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NGS lease extension legislation ruled out of order citing concerns over Title 18 provisions

Window Rock – Legislation No. 0042-13, sponsored by Speaker Johnny Naize (Low Mountain, Many Farms, Nazlini, Tachee/Blue Gap, Tselani/Cottonwood), which sought to extend the Navajo Generating Station’s lease for 25 years beginning in 2019, was ruled “out of order” at the Naabik’iyáti Committee meeting yesterday.

After two hours of debate, Pro Tem Chair Elmer Begay ruled the legislation “out of order” on the grounds that the negotiating task force appointed by Navajo Nation President Ben Shelly was not formulated in accordance to Title 18 of the Navajo Nation Code.

Title 18 provisions guide the selection of the negotiating team members who are charged with negotiating minerals leases or other energy agreements on behalf of the Navajo Nation.

Council Delegate Alton Shepherd (Jeddito, Cornfields, Ganado, Kin Dah Lichíí, Steamboat) was the first to raise concerns over questionable adherence to Title 18 in the formation of the negotiating team, and requested for Attorney General Harrison Tsosie to furnish additional documentation detailing how the negotiating team was established.

Specific attention was placed on §105 of Title 18, which provides that two members of the ten-member negotiation team be selected from the Resources and Economic Development Committee. Additionally, the Government Services Committee (now the Naabik’iyáti Committee) of the Navajo Nation Council must approve the appointed team.

“The Attorney General is supposed to be abiding by the law, and I want to see the documentation as far as section 105, Title 18,” said Delegate Shepherd.

In response, Attorney General Tsosie began to frame his answer stating that in 1989, there were significant revisions to the Navajo Nation Code at a time when the government was transitioning to a three-branch government.

“At that time, there was a lot of transition that occurred, and this particular reference to Title 18, this particular negotiating team was developed in 1985 for a very specific purpose,” and at that time the Peabody mine royalties were being re-negotiated, explained Attorney General Tsosie.

Dissatisfied with the attorney general’s focus on mining, Delegate Shepherd interjected to emphasize that §101 of Title 18 mentions energy agreements in addition to mineral leases.

"I don't know where the AG is coming from. The laws are here, and for him to change my mind to say [this law] was written way back then, 'we're not going to abide by it', but we have laws," said Delegate Shepherd, who followed by making a second firm request for documentation on the team's selection.

According to Attorney General Tsosie, the NGS lease negotiating task force was not assembled according to Title 18 provisions, but was assembled by President Shelly "specifically for engaging in these particular activities."

"So what you're saying is that the president is not following the law in terms of the negotiation for mines or minerals according to Title 18," questioned Council Delegate Dwight Witherspoon (Black Mesa, Forest Lake, Hardrock, Pinon, Whippoorwill).

This non-adherence to Title 18 was a point Delegate Witherspoon said he had brought to the attention of President Shelly at least two times before, and explained that Delegate Shepherd merely cited the law to reflect that the Navajo Nation Council was not involved in the negotiations as the law states.

"There was no Council that participated in the negotiating team, that's a flaw in the negotiations," continued Delegate Witherspoon. "We didn't have an opportunity to provide input into the negotiations."

Some delegates also expressed concern that the Council was rushing to make a decision regarding the legislation.

"What is the driving force behind rushing this very important issue for the Navajo Nation?" asked Delegate Roscoe Smith (Crystal, Fort Defiance, Red Lake, Sawmill). "There are major issues being brought to the table."

Council Delegate Katherine Benally (Chilchinbeto, Dennehotso, Kayenta) supported Delegate Smith's concerns, saying, "We have to make sure we turn every stone. Make sure we're all satisfied. We may not get everything we're asking for, we recognize that, but let's get it done right."

Referring to the original lease agreement approved by past leadership in 1969, Delegate Benally further stated, "They had a good reason that they didn't have the upper hand, they weren't educated. Twenty-five years from now, fifty years from now, when our children and great-grandchildren are looking at this, what excuse are we going to have?"

"I wholeheartedly support this, but I want to make sure we have the best deal for the people," concluded Delegate Benally.

Council Delegate Duane Tsinigine (Bodaway/Gap, Coppermine, K'ai'Bii'To, LeChee, Tonalea/Red Lake) made it clear he supported the legislation as it directly impacted a large portion of his

constituency, many of whom were seated in the gallery having traveled many hours that morning to attend the meeting.

“I would like to proceed because it’s Navajo Nation economy... LeChee, Coppermine, K’ai’Bii’To, Bodaway/Gap’s economy. It’s their workforce, it’s their livelihood,” said Delegate Tsinigine.

As result of the concerns voiced by the council delegates, Speaker Naize asked legislative counsel for clarification as to whether or not the provisions guiding the selection of a negotiating team under Title 18 were pertinent to the discussions on the lease renewal.

Mariana Khan, Legislative Counsel, explained that there have been instances in the past where a president has formed a negotiating team outside of Title 18. However, there have been no legislations formally changing Title 18 to legitimize such a practice.

“Without any particular legislation coming to our office amending Title 18 that I know of, it appears Title 18 is still valid law,” Kahn stated.

Responding to Kahn’s explanation, Pro Tem Chair Elmer Begay stated that the delegates can insist on utilizing Title 18 to declare the legislation “out of order.”

Kahn further explained that “out of order” means you do not have a valid resolution.

In this case, Exhibit A, the amendments to the Indenture of Lease, could be ruled “out of order” because the negotiating team did not have authority, under Title 18, to negotiate on behalf of the Navajo Nation.

Pro Tem Chair Elmer Begay ruled the legislation out of order placing the NGS lease renewal discussion on hold.

It is now in the hands of the Naabik’íyátí Committee, President Shelly, and the Attorney General to resolve uncertainties concerning Title 18 and the negotiations completed by the president’s appointed team.

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