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LENDER RECOURSE IN INDIAN COUNTRY: A NAVAJO CASE STUDY

PAUL E. FRYE*

I. INTRODUCTION

This article analyzes lender recourse issues which are significant in the evaluation of investment and lending decisions within the Navajo Nation. Initial research for this article was done under a contract with the Council of Energy Resource Tribes ("CERT").¹ After examining the structure of the Navajo government, characterized as "probably the most elaborate among tribes,"² this article discusses the applicable substantive law, procedures, and remedies. In addition, this article analyzes lender perceptions of consistency, competence, and fairness of the Navajo judiciary, and it treats the concerns of some commentators regarding Indian court systems generally.

This article integrates the results of interviews with attorneys for lenders and consumers, literature searches, legal analysis, and the observations of the writer from fourteen years of practice within the Navajo Nation. In light of the rapid pace of development of commercial law in the Navajo Nation, periodic follow-up research is plainly warranted.

Because of the complexity of the Navajo government, and because lenders may be unfamiliar with or suspicious of Navajo institutions and decisionmaking processes, this article first describes the Navajo governmental structure. Analysis of the substantive law is preceded by an overview of traditional attitudes of Navajos regarding personal indebtedness. These attitudes are useful not only in evaluating generalizations made about Navajo borrowers, but also in predicting, to some extent, the attitudes of Navajo judges in civil actions brought by creditors. Indeed, the choice of law provision of the Navajo Tribal Code requires consideration of Navajo traditional law, and—while no true traditional law will be applicable or provable in most actions brought by creditors—both the Navajo Nation Council and the judges are sensitive to the

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1. The writer expresses his appreciation to CERT and its counsel, Mervyn L. Tano, for their support and input, and to Lisa M. Enfield for her comprehensive review of this article.

2. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (quoting H.R. REP. NO. 78, 91st Cong., 1st Sess., 8 (1969)). The value of this complexity is certainly debatable. See Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231-32 (1989); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219, 281-289 (1986).

desirability of retaining Navajo traditions even as non-Indian legal concepts are integrated into the Navajo system.³

After a discussion of the applicable substantive law of the Navajo Nation, the procedures promulgated by the Navajo judiciary are analyzed and remedies are evaluated. Finally, this article describes in some detail non-Indians' perceptions of the fairness and consistency of the Navajo judiciary and analyzes these perceptions and concerns with reference to reported decisions.

In summary, the Navajo Nation has for several years taken significant steps to improve the climate for those seeking to do business within Navajo Indian Country. The most recently elected administrations have emphasized the need to develop Navajo small businesses—ones not dependent on government subsidies for their success. Concomitantly, the Navajo Nation has sought to strengthen its sovereign interests in assuring that commercial development is accomplished in a manner consistent with Navajo needs, expectations, and interests, and in regulating or excluding those entities whose practices do not comport with the policies established by the Navajo Nation Council.

Studies conducted by the Council of Energy Resource Tribes show an unmet demand for lending to credit-worthy small businesses and persons within the Navajo Nation. The existing credit programs, administered by the Bureau of Indian Affairs or initiated by the Navajo government in Window Rock, are failures because of administrative neglect, lack of either business acumen of the borrowers or technical assistance from the lenders (or both), and the intrusion of political considerations into lending decisions. New institutions are certainly called for, and the Navajo government, at all levels, is creating a favorable environment for the creation and operation of institutions capable of taking advantage of this environment.

II. OVERVIEW OF THE NAVAJO GOVERNMENTAL STRUCTURE

A. Historical and Geographical Setting

The Navajo Nation now encompasses an area of about seventeen million acres. The Tribe is the most populous of any Indian tribe in North America, and the land base held in trust for the Tribe as a whole is larger than eight of the states of the Union.

Although almost all of the Arizona and Utah portions of the Navajo Nation is held in trust for the Tribe as a whole, the situation is different

3. For a recent example, see the Preamble to the Navajo Nation Corporation Code, passed on January 30, 1986, at 2:

The interpretation of this code should be based on Navajo Tribal Court interpretation and such interpretation shall give the utmost respect in deciding the meaning and purpose of this code to the unique traditions and customs of the Navajo People. General decisional law interpreting similar provisions of the above Model Acts and state agricultural cooperative acts may be used as guidance.

in the eastern part of the New Mexico portion of the Navajo Nation. In New Mexico lie not only 1,572,710 acres of the original treaty reservation⁴ and 829,600 acres of tribal trust reservation,⁵ but also the New Mexico portion of the reservation created by executive orders in 1907 and 1908 ("E.O. 709/744 reservation").⁶ In 1908, the E.O. 709/744 reservation was opened to non-Indian settlement. This area, called the "Pueblo Bonito subdivision of the Navajo reservation" in appropriations acts from 1919-1927, is now administered by the Eastern Navajo Agency of the United States Bureau of Indian Affairs ("BIA"), which also has jurisdiction over other "checkerboard" lands in New Mexico.⁷

It is somewhat peculiar that only the New Mexico portion of the Navajo Nation is characterized by checkerboard land ownership because this area is the "Dinetah," or Navajo homeland. Navajo origins are traced in Navajo tradition to Fajada Butte, near Pueblo Bonito in Chaco Canyon, and Huerfano Peak, in the Eastern Navajo Agency north of the E.O. 709/744 boundary.

Historically, the political organization of the Navajo people centered around "Naat'a'anii," or local headmen.

From the legends we can learn something of the social and economic life of the [Navajo] People, including their political organization, at the time they lived in *Dine'tah* more than 500 years ago.

4. This area was conferred by the Treaty with the Navajo Indians, Aug. 12, 1868, United States-Navajo, 15 Stat. 667 (1868).

5. Established by the Executive Order of January 6, 1880. EXECUTIVE ORDERS RELATING TO INDIAN RESERVES 56 (1890).

6. Executive Order Nos. 709, 744 (dated Nov. 9, 1907 and Jan. 28, 1908, respectively) [hereinafter E.O. 709/744 reservation]. This part of the reservation was opened pursuant to section 25 of the Act of May 29, 1908. 35 Stat. 444, 457 (1908).

7. The boundaries of the New Mexico portion of the E.O. 709/744 reservation contain approximately 1.9 million acres. Approximately 95% of the population in this area is American Indian, according to the 1990 census. About 55% of the land in the E.O. 709/744 area is Indian-owned and another 21% is United States Bureau of Land Management land administered by the Navajo Tribe under a cooperative agreement with the BLM and the BIA.

In resolving conflicting decisions of two district court judges, the United States Court of Appeals for the Tenth Circuit held that the E.O. 709/744 reservation in New Mexico was diminished as a result of the opening of the area to non-Indian settlement. *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990). The Navajo suggestion for rehearing *en banc* was denied by an evenly divided court of appeals, with two judges not participating.

In the remainder of the "checkerboard" lands administered by the Eastern Navajo Agency, about 88% of the population is Indian, according to the 1990 census, and 83% of the land is Indian-owned or administered. See *Sandoval v. Tinian, Inc.*, 5 Navajo Rptr. 215 (Window Rock D. Ct. 1986) (regarding demographics of Torreon Chapter in Eastern Navajo Agency). That Navajo ownership of land in Arizona is generally confluent with Arizona reservation boundaries, while the New Mexico portion of the Navajo Nation is not, is a result of the political power of perhaps a half dozen non-Indian ranchers who succeeded in opening the E.O. 709/744 reservation in New Mexico, as well as the unfortunate by-product of an unrelated dispute between Senator Chavez of New Mexico and John Collier, the Commissioner of Indian Affairs, when land consolidation and boundary bills were being considered by Congress in the 1930's. See D. PARMAN, *THE NAVAJOS AND THE NEW DEAL* 132-59 (1976).

The jurisdiction of the Navajo Nation over actions arising in the Eastern Navajo Agency is likely to be the subject of substantial litigation. In *Sandoval*, the court held that it had both subject matter and personal jurisdiction over a corporate defendant doing business in the checkerboard area, finding that the area in question was a "dependent Indian community" and part of Navajo Indian Country. 5 Navajo Rptr. at 220.

In these traditional accounts we find recurrent references to Chiefs (Naat'a'anii) and democratic gatherings (Councils) as media for decision-making and group control. (At this early period the group involved seems to have been the clan.) The Chiefs talked to the people, advised them and gave them guidance, and when problems arose or danger threatened the Chiefs might call a Council to decide upon a course of action. The Chiefs of legendary times were much like the Headmen (Naat'a'anii) of a more recent period, to judge by their function; and, like the more modern Headmen, the Naat'a'anii of the distant past could be deposed or forced to resign for cause. A Headman remained a leader so long as his leadership enlisted public confidence or resulted in public benefit. Clearly, the concept of democratic government was not absent in Navajo life of long ago, although the unit involved—whether the clan or a local community group—was far smaller than the entire Tribe.

The legends, the recollections of the aged, and the written accounts that have come down to us from Spanish and Anglo-American observers over the past two centuries all point to the Navajo Tribe of former times as a group of people sharing a common language and a common way of life, but not as a political entity organized under centralized leadership for a common purpose. The emergence of the Tribe as a nation, in a political sense, has come only in very recent times.⁸

With respect to the Navajo economy, it has only been in recent years that any significant departure from the traditional pastoral and agricultural lifestyle has taken place. This is the result of a variety of factors, including the relative success and industry of Navajos in the traditional economic pursuits. However, the pursuit of traditional means of support has been determined, in large measure, by a lack of viable alternatives. The state and federal governments have historically ignored the infrastructure needs of Navajo Indian Country, and lack of roads,⁹ electricity,¹⁰ running water,¹¹ and health facilities¹² are only a few of the disincentives for industry to come to Navajo Country and create jobs. The businesses which do come to Navajo Indian Country do so often because they have no viable alternative—one cannot extract Navajo coal or petroleum products from Phoenix or Albuquerque.

8. R. YOUNG, *A POLITICAL HISTORY OF THE NAVAJO TRIBE* 15-16 (1978).

9. In 1975, it was reported that Navajo Indian Country had 60 miles of paved roads per 1,000 square miles, compared with 154 miles in comparable rural areas of the Southwest. UNITED STATES COMMISSION ON CIVIL RIGHTS, *THE NAVAJO NATION: AN AMERICAN COLONY* 41 (1975) [hereinafter *THE NAVAJO NATION*]. A 1982 study performed for the Navajo Nation shows this disparity to be increasing, and found further that there were 25 times the miles of unpaved but improved roads in areas outside of Navajo Indian Country as in comparable areas within. MOUNTAIN WEST RESEARCH AND APPLIED ECONOMICS, *ANALYSIS OF PUBLIC SERVICE AND FACILITIES: NAVAJO NATION AND SELECTED SAMPLE COUNTIES* 40-41 (1982).

10. See Back & Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 NAT. RESOURCES J. 71, 74 (1980): "Still, about 90 percent of the homes on the reservation are without electricity, compared to only one percent nationwide . . ."

11. The Commission on Civil Rights found that 8.4% of Navajo homes had standard inside plumbing, compared with 81.8% nationwide. *THE NAVAJO NATION*, *supra* note 9, at 41.

12. "Health care on the reservation is not only inadequate, it is unsafe." *Id.* at 128.

The most critical determinant of the current lack of a modern economic infrastructure in Navajo Indian Country is the lack of education of adult Navajos. In article VI of the 1868 Treaty with the Navajos, the United States agreed to provide a school and teacher wherever thirty children could be induced to attend school.¹³ The Navajos, a people often characterized as adept at integrating non-Navajo values into Navajo ways, sought compliance with the Treaty terms, but congressional debates in 1894 noted that the United States had "defaulted"¹⁴ on its obligations and that "[i]n other cases, like that of the Navajoe [sic] tribe, with 3,000 children, they have only one school."¹⁵

The situation was little better in March of 1948 when a Department of Interior report stated the following:

In its Treaty of 1868 with the Navajo Tribe, the United States agreed to provide a school house and teacher for each thirty Navajo children. Yet today there are 24,000 Navajo children of school age (6 to 18 years) with total school facilities available for not more than 7,000.

The educational status of the present Navajo population may be summarized as follows: more than 66 percent have had no schooling whatever, while the median number of school years for the group as a whole is less than one.¹⁶

By 1980, census statistics indicated that the median education level for adult Navajos had risen to fifth grade. Apparently content with this advancement, the Reagan administration began closing schools on the Navajo reservation. The school districts of the states purport to encompass all lands within Navajo Indian Country, yet according to the Assistant Supervisor of the Gallup Public Schools, the state schools are not able to educate many Navajos because: (1) state schools have no four-wheel drive vehicles to pick up students (and have no plans to obtain such vehicles); and (2) the roads in Navajo Indian Country are so bad that four-wheel drive vehicles are required to get Navajo children to and from schools. Almost poetically, the areas of historical neglect of Navajos reinforce each other.¹⁷

To provide for its own infrastructure, the Navajo Nation has recently begun implementation of its tax program, after the Supreme Court de-

13. Treaty with Navajo Indians, Aug. 12, 1868, United States-Navajo, art. VI, 15 Stat. 667, 669 (1868).

14. 26 CONG. REC. 7703 (1894) (reproducing the report of Special Agent Donaldson).

15. *Id.* at 5926.

16. UNITED STATES DEPARTMENT OF THE INTERIOR, REPORT ON THE NAVAJO, LONG RANGE PROGRAM OF NAVAJO REHABILITATION 11 (1948) (available at University of New Mexico Law Library, call no. IND-E-99-N3U55).

17. See *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 (1982), referring to the "tribal children abandoned by the State [of New Mexico]." The worst discrimination in the United States against Indian children by public schools was found in the checkerboard area in New Mexico. NAACP & HARVARD CENTER FOR LAW AND EDUCATION, AN EVEN CHANCE: A REPORT ON FEDERAL FUNDS FOR INDIAN CHILDREN IN PUBLIC SCHOOL DISTRICTS 7 (1971); see also *Natonabah v. Board of Educ. of Gallup-McKinley County School Dist.*, 355 F. Supp. 716, 719 (D.N.M. 1973).

terminated that its tax ordinances need not be approved by the Secretary of the Interior.¹⁸ Tribal taxes on petroleum production will decrease with the decrease in recoverable Navajo reserves and will fluctuate with world pricing. Major coal producers and power plants on the reservation have obtained yet-to-be-tested tax waivers on their activities. Thus, Navajo taxing authority will be able to meet some, but by no means all, of the infrastructure needs in Navajo Indian Country.¹⁹ It should be expected, therefore, that investment and development in the near term will concentrate in areas where some infrastructure is already in place, primarily in the communities of Crownpoint, Window Rock, Shiprock, Chinle, Tuba City, Churchrock, and Kayenta.

B. *The Origins of the Modern Navajo Government*

The Navajo government was established, and to some extent continues to operate, in an environment of divergent expectations, needs, and goals. The Department of the Interior, by regulations promulgated on January 7, 1923, created a Navajo Tribal Council of one Chairman, one Vice-Chairman, and six members.²⁰ The Secretary of the Interior retained the power to remove any member of the Council "upon proper cause shown."²¹ In 1928, the Hopi Reservation was officially represented in the Navajo Tribal Council.²²

The initial regulations did not set out the scope of authority of the Council, nor did later amendments to the regulations.²³ Revisions were sought during the 1930s to allow the Tribe "greater responsibility of the management of its own affairs, acting for this purpose through its representative Tribal Council."²⁴ A Committee for Council Reorganization, composed of Council members, was formed around 1930.²⁵ Other committees, including the forerunner of the powerful Advisory Committee, were established by Chairman Dodge.²⁶

Commissioner of Indian Affairs John Collier sought to strengthen the Council in 1933, and the Council responded by rescinding the 1923 resolution which gave the Secretary of the Interior a "power of attorney"

18. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

19. A 3.8 billion dollar infrastructure investment was needed in 1975 to bring Navajo Indian Country to parity with the surrounding areas. *THE NAVAJO NATION*, *supra* note 9, at 42.

20. The federal government created the Tribal Council in order to establish an ostensibly representative body to ratify mineral leases on Navajo land. R. YOUNG, *THE NAVAJO YEARBOOK: 1951-1961 A DECADE OF PROGRESS* 373-75 (1961). In 1936, by resolution, the Council stated "that the sole purpose for creation of the 1923 Council was the making of oil and gas leases." R. YOUNG, *supra* note 8, at 90.

21. R. YOUNG, *supra* note 8, at 60.

22. *Id.* at 70.

23. *Id.* at 68-69.

24. *Id.* at 69.

25. *Id.* at 76.

26. *Id.* at 76, 130-131. The Advisory Committee was redesignated as the Intergovernmental Relations Committee in the extensive revisions to the Navajo Tribal Code. Resolution CD-68-89 (Dec. 15, 1989). Of the various committees of the Navajo Nation Council, the Advisory Committee has had the most delegated authority. See *NAVAJO TRIB. CODE* tit. 2, §§ 341-44 (Supp. 1985). Under the revised government structure, the Intergovernmental Relations Committee continues to hold the most power.

to enter into leases for the Tribe.²⁷ In 1936, the Council determined that its authority was inadequate and established a committee with responsibility for calling a constitutional assembly. From this assembly came a greater number of representatives and bylaws, which, although no constitution was approved, served as a great step away from the earlier restrictive regulations and toward self-government.²⁸ "Rules for the Navajo Council," containing many of the provisions of the Navajo bylaws, were approved by Secretary Ickes on July 26, 1938, and these Rules "remain the foundation upon which the modern Navajo Tribal Council rests."²⁹

Major revisions to the 1938 Rules came in 1951 and 1955, when federal involvement in tribal elections was all but eliminated. In 1958, the election procedures were revised to provide for appointment, rather than election, of judges.³⁰ The number of Council delegates has increased from six in 1923, to twelve in 1928, to twenty-four in 1934, to seventy-four (in the bylaws) in 1937, to the present eighty-eight in 1979.³¹

The growth of a national Navajo government was accompanied by the establishment of local governments, called "Chapters." These are also BIA innovations. This "local political structure . . . bears striking resemblance to the New England town meeting of the 17th and 18th centuries."³² In 1955, the Navajo Tribal Council recognized eighty-six Chapters throughout Navajo Indian Country.³³ By 1970, there were ninety-six,³⁴ and the number of Chapters is now 108. The system came into disrepute among some Navajos during the traumatic stock reduction era, when the Chapter Houses were used as centers of operations for those in charge of reducing the number of Navajo sheep.³⁵ Recently, though, Chapters have been delegated authority to pass "local ordinances on any matter affecting the community,"³⁶ subject to the approval of the Navajo Tribal Council and its Intergovernmental Relations Committee.

Williams properly notes the non-Indian origins of the current Navajo political structure.³⁷ He—again properly—also cautions against assigning non-Indian content or meaning to such structures.³⁸ Traditional decision-making has not been supplanted by Anglo-inspired forms, as an early example illustrates.

27. R. YOUNG, *supra* note 8, at 78-79.

28. *Id.* at 107.

29. *Id.* at 114.

30. *Id.* at 148.

31. See NAVAJO TRIB. CODE tit. 2, § 4001(d) (Supp. 1985).

32. A. WILLIAMS, NAVAJO POLITICAL PROCESS 1 (1970). For an account of a typical Chapter meeting, see *id.* at 43.

33. R. YOUNG, *supra* note 8, at 154.

34. A. WILLIAMS, *supra* note 32, at 154.

35. *Id.* at 38.

36. NAVAJO TRIB. CODE tit. 2, § 4002 (Supp. 1985).

37. A. WILLIAMS, *supra* note 32, at 53; accord THE NAVAJO NATION, *supra* note 9, at 19 (Navajo government is "structured on Anglo, not Indian concepts"). Williams, however, attributes the relative success of the Chapter system to its use of "preexisting patterns of political selection and social control in the operations of chapters." A. WILLIAMS, *supra* note 32, at 62.

38. A. WILLIAMS, *supra* note 32, at 53.

In 1920, the Indian Agent Stacher for the Crownpoint area felt that his program suffered from a lack of centralized leadership among the Navajos. He requested that a meeting be called to elect a leader of the Navajo people, so that the Government program could be pushed by this elected leader.

The meeting took place at Charley Jim's, while a Yeibichai dance was underway. . . . Three men were nominated. The first was Casamero Tsinajinni, the second was Chief Becenti, and the third was Atsidi Yazzi Biye'. These three men all gave a talk, and the vote was taken in the following manner. The people who were in favor of Chief Becenti were asked to go over and stand near him, and the ones favoring the other two were to go and stand near them. Two of the nominated men had what seemed like an equal number of voters standing near them, and one man had but a few people standing near him.

It was decided to count the fewer men around Atsidi Yazzi Biye' first, and the number was 50. Next, Stacher counted those people around Chief Becenti, then the people around Casamero Tsinajinni. The count was Becenti 333 votes, and Casamero Tsinajinni got 330 votes, thus Becenti was elected as chief or headman for the people around Crownpoint by 3 votes. This was how we did things then. However, it did not change things very much as we still went to our regular leaders and did what they suggested, just as we did before Stacher had the vote, but I guess Stacher felt better.³⁹

The most significant difference in the meaning of Navajo political thought is the value attached to a dissenting minority. Failure to recognize the centrality of consensus in Navajo political behavior would be a serious oversight in the establishment of any major economic institution or program in Navajo Indian Country. As Williams states:

I believe that the interdependent functions of withdrawal and consensus characterize most, if not all, contemporary Navajo sociopolitical structures.

A major emphasis of all Navajo social interaction is to achieve harmony, and the well-being of individuals is coextensive with that of the group. . . . Harmonious interpersonal relations are thus the primary objective of action, and consensus is the direct evidence that a group has reached its goal. Consensus among the Navajos is not so much an agreement on all issues as it is the pattern of discussion, debate, negotiation, and compromise, and the respect for attitudes of indifference among members of its group whose primary aim is to maintain a sense of identification with each other as participants in the Navajo culture. The act of withdrawing from a social or political gathering by individuals is behavior prompted by considerable social pressure for consensus and harmony which, in turn, is valued by Navajos as the greatest good in the universe.⁴⁰

39. *Id.* at 34 (citing a 1962 interview).

40. *Id.* (citation omitted).

The value attached to spirited debate is quite different in the Navajo tradition, as evidenced by the following narration, reproduced in Williams' book⁴¹ and describing reactions to meetings which concerned the devastating stock reductions:

MEETINGS

For long time	Tonight
there have been meetings	when my father
of many men	came home from meeting
for many days.	he just sat looking
At the meetings	and looking.
there is talking	Then my mother
talking,	spoke to me.
talking.	She said
Some this way,	"A meeting is like rain.
some that way.	When there is little talk
In the morning	now and then,
when my father	here and there,
leaves for meeting	it is good.
he says to us,	It makes thoughts grow as
"When I come here again	little rain makes corn grow.
then I will know	But big talk, too much,
if it be best	is like a flood
to have many sheep	taking things of long
or a few sheep,	standing before it."
to use the land	My mother
or let it sleep."	said this to me,
But	but I think
when my father	she wanted my father
comes home from meeting	to hear it.
he does not know	Author: Anonymous Navajo
which talking way to follow.	

The non-Indian model of the Council and Chapter system is repeated in the Navajo Nation courts. The Navajo judiciary reflects a similar tension between Navajo tradition and Navajo perceptions of what is needed for acceptance of its authority to adjudicate disputes regarding economic activities within the Navajo Nation.

The reason for the adoption by the Navajo Tribal Council of an Anglo-style judiciary has been alluded to by the Court of Appeals of the Navajo Nation in *In re Battles*, where the court stated: "The Navajo Tribal Council was afraid of state jurisdiction and a state takeover, and it did wish to reinforce Navajo sovereignty. . . . The new court system was created to avoid the systems of others, and a legal system designed on state and federal models was the result."⁴² The court cited an article by

41. *Id.* at v.

42. 3 Navajo Rptr. 92, 95 (1982) (citations omitted). At the time of the *Battles* decision, the court of appeals was the highest court in the Navajo judicial system. The recent reorganization of the Navajo judiciary has replaced the former court of appeals with the Navajo Supreme Court. See *infra* text accompanying notes 58-69. The *Battles* case, concerning among other things whether "professional attorneys" were barred from practicing in the Navajo Tribal Courts, has antecedents in both federal law and the law of other tribes. See section 8 of Law and Order Regulations, approved by the Secretary of the Interior on November 27, 1935, reproduced in *Tribal Power-Exclusion of Non-Indian Attorneys*, 1 Op. Sol. 775 (1937). The past Chairman of the Navajo Tribal

Stephen Conn.⁴³ In it, Conn opines that the legal system was designed, at least in part, to prove to both Navajos and non-Navajos that a "centralized tribal government could be trusted to govern."⁴⁴ Laurence Davis, an attorney assisting then-general counsel Norman Littell, wrote of the transition from the BIA-initiated Court of Indian Offenses to the independent Navajo judiciary of the late 1950's, concluding that the assumption by the Navajo Nation of "complete and exclusive responsibility for its own judiciary . . . is clearly one of the greatest accomplishments of Indian self-government in this century."⁴⁵

The relevant Tribal Council resolutions establishing the reformed Navajo judiciary have been codified in title 7 of the Navajo Tribal Code. Only recently have any significant amendments been enacted. The territorial jurisdiction provision was revised in 1985 to define more generally the geographical reach of the judicial power.⁴⁶ More importantly, the widely mistrusted (but almost completely idle) "Supreme Judicial Council," an arm of the Tribal Council which had been delegated the ability to review decisions of the court of appeals which invalidated Council resolutions, was abolished in 1985 in the same resolution which established an appointed Navajo Supreme Court, whose judges sit during good behavior.⁴⁷

The tension between preservation of the traditional (and, by all accounts, successful) means of ordering social relations, and the dictates of interactions with non-Indian economic and political institutions, is apparent in each of the major issues discussed below. While many believe that the adoption of Anglo models of dispute resolution are fundamentally inimical to preservation of tradition, at least one respected authority does not.⁴⁸ At any rate, it does appear to be true that "[t]he greatest challenge faced by the modern tribal court system is in the harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence."⁴⁹

Council and the current President of the Navajo Nation, Peterson Zah, once said: "I am not a lawyer. Some people have urged that I should go to law school and become a lawyer, but after working for those lawyers in the last ten years, I am better off the way I am." AMERICAN INDIAN LAW TRAINING PROGRAM, JUSTICE IN INDIAN COUNTRY 107 (1980) [hereinafter JUSTICE IN INDIAN COUNTRY].

43. Conn, *Mid-Passage—The Navajo Tribe and its First Legal Revolution*, 6 AM. INDIAN L. REV. 329 (1978).

44. *Id.* at 340-46.

45. Davis, *Court Reform in the Navajo Nation*, 43 J. AM. JUDICATURE SOC'Y 53, 55 (1959).

46. Compare NAVAJO TRIB. CODE tit. 7, § 254 (1978) with NAVAJO TRIB. CODE tit. 7, § 254, as amended on July 25, 1985. The 1985 provision states:

The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to, the Navajo Tribe or any Band of Navajo Indians.

47. Navajo Nation Judicial Reform Act of 1985, Resolution No. CD-94-85 (Dec. 4, 1985).

48. See V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 136-37 (1983).

49. *Id.* at 120. See generally JUDICIAL BRANCH OF THE NAVAJO NATION, ANNUAL REPORT 1-5 (1988).

This historical tension between the goal of preserving customs and traditions, while establishing institutions and practices to satisfy non-Indian standards, is a theme repeated in many variations in the discussion which follows.

C. *The Lack of a Constitution*

The Indian Reorganization Act of 1934 ("IRA") contained provisions to encourage Indian tribes to adopt constitutions. The BIA often drafted constitutions for the tribes, and standard provisions of these BIA constitutions, contrary to the intent of the IRA to foster self-determination, included the submission of tribal laws for Secretarial approval or disapproval.

The Navajo Tribe rejected the opportunity to become an IRA tribe in an election held on June 17, 1935, by a vote of 7,992 to 7,608.⁵⁰ The reason for the rejection was a reaction to a perceived continuation of federal intrusion: opponents of the IRA equated the adoption of IRA provisions with stock reduction carried out, often brutally, by federal officials during that time. A constitutional assembly was convened in April of 1937. In 1950, Congress included in the Navajo-Hopi Rehabilitation Act of 1950⁵¹ authority for the Navajo people to adopt a constitution.⁵² As late as 1968, the Navajo Tribal Council adopted a resolution calling for the submission of a constitution to the Navajo people.⁵³ Support for a Navajo constitution was renewed and strengthened as a result of the placing by the Council of former Chairman Peter MacDonald on "administrative leave" after allegations of misuse of power were made before a congressional subcommittee in 1988.

Non-Indian entities have argued that, because of the origins of the Council, because of the lack of a constitution, and because of the principle that a sovereign governs only by the consent of the governed, the resolutions of the Council have no legal effect.⁵⁴

The Solicitor General viewed the contention that a constitution was necessary for Council actions to be valid as follows:

Only the most insular perspective would view a governmental body as lacking legitimacy or plenary authority merely because its pedigree is not traced to a popular constitutional convention and its powers are not defined by an entrenched constitution. One need only consider the British Parliament, which, from year to year, defines its own authority and evolved from a council of royal appointees. The first

50. R. YOUNG, *supra* note 8, at 377.

51. 25 U.S.C. §§ 631 to 640c-3 (1988).

52. *Id.* § 636.

53. *Minutes of Sessions of the Navajo Tribal Council*, Nov. 14, 1968. With regard to the various attempts to impose a constitutional structure on the Navajo, see generally R. YOUNG, *supra* note 8, at 114, 128-29, 148-49; Conn, *supra* note 43, at 336.

54. These arguments have been made most forcefully by corporations seeking to invalidate the Navajo tax code. Ironically, these corporations based their right to extract minerals from, and to do business on, the Navajo Reservation on Tribal Council resolutions approving leases of tribal lands.

principle of sovereignty, after all, is that the form of government is a matter for self-determination.⁵⁵

Noting that a much greater percentage of eligible Navajos vote in tribal elections than do non-Indians in state and federal elections, the Supreme Court dealt with the non-Indians' arguments rather succinctly, stating that "[t]he legitimacy of the Navajo Tribal Council, the freely elected governing body of the Navajos, is beyond question."⁵⁶ The lack of an IRA constitution does not detract from the Council's legitimacy or its power over members and non-members alike.⁵⁷

D. Separation of Powers

Prior to the 1985 Judicial Reform Act, the Navajo Tribal Courts, like most tribal courts,⁵⁸ were subordinate to the Tribal Council.⁵⁹

Unlike many Indian judicial systems, however, the Navajo Nation has customarily adhered to the principle of separation of powers,⁶⁰ and the Navajo courts have ruled on the validity of Tribal Council actions.⁶¹ The independence of the Navajo judiciary is illustrated by, for example, *Howard Dana & Associates v. Navajo Housing Authority*⁶² (affirming a judgment of \$104,864 against the Navajo Housing Authority), *George v. Navajo Tribe*⁶³ (holding that, contrary to Navajo Tribal Code title 7, section 653, non-Indians were eligible to serve as jurors in tribal courts), *Halona v. MacDonald*⁶⁴ (affirming an injunction prohibiting the Chairman and tribal comptroller from expending funds appropriated by the Tribal Council to pay for the Chairman's legal expenses), and *Yazzie v. Board of Election Supervisors*⁶⁵ (rejecting an apportionment plan adopted by the Council).

That the judicial branch may have been formally subordinate to the legislative branch was not necessarily inappropriate. "The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine and define its own form of government."⁶⁶ Again, one need look only

55. Brief for the United States as *Amicus Curiae* at 25, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

56. *Kerr-McGee Corp.*, 471 U.S. at 201 (footnote omitted).

57. *Id.* at 198-99.

58. See AMERICAN INDIAN LAW TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS 37 (1977) ("as a general rule these courts are not empowered to review the validity of council actions or enactments . . .").

59. R. YOUNG, *supra* note 8, at 160; see *Badonie v. Donaldson*, 1 Navajo Rptr. 73, 75 (1973).

60. *Badonie*, 1 Navajo Rptr. at 74.

61. *Halona v. MacDonald*, 1 Navajo Rptr. 189, 203-04 (1978); see also *infra* notes 338-54 and accompanying text.

62. 1 Navajo Rptr. 325 (1978).

63. 2 Navajo Rptr. 1 (1979).

64. 1 Navajo Rptr. 189 (1978).

65. 1 Navajo Rptr. 213 (1978).

66. *Powers of Indian Tribes*, 1 Op. Sol. 445, 455 (1934), cited in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1955), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982).

to parliamentary forms of government to find other examples of the organizational or formal subordination of the judiciary to the legislature.

The prior Zah administration was elected in 1982 on a platform of fostering greater formal separation of powers. As noted above, the "Supreme Judicial Council" was abolished by the Council in December of 1985. No longer is there a body of Council delegates able to review decisions of the Tribal Courts. The Tribe in the prior Zah administration received a grant from the Administration for Native Americans to accomplish a greater separation of powers.⁶⁷

Formal separation of powers has now been accomplished by resolution of the Navajo Tribal Council passed on December 15, 1989. This resolution reorganized completely the legislative and executive branches, provided for a separation of powers between these two branches, and characterized the Judicial Reform Act of 1985 as "treating the Judicial Branch as a separate branch of government"⁶⁸ The resolution is predicated on the view of the Council that:

[I]t is in the best interest of the Navajo Nation that the Navajo Nation Government be reorganized to provide the separation of functions into three branches, and provide for checks and balances between the three branches until the Navajo People decide through the Government Reform Project the form of government they want to be governed by⁶⁹

As this language suggests, various proposed constitutions are being circulated and discussed among the Navajo people, and further reorganization is a possibility. However, history strongly suggests that action to adopt a constitution will take a long period of time, if, indeed, one is ever adopted. Thus, persons contemplating doing business within the Navajo Nation should not necessarily treat the 1989 reorganization as a mere temporary measure, as the above language might suggest.

E. Ability of Non-Indians to Influence Decisionmaking

Attorneys for corporations seeking to invalidate tribal taxes argue that such taxes impose "taxation without representation." Again, the Solicitor General provided guidance:

That is not the unique situation of non-members of an Indian Reservation, as is plain enough to residents of the District of Columbia, taxed and ultimately ruled by a Congress in which they have no voting representative. Certainly, petitioner has no standing to complain, being a foreign corporation . . . with no greater vote in the Legislatures of New Mexico and Arizona than in the Navajo Tribal Council.⁷⁰

67. *Navajos to Use Grant Money to Revamp Tribal Operations*, Albuquerque J., Feb. 2, 1986, at C6.

68. Resolution No. CD-68-89, p. 1, ¶ 3.

69. *Id.* at 2, ¶ 8.

70. Brief for the United States as *Amicus Curiae* at 28; *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (citations omitted).

Corporations may not vote in tribal elections, as is the case in all states of the Union. Corporate interests, however, are represented in the Tribal Council through the views of the Navajo employees of the corporation. Corporate lobbying is a well-accepted phenomenon, although corporate and non-member contributions to the Navajo political candidates are prohibited.⁷¹

One must be a member of the Navajo Tribe to vote in tribal elections.⁷² This, in the Supreme Court's view, does not limit the sovereign authority of Indian nations over non-members doing business within Indian Country.⁷³ United States corporations doing business in the Navajo Nation (a "domestic, dependent nation")⁷⁴ are plainly much better protected than those doing business in foreign countries, given the pervasive authority of Congress rooted in article I, section 8 of the United States Constitution.⁷⁵

Other avenues for input into and influence upon tribal decisionmaking exist. The executive agencies of the Navajo Nation are remarkably receptive and accessible. For purposes of this article, the agencies of most impact are the Division of Economic Development, the Minerals Department, and the Office of the President and Vice-President. In some instances, the BIA and individual members of Congress have succeeded in affecting tribal decisions regarding non-Indian proposals.

For a proposal with primarily local impacts,⁷⁶ though, the proponent would be wise to contact local Chapter officials in order to present the proposal to the Chapters. The proponent should be prepared to do this several times (with an interpreter) and to wait—consensus politics in the Navajo tradition often requires much explanation, reflection, deliberation, and the building of personal trust and rapport. Projects determined to be of benefit will ultimately be approved; those found detrimental to the community will either be rejected or, more likely, not acted upon at all in any final way.

Once Chapter approval is obtained, the Council Delegate is often directed to facilitate compliance with tribal procedures in Window Rock. Capable attorneys⁷⁷ in Window Rock, Fort Defiance, and Gallup can provide services of inestimable value in this regard.

71. NAVAJO TRIB. CODE tit. 11, § 247 (Supp. 1985).

72. *Id.* § 6.

73. Compare *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) with dissenting opinion at 172-73 (Stevens, J., dissenting). However, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court rejected the claim of an Indian tribe that it possessed the authority to try and punish a non-member Indian of a criminal offense under its tribal laws. The *Duro* Court relied in great measure on the principle of the consent of the governed, citing to the dissent in *Merrion*.

74. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

75. See Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 386 (1989).

76. For economic development proposals with national impacts, the proponent of the project should coordinate closely with the Navajo executive agency (such as the Division of Economic Development) from the outset, as well as going to the Chapters.

77. These include former legal services attorneys, former tribal attorneys, and others with significant experience with tribal institutions.

F. Conclusion

This "Overview" is perhaps lengthier than might be considered warranted by the primary purpose of this article, which is to discuss lender recourse within the Navajo Nation. Those contemplating entering into commercial transactions in Navajo Indian Country, however, must be aware of the historical setting and the origins and peculiarities of the Navajo government in order to make informed judgments about whether or how to do business in Navajo Country.

It is this tradition which suggests several general approaches for creditors in Navajo Country. First, it is far more effective and accepted in the long run to establish personal relationships and to attempt to employ non-coercive⁷⁸ types of enforcement means than to use initially the coercive mechanisms made available by the Navajo Nation Council and the judiciary. Second, initial lending decisions must be carefully evaluated, and in many instances, a creditor who lends to Navajo small businesses must be prepared and willing to assist actively the business owner in his own operations and decisionmaking. Finally, Navajo tradition and values are resilient and fundamental. Despite the adoption of commercial codes, corporation codes, and Anglo-style dispute resolution mechanisms, the creditor must be prepared to adapt to Navajo traditional ways. Navajo institutions are unlikely to incorporate totally the adversarial and coercive precepts of the non-Indian legal system.

III. TRADITIONAL ATTITUDES REGARDING PERSONAL INDEBTEDNESS

Because there has been, at least prior to 1923, no historic conception of economic activity undertaken by the Navajo Nation as a whole,⁷⁹ no substantive Navajo common law with respect to tribal debts or obligations exists. Anthropological sources suggest that traditions and customs regarding debts of tribal members did, and perhaps still do, exist.⁸⁰ Conn notes that

[d]ebt relationships were secured traditionally by families as well as by individuals. They generally arose out of ongoing relationships between creditor and debtor, be they Navajo and white trader or Navajo and Navajo. . . .

78. In R. YOUNG, *supra* note 8, at 91, Young states that until 1936 [n]o traditional native institution in the history of the Tribe ever had possessed or used coercion as an instrument for internal control—including the institution of the Headmen. In fact, coercion was repugnant to the principles of democratic government in Navajo society—and, even today, the Council is reluctant to enact obligatory legislation affecting the tribal membership, preferring to rely instead on persuasion.

To the same effect, see *id.* at 25, 48-49; A. WILLIAMS, *supra* note 32, at 6-7, 12, 61.

79. See Haile, *Property Concepts of the Navaho Indians*, CATHOLIC UNIVERSITY ANTHROPOLOGICAL SERIES No. 17, 54 (1954).

80. Such customs and usages apply in civil actions. See NAVAJO TRIB. CODE tit. 7, § 204 (Supp. 1985).

Where tied to the community or local economic cycles, debts were repaid. In this realm, social control by the family or by Chapter officials was strong enough without law. The tribe's loan program was built upon this local base. Loans were screened by individuals in local communities. *The tribe lost only seven-tenths of 1 per cent of nearly \$700,000 disbursed.*⁸¹

Few Navajos, until the 1960's, used the Navajo courts to collect debts owed by others.⁸²

Fr. Berard Haile reported that, in the 1930's, gambling debts were secured by "arm security," as well as by tangible property.

After a gambler had lost "his bundle" meaning, whatever loose property he carried with him, he might stake "other" properties left at home. He would ask saxado'cih that he be "credited" on these. If the winner expressed doubt about the existence of such properties the loser would raise his arm, left or right, as security. This implied that he pledged himself to 'aganbe'na'nis "labor by arm" to work out the value of his wager. This was considered the highest security. On the strength of that security he could continue in the sport.⁸³

Haile describes the Navajo lender as "inexorable," asserting that a Navajo lender "demands more interest and security than whites are in the habit of asking."⁸⁴ "As a rule the Navaho strive to pay debts incurred."⁸⁵

Hill's field notes⁸⁶ report the information supplied by Late Little Smith's Son of Crownpoint:

Lending. In the old days if a man was hard up he would come to some one and beg for something and get it free. Later on borrowing came in. Even in the old days, though, a man would replace what he had borrowed or even give back a little more because he would say it has been a great help. In a debt like that if both parties died the debt was cancelled.⁸⁷

Van Valkenburgh traced the development of Navajo contract law somewhat sketchily.⁸⁸ If Van Valkenburgh is correct, traditional social controls

81. Conn, *supra* note 43, at 356-57 (footnotes omitted) (emphasis added). By contrast, the current default rate in the centralized BIA and tribal loan programs is reported to be 60%. Gallup Independent, Feb. 1, 1991, at 1.

82. Conn, *supra* note 43, at 358.

83. Haile, *supra* note 79, at 44.

84. *Id.* at 46.

85. *Id.*

86. W. Hill, Concerning Law Among the Navajo Indians (unpublished field notes) (available at University of New Mexico Law Library, call no. IND-KF-8228-N3H55). These field notes are undated, but probably date from 1933-1934. See C. KLUCKHOHN, NAVAJO MATERIAL CULTURE vii (1971).

87. Hill, *supra* note 86, at 6.

88. MUSEUM OF NORTHERN ARIZONA, NAVAJO COMMON LAW vol. 9, no. 4 (1936) [hereinafter NAVAJO COMMON LAW]; *id.* vol. 9, no. 10 (1937); *id.* vol. 10, no. 12 (1938).

sufficed to secure debts through at least 1938, with the "Indian courts" showing "general indifference" to such matters.⁸⁹

IV. NAVAJO SUBSTANTIVE LAW

A. Overview and Trends

This section discusses the substantive law which applies in the Navajo courts in actions brought by creditors. While this article focuses on consumer and business lending to non-governmental persons and entities, the issues of sovereign immunity and the trust status of tribal lands, issues raised almost always in conjunction with transactions involving the Tribe or tribal enterprises, are also treated briefly in the following section.

The substantive law, as enacted by the Navajo Tribal Council, has seen major changes during the past thirty years. The mistrust of secured creditors in the 1950's⁹⁰ has given way to deferential protection of their interests in recent years. The Council, in 1968, enacted a resolution⁹¹ which prohibits unconsented-to self-help repossessions, as is the law in Wisconsin⁹² and Louisiana. The legislative history of this resolution shows an increased sensitivity to creditor interests; indeed, one of the Council delegates who participated most significantly in the Council debates related his experiences as a reposessor for motor vehicle dealerships.

While creditors are not particularly happy with the procedural requirements imposed by this resolution, practitioners in the Navajo courts generally agree that these courts provide prompt and adequate relief for secured creditors. In addition, both the Council and the courts have attempted to ease the burden on creditors imposed by this resolution. First, Tribal Council Resolution No. CJA-8-78 (January 24, 1978), while affirming the protections for individual Navajo debtors, declared that sections 607-609 were not intended to apply to the commercial relationships entered into by enterprises of the Navajo Nation itself. Second, and even more important to this discussion, the judges of the Navajo courts adopted special court rules on January 29, 1982 "providing a rule of pleading, practice, and procedure for the repossession of personal property by creditors where such property is security for a loan or other extension of credit." Whether or not this rulemaking is authorized by Navajo Tribal Code title 7, section 601, it is remarkable evidence of the view of the judiciary that the extension of credit to Navajos is beneficial to the Nation and should not be discouraged by unnecessarily protracted

89. *Id.* vol. 10, no. 12, at 43. This is similar to the experience of other tribes, which settled civil matters in traditional ways. See, e.g., S. REP. NO. 615, 52d Cong., 1st Sess. (1892).

90. See Conn, *supra* note 43, at 355-67.

91. NAVAJO TRIB. CODE tit. 7, §§ 607-609 (Supp. 1985).

92. See Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607 (1975).

proceedings to enforce security interests. Decisions of the tribal courts construe creditor rights broadly.⁹³

Most recently, the Tribal Council has enacted a Navajo Uniform Commercial Code ("NUCC") and a Navajo Nation Corporation Code ("Corporation Code"). The NUCC and Corporation Code are both designed to encourage business development in the Navajo Nation and to reassure creditors that Navajo law offers protection comparable to state law.⁹⁴

The substantive law of debtor-creditor relations in the Navajo Nation is found generally in title 7 of the Navajo Tribal Code. Substantive rights in the Navajo courts are governed by the choice of law provision.⁹⁵ Section 204 of the law appears to establish a hierarchy of law to be applied if the Council has not yet spoken: first, customs and usages of the Tribe; second, federal laws and regulations; third, laws of the state "in which the matter in dispute may lie."⁹⁶

With respect to this hierarchy, there have been several proposals, the most recent by the Navajo Nation Bar Association, to document Navajo traditional customs and usages. This work has not been completed. In addition, no reported decision of the Navajo courts has been found applying traditional customs and usages to debtor-creditor disputes. Instead, the tribal courts have looked to state and federal law.⁹⁷ Nonetheless, creditors should be aware that Navajo custom and tradition, if proved at trial, could preempt the commercial law developed by the states.⁹⁸

In sum, practitioners in tribal courts generally feel that secured creditors are adequately protected by Navajo law in Navajo courts. Unsecured creditors face serious difficulties, on the other hand, and practitioners assert a need for mechanisms for examination of debtors and for gar-

93. See, e.g., *Becenti v. Laughlin*, 4 Navajo Rptr. 147 (Window Rock D. Ct. 1983) (per Tso); *A-1 Mobile Homes, Inc. v. Becenti*, 2 Navajo Rptr. 21 (Crownpoint D. Ct. 1979); see also *General Motors Acceptance Corp. v. Bitah*, 6 Navajo Rptr. 104 (1988) (reversing judgment awarding \$85,000 damages against GMAC).

94. In a very general sense, the NUCC simply restated the law that had been applied prior to the enactment of the Navajo U.C.C. because the Navajo choice of law provision, *NAVAJO TRIB. CODE* tit. 7, § 204, borrowed state commercial law in cases before the tribal courts. However, the Navajo Nation extends over three states, and the state statutes and the interpretations of the U.C.C. by state courts have not been uniform. New Mexico, for example, did not adopt the 1972 amendments to the UCC until 1985, effective January 1, 1986. 1985 N.M. Laws ch. 193.

95. *NAVAJO TRIB. CODE* tit. 7, § 204 (Supp. 1985).

96. *Id.* § 204(c); see *JUDICIAL BRANCH OF THE NAVAJO NATION, ANNUAL REPORT 3* (1988).

97. See, e.g., *Manygoats v. General Motors Acceptance Corp.*, 4 Navajo Rptr. 94, 96 (1983); *Johnson v. Dixon*, 4 Navajo Rptr. 108 (1983); *General Electric Credit Corp. v. Vandever*, 1 Navajo Rptr. 352 (Crownpoint D. Ct. 1978).

98. See *Benally v. Navajo Nation*, 5 Navajo Rptr. 209, 210 (1986) (finding that Navajo customary law allowed for damages for wrongful death, and refusing to adopt the common law of the states which requires legislative authorization for wrongful death actions); *Estate of Belone*, 5 Navajo Rptr. 161, 164-65 (1987) (traditional adoption); *Estate of Apache*, 4 Navajo Rptr. 178, 182-83 (1978) (custom of intestate distribution discussed under *NAVAJO TRIB. CODE* tit. 8, § 2(b)); *Estate of Thomas*, 6 Navajo Rptr. 129 (1988); cf. *Estate of Benally*, 5 Navajo Rptr. 174, 176-77 (1987) (discussing failure of proof to support position that Navajo custom favors oldest child in division of estate property). See generally, Tso, *supra* note 2, at 233-34.

nishment of wages.⁹⁹ Most important, however, is the fact that both the Council and the judiciary are cognizant of, and have acted to accommodate, needs of secured creditors.

B. Indian Law Issues

Two related matters, tribal sovereign immunity and the trust status of Indian lands, concern lenders doing business in Indian Country. The existing literature generally supports the view that "the complexity of Indian land ownership and control always creates uncertainty and substantial delay, and adds to the cost of doing business in Indian country."¹⁰⁰ Tribal trust land is not mortgageable.¹⁰¹

On the other hand, a lessee of tribal trust lands may encumber its leasehold interest to obtain funds to improve the leased premises.¹⁰² The Window Rock Field Solicitor, in an interview conducted in January of 1986, opined that such arrangements are of limited utility, at best. The Field Solicitor noted that, although at least one substantial investment had been secured in this manner for a Navajo tribal administration building, investors will generally not be very interested in a leasehold in a remote area to begin with and that, therefore, the presence of a leasehold mortgage alternative is not likely to make most investments significantly more attractive to an investor. Moreover, in an opinion by a lender's attorney,¹⁰³ the leasehold mortgage capability is only as viable as foreclosure proceedings are able to assure satisfaction of the obligation.¹⁰⁴

99. To the extent that security for a debt is insufficient to cover the obligation, these comments are applicable to secured creditors as well. Part VI of this article discusses remedies under Navajo law.

100. E. Natwig, *Initiatives In Development Finance: Institutional Barriers to Financing Development Projects in Indian Country* 7 (July 1981) (unpublished manuscript); *accord*, e.g., Office of Arid Land Studies, University of Arizona, *Development Financing Alternatives on Tribal Lands: The Lender's Perspective* 5 (Nov. 1981) (unpublished manuscript) [hereinafter *Development Financing Alternatives*].

101. See E. Natwig, *supra* note 100, at 5. Individual Indian allotments may be mortgaged, however, with the approval of the Department of the Interior. 25 U.S.C. § 483(a) (1983); 25 C.F.R. § 152.34 (1989). Interior officials do not encourage such mortgages. State courts have no subject matter jurisdiction over foreclosures of these mortgages. *Northwest S.D. Prod. Credit Ass'n v. Smith*, 784 F.2d 323 (8th Cir. 1986); *Crow Tribe v. Deernose*, 158 Mont. 25, 487 P.2d 1133 (1971); *Southwest Prod. Credit Ass'n v. Martinez*, No. 85-113 (McKinley County, N.M.D. Ct. 1986); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 621-22 (1982). *Contra* *Federal Land Bank of Wichita v. Burris*, 790 P.2d 534 (Okla. 1990).

102. 25 C.F.R. § 162.12 (1985).

103. The opinion is reproduced as Appendix A to *Development Financing Alternatives*, *supra* note 100.

104. *Development Financing Alternatives*, *supra* note 100, at 23. There have been at least three foreclosures of leasehold interests on tribal trust lands by the Farmers Home Administration ("FHA"), according to tribal attorneys. The federal Justice Department attorney who handles such foreclosures noted that the cases in Navajo Country have been settled, or the Tribe (in the case of an allotment foreclosure action) has purchased the land at its appraised value. The attorney in the Office of the General Counsel for FHA in Albuquerque who works most directly with Navajo foreclosures states that any foreclosures have been accomplished judicially. FHA is able to go to federal court in these actions because the United States is the plaintiff. The actions in federal court for Navajo foreclosures are pursued in the same manner as non-Indian foreclosures. FHA has not asked for deficiencies, for two reasons: first and most important, FHA recognizes Arizona law, which does not allow

Thus, the Tribe's sovereign immunity is implicated in lender decision-making, where a tribe (or tribal authority imbued with tribal sovereign immunity) is the lessor. The lender's counsel concludes that only an act of Congress abrogating a tribe's sovereign immunity would assure that a tribe's sovereign immunity would not bar recourse.¹⁰⁵ This conclusion has been proved erroneous, given recent developments in caselaw.

While earlier cases stated that tribal sovereign immunity from suit would bar suits against tribes "either in the federal or state courts, without Congressional authorization,"¹⁰⁶ the sounder view is that Indian tribes may waive such immunity if such waiver is unequivocally expressed.¹⁰⁷ Having examined the law of Indian sovereign immunity, a report concludes: "The tribe as a business corporation, or certain tribally chartered subsidiary corporations, have been successful in creating a limited waiver of tribal sovereign immunity under conditions that demonstrate such immunity has been knowingly and validly waived."¹⁰⁸ The Navajo Tribal Council did precisely that in resolutions CO-62-80 and CN-71-80, relating to the Navajo Agricultural Products Industries ("NAPI"), providing a limited waiver of Navajo sovereign immunity in order to secure financing with a major institutional lender.¹⁰⁹

The NAPI resolutions were enacted to modify to this limited extent the 1980 Navajo Sovereign Immunity Act.¹¹⁰ The Act provides procedures for asserting claims against the Navajo Nation where such claims are authorized.¹¹¹ In general, however, enterprises of the Navajo Nation are

deficiency judgments on residential property; second, the debtor would likely be judgment-proof, in the experience of the attorney for FHA.

A potential area of concern was raised by one tribal attorney that the current homesite lease form being used differs somewhat from the form approved many years ago by the Advisory Committee. In light of the extensive delegated authority in NAVAJO TRIB. CODE tit. 2, §§ 341(b)(4), 343(b)(8), 344(c)(4)(D) (Supp. 1985) and longstanding practice, this concern is no longer valid.

105. Development Financing Alternatives, *supra* note 100, at 20-21. Appendix B to the study consists of an article entitled *A Lender's View of Unsubordinated Ground Leases*. In addition to the option of unsubordinated ground leases, arrangements where movable (and removable) assets are encumbered have proved useful, as in the financing of Navajo Agricultural Products Industries, according to the Window Rock Field Solicitor.

106. Maryland Casualty Co. v. Citizens Nat'l Bank of Hollywood, 361 F.2d 517, 520 (5th Cir. 1966); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940).

107. Enterprise Management Consultants v. United States *ex rel.* Hodel, 883 F.2d 890, 894, 895 n.5 (10th Cir. 1989); Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 318 (10th Cir. 1982); Wichita and Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 773 (D.C. Cir. 1986); American Indian Agric. Credit Corp. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1377-79 (8th Cir. 1985); United States v. State of Oregon, 657 F.2d 1009, 1013 (9th Cir. 1981); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982); *see also* Rehner v. Rice, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *cf.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

108. KARL A. FUNKE & ASSOCIATES, TRIBAL BUSINESS LAW DEVELOPMENT PROJECT 91 (1983).

109. If relying on a waiver of sovereign immunity, a lender should observe limitations on a tribal official's ability to waive immunity. *See, e.g.*, Hydrothermal Energy Corp. v. Fort Bidwell Indian Community, 12 Indian L. Rep. (Am. Indian Law. Training Program) 5103 (Cal. Ct. App. July 23, 1985) (without delegation of authority to waive Community's immunity from suit, tribal chairman's attempt to do so was invalid).

110. NAVAJO TRIB. CODE tit. 1, §§ 351-355 (Supp. 1985).

111. *Id.* § 354.

immune from suit.¹¹² Officials of the Navajo Nation, not including the members of the Tribal Council, may be sued to compel performance of duties under Navajo or federal law.¹¹³

The Navajo Sovereign Immunity Act followed several cases decided by the Navajo Court of Appeals. In *Dennison v. Tucson Gas & Electric Co.*,¹¹⁴ the court stated that it "has always upheld and presently does uphold the sovereign immunity doctrine of the Navajo Nation"¹¹⁵ Nonetheless, finding that executive officers had acted outside the scope of their authority in *Dennison*, suit was permitted. *Dennison* was followed by *Keeswood v. Navajo Tribe*,¹¹⁶ where the court "strongly urge[d] the Navajo Tribal Council to examine the trend in American law and take some kind of affirmative action on the issue of sovereign immunity."¹¹⁷ Again, while holding that the Tribe could not be sued without its consent, the court affirmed the district court's holding that individuals employed by the Tribe could be sued if they "exceeded their lawful authority."¹¹⁸ The *Land v. Dollar*¹¹⁹ exception to the sovereign immunity doctrine was also noted in *Davis v. Navajo Tribe*¹²⁰ and discussed in *Johnson v. Navajo Nation*.¹²¹ The Navajo Tribal Council addressed the issue comprehensively in 1980 in the Navajo Sovereign Immunity Act.¹²² The 1980 Sovereign Immunity Act was amended in 1986.¹²³

The above discussion suggests strongly that each transaction with the Navajo Nation or its enterprises must be considered *sui generis*. Further, secure financing of leasehold improvements on tribal trust land will depend on the terms of the tribal lease, and a prudent lender should, if necessary, seek lease modifications to assure that a foreclosure action would ultimately protect its interests in the debtor's assets.

C. Repossessions

Repossession of personal property in Navajo Indian Country is governed by Navajo Tribal Code title 7, sections 607-610, reproduced below:

112. *Id.* §§ 352(13), 353(a). The court of appeals has held, however, that such immunity does not extend to enterprises in garnishment actions authorized by the Navajo Tribal Code. *Foster v. Lee*, 3 Navajo Rptr. 203 (1982).

113. NAVAJO TRIB. CODE tit. 7, § 854(d) (Supp. 1985).

114. 1 Navajo Rptr. 95 (1974).

115. *Id.* at 105.

116. 2 Navajo Rptr. 46 (1979).

117. *Id.* at 55.

118. *Id.* at 56.

119. 330 U.S. 731 (1947), *limited*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

120. 1 Navajo Rptr. 379, 381 (Crownpoint D. Ct. 1978).

121. 5 Navajo Rptr. 192, 195-96 (1987). "Indeed, Section 253 [NAVAJO TRIB. CODE tit. 7, § 253] would give the district courts jurisdiction over ultra vires actions of tribal officials without running afoul of the sovereign immunity doctrine." *Id.* at 196; *accord* *TBI Contractors, Inc. v. Navajo Tribe*, 6 Navajo Rptr. 116 (1988) ("Sovereign immunity does not extend to protect tribal officials who act outside the law."). *TBI Contractors, Inc.* is most significant in its discussion of the relationship of tribal sovereign immunity with economic development. See 6 Navajo Rptr. at 126-27.

122. NAVAJO TRIB. CODE tit. 1, §§ 351-55 (1985).

123. See *Johnson v. Navajo Nation*, 5 Navajo Rptr. 192, 200 n.4 (1987).

§ 607. Repossession of personal property

The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following:

(1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand.

(2) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding.

§ 608. Violations—Penalty

(a) Any nonmember of the Navajo Tribe, except persons authorized by Federal law to be present on Tribal land, found to be in wilful violation of 7 N.T.C. § 607 may be excluded from land subject to the jurisdiction of the Navajo Tribe in accordance with procedure set forth in 17 N.T.C. §§ 1903-1906.

(b) Any business whose employees are found to be in wilful violation of 7 N.T.C. § 607 may be denied the privilege of doing business on land subject to the jurisdiction of the Navajo Tribe.

(c) Any Indian who violates any provision of 7 N.T.C. § 607 shall be guilty of a crime, and upon conviction shall be punished by a fine of not more than \$100.

§ 609. Civil Liability

Any person who violates 7 N.T.C. § 607 and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with 7 N.T.C. §§ 607-609.

If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

Purchaser means the person who owes payment or other performance of an obligation secured by personal property, whether or not the purchaser owns or has rights in the personal property.

§ 610. Agencies of United States

The provisions of 7 N.T.C. §§ 607-609 shall not apply to legally recognized agencies of the United States Government.

As the statute indicates, unconsented-to self-help is prohibited.¹²⁴ Violations of these provisions subject the creditor to civil liability, as set out in section 609, and may subject the creditor to exclusion from the Navajo Nation under section 608.¹²⁵

124. See *Russell v. Donaldson*, 3 Navajo Rptr. 209, 213 (Window Rock D. Ct. 1982).

125. See *Naswood v. Foremost Fin. Servs.*, 3 Navajo Rptr. 138, 140 (1982).

The Navajo statute is similar to one enacted by the Wisconsin legislature. It appears that the prohibition of unconsented-to self-help repossessions under the Wisconsin law has not had any significant effect on credit practices in that state.¹²⁶

The authority of Navajo law on repossessions within the Navajo Nation is clear,¹²⁷ and the repossession laws are accorded full faith and credit by the New Mexico courts¹²⁸ and comity by the Arizona courts.¹²⁹ Of interest to creditors doing business with the Tribe itself is Tribal Council Resolution CJA-8-78 (Jan. 24, 1978), which affirms that the protections afforded by Navajo Tribal Code title 7, sections 607-609 were intended to benefit individual Navajo debtors, and not to apply to the commercial relationships entered into by enterprises of the Navajo Nation.

Creditors have attempted to circumvent the requirement of written consent to repossession by various means. Often, creditors are able to obtain signatures on consent forms from Navajo buyers at the time of purchase. The Navajo courts have rejected this strategy, requiring in all cases that the written consent be obtained at the time that repossession is effected.

D. *The Navajo Uniform Commercial Code*¹³⁰

1. Background and Policy

The Executive Summary of the then-proposed NUCC gives the background of the Navajo Nation's efforts to enact a commercial code. The initial thrust was the formation of a task force in May of 1978. The task force "found that adoption of the NUCC would stimulate economic and business development by encouraging more bank financing of businesses on the Navajo Reservation."

The University of Arizona's Office of Arid Land Studies studied the general question of Indian commercial codes from 1978 to 1980. A draft UCC was produced and examined by the Navajo task force in 1982. The task force ultimately decided to hire a law firm to refine earlier drafts and propose a Navajo UCC. The Center for Indian Economic Development did so, and its draft was reviewed and, in some instances,

126. See Whitford & Laufer, *supra* note 92, at 656. The special rules adopted by the Navajo judiciary to simplify and expedite replevin actions further reduce any impacts on credit practices within the Navajo Nation, assuming the validity of such rules. See *infra* notes 214-37 and accompanying text.

127. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593-94 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

128. *Jim v. CIT Fin. Servs. Corp.*, 87 N.M. 362, 533 P.2d 751 (1975).

129. *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977). See generally *Williams v. Lee*, 358 U.S. 217, 223 (1959).

130. Resolution No. CJA-1-86 (Jan. 29, 1986) [hereinafter NUCC]. The NUCC was amended by Resolution No. CD-61-86 (Dec. 11, 1986), clarifying the authority of the Commerce Department of the Division of Economic Development to promulgate regulations. The most recent supplement to the Navajo Tribal Code was published in 1987 and includes only the resolutions passed through the end of 1985. Therefore, this article cites to the sections of the NUCC as adopted by the Navajo Nation Council, rather than to a codified version.

criticized by the Navajo Nation's Department of Justice in early 1984.¹³¹ After orientation meetings in May of 1985, a final draft was prepared and draft resolutions were submitted to and circulated between the Economic and Community Development Committee and the Advisory Committee of the Navajo Tribal Council. The Council, after reviewing several drafts by these committees, adopted the Navajo Uniform Commercial Code.¹³²

The Executive Summary gives the following purpose of the NUCC: "The encouragement of business activities on the Navajo Nation is the primary benefit of adopting a Navajo Uniform Commercial Code (NUCC). A secondary benefit of its adoption is the enforcement of Navajo sovereignty." Later, the Executive Summary states that

[t]he creation of a conducive climate for business and economic development on the Navajo Reservation is the basic purpose of the creation of a Navajo Uniform Commercial Code. The realization of this basic goal will lead to increasing the level of commercial banking activity and thus the development of more Navajo-owned and operated small businesses on the Reservation.

Official comments which address policy matters are in accord. The Official Comment to section 9-313 of the NUCC states that "the general policy of the Navajo Nation is to encourage commercial transactions and to enable Navajo debtors to maximize their credit worthiness by maximizing the business property which they can use as collateral."

The second policy identified in the Executive Summary—advancement of Navajo sovereignty—is also reflected in such a way as to promote commercial activities in Navajo Indian Country. In discussing changes in section 9-401 of the NUCC, the Official Comment notes that "[t]he changes reflect the fact that the Navajo Nation wishes to exercise its civil jurisdiction over Navajo Indian Country to avoid the confusion caused by the otherwise conflicting jurisdictions." Changes to section 9-504 of the NUCC also show a desire to facilitate lending by providing a presumptively satisfactory means of notice of sale of repossessed goods.

2. Differences Between the NUCC and the UCC Adopted by the States

The NUCC includes what are termed "Special Plain Language Comments" in addition to the Official Comments accompanying the UCC.

131. These comments, if the Navajo Nation chooses to release them, would be useful legislative history of the NUCC. Early drafts of the NUCC would have, for example, distinguished contracts between Navajos from contracts between Navajos and non-Navajos, would have made the Navajo Nation a testing ground for substantive provisions believed by the drafters to be superior to those adopted by the fifty states, and would have created a mechanism for Tribal Council approval of forms of contracts. The Department of Justice, among others, urged a Navajo UCC more closely modeled on the UCC, and such was passed in January of 1986 by the Council. A vestige of the earlier draft inadvertently remains in the Commentary to § 9-317 of the NUCC, referring to "Approved Contracts."

132. Resolution No. CJA-1-86 (Jan. 29, 1986).

These special comments are intended to "facilitate use of the Code,"¹³³ but they, like the other comments, "are not the law."¹³⁴

While the NUCC is designed to conform to the general UCC in order to provide a stable and predictable environment for commercial lending, some modifications to the general UCC have been made. These modifications are grouped into six categories.

The first group recognizes that the NUCC cannot affect restrictions on alienation of trust property. This includes, primarily, Navajo Tribal trust land and individual Indian trust allotments. The NUCC does not attempt to decide questions of trust law,¹³⁵ but notes that the trust responsibility of the federal government may affect transactions involving real property of the Navajo Nation and that "Navajo statutes dealing with realty are not to be lightly disregarded or altered" by article 2 of the NUCC.¹³⁶

The NUCC contains only articles I, II, III, and IX of the UCC. This is termed "phase I of the NUCC" in the Executive Summary. This phased approach is justified in the Executive Summary by "human and financial constraints, and the need to educate the Navajo people" before adoption of the remaining articles. The partial adoption of the UCC, however, requires that some technical changes be made to those portions of the UCC which refer to the remaining articles. The NUCC usually remedies this situation by referring to the tribal choice of law provision,¹³⁷ which, in most commercial transactions, incorporates applicable state law.¹³⁸ Occasionally, portions of the omitted articles are incorporated into the body of the NUCC, such as the definitions in sections 9-105 and 9-302 and with respect to rights of subrogation in section 3-801.¹³⁹

A third area of divergence from the UCC seeks to protect the "traditional" Navajo economy, including barter transactions under \$10,000¹⁴⁰ and Indian artists.¹⁴¹ Other provisions attempt to recognize peculiarities of the Navajo economy. For example, buyers of farm products are given greater protection under section 9-307; goods regularly used for personal

133. NUCC, *supra* note 130, at Official Comments following § 1-102(6).

134. *Id.*

135. For example, the drafters noted that "'things attached to realty' may be considered, in some instances, trust property." *Id.* at Commentary No. 1 following § 2-105; *id.* at Commentary No. 2 following § 2-107; *see id.* at Commentary No. 2 following §§ 2-304, 2-102. In addition, property purchased with trust funds may continue to be impressed with the trust; *see also* Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935); F. COHEN, *supra* note 101, at 628-32.

136. NUCC, *supra* note 130, at Commentary No. 2 following § 2-304.

137. NAVAJO TRIB. CODE tit. 7, § 204 (Supp. 1985).

138. *See, e.g.*, NUCC, *supra* note 130, at Commentary following §§ 2-308, 2-310, 2-323, 2-503, 2-505, 2-506, 2-507, 2-512, 2-514, 2-603, 2-614, 3-103, 3-418, 9-203, 9-309, and 9-312.

139. *See also id.* §§ 9-304, 9-305 (incorporating certain provisions of article 8 regarding certificated securities); §§ 9-403 to -406 (making adjustments needed because of the establishment of a filing system).

140. *See id.* § 1-110.

141. *See id.* § 2-104 (excluding individual artists from the definition of merchants); *id.* § 9-114 (giving artists who consign goods priority over the creditors of consignors).

and family use are defined in section 9-109 as consumer goods even though they may more often be used for business; and oral creations or negations of express warranties must be "comprehensible to the purchaser" according to the Comment to section 2-316.¹⁴² Finally, section 9-503 makes clear that self-help repossessions prohibited by Navajo Tribal Code title 7, section 607 are not allowed by the NUCC.¹⁴³

The NUCC differs from the UCC in a fourth way, which reflects the position of the Navajo Tribal Council with respect to the sovereign immunity of the Tribe and some of its enterprises.¹⁴⁴ This article neither examines in depth the law of tribal sovereign immunity nor determines which of the Navajo enterprises are protected under the sovereign immunity doctrine.¹⁴⁵ Transactions with the Navajo Nation or its enterprises must be evaluated by a lender on a case-by-case basis. This article, again, focuses on lending to small businesses and individuals within Navajo Indian Country.¹⁴⁶

Fifth, the NUCC adopts at times the provisions of California's UCC. These provisions include sections 9-104(g) and 9-104(g)(1), 9-105(c), 9-106, and 9-302 concerning the use of deposit accounts and insurance policies as security; section 9-208 regarding multiple branches or offices of the secured party; section 9-307 regarding the protections accorded buyers of farm products and consumer goods without notice of security interests therein; and section 9-311, clarifying that transfers of a debtor's rights in collateral may constitute defaults under the security agreements.

A sixth category of divergence from the UCC adopted by most of the states is, of necessity, termed "miscellaneous." Two of the sections of the NUCC grant greater protections to the creditor.¹⁴⁷ Section 9-502 is a mixed blessing for creditors, requiring on the one hand a "conspicuous written agreement to predefault collection of assigned rights to payment,"¹⁴⁸ while including remedies for the security interest in a deposit account. Finally, alternative C of the general UCC (regarding warranties) was adopted in section 2-318; additional protections to buyers in the case of sellers' insolvencies are granted in section 2-502 of the NUCC; and portions of the 1962 version of section 9-505 were adopted in the NUCC, requiring a written 30-day notice from the secured party to the debtor.

142. Section 2-316 of the NUCC also adds a subsection to delete the implied warranty relating to health of animals in a sale unless the seller knowingly sells diseased animals. Greater clarity in notices to debtors is required in § 9-318, consistent with the general need for comprehensibility recognized in § 2-316.

143. See *supra* text part IV.C; see also NUCC, *supra* note 130, at Commentary following § 9-307.

144. See *id.* §§ 1-201(30), 9-104(e).

145. For a more complete discussion of sovereign immunity issues, see Frye, *Defining the General Contours of the Sovereign Immunity of Indian Nations*, 1 INDIAN L.J. 17 (1988).

146. "Navajo Indian Country" is defined in NAVAJO TRIB. CODE tit. 7, § 254 (Supp. 1985) and incorporated into § 1-201(26) of the NUCC.

147. One section establishes a presumptively adequate method of notice of sale or disposition of repossessed goods. See NUCC, *supra* note 130, § 9-504. The other extends protections for persons claiming security interests in chattel paper to proceeds from the sale of all goods, not merely inventory. See *id.* § 9-502.

148. *Id.* at Official Comment to § 9-502.

3. Summary

The Navajo UCC is intended to encourage commercial and consumer lending within the Navajo Nation, while excepting traditional exchanges from the NUCC and recognizing some special characteristics of the Navajo economy and demography. Six areas of difference between the NUCC and the UCC adopted by most of the states have been discussed. Because the NUCC does not purport to (and cannot) affect the trust duty of the United States, the NUCC's recognition of the federal trusteeship with respect to certain property is of no significance to potential lenders. Because the Navajo choice of law provision¹⁴⁹ will incorporate state law where Navajo law is absent, the phased approach of the Tribal Council is also of little significance to lenders, although some consideration must be given to differences among the states of Utah, Arizona, and New Mexico in their interpretations of articles 4, 5, 6, 7, and 8 of the UCC, if a transaction in Navajo Indian Country has a logical nexus to more than one of these states.

The added protections for traditional Navajo barter transactions and for Navajo artists should be noted, but will have little commercial impact. Also, the NUCC does not affect the need to examine on a case-by-case basis transactions involving the Navajo Nation or its enterprises.

The changes or differences which are most significant to creditors will be those in the fifth and sixth categories above. Added protections for creditors with regard to deposit accounts, chattel paper, and presumptively adequate notice are accorded. Creditors will continue to be barred from unconsented-to self-help repossessions,¹⁵⁰ and buyers of farm products are treated somewhat differently in the NUCC. Finally, creditors must take care to abide by the requirements of comprehensibility and notice, which are stricter than some provisions of the UCC.¹⁵¹ Moreover, filing of security interests must now conform to Navajo law in section 9-401.¹⁵²

*E. The Navajo Corporation Code*¹⁵³

By resolution No. CJA-2-86 on January 30, 1986, the Navajo Tribal Council passed the Navajo Corporation Code, containing four Chapters: (1) General Corporation Law; (2) Close Corporations; (3) Non-profit Corporations; and (4) Agricultural Cooperatives. The Corporation Code's impact on lending decisions will be slight, but some features should be noted here.

The preamble to the Code states its purposes are "to permit the formation of various corporate entities and require registration of foreign corporations; and to regulate such entities so as to promote economic

149. NAVAJO TRIB. CODE tit. 7, § 204 (Supp. 1985).

150. *Id.* § 607.

151. See NUCC, *supra* note 130, §§ 9-502, 9-505, 2-316.

152. Section 9-401 will require technical amendments when implementing steps for the filing system are formulated and adopted.

153. See Resolution No. CJA-2-86 (Jan. 30, 1986) [hereinafter Corporation Code]. For the reasons detailed *supra* note 130, citation is made to the resolution of the Navajo Nation Council.

growth and further the exercise of tribal sovereignty in the governance of its territory and citizens." Thus, any corporate entity seeking to do business within Navajo Indian Country, as defined by Navajo Tribal Code title 7, section 254, must comply with the Corporation Code.¹⁵⁴ The designation of a registered agent is required.¹⁵⁵

Corporations formed under the Corporation Code are required to state in their articles of incorporation that they will "abide by all criminal, civil and regulatory jurisdiction [sic] of the Navajo Nation."¹⁵⁶ Names of corporations formed under the Corporation Code may not include the words "bank," "trust," "Navajo Nation," "Navajo Tribe," or "deposit."¹⁵⁷ Navajo corporations will be dissolved involuntarily by a judgment of a tribal court in an action filed by the Attorney General when any one of six conditions is established.¹⁵⁸ These include violations of the laws of the Navajo Nation and conduct of business "in a fraudulent or otherwise illegal manner" over a period of time.¹⁵⁹

Piercing of the corporate veil of Navajo corporations will be determined in accordance with other decisional law (generally state law) under the Navajo choice of law provisions.¹⁶⁰ The Corporation Code lists seven circumstances which may be considered by a tribal court in reaching its determination. These include fraud, misrepresentation, thin capitalization, ultra-hazardous activities, violation of applicable consumer protection laws, criminal wrongdoing, and failure to maintain adequate insurance.¹⁶¹ Stockholder meetings need not be held within the Navajo Nation.¹⁶² Navajo corporations may not sue in tribal courts unless all fees and charges have been paid.¹⁶³ Inherent in this requirement is that articles, certificates, and other papers must be filed with the Department of Commerce in order for such corporations to utilize the tribal courts.¹⁶⁴

Foreign corporations may not transact business within the Navajo Nation absent conformity with the Corporation Code.¹⁶⁵ However, the maintenance of actions in tribal courts is not necessarily considered the transaction of business.¹⁶⁶ Nothing in the Code authorizes the Navajo government to regulate the organization or internal affairs of foreign corporations.¹⁶⁷ A foreign corporation must have a registered agent.¹⁶⁸

154. Corporation Code § 168.

155. *Id.* § 173.

156. *Id.* § 109(a)(10).

157. The same is true for foreign corporations. *Id.* §§ 170(d), 107.

158. *Id.* § 143.

159. *Id.* § 143(b).

160. See NAVAJO TRIB. CODE tit. 7, § 204 (Supp. 1985).

161. Corporation Code, *supra* note 153, § 119(c).

162. *Id.* § 122.

163. *Id.* § 167(b).

164. See *id.* § 167(a).

165. *Id.* § 168(a).

166. *Id.* § 168(b)(1).

167. *Id.* § 168(a).

168. *Id.* § 173.

The Corporation Code requires a foreign corporation desiring to transact business within the Navajo Nation to apply for such authority in accordance with rules to be promulgated by the Department of Commerce.¹⁶⁹ Revocation of authority of foreign corporations to do business within the Navajo Nation is provided for under section 175 of the Corporation Code. Any corporation transacting business within the Navajo Nation without compliance with the Corporation Code may be enjoined from doing business by a tribal court upon an action brought by the Attorney General or any other person.¹⁷⁰ Whereas any corporation not transacting business within the Navajo Nation may bring suit in tribal courts without securing authority to transact business from the Department of Commerce, foreign corporations doing business in Navajo Indian Country are barred from bringing actions in tribal court without securing authority to do business from the Department of Commerce.¹⁷¹

Safeguards against arbitrary Department of Commerce actions are provided in section 183 of the Code. These include administrative remedies which must be exhausted¹⁷² and subsequent suits in the tribal courts.¹⁷³ The Corporation Code appears to allow suits directly under the Code, as well as to authorize suits against the Department of Commerce under the provisions of the Indian Civil Rights Act.¹⁷⁴ Although the language of section 183(a) is far from precise, a good argument can be made that equal protection and due process guarantees may be vindicated in such suits.¹⁷⁵ Suits against the Department of Commerce¹⁷⁶ must comply with the procedural provisions of the Navajo Sovereign Immunity Act.¹⁷⁷

As the Preamble notes, the Corporation Code is closely modeled after the American Bar Association's Model Business Corporation Act, Model Close Corporation Act, and Model Non-Profit Corporation Act, as well as state laws on agricultural cooperatives. Interpretation of the Code may be guided by decisional law construing the model acts and other state law, while traditions and customs of the Navajo people must also be considered.¹⁷⁸ The principal impact of the Navajo Nation Corporation

169. *Id.* § 172. The rulemaking power of the Department of Commerce in this area appears unfettered by the Tribal Council, but rules must generally be passed on by the Attorney General and the Economic and Community Development Committee of the Navajo Tribal Council. *Id.* § 165(c). Other rulemaking authority (regarding unincorporated associations) is found in § 168(d). Regulations were to be promulgated within 180 days of the enactment of the Code. Corporation Code at Preamble, ¶ 4.

170. Corporation Code, *supra* note 153, § 177(d).

171. *Compare id.* § 168(b)(1) with § 177(a).

172. *Id.* § 183(a).

173. *Id.*

174. *Id.*

175. The section mentions due process explicitly. Due process rights have been held to subsume generally rights to equal protection under the Fifth Amendment to the United States Constitution. *See, e.g.,* Califano v. Webster, 430 U.S. 313, 316 (1977); United States v. Antelope, 430 U.S. 641, 644 (1977).

176. Corporation Code, *supra* note 153, § 183(c).

177. NAVAJO TRIB. CODE tit. 1, §§ 351-55 (Supp. 1985).

178. *Id.* at Preamble, ¶ 2. The integration of Navajo custom is mandated generally by NAVAJO TRIB. CODE tit. 7, § 204 (Supp. 1985), but will probably have little practical impact on how the Code is administered or interpreted.

Code on most creditors will be the requirements of filing and appointing a registered agent.

V. PROCEDURES IN THE NAVAJO COURTS

A. Representation in Navajo Tribal Courts

With the exception of natural persons, who may appear *pro se*, parties in Navajo Tribal Court actions must be represented by a licensed tribal court advocate. The judicial branch has delegated to the Navajo Nation Bar Association ("NNBA") the authority to administer bar examinations and otherwise pass on the qualifications of those seeking to be admitted to practice in the courts. The courts, however, maintain ultimate authority over bar admissions.¹⁷⁹ The establishment of the NNBA and the admission of attorneys to practice in Navajo courts represents a final departure from the remains of the court system established by the federal government for Indian tribes.

Tribal courts had their origin in 1883 when the BIA established "Courts of Indian Offenses" for the various Indian nations.¹⁸⁰ Although these courts were intended to alienate traditional leadership, suppress traditional laws, and hasten the assimilation process then in vogue,¹⁸¹ professional attorneys were barred from practicing in these courts,¹⁸² and the Indian judges did not feel constrained to follow strictly the adversarial Anglo model.¹⁸³ The Navajo judges in particular exhibited some independence from federal control, continuing to follow Navajo custom in probate matters and dealing with some criminal matters as boundary disputes to be decided in the civil context.¹⁸⁴ The Navajo courts developed procedures for handling property, business, and other civil cases in the 1920's and 1930's.¹⁸⁵ In 1959, the Navajo Nation assumed complete control of its courts.¹⁸⁶

A remnant of the rules for the Court of Indian Offenses—that prohibiting "professional attorneys" from practicing in the Navajo courts—was discussed in *In re Battles*,¹⁸⁷ which determined that Battles, a non-

179. See, e.g., *In re The Practice of Law in the Courts of the Navajo Nation*, 4 Navajo Rptr. 75, 76 (1983).

180. B. MORSE, INDIAN TRIBAL COURTS IN THE UNITED STATES: A MODEL FOR CANADA? 9 (1980). The first Navajo "Court of Indian Offenses" was established in 1903. JUDICIAL BRANCH OF THE NAVAJO NATION, ANNUAL REPORT 2 (1985) [hereinafter 1985 ANNUAL REPORT]. See United States Dept. of Interior, *Annual Report of the Commissions of Indian Affairs* 111 (1893).

181. R. BARSCH & J. HENDERSON, *Tribal Courts, The Model Code, and the Police Idea in American Indian Policy*, AMERICAN INDIANS AND THE LAW 25, 34 (1978); JUDICIAL BRANCH OF THE NAVAJO NATION, ANNUAL REPORT 3 (1988) [hereinafter 1988 ANNUAL REPORT].

182. See section 8 of the Law and Order Regulations, approved by the Secretary of the Interior on November 27, 1935, reproduced in *Tribal Power-Exclusion of Non-Indian Attorneys*, 1 Op. Sol. 775 (1937); 1988 ANNUAL REPORT, *supra* note 181, at 3.

183. R. BARSCH & J. HENDERSON, *supra* note 181, at 40.

184. Conn, *supra* note 43, at 338; R. BARSCH & J. HENDERSON, *supra* note 181, at 39-42.

185. R. BARSCH & J. HENDERSON, *supra* note 181, at 41, cited in Preamble to the Rules of the Navajo Peacemaker Court 4.

186. 1985 ANNUAL REPORT, *supra* note 180, at 2.

187. 3 Navajo Rptr. 92 (1982).

Indian lay advocate who passed the first Navajo bar examination in 1976, was not prohibited from representing clients in Navajo courts, in part because the Tribal Code did not distinguish between Navajo and non-Navajo lay advocates.

Part III of the NNBA by-laws prescribes the qualifications for admission to membership. These include the passing of a bar examination administered by the NNBA, a requirement that the applicant be at least eighteen years old, educational requirements,¹⁸⁸ and a requirement that the applicant "be a resident of, or be permanently employed full-time within the lands subject to the jurisdiction of the Navajo Nation for at least thirty (30) days next preceding the date of the application."¹⁸⁹ Given the unique status and interests of Indian tribes and their unique ability to exclude non-members from entering Indian land,¹⁹⁰ the residency requirement is likely to be held valid, even after *Supreme Court of New Hampshire v. Piper*.¹⁹¹

Advocates in the Navajo courts are held to the American Bar Association ("ABA") ethical standards.¹⁹² Notice to the counsel of record in the Navajo courts (as in most other courts) serves as notice to the client.¹⁹³ Great care should be taken in selecting a legal representative because of the great differences in training, ability, and competence of the Bar members. Some members are employed in large firms in Phoenix and Albuquerque; others are traditional Navajo advocates whose membership in the NNBA was confirmed prior to the institution of bar examinations; a few others are non-Navajo non-attorneys who were likewise grandfathered into the Bar. It should be emphasized that a lawyer from a prestigious firm is not necessarily a better choice than a traditional Navajo advocate.¹⁹⁴ Often, it is quite the opposite. The traditional advocate will often be more persuasive with a jury and will have more experience before a particular judge. Many have been well trained in conjunction with previous employment in the legal aid programs on the reservation.

The NNBA maintains a roster of persons admitted to practice in the Navajo courts. Bar examinations are given twice each year.

B. Rules of Procedure

Aside from substantive remedies and procedures adopted by the Navajo Tribal Council, the investor analyzing the lending environment should

188. Any of four options will satisfy the educational requirements: (a) admission to a state bar; (b) successful completion of a Bar training course certified by the NNBA; (c) associate membership for no less than six months; or (d) membership in another Indian tribal Bar whose courts grant reciprocity to members of the Navajo Bar.

189. By-laws, ¶ III.B.1.

190. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982).

191. 470 U.S. 274 (1985).

192. *In re Deschinny*, 1 Navajo Rptr. 66, 67 (1972).

193. See, e.g., *Estate of Wauneka*, 6 Navajo Rptr. 140 (1988); *Chavez v. Tome*, 5 Navajo Rptr. 183, 189 (1987); *Tracey v. Heredia*, 4 Navajo Rptr. 149, 153 (Window Rock D. Ct. 1983).

194. Creditors should also be aware of the Peacemaker Court, a parallel system for resolving disputes in more traditional fashions. The Peacemaker Court is not generally intended to be used in civil actions where the amount in controversy exceeds \$1,500. See *infra* text part V.D.

consider procedural protections afforded by the tribunal which will decide his cause of action. In the recent past, procedural provisions were contained generally in a pamphlet published by the Judicial Branch of the Navajo Nation. In addition, the Navajo Nation Bar Association, for a nominal fee, distributed a pamphlet of rules of procedure annotated by Michael Vargon, Esq., of Navajo Community College. The rules were not nearly as detailed as the rules of procedure of the state or federal courts. Nonetheless, the courts applied principles of comity to tribal court procedures.¹⁹⁵

Pursuant to the authority granted in Navajo Tribal Code title 7, section 601, the Navajo tribal courts previously adopted Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure.¹⁹⁶ Practitioners interviewed did not view these rules as impediments to a fair outcome, although several deficiencies appeared from the reported cases.

For example, rule 4 of the former Rules of Civil Procedure required the filing of compulsory counterclaims; however, no rule required an answer to a counterclaim. Thus, in *General Electric Credit Corp. v. Vandever*,¹⁹⁷ the counterclaim of a debtor was heard without the issues being joined in the pleadings. *Vandever* was cited in *Martin v. Tovar*,¹⁹⁸ which affirmed the dismissal of a counterclaim because the counterdefendant failed to answer the counterclaim. The opinion is prefaced by the following statement: "NOTE: This decision has been OVER- RULED."¹⁹⁹

The *Begay* case identified another shortcoming of the former Navajo Rules of Civil Procedure: the lack of detailed discovery rules.²⁰⁰ However, prior to the adoption of comprehensive rules of civil procedure, the Navajo Supreme Court upheld a judgment by default on the issue of liability based on a defendant's willful failure to cooperate in discovery and to comply with discovery orders.²⁰¹ The sanction of entry of a default judgment is reserved for instances of egregious conduct.²⁰²

The Navajo judiciary anticipated by several years the new federal rule allowing service of process by mail, but provisions for service by registered mail²⁰³ in former rule 3 have become more restrictive than federal and state rules.²⁰⁴ Although rule 3 appeared to allow, for *in personam* actions

195. See *Smith v. Confederated Tribes of Warm Springs*, 783 F.2d 1409 (9th Cir. 1986).

196. See *Thompson v. Wayne Lovelady's Frontier Ford*, 1 Navajo Rptr. 282, 293 (Shiprock D. Ct. 1978).

197. 1 Navajo Rptr. 352 (1978).

198. 3 Navajo Rptr. 27 (1980).

199. *Id.*; see also *Becenti v. General Elec. Credit Corp.*, 2 Navajo Rptr. 21, 22 (Crownpoint D. Ct. 1979); *Four Corners Auto Sales, Inc. v. Begay*, 4 Navajo Rptr. 100, 101-02 (1983) (requiring, prospectively, all counterclaims to be answered).

200. See *Four Corners Auto Sales*, 4 Navajo Rptr. at 103; *Battese v. Battese*, 3 Navajo Rptr. 110 (1982).

201. *Chavez v. Tome*, 5 Navajo Rptr. 183 (1987); see also *Four Corners Auto Sales*, 4 Navajo Rptr. at 100.

202. *Billie v. Abbott*, No. A-CV-34-87, slip op. at 25 (Navajo, Nov. 10, 1988).

203. Service by certified mail satisfied the requirement of former rule 3. *Id.* at 21.

204. See *Thompson*, 1 Navajo Rptr. at 295.

as well as all others, service by publication after the plaintiff attempted other means of service, the validity of service by publication in *in personam* actions was never tested.²⁰⁵

The Navajo judiciary made minor revisions to its rules of civil procedure in 1982. The tension between the objective of accessibility to and understanding of court procedures by litigants and advocates alike, versus the need for predictable procedures by creditors contemplating significant financial exposure, made major revisions of court rules by the judiciary problematic. Nonetheless, the Navajo Supreme Court, on May 22, 1989, adopted sweeping changes to the rules of civil procedure for the district courts, such rules becoming effective on July 1, 1989 and applying to all cases filed on or after July 1, 1989. The new rules closely follow the Federal Rules of Civil Procedure. It is important to be aware of the deviations from the federal rules even though the federal rules provided the framework for the Navajo Rules of Civil Procedure. In addition, the Navajo rules integrate the requirements of other Navajo law, such as the Navajo Corporation Code.²⁰⁶ The new rules also contain features which may affect the substantive rights of parties.²⁰⁷ Matters commonly treated in local rules are included in the new rules. For example, Rule 10(d) addresses the size of paper, double spacing, and similar matters. Rule 11 of the Navajo Rules of Civil Procedure puts an even greater burden on counsel than the revised rule 11 of the federal rules by not only "binding" parties to affidavits and exhibits filed by them, but also requiring counsel to "make an adequate investigation of the facts of an affidavit to make certain there is an independent review of their contents."²⁰⁸

The Navajo rules contain no provision for amendments of pleadings to conform to the evidence. Rule 17 of the Navajo Rules of Civil Procedure contains much more detail than the comparable federal rule, especially with respect to guardians ad litem and actions against sureties, assignors and endorsers.

The reasons for some differences between the Navajo and federal rules are not readily apparent. For example, rule 22 of the federal rules allows a defendant to obtain an interpleader "by way of cross-claim or counterclaim."²⁰⁹ The Navajo rules only authorize a defendant interpleader "by way of cross-claim."²¹⁰

Rule 30(i) of the Navajo Rules of Civil Procedure sets out useful procedures for taking depositions within the Navajo Nation for use in actions pending in foreign (*i.e.*, state or federal) jurisdictions.

205. Such an application of the rule could have raised serious due process implications. *See, e.g.*, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 796-97 n.3 (1983); *Chapman v. Farmers Ins. Group*, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977).

206. *See, e.g.*, NAVAJO R. CIV. P. 4(d)(4), regarding service on corporations doing business within the Navajo Nation.

207. *See, e.g.*, NAVAJO R. CIV. P. 8(c), 12(i), regarding waiver of affirmative defenses.

208. NAVAJO R. CIV. P. 11(a)(2).

209. FED. R. CIV. P. 22(1).

210. NAVAJO R. CIV. P. 22(a).

Of special importance to creditors is the omission in the Navajo rules of any counterpart to rule 64 of the Federal Rules of Civil Procedure. Thus, requests for seizure of persons or property (for example, by arrest, attachment, garnishment, replevin or sequestration) will be decided by reference to the provisions of the Navajo Tribal Code and by the caselaw developed in the Navajo courts on these subjects. Similarly, there is no rule in the Navajo courts regarding receivers. Notable, too, is the omission of a rule of civil procedure to govern condemnation actions, such as rule 71A of the federal rules.

In short, the new rules of civil procedure provide much greater certainty for counsel representing both creditors and debtors. Most of the problems encountered under the former rules are addressed. Other problems, such as the absence of procedural rules governing garnishment, could not be fully remedied because of the substantive law enacted by the Navajo Tribal Council.

The Navajo Nation's Rules of Evidence are fairly detailed, and the Navajo Supreme Court apparently considers the Federal Rules of Evidence in deciding cases in the Navajo judicial system.²¹¹

In extraordinary circumstances, questions may be certified by the district courts for consideration by the Navajo Supreme Court.²¹² Most recently, the Window Rock District Court certified controlling questions of law to the Navajo Supreme Court in a case involving the Tribal Council's actions in placing Chairman MacDonald on "administrative leave" pending resolution of allegations of receipt of kickbacks and other wrongdoing by MacDonald.²¹³

Finally, the Judiciary Committee of the Navajo Tribal Council approved, on January 9, 1987, the Rules of Civil Appellate Procedure applicable in civil appeals to the Navajo Nation Supreme Court.

C. *Special Rules Regarding Possessions*

The provisions of Navajo Tribal Code title 7, sections 607-609 regarding self-help repossessions have little practical effect on transactions not involving motor vehicles.²¹⁴ Under the authority of section 601(a),²¹⁵ which authorizes the judiciary to "adopt rules of pleading, practice, and procedure," the judges approved special rules for replevin actions on January 29, 1982. It has been held that Navajo Tribal Code title 7, section 601(a) encompasses "all necessary rulemaking powers and regulatory authority"²¹⁶

211. *Navajo Nation v. Murphy*, No. A-CR-02-87, slip op. at 10 n.1 (Navajo, Apr. 21, 1988).

212. *See, e.g., Navajo Housing Auth. v. Betsoi*, 5 Navajo Rptr. 5 (1984).

213. *Navajo Nation v. MacDonald*, No. CV-99-89 (Navajo D. Ct. 1989).

214. *See White, The Abolition of Self-Help Repossession: The Poor Pay More*, 1973 Wis. L. REV. 503, 513 ("It appears that when one speaks of self-help repossession he is talking mostly of automobiles.").

215. NAVAJO TRIB. CODE tit. 7, § 601(a) (Supp. 1985).

216. *In re Battles*, 3 Navajo Rptr. 92, 96 (1982) (citing *In re Bowman*, 2 Navajo Rptr. 27, 28 (1979)).

The rulemaking was done in the form of a resolution signed by all of the judges. The "Whereas" portion of the rulemaking is most revealing about the attitudes of the judges. First, the judges noted that the application of sections 607-609 "to non-Indian creditors has been the occasion of a great deal of litigation, most of which has been unnecessary." Second, the judges made, as a basis for the rulemaking, a policy statement that extensions of credit by off-reservation creditors are beneficial to the residents of the Navajo Nation, and, therefore,

[t]he protection of the rights of extenders of credit as to property used as security and the protection of rights of consumers within the Navajo Nation requires the courts to adopt a rule of pleading, practice and procedure with respect to property repossession which is simple, speedy, and fair.

The Tribal Code requires such rules to be "reviewed by one of the Tribal attorneys."²¹⁷ The repossession rulemaking was reviewed by the then-Solicitor to the Navajo Tribal Courts, James W. Zion.

The rules address all actions "whether or not credit was extended within the Navajo Nation and shall apply in all situations where the security is located, possessed, garaged, kept, or otherwise found within the Navajo Nation."²¹⁸ Rule 2 states that anyone seeking to recover secured property through the Tribal Courts "shall be deemed to have submitted to the jurisdiction of the court for the purpose of determining the rights of all parties to the credit transaction."

The rulemaking establishes an efficient mechanism for recovering secured property. Rule 5 sets forth the requirements of a verified petition, which may be "informal or drafted by a creditor without counsel, as long as it substantially complies with this rule."²¹⁹ The petition may request damages in addition to recovery of the property.²²⁰

When a petition is filed, the clerk of the court will issue an order to show cause directing the debtor to appear at a hearing and show "good legal grounds why the property should not be repossessed."²²¹ If the creditor seeks immediate possession of the property, the court may order its immediate seizure.²²² A motion under rule 10 must be accompanied by an "affidavit giving specific facts and reasons" to show an "immediate and likely danger that the security will be damaged, destroyed, hidden, removed from the jurisdiction of the court or impaired [sic] as a security."²²³

The hearing must be held between five and ten days from the filing of the petition.²²⁴ The hearing is to be conducted informally, and the

217. NAVAJO TRIB. CODE tit. 7, § 601(c) (Supp. 1985).

218. Navajo Rules Regarding Repossession of Personal Property, Rule 1 (enacted Jan. 29, 1982).

219. *Id.* Rule 5(a).

220. *Id.* Rule 5(b)(5).

221. *Id.* Rule 6(a).

222. *Id.* Rule 10.

223. *Id.* Rule 10(a).

224. *Id.* Rule 7.

debtor may present defenses or objections to the petition.²²⁵ Counterclaims and set-offs will not be considered at this initial hearing.²²⁶ The court's order shall issue within twenty-four hours of the conclusion of the hearing.²²⁷

If set-offs or counterclaims are pleaded against the creditor, the court shall determine if there is "probable cause" to believe the debtor's assertions.²²⁸ If there may be a valid claim by the debtor, the court may impound the secured property pending disposition of the debtor's claims, allow repossession either upon the posting of a bond or without such a bond,²²⁹ or allow the debtor to keep the property upon posting of a bond or payment to the court of an amount equal to the value of the property or, if the creditor agrees, with timely monthly payments to the creditor pending disposition of the action.²³⁰ Sanctions against both creditors and debtors for failure to comply with the rules are provided in rule 11.

The rules are plainly intended to reduce costs associated with recovering secured property under Navajo Tribal Code title 7, section 607.²³¹ Their validity has apparently not been challenged, but at least four bases for challenge exist.

First, in light of both the Tribal Council's specific attention to remedies and the significant alteration of the respective rights of debtors and creditors under the rulemaking, the judicial branch may well have usurped authority vested in the Council. That is, the rulemaking may implicate not "pleading, practice, and procedure,"²³² but substantive rights.²³³ The bounds of the judiciary's rulemaking authority has not been addressed by the Supreme Court of the Navajo Nation. The largely academic discussion of rulemaking authority in the federal courts is inconclusive, even as to purely procedural rules in federal courts.²³⁴ Congress has required that rules of procedure and evidence prescribed for the federal courts be submitted to Congress prior to their effective dates.²³⁵

Second, it is questionable whether the Solicitor to the Judiciary is "one of the Tribal attorneys" as contemplated by Navajo Tribal Code title

225. *Id.* Rule 8(a).

226. *Id.* Rule 8(b).

227. *Id.* Rule 8(c).

228. *Id.* Rule 9(a).

229. No bond is necessary when the creditor submits to the court's jurisdiction with regard to the debtor's claims. *Id.* Rule 9(b)(4).

230. *Id.* Rule 9(b).

231. These costs can be quite significant. See White, *supra* note 214, at 503.

232. NAVAJO TRIB. CODE tit. 7, § 601(a) (Supp. 1985).

233. Indeed, the rulemaking addresses the foundational question of the court's jurisdiction in rules 2 and 9(b)(4).

234. Compare Wigmore, *Legislature Has No Power in Procedural Field*, 23 ILL. L. REV. 176 (1928), with 4 K. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1001, at 28, 28 n.9 (1987). See *Livingston v. Story*, 34 U.S. (9 Pet.) 632 (1835), holding that the power of Congress to ordain and establish courts subordinate to the Supreme Court carries with it the power to prescribe and regulate the modes of proceeding in such courts.

235. See 28 U.S.C. § 2072 (1990); Act of March 30, 1973, Pub. L. No. 93-12, § 1, 87 Stat. 9 (1973).

7, section 601(c). Section 601 was passed in 1958 when the only attorneys for the Tribe were those employed as general counsel and responsible directly to the Navajo Tribal Council. Section 601(c), at the time of its enactment, was apparently intended to require an independent review of rules promulgated by the courts. Because the Solicitor to the Judiciary probably played a significant role in drafting the rules regarding replevin actions, the policy of an independent review by an attorney responsible to the Tribal Council was not served by the in-house review.

Third, debtors may assert that the summary procedures violate due process rights guaranteed by the Indian Civil Rights Act,²³⁶ by the Navajo Bill of Rights,²³⁷ or both. It seems unlikely that, if the Navajo courts reject other challenges to these rules, a judge will rule that the rules violate fundamental rights of Navajo debtors, because all of the judges sitting in 1982 subscribed to the resolution adopting the rules.

Fourth, the Tribal Council's adoption of article 9 of the UCC appears to occupy the entire field regarding procedures on default. Thus, where a need for detailed procedures in replevin actions may have existed in 1982, no such need justifies the rules at this time.

These rules may or may not be valid. Their principal utility is in recovery of motor vehicles purchased under a security agreement. Their promulgation, more importantly, reflects the unanimous view of the Tribal judges that creditors' rights should be assiduously protected in tribal courts.

D. The Peacemaker Court

When the Navajo Nation Bar Association was being formed, there was some debate over which qualifications would be appropriate for admission into the Bar. Although the Bar (and the Navajo judiciary) did not ultimately adopt his position, President Zah felt that the Bar Association should

give tests to people to practice law in the Tribal Courts. One of those tests would be the ability to speak Navajo. . . . This is what the states have done. If I want to practice law in the state of Arizona, they bring me in and say I've got to have language ability to a certain level. . . . Why shouldn't the Navajos do the same thing? We've got to say, "You've got to understand Navajo common law. You've got to be able to speak Navajo, because most of your clients are going to feel more comfortable speaking Navajo, and solving and listening to these problems in Navajo."²³⁸

In response to concerns that the Anglo-style judiciary was inappropriate for many disputes involving Navajos, who regard the formal procedures and adversarial style as alien to them and their culture, the judiciary adopted rules for a Navajo Peacemaker Court in 1982. This court is a

236. 25 U.S.C. § 1301-41 (1983).

237. NAVAJO TRIB. CODE tit. 1, §§ 1-8 (Supp. 1985).

238. D. VICENTI, *THE LAW OF THE PEOPLE* 255-56 (Ramah High School Press 1972).

community-based system modeled after the traditional manner of resolving disputes among Navajos.²³⁹

The Navajo Peacemaker Court Manual ("Manual") provides a general overview of the system. Among other things, the Peacemaker Court is meant for business matters involving \$1,500 or less and "any other matter the District Court judge feels should or can be taken care of in the Peacemaker Court."²⁴⁰ Only Indians may be compelled to use the peacemaking process; non-Indians, however, may choose to resolve their disputes using peacemakers.²⁴¹

The Peacemaker Court is intended to mediate disputes.²⁴² Lawyers are not permitted in the process, and traditional law is applied.²⁴³

Venue for peacemaking proceedings is generally in the Chapter where the defendant resides. In the case of a non-Indian creditor requesting peacemaking proceedings, the creditor must fill out a form requesting a peacemaker. The judge may grant or deny the request.²⁴⁴ The judge, if the request is granted, may appoint a peacemaker from a list of persons compiled from selections of peacemakers by Chapters. The party requesting the peacemaker must deposit \$30 in the court for payment to the peacemaker.²⁴⁵

Peacemakers are selected by their ability to solve problems, their wisdom, their knowledge of Navajo tradition and religion, and their reputation for integrity, honesty, and humanity.²⁴⁶ The peacemaker is the modern-day equivalent of the *naat'a'anii*,²⁴⁷ with the added ability to enforce the results of his mediation efforts by compulsory process, if necessary.²⁴⁸ Moreover, the district judges maintain supervisory authority over the proceedings.²⁴⁹

Peacemakers are bound by canons 1-5 of the ABA Code of Judicial Conduct.²⁵⁰ Other canons, such as the one which prohibits judges from participating in a case in which he or she has a close acquaintance with a party, are not applicable because "[u]nder Navajo custom, it is considered ridiculous for a judge to not know the parties or to not have been in their home."²⁵¹

The peacemaker proceedings are designed to be simple, speedy, and inexpensive. The peacemaker may report back to the district judge that informal resolution is impossible.²⁵² Peacemakers are not allowed to use

239. See generally 1988 ANNUAL REPORT, *supra* note 181, at 2.

240. NAVAJO PEACEMAKER COURT MANUAL at 8 [hereinafter MANUAL].

241. *Id.* at 27.

242. *Id.* at 9.

243. *Id.* at 17 (citing NAVAJO TRIB. CODE tit. 7, § 204(a)).

244. *Id.* at 28.

245. *Id.* at 29.

246. *Id.* at 20.

247. *Id.* at 19.

248. *Id.* at 23, 30 (subpoena power); *id.* at 30-34 (protective orders); *id.* at 34-37 (judgments).

249. *Id.* at 18-19.

250. *Id.* at 39.

251. *Id.* at 40.

252. *Id.* at 25.

any means of force or to violate rights guaranteed by the Navajo Bill of Rights.²⁵³ Appeals from judgments of the peacemakers are allowed,²⁵⁴ and judgments of the peacemakers are to be accorded the same respect as a district court judgment.²⁵⁵

Given the effectiveness of the Chapter-based traditional tribal revolving credit program (as compared with the relative failure of the formal and centralized BIA/tribal credit programs), a creditor who expects to establish successful long-term credit relationships in Navajo Indian Country should consider carefully the use of the Peacemaker Court. Its value and limitations will depend upon the circumstances of each case, of course. Actions against debtors with traditional beliefs and lifestyles and strong community ties will probably be more successful and less expensive in the Peacemaker Court than in the district courts. Community relations will be enhanced, in addition, and the creditor will gain valuable insights about the consumer population in general and the credit-worthiness of individuals in particular.

The creditor who chooses the peacemaker approach cannot do so successfully without some knowledge of Navajo tradition. A pushy, intolerant, or impatient creditor, or one who seeks to rely heavily on rights and duties set forth in the documents which establish the creditor-debtor relationship, will likely not be respected in the peacemaker environment. On the other hand, a creditor who genuinely seeks to solve the credit problem with reference to the larger context of the debtor's other problems, interests, and place in the community, who seeks long-term acceptance and effectiveness in Navajo Indian Country, and who views the debtor as judgment proof *without* the problem-solving and persuasive talents of a community elder, will be able to protect its interests more effectively in the Peacemaker Court in many instances.

VI. REMEDIES OF JUDGMENT CREDITORS

A. Remedies Under the Navajo Tribal Code

Remedies of judgment creditors are found in Navajo Tribal Code title 7, sections 701-712. These provisions supplement and effectuate, to some extent, the remedies provided in the NUCC.

Section 701(a) states that "[i]n all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party." Such a judgment is to be considered a lawful debt in probate proceedings both in tribal courts and before the Department of Interior's

253. NAVAJO TRIB. CODE tit. 1, §§ 1-8 (Supp. 1985); MANUAL, *supra* note 240, at 23.

254. MANUAL, *supra* note 240, at 38.

255. *Id.*

Office of Hearings and Appeals (which probates trust property).²⁵⁶ Satisfaction of judgments may be directed, in addition, from individual Indian money ("IIM") accounts held in trust by the Secretary of the Interior.²⁵⁷

The Code provides for the issuance of writs of execution.²⁵⁸ "A judgment creditor may have as many writs of execution as are necessary to effect collection of the entire amount of the judgment."²⁵⁹ The Navajo police will seize and deliver to the court "sufficient unrestricted and nonexempt²⁶⁰ property to pay the judgment and costs of sale. It may specify the particular property to be seized."²⁶¹

Sale procedures are set forth in Navajo Tribal Code title 7, section 709. The posting of notices and a public sale are both required.²⁶² Navajo law provides somewhat greater protection for the judgment debtor than most states in that the property may not be sold for less than its appraised value.²⁶³ Private sales, which may be conducted after unsuccessful public sales, are also so limited.²⁶⁴

For "good cause shown" a plaintiff may obtain a writ of execution prior to judgment.²⁶⁵ Sales of perishable goods may also precede judgment.²⁶⁶ The posting of a bond is required to invoke these procedures.²⁶⁷

As stated earlier, the Tribal Code does not provide for the garnishment of wages except in cases involving child support.²⁶⁸ The lack of such a remedy is considered a significant hindrance in collecting unsecured debts by practitioners in Navajo Indian Country. Again, as stated earlier, tribal sovereign immunity and federal Indian law regarding trust property may erect independent barriers to obtaining adequate remedies in certain cases.

B. Comity and Full Faith and Credit

Because state courts lack jurisdiction over actions by creditors against Indians concerning transactions in Indian Country,²⁶⁹ an effective recourse for creditors will, in many instances, be determined by the ability to enforce tribal court judgments in state courts. The courts have vacillated between the doctrines of comity and of full faith and credit when

256. NAVAJO TRIB. CODE tit. 7, § 703 (Supp. 1985).

257. *Id.* § 704.

258. *Id.* § 705. The legislative history of section 705, passed in 1956, again reveals that the Council sought to relieve pressure to extend state jurisdiction onto the reservation by offering the use of tribal governmental power to assure that creditors' rights were protected.

259. *Id.*

260. "Unrestricted" property is property not held in trust for the debtor by the United States; that is, property without federal restrictions on alienation. "Nonexempt" property is that subject to execution under NAVAJO TRIB. CODE title 7, section 711 (Supp. 1985), which provides far fewer exemptions than state law.

261. NAVAJO TRIB. CODE tit. 7, § 706 (Supp. 1985).

262. *Id.* § 709(a),(c).

263. *Id.* §§ 709(c), 708.

264. *Id.* § 710(a),(b).

265. *Id.* § 712(a).

266. *Id.* § 712(b).

267. *Id.*

268. *Heredia v. Heredia*, 4 Navajo Rptr. 124, 127 (1983).

269. *See F. COHEN, supra* note 101, at 251 (citing *Williams v. Lee*, 358 U.S. 217 (1959)).

considering the degree of recognition to be accorded tribal court judgments. The Arizona and New Mexico courts typify the disagreements on this issue.

In *Jim v. CIT Financial Services Corp.*,²⁷⁰ the New Mexico Supreme Court held that Navajo repossession laws²⁷¹ are entitled to full faith and credit in New Mexico courts because the Navajo Nation is a territory pursuant to 28 U.S.C. section 1738. The Arizona Court of Appeals disagreed, holding in *Brown v. Babbitt Ford, Inc.* that provisions of the Navajo Tribal Code are to be recognized on comity principles.²⁷²

In *Brown*, though, the Arizona Court of Appeals noted that "Arizona has fully recognized the validity of Navajo Tribal Court decisions in the courts of Arizona."²⁷³ Two Arizona cases suggest a trend toward greater recognition of tribal court judgments in that state.²⁷⁴ The first, *Begay v. Miller*,²⁷⁵ rejected both the notions of comity and full faith and credit, while recognizing the validity of a tribal court divorce decree. In the second, *In re Lynch's Estate*,²⁷⁶ the court found that "the proceedings held in the Navajo Tribal Court must be treated the same as proceedings in a court of another state or foreign country."²⁷⁷ New Mexico state district courts have also enforced Navajo tribal court judgments in unreported consumer cases.

The Supreme Court provides significant, but not dispositive, guidance here. In *Santa Clara Pueblo v. Martinez*,²⁷⁸ the Court stated that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."²⁷⁹ In a footnote, the Court then stated somewhat tentatively that "judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts."²⁸⁰ In *United States ex rel. Mackey v. Coxe*,²⁸¹ after noting the advancement of the Cherokee Nation and its "organized judiciary,"²⁸² the Court held that an administrator appointed by the Cherokee probate court was entitled to the same recognition as one appointed in courts of states or territories of the United States.²⁸³ In *Standley v. Roberts*,²⁸⁴ rights to rentals affecting

270. 87 N.M. 362, 533 P.2d 751 (1975).

271. NAVAJO TRIB. CODE tit. 7, §§ 607-09 (Supp. 1985).

272. 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977).

273. *Id.* at 198, 571 P.2d at 695.

274. See Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. REV. 133, 139-40 (1977).

275. 70 Ariz. 380, 222 P.2d 624 (1950).

276. 92 Ariz. 354, 377 P.2d 199 (1962).

277. 92 Ariz. at 356, 377 P.2d at 201.

278. 436 U.S. 49 (1978).

279. *Id.* at 65 (footnote omitted).

280. *Id.* at 65 n.21 (citations omitted).

281. 59 U.S. (18 How.) 100 (1856).

282. *Id.* at 102.

283. *Id.* at 103.

284. 59 F. 836 (8th Cir. 1894), *appeal dismissed*, 166 U.S. 704 (1896).

title to lands within the Choctaw Nation were determined by the Choctaw court. The Eighth Circuit stated that "this court has held that the judgments of the courts of these nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit."²⁸⁵

Neither *Mackey* nor *Standley* concerned disputes between non-Indians and Indians, although the reasoning of the courts is fully applicable to causes of action involving Indians and non-Indians alike.²⁸⁶ *National Farmers Union Insurance Co. v. Crow Tribe of Indians*²⁸⁷ suggests that at least substantial deference will be accorded tribal court judgments in such actions. In *National Farmers Union*, the Court, in determining that federal court subject matter jurisdiction existed to decide whether the Crow Tribe court retained authority to require non-Indians to submit to its civil jurisdiction, held that the federal district court should have dismissed the complaint.²⁸⁸ The Supreme Court found that a requirement for the non-Indian litigant to proceed in tribal court would serve several ends, including "provid[ing] other courts with the benefit of their expertise in such matters in the event of further judicial review."²⁸⁹ Notably, the Court found that the orderly administration of justice in federal courts "will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed."²⁹⁰ The Court explained its thinking when it talked of "any question concerning appropriate relief"²⁹¹—it was considering not the relief ordered by the tribal court, but limits on relief which would be appropriately granted by the federal court to the litigant challenging the jurisdiction of the tribal court.²⁹²

The requirement that state courts extend full faith and credit to tribal court judgments in the context of the Indian Child Welfare Act²⁹³ is a two-edged sword. On one hand, the requirement has increased state courts' awareness of tribal courts.²⁹⁴ On the other hand, the requirement exemplifies Congress' failure to consider orders of tribal courts in other matters. But,

[w]hile the intricacies of this legal argument [regarding full faith and credit] apparently need more time for resolution, it is clear that tribal

285. *Id.* at 845 (citations omitted).

286. See also *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977); *In re Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (1976); *In re Red Fox*, 23 Or. App. 393, 542 P.2d 918 (1975); *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950).

287. 471 U.S. 845 (1985).

288. *Id.*

289. *Id.* at 857 (footnote omitted).

290. *Id.* at 856 (footnote omitted).

291. *Id.*

292. After *Farmers Union*, at least one court of appeals has construed quite narrowly the exceptions to the requirement of exhaustion in tribal courts. *A & A Concrete v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986); see also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457 (D. Nev. 1986).

293. 25 U.S.C. § 1911(d) (1983).

294. JUSTICE IN INDIAN COUNTRY, *supra* note 42, at 58.

court judgments that presently depend upon recognition through comity are sufficiently legitimate to be an acceptable and integral part of the overall American system of laws.²⁹⁵

The most authoritative treatise on Indian law notes that if 28 U.S.C. section 1738 were finally construed to require state courts to accord full faith and credit to tribal court judgments, tribal courts would be under a corresponding duty vis-a-vis state court judgments.²⁹⁶ Indeed, even under the comity doctrine, the state courts should be expected to consider the attitudes of tribal courts with respect to state court judgments when exercising their authority to recognize tribal judgments.²⁹⁷ The reported decisions of the Navajo courts should also be examined.

The earliest case concerning this issue, and one cited often, is *In re Chewiwi*.²⁹⁸ In *Chewiwi*, the court of appeals rejected the application of full faith and credit to a judgment of a court of the Pueblo of Isleta, but recognized the judgment on the basis of comity.²⁹⁹ The court held that Indian tribes were not intended to be included in the scheme established in 28 U.S.C. section 1738.³⁰⁰ In *Hubbard v. Chinle School District*,³⁰¹ the court held that, while the tribal courts possess the authority to adjudicate civil actions where the defendant is an arm of a state government, the tribal court should refrain from exercising such authority as a matter of comity. The court noted that it would continue to look at the good will and conduct of the State of Arizona to see if, in future cases, the tribal courts should defer to state courts in similar actions.³⁰²

Later cases have sustained the jurisdiction of Navajo courts over state officials.³⁰³ The district court in *In re Tsosie*³⁰⁴ held that BIA officials are required to recognize Navajo court orders by the doctrine of full faith and credit.³⁰⁵ District Judge (now Chief Justice) Tso, in *Frejo v. Barney*,³⁰⁶ cited *Chewiwi* in denying a motion to set aside a divorce decree issued by a New Mexico state court. Judge Tso reasoned:

As to the effect to be given the New Mexico decree, the respondent was quite correct that this court will honor and enforce that decree. *Guardianship of Katherine Denise Chewiwi*, 1 Navajo Rptr. 120 (1977).

295. V. DELORIA & C. LYTLE, *supra* note 48, at 120.

296. F. COHEN, *supra* note 101, at 385; see *Navajo Nation v. District Court for Utah County*, 624 F. Supp. 130, 136 (D. Utah 1985).

297. This point is somewhat overstated in AMERICAN INDIAN LAWYERS TRAINING PROGRAM, ISSUES IN MUTUALITY 9 (1976): "In the case of comity, the tribal/state court relationship depends entirely upon the flexibility and sensitivity of the jurists involved."

298. 1 Navajo Rptr. 120 (1977).

299. *Id.* at 125-26.

300. *Id.*

301. 3 Navajo Rptr. 167 (1982).

302. *Id.* at 172.

303. See *Tracy v. Yazzie*, 5 Navajo Rptr. 223 (Window Rock D. Ct. 1986); *Billie v. Abbott*, No. A-CV-34-87, slip op. at 25 (Navajo, Nov. 10, 1988) (reversing entry of a default judgment against Utah official).

304. 3 Navajo Rptr. 182 (Chinle D. Ct. 1981).

305. *Id.* at 186-87.

306. 3 Navajo Rptr. 237 (Window Rock D. Ct. 1982).

This court wishes to discourage forum-shopping in a jurisdiction which is close to us, and therefore not only will the decree be fully enforced by this court, but it will be modified only upon the same standards set by the law of New Mexico.³⁰⁷

In *Anderson Petroleum Services, Inc. v. Chuska Energy and Petroleum Co.*,³⁰⁸ the court refused to give full faith and credit to an Oklahoma county court judgment. Applying comity principles, the court declined to enforce the judgment, finding that the Oklahoma court had not obtained personal jurisdiction over the defendant in the action.³⁰⁹

The American Indian Lawyer Training Program has identified two "stumbling blocks" to full faith and credit.³¹⁰ The first is the need to separate tribal politics from the tribal judicial system. The recent abolition of the Supreme Judicial Council and the appointment of permanent judges under Navajo Tribal Code title 7, section 252, satisfy this concern, although the unsuccessful attempt of Chairman MacDonald in 1989 to install judges on an *ad hoc* basis to contest his being placed on "administrative leave" alarmed at least one bank doing business with a tribal enterprise. The second "stumbling block" is the lack of appellate review in most tribal court systems. The Navajo Nation, however, has had appellate review since 1958.³¹¹ Creditors should have no difficulty enforcing Navajo court judgments in state courts.

VII. PERCEPTIONS OF CONSISTENCY AND FAIRNESS

A. General Concerns

Dealing with procedural and substantive shortcomings of tribal law is not an overwhelming task, if, indeed, the shortcomings limit prudent lenders at all. In the writer's opinion, the hesitation of some creditors to do business within the Navajo Nation results more from subjective reservations than from objective reality.³¹²

307. *Id.* at 238.

308. 4 Navajo Rptr. 187 (Window Rock D. Ct. 1983).

309. *Id.* at 188. The Window Rock District Court, after stating that "[i]t is against the Navajo policy for people to literally breach their contracts," *id.* at 191, noted that the plaintiff-creditor would have an opportunity to prove at trial his allegations. *Id.*

310. JUSTICE IN INDIAN COUNTRY, *supra* note 42, at 58-59.

311. NAVAJO TRIB. CODE tit. 7, § 301-72 (Supp. 1985).

312. As the next section of this report shows, a review of the reported cases strongly suggests that the subjective fears of bias and inconsistency are unwarranted. Indeed, such fears may well mirror the lender's recognition of the hostility of state courts and institutions to Indian rights. It was not until 1962 that Navajo Indians were effectively allowed to vote in New Mexico. *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962); *see also Allen v. Merrell*, 6 Utah 2d 32, 305 P.2d 490 (1956); *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). *See generally* F. COHEN, *supra* note 101, at 646, 678. Disparate provisions of services and opportunities to Navajos, as opposed to non-Indians, is well documented. *See, e.g., UNITED STATES COMMISSION ON CIVIL RIGHTS, THE NAVAJO NATION: AN AMERICAN COLONY* (1975). *See generally* *United States v. Kagama*, 118 U.S. 375 (1886); F. COHEN, *supra* note 101, at 163.

There are "six major problems that demand attention"³¹³ in reservation court systems throughout the United States. These concerns, previously identified by the National American Indian Court Judges Association, are:

1. Political pressure from tribal and religious leaders;
2. Lack of judicial training;
3. Lack of staff, administrative organization, and mechanical support;³¹⁴
4. Inability to enforce court orders;
5. Relationships with law enforcement; and
6. Relationships with the BIA.

With respect to the first concern, Navajo judges are insulated from political pressures, as noted above, by Navajo Tribal Code title 7, section 252. In past years, a valid argument could be made that Navajo Tribal Court judges were kept on probationary status for long periods of time in order to ensure that they would defer to political expediency. As the cases in the following section show, this practice, to the extent it was employed, was ineffective. The historical independence of the Navajo judiciary is evident,³¹⁵ and the Navajo Nation has recently formalized the separation of powers between the Navajo judiciary and other branches of the Navajo government. The writer is unaware of any example of religious leaders attempting to influence a judicial decision in Navajo courts.

The 1985 Annual Report of the Judicial Branch refers to some of the training received by tribal judges.³¹⁶ A Judiciary Committee report to the full Council³¹⁷ alluded to further training needed by the judges in civil cases.³¹⁸ The Judiciary Committee stated that it believes it is

imperative that our judges receive good training and that they be given more assistance in terms of legal personnel with the Judicial Branch. The committee believes that the number and complexity of cases which each judge handles require that planning and preparation be made for placing a law clerk in each judicial district.³¹⁹

Of the five district judges and three supreme court justices who hear most civil matters, two are law school graduates. The Chief Justice and

313. V. DELORIA & C. LYTLE, *supra* note 48, at 123.

314. For Indian tribes generally, see also AMERICAN INDIAN LAW TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF THE TRIBAL COURTS 61-115 (1977).

315. See e.g., United States Dept. of the Interior, *Report of Survey of Law and Order Conditions on the Navajo Indian Reservation* 17 (Mar. 23, 1942) ("No cases were found wherein there was any indication that Tribal politics had influenced the action of the court . . . On the whole it appears that the [Navajo] Indian Courts are less subject to outside influences than are the white courts.").

316. The Judiciary Committee of the Navajo Tribal Council was directed by the Council to evaluate the training needs of the judges. The Committee made site visits to each courtroom, reviewed evaluations of judges by Navajo Bar members, and evaluated the training that each judge had received. The two new probationary judges, the Committee reported, were "in the process of completing an extensive judicial training course through the National Judicial College in Reno." Evaluation of the Navajo Tribal Court Judges, Oct. 24, 1985, at 3.

317. NAVAJO TRIBAL COUNCIL, REPORT OF THE JUDICIARY COMMITTEE 7 (Sept. 19, 1985).

318. The report of the Committee is included in the 1985 ANNUAL REPORT, *supra* note 180.

319. NAVAJO TRIBAL COUNCIL, REPORT OF THE JUDICIARY COMMITTEE 7 (Sept. 19, 1985).

Justice Bluehouse were well-regarded and experienced trial judges prior to their appointments to the supreme court, and the Chief Justice, prior to becoming a trial judge, was instrumental in establishing the Navajo Nation Bar Association and developing tribal law. Certainly, in the area of criminal law,³²⁰ any lack of judicial training is less serious than in many state courts.³²¹

The third general problem, lack of staff, administrative organization, and mechanical support, is not a problem in Navajo courts. As the 1985 Annual Report states, the Navajo courts have a solicitor, law clerks, clerks and assistant clerks of the courts, legal paraprofessionals, probation officers, bailiffs, a court administrator, and a fiscal director. Even one who views Indian courts with hostility recognizes that the Navajo judiciary has adequate support staff and facilities.³²²

Nor is inability to enforce court orders a problem, according to practitioners in the Navajo tribal courts. The difficulty in lender recourse is not that orders are not enforceable, but that unsecured creditors cannot obtain orders garnishing wages.

With respect to the final areas of concern, the judges of the Navajo reservation, unlike those of "smaller reservations,"³²³ are not legal advisors to the police. Such advice is sought from the Navajo Nation Department of Justice, which employs approximately twenty attorneys. Finally, with regard to the potential for BIA pressure to be imposed on the Navajo judiciary, the 1958 enactments of the Tribal Council made the Navajo judiciary independent from any BIA control.³²⁴

In addition to the reasoned concerns discussed above, other problems are identified by persons who have done poor research or who harbor unvarnished racism.³²⁵ For example, in support of his argument that tribal courts should be abolished, Brakel asserts that Navajo judges are incompetent and untrained³²⁶ and suggests that the "low stature and low

320. Tribal court jurisdiction in criminal matters is plenary, but limited by federal law to cases where the punishment does not exceed one year imprisonment and/or a \$5,000 fine. 25 U.S.C. § 1302(7) (1983). Jurisdiction over major crimes committed by Indians in Indian Country is concurrent in that of the federal courts. 18 U.S.C. § 1153 (1984); *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991); *People v. Morgan*, 785 P.2d 1294 (Colo. 1990) (en banc).

321. See *Tsiosdia v. Rainaldi*, 89 N.M. 70, 547 P.2d 553 (1976) (New Mexico magistrates need not be law school graduates).

322. S. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS, THE COSTS OF SEPARATE JUSTICE 2* (American Bar Foundation 1978).

323. V. DELORIA & C. LYTLE, *supra* note 48, at 124.

324. See 1985 ANNUAL REPORT, *supra* note 180, at 2; see also *Benally v. John*, 4 Navajo Rptr. 39 (1983); *In re Tsosie*, 3 Navajo Rptr. 182 (1981).

325. See Byrnes, *Attorneys Should Practice in Tribal Courts*, 2 Tribal Court p.C-40 (1981). Mr. Brakel's view of Indian tribal autonomy is that it "pretty much amounts to the right to operate bingo games." Slavin, *Tribal Rights, Anglo Rights*, STUDENT LAW. 31 (1986). This is hardly the view of the courts. See, e.g., F. COHEN, *supra* note 101, at 246-57. Mr. Brakel, for example, expresses concern over arraignments in Navajo tribal courts, where he says, "the poorer drunks were fined and jailed, while those with money walked out." S. BRAKEL, *supra* note 322, at 84. Court records belie the assumption of Brakel that all Indian criminal cases involve substance abuse. See 1988 ANNUAL REPORT, *supra* note 181, at 46-47.

326. See S. BRAKEL, *supra* note 322, at 83, 86-91. Brakel later generalizes tribal judges as "professionally inadequate . . . [and] politically and socially insecure." *Id.* at 95.

pay³²⁷ of Navajo judges causes high turnover. Brakel offers this final observation as if this problem were unique to Indian tribes, but surely it is not.

In 1986, it was reported in a front page newspaper article that New Mexico's Chief Justice complained that the state's judiciary had to "grovel" before the state legislature for reasonable pay and that the lack of money was demoralizing the judiciary.³²⁸ The article quoted the Chief Justice as follows: "It hasn't happened yet, but I see the beginning of things starting to crumble."³²⁹ Former Chief Justice Riordan of the New Mexico Supreme Court has noted that low pay contributes to a yearly employee turnover rate of thirty percent or more.³³⁰ Indeed, former Chief Justice Burger identified the low pay for federal judges as a significant problem, and Congress responded by increasing salaries of federal judges. Certainly, no one would argue that state or federal courts should be abolished because of the low pay or perceived low stature of their judges.

Brakel also reports "indications" that the Navajo Nation Bar Association uses bar examinations to keep out "white professionals."³³¹ To the contrary, trained attorneys have experienced little difficulty in passing the examinations; the concern now is that talented traditional advocates will be excluded. The court of appeals, moreover, has maintained its ultimate authority over bar admissions.³³²

In addition, Brakel expresses concern over "summary justice," with "high rates for guilty-pleas, convictions, and winning plaintiffs."³³³ Of the two civil cases Brakel viewed in his nine days on the Navajo reservation, both were resolved by stipulation.³³⁴ Brakel states these observations as if they are alarming, but he offers no comparisons of the proportion of similar criminal cases resolved by guilty pleas in state or federal courts. The fact that both of the civil cases were settled by consent undermines Brakel's later assertion that the "so-called traditional goals of mediation and harmony do not appear to weigh in the routine thoughts and actions of the tribal judges, the parties before the tribal courts, or the reservation residents."³³⁵

Had Brakel compared the tribal courts with the state courts, he would have found the comparison more than favorable in many instances. Arraignments in state courts are hardly impressive. A front page newspaper article described one arraignment session in state court. After Judge Jones

327. Compare AMERICAN INDIAN LAW TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS 100 (1977) (64% of all tribal judges surveyed felt that the tribal courts were receiving adequate financial support).

328. Albuquerque J., Jan. 20, 1986, at A-1.

329. *Id.*

330. Albuquerque J., Dec. 31, 1985, at B-3.

331. S. BRAKEL, *supra* note 322, at 83.

332. See, e.g., *In re Elkins*, 4 Navajo Rptr. 63 (1983); *In re The Practice of Law in the Courts of the Navajo Nation*, 4 Navajo Rptr. 75 (1983).

333. S. BRAKEL, *supra* note 322, at 83.

334. *Id.* at 84.

335. *Id.* at 97.

asked the public defender, one Ms. Chavez, what the defendant would plead, the following occurred.

"You tell me judge," she reportedly replied. "You've been entering all the pleas, you might as well enter this one."

Jones, who was elected last year and took office Jan. 4, appeared outraged.

"Get out," the witness said Jones shouted at Ms. Chavez. And when the attorney did not move quickly enough, Jones turned to a court officer and shouted, "Get her butt out of here," a witness said.

After Ms. Chavez left the courtroom, Jones apparently continued conducting arraignments, although none of the approximately 15 persons arraigned by him was allowed to consult with an attorney.

Another witness, who has agreed to give a formal statement for the Supreme Court, said Jones was making defendants sign waivers of representation without informing them of what other rights they were losing by doing so.

"I saw him order the clerk to have three or four persons sign the waiver. Judge Jones didn't explain to them what that means. Then he accepted their pleas and sentenced them," the witness said.³³⁶

Brakel was identified as a Research Attorney at the American Bar Foundation of Chicago, Illinois. Suffice it to say that never in the history of the Navajo judiciary has there been any scandal such as that uncovered in Operation Greylord, where attorneys and judges in Chicago routinely bought and sold justice.³³⁷ In sum, the only thing the Navajo judiciary needs to improve its performance is continuing legal education. This need is readily acknowledged by the judicial branch and is being addressed adequately.³³⁸

B. Illustrative Cases

That the Navajo Tribe may lawfully exercise jurisdiction over non-Indians doing business in Navajo Indian Country is accepted in both federal³³⁹ and tribal courts.³⁴⁰ The tribal courts apply a "minimum contacts" test to determine if the assertion of jurisdiction over a non-Indian defendant is proper.³⁴¹

336. Albuquerque J., Dec. 10, 1985, at A-1.

337. See Albuquerque J., Feb. 19, 1986, at D-10.

338. See 1988 ANNUAL REPORT, *supra* note 181, at 6, 68-73.

339. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); *Navajo Tribe of Indians v. Orlando Helicopter Airways, Inc.*, 1 Navajo Rptr. 40 (1972); *Deal v. Blatchford*, 3 Navajo Rptr. 159 (1982).

340. NAVAJO TRIB. CODE tit. 7, § 253(2) (Supp. 1985) gives Navajo district courts original jurisdiction over [a]ll civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." *Id.*

341. *Billie v. Abbott*, No. A-CV-34-87, slip op. at 19-20 (Navajo, Nov. 10, 1988); *Sandoval v. Tinian, Inc.*, 5 Navajo Rptr. 215 (Window Rock D. Ct. 1986); see also *Navajo Tribe v. Orlando Helicopter Airways, Inc.*, 1 Navajo Rptr. 40, 43 (1972); *Peterson v. Ford Motor Credit Co.*, 2 Navajo Rptr. 36 (Crownpoint D. Ct. 1979); *Thompson v. Wayne Lovelady's Frontier Ford*, 1 Navajo Rptr. 282, 288 (Shiprock D. Ct. 1978).

The preceding parts of this report have discussed actions brought by non-Indian creditors and the attitude of the tribal courts that, as a matter of public policy, the extension of credit by non-Indian lenders should be encouraged. Non-Indian creditors have fared well in Navajo tribal courts in these consumer actions. But these actions, it can be argued, do not impact the Navajo treasury or the Navajo political environment. What might a creditor expect in such a situation?

The most instructive reported decision concerning a case of economic significance to the Navajo Nation is *Howard Dana & Associates v. Navajo Housing Authority*.³⁴² In *Dana*, the district court entered judgment in the amount of \$104,864.14 against the Authority. Over a dissent which argued that the plaintiff knew or should have been held to know of federal regulations requiring HUD approval of one of the two architectural contracts at issue, the court affirmed an award of \$91,242.14 in consequential damages to the plaintiff. The court excoriated the Executive Director of the Authority, Pat Chee Miller. However, nine years later, the Navajo Supreme Court, reversing the district court, held that while the judgment was valid, the Authority had not waived its immunity from levy and execution.³⁴³

Navajo Tribal Code title 7, section 653 provides that "any Navajo Indian over the age of 21 years, of at least ordinary intelligence, and not under judicial restraint, shall be eligible to be a juror." The court of appeals struck down this Tribal Council action, holding that non-Indians are eligible to be jurors in Navajo courts.³⁴⁴

In other reported cases of significance, the Navajo judiciary has ruled against the Tribal Council and its Chairman.³⁴⁵ In *Halona v. MacDonald*, the court stated:

Our right to pass upon the legality or meaning of these actions has been questioned in certain places but never by the Council or its Chairman. That is because they have a traditional and abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo People did not learn this principle from the white man. They have carried it with them through history.³⁴⁶

In a highly-charged political controversy, the court in *Deswood v. Navajo Board of Election Supervisors*³⁴⁷ reversed a determination of the Board of Election Supervisors that an anti-administration candidate did

342. 1 Navajo Rptr. 325 (1978).

343. *Navajo Housing Auth. v. Howard Dana & Associates*, 5 Navajo Rptr. 157 (1987) (citing NAVAJO TRIB. CODE tit. 6, § 623).

344. *George v. Navajo Tribe*, 2 Navajo Rptr. 1 (1979).

345. See *Dennison v. Tucson Gas and Elec. Co.*, 1 Navajo Rptr. 95 (1974); *Halona v. MacDonald*, 1 Navajo Rptr. 189 (1978) (affirming an injunction prohibiting the former Chairman and the tribal comptroller from expending funds appropriated by the Tribal Council to pay for the Chairman's legal expenses).

346. *Halona*, 1 Navajo Rptr. at 205.

347. 1 Navajo Rptr. 306 (1978).

not qualify to be placed on the ballot. The case was decided after the MacDonald administration instituted the now-defunct Supreme Judicial Council, which had overruled a court of appeals decision in a similar case, *Benally v. Lancer*.³⁴⁸ The court of appeals, although stating that it would "abide by the decisions of the Supreme Judicial Council where it is possible to understand them,"³⁴⁹ again reversed the Board of Election Supervisors and allowed the candidate to run for office.

The most significant political cause of action in the reported cases is *Yazzie v. Board of Election Supervisors*.³⁵⁰ In *Yazzie*, the court of appeals rejected an apportionment plan adopted by the Tribal Council, stating that "[t]he reapportionment plan adopted by the Council may have satisfied minimum federal requirements but in no way did it satisfy the unique requirements of the Navajo electorate."³⁵¹

As a result of the *Yazzie* and *Halona* decisions, two judges, Merwin Lynch and Charlie John, were ultimately forced off the Bench. Later, Peterson Zah campaigned successfully on a platform seeking to separate tribal politics from the tribal judicial system.³⁵² The accomplishment of this objective by the formal abolition of the "Supreme Judicial Council" and the recent appointments of permanent judges under the Navajo Tribal Code has removed the second of the two "stumbling blocks" to full faith and credit which exist for many tribes.³⁵³ Moreover, none of the reported cases suggest that any of the trial judges have succumbed to political pressure. The principled decisions in the *Tome* cases³⁵⁴ and those in 1989 involving the Tribal Council's placement of Chairman MacDonald on "administrative leave" are the most recent examples of this fact.³⁵⁵ In sum, the concern of some that Navajo courts may not be fair and impartial when considering claims of non-Indian creditors is not supported by any objective standard.

C. Recent Developments

The Navajo judiciary has the unenviable task of dispensing justice in a spectrum of legal disputes ranging from customary grazing rights, where proceedings may be held in the Navajo language, to debtor-creditor problems, which may require a sophisticated analysis of federal Indian law or procedural issues. Recent appointments to the Navajo judiciary

348. 1 Navajo Rptr. 312 (1978).

349. *Deswood*, 1 Navajo Rptr. at 308.

350. 1 Navajo Rptr. 213 (1978).

351. *Id.* at 217.

352. See JUSTICE IN INDIAN COUNTRY, *supra* note 42, at 59.

353. *Id.* at 58. The Navajo Nation has had appellate review (identified as a second "stumbling block") since 1958. NAVAJO TRIB. CODE tit. 7, § 301-72 (Supp. 1985).

354. The first of the opinions is reported as *Tome v. Navajo Nation*, 4 Navajo Rptr. 159 (Window Rock D. Ct. 1983).

355. In July 1990, the Independent Judicial Review Task Force published its evaluation of the Navajo courts, concluding that "the Judicial Branch of the Navajo Nation provides a firm illustration of effective administration of justice. . . . This Task Force has been impressed by this commitment and dedication to integrity and independence in decision making and the administration of justice." The members of the Task Force were Hon. Carl A. Muecke, Senior United States District Judge for the District of Arizona; Hon. William Thorne, Jr., Utah State Court Judge, Salt Lake City; and Lawrence M. Hyde, Associate Dean, National Judicial College, Reno, Nevada.

show the Navajo Nation's recognition of the need to address issues arising in such commercial transactions.

The appointment of Raymond Austin to the Navajo Supreme Court is one example. Austin, a graduate of the University of New Mexico Law School, was a law clerk for former Chief Justice Payne of the New Mexico Supreme Court. Justice Payne highly praises Austin. A second example is the appointment of Robert Yazzie as Window Rock District Judge. Yazzie also graduated from the University of New Mexico Law School. Yazzie was recently commended by former Chief Judge Howard Bratton of the United States District Court for the District of New Mexico for Yazzie's efforts in completing a Navajo-English glossary for use in federal courts. Other recent appointments, including the elevation of Judge Tso to Chief Justice of the Navajo Supreme Court, show that the Navajo judiciary can function properly not only in typical debtor-creditor disputes, but also in disputes between tribal members requiring an understanding of Navajo common law and the Navajo language. Navajo judges, like their non-Indian counterparts, have regularly augmented their legal knowledge and abilities with continuing legal education programs sponsored by a variety of institutions, including the National American Indian Court Judges Association and the Law Enforcement Assistance Administration.³⁵⁶

VIII. CONCLUSION

Lender recourse in Navajo Indian Country is, as a matter of Navajo substantive law, public policy, and judicial interpretation, adequate for most secured creditors. For others, the addition of garnishment provisions for commercial transactions should provide significant lender assurance. Lender recourse in transactions involving the Navajo Nation or its enterprises must be examined on a deal-by-deal basis, with special emphasis on provisions to satisfy lender insecurity based upon the Nation's sovereign immunity and the trust status of its most significant assets.

With respect to procedural protection, the former shortcomings of the Navajo Rules of Civil Procedure have been remedied by new rules effective July 1, 1989. However, more timely publication and dissemination of supplements to the published Navajo Tribal Code, the rules of civil and appellate procedure, and the Navajo Reporter would generally increase creditor confidence about the substantive law and the manner in which creditors' rights are enforced in Navajo courts.

Favoritism based either on tribal politics or on the race of the litigants has not been experienced. Indeed, the Navajo courts have consciously encouraged lending to Navajos, and there is no indication of a change in this policy.

356. See V. DELORIA & C. LYTLE, *supra* note 48, at 123.

In addition to the standard information required by lenders of debtors, knowledge of the background of the Navajo government and the traditions of its people, along with the addition of the Navajo Tribal Code, the Navajo Rules of Court, the Navajo Rules of Civil Procedure, and the Navajo Reporter to the libraries of creditors' attorneys, is necessary to make prudent lending decisions. The institutional climate for lending in Navajo Indian Country is more than acceptable and, with the recent strengthening of the Navajo judiciary, it is likely to stay that way.