. With an expanding Navajo population, grazing land that in the past sustained a livestock economy has severely diminished, which has caused frequent land disputes between neighbors and

734 Yazzie v. Catron, 7 Nav. Rptr. at 21. In addition, the Court said, “Unless a Navajo has a grazing or agricultural use permit, a homesite or business lease, or rights to a customary use area, he or she has no rights or interest in trust land beyond those of every other member of the Navajo Nation.” Id. at 22.
735 Id. at 21.
737 Id.
between land users and the Navajo Nation Government. The Court has expressed what every Navajo knows, in that just about every “acre on the reservation not reserved for a special purpose is a part of someone’s customary use area.”

Because land and livestock are crucial to the survival of the Navajo people, the Navajo Nation Government and its courts have recognized that just compensation must be paid for government taking of customary use rights through eminent domain. Thus, customary usage is protected as a property right “by the Navajo Bill of Rights and the Indian Civil Rights Act.”

The Navajo Nation Supreme Court has yet to establish a firm test that the trial courts can use to determine which lands fit the definition of a customary use area. In the case of In re Estate of Wauneka, the Court relied on the following reasons to rule that land the decedent used for farming qualified as his customary use area: 1) the decedent continuously and exclusively used the land during his lifetime; 2) the decedent’s use of the land was not disputed either by the Navajo Nation Government, the Bureau of Indian Affairs, or other land users in the area; and 3) the land was fenced and readily ascertainable. Thus, the decedent’s heirs could inherit his property interest in his customary use area.

---

738 In re Estate of Wauneka, 5 Nav. Rptr. at 83.
739 Dennison v. Tucson Gas and Electric Co., 1 Nav. Rptr. 95 (1974). The dispute arose after the Navajo Nation Government granted a right-of-way to an electric company for construction of a power transmission line across Navajo lands. The Court used the term “traditional use area” to refer to the area the government took by eminent domain and for which the plaintiffs wanted compensation. Id. at 96. See also 16 N.N.C. § 1402 (2005)(Navajo Nation Government shall compensate the land user for the diminished or destroyed value of the land “for its customary use”).
740 In re Estate of Wauneka, 5 Nav. Rptr. at 81.
741 Id. at 82.
In *Hood v. Bordy*, the appellants claimed that “they acquired a ‘customary use’ ownership or possessor interest” in a condemned apartment owned by the Navajo Nation Government and, therefore, could sell that interest to a buyer.\(^{742}\) The appellants claimed that they acquired “customary use ownership interests” when they or their predecessors refurbished the apartment.\(^{743}\) According to the Court, Navajo common law recognizes that “individual Navajos who use or improve land with buildings, corrals, fences, etc., create for themselves a customary use ownership interest” that can be bought and sold.\(^{744}\) The Court, however, relied on three reasons to dispel the appellants’ claim that they acquired a customary use interest in the apartment: 1) they did not make “improvements” to the land from the ground up; 2) property cannot be wrested from the Navajo Nation Government through adverse possession; and 3) public policy prohibits individuals from acquiring customary use interests in condemned property.\(^{745}\)

The Navajo people view land, not as property to be privately owned and bought and sold, but essential to life. The Shiprock District Court explained the central importance of land to the Navajo people this way:

Land to the Navajo people is life which embodies the concept of spiritual, mental, physical and emotional well being. Navajo thinking and values accord land with survival and sustenance. Since the Long Walk \[the 1864 forced march to Fort Sumner, New Mexico\], Navajos have maintained a

\(^{742}\) 6 Nav. Rptr. at 351, 352-53.

\(^{743}\) *Id.* at 355-56.

\(^{744}\) *Id.* at 354.

\(^{745}\) *Id.* at 354, 356. The Court stated as follows: “The ownership of land always remains vested in the Navajo Nation as a whole, and cannot be wrested away through adverse possession or prescription by individual occupiers.” *Id.* at 354, citing *Yazzie v. Jumbo*, 5 Nav. Rptr. 75, 77 (1986).
subsistence life-style based on livestock production, which livestock ownership among the Navajo is a symbol of wealth, prestige and stability.\textsuperscript{746}

Land guarantees that future generations of Navajos will seek guidance from the Holy People as their ancestors did to ensure continuation of Navajo culture, language, spirituality, and identity. Land is so integral to a Navajo’s physical, mental, and spiritual well-being that the Blessing Way Ceremony uses land and sacred places, the gifts of Mother Earth, to restore troubled Navajos to a state of \textit{hozho}. It is not difficult to understand the Navajo belief that their lands are sacred, when one realizes that Navajo culture, language, spirituality, and identity are inextricably intertwined with place (land).

\textsuperscript{746} In re Joe’s Customary Use Area, 6 Nav. Rptr. 545, 547-48 (Shiprock Dis. Ct. 1990).
CHAPTER VII. CONCLUSION

Commentators on the state of Indian nation courts have heaped accolades on the Navajo Nation courts for blazing a path back to use of ancient Navajo values in their modern decision-making. While praise is well-deserved and the Navajo Nation courts indeed have proven that Indian values can be incorporated into Western-styled Indian adjudicatory systems, which by their nature are adversarial, the Navajo judges pursue more significant goals when they use traditional Navajo values to make their decisions. When viewed in a political context, use of Navajo common law in the decision-making process promotes nation-building and strengthens and expands Navajo Nation sovereignty using traditional Navajo ways. When viewed in the context of culture, the Diné Life Way — Diné culture, language, spirituality and identity — is preserved for future Navajo generations when a Navajo judge analyzes Navajo common law and applies it to issues deemed vital to Navajo society. When viewed in a spiritual context, use of Navajo common law ensures continued recognition of the covenant the Navajos believe the Holy People made with their primordial ancestors at their creation. The ultimate goal, however, is that centuries from now, the Navajo people will still exist as the “Nihookaa’ Dinet’e Diyinii (Holy Earth Surface People); thus, these views constitute a unified whole that is critical to that objective.

The United States Government in the 1890’s attempted to extirpate Navajo customs and traditions or Navajo common law through the Navajo Court of Indian Offenses (Navajo CFR Court) and the Bureau of Indian Affairs Law and Order Code. The Navajo judges of the Navajo Court of Indian Offenses repelled those federal attacks
on the Dine Life Way by using Navajo common law and traditional Navajo peacemaking
to settle disputes; thus, continuing traditional Navajo expectations. The Navajo judges of
the Navajo Court of Indian Offenses were the innovators of using Navajo common law in
a Western-styled court system. The modern Navajo judges learned from their
predecessors’ experiences and developed methods compatible with Western-styled
adjudication and court rules and used those methods to implement traditional
peacemaking and to incorporate Navajo common law into litigation. The Navajo judges
of the Navajo Court of Indian Offenses deserve credit for their foresight, dedication, and
achievements in the face of tremendous pressure from the Bureau of Indian Affairs to use
the CFR court system to eradicate Navajo culture, language, spirituality, and identity.

The three fundamental Diné doctrines, hozho (harmony and balance), k’ê (kinship
solidarity), and k’ei (clanship system), and the customs and traditions that derive from
them, form the basis upon which Navajo society functions. When the three foundational
doctrines are invoked in dispute resolution, they become sources for methods of dispute
resolution and customs and traditions that are applied as law by the Navajo Nation courts.
Incorporation of traditional Navajo values into the proceedings of the Navajo Nation
courts is a difficult process. Nonetheless, the Navajo judges use American-styled rules of
evidence, particularly expert witnesses, judicial notice, and court rules to bring Navajo
customs and traditions into litigation and apply them to legal issues. The incorporation
process advances as lawyers and advocates gain more understanding of Navajo common
law and use relevant norms and values in litigation before the courts.
The Navajos are a pragmatic people. Pragmatism is an important element in Navajo culture and this text shows that the Navajo judges base the modern dispute resolution process, including deciding court cases and peacemaking, on a model \((hozho-hochxo-hozho)\) that restores people to \(hozho\) (harmony) in the religious and cultural contexts. Navajos strive for harmony \((hozho)\) in their daily lives, but when disrupters known as \(nayee\)’ (“monsters”) cause disharmony \((hochx0)\), ceremony is used to restore them to harmony \((hozho \text{ restored})\). The same process is used in Navajo jurisprudence, which uses \(anahoti\)’ (“existence of a problem”) in place of \(hochxo\), and instead of relying on religious ceremony, the judges use Navajo common law and traditional dispute resolution methods, such as “talking things out,” to restore disputants to harmony. The Navajo jurisprudence model \((hozho-anahoti-hozho)\) works exceptionally well in Navajo peacemaking, a modern Navajo institution that is based on the traditional Navajo forum for dispute resolution. When the Navajo jurisprudence model is used, the dispute resolution process becomes a Navajo justice ceremony.

The Navajo judges have proven that Navajo customs and traditions work well at resolving legal disputes brought by Navajos and non-Navajos alike. This work, hopefully, will ease the fears of non-Indian state and federal judges, including those on the United States Supreme Court, who harbor or express antagonistic views of American Indian customs and traditions and American Indian tribal courts in general. Navajo common law and American Indian common law are products of human experience, just like Euro-American common law is the product of human experience. Thus, any suggestion that Indian common law is so divergent that it should be confined to Indians is
unwarranted, unsupportable, and smacks of extreme Euro-American ethnocentrism, probably to the point of racial bias. Such fear mongering can be attributable to ignorance of American Indian cultures, languages, spirituality, and the role American Indian justice plays in the overall scheme of justice in the United States.

The Navajo Nation courts and all American Indian courts should be encouraged to resurrect their common laws and traditional methods of dispute resolution. Every dispute resolution system contains beneficial elements that can be used by other systems to improve dispute resolution methods for everyone. The Navajo dispute resolution system called peacemaking brings parties and communities together on amicable terms, costs a fraction of adversarial court litigation, and does not cast blame on wrong-doers but identifies and treats the underlying cause of the problem. The opportunity is always available for the peoples of the World to learn from each other and this work is offered with that in mind.
REFERENCES


Austin, Raymond D., ADR and the Navajo Peacemaker Court, 32 JUDGES’ J. 8 (1993).


Diné College website: https://www.Dinecollege.edu/ics/


Navajo Nation, Judicial Branch Fiscal Year 2005 Annual Report (Released in March 2006).


Shirley, Joe, Navajo Nation President, Address at the Bosque Redondo Memorial Dedication, Bosque Redondo, New Mexico (unpublished document on file with author) (June 4, 2005).


The Phelps-Stokes Fund, *The Navajo Indian Problem* (1932).


Wilkins, David E., *Governance Within the Navajo Nation: Have Democratic Traditions Taken Hold?*, 17 WICAZO SA REV. (2002).


Court Cases:


Davis v. Means, 7 Nav. Rptr. 100 (1994).


Descheenie v. Mariano, 6 Nav. Rptr. 26 (1988).


Goldtooth v. Goldtooth, 3 Nav. Rptr. 223 (Window Rock Dist. Ct. 1982).


Halona v. MacDonald, 1 Nav. Rptr. 189 (1978).

Halona v. MacDonald, 1 Nav. Rptr. 341 (Shiprock Dist. Ct. 1978).


In re A.W., 6 Nav. Rptr. 38 (1988).


In re Certified Questions I, Navajo Nation v. MacDonald, 6 Nav. Rptr. 97 (1989).


In re Estate of Benally, 1 Nav. Rptr. 219 (1978).
In re Estate of Benally, 5 Nav. Rptr. 174 (1987).
In re Estate of Chee, 6 Nav. Rptr. 460 (Window Rock Dist. Ct. 1989).
In re Estate of Harvey and Begay #2, 6 Nav. Rptr. 413 (1991).
In re Estate of Howard, 7 Nav. Rptr. 262 (1997).
In re Estate of Lee, 1 Nav. Rptr. 27 (1971).
In re Estate of Nelson, 1 Nav. Rptr. 162 (1977).
In re Estate of Plummer Sr., 6 Nav. Rptr. 271 (1990).
In re Estate of Thomas, 6 Nav. Rptr. 51 (1988).
In re Estate of Wauneka, 5 Nav. Rptr. 79 (1986).
In re Interest of Tsosie, 3 Nav. Rptr. 182 (Chinle Dist. Ct. 1981).
In re Joe’s Customary Use Area, 6 Nav. Rptr. 545 (Shiprock Dis. Ct. 1990).
In re Marriage of Daw, 1 Nav. Rptr. 1 (1969).
In re Mental Health Services of Bizardi, No. SC-CV-55-02 (Nav. Nat. Sup. Ct., Nov. 9, 2004).
In re Practice of law in the Courts of the Navajo Nation by Avalos, 6 Nav. Rptr. 191 (1990).
In re Validating the Marriage of Garcia, 5 Nav. Rptr. 30 (1985).
In re Validation of Marriage of Francisco, 6 Nav. Rptr. 134 (1989).
In re Validation of Marriage of Slowman, 1 Nav. Rptr. 141 (1977).
Johnson v. Johnson, 3 Nav. Rptr. 9 (1980).


Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).


Navajo Nation v. Murphy, 6 Nav. Rptr. 10 (1988).


Navajo Tribal Utility Authority v. Foster, 4 Nav. Rptr. 86 (Window Rock Dist. Ct. 1983).


Yazzie v. Jumbo, 5 Nav. Rptr. 75 (1986).


Resolutions:

Navajo Nation Council Resolution No. CJN-34-05 (June 3, 2005).

Navajo Nation Council Resolution No. CJY-52-00 (July 20, 2000).


Navajo Tribal Council Resolution (July 12, 1945, 1922-1951 Resolutions, at 86).


Navajo Tribal Council Minutes, 478-95 (May 4, 1978).

Navajo Tribal Council Minutes, 470-71 (May 4, 1978).

Navajo Tribal Council Resolution No. CF-2-54 (Feb. 11, 1954).

Navajo Tribal Council Resolution No. CJ-2-40 (June 3, 1940).

Navajo Tribal Council Resolution No. CJ-3-40 (June 4, 1940).


Navajo Tribal Council Resolution No. CJA-1-59 (Jan. 6, 1959).


Statutes:


1 N.N.C. § 7 (2005).

1 N.N.C. § 8 (2005).
1 N.N.C. § 201 (2005).
1 N.N.C. § 702 (2005).
7 N.N.C. § 204 (1985).
7 N.N.C. § 204(A) (2005).
7 N.N.C. § 204(B) (2005).
7 N.N.C. § 253(B) (2005).
7 N.N.C. §§ 292(A) & (C) (2005).
7 N.N.C. § 303 (2005).
7 N.N.C. §§ 352(A), (B) & (D) (2005).
7 N.N.C. § 352(C) (2005).
7 N.N.C. § 355(B), (C) (2005).
7 N.N.C. § 651 (2005).
7 N.N.C. § 701(A) (2005).
8 N.N.C. § 1 (2005).
8 N.N.C. § 2(B) (2005).
8 N.N.C. § 3 (2005).
9 N.N.C. § 1(A) (2005).
9 N.N.C. § 2(A) & (C) (2005).
9 N.N.C. § 2(B) (2005).
9 N.N.C. § 5(D) & (E) (2005).
9 N.N.C. § 1705(F) (2005).
9 N.N.C. § 1708(F) (2005).

17 N.N.C. § 204(C) (2005).

17 N.N.C. § 204(D)(1)-(4) (2005).


