



THE NAVAJO NATION

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Navajo Nation Attorney General issues opinion stating ‘supermajority’ not required for council reduction, line item veto initiatives to succeed

WINDOW ROCK, Ariz. – A Navajo Nation Department of Justice legal opinion has concluded that a ballot initiative to reform the Navajo government would be valid with a simple majority vote of the people.

A Presidential initiative to reform the Navajo government began May 1 with the start of a petition drive to place two initiative questions on the Nov. 4, 2008, Navajo election ballot. One question seeks to reduce the council from 88 to 24 delegates and the other seeks to give the President line item veto authority.

Navajo Nation President Joe Shirley, Jr., announced the formation of a Presidential Task Force on Government Reform during his April 21 State of the Navajo Nation address.

The 11-page, April 29 opinion examines the question of whether a majority vote in every voting precinct – known as a supermajority – is required for an initiative brought by the people to succeed.

Navajo Nation Attorney General Louis Denetsosie concludes the answer is no, and that a simple majority of 50-percent-plus-one vote of the electorate applies to an initiative of the people.

Both initiative measures contain language that state, “If approved, this initiative may be repealed or amended by the initiative process only.” That means that the only way either initiative could be repealed or amended should they succeed is through another initiative process rather than by council action.

“There is an unjustified belief among the voters that the Diné cannot amend (specific provisions of the law) because of the supermajority requirement in the procedure component,” Mr. Denetsosie writes. “The basic issue is whether the Navajo Nation Council can impose draconian procedural requirements on the right of the Diné to make their own laws. The supermajority requirement contained in

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(the law) is inconsistent with this right, and the Navajo Nation Council cannot supersede the right of the people to make their own laws and establish their own form of government.”

In accordance with the Navajo Nation Department of Justice plan of operation, the attorney general has the responsibility to issue legal opinions at the request of any elected Navajo Nation official, and President Shirley sought the opinion.

Mr. Denetsosie said he is not involved in the Presidential initiative, and noted that he represents all of the Navajo Nation government and people.

President Shirley said the opinion is based on the Fundamental Law of the Diné, Navajo Nation Supreme Court rulings, and the intent and actions taken by the Navajo Nation Council in 1989 to forever prevent the concentration of power in the hands of one individual or one branch of Navajo government.

He said the opinion strongly acknowledges the principle of the people giving their consent to be governed while never relinquishing their right to change their government.

“The Navajo government and Navajo leaders are accountable to the people first and foremost, not the other way around, and this legal opinion reflects that understanding,” President Shirley said Friday. “It is an inherent right of the people to petition their government to let it know that they want change. The government cannot refuse to hear the plea of the people. That is tyranny, and tyrannies do not last.”

A Sept. 5, 2000, referendum asked Navajo voters whether they wished to reduce the council to 24 delegates. More than 70 percent of those who voted – or 22,081 – said yes.

But the referendum failed despite winning the popular vote because of language contained in the law that set a nearly-impossible standard of needing a supermajority for passage.

According to the DOJ opinion, that language is inapplicable in this instance because the government reform is being sought through an initiative process, not a referendum.

At the heart of the opinion is the difference between a “referendum” and an “initiative,” which are not the same although often mistakenly believed to be.

A referendum is a general vote by the electorate on a political question that has been referred to the people *by the government*.

An initiative is a general vote by the electorate on a political question that has been put on the ballot *by the people* through a petition process.

The DOJ opinion notes that in the Navajo Nation Code the three ways to create new tribal law are by council action, a referendum brought to the people by the council, or through an initiative brought to the government by the people.

“There are differences in how referendums and initiatives are initiated,” the opinion states. “Council can initiate a referendum and the Diné can originate an initiative by petition.”

The initiative procedure arose from the historic participatory democracy of the Navajo people, which is an inherent right of the people, the opinion states. The supermajority voting

requirements for a referendum to succeed “do not apply to the certification of initiatives approved by the Diné.”

Laws “must be read liberally” so as to not “frustrate the intention to give a voice to the Diné in their government, specifically on matters such as the form of government and their right to choose leaders,” the opinion states.

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The opinion takes into account rulings of the Navajo Nation Supreme Court, the legal context that existed during the political turmoil of December 1989, and again when the council sought to raise its pay without consultation or approval by the people.

It notes that the Navajo high court found that “courts are compelled to interpret Diné fundamental rights in light of the Navajo Bill of Rights, as informed by *Diyin Nohookáá Diné Bi Beehaz’áanii*,” or Diné common law.

“The Fundamental laws of the Diné provides guidance on the subject of leadership and the manner in which traditional law has established the people’s right and freedom to choose their leaders,” the opinion states.

Citing council resolution CD-68-89, the opinion notes that the intentions of the council in 1989 “demonstrated that the present Navajo Nation Government structure allows too much centralized power without real checks on the exercise of power. Experience shows that this deficiency in the government structure allows for, invites and has resulted in the abuse of power.”

This historic resolution reorganized the government to define the powers of the legislative and executive branches to “limit the legislative function to legislation and policy decision making,” “limit the executive function to implementation of laws and representation of the Navajo Nation,” and to “impose limitations on exercise of such powers.”

The 1989 council was determined “to impede future councils from obtaining too much power and to create a checks and balances system for the three branches of government,” the opinion states.

That council “recognized the power of the Diné to change even this checks and balances system ‘through the Government Reform Project’ to determine ‘the form of government [the people] want to be governed by,’” the opinion states.

In enacting amendments to Title 2 of the Navajo Nation Code, “the council was attempting to reduce the likelihood that any single person or branch of government would ever obtain so much power that they become unaccountable to the government or the people,” the opinion states.

Because the council was concerned that future councils would amend the law without consulting the Navajo people, it instituted a “check” to limit its ability, the opinion states. The check was making such changes subject to ratification by the people and required an extraordinarily-high standard known as a supermajority – or a majority vote in each chapter precinct. The intent of the law, however, was to

prevent abuse by government rather than to limit the powers of the people.”

“The council, in enacting the referendum/initiative procedures, clearly did not intend to have Section 102 (A) be a restriction on the right of the Diné to make their own laws,” Mr. Denetsosie writes. “Such laws are valid if approved by a simple majority vote.”

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“The right of the Diné to make any laws that they want is inherent in their history and tradition, to times before the Long Walk and the Treaty of 1868, and it was the intention of the Navajo Nation Council in enacting the referendum/initiative procedures to enable (the) people to make and/or amend any and all laws relating to Navajo government,” the opinion states.

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