

Restoring Harmony through *Nalyeeh*: Can the Navajo Common Law of Torts be Applied in State and Federal Forums?

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INTRODUCTION

Tribal courts are faced with the task of restoring harmony to their communities and crafting practical remedies acceptable to the people can be challenging.² Many tribal courts in the United States are struggling to incorporate traditional tribal customary law into modern judge-decided law. The Navajo Nation has been especially proactive in this endeavor. Berkeley law professor Robert D. Cooter and Professor Wolfgang Fikentscher of the University of Munich observe:

The Navajos, who have the largest, most populous, and one of the richest reservations in America, also have the best funded tribal court system. The Navajo Supreme Court hears many cases each year argued by lawyers who continually refer back to its past decisions, which are published and stored in an impressive library. The Navajo judges speak about “Navajo common law” and regard themselves as participating in its elaboration and development.³

The Navajo Nation touches four states, Arizona, Colorado, New Mexico, and Utah and its population nears one quarter million tribal members.⁴ In size, the Navajo Nation occupies the largest Indian reservation in North America. Because of the Navajo Nation’s vast size and large population, the probabilities that a non-Navajo lawyer might require some understanding of its legal complexities seem quite likely. For this reason, among others, the Navajo Nation’s traditional law and its judicial system have been chosen for investigation in this paper.

In the traditional Navajo experience, the meaning of life is to maintain balance between the individual and the universe. This means to organize one’s life so that one can live in harmony with the natural world.⁵ As traditional Navajo Betty Tso writes, “We the five-fingered beings are related to the four-legged, the winged beings, the spiritual beings, Father Sky, Mother Earth, and nature. We are all relatives. We cannot leave our relatives behind.”⁶ This paper will demonstrate that the Navajo Nation has developed and articulated a modern tort law and doctrine of

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² Tribal courts can exercise civil jurisdiction in cases where a plaintiff has a claim against an Indian for an injury that occurred in Indian Country. Likewise, an Indian plaintiff can sue a non-Indian or Indian non-member when the injury likewise occurred in Indian Country. See *Williams v. Lee*, 358 U.S. 217, 218, 223 (1959).

³ Robert D. Cooter and Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 328 (1998).

⁴ According to the 1990 U.S. Census, the population of the Navajo Nation is 219, 198 members and the Navajo Nation is the second largest U.S. Indian nation in terms of population. Cited in “American Indians in New Mexico and Their Neighbors: Building Bridges of Understanding,” Report of the Twenty-First New Mexico First Town Meeting, June 4-7, 1998, at 13.

⁵ GLADYS A. REICHARD, *NAVAHO RELIGION: A STUDY OF SYMBOLISM* 49 (1983).

⁶ See *Navajo Religion: A Sacred Way of Life*, at www.xpressweb.com/zionpark/index3.html “<http://www.xpressweb.com/zionpark/index3.html> (last visited Feb. 28, 2002).

restitution grounded in Navajo tradition and evolved from ancient custom, similar to the Anglo-American notion of common law. This Navajo doctrine of law has been applied most recently against a state supported workers' compensation scheme.

This paper will also discuss the definition and sources of Navajo customary law. Further, the paper will examine several Navajo Nation court decisions that can be used to tease out a tort doctrine. The paper will also look toward the Navajo Tribal Code in an effort to demonstrate how the Tribal Council has codified customary doctrines, such as, restitution. Moreover, the paper will also look at the statements of Navajo judges who in their own words explain how the Navajo common law developed into the modern body of law found today. Finally, the paper will discuss a recent federal case *Cheromiah v. United States*⁷ where a federal court held that tribal customary law would control in a tort action against the federal government.⁸

I. Navajo Traditional Law as Restorative Justice

One definition of "law" is that it is composed of three things: norms, institutions and force. A "norm" is a feeling of "ought." One "ought" to do this and ought not do that. A norm becomes a law when it is enforced by an "institution" such as a court or the police. Many definitions insist that without force, or without ability to punish, there can be no "law". The Anglo definition of "law" insists on visible institutions such as courts and punishment. This type of "law" can only hurt; it cannot heal.⁹

For Navajo people, the dynamics of justice has much more to do with the importance of relationships. Navajo justice concerns itself with harmony and restoring good relations. Thus, unlike its Anglo counterpart, Navajo law seeks to heal.¹⁰ Central in the Navajo idea of law is the notion of *hozho* or harmony¹¹—harmony not in the sense of its usual English usage, but something more profound. An English speaker might think of harmony as an internal calmness, or perhaps a sense of tranquility. Others might define harmony as something in the context of an integration of separate parts, or an agreement.¹² Yet, when Navajos speak of harmony their definition is closer to a quality or sense of natural and spiritual perfection.¹³ In other words, Navajo traditional law seeks to find a place for everything and put everything in its place. James Zion, former solicitor to the Navajo Nation Supreme Court, relates, "[t]he legal systems of Indian peoples were based upon the idea of maintaining harmony in the family, the camp, and the

⁷ 55 F. Supp. 2d 1295 (D.N.M. 1999).

⁸ *Id.* at 1305.

⁹ Hon. Robert Yazzie, *Healing as Justice: The American Experience*, in JUSTICE AS HEALING: A NEWSLETTER ON ABORIGINAL CONCEPTS OF JUSTICE, Spring 1995, at 1, available at www.usask.ca/nativelaw/jah_yazzie.html (last visited Feb. 28, 2002) [hereinafter *Healing*].

¹⁰ *Id.* at 1-3.

¹¹ Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141, 142 (1994).

¹² See e.g., WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1035 (1976).

¹³ See REICHARD, *supra* note 4, at 148—49.

community.”¹⁴ Today, the Navajo Nation judiciary has been charged with the task of ensuring social harmony and has chosen to revive traditional law as means of realizing what in Navajo is called *hozho nahasdlíí* “now that we have done these things we are again in good relations.”¹⁵ Well beyond the sphere of jurisprudence in its application, Navajo traditional law serves as a process designed to lead to “healing of the body, the mind, and the spirit.”¹⁶

A. Navajo Traditional Law and the Judiciary

The use of custom in tribal jurisprudence, codified and common law, with the appropriate Anglo-American law concepts produces synergistic results, rather than a laminate with discrete layers. While elegant integration of diverse legal concepts is an accomplishment in itself, that is not the primary benefit of tribal law. Of most value is the creative capacity of tribal courts, shown through the work of [American Indians trained in law who also retain their cultural identity and sensitivities] [and] use the old to make new and appropriate law... In both the tribal law and the concept of [American Indians trained in law who also retain their cultural identity and sensitivities], there is an innovative result that is consistent with a pervasive characteristic of the indigenous nations: the capacity to change as an evolving culture.¹⁷

Professor Valencia-Weber points out that tribal court systems have been the driving engine of internal legal innovation. In the case of the Navajo people, adaptation and creative modernization have been a mainstay of the culture since first contact with Europeans.¹⁸ The incorporation of cattle and horses into the culture are two such examples. Similar to the horse, perhaps even more important, was the adoption of sheep herding which eventually figured central in Navajo agrarian culture both in terms of economics and religion.¹⁹ Like agricultural techniques, the Navajo people have adopted components from various political systems in an effort to synthesize a genuine Navajo legal structure. When cultures such as the Navajo, embrace conceptualizations from another “donor” society, the original meanings are lost and become part of the adoptees’ identity.²⁰

Since 1981, the Navajo Nation judiciary has sought to systematically incorporate Navajo traditional law into the law books.²¹ The first major revival of Navajo traditional law was the re-creation of an ancient dispute resolution process in modern guise, the Peacemaker Court. This structure brought together traditional dispute resolution, a talking out process, and the authority of a district court order.²² Justice Yazzie explains, “alien ways do not solve peoples’ problems...

¹⁴ James Zion, *Harmony among the People: Torts and Indian Courts*, 45 MONTANA L. REV. 265 (1984).

¹⁵ Hon. Robert Yazzie, “_Hozho Nahasdlíí_” — *We are Now in Good Relations: Navajo Restorative Justice*, ST. THOMAS L. REV. 117, 124 (1996) [hereinafter *Hozho Nahasdlíí*].

¹⁶ *Id.*

¹⁷ Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 237, 256—57 (1994).

¹⁸ *Id.* at 257—58.

¹⁹ *Id.*

²⁰ *Id.* at 258.

²¹ Wallingford, *supra* note 10, at 146—47.

²² *Id.* at 147.

Rather, if the Navajo courts institutionalize Navajo justice concepts—equality, talking things out and consent—that will respond to expectations that Navajo people already have.”²³ Many observers point to the success of the Peacemaker Court where there is less than a five percent rate of recidivism for criminal and quasi-criminal cases resolved through the system.²⁴ Clearly, this low rate points to the program’s popular support and its legitimization in the eyes of the people.²⁵

Desiring to enhance the prestige and usage of traditional law, Navajo statutory law provides for the introduction of custom.²⁶ Experts do not always prove custom in court. Where most tribal members commonly know a custom, it is proven.²⁷ The Navajo Nation Supreme Court explained in *Dawes v. Yazzie*,²⁸ that there are several options when relying upon Navajo common law.²⁹ Parties may introduce expert witness testimony, or the judge may take judicial notice of Navajo common law, or common law may be supported/proven through scholarly works.³⁰ Justice Raymond Austin explains why the Navajo Nation judiciary has been so dynamic in applying traditional law:

We prefer Navajo common law for several reasons. First, it is what our constituents know and want. Second, it gives us control over our own law without outside interference and second-guessing. Third, we believe that our concepts of freedom, liberty, equality and fairness are superior to Anglo-American principles. Finally, we want Navajo law, which is framed by Navajos, written by Navajos, and used by Navajos. It is our law, and we are free to develop it to meet the changing needs of Navajo Society as it proceeds in an alliance with the United States, which began in 1868.³¹

Since the 1980’s the Navajo judiciary has been very proactive in incorporating custom into Anglo style judge-made law. Traditional Navajo ideas of restitution and injury, or what non-Navajos might call tort law, will be examined below.

B. Traditional Navajo Tort Law

What happens when there is a dispute? The person who claims the injury demands *nalyeeh*. The word is translated as “restitution” or “reparation,” but it is an action word, which demands compensation for an injury and an adjustment of

²³ *Id.* at 148, n.32 (quoting Robert Yazzie, The Navajo Peacemaker Court: Contrast of Justice 4 (Nov. 10, 1992) (unpublished manuscript, on file with the Oklahoma City University Law Review)).

²⁴ *Id.* at 148.

²⁵ *Id.*

²⁶ See 7 N.T.C. § 204 (1995). Although the scope of this paper traces the development of Navajo traditional law through the lens of judge-made law, to be sure, the Navajo Nation Tribal Council has taken an active role in codifying portions of the traditional law.

²⁷ Wallingford, *supra* note 10, at 149.

²⁸ 5 Nav. R. 161 (Nav. Sup. Ct. 1987).

²⁹ *Id.* at 165—66.

³⁰ *Id.*

³¹ Hon. Raymond D. Austin, *Incorporating Tribal Customs: and Traditions into Tribal Court Decisions*, 1992 FED. BAR ASS’N INDIAN L. CONFERENCE 11—12.

relationships between an “offender” and a “victim.” Who is the judge? It is not a *naat’aanii*, but the persons who are involved in the dispute.³²

Historically, Navajos have sought to settle disputes by talking things out.³³ When someone harmed another, the party causing the injury compensated the victim or victim’s family.³⁴ The compensation was thought to be a symbolic gesture that would actually restore the community to a sense of harmony or wholeness.³⁵ In earlier times prior to the reservation era, Navajos would shun an offender and demand restitution for the harm caused to the victim and his/her relations. Restitution remedied bad feelings and restored good will.³⁶

[T]raditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for an injury. In the law of *nalyeeh*, one who is hurt is not concerned with intent, causation, fault, or negligence. If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt to stop, and I want others to acknowledge that I am in pain. The maxim for *nalyeeh* is that there must be compensation so there will be no hard feelings. This is restorative justice. Returning people to good relations with each other in a community is an important focus. Before good relations can be restored, the community must arrive at a consensus about the problem.³⁷

Even a quick reading of Justice Yazzie’s words reveal that tort law in the Navajo Nation is quite different from its Anglo-American counterpart. The foundation on which Navajo tort law rests is the idea of harmony—a radical departure from the adversarial fault based nature of American tort law.³⁸ Central to Navajo tort law is the flexible concept of restorative justice called *nalyeeh*.³⁹ In the past, *nalyeeh* was a symbolic payment of material goods e.g. sheep, horses, silver, given in an effort to restore an injured party to wholeness.⁴⁰ Over time, modern Navajo courts have acknowledged *nalyeeh* as something more analogous to the western idea of monetary damages.⁴¹ What is important to grasp is the reality of the

³² James W. Zion and Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT’L & COMP. L. REV. 55, 77 (1997) (citations omitted).

³³ *Healing*, *supra* note 8, at 4.

³⁴ *Id.* at 1.

³⁵ *Id.* at 1—2.

³⁶ *Id.* See also Hon. Robert Yazzie, Address at the National Symposium on Sentencing: The Judicial Response to Crime at the American Judicature Society in San Diego, Cal. (Nov. 2—3, 1997) available at www.usask.ca/nativelaw/jah_yazzie2.html (last visited Feb. 28, 2002).

³⁷ Hon. Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 184—85 (1994).

³⁸ Interestingly, early in the development of English tort law, the law was not so much concerned with the intent or moral responsibility of the defendant. One English judge was quoted as saying, “The thought of man shall not be tried, for the devil himself knoweth not the thoughts of man.” PROSSER, WADE, AND SCHWARTZ, *CASES AND MATERIALS ON TORTS* 2-3 (9th ed. 1994) (citing Y.B. 7 Edw. IV, f.2, pl.2 (1486)). “[I]n all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering.” *Id.* (citing *Lambert v. Bessy*, T.Raym. 421, 83 Eng. Rep. 220 (K.B. 1681)). Compare these early maxims with contemporary doctrines of punitive damages.

³⁹ See *Benally v. Navajo Nation*, 5 Nav. R. 209, 213, 5 Navajo L. Rep. 107, 109—10 (W.R. Dist. Ct. 1986); see also *Nez v. Peabody Western Coal Company*, 2 Navajo App. Rep. 550, 554 (Nav. Sup. Ct. 1999).

⁴⁰ *Healing*, *supra* note 8, at 1.

⁴¹ See e.g., *Bryant v. Bryant*, 3 Nav. R. 194, 3 Navajo L. Rep. 112 (S.R. Dist. Ct. 1981) (reasoning that a Navajo jury would incorporate Navajo community standards, values, and customs when determining

doctrine's wide-ranging applicability and elasticity. So broad and encompassing is the doctrine's restorative force that the Window Rock district court in *Benally v. Navajo Nation*⁴² recognized, "[n]alyeeh, traditionally, has the power to correct wrongs of any kind."⁴³ The court, guided by *Bryant v. Bryant*,⁴⁴ linked the concept of *nalyeeh* to Anglo style cash awards.⁴⁵ The Shiprock District Court explained that the jury in *Benally*, had no problem awarding monetary damages "[t]here was no talk of sheep or horses in that opinion... Navajos today look to their codes and tribal law to seek fair compensation."⁴⁶

The Navajo courts have also applied *nalyeeh* in automobile personal injury cases. In *Cadman v. Hubbard*,⁴⁷ the Crownpoint District Court recognized that 7 N.T.C. Section 701(d) which authorizes damages for injuries, was akin to a pure comparative fault scheme similar to that found in both New Mexico and Arizona. Moreover, the court likened the statute to essentially a codification of *nalyeeh*.⁴⁸ The court pointed out that anything short of a pure comparative fault system simply did not offer victims adequate opportunity for compensation.⁴⁹ Citing to the *Benally* case, the court explained that compensating victims was "the Navajo way".⁵⁰

Navajo law also recognizes a tort action for recovery of damages resulting from spousal assault and rape. In *Kuwanhyoima v. Kuwanhyoima*⁵¹ Judge Bluehorse instructed that Navajo notions of harmony or *hozop* prohibited the use of unreasonable force by a husband towards his wife. Further, the court recognized that crimes such as spousal rape were forbidden under Navajo common law. The court also broadened the *nalyeeh* doctrine by stating that in some instances compensation payments can be spread out and paid to the family or clan members of the injured.⁵²

The Navajo Nation Supreme Court has also applied *nalyeeh* to insurance proceeds. In *Benalli v. First National Insurance Co. of America*,⁵³ the Navajo high

cash damages). Although not mentioning *nalyeeh* specifically, the court likened the doctrine to Anglo style damages. *Id.*

⁴² 5 Nav. R. 209, 5 Navajo L. Rep. 107.

⁴³ *Id.* at 212, 5 Navajo L. Rep. at 109 (citing *The Law of the People —Dine'Bibee Haz' a'nii'*, Volumes I-IV, Ramah High School, Ramah, New Mexico. 1972. Dan Vicenti, *et al.*).

⁴⁴ 3 Nav. R. 194, 3 Navajo L. Rep. 112 (S.R. Dist. Ct. 1981).

⁴⁵ The *Benally* court also points out that Navajo common law regarding wrongful death compensation has been codified as 7 N.T.C. § 701(B). This statute, according to the court, provides for special damages, general damages, pain and suffering, and finally cash damages for the speculative value of the lost life—as determined by a Navajo jury.

⁴⁶ *Benally*, 5 Nav. R. at 213.

⁴⁷ 5 Nav. R. 226, 5 Navajo L. Rep. 116 (Crownpoint D. Ct. 1984).

⁴⁸ *Id.* at 230, 5 Navajo L. Rep. at 119. (The case doesn't use the word *nalyeeh* but it does use the word tradition.)

⁴⁹ *Id.*, 5 Navajo L. Rep. at 118.

⁵⁰ *Id.*, 5 Navajo L. Rep. at 119 (citation omitted).

⁵¹ See *Kuwanhyoima v. Kuwanhyoima*, No. TC-CV-344-84, slip op. at 3 (Tuba City D.Ct. 1990), cited by Daniel L. Lowery, *Developing A Tribal Common Law Jurisprudence: The Navajo Experience, 1969—1992*, 18 *Am. Indian L. Rev.* 379 (1993) at 436. For further discussion of this case, see Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage-Cultural Traditions and Modern Challenges*, 17 *Ariz. J. Int'l & Comp. Law* 283 (2000) at FN 20.

⁵² *Kuwanhyoima*, slip op. at 3.

⁵³ 2 Navajo App. Rep. 595 (Nav. Sup. Ct. 1998).

court likened an insurance board to a Navajo clan.⁵⁴ The employee plaintiff was similarly compared to a Navajo relative like a cousin. The restorative power of *nalyeeh*, which restores the plaintiff to wholeness, was held to be based upon two factors, the injury; and the relatives' ability to restore harmony.⁵⁵ In other words, *nalyeeh* is based upon the nature of the tort including alleged damages, and the ability of defendants to pay.

In *Navajo Nation v. Crockett*,⁵⁶ the Navajo Nation Supreme Court applied *nalyeeh* in a free speech case.⁵⁷ Here the high court explained that under the *nalyeeh* doctrine, the plaintiff should seek to resolve the matter with the offending party without seeking intervention from a third person or entity.⁵⁸ According to the court, the plaintiff should approach the defendant and explain why there is a problem, and seek a solution that "puts things right".⁵⁹ The Navajo Nation Supreme Court noted that even in modern times using contemporary judicial methods, the traditional rules of respect, honesty, and kinship apply.⁶⁰

Recently, the Navajo Nation Supreme Court applied *nalyeeh* in a tort case, overruling a district court decision. The case is significant because it is the only known case where a tribal court denied full faith and credit to a state entity, applying traditional law in place of the state statutory scheme. In *Nez v. Peabody Western Coal Company, Inc.*,⁶¹ the Navajo Nation Supreme Court further developed and applied the remedy of *nalyeeh* in a workers' compensation case. On June 12, 1995, plaintiff Nez, a member of the Navajo Nation, was injured during her employment at Peabody's Black Mesa Mine located near Kayenta, Navajo Nation (Arizona).⁶² While cleaning paintbrushes, solvent splattered on plaintiff, permanently disfiguring her face. She filed a claim for benefits under the Arizona Workers' Compensation Act.⁶³ In April of 1996, the Arizona Industrial Commission awarded Nez benefits for medical costs, lost wages, and \$7,530 for the disfigurement of her face.⁶⁴

Nez requested that her case be reopened so she could receive additional medical treatments for loss of pigmentation.⁶⁵ Her request was approved and she was further treated, although the treatment was unsuccessful.⁶⁶ Following the treatment, the Arizona Industrial Commission closed Nez' case stating that no

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Navajo Nation v. Crockett*, Nav. R., SC-CV-14-94 (Nav. S. Ct., Nov. 26, 1996) cited in Discussion of Navajo Common Law in the Reported Decisions of the Navajo Nation Courts: A Chronological Indexing Compiled by the Office of Legislative Counsel, September 2000, at 19. Published materials for Navajo Common Law Symposium 2000.

⁵⁷ *Id.*

⁵⁸ *Id.* at 20

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 2 Navajo App. Rep. 550 (Nav. Sup. Ct. 1999).

⁶² *Id.* at 551.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

change had occurred since the first benefits award.⁶⁷ Thus, Nez was left with only the \$7,530 award to compensate her for her permanent facial disfigurement.⁶⁸

Plaintiff brought a personal injury claim against Peabody in the Kayenta District Court. Nez sought damages for emotional distress, pain and suffering, diminution of the quality of her life, permanent facial disfigurement and any other damages not covered by the workers' compensation award. Defendant argued that the Navajo Nation courts lacked subject matter jurisdiction and moved for dismissal. The district court disagreed although it dismissed the case because the suit might cause unjust enrichment and violate the expectations of both employers and employees under a state workers' compensation system.⁶⁹

Nez appealed the district court's decision to the Navajo Nation Supreme Court arguing that no Navajo principle of equity could deny her suit.⁷⁰ Defendant contended that the Navajo Nation must recognize the exclusive remedy provision of the Arizona workers' compensation statute.⁷¹ Further, Peabody asserted that even if the Navajo Nation was not required to recognize the statute, Nez should be denied under the doctrine of equitable estoppel.⁷²

The Navajo Nation Supreme Court articulated the issues in the dispute as: (1) whether the Arizona Industrial Commission's award of workers' compensation benefits pursuant to 40 U.S.C. § 290⁷³ precludes the Navajo courts from assuming subject matter jurisdiction over a personal injury claim arising from the same injuries; (2) whether the Kayenta District Court erred in dismissing Nez' case on equity grounds. The Navajo Nation Supreme Court held that Arizona's state workers' compensation did not preclude the Navajo Nation from asserting jurisdiction over Nez' case. Second, the court held that indeed, the district court had abused its discretion when it dismissed the case.⁷⁴

In reaching its decision, the high court first looked to the federal statute to see whether tribal jurisdiction had been divested. Following the U.S. Supreme Court's guidance in *Iowa Mutual Insurance Co. v. La Plante*,⁷⁵ and *National Farmer's Union Insurance Co. v. Crow Tribe*,⁷⁶ the Navajo Nation Supreme Court reasoned Congress had not expressly divested Navajo jurisdiction.⁷⁷ Further, the

⁶⁷ *Nez* at 551—552.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Nez*, 2 Navajo App. Rep. at 551.

⁷³ "Section 290 was passed to 'fill a conspicuous gap in the workmen's compensation field.' Prior to the passage of Section 290, employees working on federal lands for private employers were not covered by any workers' compensation program. They were not covered by the United States Employees' Compensation Act, because it covered only those directly employed by the Federal Government. Nor were they covered by any state compensation program, since such acts only protected employees on state lands. Section 290 has been interpreted to allow states to extend their workers' compensation coverage to employees of private employers operating on Indian reservations, but not to employees of tribal governments or enterprises." *Nez*, 2 Navajo App. Rep. at 551—52.

⁷⁴ *Nez*, 2 Navajo App. Rep. at 551.

⁷⁵ *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, (1987) (holding that tribal courts determine their own jurisdiction over parallel litigation).

⁷⁶ 471 U.S. 845, 855—56 (1985) (holding that parties must exhaust available tribal remedies before filing in a federal forum).

⁷⁷ *Nez*, 2 Navajo App. Rep. at 552. The U.S. Supreme Court noted "that existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the

court reasoned that since the federal statute creating worker's compensation had been drafted in 1936, decades prior to the creation of the Navajo Nation Judiciary, the statute could not have divested the courts of jurisdiction.⁷⁸ In other words, how can a federal statute written years prior to the creation of a court and lacking any implied or express intent divest the same court of jurisdiction?

Additionally, the court reasoned that the exclusivity remedy did not apply. Relying upon *Garcia v. American Airlines, Inc.*,⁷⁹ the high court stated that a forum state was not required to offer full faith and credit to another state's exclusive remedy.⁸⁰ Thus, the Navajo Nation courts likewise were not compelled to recognize Arizona's exclusive provision. Foreseeing the decision might be opening a Pandora's box, the court fashioned a rule. Before the Navajo courts assert jurisdiction over similar cases, plaintiffs will bear the burden of proving that a state's workers' compensation benefits differ substantially from what Navajo common law considers adequate.⁸¹

The high court also recognized key factual issues to be determined by the district court in the *Nez* case. These factors included first, whether *Nez*'s award under the Arizona regime is substantially different and inadequate under Navajo common law; second, whether *Nez* waived her rights to pursue a court remedy; and whether Peabody suffered from *Nez*' actions.⁸²

Having dealt with these preliminary issues, the Navajo Nation Supreme Court turned towards the topic of *nalyeeh*.

Under Navajo Common law, damages in personal injury actions are measured by *nalyeeh*... *Nalyeeh* has been interpreted to include a broad range of damages, including claims such as mental anguish and pain and suffering. However, *nalyeeh* is a flexible concept of distributive justice, and it is possible that Navajo common law prevents plaintiffs from seeking to recover twice for the same injury. How *nalyeeh* should apply to *Nez*'s situation is a matter to be determined by the district court.⁸³

The Navajo Nation Supreme Court remanded the case back to the district court for a determination of what constitutes *nalyeeh*.⁸⁴

sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855—56. At a minimum, the tribal exhaustion doctrine requires tribal appellate courts be provided the opportunity to review the decisions of their lower courts. This rule underlies the federal government's current policy of promoting tribal self-government. *Id.* at 855—57.

⁷⁸ *Nez*, 2 Navajo App. Rep. at 553.

⁷⁹ 12 F.3d 308, 312 (1st Cir. 1993).

⁸⁰ *Nez*, 2 Navajo App. Rep. at 552—53 (citations omitted). The Navajo Nation Supreme Court explained that a forum state was not required to recognize the exclusive remedy provision of another state's workers' compensation and further stated that a forum state maintains jurisdiction over an employee's common law tort suit even after the employee receives another state's worker's compensation. *Id.* Generally, states offer full faith and credit or apply comity principles when recognizing another state's judgments. The doctrine of full faith and credit springs forth from AMENDMENT XIV U.S. CONST. Because the Navajo Nation understands its tribal sovereignty as something at least on par with a state, its legal requirements to recognize another state's exclusive remedy would be the same as that of a state-discretionary. *See Nez*, 2 Navajo App. Rep. at 552—53.

⁸¹ *Id.* at 554.

⁸² *Id.*

⁸³ *Id.* (citation omitted).

⁸⁴ *Id.*

In the meantime, the defendant has appealed to the federal district court in Arizona and the Navajo Nation Tribal Council has attempted to overrule the *Nez* decision by resolution.⁸⁵ [86] The issue of the validity of the Council's resolution and its meaning are currently being deliberated by the Navajo Nation Supreme Court in the form of a certified question.⁸⁷ [88] Following *Nez*, the Navajo Nation high court revisited the question of *nalyeeh* and its application to worker' compensation.

In *Benally v. Big A Well Service Co.*,⁸⁹ the Navajo Nation Supreme Court stated that "[w]e now take this opportunity to explain the principle of *nalyeeh*. It does not carry the same meaning as 'the adequate award' in contemporary personal injury practice. Generally, *nalyeeh* means compensation for an injury."⁹⁰ The high court continued, "[I]t has a deeper meaning of a demand to 'make right' for an injury and an invitation to negotiate what it will take so that an injured party will have 'no hard feelings.'"⁹¹ However, on the subject of workers' compensation, the Navajo Nation Supreme Court cautioned that in most cases, the workers' compensation award would satisfy the requirements of *nalyeeh*.⁹² Because the workers' compensation scheme determines the monetary award through a method based upon the nature of the injury and the monetary needs of the worker, *nalyeeh* is met.⁹³ The doctrine of *nalyeeh* is far from being fully articulated, however its broad application even in workers' compensation cases provides the practitioner a well-founded reason to study the case law.

What must be underscored is the doctrine's remarkable adaptability that in practical terms can mean damages far different from those awarded in state court. *Nalyeeh* can be crudely translated into English as "restitution." Sadly, the English meaning offers little by way of justice to the original Navajo because it

⁸⁵ Personal electronic mail message from former Navajo Nation Supreme Court solicitor James K. Zion to the author, (Mar. 26, 2001).

⁸⁶ *Editor's Note*: The plaintiff has since voluntarily dismissed the underlying Navajo Tribal Court case. The parties then stipulated to a dismissal of the pending action in the United States District Court for the District of Arizona. E-mail from C. Benson Hufford, Attorney for Peabody Western Coal Company, to Ahnawake Carroll, Tribal Law Journal Managing Editor (July 8, 2002, 11:10:00 MST) (on file with the Tribal Law Journal).

⁸⁷ Personal electronic mail message from former Navajo Nation Supreme Court solicitor James K. Zion to the author, (Mar. 26, 2001).

⁸⁸ *Editor's Note*: The Navajo Nation Supreme Court answered a certified question posed by the United States District Court for the District of Arizona in a decision filed on July 18, 2001. No. SC-CV-49-2000, Answer to Certified Question from the United States District Court for the District of Arizona, *Peabody Western Coal Company, Inc. v. Nez*, Supreme Court of the Navajo Nation 1 (2001). The certified question before the Navajo Nation Supreme Court was "whether [Navajo Nation Council Resolution] No. CJA-18-00, enacted on February 2, 2000 and recognizing 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." *Id.* at 1—2. The Court focused more precisely on whether the Navajo Nation Council resolution "[was] a 'legislative act' which carrie[d] the weight of law." *Id.* at 2. The Court ultimately held that that "the resolution [was] not a statute which carrie[d] the weight of law, but a declaration of the wishes of the Navajo Nation Council and guidance for future legislation." *Id.*

⁸⁹ *Benally v. Big A Well Service Co.*, *Nav. R.*, SC-CV-27-99 (Nav. S. Ct. Aug. 28, 2000) cited in Discussion of Navajo Common Law in the Reported Decisions of the Navajo Nation Courts, at 23.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

oversimplifies or even overlooks the restorative value inherent in the Navajo understanding of restitution.

The Navajo conceptualization of restitution is strikingly different from conceptualizations of restitution found in Anglo-American jurisprudence.⁹⁴ Generally in most American jurisdictions, successful plaintiffs are entitled to recover money damages to compensate them for the injury caused by the tortfeasor.⁹⁵ The very foundation of tort law is that someone is hurt or injured by another, and must prove that his/her injury was the result of someone's fault.⁹⁶ The American law of remedies' fundamental aspiration is to vindicate the injured plaintiff's legal rights in the most economically efficient manner without overburdening the defendant, keeping within broadly held social policy concerns.⁹⁷ In other words, there must be a confrontation between the two parties, legal fault must be established and legal injury proven, usually resulting in an economic windfall for the injured party or an equitable remedy.⁹⁸ *Nalyeeh* is fundamentally different in that the notion of blame and adversarial combat are foreign. Justice Yazzie explains:

Another aspect of Navajo justice, *nalyeeh*, which is a payment made to a victim or someone who is injured, addresses concrete means of resolving conflict. It transcends the usual definitions of "restitution" and "reparation," in the sense that it does not dwell upon what tort lawyers call "just compensation." In *nalyeeh*, the parties discuss what is needed to make the injured person feel better and compensation can be symbolic... The focus is not on an "eye for an eye, tooth for a tooth" approach, but on helping people and adjusting their relationships in *k'e*.⁹⁹

Navajo philosophy teaches that the world must be kept within balance or natural harmony. Harmony in the Navajo mind is something more akin to the Taoism of Asia rather than Hellenistic inspired ideas of anthro-centric humanistic perfection.

Harmony or *hozho* refers to the "wholeness of all reality and the connections of everyone and everything."¹⁰⁰ Navajo Nation Supreme Court Justice Raymond D. Austin describes *hozho* as "a reality with a place for everything, and everything in its place, functioning well with everything else. In other words, the

⁹⁴ Restitution is a restoration of "something" to the plaintiff and its goal is to prevent the defendant's unjust enrichment. Thus, restitution is measured not by the losses to the plaintiff, but by the defendant's gains. See *DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 4* (2d ed. 4 1993). Damages on the other hand, are usually lump sums of cash awarded to the winning party who proves a legally recognizable injury or harm. See *id.* at 208. Damages are designed to compensate the prevailing party for all relevant injuries past and future. See *id.* Thus, although one might state that a particular cash judgement or equitable order rendered in a state court might resemble remedies based upon *nalyeeh*, the Navajo traditional remedy springs from another source philosophically and factors in its calculus many mitigating elements not contemplated by American election of remedies.

⁹⁵ See KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW: AN ANALYTICAL PRIMER ON CASES AND CONCEPTS 207 (1997).

⁹⁶ See *id.* at 1. The word "tort" comes from the Latin word meaning "twisted." Hence, when a party becomes "twisted" by the actions or inactions of another, a tort results. *Id.*

⁹⁷ See DOBBS, *supra* note 93, at 29.

⁹⁸ See ABRAHAM, *supra* note 94, at 3.

⁹⁹ *Hozho Nahasdlüi*, *supra* note 14, at 123—24. When Justice Yazzie speaks of *k'e*, the learned jurist speaks of the way in which things relate to one another in nature. *Id.* Through *k'e*, the life force behind such positive qualities as humanity, solidarity, respect and cooperation come into being. *Id.* at 122.

¹⁰⁰ *Id.* at 124.

‘Perfect State’.”¹⁰¹ When an injury occurs, the harmony of both the physical world and the more esoteric planes are plunged out of balance into a state of chaos. An offering of restitution is required to restore harmony. In ancient times, an injured party and his/her family including the “opposing party” met to talk things out. When an offering was made that was acceptable to all, harmony was restored.¹⁰²

In the modern tribal courts of the Navajo Nation, the traditional law of *nalyeeh* has been applied in many cases that would resemble common law torts or state tort claims to the non-Indian law practitioner. In this study, we have examined cases of personal injury, assault, and personal injury associated with a state workers’ compensation scheme. To be sure, case law provides ample evidence of the Navajo judiciary’s willingness to further develop the law of *nalyeeh*, expanding its application to other tort-like claims.

One question sure to arise is what constitutes sufficient compensation in order to meet the requirements of *nalyeeh*. Traditionally, Navajos would offer livestock, silver, or other valuables to the victim or his/her family. Many times, the injuring party would offer “a little extra” to demonstrate his/her seriousness.¹⁰³ In modern application of *nalyeeh*, the amount of compensation is unclear. In the most recent dispositive case, *Nez*, the Navajo Nation Supreme Court remanded the matter back to the district court for a determination of damage amounts.¹⁰⁴

As discussed earlier, it is important to bear in mind that Indian tribal courts, the Navajo Nation included, are by no means bound to damages caps imposed by state tort claims statutes. When applying *nalyeeh*, juries are free to award damages as they see fit. When considering damages, juries are thought to include Navajo values, community standards, and customs in the calculus.¹⁰⁵ Thus, we can say that Navajo tort law is a flexible legal concept with a multitude of applications and that it has no definite formalization of damages. Although the flexibility of *nalyeeh* might sound the alarm to the alert practitioner, bear in mind Solicitor Zion’s following conclusion. Zion writes, “While non-Indian society may fear that the use of Indian custom is arbitrary, vague, and discriminatory, the tribal court that develops a body of law which can be read and which provides a means of predicting what will happen in court will gain the acceptance of many.”¹⁰⁶

In sum, as the Navajo judiciary applies *nalyeeh* in various circumstances, a sense of regularity will naturally ensue, and as a result possible skepticism from outsiders most likely will subside.

C. Considerations for Pleading *Nalyeeh*

This section discusses how a practitioner pleads a Navajo traditional doctrine such as *nalyeeh* in tribal court. When an attorney first takes a case that he/she believes will result in an appearance before the Navajo courts, the practitioner would be wise to study the Navajo Rules of Civil Procedure. The first

¹⁰¹ Raymond D. Austin, *Freedom, Responsibility and Duty: ADR and the Navajo Peacemaker Court*, 32 JUDGE’S J., Spring 1993, at 10.

¹⁰² *Id.* at 11.

¹⁰³ *Id.*

¹⁰⁴ *Nez*, 2 Navajo App. Rep. at 550.

¹⁰⁵ *Bryant v. Bryant*, 3 Nav. R. 194, 194-95, 3 Navajo L. Rep. 112, 112 (S.R. Dist. Ct. 1981).

¹⁰⁶ Zion, *supra* note 13, at 279.

steps, which include drafting the complaint and service of process, are similar to the rules found in other jurisdictions. However, if one intends to plead a Navajo custom, one will make such a pleading pursuant to Rule Five.¹⁰⁷ The rule provides that the pleading contain three elements; first a short statement explaining how the court has jurisdiction over the matter. Second, a statement explaining the claim and how the party is entitled to relief must be included. It is here that a party would explain the Navajo custom and how the party is entitled to relief under the custom. Lastly, the pleading must include a demand for relief or judgment.

Once a custom has been pled, the moving party will have to prove the existence of the custom. A judge can take judicial notice of a custom. Likewise, experts, both traditional and academic, and learned treatises can prove custom.¹⁰⁸ It is important to note that Navajo traditional law can be pled and applied in state or federal court. When questions concerning the meaning and application of Navajo traditional law or custom arise in the context of proceedings in foreign jurisdictions, including administrative agency hearings, the Navajo Nation Supreme Court can make a determination of the law through a certified question. The procedure for submitting a certified question of law to the Navajo Nation Supreme Court is outlined in the court's rules.¹⁰⁹ The foreign court simply submits the question(s) with the appropriate facts and supporting documents to the Navajo Nation Supreme Court. Upon receipt, the court will ask for briefs and other documents, but will seldom allow oral arguments. In some cases, the court will ask the Navajo Nation Attorney General to submit briefs or comments. Once the court makes its determination, it will transmit a certified copy of its opinion to the appropriate foreign court. This procedure for determining traditional law is especially useful to the practitioner if faced with a case similar to the example discussed next.

D. *Cheromiah v. United States*: An Application of Tribal Law in a Federal Forum and its Significance to Navajo Traditional Tort Law

American courts follow the U.S. Supreme Court's lead when Indian plaintiffs seek to file suits in state or federal courts and attempt to apply tribal law in the case. The Supreme Court in various decisions has defended tribal sovereignty by finding tribal interests in various cases. When the courts determine that tribal interests are great enough to apply tribal law, they more than frequently remand the cases back to the tribal courts following exhaustion doctrines.¹¹⁰ Ironically, in *State v. A-1 Contractors*,¹¹¹ the Supreme Court couldn't

¹⁰⁷ See *In the Matter of Estate of Belone*, 5 Nav. R. 161, 5 Navajo L. Rep. 82 (Nav. S. Ct. 1987). The Navajo Nation Supreme Court has ruled that if custom is to be pled, it must meet the pleading requirements stated above. If a party neglects to plea custom, he/she cannot later introduce custom into the case. Secondly, if a party pleads a custom which is local and not generally accepted, the party must state that in the pleading. See *Id.* For a further discussion of the pleading requirement, see Daniel Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969—1992*, 18 AM. INDIAN L. REV. 379 (1993) at 392—399.

¹⁰⁸ See *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App 1983); 7 N.T.C. § 204.

¹⁰⁹ See Navajo Rules for Declaratory Rulings on Questions of Navajo Law 1983.

¹¹⁰ See *National Farmers*, 471 U.S. 845; *Iowa*, 480 U.S. 9.

¹¹¹ 520 U.S. 438 (1997).

find a substantial tribal interest in a case involving an automobile accident within the reservation.¹¹² Nevertheless, there are occasions when plaintiffs filing in state or federal court will seek to apply tribal law. Although to some practitioners the possibility seems remote and the stuff of law school exam questions, a recent federal case provides the perfect example.¹¹³

In the recent case, *Cheromiah v. United States*,¹¹⁴ an Indian family sought to file an action for wrongful death as provided for in the Federal Tort Claims Act (FTCA).¹¹⁵ The plaintiffs brought suit against the United States Government, seeking damages for the death of their adult son.¹¹⁶ Plaintiffs asserted a claim for medical malpractice under the Federal Tort Claims Act, two claims under the Emergency Medical Treatment and Active Labor Act and finally a claim for loss of consortium.¹¹⁷ Cheromiah had been to the Indian Health Services operated hospital, the Acoma Canoncito Laguna Hospital¹¹⁸ several times complaining of a respiratory problem. The doctors misdiagnosed his condition, and as a result, Mr. Cheromiah died while being transported to another hospital in Albuquerque.¹¹⁹

Among many things, the federal district court held that the tort had occurred within the boundaries of the Acoma Indian Reservation.¹²⁰ Relying upon federal case law, the court explained that federal law provides that the law of the place of injury controls, further, the analysis was applicable to political entities.¹²¹ Thus, the court held the Acoma tribal law and not New Mexico tort law applicable in this case.¹²²

Once the court decided that issue, the second issue was whether a private person in like circumstances could be found liable under Acoma tribal law for the acts of negligence asserted in the complaint. In other words, could the United States government be sued like a private person? The district court answered in the affirmative. In reaching its decision, the court looked to two major cases, *Montana v. United States*,¹²³ and *A-1 Contractors*. The court reasoned that in this case, the two *Montana* exceptions were met, consensual relations and a threat to tribal health and welfare. Secondly, the court distinguished this case from *Strate* because this case involved Indian plaintiffs and the tort related to Indian health and welfare. Once the court applied Acoma tribal law, it found the New Mexico's damage caps

¹¹² *Id.* This case involved two non-tribal member parties who hit one another on a highway within an Indian reservation. *Id.* at 442. Because both parties were non tribal members and the accident occurred on a federal right of way, the Supreme Court reasoned that the tribal interests in the matter were considered minimal. *Id.* at 457.

¹¹³ *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999). Similarly, months prior to this case, the district court heard *Louis v. United States*, 54 F. Supp. 2d 1207 (D.N.M. 1999), however in *Louis*, plaintiff did not attempt to plea traditional tribal law.

¹¹⁴ 55 F. Supp. 2d 1295 (D.N.M. 1999).

¹¹⁵ The Federal Tort Claims Act, 28 U.S.C. § 1346 (2001).

¹¹⁶ *Cheromiah*, 55 F. Supp. 2d at 1296—1297.

¹¹⁷ *Id.*

¹¹⁸ The hospital is located on Pueblo of Acoma land and the hospital's primary patients are Indians from Acoma Pueblo, Laguna Pueblo, and the Navajo community of To'Hajiilee formerly known as Canoncito.

¹¹⁹ *Cheromiah*, 55 F. Supp. 2d at 1296—97.

¹²⁰ *Id.*

¹²¹ *Id.* at 1299—1300.

¹²² *Id.* at 1301—1302.

¹²³ 450 U.S. 544 (1981).

inapplicable. Thus, tribal tort law was applied. In the words of Professor Kathrine C. Pearson, “[t]he *Cheromiah* decision signals the Federal Tort Claims Act as a future area for recognition of tribal law as a viable choice in conflicts of law.”¹²⁴

The *Cheromiah* decision is important because it demonstrates a way in which traditional ideas of tort through the Navajo law of *nalyeeh* can be applied in a federal forum. What is important to note is the *Cheromiah* plaintiff’s creative application of the Federal Tort Claims Act’s provisions for choice of law. Until Congress amends the statute, more litigants could employ similar creativity, tactically sidestepping federal or state law in favor of tribal law. The door was opened via the FTCA, perhaps in the future, other federal statutory schemes could be used a vehicle for applying traditional tribal law.

The case genuinely offers an example of the federal judiciary’s willingness to apply traditional Indian law when possible. Certainly, not all courts within the federal system will be as open to the possibility of applying tribal law as the *Cheromiah*. However, the case offers persuasive support and federal precedent for the proposition that traditional law such as *nalyeeh* is a viable alternative to state law and state law remedies.

II. Conclusion

This paper has argued the proposition that Indian tribal law is law in the United States and can be applied in tribal, state, and federal forums. Tribal customary law finds its origin in the chants, dances, songs, and stories, which embody the oral tradition of indigenous people. Because tribal governments are products of the inherent sovereign rights of Native people, and not a result of federal statute, tribal governments are free to apply traditional law when it does not conflict with federal law. Moreover, thanks in a large part to U.S. Supreme Court decisions, tribal jurisdiction and tribal law have been held to be applicable in cases involving non-Indians. Thus, for these reasons, one concludes that indeed, tribal custom is law in America.

Tribal customs relating to personal injury have been applied in a variety of settings. This paper discussed the Navajo concept of *nalyeeh*, which loosely translates as something akin to “restitution”. In sum, Navajo tort law is *nalyeeh* and its sole purpose, unlike Anglo-American tort law, is to restore harmony to the community. *Nalyeeh* does not seek to point the finger of blame and fault, nor is it a means of winning a monetary windfall from a contest-like proceeding. Rather, *nalyeeh* seeks to encourage parties to talk things out, resolve differences, and restore balance to society. One can say that *nalyeeh* is healing or restorative justice. Thus, one concludes that Navajo tort law is in reality, community-based curative problem solving.

In the Navajo Nation, parties seeking to introduce traditional law such as *nalyeeh* must meet the pleading requirements set forth in the both the Navajo Nation Rules of Civil Procedure and case law. Parties must plead Navajo tradition in their pleadings or be barred from introducing it later in the case. Navajo tradition

¹²⁴ Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law under the Federal Tort Claims Act*, 32 ARIZ. ST. L. J. 695, 706 (2000).

can be proven by expert testimony, reliance upon both Navajo and learned academic treatises, and finally, by judicial notice.

For the practitioner, understanding tribal law is important. The possibility of arguing traditional tribal law in federal court and prevailing is very possible. The *Cheromiah* case provides ample support for the contention that traditional tribal law can provide an apropos tort system fitting the needs of Native people. Finally, and perhaps most importantly, traditional ideas such *nalyeeh* offer the mainstream culture the possibility of evolving beyond the confines of fault-based common law torts.