

1-1-2004

Diné Bi Beenahaz'áanii: Codifying Indigenous Consuetudinary Law in the 21st Century

Kenneth Bobroff

University of New Mexico - School of Law

Follow this and additional works at: <https://digitalrepository.unm.edu/tlj>



Part of the [Law Commons](#)

Recommended Citation

Bobroff, Kenneth. "Diné Bi Beenahaz'áanii: Codifying Indigenous Consuetudinary Law in the 21st Century." *Tribal Law Journal* 5, 1 (2004). <https://digitalrepository.unm.edu/tlj/vol5/iss1/2>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Tribal Law Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

Diné Bi Beenahaz'áanii: Codifying Indigenous Consuetudinary Law in the 21st Century

Kenneth Bobroff¹

Table of Contents

- I. Abstract
- II. Introduction
- III. A Note on Language and Terminology
- IV. Navajo Common Law Project
- V. *Diné Bi Beehaz'áanii Bitsé Siléí* - The Foundation of the Diné, Diné Law, and Diné Government
 - a. *Diné Bi Beenahaz'áanii*
 - b. *Diyin Bits'áádéé³⁷ Beehaz'áanii* — Diné Traditional Law
 - c. *Diyin Diné e Bitsaadee Beehaz'áanii* — Diné Customary Law
 - d. *Nahaszáán dóó Yádilhil Bits'áádéé' Beehaz'áanii* - Diné Natural Law
 - e. *Diyin Nohookaáá Diné Beehaz'áanii* - Diné Common Law
- VI. Commentary on the Incorporation of Consuetudinary Law into the Navajo Code

I. Abstract

The fundamental laws of the *Diné*, “the People” in the Navajo language, were placed by the Holy People long before Spaniards arrived in the New World. Since Coronado first traveled to Navajo Country almost five centuries ago, *Diné* have resisted European assaults on Navajo Law. On November 1, 2002, the Navajo Nation Council acknowledged the survival of the fundamental laws of the *Diné*, recognizing four specific constituent elements — traditional law, customary law, natural law, and common law - and explaining the principles of each. This action by the legislature follows more than two decades of conscious efforts by the Navajo Nation judiciary to apply Navajo common law in written legal opinions and to incorporate traditional Navajo dispute resolution into the judicial system. This paper examines the Council’s efforts to incorporate consuetudinary law² in its written statutes in English. It is primarily descriptive, attempting to provide a Spanish audience with an understanding of *Diné* legal principles employed by the Navajo legislature in first attempting codification of principles of Navajo consuetudinary law.

II. Introduction

Ever since Spanish conquistadors arrived in *Diné Bikeyah* in the sixteenth century, Navajo leaders have defended their homeland. They have struggled in the midst of Spanish, Mexican, and United States’ rule to survive as a People. While they gave up military defense in the Treaty of 1868 to win release from United States’ internment

on the Pecos River in New Mexico, they have continued to fight for physical and legal space where the *Diné* and their culture could survive and flourish.³ Since the treaty, this struggle has been waged mostly on the fields of law and culture and mostly in Navajo Country itself. *Diné bi beehaz'áanii*, most commonly translated as Navajo law, has always been at the center of this collective effort, though often hidden from non-Navajo speaking outsiders.⁴ Navajo leaders have used this unwritten Navajo law in local governance and traditional dispute resolution under all three colonial governments. Since the late 1800s, Navajo judges appointed to U.S.-style courts have used it in actions and decisions, although often only implicitly.⁵ Since the early 1980s, the Navajo judiciary has used Navajo common law openly and explicitly in written decisions, at both trial and appellate court levels.⁶ But until recently, the legislative and executive branches of the Navajo Nation government have left the explicit use and development of consuetudinary law to the judicial branch. This changed in November 2002 when the Navajo Nation Council amended Title 1 of the Navajo Nation Code “to recognize the fundamental laws of the Diné” and made the first effort to codify Navajo consuetudinary law.⁷ This essay will describe that amendment and attempt to understand the legislature’s first comprehensive statement of *Diné bi beehaz'áanii*.

III. A Note on Language and Terminology

In amending the Navajo Nation Code, the Council chose different terminology than the Navajo judiciary has used in discussing consuetudinary law. Although Navajo has been a written language for almost a century, it is only in recent decades that documents have begun to be written directly in the Navajo language.⁸ Even today, legal documents are almost never written in Navajo.⁹ While there is no doubt that Navajo judges, legislators and other government officials have been applying Navajo legal concepts for generations, until the late 1900s that process was almost entirely oral, conducted in spoken Navajo.¹⁰ When Navajo judges first issued written opinions incorporating consuetudinary law they used the term “custom”.¹¹ As the number of opinions relying on consuetudinary law began to grow in the 1980s, under the influence of future Chief Justice Tom Tso, the courts used the terms “customary” and “traditional law.”¹² Then, in 1987, the Navajo Supreme Court declared its preference for the term “common law” over “customary” or “traditional law”. “Common law,” then Chief Justice Tso wrote, “properly emphasizes the fact that Navajo custom and tradition is law, and more accurately reflects the similarity in the treatment of custom and common law.”¹³ Following Chief Justice Tso’s retirement from the Court, Chief Justice Robert Yazzie, Associate Justice Raymond D. Austin, and Associate Justice Homer Bluehouse continued to develop the use of Navajo Common Law in the judiciary’s written opinions.¹⁴

Until now, the legislative branch has not developed the use of consuetudinary law in its statutes and written documents. The Navajo Tribal Council first recognized the application of customary law in 1959, although it was limited to civil cases only.¹⁵ In 1985, the Navajo Nation Council, as it is now called, expanded the application of customary law by passing the current version of the provision directing the

application of the “laws or customs” of the Navajo Nation whenever not prohibited by American (*estadounidense*) federal law. This provision refers specifically to “traditional customs and usages of the Navajo Nation.”¹⁶

IV. Navajo Common Law Project

In 1999, the Speaker of the Navajo Nation Council, Edward T. Begay, directed his staff to begin “to conduct research, to define and to transcribe the Diné origin” of Navajo consuetudinary law.¹⁷ In March of that year, the three branch chiefs of the Navajo Nation, President Kelsey A. Begaye, Chief Justice Yazzie, and Speaker Begay signed a Statement of Fundamental Priorities stating that integrating elements of Navajo laws – meaning consuetudinary laws – into every aspect of Navajo government was the key to preserving Navajo culture and sovereignty. The Speaker committed to develop legislation to incorporate these principles into the Navajo Nation Code.¹⁸

The resulting research was summarized in the Navajo Common Law Report submitted by Henry Barber, Staff Assistant to the Speaker, in October 2002. The Report acknowledged “Diné spiritual practitioners and philosophers, Mike Mitchell, Johnson Dennison, Sam Begaye, Hoskie Tom Becenti, Thomas Morris, and others for their contributions of Diné traditional values and the universal guiding principles.” In addition to these experts, the Report also referenced the contributions of Anthony Lee, Sr.¹⁹ The research for the report, of course, was conducted primarily in Navajo. Key terms in the Report (as in the legislation which followed) are written in Navajo, but most of the Report itself is written in English.²⁰

V. *Diné Bi Beehaz’áanii Bitsé Siléí* – The Foundation of the *Diné*, *Diné* Law, and *Diné* Government

Navajo Nation Council Resolution CN-69-02 created a new chapter to begin the Navajo Nation Code, entitled *Diné Bi Beehaz’áanii Bitsé Siléí* – The Foundation of the *Diné*, *Diné* Law, and *Diné* Government.²¹ Although the Navajo Nation Council conducts most of its deliberations and debate in the Navajo language, it publishes most written documents and almost all statutes in English. The new chapter is quite unusual in that it begins with an extended Navajo text and “a visual image of the journey of life from the first creation.”²² The official text passed by the Council and signed by the Navajo Nation President includes both the Navajo text and an English translation. The English translation is:

We, the Diné, the people of the Great Covenant, are the image of our ancestors and we are created in connection with all creation.

The Holy People ordained,

Through songs and prayers,

That

Earth and universe embody thinking,

Water and the sacred mountains embody planning,

Air and variegated vegetation embody life,

Fire, light, and offering sites of variegated sacred stones embody wisdom.

These are the fundamental tenets established.

Thinking is the foundation of planning.

Life is the foundation of wisdom.

Upon our creation, these were instituted within us and we embody them.

Accordingly, we are identified by:

Our Diné' name,

Our clan,

Our language,

Our life way,

Our shadow,

Our footprints.

Therefore, we were called the Holy Earth-Surface-People.

From here growth began and the journey proceeds.

Different thinking, planning, life ways, languages, beliefs, and laws appear among us,

But the fundamental laws placed by the Holy People remain unchanged.

Hence, as we were created with living soul, we remain Diné' forever.²³

In one of its most important cases on Navajo common law, *Bennett v. Navajo Board of Supervisors*, the Navajo Supreme Court described *beehaz'aanii*: "It actually refers to a 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."²⁴ Similarly, the Council's resolution begins with the acknowledgement of "the immutable laws" provided by the Holy People which have provided "sanctuary for the Diné Life Way" and guided, sustained, and protected the Diné as they journeyed upon and off the sacred lands upon which they were placed since time immemorial."²⁵

A. *Diné Bi Beenahaz'áanii*

After the Declaration of the Foundation of Diné Law, the new code chapter describes *Diné bi beenahaz'áanii*. One Navajo scholar translates the term literally as "with it things are kept in place," suggesting that it provides a superstructure for *Diné* Law.²⁶ The Navajo Common Law Project defines the term in conjunction with the more common *beehaz'aanii*, adding the notion of "guiding principles."²⁷ The amended code states that *Diné bi beenahaz'áanii* "embodies" four strands of Navajo consuetudinary

law: Traditional Law, Customary Law, Natural Law, and Common Law.²⁸ These laws “provide sanctuary for the Diné life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world.” “Respect for, honor, belief and trust in the *Diné bi beenahaz’áanii* preserves, protects and enhances” specific named “inherent rights, beliefs, practices and freedoms.”²⁹

The *Diné bi beenahaz’áanii* superstructure contains some elements familiar to Western written and unwritten constitutions. As described in the amended code, *Diné bi beenahaz’áanii* recognizes individual rights and freedoms of each Navajo “from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age” and claims collective rights and freedoms of the Diné as a distinct people. It acknowledges self-governance and a four branch structure consisting of the Executive, Legislative, Judicial, and “National Security” branches, each named in Navajo.³⁰ In contrast to visions focused on preserving or recovering pre-European culture, the code specifically recognizes that *Diné bi beenahaz’áanii* provides a framework for the future development and growth of the Navajo Nation “regardless of the many different thinking, planning, life ways, languages, beliefs, and laws that may appear within the Nation.”³¹ It also recognizes the right of Navajos to be educated about *Diné bi beenahaz’áanii*. Finally, the code notes that *Diné bi beenahaz’áanii* provides for establishing and respecting governmental relationships and agreements with other nations and the expectation of reciprocal honor and respect from such nations.³²

For non-Navajos, the least familiar and most difficult aspect of *Diné bi beenahaz’áanii* described in the amended code relates to *Diné bi nahat’á*. Commonly translated as “planning,” the term seems far more significant in the structure of *Diné bi beenahaz’áanii* than that translation suggests.³³ The code defines *Diné bi nahat’á* as “providing leadership through developing and administering policies and plans utilizing these laws [embodied within *Diné bi beenahaz’áanii*] as guiding principles.”³⁴ It recognizes the importance of *Diné bi nahat’á* within *Diné bi beenahaz’áanii*: “the practice of Diné bi nahat’a through the values and life way embodied in the Diné bi beenahaz’áanii provides the foundation for all laws proclaimed by the Navajo Nation government.”³⁵ It states that “the faithful adherence to Diné Bi Nahat’a will ensure the survival of the Navajo Nation.”³⁶ To a non-Navajo speaker this suggests that *Diné bi nahat’á* is the process of planning, based on the principles of *Diné* law, by which the Navajo Nation maintains sanctuary for the *Diné* life and culture, their relationship to the outside world, and their balance with the natural world.

B. *Diyin Bits’áádée*³⁷ *Beehaz’áanii* — *Diné* Traditional Law

Diyin Bits’áádée Beehaz’áanii, the first of four constituent elements of Navajo consuetudinary law discussed by the amended code, is translated as “Traditional Law”.³⁸ In its definition, the Navajo Common Law Project describes *Diyin Bits’áádée Beehaz’áanii* as “the supreme, fundamental guiding principles of the Diné that play a vital role in the practice of physical, mental, and spiritual well-being.”³⁹

According to the amended code, Traditional Law “declares and teaches” that *Diné* have the right and freedom to choose leaders who will communicate with the people, use their experience and wisdom to act in the best interests of the people, and ensure the rights and freedoms of generations yet to come. It charges Navajo leaders with fulfilling their duties in a moral and legal manner and states that the people’s confidence and trust, and continued status as a leader, are dependent upon adherence to the values and principles of *Diné bi beenahaz’áanii*.⁴⁰

From Traditional Law also comes the responsibilities of the four branches of government. The leaders of the executive branch are charged with representing the Navajo Nation to other peoples and nations and with implementing policies and laws enacted by the legislature. The leaders of the legislative branch are charged with enacting policies and laws to address immediate and future needs. The leaders of the judicial branch are to uphold the values and principles of *Diné bi beenahaz’áanii* “in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments”.⁴¹ The leaders of the security branch, which up to now has not existed as a separate branch of government, are entrusted with the safety of the people and the government. They are charged with maintaining and enforcing security systems and operations for the Navajo Nation and with providing services and guidance in the event of severe national crisis or “military-type” disasters.⁴²

The Traditional Law section of the amended code also addresses the role of what Westerners would call religion. It provides that elders and medicine people, as teachers of traditional laws, values, and principles, must be respected and honored if the people and government are to “persevere and thrive.”⁴³ It calls for their participation in the government and states that their contributions of the traditional values and principles of the *Diné* “life way” will ensure the growth of the Navajo Nation. It specifically says that “from time to time, the elders and medicine people must be requested to provide the cleansing, protection prayers, and blessing ceremonies necessary for securing healthy leadership and the operation of the government in harmony with traditional law.”⁴⁴

The section on Traditional Law also states that “the various spiritual healings through worship, song and prayer (*Nahaghá*) must be preserved, taught, maintained and performed in their original forms.”⁴⁵ At the same time, it calls on the *Diné* and the government to respect the spiritual beliefs and practices of any person and allow for the input and contribution of any religion to the maintenance of a moral society and government. In proposing this provision, the Navajo Common Law Project report called for honoring and respecting the moral practices and spiritual beliefs of the Navajo Native American Church (Peyote Way) and the denominational churches of Navajo Christianity.⁴⁶ The provision recognizes the history of Christianity and change among Navajos and the fact that large numbers of Navajos now follow traditions other than or in addition to traditional *Diné* spirituality.⁴⁷ Finally, the code section on Traditional Law states that “the *Diné* and the government can incorporate those

practices, principles and values of other societies that are not contrary to the values and principles of *Diné bi beenahaz'áanii* and that they deem it in their best interest and necessary for the physical and mental well-being of the individual.”⁴⁸

Functionally, in describing the content and teaching of *Diné* Traditional Law, the amended code sets out standards for Navajo Nation leaders and describes very generally the responsibilities of those leaders within each branch of government. It reinforces the role of Navajo elders and medicine people in government and in the use and maintenance of *Diné* spiritual healings and ceremonies. It specifically acknowledges the spiritual contributions of other religions and provides for the incorporation of practices, principles, and values from other societies that are not contrary to *Diné bi beenahaz'áanii*.

C. *Diyin Diné e Bitsaadee Beehaz'aanii* — *Diné* Customary Law

The amended code cites *Diné* Customary Law for six “rights and freedoms” of the people.⁴⁹ Three of these relate to education. First, the amended code states that it is the right and freedom of the people that there always be “holistic education” of the values and principles underlying “living in balance with all creation, walking in beauty, and making a living.”⁵⁰ Second, the code states that under Customary Law it is the right and freedom of the people that the sacred *Diné* language (*nihiiinéi*) be “taught and preserved.”⁵¹ Third, the section provides that Customary Law recognizes the right and freedom of the people to the education needed to absorb wisdom, self-knowledge, and knowledge to empower them to make a living and participate in the growth of the Navajo Nation.⁵²

According to the amended code, Customary Law also protects the right and freedom of the people to have the sacred system of *k'é* taught and preserved.⁵³ The Navajo Common Law Project explains *k'é* as the Navajo system of clans based upon the four original clans created by the Navajo holy figure Changing Woman: *Kiiyaa'áanii* (Towering House People), *Todích'íiníi* (Bitter Water People), *Honagháahníi* (“The Back or One-Who-Walks-Around-You”), and *Hasht'ishnii* (Mud People) and the many clans descended from those four. According to the Project, the clan system is the foundation of keeping healthy bloodlines and assuring the well-being of individuals, families, and the Navajo Nation as a whole; it should be considered before a couple weds to avoid incest.⁵⁴ The Project notes the foundational importance of *k'é*, describing how it was within the very first set of laws coming from within the Holy Spirit at the time of the *Diné* origin and how the Holy People were told they would address the Holy Spirit through *k'é*. According to the Project, “*K'é* is a law and is the foundation of all laws ... [and] [h]ence became the foundation for the guiding principles established by the Holy People.”⁵⁵

Two of the rights and freedoms the amended code attributes to *Diné* Customary Law relate to the family. One recognizes “the right and freedom of the people that the sacred bonding in marriage and the unity of each family be protected.”⁵⁶ The Navajo Common Law Report gives substantial attention to the *Diné* traditional wedding ceremony and its meaning as an exercise of Navajo Customary Law.⁵⁷ The second

right and freedom related to the family guarantees the people that “every child and every elder be respected, honored and protected with a healthy physical and mental environment, free from abuse.”⁵⁸

D. *Nahasdzáán dóó Yádilhil Bits'áádéé' Beehaz'áanii* – *Diné* Natural Law

The Navajo Common Law Project describes *Diné* Natural Law as establishing guiding principles based upon the cycles and changes of the elements of creation.⁵⁹ Natural Law focuses on the natural world. According to the amended code, *Diné* Natural Law declares and teaches that the four sacred elements of life, air, light/fire, water and earth/pollen must be respected, honored, and protected in all their forms, for they sustain life. Natural Law recognizes the six sacred mountains of the *Diné*, *Sisnajini* (Mt. Blanca), the White Shell Mountain set to the east, near Alamosa, Colorado, *Tsoodzil* (Mt. Taylor), the Turquoise Mountain set to the south, near Laguna, New Mexico, *Dook'o'osliid* (San Francisco Peaks), the Abalone Shell Mountain set to the west, near Flagstaff, Arizona, *Dibe Nitsaa*, (Mt. Hesperus), the Jet Mountain set to the north, near Durango, Colorado, and *Dzil Na'oodilii* (Huerfano Mesa) and *Dzil Ch'ool'i'l* (Governador Knob), both in *Dinetah*, the most sacred area in Navajo Country, near Bloomfield, New Mexico.⁶⁰ It establishes that these “all the attendant mountains” must be respected, honored and protected as the foundation of the Navajo Nation.⁶¹

The amended code notes that *Diné* Natural Law establishes that all creations, including animals, those who live in water, those who fly, and plant life, have their own laws and have rights and freedoms to exist.⁶² It recognizes the sacred obligation and duty the *Diné* carry to use their sacred gifts of language and thinking as stewards for these relatives and to respect, preserve and protect all that was provided.⁶³ It acknowledges Mother Earth and Father Sky as part of the *Diné* and the *Diné* as part of Mother Earth and Father Sky. It requires the *Diné* to “treat this sacred bond with love and respect without exerting dominance for we do not own our mother or father.”⁶⁴ *Diné* Natural Law declares and teaches that the rights and freedoms of the people to use the sacred elements of life, the land, natural resources, sacred sites, and other living beings must be exercised with the proper protocol of respect and offering and that such practices must be protected and preserved as the foundation of spiritual ceremonies and the *Diné* life way.⁶⁵ Finally, the code states that according to Natural Law, “it is the duty and responsibility of the *Diné* to protect and preserve the beauty of the natural world for future generations.”⁶⁶

E. *Diyin Nohookaáá Diné Beehaz'áanii* – *Diné* Common Law

Diné Common Law may be the most difficult of the four constituent elements of *Diné bi beenahaz'áanii* for a non-Navajo speaker to fully understand. The Navajo Common Law Project defines *Diné Bi Beehaz'áanii* – Common Law as the “verbally established *Diné* principles that encompass the moral practices of respect, honor, and trust in the relationship.”⁶⁷ Unlike the amended code’s declarations and explications of Traditional Law, Customary Law, and Natural Law, the section on Common Law is not a listing of particular principles or values. Rather, the amended code itself is a series

of normative “must” statements which themselves reference *Diné* Common Law. The amended code states that *Diné* Common Law declares and teaches that:

The knowledge, wisdom, and practices of the people must be developed and exercised in harmony with the values and principles of the *Diné Bi Beenahaz’áanii*; and in turn, the written laws of the Navajo Nation must be developed and interpreted in harmony with *Diné* Common Law; and

The values and principles of *Diné* Common Law must be recognized, respected, honored and trusted as the motivational guidance for the people and their leaders in order to cope with the complexities of the changing world, the need to compete in business to make a living and the establishment and maintenance of decent standards of living; and

The values and principles of *Diné* Common Law must be used to harness and utilize the unlimited interwoven *Diné* knowledge, with our absorbed knowledge from other peoples. This knowledge is our tool in exercising and exhibiting self-assurance and self-reliance in enjoying the beauty of happiness and harmony.⁶⁸

It appears from these statements that the Navajo Nation Council’s use of the term *Diné* Common Law is not inconsistent with the term’s use by the Navajo judiciary.⁶⁹

VI. Commentary on the Incorporation of Consuetudinary Law into the Navajo Code

The Navajo Nation Council’s first substantive incorporation of consuetudinary law into its written statutes raises significant issues, some common to other attempts to codify consuetudinary law, particularly within superseding colonial regimes, and some specific to the Navajo effort. First, and most obvious to a non-Navajo speaker describing the amended code, the use of two languages in the legal system creates challenges in attaining shared meaning and understanding. A legacy of United States’ rule over the Navajo Nation is a legal system that operates orally in Navajo among Navajo speakers and in English among both Navajo and English speakers, but in which statutes, pleadings, opinions, and other legal documents are almost all written in English. Judges in the Navajo judiciary must be members of the Navajo Nation and must have knowledge of Navajo culture and tradition.⁷⁰ District Court judges must speak Navajo. However, the requirements for membership in the Navajo Nation Bar and practice before the Navajo Nation courts do not include the ability to speak Navajo.⁷¹ A large number of non-Navajo and non-Navajo speaking lawyers regularly appear in Navajo court and practice at every level of the Navajo legal system. While Navajo is among the most widely spoken indigenous languages in the Americas, Navajos who grew up outside Navajo Country, who attended boarding school, or who for other reasons did not learn Navajo, regularly participate in the Navajo legal system as parties, witnesses, practitioners, and staff. As a result, while it may be necessary to have English translations of Navajo consuetudinary legal terms, the process raises difficult questions on the very possibility of achieving accuracy. The amended code ascribes Navajo meaning to English terms – e.g., Customary Law, Traditional Law, Natural Law, and Common Law – that is not necessarily shared outside the code and that may be contested when deployed in argument within the

Navajo legal system. Such argument, often in English, may result in modification to the understanding and meaning of the Navajo terms themselves, conceivably in ways inconsistent with the original meaning of those terms. Moreover, gaining agreement on the proper translation may be difficult when speakers of Navajo from different regions of Navajo Country disagree on the correct meaning and use of Navajo terms. Finally, the process raises questions about changes in meaning resulting from the application and manipulation of Navajo concepts in the English language, by both Navajo-speaking and non-Navajo speaking participants.

The second significant issue raised by the amended code is the importance it places on the role of education and *Diné Bi Beehaz'áanii*. The “whereas” clauses preceding the code amendments recognize great concern that knowledge of the fundamental laws of the *Diné* is fading among young people and that this lack of knowledge may be a primary reason for negative behavior and natural events now plaguing Navajo society. The resolution calls for incorporating these fundamental laws into the Navajo code in a way that will acknowledge and recognize their importance and “generate interest to learn among all Diné.”⁷² It calls on all elements of the government to “learn, practice, and educate the Diné on the values and principles of these laws” and on judges using these fundamental laws to “thoroughly explain” when using the fundamental laws of the *Diné* to adjudicate disputes “so that we can all learn.”⁷³ The resolution implicitly denies that the amendment is intended to conclusively and comprehensively define these fundamental laws and acknowledges that more work is required in order to do so. According to the resolution, it is “planting the seed for the education of all Diné so that we can continue to Walk in Beauty.”⁷⁴

A third important issue raised by the Council’s resolution amending the code is its treatment of religion. It is worthwhile to include its statement on the issue in its entirety:

The Navajo Nation Council finds that the acknowledgment, recognition and teaching of these laws do not contravene 1 N.N.C. § 4 [the Navajo Nation Bill of Rights]; the incorporation of these fundamental laws into the Navajo Nation Code is not governmental establishment of religion nor is it prohibiting the free exercise of religion; the Navajo Nation Council and the *Diné* have always recognized and respected the principle of these fundamental laws and the *Diné* Life Way that all *Diné* have the right and freedom to worship as they choose; and the Navajo Nation Council and the *Diné* recognize that the *Diné* Life Way is a holistic approach to living one’s life whereby one does not separate what is deemed worship and what is deemed secular in order to live the Beauty Way.⁷⁵

The statement suggests some defensiveness about the role of religion, as understood by non-Navajos, under Navajo law. It takes pains to state that incorporating fundamental laws of the *Diné* violates neither the free exercise nor the establishment provisions of the Navajo Bill of Rights and reaffirms Navajos’ freedom to worship as they please.⁷⁶ Most interestingly, it contests the division between religious and secular life in Navajo life, implying instead that the *Diné* Life Way does not

distinguish between the two, but rather incorporates both spiritual and secular life in a context that allows freedom of worship.

A fourth significant issue raised by the amended code is its approach to the role of *Diné Bi Beehaz'áanii* in responding to the modern world, in particular, the modern economy. In several places the amended code references the role of *Diné* law in assuring “growth” of the Navajo Nation and responding to future needs.⁷⁷ The amended code acknowledges the importance of “making a living,” suggesting a refusal to draw a sharp divide between following *Diné Bi Beehaz'áanii* and thriving in the modern economy. The code specifically states:

The values and principles of Diné Common Law must be recognized, respected, honored and trusted as the motivational guidance for the people and their leaders in order to cope with the complexities of the changing world, the need to compete in business to make a living and the establishment and maintenance of decent standards of living.⁷⁸

This is entirely consistent with what one observer calls Navajos’ “integrative” culture.⁷⁹ As former Navajo Nation Solicitor James Zion phrases it: “there is one thing that distinguishes Navajo culture: the ability to adapt, taking the best from other cultures and rejecting the remainder.”⁸⁰

A fifth issue appearing from the amended code is that the Navajo Nation Council’s attempt to incorporate *Diné Bi Beehaz'áanii* into the code occurred as part of the continuing definition of separation of powers and the relationships among the three branches of the Navajo Nation government.⁸¹ In 1981, Navajo Tribal Chairman Peter MacDonald directed examination into how customs and traditions could be incorporated into the court system.⁸² The judiciary then took the lead in the development of Navajo consuetudinary law, incorporating it into written decisions, establishing and developing the Peacemaker division of the Navajo courts, and initiating the first Navajo Common Law Project.⁸³ During the 1990s, the Navajo Nation Division of Education engaged in study and investigation into *Diné* culture and philosophy which appears to have formed some of the basis for the Speaker’s Navajo Common Law Report. However, until the Speaker of the Council initiated his Navajo Common Law Project in 1999, the legislative branch had been absent from the development and use of Navajo consuetudinary law, except, arguably, in its mostly oral use of *Diné* law in its deliberations and lawmaking.⁸⁴ Issues of the primacy of consuetudinary law and the authority of the legislature to overrule the judiciary in interpreting it remain controversial and unresolved. Although the Speaker’s Navajo Common Law Report recommended that under *Diné* Traditional Law “Those Navajo Nation court decisions based on or in accordance of Diné laws shall be reviewed and ratified by the Navajo Nation Council,” the amended code did not include such a provision.⁸⁵

Finally, it should be recognized that this brief description of the initial effort of the Navajo legislature to incorporate consuetudinary law into its code does not address larger questions about the codification of consuetudinary law in general. Specifically,

it does not address concerns about the effects of “freezing” consuetudinary law through codification, about regional variations in understandings of consuetudinary law, and about the temptation of elected legislators to distort the meaning of consuetudinary law to meet short-term political objectives. Such concerns demand further consideration.

¹ Associate Professor of Law, University of New Mexico School of Law. A.B. 1986, Princeton University; M.Phil. 1988, Oxford University; J.D. 1994, Stanford University. This article is written in respect and appreciation of Homer Bluehouse, Associate Justice of the Navajo Nation Supreme Court, and the great contributions he made to the Navajo people. I am indebted to former Associate Justice Raymond D. Austin, Philmer Bluehouse, Chief Justice Robert Yazzie, and James Zion for their insights. I thank Elizabeth Jeffreys for her research assistance, and Ruth Singer for her persistence. Any errors remaining, of course, are mine. This article would not have been possible except for the opportunity provided by the University of Extremadura, the University of New Mexico School of Law, and the Utton Transboundary Resources Center.

² “Consuetudinary” means according to “custom recognized as having legal force; the unwritten law of custom.” OXFORD ENGLISH DICTIONARY (2d ed. 1989). It was used specifically to refer to Scottish common law, although it is also used occasionally to refer to customary norms or international law.

³ For accessible general histories of the Navajo Nation, see DAVID E. WILKINS, *THE NAVAJO POLITICAL EXPERIENCE* (2003); PETER IVERSON, *DINÉ: A HISTORY OF THE NAVAJOS* (2002).

⁴ For translation, see ROBERT W. YOUNG & WILLIAM MORGAN, *THE NAVAJO LANGUAGE: A GRAMMAR AND COLLOQUIAL DICTIONARY* (1987); See also Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009, 6011 (Navajo 1990).

⁵ William Bluehouse Johnson, *Navajo Peacemaker Court: Impact and Efficiency of Traditional Dispute Resolution in the Modern Setting* 6 (1990) (unpublished J.D. thesis, Univ. of New Mexico School of Law) (on file with author); See also Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993) (citing *Navajo Nation v. Platero*, 19 Indian L. Rep. 6049, 6050 (Navajo 1991)); Paul Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. REV. 275, 304 (1991). Mr. Lowery’s article is a comprehensive treatment of the judiciary’s use of Navajo common law in written decisions up to 1992. This essay draws on it extensively for the background and history of the use of Navajo common law by Navajo courts.

⁶ See generally Lowery, *supra* note 5.

⁷ Navajo Nation Council Res. CN-69-02, Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné (Nov. 13, 2002).

⁸ Robert W. Young, *A History of Written Navajo*, in *ADVANCES IN THE CREATION AND REVISION OF WRITING SYSTEMS* 459, 469-79 (Joshua A. Fishman ed., 1977).

⁹ E.g., DANIEL MCLAUGHLIN, WHEN LITERACY EMPOWERS: NAVAJO LANGUAGE IN PRINT (1992) (noting limited venues for use of Navajo language literacy).

¹⁰ Cf. *id.* at 46 (citing B. Spolsky & P. Irvine, Sociolinguistic Aspects of the Acceptance of Literacy in the Vernacular, in BILINGUALISM AND LANGUAGE CONTACT: SPANISH, ENGLISH, AND NATIVE AMERICAN LANGUAGES (F. Barkin, et al. eds., 1982) (“Navajo is the preferred and appropriate language for oral use, and English the most frequently used language for writing,”)).

¹¹ E.g., *Trust of Benally*, 1 Navajo Rptr. 10 (Navajo Ct. App. 1969); *Marriage of Daw*, 1 Navajo Rptr. 1 (Navajo Ct. App. 1969); *Lente v. Notah*, 3 Navajo Rptr. 72 (Navajo Ct. App. 1982).

¹² E.g., *Estate of Apachee*, 4 Navajo Rptr. 178 (Navajo D. Ct. 1983); *Tome v. Navajo Nation*, 4 Navajo Rptr. 159 (Navajo D. Ct. 1983); *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250 (Navajo D. Ct. 1982); *Lente v. Notah*, 3 Navajo Rptr. 72 (Navajo Ct. App. 1982).

¹³ Lowery, *supra* note 5, at 383 (citing *Dawes v. Yazzie*, 5 Navajo Rptr. 161, 165 (Navajo 1987); James W. Zion, *Harmony among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 269-70 (1984) (comparing Navajo common law with American common law); See Richard Van Valkenburgh, *Navajo Common Law I: Notes on Political Organization, Property and Inheritance*, 9 MUSEUM NOTES: MUSEUM OF N. ARIZ. 17 (1936).

¹⁴ James Zion, then Solicitor of the Navajo Nation Judicial Branch was also instrumental in developing the use of Navajo common law throughout the judiciary during this period. For key articles by the participants regarding this effort, see Raymond D. Austin, *Freedom, Responsibility, and Duty: ADR and the Navajo Peacemaker Court*, 32 THE JUDGE'S JOURNAL 8 (Spring 1993); Robert Yazzie, “Life Comes From It”: Navajo Justice Concepts, 24 N.M. L. REV. 175 (1994); JAMES W. ZION & ROBERT YAZZIE, *Indigenous Law in North America in the Wake Of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (Winter 1997).

¹⁵ Lowery, *supra* note 5, at n.29 (citing Navajo Tribal Council Res. CJA-1-59, § 1 (Jan. 6, 1969)).

¹⁶ Nation Code tit. 7, § 204 (1995).

¹⁷ Henry Barber, Office of the Speaker, Navajo Common Law Project: Researching Our Original Diné Laws 6 (Oct. 6, 2002) (unpublished manuscript) (on file with author).

¹⁸ *Id.*

¹⁹ *Id.* at 4, 17, 40-44.

²⁰ *Id.* at 37-39 (containing “definitions”).

²¹ Unlike many indigenous nations in the United States, the Navajo Nation does not have a written constitution.

²² Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”; Barber, supra note 17, at 8.

²³ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. The Council resolution includes a footnote identifying those who responsible for the Declaration: “The Navajo Nation is grateful to Mike Mitchell, Wilson Aronilth, Peggy Scott, Laura Wallace, the late Andrew Notonabah, and the late Dr. Dean Jackson who developed the declaration, with guidance from the Navajo Medicine-Men Association and Navajo Community College. The revision of the declaration interpretation was made by: Laura Wallace, Division of Diné Education; Roger Begay, Diné Language and Cultural Development–Division of Diné Education; and Henry Barber, Office of the Speaker.” Id.

²⁴ 18 Indian L. Rep. 6009 (Navajo 1990).

²⁵ Navajo Nation Council Res. CN-69-02, supra note 7, at cl. 2.

²⁶ Interview with Anonymous Navajo scholar (May 1, 2003).

²⁷ Barber, supra note 17, at 37.

²⁸ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. Each of these has a much more descriptive Navajo term and is defined in more detail in subsequent sections of the amended code.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ YOUNG & MORGAN, supra note 4, at 533.

³⁴ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

³⁵ Id.

³⁶ Id.

fn37 .This word includes diacritic characters that cannot be printed correctly without a special font. A Navajo font can be downloaded at <http://dine.sanjuan.k12.ut.us/index.html>. The proper spelling of Navajo words can be confirmed in YOUNG & MORGAN, supra note 4.

³⁸ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

³⁹ Barber, supra note 17, at 37.

⁴⁰ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

⁴¹ Id.

[42](#) Id.

[43](#) Id.

[44](#) Id.

[45](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[46](#) Barber, supra note 17, at 26.

[47](#) For a classic discussion of Navajo religious change, see DAVID ABERLE, THE PEYOTE RELIGION AMONG THE NAVAHO (1982).

[48](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[49](#) Id.

[50](#) Id.

[51](#) Id.

[52](#) Id.

[53](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. According to the Navajo Supreme Court, “ K’é frames the Navajo perception of moral right, and therefore this court’s interpretation of due process rights. K’é contemplates one’s unique, reciprocal relationships to the community and the universe. It promotes respect, solidarity, compassion and cooperation so that people may live in hozho, or harmony. K’é stresses the duties and obligations of individuals relative to their community.” *Atcitty v. Dist. Court*, 24 Indian L. Rep. 6013, 6014 (Navajo 1996).

[54](#) Navajo Common Law Project, Navajo Kinship and Clan System 4 (Sept. 23, 2002) (unpublished manuscript) (on file with author); Barber, supra note 17, at 17.

[55](#) Barber, supra note 17, at 7. To an outside observer, k’é appears to occupy a more central place in Navajo culture and consuetudinary law than suggested by the relatively short provision related to it in the amended code.

[56](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[57](#) Barber, supra note 17, at 14-17.

[58](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[59](#) Barber, supra note 17, at 38.

[60](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”; Barber, supra note 17, at 37-39.

[61](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. The Navajo Common Law Report acknowledged that there are basically twelve sacred mountains. See Barber, supra note 17, at 10.

[62](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[63](#) Id.

[64](#) Id.

[65](#) Id.

[66](#) Id.

[67](#) Barber, *supra* note 17, at 37.

[68](#) Navajo Nation Council Resolution CN-69-02, *supra* note 7, Exhibit “A”.

[69](#) See, e.g., *Bennett v. Navajo Bd. of Election Supervisors*, 18 Indian L. Rep. 6009 (Navajo 1990).

[70](#) James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523, 542 (2002) (citing Nation Code tit. 7, § 354(A) and (E) (1995)) [hereinafter *Civil Rights*].

[71](#) Id. at 543.

[72](#) Navajo Nation Council Res. CN-69-02, *supra* note 7.

[73](#) Id.

[74](#) Navajo Nation Council Res. CN-69-02, *supra* note 7.

[75](#) Id.

[76](#) See *Civil Rights*, *supra* note 70, at 539-40 (providing a very brief history of some of the conflicts within the Navajo Council over freedom of religion, particularly as it relates to the Native American Church).

[77](#) E.g., Navajo Nation Council Resolution CN-69-02, *supra* note 7, Exhibit “A”.

[78](#) Navajo Nation Council Res. CN-69-02, *supra* note 7, Exhibit “A”.

[79](#) *Civil Rights*, *supra* note 70, at n.111 (citing Louise Lamphere, *Comments on the Navajo Healing Project*, 14 MED. ANTHROPOLOGY Q. 598, 599 (2000)).

[80](#) Id. at 542.

[81](#) Id. at 535-38, 542-44, providing a thoughtful analysis of the issue from the perspective of the judiciary.

[82](#) Lowery, *supra* note 5, at 383 (citing James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 92 (1983) [hereinafter *Navajo Peacemaker Court*]).

[83](#) See generally Lowery, *supra* note 5. On Navajo Peacemaking, see Navajo Peacemaker Court_, *supra* note 82; Philmer Bluehouse & James W. Zion, *Hozhooji Naat’ aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).

⁸⁴ The Council acknowledged its absence from the discussion about and development of the fundamental laws of the Diné in the resolution amending the code. See Navajo Nation Council Res. CN-69-02, *supra* note 7, at cl. 3.

⁸⁵ Barber, *supra* note 17, at 25.

¹ Associate Professor of Law, University of New Mexico School of Law. A.B. 1986, Princeton University; M.Phil. 1988, Oxford University; J.D. 1994, Stanford University. This article is written in respect and appreciation of Homer Bluehouse, Associate Justice of the Navajo Nation Supreme Court, and the great contributions he made to the Navajo people. I am indebted to former Associate Justice Raymond D. Austin, Philmer Bluehouse, Chief Justice Robert Yazzie, and James Zion for their insights. I thank Elizabeth Jeffreys for her research assistance, and Ruth Singer for her persistence. Any errors remaining, of course, are mine. This article would not have been possible except for the opportunity provided by the University of Extremadura, the University of New Mexico School of Law, and the Utton Transboundary Resources Center.

² “Consuetudinary” means according to “custom recognized as having legal force; the unwritten law of custom.” OXFORD ENGLISH DICTIONARY (2d ed. 1989). It was used specifically to refer to Scottish common law, although it is also used occasionally to refer to customary norms or international law.

³ For accessible general histories of the Navajo Nation, see DAVID E. WILKINS, *THE NAVAJO POLITICAL EXPERIENCE* (2003); PETER IVERSON, *DINÉ: A HISTORY OF THE NAVAJOS* (2002).

⁴ For translation, see ROBERT W. YOUNG & WILLIAM MORGAN, *THE NAVAJO LANGUAGE: A GRAMMAR AND COLLOQUIAL DICTIONARY* (1987); See also Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009, 6011 (Navajo 1990).

⁵ William Bluehouse Johnson, Navajo Peacemaker Court: Impact and Efficiency of Traditional Dispute Resolution in the Modern Setting 6 (1990) (unpublished J.D. thesis, Univ. of New Mexico School of Law) (on file with author); See also Daniel L. Lowery, Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992, 18 AM. INDIAN L. REV. 379 (1993) (citing Navajo Nation v. Platero, 19 Indian L. Rep. 6049, 6050 (Navajo 1991)); Paul Frye, Lender Recourse in Indian Country: A Navajo Case Study, 21 N.M. L. REV. 275, 304 (1991). Mr. Lowery’s article is a comprehensive treatment of the judiciary’s use of Navajo common law in written decisions up to 1992. This essay draws on it extensively for the background and history of the use of Navajo common law by Navajo courts.

⁶ See generally Lowery, *supra* note 5.

⁷ Navajo Nation Council Res. CN-69-02, Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné (Nov. 13, 2002).

⁸ Robert W. Young, A History of Written Navajo, in *ADVANCES IN THE CREATION AND REVISION OF WRITING SYSTEMS* 459, 469-79 (Joshua A. Fishman ed., 1977).

⁹ E.g., DANIEL MCLAUGHLIN, WHEN LITERACY EMPOWERS: NAVAJO LANGUAGE IN PRINT (1992) (noting limited venues for use of Navajo language literacy).

¹⁰ Cf. *id.* at 46 (citing B. Spolsky & P. Irvine, Sociolinguistic Aspects of the Acceptance of Literacy in the Vernacular, in BILINGUALISM AND LANGUAGE CONTACT: SPANISH, ENGLISH, AND NATIVE AMERICAN LANGUAGES (F. Barkin, et al. eds., 1982) (“Navajo is the preferred and appropriate language for oral use, and English the most frequently used language for writing,”)).

¹¹ E.g., *Trust of Benally*, 1 Navajo Rptr. 10 (Navajo Ct. App. 1969); *Marriage of Daw*, 1 Navajo Rptr. 1 (Navajo Ct. App. 1969); *Lente v. Notah*, 3 Navajo Rptr. 72 (Navajo Ct. App. 1982).

¹² E.g., *Estate of Apachee*, 4 Navajo Rptr. 178 (Navajo D. Ct. 1983); *Tome v. Navajo Nation*, 4 Navajo Rptr. 159 (Navajo D. Ct. 1983); *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250 (Navajo D. Ct. 1982); *Lente v. Notah*, 3 Navajo Rptr. 72 (Navajo Ct. App. 1982).

¹³ Lowery, *supra* note 5, at 383 (citing *Dawes v. Yazzie*, 5 Navajo Rptr. 161, 165 (Navajo 1987); James W. Zion, *Harmony among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 269-70 (1984) (comparing Navajo common law with American common law); See Richard Van Valkenburgh, *Navajo Common Law I: Notes on Political Organization, Property and Inheritance*, 9 MUSEUM NOTES: MUSEUM OF N. ARIZ. 17 (1936).

¹⁴ James Zion, then Solicitor of the Navajo Nation Judicial Branch was also instrumental in developing the use of Navajo common law throughout the judiciary during this period. For key articles by the participants regarding this effort, see Raymond D. Austin, *Freedom, Responsibility, and Duty: ADR and the Navajo Peacemaker Court*, 32 THE JUDGE'S JOURNAL 8 (Spring 1993); Robert Yazzie, “Life Comes From It”: Navajo Justice Concepts, 24 N.M. L. REV. 175 (1994); JAMES W. ZION & ROBERT YAZZIE, *Indigenous Law in North America in the Wake Of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (Winter 1997).

¹⁵ Lowery, *supra* note 5, at n.29 (citing Navajo Tribal Council Res. CJA-1-59, § 1 (Jan. 6, 1969)).

¹⁶ Nation Code tit. 7, § 204 (1995).

¹⁷ Henry Barber, Office of the Speaker, Navajo Common Law Project: Researching Our Original Diné Laws 6 (Oct. 6, 2002) (unpublished manuscript) (on file with author).

¹⁸ *Id.*

¹⁹ *Id.* at 4, 17, 40-44.

²⁰ *Id.* at 37-39 (containing “definitions”).

²¹ Unlike many indigenous nations in the United States, the Navajo Nation does not have a written constitution.

²² Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”; Barber, supra note 17, at 8.

²³ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. The Council resolution includes a footnote identifying those who responsible for the Declaration: “The Navajo Nation is grateful to Mike Mitchell, Wilson Aronilth, Peggy Scott, Laura Wallace, the late Andrew Notonabah, and the late Dr. Dean Jackson who developed the declaration, with guidance from the Navajo Medicine-Men Association and Navajo Community College. The revision of the declaration interpretation was made by: Laura Wallace, Division of Diné Education; Roger Begay, Diné Language and Cultural Development–Division of Diné Education; and Henry Barber, Office of the Speaker.” Id.

²⁴ 18 Indian L. Rep. 6009 (Navajo 1990).

²⁵ Navajo Nation Council Res. CN-69-02, supra note 7, at cl. 2.

²⁶ Interview with Anonymous Navajo scholar (May 1, 2003).

²⁷ Barber, supra note 17, at 37.

²⁸ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. Each of these has a much more descriptive Navajo term and is defined in more detail in subsequent sections of the amended code.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ YOUNG & MORGAN, supra note 4, at 533.

³⁴ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

³⁵ Id.

³⁶ Id.

fn37 .This word includes diacritic characters that cannot be printed correctly without a special font. A Navajo font can be downloaded at <http://dine.sanjuan.k12.ut.us/index.html>. The proper spelling of Navajo words can be confirmed in YOUNG & MORGAN, supra note 4.

³⁸ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

³⁹ Barber, supra note 17, at 37.

⁴⁰ Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

⁴¹ Id.

[42](#) Id.

[43](#) Id.

[44](#) Id.

[45](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[46](#) Barber, supra note 17, at 26.

[47](#) For a classic discussion of Navajo religious change, see DAVID ABERLE, THE PEYOTE RELIGION AMONG THE NAVAHO (1982).

[48](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[49](#) Id.

[50](#) Id.

[51](#) Id.

[52](#) Id.

[53](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. According to the Navajo Supreme Court, “ K’é frames the Navajo perception of moral right, and therefore this court’s interpretation of due process rights. K’é contemplates one’s unique, reciprocal relationships to the community and the universe. It promotes respect, solidarity, compassion and cooperation so that people may live in hozho, or harmony. K’é stresses the duties and obligations of individuals relative to their community.” Atcitty v. Dist. Court, 24 Indian L. Rep. 6013, 6014 (Navajo 1996).

[54](#) Navajo Common Law Project, Navajo Kinship and Clan System 4 (Sept. 23, 2002) (unpublished manuscript) (on file with author); Barber, supra note 17, at 17.

[55](#) Barber, supra note 17, at 7. To an outside observer, k’é appears to occupy a more central place in Navajo culture and consuetudinary law than suggested by the relatively short provision related to it in the amended code.

[56](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[57](#) Barber, supra note 17, at 14-17.

[58](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[59](#) Barber, supra note 17, at 38.

[60](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”; Barber, supra note 17, at 37-39.

[61](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”. The Navajo Common Law Report acknowledged that there are basically twelve sacred mountains. See Barber, supra note 17, at 10.

[62](#) Navajo Nation Council Res. CN-69-02, supra note 7, Exhibit “A”.

[63](#) Id.

[64](#) Id.

[65](#) Id.

[66](#) Id.

[67](#) Barber, *supra* note 17, at 37.

[68](#) Navajo Nation Council Resolution CN-69-02, *supra* note 7, Exhibit “A”.

[69](#) See, e.g., *Bennett v. Navajo Bd. of Election Supervisors*, 18 Indian L. Rep. 6009 (Navajo 1990).

[70](#) James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523, 542 (2002) (citing Nation Code tit. 7, § 354(A) and (E) (1995)) [hereinafter *Civil Rights*].

[71](#) Id. at 543.

[72](#) Navajo Nation Council Res. CN-69-02, *supra* note 7.

[73](#) Id.

[74](#) Navajo Nation Council Res. CN-69-02, *supra* note 7.

[75](#) Id.

[76](#) See *Civil Rights*, *supra* note 70, at 539-40 (providing a very brief history of some of the conflicts within the Navajo Council over freedom of religion, particularly as it relates to the Native American Church).

[77](#) E.g., Navajo Nation Council Resolution CN-69-02, *supra* note 7, Exhibit “A”.

[78](#) Navajo Nation Council Res. CN-69-02, *supra* note 7, Exhibit “A”.

[79](#) *Civil Rights*, *supra* note 70, at n.111 (citing Louise Lamphere, *Comments on the Navajo Healing Project*, 14 MED. ANTHROPOLOGY Q. 598, 599 (2000)).

[80](#) Id. at 542.

[81](#) Id. at 535-38, 542-44, providing a thoughtful analysis of the issue from the perspective of the judiciary.

[82](#) Lowery, *supra* note 5, at 383 (citing James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 92 (1983) [hereinafter *Navajo Peacemaker Court*]).

[83](#) See generally Lowery, *supra* note 5. On Navajo Peacemaking, see Navajo Peacemaker Court_, *supra* note 82; Philmer Bluehouse & James W. Zion, *Hozhooji Naat’ aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).

⁸⁴ The Council acknowledged its absence from the discussion about and development of the fundamental laws of the Diné in the resolution amending the code. See Navajo Nation Council Res. CN-69-02, *supra* note 7, at cl. 3.

⁸⁵ Barber, *supra* note 17, at 25.