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## Customary Law: The Way Things Were, Codified

Ezra Rosser, *American University Washington College of Law*



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# CUSTOMARY LAW: THE WAY THINGS WERE, CODIFIED\*

*Ezra Rosser*\*\*

Frequently referred to as “customary law,” the unique traditions and customs of different Native American tribes are cited by their tribal courts as authoritative and binding law. The recent use of customary law as a mechanism for deciding individual cases is not uniform among tribal court systems as it differs depending upon which tribe’s judges are working to place custom into contemporary judicial analysis. Understanding the present role of customary law in tribal law requires first understanding the nature of customary law and then understanding how it is being used. The effect of customary law is dependent upon the place it has in relation to other sources of law from tribal statutes to state common-law. Furthermore, the differing treatment afforded customary law by separate tribal court systems in many ways is a reflection of the degrees of proof required by different courts to establish what is or is not a tribal custom. However, despite limitations upon the use of customary law due to alternative conflicting sources of law and to difficulties proving custom, tribal courts use customary law to decide both the procedural rules of the courtroom and the substantive outcome of many disputes.

## I. What is Customary Law?

Though formed by customs and traditions, customary law’s meaning is also based upon its service in defining the role of tribal courts. At its most basic, “in Native American terms, tribal tradition and custom serves as the customary or common law.”<sup>1</sup> As with the Pequot tribe, several tribes use the term “common law” interchangeably with “customary law” when describing the place of custom among recognized authorities. Customary law is for some tribal courts seen as a given. “It should come as no surprise that the customs and traditions of the Navajo people have the force of law. They provide a unique body of law known as Navajo common law.”<sup>2</sup>

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\* Elements of this paper have appeared in other forms and publications. The paper was initially written as part of a Harvard Law School independent study directed by University of Arizona Professor Robert A. Williams, Jr. focusing on customary law for the new edition of Getches, Wilkinson, and Williams, *Federal Indian Law* (5th ed., 2004). Subsequently, University of Arizona Professor S. James Anaya placed the initial study in a larger historical and comparative context and presented our joint work, *Indigenous Justice Systems and Customary Law in the United States: Between Colonization and Self-Determination* at the United Nations Meeting of Experts on the Administration of Justice and Indigenous Peoples, Madrid, Nov. 2003, and that joint work has been translated into Spanish and published as a chapter in *CAMINOS HACIA EL RECONOCIMIENTO: PUEBLOS INDÍGENAS, DERECHOS Y PLURALISMO* (Marco Aparicio Wilhelmi ed., 2005). I am indebted to Professors Williams and Anaya for their earlier use of the work of a then eager student and for their willingness to see this paper presented in a manner that sticks to an exclusively the tribal court decision based treatment of customary law.

\*\* Assistant Professor of Law, American University Washington College of Law.

<sup>1</sup> *Delorge v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-97-114, 1997.NAMP.0000038, ¶ 35 (Aug. 21, 1997) (VersusLaw). See also *Saint Regis Mohawk Tribe v. Basil Cook Enter.*, No. 95-001, 1996.NASR.0000005, ¶ 30 (Mar. 4, 1996) (VersusLaw).

<sup>2</sup> *Navajo Nation v. Platero*, 6 Nav. R. 422, 425 (Nav. Sup. Ct. Dec. 5, 1991), available at 1991.NANN.0000001, ¶ 22 (VersusLaw). See also *In re Harvey*, No. A-CV-15-91, 6 Nav. R. 413, 415 (Nav. Sup. Ct. Sept. 19, 1991), available at 1991.NANN.0000009, ¶ 26 (VersusLaw) (discussing customary laws based in part on the Navajo experience).

Customary law naturally appeals to many tribal courts, not only because it allows tribal justice to accord with tribal society as shown through traditions, but also because the use of customary law is thought to reinforce the very same traditions. Customary law is good in and of itself, according to this perspective, for preserving culture:

As a sovereign Indian nation that is constantly developing, the Navajo Nation must be forever cautious about state or foreign law infringing on Navajo Nation sovereignty. The Navajo Nation must control and develop its own legal system because "the concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people."<sup>3</sup>

Similar language in opinions to the quote above suggests that for tribal courts in particular customary law plays an especially important role in linking justice with community values. At least some courts seem willing to suggest that customary law has a larger role in tribal court decisions than it does in decisions of state and federal courts. "Custom and tradition are important considerations in tribal courts such as this one. As one tribal justice and Indian law commentator has stated, tribal courts must not lose touch with the people and traditions that nourish them."<sup>4</sup> In some decisions then, customary law is presented as fundamental to Native cultural survival and as something perhaps uniquely, or predominantly, the providence of tribal courts.

The Navajo Nation courts which frequently rely upon customary law has implicitly rejected the notion that this sort of law is unique to tribal courts, and instead, in two opinions, has linked customary law as practices by tribal courts to be the same sort of law used by Anglo court systems. The Navajo Court of Appeals held that with customary or common law it would "adopt the ancient precedent that the Navajo common law is as the English common law."<sup>5</sup> The Court then went on to quote William Blackstone, at length, on the Law of England to define common or customary law:

The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.<sup>6</sup>

Thus, in answering the question, what is customary law, the Navajo Court grounds its answer in an established authority for Anglo-American jurisprudence. Likewise, in defining "custom," the Navajo Court cites John Chipman Gray's *The Nature and Sources of Law* for the proposition that

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<sup>3</sup> *In re Validation of Marriage of Francisco*, 6 Nav. R. 134, 139 (Nav. Sup. Ct. Aug. 2, 1989), available at 1989.NANN.0000013, ¶ 44 (VersusLaw) (citing T. Tso, Chief Justice's Annual Report, Jud. Branch of the Navajo Nation Ann. Rep. 1 (1988)).

<sup>4</sup> *Marino v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-97-104, 2000.NAMP.0000033, ¶ 16 (VersusLaw) (internal quotations omitted). See also *Bennett v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 319, 324 (Nav. Sup. Ct. Dec. 12, 1990), available at 1990.NANN.0000016, ¶ 42 (VersusLaw) (linking reserved treaty right to self-government with the use of "customs and traditions as law").

<sup>5</sup> *In re Estate of Apachee*, 4 Nav. R. 178, 180 (W.R. Dist. Ct. Oct. 11, 1983), available at 1983.NANN.0000070, ¶ 27 (VersusLaw).

<sup>6</sup> *Id.* at 179-80, ¶ 28 (VersusLaw) (citing WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 62).

“custom is what men do, not what they think.”<sup>7</sup> In *Lente* the Navajo Court goes on by saying, “custom is the practice or regular conduct of members of a group of people, acting in a certain way.”<sup>8</sup>

The perspective found in these two Navajo cases is not one of difference from but one of similarity to the Anglo-American use of customary or common law. The choice by the Navajo court system to ‘normalize’ the use of customary law by framing it in terms of authorities and practices common in state and federal courts is very important for understanding customary law because the Navajo court system in particular bases many decisions on this source of law. Navajo courts, while still using the term “customary law” often, seem to disdain usage of that term because as words of art the term runs counter to the ‘normalizing’ understanding of this type of law that the same courts attempt through their definition of customary law. It is not surprising therefore that the Navajo Supreme Court prefers “the term “Navajo Common Law” rather than “custom” for the reason that it is not widely understood that the customs and traditions of the Navajo People are law, and the English term is used because it more accurately reflects our customs as law.”<sup>9</sup>

The desire to characterize customary law<sup>10</sup> as identical to Anglo-American common law is limited by tribal courts’ acknowledgement that it is their unique ability to apply customary law that differentiates them from non-tribal courts. The Colville Confederated Court began its statement of its role by saying “our court system interprets and enforces laws from custom and tradition.”<sup>11</sup> During the crisis set off by the controversy involving Peter MacDonald, the Navajo Supreme Court likewise put itself forward as the best suited institution for review of Tribal Council action because its familiarity with “Navajo customs” made it a preferable venue to “far-away federal courts.”<sup>12</sup> In *Halona*, the Navajo Court further emphasized the unique power of customary law to give tribal courts a distinct and crucial role in tribal justice when the Court explained that it could not “adequately explain” its ruling in English, and therefore, had to issue part of the ruling from the bench in the Navajo language.<sup>13</sup> The wish to find roots for customary law in the Anglo-American legal tradition is limited by the somewhat conflicting necessity of claiming customary law as solely within the sphere understood by tribal courts.

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<sup>7</sup> *Lente v. Notah*, 3 Nav. R. 72, 80 (Nav. Ct. App. May 25, 1982), available at 1982.NANN.0000030, ¶ 107 (VersusLaw) (citing JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 606 (1916)).

<sup>8</sup> *Id.* at 80, 1982.NANN.0000030, ¶ 108 (citing EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF LAW 224(1953)).

<sup>9</sup> *In re Estate of Apachee*, 4 Nav. R. at 181, 1983.NANN.0000070, ¶ 33.

<sup>10</sup> I am going to use ‘customary law’ and not ‘common law’ for the remainder of the paper not to suggest disagreement with the Navajo Court but to differentiate custom based law from precedent based common-law.

<sup>11</sup> *Seymour v. Colville Confederated Tribes*, No. AP96-022, 2001.NACC.0000009, ¶ 30 (Colville Confederated Tribes Ct. App. Oct. 18, 2001) (VersusLaw). See also *Sells v. Sells*, 5 Nav. R. 104, 108 (Nav. Sup. Ct. Nov. 17, 1986), available at 1986.NANN.0000006, ¶ 46 (VersusLaw). (“The soul of this Court is to apply Navajo Tribal law, especially where our custom and tradition are appropriate.”).

<sup>12</sup> *Halona v. MacDonald*, 1 Nav. R. 189, 205 (Nav. Sup. Ct. Jan. 24, 1978), available at 1978.NANN.0000002, ¶ 84 (Versus Law).

<sup>13</sup> *Id.* at 211, 1978.NANN.0000002, ¶ 110.

## II. Where does Customary Law fit in relation to other sources of law?

The role of customary law depends upon the place of customary law relative to other sources—tribal, state, and federal—of law considered by tribal courts and the consequent level of authority customary law is granted. Although tribal courts at times will write as if custom is the sole grounds upon which they base decisions, more frequently the complexities of considering these many types of authority are acknowledged as the sources of law are placed into a hierarchy. Even where the relevant analysis centers upon customary law, federal and state laws can still play a role through tribal courts usage of those authorities as instructive for understanding tribal, including custom based law. Finally, from the fact that customary law is subject to a legal hierarchy comes the possibility of customs and traditions being overruled by higher authorities or changing norms.

Tribal courts defining their sphere of influence, authority, and expertise occasionally present customary law as having an all-encompassing and higher role than any other types of law. The Navajo experience with customary law, first developed by the judiciary and then emphasized and codified by the Navajo Nation Council in their statutory recognition of the Fundamental Laws of the Diné,<sup>14</sup> provides a way of looking at the all-important role of customary law. Two Navajo Nation opinions exemplify the independent judicial temptation to see customary law as existing separate from and above other types of law, even implicitly other tribal law. In *Ben v. Burbank*, customs and traditions are described as “the laws of preference” for present Navajo courts as they have been since the first Indian claims courts.<sup>15</sup> *Burbank* goes on, “Navajo courts apply Navajo customs and traditions, or Navajo common law, before they apply any other form of law... Navajo common law is the first law of our courts.”<sup>16</sup>

Such an elevated position for customary law makes custom based arguments attractive and in fact requisite for any attorney hoping to win on the Navajo Nation. In *Bennett v. Navajo Board of Election Supervisors*, the Navajo Supreme Court wrote that the Navajo word for “law,” beehaz'aahii, while sometimes used for tribal council resolutions, actually referred to:

something which is "way at the top"; something written in stone so to speak; something which is absolutely there; and, something like the Anglo concept of natural law. In other words, Navajos believe in a higher law, and as it is expressed in Navajo, there is a concept similar to the idea of unwritten constitutional law.<sup>17</sup>

Not surprisingly, *Bennett's* conclusion is that customary law is “natural law” for the Navajo people: to the extent that “customs and traditions are fundamental and basic to Navajo life and society, they are higher law.”<sup>18</sup> Indeed, by defining beehaz'aahii in a way suggesting that tribal

<sup>14</sup> See Navajo Nation Council Res. CN-69-02 in Kenneth Bobroff, *Diné Bi Beenahaz' áanii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 TRIBAL L. J. 4 (2004/2005), [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_5/ dine bi beenahazaanii\\_codifying\\_indigenous\\_consuetudinary\\_law\\_in\\_the\\_21st\\_century/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_5/ dine bi beenahazaanii_codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php). See generally Robert Yazzie, *Air, Light/Fire, Water and Earth/Pollen: Sacred Elements that Sustain Life*, 18 J. ENVTL. L. & LITIG. 191 (2003) (discussing what the former Chief Justice understands as Fundamental Navajo Law and ending with the text of Res. CN-69-02).

<sup>15</sup> *Ben v. Burbank*, 7 Nav. R. 222, 223 (Nav. Sup. Ct. 1996), available at 1996.NANN.0000008, ¶ 25 (VersusLaw).

<sup>16</sup> *Id.* at 432, 1996.NANN.0000008, ¶ 26.

<sup>17</sup> *Bennett v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 319, 324 (Nav. Sup. Ct. Dec. 12, 1990), available at 1990.NANN.0000016, ¶ 41 (VersusLaw).

<sup>18</sup> *Id.* at 324, 1990.NANN.0000016, ¶ 42.

resolutions are not truly law as the Navajo word is properly understood and describing custom as an unwritten constitutional law, the Navajo Supreme Court seems to see customary law as the highest possible law. With the Navajo Council's recognition of the Fundamental Laws of the Diné, judicial opinions asserting the primacy of customary law were supported by a powerful statutory mandate. Following Council Resolution CN-69-02 and linked choice of law amendment CO-72-03, there remained no question that a trial court could take judicial notice of Navajo Fundamental Law.<sup>19</sup> Furthermore, tribal provisions "passed before the Fundamental Law statute, and in irreconcilable conflict with one of those principles must yield" according to the Navajo Supreme Court's understanding of the effect of the Council's recognition of the primacy of Navajo Fundamental Laws.<sup>20</sup> Despite the reaffirmation of customary law accomplished in both Navajo cases and the recent Navajo Council's Fundamental Law statute, other tribal courts and even Navajo courts in other pre-Resolution CN-69-02 cases have customary law, while important, as simply one level of authority, and not necessarily the highest.

Tribal court judges regularly are faced with a myriad of sometimes conflicting jurisdictional and conflict of laws situations that arguably are much more complicated than those faced by their peers on state or federal benches<sup>21</sup>; therefore, tribal courts need a mechanism for dealing with these complex choice of law questions. The Hopi Tribe in particular has innumerable decisions establishing the following legal hierarchy and can therefore serve as the best example a tribal court system thinking through the choice of law mechanisms:<sup>22</sup>

When deciding matters of law, Hopi Trial Courts must consult authorities in their proper precedential order. The suggested order of authority for the Hopi Tribe is:

- (1) the Hopi Constitution and By-laws;
- (2) Ordinances of the Hopi Tribal Council;

<sup>19</sup> *In re Estate of Kindle*, No. SC-CV-40-05, slip op. at 7 (Nav. Sup. Ct. May 18, 2006), available at 2006.NANN.0000017, ¶ 28 (VersusLaw). The author would like to thank Paul Spruhan, Navajo Nation Supreme Court Law Clerk, who highlighted both the *Kindle* and *Vern Lee* cases as worthy of examination regarding the effect of CN-69-02 on judicial use of Navajo customary law.

<sup>20</sup> *In re Appeal of Lee*, No. SC-CV-32-06, slip op. at 5, 6 n.2 (Nav. Sup. Ct. Aug. 11, 2006), available at 2006.NANN.0000016, ¶¶ 24, 32 (VersusLaw).

<sup>21</sup> Is it no wonder then that many scholars of Indian Law are also Conflict of Laws scholars.

<sup>22</sup> The equivalent discussion is possible with other tribal courts which also have hierarchal lists of authority which closely parallel the Hopi list of legal authority. For the Colville Confederated Tribes equivalent, see *Clark v. Friedlander*, 25 INDIAN L. REP. 6154, 6155 (Colville Confederated Tribes Ct. App. Apr. 9, 1998), available at 1998.NACC.0000013, ¶ 41 (VersusLaw) ("In all cases the Court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law") where customary law is incorporated into the tribal law category by Colville Confederated Tribes v. LaCourse, No. AP80-3222, 1982.NACC.0000001, ¶ 25 (Colville Confederated Tribes Ct. App. May 20, 1982) (VersusLaw) ("this Court gives effect to and interprets Tribal law, including customary law of the Colville Tribe...This Court looks to federal and state law for guidance, and finds such law persuasive when consistent with Tribal policies and customs."). For the Navajo equivalent, see *Johnson v. Dixon*, 4 Nav. R. 108, 109 (Nav. Ct. App. Oct. 17, 1983), available at 1983.NANN.0000032, ¶ 23 (VersusLaw) ("a sliding scale of laws to be applied in the Navajo Courts"); *Benally v. Navajo Nation*, 5 Nav. R. 209 (W.R. Dist. Ct. Apr. 15, 1986), available at 1986.NANN.0000013, ¶ 20 (VersusLaw) ("custom, where it exists, is held to be superior to the common law of the states"); *Johnson v. Johnson*, 3 Nav. R. 9, 11 (Nav. Ct. App. Apr. 11, 1980), available at 1980.NANN.0000009, ¶ 26 (VersusLaw) (analysis determined that "nothing in Navajo tradition or custom would prohibit this court from applying New Mexico law"). But see *In re Practice of Law and Professional Conduct of Ricketts*, No. PC-99-004, 2000.NAFM.0000002 ¶ 17 (Fort McDowell Yavapai Tribal Ct. Feb. 2, 2000) (VersusLaw) (in which the sources of legal authority are broken down into mandatory and persuasive categories but not placed into an ordered list).

- (3) Resolutions of the Hopi Tribal Council;
- (4) the customs, traditions and culture of the Hopi Tribe;
- (5) federal law;
- (6) Arizona law;
- (7) the common law. Hopi Resolution H-12-76.

Federal law, Arizona law, and the common law are merely persuasive, not mandatory, authority.<sup>23</sup>

The above order is merely “suggested” because, as *Hopi Indian Credit Assoc. v. Thomas*,<sup>24</sup> makes clear, number (5) federal law at times can “in circumstances dictated by the Supremacy Clause of the U. S. Constitution, be required to take a higher order or precedence.”<sup>25</sup> Nevertheless, Hopi decisions continually highlight the “merely persuasive” nature of federal and state law.<sup>26</sup>

Customary law’s important role in tribal jurisprudence is not diminished by the fact that it is part of a hierarchy of legal sources, rather customary law’s unique ability to be both an independent authority and a tool for interpreting federal and state law gives it even greater significance. Customary law has enough independent strength as a category of law for a trial court’s not mentioning customs to be labeled error caused “by applying foreign law before it considered the relevancy of Hopi custom.”<sup>27</sup> The true meaning of customary law comes across not only from cases decided upon it alone but also from cases in which custom is used by tribal courts to decide whether state and federal laws should be applied or used as reference points. State and federal law provides “guidance” to the Colville Confederated tribal courts and is “persuasive when consistent with Tribal policies and customs.”<sup>28</sup> The same court later warned that though it will examine federal court treatment of “similar constitutionally-based issues,” it will only adopt common law interpretations consistent with tribal law because “any parallels between federal common law and tribal law must be drawn with caution.”<sup>29</sup>

<sup>23</sup> *Ami v. Hopi Tribe*, No. AP-003-89, 1996.NAHT.0000006, ¶ 21 (Hopi Tribal Ct. Mar. 29, 1996) (VersusLaw).

<sup>24</sup> *Hopi Indian Credit Assoc. v. Thomas*, No. 98AC000005, 1998.NAHT.0000013, ¶ 28 (Hopi Tribal Ct. Nov. 23, 1998) (VersusLaw).

<sup>25</sup> For more hierarchal lists, see also *Hopi Tribe v. Mahkewa*, No. AP-002-92, 1995.NAHT.0000014, ¶ 25 (Hopi Tribal Ct. July 14, 1995) (VersusLaw); *Sinqua v. Hopi Tribe*, No. 99AC000012, 2000.NAHT.0000010, ¶ 16 (Hopi Tribal Ct. Apr. 14, 2000) (VersusLaw).

<sup>26</sup> See *Komalestewa v. Hopi Tribe*, No. AP-004-90, 1996.NAHT.0000008, ¶ 21 (Hopi Tribal Ct. Mar. 29, 1996) (VersusLaw) (In the absence of tribal law or customary law, “we will consider foreign law and apply it to the extent it is consistent with our customs, traditions and culture.”).

<sup>27</sup> *Hopi Indian Credit Assoc. v. Thomas*, No. AP-001-84, 1996.NAHT.0000007, ¶ 25 (Hopi Tribal Ct. Mar. 29, 1996) (VersusLaw).

<sup>28</sup> *Colville Confederated Tribes v. LaCourse*, No. AP80-3222, 1982.NACC.0000001, ¶ 25 (Colville Confederated Tribes Ct. App. May 20, 1982) (VersusLaw).

<sup>29</sup> *Sam v. Colville Confederated Tribes*, No. AP93-15379/80, 1994.NACC.0000002, ¶ 25 (Colville Confederated Tribes Ct. App. Mar. 8, 1994) (VersusLaw). In tribal courts, foreign laws—federal or state—can serve as tools or interpretation aids for tribal law, just as customary law helps interpret foreign law; yet, always against the backdrop that customary law remains a mandatory authority. In *Johnson v. Dixon*, 4 Nav. R. 108, 110 (Nav. App. Ct. Oct. 17, 1983), available at 1983.NANN.0000032, ¶¶ 31-33 (VersusLaw), the Navajo Court of Appeals, after saying that tribal law must come before state law, described the use of state law as a mechanism for interpretation as:

This is not to say that state law may not have its place. Our statutes are largely the product of Anglo-European legal thinking and drafting, and they are frequently based upon legislative models found in state and federal legislation. That being the case, state cases and similar statutes may be used in aid of



The power of custom as law is limited by the twin effects of its position below written tribal law and of the potential for customs to change. “Where tribal tradition and custom conflict with subsequent [tribally] written law,” the Yakima tribe “has allowed its written tribal code to be overridden by custom” related to the treatment of traditional weddings.<sup>30</sup> The Navajo courts however, prior to passage of Council Resolution CN-69-02, had at times treated tribal enactments as superceding custom, even if that custom was firmly rooted.<sup>31</sup> The changing societal norms contained below the surface when a newer written law rejects older customs or traditions presents an analogous problem when customs independently, that is without official legislative action, change or become indeterminate with time.<sup>32</sup>

Customs change and courts have recognized these changes through changes in the governing customary law. For an illustrative example, one Navajo custom, described as the “expected compensation for sexual favors,” has been overridden, not by legislative action but instead because “of the ever changing Navajo common law through the introduction of Anglo-American customs and traditions (common law) and will often times conflict with existing statutes.”<sup>33</sup> In that case, Gary Witherspoon’s *Navajo Kinship and Marriage* was used for the proposition that “in Navajo society, a woman bestows sexual favors on a man in exchange for something of economic value,” but the court decided that that custom, not only had changed, but also certainly did not warrant the plaintiff receiving her lover’s 1986 GMC truck. Despite odd cases such as *Estate of Bighumb*, the serious and difficult issues related to the application of customary law have been acknowledged as limiting its power and potential use as final authority. The concerns raised by Navajo customary law are very much the concerns all tribal court systems should share regarding customary law:

The danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation.

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interpretation of a Navajo statute. This is particularly the case where words of legal art are used in a statute. However that is a far different matter than actually applying state law.

Similarly, the Appellate Court of the Fort McDowell Yavapai Nation described the case law from federal, state, and other tribal courts, as a “resource” for interpreting Yavapai law. *In re Practice of Law and Professional Conduct of Ricketts*, No. PC-99-004 6125, 2000.NAFM.0000002, ¶¶ 17, 25 (Fort McDowell Yavapai Tribal Ct. Feb. 2, 2000) (VersusLaw). Finally, in one Navajo case involving the Navajo Workmen’s Compensation Act, the court went so far as to say that “non-Navajo sources are ideal for clarification and guidance,” because the Act was based on state legal counterpart acts. *Tso v. Workmen's Compensation Employee Benefit Review Bd. of the Navajo Nation*, 5 Nav. R. 89, 90 (Nav. Sup. Ct. July 28, 1986), *available at* 1986.NANN.0000001, ¶ 18 (VersusLaw).

<sup>30</sup> *Marino v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-97-104, 2000.NAMP.0000033, ¶ 20 (Mashantucket Pequot Ct. Jan. 6, 2000) (VersusLaw) (discussing *In re the Marriage of Napyer*, 19 INDIAN L. REP. 6078 (1992)).

<sup>31</sup> *See, e.g., In re Marriage of Slim*, 3 Nav. R. 218 (Crwn. D. Ct. Apr. 13, 1982), *available at* 1982.NANN.0000060, ¶ 14 (VersusLaw) (disallowing remarriage following a customary as opposed to legal divorce with the words, “the Navajo Tribal Council has the authority to override Navajo custom and tradition by statute”); *Begay v. Chief*, No. SC-CV-08-03, slip op. at 6 (Nav. Sup. Ct. May 18, 2005), *available at* 2005.NANN.0000004, ¶¶ 27-29 (VersusLaw) (disallowing “traditional” divorce when tribal statutes require a court issued divorce decree). Implicit of course in the earlier discussion of the Navajo sense of an unwritten constitution is the possibility of judicial rejection of certain, more major, overriding of custom.

<sup>32</sup> *See, e.g., Ration v. Robertson*, 4 Nav. R. 15, 15 (Nav. Ct. App. Jan. 24, 1983), *available at* 1983.NANN.0000028, ¶ 13 (VersusLaw) (challenge to customs favoring Navajo women through use of changing norms as well as the equal rights amendment).

<sup>33</sup> *In re Estate of Bighumb*, 6 Nav. R. 453, 455 (W.R. Dist. Ct. 1989), *available at* 1989.NANN.0000026, ¶ 20 (VersusLaw).

Navajo custom varies from place to place throughout the Navajo Nation; [o]ld customs and practices may be followed by the individuals involved in a case or not; [t]here may be a dispute as to what the custom is and how it is applied; or, [a] tradition of the Navajo may have so fallen out of use that it cannot any longer be considered a "custom."<sup>34</sup>

*Lente* is a telling study of customary law's limitations in that the reviewing court held that a "trial judge may be justified in disregarding old ways... we see no reason to overturn his decision for failure to strictly follow custom and tradition."<sup>35</sup>

### III. Establishing Custom before Tribal Courts

The difficulties inherent in the use of customary law makes the substantiation and methods of proving customs all the more important if customary law is to help enable tribally and culturally appropriate justice. Although tribes sometimes will have had books written about their customs or have other written items to guide courts in determining custom, in many ways establishing the existence of a custom is more similar to providing evidence than citing definite authority. Customary law can be recognized in a courtroom through judicial notice of known and well-accepted customs or through court acceptance of accounts given by experts detailing traditions and customs. The burden to introduce custom and the burden to substantiate customs varies from tribal court to tribal court. Understanding the duty of proof related to customary law is crucial to an understanding of the nature of customary law because this duty will help dictate the availability and use of customary law as legal authority.

Judicial notice of tribal custom is the simplest form by which customary law can be considered. Describing the circumstance of judicial notice, one tribal court judge said that there would be such notice of custom only if the custom is of the sort "every damn fool knows."<sup>36</sup> Or, stated differently, "a court may dispense with proof of the existence of a Hopi custom, tradition or culture if it finds the custom, tradition or culture to be generally known and accepted within the Hopi Tribe. In such a case, the judge may take judicial notice of the custom or tradition."<sup>37</sup> The frequency and 'degree' of judicial notice varies from judge to judge and tribe to tribe, largely depending on the nature of the customs at issue and the willingness of the tribal court to find custom. A Hopi judge for example ruled that though the appeals court could "take judicial notice of custom," the interpretation of that custom should take place at the trial court level.<sup>38</sup> Still other judges are much less receptive to taking judicial notice of custom, applying the

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<sup>34</sup> *Lente v. Notah*, 3 Nav. R. 72, 79 (Nav. App. Ct. 1982), available at 1982.NANN.0000030, ¶ 106 (VersusLaw).

<sup>35</sup> *Id.* at 81, 1982.NANN.0000030, ¶ 118.

<sup>36</sup> *Apache v. Republic Nat'l Life Ins.*, 3 Nav. R. 250 (W.R. Dist. Ct. Sept. 16, 1982), available at 1982.NANN.0000050, ¶ 28 (VersusLaw). See also *Fort Defiance Hous. Corp. v. Lowe*, No. SC-CV-32-03, slip op. at 3-4 (Nav. Sup. Ct. Apr. 12, 2004) available at 2004.NANN.0000005, ¶ 20 (VersusLaw) (using the "every damn fool knows" standard to define the home as more than just a dwelling place for Navajos); see generally *Tome v. Navajo Nation*, 4 Nav. R. 159 (W.R. Dist. Ct. May 13, 1983) ("The court can 'find' the Navajo common law through its own knowledge of it, since it is a matter of common knowledge."), available at 1983.NANN.0000069, ¶ 17 (VersusLaw); *In re Estate of Kindle*, No. SC-CV-40-05, slip op. at 7 (Nav. Sup. Ct. May 18, 2006) (Council Res. CN-69-02 allows judicial notice of custom to be taken).

<sup>37</sup> *Hopi Indian Credit Assoc. v. Thomas*, No. AP-001-84, 1996.NAHT.0000007, ¶ 32 (Hopi Tribal Ct. Mar. 29, 1996) (VersusLaw).

<sup>38</sup> *Polingyouma v. Laban*, No. AP-006-95, 1997.NAHT.0000018, ¶ 27 (Hopi Tribal Ct. Mar. 28, 1997) (VersusLaw).

general rule that the parties must present tribal customs or cultural practices otherwise they are not considered.<sup>39</sup>

The fact that parties in tribal court cannot guarantee that the court will take notice of an existing, even common, custom means that as a practical matter parties should introduce customs which must be “proved by expert testimony or otherwise shown by evidence.”<sup>40</sup> Experts on customs are described in many ways: counselors,<sup>41</sup> medicine men,<sup>42</sup> or simply as experts.<sup>43</sup> Similarly, custom can be established through written treatises on custom, but courts will look at such texts cautiously because the works of “anthropologists, ethnologists and other commentators” on custom often are inaccurate as only tribal members make the “most accurate commentators on themselves.”<sup>44</sup> Whether custom is described by texts or experts, tribal courts establish “methodology for establishing tradition and custom” that are distinct from tribe to tribe.<sup>45</sup> Just as the methods for establishing tradition vary from tribe to tribe, so too does the degree of substantiation required for customs to be accepted by tribal courts.<sup>46</sup> Effective

<sup>39</sup> See *Healy v. Mashantucket Pequot Gaming Enter.*, No. MTPC-EA-97-132, available at 1999.NAMP.0000053, ¶ 36 (Mashantucket Pequot Ct. Apr. 8, 1999) (VersusLaw); *Johnson v. Mashantucket Pequot Gaming Enterprise*, No. MPCA-96-1008, 1995.NAMP.0000026, ¶ 34 (Mashantucket Pequot Ct. Jun. 11, 1996) (VersusLaw).

<sup>40</sup> *In re Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983), available at 1983.NANN.0000070, ¶ 32 (VersusLaw).

<sup>41</sup> See *Benally v. Navajo Nation*, 5 Nav. R. 209 (W.R. Dist. Ct. 1986), available at 1986.NANN.0000013, ¶ 18 (VersusLaw) (“counselors familiar with these customs and usages”); *Hoffman v. Colville Confederated Tribes*, 24 INDIAN L. REP. 6163 (Colv. Ct. App., May 5, 1997), available at 1997.NACC.0000010, ¶ 133 (VersusLaw). (“Where any doubt arises as to the customs of the Tribes the Court may request the advise of counselors familiar with those customs.”).

<sup>42</sup> See *In re Estate of Bighumb*, 6 Nav. R. 453, 455 (W.R. Dist. Ct. Jan. 20, 1989) available at 1989.NANN.0000026, ¶ 22 (VersusLaw) (a Navajo medicine man described payment to women for being dancing partners at squaw dances in order to show the custom of monetizing sexual intercourse).

<sup>43</sup> See *Marino v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-97-104, 2000.NAMP.000003, ¶ 30 (VersusLaw) (Manshantucket Pequot Ct. Jan. 6 2000) (“an expert on the culture, custom, and traditions of the Tribe”); *Hopi Indian Credit Assoc. v. Thomas*, No. AP-001-84, 1996.NAHT.000000, ¶ 41 (Hopi Tribal Ct. Mar. 29, 1996); (VersusLaw) (“expert witnesses will be called to testify as to the existence and scope of traditions”); *Jensen v. Giant Indust.*, No. SC-CV-51-99, slip op. at 4 (Nav. Sup. Ct. 2002), available at 2002.NANN.0000003, ¶ 21 (VersusLaw) (“The court must first determine the witness’s status as an ‘expert’”).

<sup>44</sup> *In re Estate of Apachee*, 4 Nav. R. 178, 180 (W.R. Dist. Ct. Oct. 11, 1983), available at 1983.NANN.0000070, ¶ 32 (VersusLaw).

<sup>45</sup> *Marino v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-97-104, 2000.NAMP.0000033, ¶ 17 (Manshantucket Pequot Ct. Jan. 6, 2000) (VersusLaw). See also *Hoffman v. Colville Confederated Tribes*, 24 INDIAN L. REP. 6163 (Colville Confederated Tribes Ct. App., May 5, 1997), available at 1997 NACC.0000010, ¶ 114 (VersusLaw) (“custom hearing” for establishing tradition); *Hopi Indian Credit Assoc. v. Thomas*, No. AP-001-84, 1996.NAHT.0000007, ¶ 41 (Hopi Tribal Ct. Mar. 29, 1996) (VersusLaw) (“separate hearing” for establishing tradition); *Smith v. James*, No. 98AP000011, 1999.NAHT.0000012 (Hopi Tribal Court Nov. 11, 1999) (VersusLaw) (process for establishing village customs); *Johnson v. Mashantucket Pequot Gaming Enter.*, 25 INDIAN L. REP. 6011 (Manshantucket Pequot Ct. Jan. 21, 1998), available at 1996.NAMP.000002, ¶ 36 (VersusLaw). (“This court is alert to opportunities to implement distinctive customs and traditions of the Mashantucket Pequot Tribe. When and as it does so, however, the court must have a clear understanding of the nature and extent of those customs and traditions.”); *Jensen v. Giant Indus.*, No. SC-CV-51-99, slip op. at 4 (Nav. Sup. Ct. Jan. 22, 2002), available at 2002 NANN.0000003, ¶ 21 (VersusLaw) (establish custom through an informal conference of experts).

<sup>46</sup> For discussions related to the degree of substantiation required for customary law, as well as the type of treatment from different tribal courts: See *Coin v. Mowa*, No. AP-005-95, 1997.NAHT.0000011, ¶ 46 (Hopi Tribal Ct. Mar. 28, 1997) (VersusLaw) (parties must explain relevance of custom); *Smith v. James*, 1999.NAHT.0000012, ¶ 40. (hearing on customary law prior to presentation of facts); *Miller v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-98-121, 1998.NAMP.0000041, ¶ 20 (Manshantucket Pequot Ct. Aug. 7, 1998) (VersusLaw) (need to “clearly” demonstrate custom); *Watt v. Colville Confederated Tribes*, 25 INDIAN L. REP. 6027 (Colville

advocacy before tribal courts thus requires knowledge of both tribal customs and the methodology required for customs to be recognized as customary law.

#### IV. Conclusion

Customary law is an important, even critical, part of tribal jurisprudence but also one that can be difficult to understand. The complex nature of customary law combined with the place of customary law in the hierarchy of law from other sources of law make it an unusual sort of legal authority subject to distinct methods of proof. Customary law is perhaps best understood through the words of one tribal court:

We believe that incorporating our customs into our written law is very important. It is what will set us apart from the state and federal courts. Our courts must approach this carefully, however. Customs and traditions are viable, living doctrines that grow with the community and the time. They are not static, frozen in the past of tepees and buckskin clothing. A good analysis of the applicability of custom and tradition in a case must be able to trace a current practice back to its roots in our society. It will not necessarily have the same complexion, but it should have the same foundation. Our customs and traditions define our uniqueness not only from the non-Indian society, but from other Indian tribes, too. To define a custom or tradition in our current Tribal Court system is an important task which should not be taken lightly by the courts or the parties.<sup>47</sup>

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Confederated Tribes Ct. App. Jan. 21, 1998), *available at* 1998.NACC.0000012, ¶ 19 (VersusLaw) (mere “suppositions” regarding custom are insufficient); *MacDonald v. Redhouse*, 6 Nav. R. 342 (Nav. Sup. Ct. Feb. 18, 1991), *available at* 1991.NANN.0000015 (VersusLaw) (custom relied upon by court without explanation).

<sup>47</sup> *Smith v. Colville Confederated Tribes*, 25 INDIAN L. REV. 6156 (Colville Confederated Tribes Ct. App. May 7, 1998), *available at* 1998.NACC.0000013, ¶ 33, 34 (VersusLaw).

## Appendix

Tribal Courts have applied customary law to a wide range of issues and cases. By its very nature, customary law does not lend itself to interpretation as to the application of custom to particular issues. The distinctive customs of each tribe means that customary law as used in tribal courts is highly dependent upon the history and culture of each tribe. Yet, through the range and type of topics being addressed using customary law, a sense of its importance comes across. Customary law helps determine the rules of tribal court justice and the substantive rights and responsibilities related to a range of issues. A sampling of type of cases and uses of customary law is found below:<sup>48</sup>

### Rules

#### Right to Notice

- Customary law includes notice and right to defend one's self.<sup>49</sup>
- Notice is part of tradition and custom.<sup>50</sup>
- Criminal statutes must provide notice that an activity is prohibited.<sup>51</sup>
- Hopi custom requires fairness which at a minimum includes notice and opportunity to be heard.<sup>52</sup>

#### Due Process Rights

- "Traditional Navajo due process encompasses a wider zone of interest than general American due process."<sup>53</sup>
- Role of courts is to formulate due process by combining Navajo government with Navajo customs.<sup>54</sup>
- Due process guarantees in some cases, not this one, subject to changes based on tradition or cultural norms.<sup>55</sup>
- Due process principles are not the "disrupt settled tribal customs."<sup>56</sup>

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<sup>48</sup> For a much more comprehensive listing of cases for a specific tribe organized by subject and area of law, see Matthew L.M. Fletcher & Zeke Fletcher, *A Restatement of the Common Law of the Grand Traverse Bay of Ottawa and Chippewa Indians*, 8 TRIBAL L. J. 1 (2006/2007), [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_7/a\\_restatement\\_of\\_the\\_common\\_law\\_of\\_the\\_grand\\_traverse\\_band\\_of\\_ottawa\\_and\\_chippewa\\_indians/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_7/a_restatement_of_the_common_law_of_the_grand_traverse_band_of_ottawa_and_chippewa_indians/index.php).

<sup>49</sup> Bennett v. Navajo Nation Bd. of Election Supervisors, 7 Nav. R. 161, 163 (Nav. Sup. Ct. Sept. 26, 1995), available at 1995.NANN.0000015, ¶ 30 (VersusLaw).

<sup>50</sup> Honie v. Hopi Tribal Hous. Auth., No. 96AP000007, 1998.NAHT.0000014, ¶ 42 (Hopi Tribal Ct. Oct. 23, 1998) (VersusLaw).

<sup>51</sup> Keeswood v. Navajo Tribe, 1 Nav. R. 362, 368 (Nav. Ct. App. Aug. 9, 1978), available at 1978.NANN.0000016, ¶ 27 (VersusLaw).

<sup>52</sup> Nevayaktewa v. Hopi Tribe, No. 97AC000004, 1998.NAHT.0000019, ¶ 47 (Hopi Tribal Ct. Mar. 20, 1998) (VersusLaw).

<sup>53</sup> Atcity v. Dist. Ct. for the Judicial Dist. of Window Rock, 7 Nav. R. 227, 231 (Nav. Sup. Ct. Oct. 16, 1996), available at 1996.NANN.0000009, ¶ 37 (VersusLaw).

<sup>54</sup> Billie v. Abbott, 6 Nav. R. 66, 74 (Nav. Sup. Ct. Nov. 10, 1988), available at 1988.NANN.0000012, ¶ 54 (VersusLaw).

<sup>55</sup> Dugan v. Mashantucket Pequot Gaming Enter., No. MPTC-EA-95-128, 1995.NAMP.0000053, ¶ 29 (Mashantucket Pequot Ct. Nov. 7, 1995) (VersusLaw).

- Due Process “must be interpreted in a way that will enhance Navajo culture and tradition.”<sup>57</sup>

### Jurisdiction and Standing

- Domicile established not by physical location but by connection based on customary “extended family relations.”<sup>58</sup>
- Domicile for purposes of venue is by custom where Navajos “maintain their traditional and legal ties, regardless of where they actually live.”<sup>59</sup>
- Clan relations determine venue, not actual location.<sup>60</sup>
- Custom based connection of non-Navajos to Navajos subjects some such individuals to criminal jurisdiction.<sup>61</sup>
- Standing based on customs, standing is broader than federal standing.<sup>62</sup>

### Subject Matter Jurisdiction

- Subject Matter Jurisdiction of courts can be limited by custom of village handling of disputes.<sup>63</sup>
- Custom can limit subject matter jurisdiction over inheritance disputes because villages traditionally settle such disputes.<sup>64</sup>
- The communal ownership of land customarily means that the judiciary has jurisdiction over land disputes.<sup>65</sup>

### Rules of Evidence

- “This Court is free to interpret rules of evidence in light of Navajo common law,” and therefore, oral wills are admitted.<sup>66</sup>
- Spousal confidentiality privilege based on custom.<sup>67</sup>

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<sup>56</sup> Johnson v. Mashantucket Pequot Gaming Enter., No. MPTC-EA-95-136, 1995.NAMP.0000026, ¶ 34 (Mashantucket Pequot Ct. Dec. 11, 1995) (VersusLaw).

<sup>57</sup> Navajo Nation v. MacDonald, 6 Nav. R. 105, 118 (Nav. Sup. Ct. Mar. 31, 1989), *available at* 1989.NANN.0000010, ¶ 112 (VersusLaw).

<sup>58</sup> Father v. Mother, No. MPTC-FA-99-111, 1999.NAMP.0000010, ¶ 30 (Mashantucket Pequot Ct. Mar. 9, 1999) (VersusLaw).

<sup>59</sup> Halona v. MacDonald, 1 Nav. R. 189 (Nav. Ct. App. Jan. 24, 1978), *available at* 1978.NANN.0000002, ¶ 39 (VersusLaw).

<sup>60</sup> *In re Adoption of S.C.M.*, 4 Nav. R. 167, 169 (Nav. Ct. App. Jun. 20, 1983), *available at* 1983.NANN.0000075, ¶ 31 (VersusLaw).

<sup>61</sup> Means v. Dist. Ct. of the Chinle Judicial Dist., 7 Nav. R. 383, 389-391 (Nav. Sup. Ct. May 11, 1999), *available at* 1999.NANN.0000013, ¶¶ 53-67 (VersusLaw).

<sup>62</sup> Village of Mishongnovi v. Humeyestewa, No. 96AP000008, 1998.NAHT.0000017, ¶¶ 48-51 (Hopi Tribal Ct. Mar. 20, 1998) (VersusLaw).

<sup>63</sup> Ross v. Sulu, No. AP-010-88, 1991.NAHT.0000002, ¶¶ 22-23 (Hopi Ct. App. July 5, 1991) (VersusLaw).

<sup>64</sup> Sanchez v. Garcia, No. 98AP000014, 1999.NAHT.0000011, ¶ 22 (Hopi Ct. App. Nov. 12, 1999) (VersusLaw).

<sup>65</sup> Tome v. Navajo Nation, 4 Nav. R. 159, 160-61 (W.R. Dist. Ct. May 13, 1983), *available at* 1983.NANN.0000069, ¶¶ 16-21 (VersusLaw).

<sup>66</sup> *In re Estate of Howard*, 7 Nav. R. 262, 267 (Nav. Sup. Ct. May 28, 1997), *available at* 1997.NANN.0000008, ¶ 40 (VersusLaw).

<sup>67</sup> Navajo Nation v. Murphy, 6 Nav. R. 10, 12-13 (Nav. Sup. Ct. Apr. 21, 1988), *available at* 1988.NANN.0000001, ¶¶ 39-44 (VersusLaw).

### Role of Judges and Juries

- According to Navajo customs, juries have a right to ask questions.<sup>68</sup>
- “The court takes judicial notice of the fact there is a longstanding custom and tradition among the Navajo People for a judge of the Navajo Tribal Courts to appoint a member of the community to mediate and conciliate problems among members of the community.”<sup>69</sup>
- Custom along with help from outside standards helps define the role of judges.<sup>70</sup>
- Qualifications for judges includes knowledge of customs.<sup>71</sup>
- Role of judges is to know customs.<sup>72</sup>

### Representation and Practice Rules for Lawyers

- Right to indigent representation based on custom.<sup>73</sup>
- Non-law trained Navajos can be admitted to practice before the Navajo court system as advocates because they are aware of Navajo customs and traditions.<sup>74</sup>
- Custom based right to effective counsel.<sup>75</sup>
- Knowledge of customs or ability to know customs required to practice law before tribal courts.<sup>76</sup>

### Equity Nature and Power of Courts

- Nalyeeh is a unique Navajo principle that is used to redress civil wrongs.<sup>77</sup>

## **Rights**

### Marriage, Children, and Divorce

- Custom requires father provide child support.<sup>78</sup>
- By custom of leaving hogans, ex-wife can't get life insurance though named as the beneficiary on the deceased's policy.<sup>79</sup>

<sup>68</sup> Downey v. Bigman, 7 Nav. R. 176, 178 (Nav. Sup. Ct. Nov. 9, 1995), *available at* 1995.NANN.0000009, ¶¶ 24-25 (VersusLaw).

<sup>69</sup> *In re Marriage of Allison*, 3 Nav. R. 199, 199 (Nav. Ct. App. Feb. 22, 1982), *available at* 1982.NANN.0000056, ¶ 9 (VersusLaw).

<sup>70</sup> Martin v. Hopi Tribe, No. AP-004-95, 1996.NAHT.0000009, ¶¶ 27-33 (Hopi Ct. App. Mar. 29, 1996) (VersusLaw).

<sup>71</sup> Navajo Nation v. MacDonald, 6 Nav. R. 97, 98 (Nav. Sup. Ct. Mar. 31, 1989), *available at* 1989.NANN.0000009, ¶¶ 26-29 (VersusLaw).

<sup>72</sup> See Seidel v. Council of Elders, 29 INDIAN L. REP. 6069, 6070 (Mohegan Tr. Ct. Apr. 17, 2002), *available at* 2002.NAMT.0000001, ¶¶ 15-47 (VersusLaw).

<sup>73</sup> Boos v. Yazzie, 6 Nav. R. 211, 214 (Nav. Sup. Ct. Sept. 24, 1990), *available at* 1990.NANN.0000021, ¶ 32 (VersusLaw).

<sup>74</sup> *In re Practice of Battles*, 3 Nav. R. 92, 93 (Nav. Ct. App. July 2, 1982), *available at* 1982.NANN.0000043, ¶ 22 (VersusLaw).

<sup>75</sup> Navajo Nation v. MacDonald, 6 Nav. R. 432, 436 (Nav. Sup. Ct. Dec. 30, 1991), *available at* 1991.NANN.0000002, ¶ 44 (VersusLaw).

<sup>76</sup> Arizona v. Begay, 3 Nav. R. 173, 175-76 (W.R. Dist. Ct., 1981), *available at* 1981.NANN.0000018, ¶ 38 (VersusLaw).

<sup>77</sup> Benally v. Broken Hill Prop. Ltd., No. SC-CV-79-98, slip op. at 4 (Nav. Sup. Ct. Sept. 21, 2001), *available at* 2001.NANN.0000015, ¶ 19 (VersusLaw).

<sup>78</sup> Alonzo v. Martine, 6 Nav. R. 395, 396 (Nav. Sup. Ct. June 25, 1991), *available at* 1991.NANN.0000012, ¶ 16 (VersusLaw).

- Child support is an element of customary law.<sup>80</sup>
- In competing claims of illegitimacy women have equal rights “based upon tradition and custom.”<sup>81</sup>
- Customary law calling for family cohesion requires paternity testing.<sup>82</sup>
- Customary law determines rules of adoption.<sup>83</sup>
- By custom, common-law weddings are not recognized only recognition of customary and legal weddings.<sup>84</sup>
- Right to alimony can be based on common, customary law.<sup>85</sup>
- Customary duty of child support: “absolute obligation under Navajo tradition.”<sup>86</sup>
- Award of alimony not against custom.<sup>87</sup>
- Customary duty of child support, alimony.<sup>88</sup>

### Restitution

- Compensating victims is part of custom.<sup>89</sup>
- “Restitution in criminal and quasi-criminal cases is also a matter of Navajo custom, and this court will require it whenever and wherever it is appropriate to the circumstances.”<sup>90</sup>
- Restitution is “central to Navajo tradition.”<sup>91</sup>
- Damages determined by customary law.<sup>92</sup>
- “Restitution is recognized as a tradition of the Mohegan Tribe.”<sup>93</sup>

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<sup>79</sup> *Apache v. Republic Nat'l Life Ins. Co.*, 3 Nav. R. 250, 253 (W.R. Dist. Ct. Sept. 16, 1982), available at 1982.NANN.0000050, ¶ 36 (VersusLaw).

<sup>80</sup> *Burbank v. Clarke*, 7 Nav. R. 369, 371 (Nav. Sup. Ct. Jan. 26, 1999), available at 1999.NANN.0000009, ¶ 21 (VersusLaw).

<sup>81</sup> *Davis v. Davis*, 5 Nav. R. 169, 171 (Nav. Sup. Ct. July 22, 1987), available at 1987.NANN.0000018, ¶ 21 (VersusLaw).

<sup>82</sup> *Davis v. Means*, 7 Nav. R. 100, 102 (Nav. Sup. Ct. Sept. 27, 1994), available at 1994.NANN.0000006, ¶ 28 (VersusLaw).

<sup>83</sup> *In re J.J.S.*, 4 Nav. R. 192, 195 (W.R. Dist. Ct. Nov. 4, 1983), available at 1983.NANN.0000071, ¶ 40 (VersusLaw).

<sup>84</sup> *In re Marriage of Francisco*, 6 Nav. R. 134, 135 (Nav. Sup. Ct. Aug. 2, 1989), available at 1989.NANN.0000013, ¶ 17 (VersusLaw).

<sup>85</sup> *Naize v. Naize*, 7 Nav. R. 269, 271 (Nav. Sup. Ct. May 28, 1997), available at 1997.NANN.0000002, ¶ 22 (VersusLaw).

<sup>86</sup> *Notah v. Francis*, 5 Nav. R. 147, 148 (Nav. Sup. Ct. June 19, 1987), available at 1987.NANN.0000005, ¶ 16 (VersusLaw).

<sup>87</sup> *Sells v. Sells*, 5 Nav. R. 104, 105 (Nav. Sup. Ct. Oct. 17, 1986), available at 1986.NANN.0000006, ¶ 25 (VersusLaw).

<sup>88</sup> *Tom v. Tom*, 4 Nav. R. 12, 13 (Nav. Ct. App. Jan. 24, 1983), available at 1983.NANN.0000038, ¶ 21 (VersusLaw).

<sup>89</sup> *Cadman v. Hubbard*, 5 Nav. R. 226, 230 (Crwn. Dist. Ct. Sept. 17, 1986), available at 1986.NANN.0000010, ¶ 50 (VersusLaw).

<sup>90</sup> *In re D.P.*, 3 Nav. R. 255, 256 (Crwn. Dist. Ct. Dec. 2, 1982), available at 1982.NANN.0000061, ¶ 15 (VersusLaw).

<sup>91</sup> *Navajo Nation v. Blake*, 7 Nav. R. 233, 235 (Nav. Sup. Ct. Nov. 5, 1996), available at 1996.NANN.0000005, ¶ 21 (VersusLaw).

<sup>92</sup> *Nez v. Peabody W. Coal Co.*, 7 Nav. R. 416, 421 (Nav. Sup. Ct. Sept. 22, 1999), available at 1999.NANN.0000007, ¶ 46 (VersusLaw).

<sup>93</sup> *Seidel v. Council of Elders*, 29 INDIAN L. REP. 6069, 6069 (Mohegan Tribal Ct. Apr. 17, 2002), available at 2002.NAMT.0000001, ¶ 16 (VersusLaw).



### Employment

- Navajo's have close relations both with spouses and kin, so power plant's anti-nepotism policy is invalid in not permitting husband and wives to both be hired.<sup>94</sup>
- Government agents of Navajo Nation not protected by sovereign immunity by Navajo principle of k'e.<sup>95</sup>

### Death and Inheritance

- Oral wills acceptable because of customary use and norm.<sup>96</sup>
- Custom includes wrongful death cause of action.<sup>97</sup>
- Customary law of inheritance: Navajo custom "controls" intestate succession.<sup>98</sup>
- Custom determines inheritance even if against probate rules.<sup>99</sup>

### Land

- Land ownership and trust is more communal under customary law, and further, that "one must use it or lose it."<sup>100</sup>
- Navajos should not lie according to customs and land use and social order part of customs.<sup>101</sup>
- Land is communal under Navajo customary law of land tenure.<sup>102</sup>

### Government and Government Officials

- "Navajo common law acknowledges that there is a strong and fundamental tradition that any Navajo can participate in the processes of government"<sup>103</sup>
- Egalitarian participation in government part of custom.<sup>104</sup>
- Tradition of allowing anyone to run for election.<sup>105</sup>
- Duty of fiduciary trust based on "traditional concept" of naat'aani.<sup>106</sup>

<sup>94</sup> *Ariz. Pub. Serv. Co. v. ONLR*, 6 Nav. R. 246, 264 (Nav. Sup. Ct. Oct. 8, 1990), available at 1990.NANN.0000003, ¶ 124 (VersusLaw).

<sup>95</sup> *Atcity v. Dist. Ct. for the Jud. Dist. of Window Rock*, 7 Nav. R. 227, 230 (Nav. Sup. Ct. Oct. 16, 1996), available at 1996.NANN.0000009, ¶ 32 (VersusLaw).

<sup>96</sup> *In re Estate of Howard*, 7 Nav. R. 262, 264 (Nav. Sup. Ct. May 28, 1997), available at 1997.NANN.0000008, ¶ 25 (VersusLaw).

<sup>97</sup> *Benally v. Navajo Nation*, 5 Nav. R. 209, 210-11 (W.R. Dist. Ct. Apr. 15, 1986), available at 1986.NANN.0000013, ¶¶ 13-24 (VersusLaw).

<sup>98</sup> *In re Estate of Apachee*, 4 Nav. R. 178, 179 (Nav. Ct. App. Oct. 11, 1983), available at 1983.NANN.0000070, ¶¶ 24-25 (VersusLaw).

<sup>99</sup> *In re Estate of Nez*, 5 Nav. R. 79, 82 (Nav. Sup. Ct. Mar. 7, 1986), available at 1986.NANN.0000008, ¶ 30 (VersusLaw).

<sup>100</sup> *Begay v. Keedah*, 6 Nav. R. 416, 421 (Nav. Sup. Ct. Nov. 26, 1991), available at 1991.NANN.0000007, ¶ 44 (VersusLaw).

<sup>101</sup> *Ben v. Burbank*, 7 Nav. R. 222, 224 (Nav. Sup. Ct. Sept. 2, 1996), available at 1996.NANN.0000008, ¶ 29 (VersusLaw).

<sup>102</sup> *In re Harvey*, 6 Nav. R. 413, 415 (Nav. Sup. Ct. Sept. 18, 1991), available at 1991.NANN.0000009, ¶ 27 (VersusLaw).

<sup>103</sup> *Rough Rock Cmty. Sch. v. Navajo Nation*, 7 Nav. R. 168, 173 (Nav. Sup. Ct. Nov. 8, 1995), available at 1995.NANN.0000008, ¶ 44 (VersusLaw).

<sup>104</sup> *Downey v. Bigman*, 7 Nav. R. 175, 177 (Nav. Sup. Ct. Nov. 9, 1995), available at 1995.NANN.0000009, ¶ 19 (VersusLaw).

<sup>105</sup> *Howard v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 380, 383 (Nav. Sup. Ct. Mar. 6, 1991) (Austin, J., concurring in part and dissenting in part), available at 1991.NANN.0000019, ¶ 30 (VersusLaw).

- Navajo culture is against government corruption.<sup>107</sup>
- Custom says that punishment only as a last resort, so notice of no police power required.<sup>108</sup>

#### Additional Customary Law Decisions

- Gifts to individuals can be considered communal gifts by customary law.<sup>109</sup>
- Freedom of speech limited by responsibility to not hurt anyone because “as a matter of Navajo tradition and custom, people speak with caution and respect.”<sup>110</sup>
- Jail time can be subject to custom based arguments.<sup>111</sup>
- Vagueness can void statutes by customary law.<sup>112</sup>
- Required to prove custom supports community service in lieu of jail time.<sup>113</sup>

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<sup>106</sup> *In re Certified Questions II*, 6 Nav. 105, 117 (Nav. Sup. Ct. Apr. 13, 1989), *available at* 1989.NANN.0000010, ¶ 104 (VersusLaw).

<sup>107</sup> *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 447 (Nav. Sup. Ct. Dec. 30, 1991), *available at* 1991.NANN.0000002, ¶ 110 (VersusLaw).

<sup>108</sup> *Navajo Nation v. Platero*, 6 Nav. R. 422, 425 (Nav. Sup. Ct. Dec. 5, 1991), *available at* 1991.NANN.0000001, ¶ 24 (VersusLaw).

<sup>109</sup> *Johnson v. Johnson*, 3 Nav. R. 9, 12 (Nav. Ct. App. Apr. 11, 1980), *available at* 1980.NANN.0000009, ¶ 37 (VersusLaw).

<sup>110</sup> *Navajo Nation v. Crockett*, 7 Nav. R. 233, 240 (Nav. Sup. Ct. Nov. 26, 1996), *available at* 1996.NANN.0000006, ¶ 39 (VersusLaw).

<sup>111</sup> *Pakootas v. Colville Confederated Tribes*, 25 INDIAN L. REP. 6024, 6024 (Confederated Tribes of the Colville Reservation Ct. App. Nov. 26, 1997), *available at* 1997.NACC.0000005, ¶ 14 (VersusLaw).

<sup>112</sup> *Rough Rock Cmty. Sch. v. Navajo Nation*, 7 Nav. R. 168, 169 (Nav. Sup. Ct. Nov. 8, 1995) *available at* 1995.NANN.0000008, ¶ 19 (VersusLaw).

<sup>113</sup> *Watt v. Colville Confederated Tribes*, 25 INDIAN LAW REP. 6027, 6027 (Confederated Tribes of the Colville Reservation Ct. App. Jan. 21, 1998), *available at* 1998.NACC.0000012, ¶ 19 (VersusLaw).